A **Titan Steel Wheels Ltd v Royal Bank of Scotland plc.**
[2010] EWHC 211 (Comm)

Queen's Bench Division (Commercial Court).
David Steel J.
B Judgment delivered 11 February 2010.

Banking – Derivatives – Alleged mis-selling of derivative products by defendant bank – Bank denied liability and counterclaimed for costs of closing out transactions – Preliminary issues – Defendant manufacturer with income predominantly in euros and expenditure in sterling – Parties entered into currency swaps – Defendant not 'private person' as defined – Transactions in course of carrying on business – Bank did not act in capacity of advisor and did not owe common law duty of care in respect of advice given about swaps – Banks terms gave rise to contractual estoppel and/or negated coming into existence of duty of care – Exclusion clause reasonable – Unfair Contract Terms Act 1977 – Financial Services and Markets Act 2000 (Rights of Action) Regulations 2001.

This was a claim for losses arising from the alleged mis-selling of two derivative products by the defendant bank in June and September 2007.

The claimant (Titan) was a manufacturer of steel wheels for the 'off-highway' vehicle industry. Its income was predominantly in euros, whereas much of its expenditure was in sterling, and it thus needed to sell euros and purchase sterling on a regular basis. The claim concerned two currency swap or derivative products that the bank provided in June and September 2007. Titan said that the products were so unusual and complex that (a) Titan's financial controller had no actual or implied authority to enter into them and the facts were such that the bank knew that; (b) the bank advised Titan to take the products which were in fact unsuitable to its needs and thus was liable in negligence; (c) the bank had a duty under the FSA rules to deal 'fairly' with Titan including a duty to ensure that communications or descriptions of the products were accurate and not misleading and that, although the information provided by the bank contained some health warnings, they did not go far enough.

The bank said that the claim was misconceived: (a) Titan had used those or similar products for a long period without complaint and the financial controller had actual, implied or ostensible authority to enter into them on Titan's behalf; (b) Titan was well able to work out for itself what was or was not suitable, and it either did so or could not blame the bank if its decision to use the products was misguided; (c) there was no advice given and the bank's contractual terms make it plain that no advice was being given or if it was it should not have been relied upon; (d) there was no duty under the FSA rules which was actionable as a

matter of breach of statutory duty by Titan. The bank had a counterclaim which represented the loss on the closing out of the two transactions in issue. That was valued at £2.8m plus interest.

The trial of preliminary issues was directed: the first issue was whether Titan was a 'private person', which was defined by the Financial Services and Markets Act 2000 (Rights of Action) Regulations 2001, reg. 3(1)(b) as 'any person who is not an individual, unless he suffers the loss in question in the course of carrying on business of any kind'; the third issue was whether the bank, in telephone conversations, acted in the capacity of an advisor and owed a common law duty of care in respect of advice given in respect of either currency swap product; the 11th issue was whether all or any of the contractual terms were exclusion clauses which were subject to the Unfair Contract Terms Act 1977, and, if so, whether the bank was entitled nevertheless to rely on such terms.

Held, **ruling accordingly:**

1. The authorities made it clear that in considering whether deals were 'in the course of business' the specific nature of the deals and their degree of regularity were relevant. The structured products were by definition not entered into solely by way of a hedge. The motive for entering into them was to make a profit. In reality the products were in the nature of a businesslike speculation which was not a pure hedge and could fairly be described as one-off trades forming part of the business. In any event, even if the purchase of foreign exchange products was incidental to Titan's business, the scale and frequency of the hedging was sufficient to satisfy any requirement of regularity justifying the categorisation of such activity as being integral to the business. The transactions were not merely sporadic and intermittent activity outside the course of Titan's business. To the contrary, the trades were sustained, large scale and a necessary concomitant of Titan's trading. It followed that Titan was not a 'private person' for the purposes of the FSMA.

2. The bank gave reasonable notice that its standard contractual terms applied. They expressly provided that the bank would not provide advisory services and that any opinions expressed by the bank did not constitute investment advice, and that Titan was to take independent advice as necessary. In that sense the bank made clear that it was only providing an execution service. The specific terms of each transaction, both as contained in the post transaction acknowledgements and the confirmations, were to the same effect. Those terms formed part of the contracts between Titan and the bank either by virtue of the signed confirmations or, in any event, by reason of the course of dealing based on the same documentary structure over the previous six years. The terms, taken as whole, were only consistent with the conclusion that Titan and the bank were agreeing to conduct their dealings on the basis that the bank was not acting as an advisor nor undertaking any duty of care regardless of what recommendations,

suggestions or advice were tendered. The terms went further than relieving the bank from any obligation to give advice: they provided that any statements were not to be treated as advice nor could they be relied upon by Titan. The terms either created a contractual estoppel or negated the coming into existence of a duty of care. (Peekay Intermark Ltd v Australia and New Zealand Banking Group Ltd [2006] 1 CLC 582 and IFE Fund SA v Goldman Sachs International [2007] EWCA Civ 811; [2007] 2 CLC 134 applied.)

3. The bank offered some ideas and recommendations in regard to financial products in the face of the large scale euro income of Titan. But in doing so, the circumstances established that the bank was not an adviser subject to a duty of care but merely a salesperson. The relationship was a commonplace feature of commercial activity. Titan listened to the bank's views and determined for itself whether the products were worth purchasing. Therefore the bank did not act in the capacity of an advisor and did not owe a common law duty of care in respect of advice in relation to the June and September products. (JP Morgan Chase Bank v Springwell Navigation Corp [2008] EWHC 1186 (Comm) followed.)

4. Clause 12.5 of the bank's terms of business was a genuine exclusion clause. The other terms merely defined the basis upon which the bank was providing its services and fell outside the provisions of the Unfair Contract Terms Act. Assuming in favour of Titan that the Act did apply, clause 12.5 satisfied the test of reasonableness. There was complete equality of bargaining power. Titan was a substantial entity that was a customer of the bank. It was open to Titan to choose any bank and it did take its custom elsewhere. The terms were not simply standard for the bank but, it appeared, to many banks including others from which Titan bought products. There was no difficulty in Titan seeking (as the terms expected) advice from another quarter if desired. The terms were clear and they were regularly brought to the notice of Titan. It was irrelevant that the information and resources available to the bank as to the nature and suitability of each product might have been greater than that available to Titan.

The following cases were referred to in the judgment:

Davies v Sumner [1984] 1 WLR 1301.
Havering LBC v Stevenson [1970] 1 WLR 1375.
Henderson v Merrett Syndicates Ltd [1994] CLC 918; [1995] 2 AC 145.
IFE Fund SA v Goldman Sachs International [2006] EWHC 2887 (Comm); [2006] 2 CLC 1043; [2007] EWCA Civ 811; [2007] 2 CLC 134.
JP Morgan Chase Bank v Springwell Navigation Corp [2008] EWHC 1186 (Comm).
Peekay Intermark Ltd v Australia and New Zealand Banking Group Ltd [2006] 1 CLC 582.
Pensher Security Door Co Ltd v Sunderland City Council [2000] RPC 249.

R & B Customs Brokers Co Ltd v United Dominions Trust Ltd [1988] 1 WLR 321.
R v Secretary of State for the Environment, Transport and the Regions, ex parte Spath Holme Ltd [2001] 2 AC 349.
Riggs AP Bank Ltd v Eurocopy (Ch D, 6 November 1998).
Smith v Bush [1990] 1 AC 831.
Trident Turboprop (Dublin) Ltd v First Flight Couriers Ltd [2008] 2 Ll Rep 581.
Stevenson v Rogers [1999] 1 QB 1028.
Valse Holdings v Merrill Lynch International Bank [2004] EWHC 2471 (Comm).

James Corbett QC and Paul Downes (instructed by HBJ Gateley Wareing LLP) for the claimant.

Adrian Beltrami QC (instructed by Denton Wilde Sapte) for the defendant.

JUDGMENT

David Steel J: Introduction

1. In these proceedings, the claimant ('Titan') has claimed for losses arising from the alleged mis-selling of two derivative products by the defendant ('the Bank') in June and September 2007. The bank denies any liability and counterclaims for the costs of closing the transactions out.

2. Titan is a manufacturer of steel wheels for the 'off-highway' vehicle industry. Titan's income is predominantly in euros whereas much of its expenditure is in sterling. Thus it needs to sell Euros and purchase Sterling on a regular basis. Therefore, whilst it may be committed to expenditure in Sterling over the medium term (for example by way of salaries and plant purchase), if the value of the Euro deteriorated Titan would be exposed to a shortfall in available income to meet its expenditure.

3. The claim concerns two currency swap or derivative products that the Bank provided in June 2007 and September 2007. In a nutshell Titan says that these products were so unusual and complex that (a) Titan's financial controller had no actual or implied authority to enter into them and the facts were such that the Bank knew this; (b) the Bank advised Titan to take these products which were in fact unsuitable to its needs and thus is liable in negligence; (c) the Bank had a duty under the FSA rules to deal 'fairly' with Titan including a duty to ensure that communications or descriptions of the products were accurate and not misleading and that, although the information provided by the Bank contained some health warnings, they did not go far enough.

A 4. The Bank on the other hand says that the claim was misconceived: (a) Titan had used these (or quite similar) products for a long period without complaint and the financial controller had actual, implied or ostensible authority to enter into them on Titan's behalf; (b) Titan was well able to work out for itself what was or was not suitable: and it either did so or cannot blame the Bank if its decision to use these products was misguided; (c) there was no advice given and the Bank's contractual terms make it plain that no advice was being given or if it was it should not have been relied upon; (d) there is no duty under the FSA rules which is actionable as a matter of breach of statutory duty by Titan.

5. The Bank has a counterclaim which represents the loss on the closing out of the C two transactions in issue. This is valued at £2.8m plus interest. Whilst there may be some relatively minor issues as to the precise calculation of this figure, Titan accepts that if the claim fails they will have a liability of something like this under the terms of the transactions entered into.

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The preliminary issues

6. This is the trial of certain preliminary issues as directed by Flaux J at a CMC on 30 April 2009 and as amended by the order of Hamblen J on 17 September:

E (i) Issue 1: Was Titan a 'private person' as defined by the *Financial Services and Markets Act 2000 (Rights of Action) Regulations* 2001?

(ii) Issue 3: In a series of telephone conversations between Mr Annetts (Titan's financial controller) and Ms Plested (a corporate treasury manager of the Bank), did the Bank act in the capacity of an advisor to the Bank and did it owe a common law F duty of care in respect of advice given in respect of either (a) the June 2007 Currency Swap Product; or (b) the September 2007 Currency Swap Product?1

(iii) Issue 11: Are all or any of the contractual terms exclusion clauses which are subject to the *Unfair Contract Terms Act* 1977? If so, is the Bank entitled nevertheless G to rely on such terms?

The witnesses

H 7. Titan called three witnesses to give oral evidence:

(i) *Mr Annetts*

Mr Annetts was the Financial Controller of Titan. He had been employed by the company since 1995.

(ii) *Mr Akers*

Mr Akers was the Chief Executive Officer of the parent company Titan Europe. Again he had held that position since 1995.

(iii) *Mr Wicks*

Mr Wicks had been the Financial Director of Titan from 1998 to 2004 and thereafter was a director of the parent company.

8. Titan also put in evidence a statement from Dr. Ellis a consultant with the securities industry. His evidence was fairly uncontroversial.

9. The Bank called two witnesses:

(i) *Ms Plested*

Ms Plested was a Corporate Treasury Manager with the Bank who had been in a front office role for foreign exchange business since 1996.

(ii) *Mr Nicklin*

Mr Nicklin was a Foreign Exchange Structurer within the Bank employed in that capacity since 2001.

10. Ms Plested and Mr Annetts had dealt regularly with each other since 1997 from which time Mr Annetts had placed a number of contracts for foreign exchange products. It was Titan's case in the main action that Mr Annetts had no authority to enter into some or all of these contracts on Titan's behalf. But for the purposes of the preliminary issues, the principal factual issue to which Mr Annetts and Ms Plested could contribute in their evidence was the extent to which Ms Plested had become the advisor of Mr Annetts and in that capacity had recommended or persuaded Mr Annetts to purchase the June and September products.

11. In fact the contribution which they could make in their written statements and oral evidence was at most marginal. This was because, quite apart from the usual contemporary documentation, almost all the relevant telephone conversations (during which on the Bank's case Ms Plested has acted in the capacity of 'saleswoman' and on Titan's case of 'trusted advisor') were recorded and both the recordings and transcripts of them were available to the court.

12. In this regard particular emphasis was placed on telephone calls on 26, 27 and 29 June 2009 and 18 September 2009. Titan claims that these conversations contained 'advice' on the part of Ms Plested uttered in her capacity as a 'trusted advisor' in the field of foreign exchange transactions. In the event, the question as to

whether 'advice' was in fact tendered is very much a secondary issue to the question in what capacity Ms Plested was acting. 'Advice' can come in many forms including the provision of information, opinions, suggestions, recommendations and so on. Nonetheless, the two issues elide and the precise content of Ms Plested's share of the conversations was subjected to detailed analysis.2

13. The Bank submitted that no 'advice' was ever tendered. Titan submitted that Ms Plested had clearly offered advice and, if relevant, had gone well beyond merely providing an execution service or even straightforward marketing into the field of expressing views as to the suitability of various products for Titan's purposes and their likely impact. Accordingly it is necessary to review the conversations to see the context of the remarks, their emphasis and their tone as well as their content.

14. Before embarking on this task it is necessary to divert onto the issue of disclosure. During the course of the hearing it became clear that notes of various telephone conversations earlier in 2007 produced by the Bank had been prepared much later in the year by Ms Plested at the request of the Bank. These notes were based on further recordings which had been listened to by Ms Plested but had not been disclosed.

15. A request for further disclosure elicited the response from the Bank that the recordings could not be found and thus must have been lost or destroyed. The notes were quite short and did not contain any material to suggest that the earlier conversations were of any significance in determining the issues. The highest it could be put, as Ms Plested accepted, was that the tone of the June and September conversations was of a piece with all earlier conversations.

16. After the evidence had been completed but in the somewhat prolonged period before final speeches the Bank revealed that some of the recordings had been found after all, not on the main system (from where they had been deleted) but on Ms Plested's own computer. They were in due course transcribed and included in the trial bundles.

17. This was unquestionably an unsatisfactory situation. The Bank's failure to search Ms Plested's computer earlier was a potential breach of its disclosure obligations. But equally unfortunate was Titan's overreaction to this development. On the basis that the Bank had earlier made a 'false statement' about the relevance of the material, Titan sought wide ranging further disclosure, an opportunity to cross-examine the author of the witness statement producing the recordings and the recall of Ms Plested for further cross-examination. This in turn was the basis of an application to adjourn the period of two days set aside for speeches and to fix another period of 3-4 days to allow for such cross-examination as well as final submissions.

18. In the result, as appears below, I refused these applications save that I did make provision for half an hour at the beginning of the first day of speeches for

further cross-examination of Ms Plested. At that stage I had not read the newly disclosed transcripts and did not want to preclude Titan from putting any significant features of them to Ms Plested.3 In fact, Ms Plested was unable to attend since a doctor's certificate recorded that she should refrain from work as a consequence of 'work related stress related to the Titan Court case'.

19. In due course it became quite apparent to me that the transcripts added nothing to the case. My hesitation in allowing further cross-examination was fully justified:

(i) There was no pleaded case that they contained any relevant advice nor was there any application to amend.

(ii) Their only value, if any, was to assess the accuracy of Ms Plested's notes: it was quite apparent that, although succinct, they were an entirely fair summary of the conversations.

20. I add this by way of postscript. The absence of Ms Plested for the resumed hearing was for these reasons not prejudicial to Titan. In any event, it was open to them to make submissions about passages in the transcripts (if necessary by comparison with the notes) which might bear on her credibility. Titan sought to suggest that the notes demonstrated the addition of a spin on the related conversation. As already indicated, I am quite unable to agree. Titan could, if so advised, seek to rely on the emergence of the 'stress related illness' as indicative of her want of credibility. To my dismay, such was in due course suggested.

21. Not content with this point, Titan submitted in closing submissions that further adverse inferences could be drawn from the fact that even now there were 17 notes but only 13 recordings relating to them on Ms Plested's computer, one of them being on the date of the February transaction that was closed out in June. This was said to reflect cherry picking by the Bank in pursuit of a 'conscious or unconscious attempt' to identify only those telephone calls which suggested that Mr Annetts was familiar with the products.

22. It is difficult to see how this proposition could be advanced without alleging some form of dishonest or at least reckless conduct. I entirely acquit the Bank of any such allegation. There is nothing within the material recently disclosed which suggests let alone demonstrates that selective disclosure to advance the Bank's case has been embarked on whether deliberately or not.

23. One last point on what I regarded as the disproportionate response of Titan to the relatively insignificant defects in the Bank's disclosure. At the end of the evidential hearing on 22 October 2009, I invited the parties to fix a 2 day hearing for final speeches to be preceded by the exchange of written submissions. For the convenience of the parties it was in due course agreed that the further hearing should be a month later on 19 and 20 November 2009.

A 24. When faced with the application by Titan for an adjournment to allow time for further evidence and a longer period for speeches, I had to explain that I could not offer a 3 to 4 day period before Easter 2010.4 The problem was further exacerbated by the uncertain length of Ms Plested's illness. Further any substantial further delay would have made my task of preparing a written judgment unduly onerous.

B 25. Against that background, as explained at the resumed hearing, considerations of convenience gave overwhelming support to completing the hearing without further cross-examination on matters which were at best peripheral. The suggestion that matters be stood down pending a medical examination of Ms Plested on behalf of Titan was, in my judgment, simply unreal.

C

The background

26. As explained Titan is a manufacturer of steel wheels for the off-highway vehicle industry. In 2007, it had a turnover of £36.5 million. It is a subsidiary of Titan D Europe plc, a substantial engineering group with a turnover of £450 million. Titan had been with the Bank for many years. In early December 1997, Titan had executed a treasury mandate for the Bank in respect of a variety of transactions including foreign exchange transactions and currency options the latter to be governed by the 1992 ISDA Master Agreement.

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27. The mandate provided:

> 'We confirm that the Treasury Transactions we enter into shall be legal, valid and binding obligations upon us. In entering into Treasury Transactions we F will act solely as principal and not on behalf of any other person and we will not rely on the skill or expertise of any Bank employee or officer when entering into Treasury Transactions.
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> …
>
> G We acknowledge that telephone dealing will be recorded by the Bank and we may also record such conversations. The Bank is entitled to rely on telephone instructions received in good faith. We acknowledge that the Bank will have no liability for entering into Treasury Transactions in reliance upon such instructions provided the Bank does not act negligently.'

H 28. The mandate was signed by Mr Wicks and authorised among others both himself and Mr Annetts to enter into trading transactions. This arrangement was taken further on 25 February 2004 when the Bank wrote to Mr Annetts classifying Titan as an Intermediate Customer5 and enclosing the Bank's terms of Business.

29. The letter stated: A

> 'This letter and the Terms of Business supersede any documentation that may have previously been sent to you and will apply to all our dealings…
>
> …Please read our Terms of Business carefully. They contain important information about our respective rights and obligations, including about certain limitations on our liability to you. B
>
> When you have reviewed the enclosed documents, you should keep them and this letter for guidance and reference. By conducting business with us you will be deemed to have agreed and accepted our Terms of Business C which will therefore become legally binding on you and, in the absence of any other agreement between us and you, will apply to all dealings which we may conduct with you or on your behalf. Your attention is also drawn to the representations and warranties in Clause 3 of these Terms of Business.
>
> If you are in any doubt about the meaning or the legal or financial effect of D these Terms of Business or any other documents we provide to you, you should obtain professional advice as necessary.
>
> If you have any questions or if you are dissatisfied with our services under these Terms of Business, please contact in the first instance the Compliance E Department…'

30. The attached terms of business set out the nature of the services which the Bank was prepared to provide to Titan, the basis of such services, and the respective rights and liabilities of the parties in respect of such services: F

Clause 1.4: Unless the Bank notified Titan otherwise, the service which the Bank provided was a general dealing service on an execution only basis in identified investments including options and futures. The Clause continued:

> 'Unless otherwise agreed between us, we will not provide advisory services.' G

Clause 1.5: All business which the Bank conducted with Titan was governed by the banking terms.

Clause 3.10: Titan undertook that, where necessary, it would take independent H advice (including legal advice) to ensure that it fully understood the provisions of the banking terms and the legal and financial effects and risks of any transactions the Bank undertook with or for it.

Clause 4.6: It was provided that any information which the Bank provided to Titan relating to trades was believed to be reliable but no representation was made or

A warranty given, or liability accepted, as to its completeness or accuracy. Any opinions constituted the Bank's judgment as of the date indicated and did not constitute investment advice or an assurance or guarantee as to the expected outcome of any transaction.

B Clause 4.7: It was provided that the Bank need not see that its dealings for Titan take account of any research which had been carried out for its market makers or otherwise with a view to assisting its own activities. Further the Bank need not see that any information it gave was given either before or at the same time as it was made available to it or an affiliate. It was agreed that Titan may not rely on any such information without independently verifying it and making its own judgment. The C clause continued:

> 'In particular, we do not act as your adviser or in a fiduciary capacity. For the avoidance of doubt, we are providing you with an execution-only service, with no advisory services.'

D Clause 4.13: Except where expressly agreed to by the Bank or as required by the FSA Rules, the Bank was under no obligation to give any general investment advice or advice in relation to a specific transaction or proposed transaction, to supervise or manage any of Titan's investments or to give any tax advice.

E Clause 4.18: The Bank had no duty to advise on or exercise judgment on Titan's behalf as to the merits of any transaction which it might present to Titan.

Clause 12.5: Except to the extent that the same resulted from its gross negligence, wilful default or fraud, the Bank was not liable for any loss of opportunity, loss resulting from any act or omission made under or in relation to or in connection with F the banking terms or the services provided thereunder, any decline in the value of investments purchased or held by the Bank on Titan's behalf, or any errors of fact or judgment howsoever.

31. Titan initially purchased vanilla forward currency contracts. However from G 2000 onwards, Titan purchased 23 structured products from the Bank.6 The purchase of these products followed a consistent pattern. In particular, immediately following each transaction the Bank would forward a 'post-transaction acknowledgement' ('PTA') to be signed on behalf of Titan which had various notes:

H (i) Note 4: that Titan was acting for its own account and had made an independent evaluation of the transactions entered into and their associated risks and had had the opportunity to seek independent financial advice if unclear about any aspect of the transaction or risks associated with it, and it placed, or had placed, no reliance on the Bank for advice or recommendations of any sort.

(ii) Note 6: the Bank drew the attention of Titan to its terms of business.

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32. After a short period the Bank would forward a 'Confirmation' of the transaction which also contained notes as follows:7

(a) Under the General Notes, that each party represented to the other party on the trade date of the transaction that, absent a written agreement between the parties that expressly imposed affirmative obligations to the contrary for the transaction:

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(i) Non-reliance: it was acting for its own account and it had made its own independent decisions to enter into the transaction and as to whether the transaction was appropriate or proper for it based upon its own judgment and upon advice from such advisers as it had deemed necessary. It was not relying, and had not relied, on any communication (written or oral) of the other party as investment advice or as a recommendation to enter into the transaction; it being understood that information and explanations related to the terms and conditions of the transaction should not be considered investment advice or a recommendation to enter into the transaction, no communication (written or oral) received from the other party should be deemed to be an assurance or guarantee as to the expected results of the transaction;

C

D

(ii) Assessment and understanding: it was capable of assessing the merits of and understanding (on its own behalf or through independent professional advice), and understood and accepted, the terms, conditions and risks of the transaction. It was also capable of assuming, and assumed, the risks of the transaction.

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(iii) Status of parties: the other party was not acting as a fiduciary or an adviser to it in respect of the transaction.

33. As already mentioned, all or most of the transactions were entered into following telephone conversations between Mr Annetts and Ms Plested. There is an issue as to whether Mr Annetts had authority to act on Titan's behalf. It is Titan's pleaded case that Mr Annetts was acting 'without the knowledge, direction and supervision of the Finance Director or the Board of Directors and was thus on a frolic of his own'.

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34. This issue does not form part of the preliminary issues and I propose to make no further finding about it. Nonetheless it is important to note as part of the material relating to the Bank's status vis-à-vis Titan the following:

(i) The scale of purchase of foreign exchange products was very large. This is not remotely surprising given the quantum of Titan's Euro earnings.

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(ii) Titan's published accounts recognised the need for minimising the effect of adverse currency movements. Risk management in that regard was said to be conducted under written policies approved by the Board of Directors.

A (iii) Mr Annetts explained in his evidence that he had regularly or at least frequently discussed foreign exchange transactions with the Financial Controller of Titan Europe (Sue Bowron) and Mr Wicks.8 He also made written reports on contracts to Miss Bowron setting out the principal terms.

B 35. Quite how the question of Mr Annetts actual or apparent authority will emerge in due course is unclear. He may prove to be a 'rogue' trader. But for the moment I accept the Bank's proposition for the purpose of determining the preliminary issues that either foreign exchange issues were conducted and supervised by senior management in accord with board policies or they ought to have been.

C 36. The June transaction was entered into against the background of three earlier products bought by Titan from the Bank:

(i) One dated 8 February 2007 which involved the sale of up to €1.5m per month by Titan to the Bank over a period of up to 17 months. The amount that Titan was obliged to sell and the period over which there was an obligation to sell depended on
D the future movement of the Euro against sterling.

(ii) One dated 20 February 2007 on similar terms involving an obligation to sell up to €800,000 per month for up to 17 months.

E (iii) One dated 5 March 2007 on slightly different terms involving an obligation to sell up to €500,000 per month for 10 months.

37. The products broadly worked as follows:

F (i) Titan was entitled to sell a base amount of euros each month if the rate of the Euro against sterling rose above a certain level (the 'upper level'). Thus Titan would be likely to sell €750,000 per month so long as the Euro rate was above 1.45 (i.e. £1 - €1.45) at a fixed rate of say €1.45. If, again for example, the rate was €1.50, then the sale of €750,000 at €1.45 would produce £517,241 as opposed to a sale at spot which would produce only £500,000.

G (ii) If the Euro/Sterling rate was in a band between the upper level and a lower level (the 'lower level') then Titan would have no obligation to sell Euros and could trade at spot.

H (iii) If the Euro-Sterling rate fell below the lower level then Titan was obliged to sell a quantity of Euros at the lower level (and in some but not all cases, a higher quantity of Euros). Thus in this example the product might provide that if Sterling fell below €1.42 Titan would be obliged to sell €1.5m per month at the upper level. (This latter aspect was not part of the 5 March 2007 product.)

38. In addition the trades had other elements such as 'knock-in' and 'knock out' terms. Thus a product might extend (knock in) if the Euro fell below a certain level on a certain date; or the product might end prematurely (knock out) if the Euro rose above a certain level at a certain time or for a certain period.

39. The June transaction replaced these three products. The spot rate had moved adversely to Titan and by mid-April there was a telephone discussion between Ms Plested and Mr Annetts as to a possible restructure. Ms Plested's note summarising that conversation (which I regard as a fair and complete) reads as follows:

> 'Looking at possible restructure. Confirm current structure protects EUR 2.15m per month and commits them to a maximum of EUR 3.8m per month. GA comments that it has to go lower for that to happen though, which he feels is unlikely. PP says that it seems unlikely but we must consider that if we move to 1.42 for example then you will have to sell EUR 3.8m. GA says they have a minimum of EUR 2-2.5m every month at least with a further EUR 11m being currently swapped forward. PP says that it is important that you do not become over-hedged and the possible consequences of losses as a result. Confirm amounts are ok. Spot is at 1.4720. GA asks can we get 1.45? PP says we could but it would have to be on some sort of leveraged transaction i.e. with an extension or ratio. GA says he doesn't mind a ratio. of 2:1. PP states that extension looks cheap to tear up at 1.45 as it looks unlikely to take place based on current rates. Trade likely to stop in June so look to firmer hedging beyond. GA states at the end of this 1.45 is what we are trying to achieve.'

40. Mr Annetts reverted to the topic on 18 May and suggested that a restructure be considered sometime in June. Ms Plested and Mr Annetts duly discussed a restructure in a series of conversations between 26 and 29 June. During these conversations it was Titan's case that Ms Plested was 'advising' Mr Annetts to take the new product as a suitable replacement. The Bank's case was that Ms Plested was simply 'selling' a replacement product.

41. There are recordings of the conversations which I have listened to (as well as transcripts which I have read). I only propose to summarise parts of them:

26 June

(i) Mr Annetts was home with his leg up. Ms Plested was in her office. The terms of the existing products were considered against the prevailing spot rate of 1.4855. Put shortly Ms Plested left matters on the basis that an accrual might be the way forward and that if she 'came across anything remotely decent' she would contact Mr Annetts.

27 June

(ii) Ms Plested duly rang back and reported on a discussion within the Bank as to the terms of a single trade to replace the existing three. There can be no doubt that Ms Plested expressed views as to the purpose and merit of entering into the replacement transaction. For example:

> 'P. And that's it. Uh, if we go below 142.90, which is your participation rate, uh, then you're basically selling €500,000 at 146.80. Um, so what I've looked at doing, and, and you know, I've [unclear], I've had about two or three, two or three of us looking at this, and we think we've come up with something that looks okay. Um, its basically to get rid of those three transactions. The ones that we've got, the three that we've got in place at the moment, tear them up. Um, because effectively we don't have sufficient protection in your existing one, the larger of the two, the 750 into one and a half. We've got sufficient protection in that and at the same time we've not got sufficient benefits if we go down, uh, too far because you, you're doubling up at 145 aren't you?
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> A. Yes, yes.
>
> P. Uh, if we go sub 145. So what, what I've looked at is getting rid of all three of them, um, and replacing it with a single trade, um, and the one that we're currently looking at, is protection at 147…
>
> P. But overall I think that's a far better position, than what we've currently got at the minute, um, because at the moment we've got, um, this trade that looks a little bit, you know, as though it could turn a little bit nasty, because of we go sub 145, then suddenly you're selling €1,5 million at 148.75 aren't you?
>
> P. … Because I think the thing we've done previously is concentrate on getting participation limits very low, when it actually, in actual fact, it's better to concentrate on the protected rate and getting that lower, um, because, you know, ultimately we're paying for participation rates that have not given us any benefits.'

She offered to e-mail her suggestion to Mr Annetts at home.

E-mail of 27 June

(iii) This she did later that day in an e-mail which set out her ideas or proposals for closing out the three outstanding transactions and replacing them with a single trade. The nature of the proposal was as follows:

(a) The June product was a 'ratio trade'. It set a 'protected rate' and a 'barrier rate'. The initial contract was for 9 months. At each monthly reset, there were three possibilities:

(i) If the £:€ spot rate was above the protected rate (i.e. if the £ had strengthened), then Titan sold €2m (or latterly €1.5m) at the protected rate. This was its hedge against a strengthening pound.

(ii) If the £:€ spot rate was at or below the protected rate and had not traded at the barrier rate, then Titan could sell any amount of € at the spot rate.

(iii) If the £:€ spot rate was at or below the barrier rate (i.e. if the £ has weakened), then Titan sold €4m (or latterly €3m) at the protected rate. The additional €2m or €1.5m sold against a weakening pound was therefore the risk element, in that Titan would lose the opportunity to sell those Euros at the more advantageous spot rate. However, even in this event, the rate was the protected rate which Titan had agreed for its hedge.

(b) At the end of the 9 month period, if the £:€ spot rate had fallen a certain amount, then the agreement extended for a further 9 months at slightly different rates, and on a €3m/€3m monthly basis.

The e-mail concluded as follows:

> 'The reasons for suggesting this as a possible restructure are-
>
> 1. To improve on the protected average rate from 1.4780 to 1.47.
>
> 2. Increase the amount protected - from EUR 1.65m to EUR 2m per month.
>
> 3. To improve the participation rate on the largest trade - from 1.45 to 1.4285.
>
> 4. Should the trade extend, it is with an improved protection rate - from 1.47 to 1.46.
>
> Things to consider are -
>
> 1. The extension had been both moved further out (from Dec 07 to Mar 08) and increased in term from 6 months to 9 months.
>
> 2. If 1.4285 trades, Titan are committed to sell EUR under the ratio at the protected rate.'

It is highly significant in my judgment that although great play is made of the contents of the telephone calls in advancing the claim this e-mail is not relied upon by Titan as containing any advice let alone inappropriate advice.

A *29 June*

(iv) Ms Plested and Mr Annetts discussed this email on 29 June at some length. The focus of the discussion was the anticipated value of sterling. The spot rate was 148.80 against a protected rate of 144. Ms Plested's view on the structure of the replacement product was as follows:

B

> 'P. So the 147 then, because, you know, if you were doing forwards at the moment, for the period that you're looking at, ah, you know, you're nowhere near it, I mean, you're basically getting, um, about 170-odd points, forward point deduction, for the full, to, you know, out to December 2008. So if you're
> C looking at 170 points off and we're at, you know 149, for argument's sake, um, you know, your forward rate's 147 and-a-half, that sort of level, isn't it? And then obviously you've got your participation rates going down anyway. Um, so the actual, um, extension part … I mean I was looking initially, um, at just doing it for this year, with the 12 month extension on the end, and then, and then, one of the guys who was, who was looking at it for me, he was saying,
> D well what about nine months into nine months, does that not suit better? So that you've got nine months guarantee with a potential nine months stuck on the end, and I thought, well, maybe that, maybe that does make more sense so that, you know, you've got more of a guaranteed amount in the front end of your contract, as opposed to just having a six-month rate. But you know, in
> E answer to your question, um, you know your two into four and then your three million straight through, um, for the whole of next year, um you, you know, the amounts do stand…'

As regards future movement she said:

F

> 'Well it's, it's you know, we're looking at probably, interest rates going to maybe 6% and you look at the cash markets, you look at, you know, where sterling deposit rates are and you've got 12 month deposit rates that are looking at six and a quarter, you know, and this sort of thing. So, you know, I don't think sterling's going to go, you know, too far in… downwards. I'm
> G thinking that it's, if anything it's going to sort of do what it's done in the last six, 12 months and sort of stay above 145 and you know, head higher, if anything. Um, I mean I know that, you know, Europe are turning around and they're looking at picking interest rates up and that will, you know, attracts something, but you know, we've been here before, ah I'm just, you know, again, I'm not particularly convinced on it. Um, but, you know, I would need
> H to get this re-priced because obviously spot is…'

In fact Ms Plested's computer broke down during the initial conversation and a further conversation took place later in the day. They both were of the view that sterling was likely to strengthen and that any loss would only arise if it fell below 142.85 and even then there would be a further restructure.

A

'A. I think so, yes, I mean, I don't think I need to talk to anybody really because, uh, nobody's really got a clue…

P. [Laughter], yes.

B

A. … on anything else …

P. You're on it, so…

A. I, I mean, we're leaving it to the experts, so…

C

P. Yeah, I mean, you know, you, you, um, from the point of view of, um…

A. And, and the one thing I've done is to actually protect it, if it screws, and I think that's the main thing really.

D

P. Yeah.

A. I know I'm not going to make a load of money, nut I'm trying to save us from losing a lot of money. I don't know if you see what I mean.

P. Yes. I appreciate that, absolutely, yeah.

E

A. I mean if I can make some more, fine, but I think the biggest thing is if I stop us from crashing out into the 150-plus scenario. And, I mean, that would really be a problem then.'

F

Ms Plested asked Mr Annetts whether he wanted to put the deal in place. The conversation continued:

'PA. Um, but you know, as it, as that stands that, that is, I, I think it's a decent trade, I really do.

G

GE. Oh, okay, yes. Yes, okay. Yeah, yeah.

PA. It's certainly better than what we've got currently.

GE. Sure, sure, sure.

H

PA. Um, only I think it addresses some issues that are developing, you know…

GE. Yeah, yeah.

A PA. In terms of like, you know, larger Euro amounts that we need to get, you know, keep a cap on, really.

GE. Yeah, okay, fine. Excellent, yeah.

B PA. Well, I'll put this in place and I'll get a confirmation to you on your next [?] talktalk.net.

GE. Yes, yes, that's fine.

PA. Is that okay?

C GE. That's, that's fine.'

Post Transaction Acknowledgement

D (v) This was sent out on 29 June in anticipation of a 'legal confirmation'. The notes to the standard form are described above. In broad terms the contract operated as follows:

(a) Titan would sell and the bank would purchase €2m per month at 1.4670 if the spot rate was at or above this rate at the monthly 'expiry date' (effectively a monthly E anniversary of the agreement).

(b) If at each expiry date the spot rate was below the upper rate of 1.4670 and had not traded at a rate below a lower rate i.e. 1.4285 in the previous four week period, Titan would not be under any obligation at all and could sell as many Euros as it wanted at F the prevailing spot rate.

(c) If at each expiry spot was below the upper rate and had traded below the lower rate during the previous four week period, Titan was obliged to sell €4m at the protected rate.

G (d) If on the final expiry date (i.e. 28 March 2008 – after nine months) spot was below the upper rate, the trade continued for a further 9 months.

Mr Annetts replied by email on 2 July: 'Please proceed with this trade structure'.

Out of the money

H (vi) The closing out of the earlier products gave rise to a total cost of €187,824. This was not a topic raised by Ms Plested or queried by Mr Annetts during their conversations. In her oral evidence Ms Plested readily accepted that as a matter of good practice she ought to have drawn attention to the fact that the earlier trades were 'out of the money' and the measure of the loss.

In the result however, there was delay in the despatch of the subsequent Confirmation or in Mr Annetts accepting it. In the meantime, the mark to market loss was reported orally to Mr Annetts on 30 June. Full details of the loss were provided in an e-mail dated 9 July:

> 'The report will show plus and minus figures for each individual option, so probably wont mean a great deal.
>
> The reason for the loss is the close out cost of the 3 outstanding transactions that were recently restructured. The majority of the closeout cost relates to the extension that the Bank owns i.e. RBS owns the right to buy EUR from Titan at the rate of 1.45 where spot on the extension dates is BELOW 1.45.
>
> This MTM loss has been carried forward into your new trade.
>
> So even where spot is favourable today at 1.48, a snap shot MTM valuation may still produce a loss, as this is a measurement of the possibility that spot on the future extension date, could be considerably lower e.g. at say 1.20 - RBS will have value in their trade.'

Confirmation dated 2 July

(vii) This was in standard form as described above. Notably no complaint was made in response about the newly reported loss despite the suggestion in Mr Annetts' second witness statement that if he had been told: 'I would not have agreed to this without involving a board member of Titan'. Indeed whether he did or did not, he executed the Confirmation on 25 July.

42. September product

(i) *E-mail 18 September*

On 18 September Ms Plested sent an e-mail to Mr Annetts containing a proposal for a further product. (There had been an earlier conversation of which there is no transcript or even note.) The e-mail explained the idea behind the product as follows:

> 'The idea below gives you the opportunity to outperform the spot and forward rates for your expected EUR requirement. Importantly, it is not a hedge. However, this additional trade does give you the opportunity to achieve rates better than what is available in the market by conventional spot or forward contracts.

A The numbers below are based on a minimum of €0.5m per month and a maximum of €1m per month. The basis for the trade is to provide an enhancement to your existing hedge and to run in conjunction with it.'

The September product was a 'knock-out trade', which meant that it would be terminated in certain identified events. This meant that, as Ms Plested expressly B pointed out to Mr Annetts: 'Importantly, it is not a hedge'. Under the terms of the transaction, there was an 'accrual rate'. At each monthly reset, if the £:€ spot rate was above the accrual rate, then Titan sold €500,000 at the accrual rate. If the £:€ spot rate was below the accrual rate, then Titan sold €1m at the accrual rate. However, the trade would be terminated, if and when Titan earned more than 10 cents in the Euro C against the spot rate.

43. The e-mail ended as follows:

'*General*

D The above trade will have credit line utilisation (CLU) of circa £750k. This CLU figure represents with 95% confidence, based on historic rate movement, the most that the Bank would expect to lose in the event of your default on this trade. Clearly this impact would only be felt to this extent in the event of aggressive EUR strengthening. Put another way, according to our calculations, E and with a 95% confidence level, this is the maximum negative value that we foresee this trade accruing from a close out/valuation standpoint. Our calculation of CLU is our internal expectation of the maximum close out cost and is by no means a guarantee that this will be the case. In extreme market conditions, this figure could be higher. Please use this calculation as a guide only.

F

Obviously this trade works best when the spot rate is low and we are currently within 1 cent of the year's low. I've attached a GBP/EUR chart for reference.'

G It is notable that, as before, no reliance whatsoever is placed by Titan on this e-mail as containing any 'advice'.

(ii) *18 September telephone conversation*

H This e-mail was discussed in a telephone conversation between Mr Annetts and Ms Plested on 18 September. Once again it is Titan's case that Ms Plested was providing 'advice' during this call while the Bank says that she was simply 'selling' the product. Mr Annetts was clearly concerned at the scale of the product albeit he recognised that sterling would have to fall considerably (below 135) to cause any difficulty. Spot was 144 and Ms Plested thought that it was unlikely to fall significantly below 140.9 Ms Plested recognised that it was a 'big decision' which Mr Annetts might want to take

time over. Mr Annetts decided however to 'go for it' but asked whether 'anyone else was doing the same' to receive the assurance that Titan was not a 'guinea pig' and not being 'greedy'. (It was in fact however a relatively new form of product.)

The resulting contract worked broadly as follows:

(i) If at the end of each month the spot rate was above a given rate (this changed as the trade progressed but started at 1.35) Titan could sell €500,000 at this rate.

(ii) However if the cumulative differential between the given rate and the spot rate reached 10 cents (i.e. by adding the difference between the given rate and spot rate at each successive expiry) the whole trade could knock out with no further obligations on either side.

(iii) If the trade did not knock out and if the spot rate at an expiry was at or below the given rate, Titan would sell €1m at that rate.

Issue 1: Was Titan a 'private person' as defined by the Financial Services and Markets Act 2000 (Rights of Action) Regulations 2001?

44. Titan has pleaded a statutory cause of action against the Bank under Section 150 of the *Financial Services and Markets Act* 2000 ('FSMA'). This section provides as follows:

> '*Actions for damages*
>
> (1) A contravention by an authorised person of a rule 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.
> …
>
> (5) "Private person" has such meaning as may be prescribed.'

45. The regulations promulgated under the FSMA define private person as follows:

> '*Private person*
>
> 3(1) In these Regulations, "private person" means -
>
> (a) any individual, unless he suffers the loss in question in the course of carrying on -
>
> (i) any regulated activity; or

A (ii) any activity which would be a regulated activity apart from any exclusion made by article 72 of the Regulated Activities Order (overseas persons); and

(b) any person who is not an individual, unless he suffers the loss in question in the course of carrying on business of any kind;

B but does not include a government, a local authority (in the United Kingdom or elsewhere) or an international organisation.'

46. The threshold issue for determination at this stage is whether Titan is a 'private person'. This raises what should be a short point of construction. It is the Bank's C case that Titan, whilst being an incorporated individual, falls within the proviso or exception to reg. 3(1)(b). It is submitted by Titan that on the true construction of the regulations the question for the Court is whether currency trading of the sort that occurred in 2007 was an integral part of Titan's business as opposed to an incidental part of its business.

D 47. On that basis Titan contended that the essential features are as follows:

(i) Titan was a manufacturer of steel wheels. It was and is not engaged in the provision of financial services. Its accounts made plain that although it used foreign exchange products for hedging purposes it did not use such products 'for trading purposes'. E Its use of the products can correctly be described as 'incidental' to its main business which is manufacturing.

(ii) Titan's annual income in euros was anticipated at €36m. The two transactions together took Titan's exposure to €51m according to the email dated 18 September 2007. Thus they exceeded any 'hedging' requirements that Titan had and put its entire F enterprise at risk.

(iii) The products themselves were highly complex and the Bank required specialist proprietary software to understand and analyse them. Titan had no training in or access to such software.

G 48. The Bank submits that Titan manifestly sustained the loss in the course of carrying out its business. The fact that Titan's business was not confined to or focused on investment business is not to the point. The regulations expressly refer to the carrying on of business of any kind. This expression should be, on the Bank's case, given a wide interpretation.

H 49. As regards the question of construction, Titan submits that, in the light of its legislative history, a much narrower interpretation of the regulation is appropriate. In further support of this submission, Titan relies on decisions with regard to different but allegedly analogous legislation and upon matters emerging from Hansard and other travaux preparatoires.

A

50. I was not entirely clear what meaning Titan contended the phrase 'in the course of carrying on business of any kind' should be accorded save that whatever the appropriate meaning Titan's purchase of the June and September products was not in the course of carrying on business. In the result, it appeared that that answer to the question of construction was being put forward in the alternative:

B

(i) It only encompassed one off trading with a view to profit or part of a regular trade which was integral to the principal business of a company; or

(ii) It only encompassed trading as a 'professional investor'.

C

51. The initial difficulty with all of these formulations is that they sit uncomfortably with the exception in reg. 3(1)(a). This exception in regard to individuals relates to the performance of regulated activity. But regulated activities are broadly defined as an activity of a specified kind which is carried on by way of business: FSMA, s. 22. This strongly suggests that the scope of the exception in reg. 3(1)(b) embraces a corporation which carries on business of any kind even if does not constitute a regulated activity or something akin to it.

D

52. Some considerable emphasis was placed by Titan on the legislative history. I was not persuaded that this of itself furnished any assistance in the interpretation of reg. 3 but it did provide the scene against which phrases of a similar character in legislation in other fields fall to be considered and also the backdrop of the excerpts from Hansard and various consultation papers relied upon.

E

53. The first statutory provision furnishing a cause of action for breach of the regulatory regime was s. 62 of the *Financial Services Act* 1986 ('FSA'):

F

> '(1) Without prejudice to section 61 above, a contravention of -
>
> (a) any rules or regulations made under this Chapter;
>
> (b) any conditions imposed under section 50 above;
>
> (c) any requirements imposed by an order under section 58(3) above;
>
> (d) the duty imposed by section 59(6) above,
>
> shall be actionable at the suit of a 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…'

G

H

54. The 1986 Act represented a wide ranging overhaul of financial services regulation in the UK including the establishment of the Securities Investment Board.

A In order to give investment firms the opportunity of becoming familiar with the provisions of the Act, s. 62 was not brought into force for six months.

55. During this period the industry expressed concern that the open ended provision for claims by any investor might encourage strategic lawsuits brought for competitive advantage: see DTI Consultation Paper 'Defining the Private Investor' September 1990. This concern led to the inclusion by virtue of s. 193 of the *Companies Act* 1989 of a new s. 62A of the FSA:

> '62A(1) No action in respect of a contravention to which section 62 above applies shall lie at the suit of a person other than a private investor, except in such circumstances as may be specified by regulations made by the Secretary of State.
>
> (2) The meaning of the expression 'private investor' for the purposes of subsection (1) shall be defined by regulations made by the Secretary of State.
>
> (3) Regulations under subsection (1) may make different provision with respect to different cases.
>
> (4) The Secretary of State shall, before making any regulations affecting the right to bring an action in respect of a contravention of any rules or regulations made by a person other than himself, consult that person.'

56. The Consultation Paper went on to annex a draft form of regulation defining 'private investor' which in all material respects is the same as later adopted in the FSMA Regulation. In proposing the definition the DTI expressed a desire to avoid complexity and to introduce the definition as 'brief and as clear as possible'. Having drawn attention to the fact that any contractual rights of action would remain unaffected, the paper went on (para 52):

> 'This proposed definition is intended to have the following effects:
>
> All individuals would retain their s 62 rights for all purposes. Individuals who carry on investment business would lose their s 62 rights only in relation to any action taken by them, or anything done to them, in the course of that investment business;
>
> All non-individuals would lose their s 62 rights in relation to any form of business. Most charities and similar bodies do not carry on any form of business, and would therefore retain their s 62 rights only in relation to any action taken by them, or anything done to them, in the course of that business.'

57. The draft regulations were in due course promulgated as the *Financial Services Act 1986 (Restriction of Right of Action) Regulations* 1991. The wording was in due course adopted in the 2001 Regulations in accord with the recommendation in a consultation paper issued by the Treasury dated December 2000.

58. Whether such consultation papers were strictly admissible or not, there is nothing in this material which gives substantive support for the proposition that the phrase 'in the course of carrying on business of any kind' has the restricted meaning urged by Titan. But Titan relies in addition on observations made by ministers during the course of the passage of the *Companies Act* 1989 in Parliament which emphasised the exclusion of 'professional investors'.

59. In the House of Commons, the Minister for the DTI said:

> 'Part VIII makes a number of individual changes to the Financial Services Act 1986, the Insolvency Act 1985, the Policyholders Protection Act 1975 and the Building Societies Act 1986. Most of these changes are for clarification or tidying up purposes rather than being major policy departures. But I should refer briefly to clause 158 which removes the right of a professional investor to sue under section 62 of the Financial Services Act if he suffers loss as a result of a breach of the rules made under that Act. In considering experience of the working of the Act we have concluded that in respect of professionals - I emphasise professionals - the provision is inappropriate. I stress, however, that there is no change in the position for private investors, who will retain the additional safeguard provided by section 62.'

60. To similar effect, the Secretary of State for the DTI said in the House of Lords:

> 'Finally, I come to Clause 132, which amends the Financial Services Act 1986 by removing the right of a professional investor to sue under Section 62 if he suffers loss as a result of a breach of the rules made under that Act. Section 62 provides valuable safeguards for private investors but it has been suggested that this provision risked contributing to an excessively litigious atmosphere between professional investment businesses. Such an atmosphere would hinder healthy competition and growth. The definition of 'professional investor' is to be included in secondary legislation so that it can be adjusted if necessary in the light of experience and of any changes in the relevant rules.'

61. The Bank submits that this material is inadmissible and, in any event, wholly unhelpful.

62. In *R v Secretary of State for the Environment, Transport and the Regions, ex parte Spath Holme Ltd* [2001] 2 AC 349 Lord Bingham stated as follows:

A 'Mr Parker, for the ministers, submitted that reference should not be made to Hansard, but also that, if reference were made, it was clear that the scope of section 11 was not intended to be so limited. Thus the threshold question arises whether, in this case, resort to Hansard should be permitted.

B In *Pepper v Hart* [1993] AC 593 the House (Lord Mackay of Clashfern LC dissenting) relaxed the general rule which had been understood to preclude reference in the courts of this country to statements made in Parliament for the purpose of construing a statutory provision. In his leading speech, with which all in the majority concurred, Lord Browne-Wilkinson made plain that such reference was permissible only where (a) legislation was ambiguous C or obscure, or led to an absurdity; (b) the material relied on consisted of one or more statements by a minister or other promoter of the Bill together, if necessary, with such other parliamentary material as might be necessary to understand such statements and their effect; and (c) the effect of such statements was clear (see pp 640b, 631d, 634d). In my opinion, each of these conditions is critical to the majority decision.'

D

63. I agree with the Bank that Titan has failed to make out any of the these specified conditions:

(i) The legislation is not ambiguous but, as contemplated in the DTI Consultation E paper, clear and simple.

(ii) Even if the words are ambiguous, the statements do not derive from a minister in a debate introducing a Bill within which the relevant words appear. The words were in due course contained in the 1991 Regulations which were laid before Parliament after a subsequent consultation paper. In short the regulations were not even in draft F at the time of the statements.

(iii) In any event, the effect of the statements is not clear and unambiguous. The emphasis is on what is termed a 'professional investor' the definition of which was to appear in the secondary legislation. In fact this term does not feature in the regulations G and thus the statements provide no material assistance on the term private investor.

64. Against that background I now turn to the authorities.10 Titan placed particular emphasis on three cases. First *Davies v Sumner* [1984] 1 WLR 1301 in the context of the *Trade Descriptions Act* 1968, s. 1(1)(a). In that case the Court was concerned with the sale of a car by a professional courier. Lord Keith held that a sale by a business H was not necessarily 'in the course' of that business. At p. 1305 Lord Keith referred to the previous decision of the Divisional Court in *Havering v Stevenson* [1970] 1 WLR 1375 and said:

'Any disposal of a chattel held for the purposes of a business may, in a certain sense, be said to have been in the course of that business, irrespective of

> whether the chattel was acquired with a view to resale or for consumption or as a capital asset. But in my opinion section 1(1) of the Act is not intended to cast such a wide net as this. The expression 'in the course of a trade or business' in the context of an Act having consumer protection as its primary purpose conveys the concept of some degree of regularity, and it is to be observed that the long title to the Act refers to 'misdescriptions of goods, services, accommodation and facilities provided in the course of trade.' Lord Parker C.J. in the *Havering* case [1970] 1 W.L.R. 1375 clearly considered that the expression was not used in the broadest sense. The reason why the transaction there in issue was caught was that in his view it was 'an integral part of the business carried on as a car hire firm.' That would not cover the sporadic selling off of pieces of equipment which were no longer required for the purposes of a business. The vital feature of the Havering case appears to have been, in Lord Parker's view, that the defendant's business as part of its normal practice bought and disposed of cars. The need for some degree of regularity does not, however, involve that a one-off adventure in the nature of trade, carried through with a view to profit, would not fall within section 1(1) because such a transaction would itself constitute a trade.'

65. Thus it could be said that there are three types of trade carried out by a business which may be in the course of that business:

(i) A one-off trade with a view to profit. Such a case, regardless of how sporadic, would be in the course of the business.

(ii) A sporadic series of trades which were not part of the normal practice of the business nor an integral part of the business. This would not be 'in the course of the business'.

(iii) A regular trade which was part of the normal practice of the business in question.11

66. The second concerned the *Unfair Contract Terms Act* 1977, s. 12(1) and was to similar effect. In *R & B Customs v UDT* [1988] 1 WLR 321 the Court of Appeal were concerned with a freight forwarding business and shipping agency that had purchased a car through a finance company, the defendant. The issue was whether the finance company could exclude an implied term as to fitness for purpose, which in turn raised the question of whether the exclusion clause was void under UCTA. In finding that the claimant had traded as a consumer, and after referring to the passage of Lord Keith's judgment in the case of *Davies v Sumner*, Dillon LJ said at p. 330:

> 'Lord Keith emphasised the need for some degree of regularity, and he found pointers to this in the primary purpose and long title of the Trade Descriptions Act 1968. I find pointers to a similar need for regularity under the Act of 1977, where matters merely incidental to the carrying on of a business are concerned,

A both in the words which I would emphasise, "in the course of" in the phrase "in the course of a business" and in the concept, or legislative purpose, which must underlie the dichotomy under the Act of 1977 between those who deal as consumers and those who deal otherwise than as consumers.

B This reasoning leads to the conclusion that, in the Act of 1977 also, the words "in the course of business" are not used in what Lord Keith called "the broadest sense". I also find helpful the phrase used by Lord Parker C.J. and quoted by Lord Keith, "an integral part of the business carried on". The reconciliation between that phrase and the need for some degree of regularity is, as I see it, as follows: there are some transactions which are clearly integral parts of the C businesses concerned, and these should be held to have been carried out in the course of those businesses; this would cover, apart from much else, the instance of a one-off adventure in the nature of trade, where the transaction itself would constitute a trade or business. There are other transactions, however, such as the purchase of the car in the present case, which are at highest only incidental to the carrying on of the relevant business; here a degree of regularity is D required before it can be said that they are an integral part of the business carried on, and so entered into in the course of that business.'

67. The third concerned the *Copyright Design and Patents Act* 1988, s. 23(a). In *Pensher Security Door Co Ltd v Sunderland City Council* [2000] RPC 249, the Court E of Appeal was concerned with an alleged secondary infringement of copyright by reason of the purchase of a security door by the City Council. Aldous LJ considered the cases of *Davies v Sumner* and *R & B Customs* and stated:

'The words "in the course of business" are words used in other legislation and I can see no reason for giving them a different meaning in the 1988 Act to the F meaning attributed to them in other legislation. That was the view taken by Dillon LJ in *R & B Customs Brokers Co Ltd v United Dominions Trust Ltd* [1988] 1 All ER 847, [1987] 1 WLR 321 when he considered the same phrase used in the Unfair Contract Terms Act 1977. He said at page 329G of the latter report:

G

"… however, it would, in my judgment, be unreal and unsatisfactory to conclude that the fairly ordinary words 'in the course of business' bear a significantly different meaning in, on the one hand, the Trades Description Act 1968, and, on the other hand, section 12 of the Act of 1977."

H

Miss Vitoria submitted that the infringing doors were no more possessed in the course of the Council's business than was a carpet in a solicitor's office. I disagree. As has been made clear in such cases as *Davies v Sumner* [1984] 3 All ER 831, [1984] 1 WLR 1301 and in *R & B Customs Brokers*, transactions which are only incidental to a business may not be possessed in the course of that business.'

68. The overarching difficulty with treating those authorities as determining the meaning of 'in the course of carrying on business of any kind' is that the phrase in the FSMA regulations is different from the phrase under consideration in these cases, namely 'in the course of a business'. It renders the additional words 'of any kind' redundant.

69. There are various additional factors which contradict the submission made by Titan:

(i) The context is very different. The regulations seek to draw a distinction between natural and corporate persons and between regulated activity and other business.

(ii) The authorities cited above are concerned with consumer protection. The protective purpose of the regulations in contrast is to stem 'strategic' claims against those conducting regulated activity (all the while preserving recourse to claims in tort or contract).

(iii) The phrase 'in the course of business' has been held in a different context to justify construction 'at their wide face value': *Stevenson v Rogers* [1999] 1 QB 1028.

70. I recognise that corporate entities who sustain losses as a result of the purchase of financial products will usually be in business of some kind. As the 1990 consultation paper states, charities and similar bodies are the more obvious exceptions. It follows that a wide interpretation of reg. 3(1)(b) would exclude little in terms of liability of a regulated body. But I prefer the view that the words can properly be construed as having their wide meaning as contended for by the Bank.

71. This conclusion is however largely redundant. In my judgment, even if Titan's construction is to be preferred, it readily passes through the accepted gateways. The principal features of the background to the relevant transactions are as follows:

(i) Titan's sales are largely made abroad within the euro zone. There was therefore a need to convert large amounts of Euros to Sterling against the background of turnover for Titan alone of £113 million. It followed that it was exposed to the risk of decline in the value of the Euro where its costs were incurred largely in Sterling. The issue was highlighted in the group accounts for 2007:

> 'The globalisation of the economy and financial markets volatility has increased the Group's exposure to external factors such as changes in foreign exchange rates, interest rates and commodity prices which in turn make future forecasting of financial and operational performance more uncertain.'

(ii) To limit that exposure the group (including Titan) entered into forward foreign exchange contracts:

A 'The Group has transactional currency exposures arising form sales or purchases by operating subsidiaries in currencies other than the subsidiaries' functional currency which are mostly naturally hedged and in certain cases are covered by the use of forward foreign exchange contracts.

B The Group operates in a global environment with global customers and, therefore, transacts in a number of currencies which subjects the Group to foreign exchange risk.'

(iii) These activities were said to be managed on a centralised basis within the whole group.

C '*Financial Risk Factors*

The Group's activities expose it to a variety of financial risks: market risk [including currency risk, fair value interest rate risk and cash flow interest rate risk], credit risk and liquidity risk. The Group's overall risk management D programme focuses on the unpredictability of financial markets and seeks to minimise potential adverse effects on the Group's financial performance. The Group uses derivative financial instruments to hedge certain risk exposures.

Risk management is carried out centrally under policies approved by the board E of directors. Centrally management identify, evaluate and hedge financial risks in close co-operation with the Group's operating units. The board provides written principles for overall risk management, as well as written policies covering specific areas, such as foreign exchange risk, interest rate risk, credit risk, use of derivative financial instruments and non-derivative financial instruments, and investment of excess liquidity.'

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72. The authorities cited above make it clear that in considering whether deals are 'in the course of business' the specific nature of the deals and their degree of regularity are relevant. The Bank contended that:

G (i) Even viewed in isolation the purchase of the June and September products were in the nature of trade.

(ii) In any event they formed part of a regular chain of transactions and thus can be treated as an integral part of the business.

H 73. The general background of the need for Titan to manage its foreign currency risks is set out above. As regards the structured products (and the specific transactions in June and September in particular) they were by definition not entered into solely by way of a hedge.12 The motive for entering into them was to make a profit: otherwise all that was required was a 'vanilla' hedge to exclude the perceived currency risk. Such was the evidence of Mr Annetts:

'A. The objective was to protect the exchange rate wherever possible.

Q. Clearly you wanted to hedge the large balances of euros which you were receiving.

A. Yes.

Q. That was vital for risk management. But if that were your sole objective, you could've continued to do that by a simple forward.

A. Yes.

Q. Yes. So you must have been looking for rather more than that by entering into these transactions.

A. Yes, because probably at that point there would have been a considerable change in the quantity of either. Deutschmarks or euros inflowing into the business, because back in 1995 it would be very limited, 2000 would be growing and so on.

Q. Never mind the volume; if you are simply hedging to avoid currency risk, you can do that by a forward, can't you?

A. Yes.

Q. So if you go for a structured product, you must be looking for something in addition to the hedging.

A. Right.

Q. And that was some profit as well.

A. Yes.

Q. Yes. Otherwise you wouldn't have done it that way. It makes sense, doesn't it?

A. Sure.

Q. Therefore, what you were seeking to do was to hedge your exposure in such a way that you managed to make some money on the side as well.

A. Hopefully, yes.'

A 74. In fact the exercise was fairly successful. As Mr Annetts duly reported to Mr Wicks, a substantial profit of £260,000 was made out of the structured products purchased in 2006. In reality the products were in the nature of a businesslike speculation which was a mile away from a pure hedge and fairly to be described as one off trades forming part of the business.

B 75. In any event, even if the purchase of foreign exchange products was merely incidental to Titan's business, the scale and frequency of the hedging is well sufficient to satisfy any requirement of regularity justifying the categorisation of such activity as being integral with the business:

C (i) Between 2000 and 2007 Titan purchased 23 structured foreign currency products from the Bank.

(ii) In addition Titan purchased 20 similar products from Anglo Irish Bank and Allied Irish Bank.

D (iii) The overall figures amounted to between €100m and €200m. In 2006 alone (as reported to Mr Wicks) Titan entered into foreign exchange products worth a total of €25 million.

(iv) In addition, Titan also entered into frequent short term swap arrangements.

E 76. I reject Titan's submission that this reflected merely sporadic and intermittent activity fully outside the course of Titan's business. To the contrary, the trades were sustained, large scale and a necessary concomitant of Titan's trading. For all the above reason, I hold that Titan was not a 'private person' for the purposes of the FSMA.

F **Issue 3: Did the Bank act in the capacity of an advisor and did it owe a common law duty of care in respect of advice given in respect the June or September Products?**

77. There is a potential overlap between this issue and Issue 11 and the parties G were not agreed as to the correct approach. Titan asserted that it was appropriate to determine the existence or otherwise of a duty of care in the absence of any applicable contractual terms and then consider the impact of those terms (subject of course to Issue 11). The Bank urged the reverse. In the event, I am not persuaded that the answer would be different on either approach.

H 78. I start with consideration of the terms. As noted above, the Bank's Terms of Business were sent under cover of the letter of 25 February 2004. These were all of a piece with an earlier set of terms (entitled Money Market Regulations) sent out in 2001 in accord with the preceding regulatory regime, the confirmatory letter having been signed and accepted by Mr Annetts on 23 March 2001. There is an issue however as to whether the 2004 terms of business were incorporated since no written

acceptance of them was made by Mr Annetts or any other responsible officer of Titan (although it is common ground that neither on receipt or at any later stage was any objection taken to them).

79. The covering letter made the Bank's position quite plain:

> 'We hereby notify you that we are treating you as an Intermediate Customer within the meaning and for the purposes of the Rules. Enclosed with this letter are our Terms of Business.
>
> The letter and the terms of Business supersede any documentation that may have previously been sent to you and will apply to all our dealings. However, the Terms of Business provide that certain other agreements which may exist between us in respect of a particular transaction or type of transaction may prevail over the Terms of Business (e.g. ISDA, Master Agreement for OTC derivative Transactions). Please read our Terms of Business carefully. They contain important information about our respective rights and obligations, including about certain limitations on liability to you.
>
> When you have reviewed the enclosed documents, you should keep them and this letter for guidance and reference. By conducting business with us you will be deemed to have agreed and accepted our Terms of Business which will therefore become legally binding on you and, in the absence of any other agreement between us and you, will apply to all dealings which we may conduct with you or on your behalf. Your attention is also drawn to the representations and warranties in Clause 3 of the Terms of Business.'

80. Their existence and applicability were expressly reiterated in the post transaction acknowledgements. There can be no doubt, in my judgment, that reasonable notice was given of these standard contractual terms and that on receipt by Mr Annetts or at least by the subsequent course of dealing were duly incorporated.

81. These terms expressly provided that the Bank would not provide advisory services and that any opinions expressed by the Bank did not constitute investment advice. Titan was to take independent advice as might be necessary. In that sense the Bank was making it clear that it was only providing an execution service.

82. The specific terms of each transaction, both as contained in the post transaction acknowledgements and the confirmations,13 were to the same effect. In particular:

(i) Titan was to seek independent advice if required.

(ii) Titan placed no reliance on the Bank for advice or recommendations 'of any sort'.

A 83. There can be no doubt about the fact that Mr Annetts accepted the transaction terms. Indeed a documentary record was required of any transaction agreed over the telephone:

(i) The June PTA was sent by e-mail to Mr Annetts at his home. It stated:

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> 'Please note that this document constitutes your acknowledgement to the economic terms of the transaction entered into between [the Bank] and yourself and the disclosure on the accompanying schedule'

Mr Annetts replied: 'please proceed with this trade structure'.

C

(ii) The September PTA in the same terms was signed by Mr Annetts.

(iii) Both the June and the September Confirmation stated:

D

> 'please confirm that the foregoing correctly sets forth the terms of our agreement by signing a copy of the Confirmation …'

Mr Annetts signed both.

84. Thus in my judgment the transaction terms formed part of the contracts E between Titan and the Bank either by virtue of these signatures or, in any event, by reason of the course of dealing based on the same documentary structure over the previous six years. It is no answer, if the point be alive, for Titan to claim that the June and September products were more 'complex' or of a 'different nature'. Even if a good point, it has no bearing on the issue of incorporation.

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85. I turn to the impact of these terms. In this regard there was some confusion in Titan's case as to whether it was alleging a pre-existing duty of care at the time the products were purchased14 or that the Bank assumed a duty of care in respect of Ms Plested's 'advice'. But on either basis, I conclude that the terms outlined, taken as whole, are only consistent with the conclusion that Titan and the Bank were agreeing G to conduct their dealings on the basis that the Bank was not acting as an advisor nor undertaking any duty of care regardless of what recommendations, suggestions or advice were tendered.

86. Indeed such a duty will even be excluded where the bank or investment advisor has been expressly retained to furnish advice but only on terms which exclude H responsibility: see *Valse Holdings v Merrill Lynch International Bank* [2004] EWHC 2471 (Comm).

87. The primary contention by Titan in response to these express terms (if incorporated) was that they can only take effect by way of evidential estoppel (which it was said was neither pleaded nor established). In my judgment this submission

fails to grapple with the contractual estoppel created by the relevant terms. In *Peekay Intermark Ltd v Australia and New Zealand Banking Group Ltd* [2006] 1 CLC 582, a bank employee had misrepresented the nature of an investment product. But the relevant terms and conditions contained provisions to the effect that the customer knew the true nature of the contract he was entering into and had determined it was suitable. There was also a notice that the customer had taken independent advice and was not relying on the bank.

88. In the judgment Moore-Bick LJ with whom Chadwick LJ and Collins LJ agreed having recorded an important principle of English law that 'underpins all commercial life' to the effect that a person who signs a document knowing it is intended to have a legal effect is generally bound by its terms there is this passage:

> '56. There is no reason in principle why parties to a contract should not agree that a certain state of affairs should form the basis for the transaction, whether it be the case or not. For example, it may be desirable to settle a disagreement as to an existing state of affairs in order to establish a clear basis for the contract itself and its subsequent performance. Where parties express an agreement of that kind in a contractual document neither can subsequently deny the existence of the facts and matters upon which they have agreed, at least so far as concerns those aspects of their relationship to which the agreement was directed. The contract itself gives rise to an estoppel: see *Colchester Borough Council v Smith* [1991] Ch 448, affirmed on appeal [1992] Ch 421.
>
> 57. It is common to include in certain kinds of contracts an express acknowledgment by each of the parties that they have not been induced to enter the contract by any representations other than those contained in the contract itself. The effectiveness of a clause of that kind may be challenged on the grounds that the contract as a whole, including the clause in question, can be avoided if in fact one or other party was induced to enter into it by misrepresentation. However, I can see no reason in principle why it should not be possible for parties to an agreement to give up any right to assert that they were induced to enter into it by misrepresentation, provided that they make their intention clear, or why a clause of that kind, if properly drafted, should not give rise to a contractual estoppel of the kind recognised in Colchester Borough Council v Smith. However, that particular question does not arise in this case. A clause of that kind may (depending on its terms) also be capable of giving rise to an estoppel by representation if the necessary elements can be established: see *E A Grimstead & Son Ltd v McGarrigan* (CA) 27 October 1999, unreported.'

89. This approach was adopted by Gloster J in *JP Morgan Chase Bank v Springwell Navigation Corp* [2008] EWHC 1186 (Comm) and by Aikens J in *Trident Turboprop (Dublin) Ltd v First Flight Couriers Ltd* [2008] 2 Ll Rep 581. I detect no basis upon which a different analysis would be justified in the present case. In the alternative the

A contractual provisions provide an evidential basis negating the coming into existence of a duty of care. I conclude that where, as here, the parties have purported to allocate by contract their respective roles and the risks involved in their relationship this will in the normal run preclude any wider obligation arising from a common law duty of care: *Henderson v Merrett Syndicates Ltd* [1994] CLC 918; [1995] 2 AC 145.

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90. This conclusion is fortified by *IFE Fund SA v Goldman Sachs International* [2007] EWCA Civ 811; [2007] 2 CLC 134 where an issue arose as to the materiality of a provision in an Information Memorandum which contained a clause to the effect that the defendant accepted no responsibility for it (per Waller LJ):

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> '28. I can start by clearing one or two issues out of the way. First it seems to me that the argument that there was some free standing duty of care owed by GSI to IFE in this case is in the light of the terms of the Important Notice hopeless. Nothing could be clearer than that GSI were not assuming any responsibility to the participants: *Hedley Byrne v Heller & Partners* [1964] AC 465. The foundation for liability for negligent misstatements demonstrates that where
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> D
>
> the terms on which someone is prepared to give advice or make a statement negatives any assumption of responsibility, no duty of care will be owed. Although there might be cases where the law would impose a duty by virtue of a particular state of facts despite an attempt not 'to assume responsibility' the relationship between GSI either as arranger or as vendor would not be one
>
> E
>
> of them. I entirely agree with the judge on this aspect.'

91. It is no answer, as it was suggested, that whilst the terms made it clear that the Bank was not obliged to give 'advice' the Bank was not protected if it did in fact advise. There are a number of difficulties with this submission:

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(i) The terms go much further than relieve the Bank from any obligation to give advice: they provide that any statements are not to be treated as advice nor can they be relied upon by Titan.

(ii) It is commercially unreal to separate banking activity into a silent execution
G service on the one hand and an advisory role on the other.

(iii) The impact of the terms is that whether or not Ms Plested proffered opinions, suggestions or even advice during the telephone conversations is irrelevant: the parties have agreed that if the Bank does give advice it is not to be treated as accepting any responsibility.

H

92. In other words, if the Bank's activities were to extend beyond mere execution, the contractual terms cater for that situation. There is no question of going beyond or outside those provisions.

Duty of care (absent contractual provisions)

93. As already recorded, it is accepted that Ms Plested did indeed offer some ideas and recommendations15 in regard to financial products in the face of the large scale Euro income of Titan. But the question is whether the circumstances established that Ms Plested had status as an adviser such that a duty of care in tendering that advice arose or whether objective analysis identifies her as merely a saleswoman. I unhesitatingly prefer the latter: see e.g. *Riggs AP Bank Ltd v Eurocopy* (Ch D, 6 November 1998).

94. There are certain features which point strongly against any conclusion that the Bank acted as an adviser or that its advice was relied upon:

(i) There is no documentary record of the Bank's status as an adviser let alone any provision for payment of a fee for such services. If there had been an acceptance of an advisory responsibility the commercial expectation would be for the scope of the anticipated advice and the fee basis to be reduced to writing.

(ii) There is no written request for advice nor any written response whether in regard to individual transactions or in regard to overall currency exchange programmes.

(iii) The telephone conversations contain no express oral request for advice let alone any reference to an agreement to tender it.

(iv) Startlingly, the only written observations relating to the June and September products16 which the Bank correctly characterised as 'the bedrock' of the outcome of the relationship are not relied upon as containing any advice.

(v) Titan was properly categorised as an 'intermediate customer' under the FSMA regime which involves a significant loss of regulatory protection.

(vi) Titan shopped around and bought FX products from other banks. The contractual terms were the same. Yet no suggestion is made that any of these other banks were acting in advisory capacity.

(vii) The Bank was never even told of the existence let alone the form of these other products: it was thus not in any position to make any overall assessment.

(viii) It would be unrealistic to categorise Mr Annetts as an ingénue in the field of financial products. He had been dealing with foreign exchange products for over 10 years. He had purchased some 23 more sophisticated products since 2000 in consultation with Mr Wicks and/or Ms Bowron. Although no doubt paying heed to what Ms Plested had to say, the transcripts of the telephone conversations leave the clear impression that Mr Annetts was exercising his own independent judgment. He was not adopting without query or understanding the views of Ms Plested.

A (ix) Whilst the Bank might be regarded as more sophisticated than Titan in the field of FX products the crucial parameter was the future Euro/Sterling exchange rate. In that context neither could be treated as more sophisticated than the other whether looking at Ms Plested and Mr Annetts individually or at the teams of people in either camp. In fact both thought (wrongly) that the Euro would not fall below about 1.38.

B

95. Indeed having again reviewed the telephone conversations between Ms Plested and Mr Annetts, I have come to agree with the Bank's classification of them as unremarkable exchanges between a financial controller of a large manufacturing company and a saleswoman employed by the company's bank. To the extent that Mr Annetts was accepting or even relying on any suggestions or recommendations C from Ms Plested does not reflect a duty of care on her part. Mr Annetts could not reasonably have regarded her as an 'advisor'.

96. Although it is suggested that Ms Plested was Mr Annetts 'trusted adviser' it is of some note that this phrase did not appear in documentation prior to Mr Annetts' witness statement. That he 'trusted' Ms Plested probably goes without saying: he D would not have dealt with her at all if not. I treat the phenomenon as no more than a commonplace feature of commercial activity. Further nothing was said by Mr Annetts to Ms Plested to support the proposition in anything other than that sense. To the contrary he appeared to listen to Ms Plested's views, fully understand those views and determine for himself whether the products were worth purchasing. In this regard E the enormous stockpile of euros that Titan had accumulated was perceived by Mr Annetts as providing protection against any fall in sterling which might occur despite his expectation (shared by Ms Plested) that sterling would strengthen.

97. Indeed I would adopt with admiration Gloster J's exhaustive analysis to similar effect of a large number of these issues in *Springwell*.17 I conclude therefore F that the Bank did not act in the capacity of an advisor and it did not owe a common law duty of care in respect of advice in respect of the June and September products.

Issue 11: Are the Contractual terms subject to the 1977 Act and, if so, is the Bank able to rely on them?

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98. It is accepted by the Bank that Clause 12.5 of the terms of business is a genuine exclusion clause. It was the Bank's case that all other terms merely defined the basis upon which the Bank was providing its services. In my judgment that proposition is correct and, as a result such terms fall outside the provisions of the *Unfair Contract Terms Act*.

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99. The point is succinctly dealt with at first instance in *IFE v Goldman Sachs* [2006] EWHC 2887 (Comm); [2006] 2 CLC 1043, per Toulson J:

> '71. … The relevant paragraphs of the SIM are not in my view to be characterised in Substance as a notice excluding of restricting a liability

for negligence, but more fundamentally as going to the issue whether there was a relationship between the parties (amounting to or equivalent to that of professional adviser and advisee) such as to make it just and reasonable to impose the alleged duty of care': A

100. A similar point arose in *Springwell supra*. As Gloster J pointed out any other conclusion would mean that every contract defining the scope of the parties obligations would have to satisfy the requirement of reasonableness. She went on: B

'604. The legislation is, in practice, of very limited application in the case of commercial contacts between commercial counterparties. In *Photo Productions Ltd v Securicor*, Lord Wilberforce said that, in commercial matters generally, when the parties were not of unequal bargaining power, Parliament's intention was one of "leaving the parties free to apportion the risks as they think fit … and respecting their decisions." Tuckey LJ made the same point in *Granville Oil & Chemicals v Davis Turner & Co*: C

"For these reasons I think the Judge reached the wrong conclusion in this case. If necessary I would say he was plainly wrong. I am pleased to reach this decision. The 1977 Act obviously plays a very important role in protecting vulnerable consumers from the effects of draconian contract terms. But I am less enthusiastic about its intrusion into contracts between commercial parties of equal bargaining strength, who should generally be considered capable of being able to make contracts of their choosing and expect to be bound by their terms." D E

The reluctance of the Courts to interfere in contracts concluded between commercial parties in relation to substantial transactions reflects the strong business need for commercial certainty, as emphasised by Chadwick LJ in *EA Grimstead & Son Ltd v McGarrigan*…' F

101. In contrast to this line of authority Titan relied upon *Smith v Bush* [1990] 1 AC 831 which would not appear to have been cited in *IFE* or in *Springwell*. The issue was whether a notice which made it plain that a valuer was not accepting liability to third parties was 'caught' by the Act. The proposition advanced was to the effect that the approach should be a two stage test: first the issue whether a duty of care arose in the absence of the contractual terms: second whether the relevant clause had the effect of excluding or restricting the liability which would otherwise have arisen. G

102. The valuer submitted that the denial of responsibility prevented a duty arising in the first place and therefore was not an exclusion clause. At p. 848 Lord Templeman said: H

'In *Harris v. Wyre Forest District Council* [1988] QB 835, the Court of Appeal (Kerr and Nourse L JJ and Caulfield J) accepted an argument that the Act of

A 1977 did not apply because the council by their express disclaimer refused to obtain a valuation save on terms that the valuer would not be under any obligation to Mr and Mrs Harris to take reasonable care or exercise reasonable skill. The council did not exclude liability for negligence but excluded negligence so that the valuer and the council never came under a duty of care to Mr and Mrs Harris and could not be guilty of negligence. This construction B would not give effect to the manifest intention of the Act but would emasculate the Act. The construction would provide no control over standard form exclusion clauses which individual members of the public are obliged to accept. A party to a contract or a tortfeasor could opt out of the Act of 1977 by declining in the words of Nourse LJ, at p. 845, to recognise "their own C answerability to the plaintiff". Caulfield J said, at p. 850, that the Act "can only be relevant where there is on the facts a potential liability". But no one intends to commit a tort and therefore any notice which excludes liability is a notice which excludes a potential liability. Kerr LJ, at p. 853, sought to confine the Act to "situations where the existence of a duty of care is not open to doubt" or where there is "an inescapable duty of care". I can find nothing in the Act D of 1977 or in the general law to identify or support this distinction. '

103. At p. 856 Lord Griffiths said:

'The Court of Appeal, however, accepted an argument based upon the E definition of negligence contained in section 1(1) of the Act of 1977…

I read these provisions as introducing a "but for" test in relation to the notice excluding liability. They indicate that the existence of the common law duty to take reasonable care, referred to in s. 1(1)(b), is to be judged by considering whether it would exist "but for" the notice excluding liability. The result of F taking the notice into account when assessing the existence of a duty of care would result in removing all liability for negligent misstatements from the protection of the Act.'

104. The focus of course was the issue of liability for poor service rather than the G scope of the service to be provided. Further the decision may have been somewhat overtaken by later decisions in regard to the assumption of responsibility and the move away from any 'but for' test in regard to the existence and extent of any duty.

105. In one sense the point is redundant since I have concluded that no liability did arise even in the absence of the contractual terms. But assuming in favour of H Titan that the Act does apply, do the terms including clause 12.5 satisfy the test of reasonableness? It is difficult to see why not:

(i) There was complete equality of bargaining power. Titan was a substantial entity that was a customer of the Bank. It was open to Titan to choose any bank and indeed it did take its custom elsewhere.

(ii) The terms were not simply standard for the Bank but, it would appear, to many banks including the Irish banks from which Titan bought products.

(iii) There was no difficulty in Titan seeking (as the terms expected) advice from another quarter if desired.

106. The terms were clear and they were regularly brought to the notice of Titan. The thrust of Titan's argument focussed on a discrete proposition to the effect that the information and resources available to the Bank as to the nature and suitability of each product was an order of magnitude greater than that available to Titan.

107. So far as it goes, this proposition is true as a matter of fact but irrelevant:

(i) The Bank's computer programmes enabled it to assess its making of profit which was of no interest to Titan.

(ii) Mr Annetts was told of the cost of closing out the February and March contracts before signing the June confirmation: whilst this was a calculation which could only be done with accuracy by the Bank no complaint was made nor questions asked.

(iii) The crucial parameter was the spot rate for Sterling/Euro exchange: there was no information or technology available to the Bank which enabled it to predict the future rate to better effect than Titan.

108. I conclude therefore that with one exception the contractual terms are not subject to the 1977 Act and, in any event, they are reasonable.

(*Order accordingly*)

NOTES

1. The order goes on to explain that this issue requires a consideration of, inter alia, the applicability, meaning and effect of the contractual terms referred to in paragraph 13 of the Defence and Counterclaim ('the contractual terms').
2. Indeed much of it was set out somewhat unhelpfully verbatim and at length in the Particulars of Claim.
3. Although there could be no dispute as to what was said and Ms Plested's views as to whether she was in fact giving advice would be of little assistance.
4. Which would have constituted day 5 of a hearing estimated for three days.
5. Pursuant to COB 4.1
6. In addition, from 2006 Titan also purchased similar structured products from two Irish Banks.
7. It is clear that the twenty or so transactions entered into with two Irish Banks were reflected in documentation of a very similar nature.
8. As regards transactions with Irish banks, Mr Wicks was a regular signatory.

A 9. In any event there was the protection afforded by Titan's stockpile of euros.
10. There is no decision on reg. 3 or its predecessors.
11. Subsequently this test has been known as the 'regularity' test.
12. Indeed the September product was expressly categorised as not a hedge.
13. Mr Annetts and Mr Wicks routinely signed confirmations on almost precisely the same terms in regard to products sold by Anglo Irish Bank.
B 14. A pre-existing duty of care as I understood it said to have emerged in about 2004 arising from the earlier negotiations between Ms Plested and Mr Annetts.
15. As explained in para. 20 above there is no significance as such in the alternative categorisation of any views or recommendations as ideas, opinions, proposals or advice.
C 16. the e-mails of 29 June and 18 September.
17. See in particular para. 434, 442-443, 449, 454, 475, 478, 492, 602 and 604.

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