Case No: A3/2017/1023

Neutral Citation Number: [2018] EWCA Civ 719
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT
ROBIN KNOWLES J
[2017] EWHC 522 (Comm)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11/04/2018

Before:

LORD JUSTICE LONGMORE
LORD JUSTICE HENDERSON
and
LORD JUSTICE FLAUX

- -

Between:

LBI EHF	**Appellant**
- and -	
RAIFFEISEN BANK INTERNATIONAL AG	**Respondent**

- -
- -

Benjamin Pilling QC and Edward Jones (instructed by **Stewarts Law LLP**) for the **Appellant**
Guy Philipps QC and Richard Power (instructed by **Stephenson Harwood LLP**) for the **Respondent**

Hearing date: 27 March 2018

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Judgment

Lord Justice Flaux:

Introduction

1. This appeal against the Order dated 20 March 2017 of Robin Knowles J sitting in the Commercial Court concerns the meaning of "fair market value" in the Global Master Repurchase Agreement dated 30 August 2007 between the parties.

Factual background

2. The appellant, the bank formerly known as Landsbanki Islands hf., failed and went into receivership on 7 October 2008. At that time it had open positions on a number of trades with the respondent bank. The present appeal is concerned only with eleven open positions on so-called "repo" trades made on the terms of the Global Master Repurchase Agreement 2000 edition ("GMRA"). "Repo" transactions are regarded as in substance a form of secured lending under which securities are provided as collateral for a loan. In effect, the appellant borrower sold a portfolio of bonds to the respondent purchaser and agreed to repurchase them at a later date at a pre-determined price which represented repayment of the principal plus interest.

3. The failure and insolvency of the appellant constituted an Event of Default under paragraph 10 of the GMRA. The respondent served Default Notices on the appellant the following day, 8 October 2008. In simple terms the GMRA then provided that the Defaulting Party, here the appellant, was to pay the non-Defaulting Party, the respondent, the agreed Repurchase Price for the securities minus the Default Market Value of Equivalent Securities. Sub-paragraph 10(e) provides for a number of methods of ascertainment of the Default Market Value, depending upon whether the non-Defaulting Party has served a Default Valuation Notice by the Default Valuation Time, defined as the close of business on the fifth dealing day after the day on which the Event of Default occurred. The Default Valuation Time in this case was 15 October 2008.

4. Where a Default Valuation Notice has been served by the Default Valuation Time, sub-paragraph (e)(i) provided for three methods of valuation:

   (1) The bonds can be sold in good faith and the sale price used to determine the Default Market Value (paragraph 10(e)(i)(A)).

   (2) The Default Market Value can be determined from the mean average of commercially reasonable quotations obtained from market makers for the bonds (paragraph 10(e)(i)(B)).

   (3) Where the non-Defaulting Party has endeavoured but been unable to sell the bonds or cannot obtain commercially reasonable quotations, the non-Defaulting Party can determine the Net Value of Equivalent Securities and elect to treat that Net Value as the Default Market Value (paragraph 10(e)(i)(C)).

5. Where a Default Valuation Notice has not been served on time, sub-paragraph (e)(ii) provides in effect that a method which is largely the same as method 3 (save that it assesses Net Value as at the Default Valuation Time) has to be used, subject to a proviso which was inapplicable in the present case:

> "(ii) If by the Default Valuation Time the non-Defaulting Party has not given a Default Valuation Notice, the Default Market Value of the relevant Equivalent Securities or Equivalent Margin Securities shall be an amount equal to their Net Value at the Default Valuation Time; provided that, if at the Default Valuation Time the non-Defaulting Party reasonably determines that, owing to circumstances affecting the market in the Equivalent Securities or Equivalent Margin Securities in question, it is not possible for the non-Defaulting Party to determine a Net Value of such Equivalent Securities or Equivalent Margin Securities which is commercially reasonable, the Default Market Value of such Equivalent Securities or Equivalent Margin Securities shall be an amount equal to their Net Value as determined by the non-Defaulting Party as soon as reasonably practicable after the Default Valuation Time."

6. "Net Value" is defined in sub-paragraph (d)(iv):

> ""Net Value" means at any time, in relation to any Deliverable Securities or Receivable Securities, the amount which, in the reasonable opinion of the non-Defaulting Party, represents their fair market value, having regard to such pricing sources and methods (which may include, without limitation, available prices for Securities with similar maturities, terms and credit characteristics as the relevant Equivalent Securities or Equivalent Margin Securities) as the non-Defaulting Party considers appropriate, less, in the case of Receivable Securities, or plus, in the case of Deliverable Securities, all Transaction Costs which would be incurred in connection with the purchase or sale of such Securities;"

7. In the present case, the respondent did not serve a Default Valuation Notice on time, so that only the method of valuation by reference to Net Value was open to it. In fact, by the end of the trial, it was common ground that the respondent had not carried out the correct valuation process, so that the judge had to consider a counter-factual question as to what Default Market Value the respondent would have arrived at if it had acted in accordance with the requirements of the GMRA. Accordingly the principal issue the judge had to decide was the meaning of "fair market value" as that phrase was used in the GMRA.

The judgment of Knowles J

8. At [17], the judge noted that the parties had not agreed a "generally recognised pricing source", as the definition of "Net Value" contemplated. At [18] the judge then rejected the appellant's argument that "fair market value" should be informed by the way that those words have been used in other legal and financial contexts, such as in the International Valuation Standards (published by the International Valuation Standards Council), the International Financial Reporting Standards (published by the International Accounting Standards Board), the American Society of Appraisers'

Business Valuation Standards, and in the United States Treasury Regulations. The judge said:

> "I do not consider it is a reliable approach to take definitions offered by those sources when the words appear without those definitions in the GMRA."

9. The appellant contended before the judge (as it does before this Court) that on the basis of other definitions of "fair market value", that phrase should be limited to "a consistently recognised concept associated with fair market value involving a willing buyer, willing seller, knowledge of the asset in question and a lack of compulsion". At [20] the judge rejected this submission:

> "I do not consider the words are to be limited in this way. In the context of the GMRA, when called into action the words are words that will have to work in a whole range of factual scenarios. LBI submitted, drawing on definitions found elsewhere, that a critical point in the meaning for which it contended was the lack of compulsion. This, it was submitted, excluded from the "fair market value" prices achieved in a distressed market. I find the submission that lack of compulsion is within the meaning of the words difficult to reconcile with the fact that under paragraph 10(e)(i) of GMRA the non-Defaulting Party may actually sell the securities, in what may be a distressed market, and determine the Default Market Value on the basis of the prices obtained, provided always that it acts in good faith."

10. The judge considered that the issue was more usefully approached by considering first the words in the definition of "Net Value" "reasonable opinion of the non-Defaulting Party". Both parties had relied upon the judgments of Rix LJ in *Socimer Bank Ltd v Standard Bank Ltd* [2008] EWCA Civ 116 and of Blair J in *Lehman Brothers International (Europe) v Exxonmobil Financial Services BV* [2016] EWHC 2699 (Comm). The judge noted that, on the basis of the judgment of Rix LJ, the appellant accepted that the task for the Court was to put itself in the shoes of the decision maker (here the respondent) and ask what decision it would have reached, acting rationally and not arbitrarily or perversely.

11. As the judge said at [22] the *Exxonmobil* case also involved the 2000 edition of the GMRA. The judge cited those passages from the judgment of Blair J (specifically [280]-[281]) where he held that the securities should be ascribed a fair market value in accordance with the opinion which the non-Defaulting Party (acting rationally) would have formed if it had conducted the valuation exercise required by paragraph 10(e)(ii), which was largely a question of fact. Blair J held that the extent of a contractual discretion depends on its terms and the test of rationality applies within those terms.

12. The judge held at [25] that the respondent's figures, which he set out in Appendix A to the judgment, met the requirement for a rational and honest determination of fair market value as at 15 October 2008. He took into account the fact that those figures were a statement of the respondent's position, rather than a product of evidence from

an expert or witness of fact. At [26] to [28] he referred to the expert evidence at trial but said it had not assisted greatly, because the task was not about independent expert valuation but to decide what view the respondent would have reached and whether that lay within or outside the range of rational views. He accepted that the expert evidence was of some help to the Court in checking whether the respondent's figures were rational or not.

13. At [29] to [31] the judge accepted the evidence of Mr Wiesenger of the respondent as to the information it had available as soon as the Default Notices were sent out to the appellant, which consisted of:

    (1) bids from 10 institutional counterparties which the respondent had requested;

    (2) algorithm-based prices shown on Bloomberg which the respondent used for internal purposes, and which the respondent did not consider to represent a practical and commercial realisable value; and

    (3) the only activity experienced by the respondent on 15 October 2008 itself, namely a bid shown by Citi at 45 for ICICI (USD) bonds and a request by Citi that RZB place an order with it at 80 for RAK Bank bonds.

14. The judge said that this left little other available material "at times that were financially exceptional and serious", a reference to the 2008 financial crisis. At [33] he referred to the appellant's submission that the respondent could have looked for other information relevant to an assessment of fair market value, but held that:

> "I am unable to treat as irrational an assessment of fair market value based on the information RZB did have in the present case and without more. I do not rule out that the position may be different in the circumstances of other cases. There is no doubt that the information available in the present case was imperfect, and it is to be noted that it includes the Bloomberg or BGN prices despite what I have said above. However the circumstances at that time were imperfect. Any assessment of fair market value would have been imperfect but the non-Defaulting party was nonetheless entitled to make one."

Grounds of appeal

15. The appellant was only given permission to appeal on Ground 1 of its Grounds, that the judge erred in holding that, on the true construction of the GMRA, the non-Defaulting Party's assessment of "fair market value" of securities could be based on prices achieved or quotations obtained in a distressed or illiquid market. The judge:

    (1) failed to give sufficient weight to the contractual context in which the words 'fair market value' appear;

    (2) failed to have regard to, or to take sufficient account of, the Guidance Notes ("the Guidance") that accompany the GMRA as a permissible aid to the construction of 'fair market value'; and

(3) reached a commercially unsound conclusion contrary to the guidance promulgated by the publishers of the GMRA.

The parties' submissions

16. The primary submission of Mr Pilling QC on behalf of the appellant before this Court, as before the judge, was that the words "fair market value" in the definition of "Net Value" in paragraph 10 of the GMRA require the non-Defaulting Party to make an assessment of the price from the perspective of an unimpaired/willing buyer and an unimpaired/willing seller, neither being under any particular compulsion to trade. Therefore, such an assessment should not reflect liquidity issues or distress that happen to feature in a particular market at a particular time. Accordingly, on that interpretation, it would be wrong to base "fair market value" on prices or quotes achieved in a distressed or illiquid market.

17. Mr Pilling QC submitted that it was impossible to say definitively what meaning the judge had ascribed to "fair market value" since the judgment offered no interpretation of the words, but it was clear that the judge had wrongly rejected the appellant's interpretation. Mr Pilling QC submitted that the judge had failed to consider the three methods of valuation in paragraph 10(e)(i) and thus to construe the phrase "fair market value" in its proper contractual context. Mr Pilling QC submitted that method 3 arose, inter alia, when the non-Defaulting Party was unable to buy or sell under method 1 or had determined that it would not be commercially reasonable to obtain quotations or not commercially reasonable to use any quotations it had obtained under method 2. This might occur either where the market for a specific security was illiquid or where the market was generally distressed.

18. He submitted that the fact that recourse was only had to method 3 (and thus to the "fair market value" provision) under paragraph 10(e)(i)(C) in the event that the non-Defaulting Party had either (a) been unable to sell the securities or (b) could not obtain commercially reasonable quotations, strongly suggested that the determination of "fair market value" required an assessment of the securities which was separate from and not reflective of current market distress. This required forming a reasonable view of the intrinsic value of the bonds by a process of valuing them in accordance with a valuation model. He submitted that "fair market value" must have the same meaning ascribed to it when the assessment of Net Value is made under paragraph 10(e)(ii) as under paragraph 10(e)(i)(C).

19. Mr Pilling QC submitted that the appellant's arguments were consistent with the meaning attributed to "fair market value", albeit in different factual contexts in Commonwealth authorities from Australia and Canada. The decision of the Court of Appeal of New South Wales in *MMAL Rentals Pty Limited v Bruning* [2004] NSWCA 451; 63 NSWLR 167 involved assessment of the "fair market value" of shares under a share option available on termination of a management agreement. Mr Pilling QC relied upon what was said by Spigelman CJ at [58]-[60]:

> "58 Where, as here, the formulation is "fair market value", the valuation test requires a similarly limited focus on the range of circumstances relevant to a process of determining exchange value. A "fair market value" may diverge from a "market

> value" for numerous reasons, e.g. where property is thinly traded, or the parcel is small, or there exist market distortions.
>
> 59 In the present contractual context, the intrusion of the word "market" between "fair" and "value" points away from a process of determining what is just or equitable between the parties, towards an objective standard. That that is so in the present case is strongly suggested by the decision-maker nominated in cl II.2.3. The decision is to be made jointly by the company's auditor and a chartered accountant nominated by the vendor and, failing agreement, by a nominee of the President of the Institute of Chartered Accountants. Persons with such a background are not generally suited to determining what is just or equitable in all circumstances. Their expertise is appropriate for determining exchange value.
>
> 60 Nevertheless, the word "fair" has, in my opinion, work to do. In a contractual context, this additional word suggests that the valuation should proceed on the assumption, which may be contrary to the facts of a particular contractual relationship, that there is no impediment to the process of bargaining, whether in terms of availability of information or restraints arising from the characteristics of a particular vendor or purchaser or otherwise. Issues will arise, however, when determining what aspects of the particular relationship are of a character which inhere in the item of the property itself, as distinct from those which should be treated as excluded by the concept of a "fair market value"."

20. He also relied upon the decision of the Federal Court of Canada in *Henderson Estate v Canada (Minister of National Revenue)* [1973] C.T.C. 636 which concerned the meaning of "fair market value" for the purposes of assessing succession duty under the relevant taxing statute where the Minister was given a wide discretion to ascertain "fair market value": "in such manner and by such means as he thinks fit". At [21] Cattanach J considered what was meant by "fair market value" in the context of the statute:

> "21 The statute does not define the expression "fair market value", but the expression has been defined in many different ways depending generally on the subject matter which the person seeking to define it had in mind. I do not think it necessary to attempt an exact definition of the expression as used in the statute other than to say that the words must be construed in accordance with the common understanding of them. That common understanding I take to mean the highest price an asset might reasonably be expected to bring if sold by the owner in the normal method applicable to the asset in question in the ordinary course of business in a market not exposed to any undue stresses and composed of willing buyers and sellers dealing at arm's length and under no compulsion to buy or sell. I would add that the foregoing understanding as I

> have expressed it in a general way includes what I conceive to be the essential element which is an open and unrestricted market in which the price is hammered out between willing and informed buyers and sellers on the anvil of supply and demand. These definitions are equally applicable to "fair market value" and "market value" and it is doubtful if the use of the word "fair" adds anything to the words "market value"."

21. Cattanach J cited with approval the judgment of Migneault J in the Supreme Court of Canada in *Untermeyer Estate v Attorney General for British Columbia* (1929) S.C.R. 84 considering the same statute, where that judge said at 91:

> "It may perhaps be open to question whether the expression "fair" adds anything to the meaning of the words "market value", except possibly to this extent that the market price must have some consistency and not be the effect of a transient boom or a sudden panic on the market."

22. Having then considered an earlier decision of his own, Cattanach J said at [27]:

> "27 The recurrent thought in these extracts is that the market price must have the element of consistency which precludes the existence of a transient boom or sudden panic and that the market price should be realistic rather than "ephemeral". If the undue stresses contemplated by Migneault J are present then those influences will result in a volatile rather than a consistent market and accordingly I would conclude that a market price subject to such influences cannot be considered as the "fair" market value, which it would be otherwise, and that this is the significance attributed by Mr. Justice Migneault in the use of the word "fair" before the words "market value"."

23. Mr Pilling QC relied upon these decisions considering the meaning of "fair market value" to submit that "fair" must add something to "market value" and in the present context what it added, as in those cases, is that the assessment must leave out of account thin trading or panic in the market or, here, illiquidity and distress in the market.

24. He also submitted that this approach to the assessment of "fair market value" was supported by the Guidance, which was a permissible aid to construction, but there was no indication in the judgment that the judge had considered the Guidance. The particular passage upon which Mr Pilling QC relied is at p 14 where the Guidance drew the distinction between what he had labelled methods 2 and 3 and gave examples of when it is not commercially reasonable to obtain quotations ("*e.g. where the position is so large that this will materially affect the quotations that could be obtained*") and when it is not commercially reasonable to utilise the quotations obtained ("*e.g. where the securities are very illiquid and there is considerable disparity between the quotations obtained*"). He submitted that these examples all relate to illiquidity, demonstrating that an assessment of 'fair market value' is not reflective of a distressed market (where there would be liquidity issues) or exceptional market circumstances.

25. He also submitted that the appellant's approach was supported by the Frequently Answered Questions (FAQs) on Repo published by ICMA. The version of these upon which he relied stated that: "In effect the calculation of Net Value is marking-to-model (calculating a theoretical fundamental price)". Mr Pilling QC submitted that this guidance did not sit well with the judge's conclusion at [27] that marking-to-model was not the only method available to the respondent within the words "fair market value".

26. Mr Pilling QC submitted that the approach of the judge would lead to absurd results as it would permit a non-Defaulting Party, who had formed the view that the market quotations it had obtained in an illiquid or distressed market were commercially unreasonable so that it could not use method 2, to use the same information to determine "fair market value" under method 3. He highlighted that point by reference to one of the bonds in question, the Sharia compliant Sukuk, where the respondent had relied upon what it was told by Citi on 14 October 2008 that it thought a sell order with a limit of 65 to 70 would be realistic but no firm bid could be obtained. The respondent had simply taken the average of 67.5 and in the Appendix to the judgment, the judge had simply accepted that figure. Mr Pilling QC criticised this as reliance on one piece of pricing data where a market quotation under method 2 could not be obtained.

27. The starting point of the submissions of Mr Guy Philipps QC for the respondent was that the definition of "Net Value" in paragraph 10(d)(iv) conferred a very wide discretion on the non-Defaulting Party. It may have regard to "such pricing sources and methods as it considers appropriate" in determining what, in its reasonable opinion, constitutes the 'fair market value' of the securities. The judge had been correct to find at [21] that the only constraint on this wide discretion was that the non-Defaulting Party act rationally and not arbitrarily or perversely. Mr Philipps QC submitted that what the appellant had failed to provide either before this Court or before the judge below was any explanation of how it was that the assessment by the non-Defaulting Party at the Default Valuation Time must not reflect the liquidity issues in the particular market at that time, given the wide definition in paragraph 10(d)(iv).

28. Whilst Mr Philipps QC accepted that Blair J in *Exxonmobil* was not required to determine expressly what was meant by "fair market value", he submitted that it was clear that neither the Court nor the parties in that case considered it had the meaning for which the appellant contends, but proceeded on the basis that the non-Defaulting Party was contractually entitled to determine the "fair market value" of the bonds by reference to the actual market conditions at the time, even though the market was highly distressed in the wake of the collapse of Lehman Brothers.

29. By contrast, the appellant's approach involved a significant restriction as a matter of law on the apparently wide discretion conferred by the provision in paragraph 10(e)(ii) so that the non-Defaulting Party could not have regard to "such pricing sources and methods as it considers appropriate" because its assessment of "fair market value" should not reflect illiquidity or distress in the particular market at the relevant time. Mr Philipps QC submitted that the judge had been right to reject the appellant's approach which not only imposed a fetter on the respondent's discretion which was not justified by the language of the GMRA but which was fundamentally inconsistent with that language.

30. He relied upon the reference in the definition of "Net Value" to the deduction from or addition to "fair market value" of Transaction Costs as demonstrating that "fair market value" means the amount for which the non-Defaulting Party reasonably determines that it could as a matter of fact have bought or sold in the market Equivalent Securities. It is impossible to see how that determination could be effected without reference to the particular market in which and date on which the notional purchase or sale was to be effected.

31. Mr Philipps QC also relied upon the proviso in paragraph 10(e)(ii) as supporting the respondent's construction. This provides that if, at the Default Valuation Time, the non-Defaulting Party reasonably determines that, owing to circumstances affecting the market in the Equivalent Securities in question, it is not possible to determine a Net Value of such Securities which is commercially reasonable, then their Default Market Value shall be an amount equal to their Net Value as determined as soon as reasonably practicable after the Default Valuation Time. He submitted that this proviso would have no purpose or meaning if, as the appellant contends, "fair market value" is to be determined without reference to the circumstances in the particular market at the particular time.

32. He also submitted that the appellant's definition of "fair market value" as involving an assessment of a price for a particular security arrived at by an unimpaired/willing buyer and an unimpaired/willing seller, neither being under any particular compulsion to trade, does not actually give any indication as to how the non-Defaulting Party is supposed to carry out the assessment if it excludes any reference to data derived from the particular market where the notional transaction is to be effected.

33. Mr Philipps QC submitted that the appellant's reliance on the fact that the Net Value was also the basis of valuation under paragraph 10(e)(i)(C), where the Default Valuation Notice given in time states that the non-Defaulting Party has been unable to sell or purchase Securities or unable to obtain commercially reasonable offer or bid quotations, was misplaced. The judge had rightly found at [20] that the provisions of paragraph 10(e)(i) undermined rather than supported the appellant's contention. Mr Philipps QC submitted that, contrary to the appellant's argument, there was no sensible reason why the non-Defaulting Party which has tried to buy or sell and/or to obtain commercially reasonable quotations for Securities in the relevant market but been unable to do so, possibly because of market conditions, should be required to attribute a theoretical value to the Securities which takes no account of whatever information as to actual market value the non-Defaulting Party has obtained in the course of its attempts to buy or sell or obtain quotations. This would involve attributing an artificially high value to the securities which would actually inflate the loss.

34. He submitted that the Guidance is of no assistance here. It does no more than state what is said in the GMRA, that if the non-Defaulting Party states in the Default Valuation Notice that it has been unable to obtain two or more commercially reasonable market quotations, then it may determine the fair market value using such sources and methods as it considers appropriate. The fact that one of the situations in which the non-Defaulting Party may be unable to obtain commercially reasonable market quotations may be that the Securities are very illiquid sheds no light on the present issue. Likewise, he submitted that the FAQs were not admissible as an aid to construction and in any event were of no assistance. They were not available to the

parties at the time and were expressly stated to be "for information only". He submitted that it was difficult to see how the view of its author that determination of "fair market value" is "in effect marking-to-model" supports the appellant's contention that the judge was wrong to conclude that on the proper construction of the GMRA 2000 version the respondent was entitled to use information obtained in a distressed market.

35. The cases relied upon by the appellant as to the meaning ascribed to "fair market value" in other cases in other jurisdictions were of no assistance because, as the judge said, what is meant by "fair market value" must depend upon the context in which the phrase is used in the contract under consideration.

Analysis and conclusions

36. I agree with Mr Philipps QC that the starting point must be the definition of "Net Value" in which the phrase "fair market value" occurs. This clearly gives a wide discretion to the non-Defaulting Party to assess "fair market value" by reference to:

> "such pricing sources and methods (which may include, without limitation, available prices for Securities with similar maturities, terms and credit characteristics as the relevant Equivalent Securities or Equivalent Margin Securities) as the non-Defaulting party considers appropriate…"

37. That this gives a wide discretion to the non-Defaulting Party is emphasised by Blair J in [331] of *Exxonmobil* (which the judge cited with approval):

> "Under the contract, the exercise in determining the "fair market value" is a broad one. The non-Defaulting Party is entitled to have regard to such pricing sources and methods, which may include without limitation available prices for securities with similar maturities, terms and credit characteristics, as it considers appropriate."

38. In the absence of some express or implied limitation in the contract on the exercise of the discretion, as a matter of principle, the only limitation will be the one recognised by Rix LJ in *Socimer*, as applied by Blair J in *Exxonmobil* and by the judge in the present case, that the decision-maker must have acted rationally and not arbitrarily or perversely. This proposition was essentially accepted by the appellant before the judge (see [21] of the judgment) and before this Court.

39. In my judgment, the limitation for which the appellant contends, that the assessment of "fair market value" must be by reference to a price agreed between an unimpaired/willing buyer and an unimpaired/willing seller, neither being under any particular compulsion to trade, so that any illiquidity or distress in the market is to be left out of account, is not one which is to be found in the express terms of the GMRA. Nor is there any basis for its implication, because it is contrary to the express language of the GMRA and, in particular, the wide discretion conferred on the non-Defaulting Party.

40. The fallacy in the argument advanced on behalf of the appellant seems to me to be the assumption that, because method 3 of valuation arises under paragraph 10(e)(i)(C) in circumstances where the non-Defaulting Party has been unable to sell or purchase Securities or unable to obtain commercially reasonable offer or bid quotations, in all likelihood because of illiquid or distressed market conditions at the time, that somehow precludes the non-Defaulting Party from making an assessment of "fair market value" by reference to any evidence or information it has obtained as to actual market value, albeit in an illiquid or distressed market, and limits the non-Defaulting Party to assessment by reference to some notional or theoretical value to be ascribed to the securities. This argument on the part of the appellant makes no commercial sense and is certainly not dictated by the terms of the provisions under consideration, which as Blair J said in *Exxonmobil* provide for a "broad" assessment of "fair market value".

41. As Mr Pilling QC accepted, the words "fair market value" must be given the same meaning in paragraph 10(e)(ii) as in paragraph 10(e)(i)(C). Under paragraph 10(e)(ii), the assessment of "fair market value" pursuant to the definition of "Net Value" will occur in all cases where the non-Defaulting Party has not served a Default Valuation Notice in time, not just in those cases where the securities could not be sold or a commercially reasonable quotation could not be obtained because of illiquidity or distress in the market. Obviously, in those cases where there is no illiquidity or distress in the market, the assessment of "fair market value" under paragraph 10(e)(ii) will have regard to prices of securities in the particular market at the particular time. What the appellant's argument fails to explain is how it is that the same expression "fair market value" is to be given a more limited meaning excluding the prices in the particular market at the particular time when the market is illiquid or distressed, given that there is no change in the language of the provision between the two sets of market circumstances.

42. I also agree with Mr Philipps QC that the appellant's argument renders the proviso in paragraph 10(e)(ii) effectively otiose. The proviso is a one way option given to the non-Defaulting Party to defer assessment of Net Value when it reasonably determines that, owing to the circumstances of the market, it cannot make a commercially reasonable determination of Net Value. The paradigm case in which that will occur is when the market is illiquid or distressed and yet, on the appellant's case, the non-Defaulting Party cannot have regard to prices or information derived from such a market in the first place.

43. It does not seem to me that the Commonwealth cases are of any real assistance in the present context, given they involve different factual contexts. In *MMAL Rentals* there was no similar wide wording indicating the matters to which regard was to be had in assessing the fair market value of the shares as in the definition of "Net Value" in the GMRA. It is also to be noted that in that case the decision making was by way of a joint valuation by expert accountants and in default of agreement, by the Institute of Chartered Accountants. That essentially buttresses the judge's conclusion that "fair market value" was to be assessed by reference to an objective standard.

44. Whilst it can be said that the decision of the Federal Court of Canada in *Henderson Estate* provides support for the appellant's construction of "fair market value" in the sense that "fair" was considered as excluding situations of thin trading or panic in the market, the context, of a taxing statute, was a completely different one from the

present case. It seems to me that, in the present context, "fair" has little to add to "market value" except as Mr Philipps QC submitted to underline the need for fairness in the sense of rationality in the assessment by the non-Defaulting Party. It might follow for example that an assessment solely by reference to a price which was not commercially viable was not assessing a "fair" market value because it was not rational. However, I agree with Mr Philipps QC that "fair" cannot have the meaning for which the appellant contends in the present context, without writing words into the definition of "Net Value" which is not permissible.

45. The meaning of "fair market value" in the present case "has to be determined as a matter of construction of this particular contract in its particular context" (per Longmore LJ at [14] of *Barclays Bank plc v Unicredit Bank AG* [2014] EWCA Civ 302; [2014] 2 Lloyd's Rep 59). The only other case which has considered the present provision in the GMRA is the decision of Blair J in *Exxonmobil*. Whilst the judge in that case did not engage in any precise definition of "fair market value", as I have said he considered that the exercise of its assessment was a broad one, subject only to the non-Defaulting Party acting rationally. That case also proceeds on the basis that an assessment of "fair market value" at the time in September/October 2008 would involve consideration of the market at the time, even though it was distressed: see for example [293] and [328]-[345]. None of that is the slightest surprising or untoward, given that the definition of Net Value expressly entitles the non-Defaulting Party to have regard to whatever "pricing sources and methods" and to "available prices for Securities" as it considers appropriate, without any limitation in the wording of the provision as to the factual circumstances in which the non-Defaulting Party can have regard to those matters.

46. I agree with Mr Philipps QC that the Guidance and the FAQs are also of little assistance. The Guidance seems to me to do no more than spell out the terms of paragraph 10(e)(i) and (ii) and the fact that the author of the FAQs considers that the calculation of Net Value is in effect marking-to-model in a document which is "for information only" and which is almost certainly not admissible as an aid to construction in any event, does not seem to me to be capable of impugning the judge's analysis.

47. In his written submissions, Mr Pilling QC was somewhat critical of the fact that the judge had not set out an interpretation or definition of "fair market value". It seems to me that this criticism is unwarranted. The difficulty with providing any fixed definition is the obvious one that it risks restricting what under the contract wording is a wide discretion given to the non-Defaulting Party to assess the "fair market value" of the Equivalent Securities by reference to "such pricing sources and methods (which may include, without limitation, available prices for Securities with similar maturities, terms and credit characteristics as the relevant Equivalent Securities or Equivalent Margin Securities) as the non-Defaulting Party considers appropriate". As Mr Philipps QC also pointed out, the GMRA is used in respect of a wide variety of financial instruments, not just bonds, so that a tailor-made definition of "fair market value" to fit the facts of this case would not have been appropriate.

48. It is tolerably clear from the judgment that the judge considered that this wide wording entitled the non-Defaulting Party to have regard to any evidence and information as to the particular market at the particular time. As I have said, there is equally no warrant for limiting the width of the discretion provided by the contract

wording by requiring the non-Defaulting Party to disregard the evidence of the market merely because it was illiquid or distressed at the particular time.

49. For all these reasons, I consider that the appeal should be dismissed.

Lord Justice Henderson:

50. I agree.

Lord Justice Longmore:

51. I also agree.