

FRENCH REPUBLIC
ON BEHALF OF THE FRENCH PEOPLE

PARIS COURT OF APPEAL

International Commercial Chamber
DIVISION 5 - CHAMBER 16

JUDGMENT OF 12 MARCH 2024

(No. 31 /2024, 16 pages)

General directory entry number: No. RG 23/01076 – No. Portalis 35L7-V-B7H-CG6AL

Decision referred to the Court: Judgement rendered on 08 December 2022 by the Paris Commercial Court (3rd chamber) - RG no. J2011000253

APPELLANT (*and respondent under the incidental motion*)

UMR,
a French *société anonyme à conseil d'administration*,
registered with the NANTES Trade and Companies Register under number 828 952 796,
having its registered office at [Address 2],
in the person of its legal representatives,
insofar as it is a successor to UNION MUTUALISTE RETRAITE, a union of mutual societies governed by Book II of the Mutual Societies Code, registered in the SIRENE register under number 442 294 856,

Represented, as counsel with right of audience, by Mrs. Martine LEBOUQC BERNARD of SCP HUVELIN & ASSOCIÉS, of the PARIS Bar, locker: R285
Represented, as trial counsel, by Mr. Jérémie DUHAMEL, of DUHAMEL AVOCATS, of the HAUTS-DE-SEINE Bar

RESPONDENT (*and appellant under the incidental motion*)

Company BARCLAYS BANK PLC
a company incorporated under the laws of England and Wales,
registered at Companies House under number 01026167,
having its registered office at [Address 1] (UNITED KINGDOM),
in the person of its legal representatives,

Represented, as counsel with right of audience, by Mrs. Florence GUERRE, of the SELARL PELLERIN - DE MARIA - GUERRE, of the PARIS Bar, locker: L0018
Represented, as trial counsel, by Mr. Arnaud DE LA COTARDIERE and Jean-Charles JAIS, of the LLP LINKLATERS, of the PARIS Bar, locker: J030

RESPONDENT

Company KA FINANZ AG
a company incorporated under Austrian law, registered under number FN 128283b with

the Vienna Register of Companies and Commerce,
having its registered office at [Address 4] (AUSTRIA), represented by its legal
representatives,
insofar as it is a successor to KOMMUNALKREDIT AUSTRIA AG, a company
incorporated under Austrian law which was a defendant in the first instance proceedings
but was struck off the Vienna Register of Companies and Commerce on 26 September
2015,

*Represented, as counsel with right of audience, by Mr. François TEYTAUD, of AARPI
TEYTAUD-SALEH, of the PARIS Bar, locker: J125*

*Represented, as trial counsel, by Mr. Thomas ROUHETTE and Mrs. Claire MASSIERA,
of SIGNATURE LITIGATION AARPI, of the PARIS Bar, locker K0151*

VOLUNTARILY JOINING THE PROCEEDINGS:

Mr. [K] [T]

born on [date of birth 3] 1975,

acting in his capacity as liquidator of KA FINANZ AG (i.A.), a company incorporated
under Austrian law in liquidation, registered under number FN 128283b with the Vienna
Trade and Companies Registry, having its registered office at [Address 4] (AUSTRIA)

*Represented, as counsel with right of audience, by Mr. François TEYTAUD, of AARPI
TEYTAUD-SALEH, of the PARIS Bar, locker: J125*

*Represented, as trial counsel, by Mr. Thomas ROUHETTE and Mrs. Claire MASSIERA,
of SIGNATURE LITIGATION AARPI, of the PARIS Bar, locker K0151*

COMPOSITION OF THE COURT:

The case was heard on 15 January 2024, in open court, before the Court
composed of:

Mr. Daniel Barlow, President
Ms. Fabienne SCHALLER, President
Ms. Laure ALDEBERT, Judge

who ruled on the case.

A report was presented at the hearing by Ms. Laure ALDEBERT under the conditions
provided for by article 804 of the French Code of Civil Procedure.

Court Clerk at the hearing: Ms. Najma EL FARISSI

JUDGMENT:

- adversarial

- judgment made available at the Court Clerk's office of the Court, the parties
having been notified in advance under the conditions provided for in the second
paragraph of Article 450 of the Code of Civil Procedure.

- signed by Mr. Daniel BARLOW, President, and by Ms. Najma EL FARISSI,
Court Clerk to whom the judgment's original was delivered by the signatory judge.

I/ FACTS AND PROCEDURE

1. In 2006 and 2007, Union Mutualiste Retraite (hereafter “UMR”), a union of mutual insurers specialising in retirement savings, which is the successor of Union Mutualiste Retraite, through the Paris branch of Barclays Bank PLC, an investment bank based in the United Kingdom (hereafter “Barclays”), subscribed to two Tier 1 bond issues involving securities issued by the Austrian bank Kommunalkredit Austria AG also known as KKA for amounts of 150 and 50 million euros.
2. In 2008, as a result of a severe liquidity crisis, KKA was nationalized by the Austrian government in order to avoid bankruptcy.
3. In November 2009, it launched a restructuring program that resulted in the management of its activities being split into two separate entities: firstly, Kommunalkredit (KA), which is responsible for managing its traditional business, essentially its lending to local authorities, and secondly, Kommunalkredit Finanz (KF), which is responsible for managing its ancillary activities relating to bonds and its portfolio of financial instruments.
4. As a result of these financial difficulties and the changes made, no coupon was paid and the nominal amount of the bonds was lost.
5. It was against this backdrop that, from 2009 onwards, UMR no longer received the coupon payments corresponding to its subscriptions, without being able to claim reimbursement of the nominal value of its investment.
6. On 17 and 23 December 2010, UMR took the view that its two subscriptions in 2006 and 2007 had been made on the basis of partial and distorted information about the structuring of the product and the quality of the issuer KA, and brought an action against Barclays and KA-KF before the Paris Commercial Court seeking to have the subscriptions declared null and to obtain payment of damages, in particular for defects in consent, fraud and breach by Barclays of its regulatory obligations.
7. KA and KF challenged the international jurisdiction of the Paris Commercial Court.
8. In a judgment rendered on 1st July 2014 in response to an appeal lodged by KA and KF, the Paris Court of Appeal upheld the decision of the lower court, which had retained jurisdiction in their decision of 3 October 2013.
9. Following cassation proceedings, the Court of Cassation, in a decision dated 1st March 2017, quashed the appeal ruling and referred the parties back to the Paris Court of Appeal.
10. In a decision rendered on 29 January 2019, the Paris Court of Appeal declined the jurisdiction of the Paris Commercial Court to hear UMR’s claims, which was referred to the Austrian courts for further proceedings.
11. On 17 March 2021, the Cour of Cassation put an end to the dispute over jurisdiction with a ruling without referral that partially quashed the judgment of the Paris Court of Appeal insofar as it had not recognised the jurisdiction of the French courts in tort matters.
12. The KA entity was struck off the Vienna Register of Companies and Commerce on 26 September 2015, so that only KF remained in the proceedings alongside Barclays.
13. In a judgment dated 8 December 2022, the Paris Commercial Court ruled on the merits as follows:

Dismisses all of UNION MUTUALISTE RETRAITE’s claims,

Dismisses SA BARCLAYS BANK PLC's claim for damages for abuse of process,

Orders UNION MUTUALISTE RETRAITE to pay €50,000 to SA BARCLAYS BANK PLC and KA FINANZ AG, a company incorporated under Austrian law, as successor of KOMMUNALKREDIT AUSTRIA AG, each, under Article 700 of the CPC, and dismisses the remainder of the action,

Orders UNION MUTUALISTE RETRAITE to pay the costs, including the costs to be recovered by the clerk's office, in the amount of €95.62, including €15.72 VAT.

14. In a statement dated 30 December 2022, UMR appealed this decision.

15. During the proceedings before the Pre-Trial Judge, the parties agreed to the Protocol on Procedural Rules of the International Commercial Chamber.

16. The proceedings were closed on 19 December 2023.

17. On 31 December 2023, KF went into voluntary liquidation under Austrian law.

18. By submissions as respondent and in voluntary intervention, sent electronically on 10 January 2024, KF requested the voluntary intervention of its liquidator.

19. The case was called for oral argument on 15 January 2024, during which counsels for the parties and the experts were heard.

II/ CLAIMS OF THE PARTIES

20. According to its latest submissions, sent electronically on 15 December 2023, **UMR** asked the Court to:

PRIMARILY,

- Allow UMR SA, successor to UMR Union, in its appeal against the judgment of the Paris Commercial Court dated 8 December 2022; declare it well founded;
- Overturn the judgment of the Paris Commercial Court dated 8 December 2022 insofar as it dismissed UMR Union's claims based on fraud;
- Declare and rule that Barclays' actions constitute fraud, a defect in consent, in that they constitute fraudulent manoeuvres that caused UMR Union to make a mistake that determined its consent to the disputed subscriptions in 2006 and 2007;
- Declare and rule that the actions of KKA (formerly) constitute fraud, a defect in consent, in that they constitute fraudulent manoeuvres that caused UMR Union to make a mistake that determined its consent to the disputed subscriptions in 2006 and 2007;

Consequently,

- Declare as invalid the subscription of 21 April 2006 (corresponding to the "trade date" of the Term Sheet of the First Issue) relating to the Certificates;
 - Order Barclays to return to UMR SA, as successor to UMR Union, the sum of one hundred and fifty million euros (€150,000,000) in cash corresponding to the sums paid by UMR Union in respect of the disputed subscription, in exchange for the return by UMR SA of the securities held by it to Barclays;
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- Declare as invalid the subscription of 26 January 2007 (corresponding to the “trade date” of the Term Sheet of the Second Issue) relating to the Certificates;
- Order Barclays to return to UMR SA, as successor to UMR Union, the sum of fifty million euros (€50,000,000) in cash corresponding to the sums paid by UMR Union in respect of the disputed subscription, in exchange for the return by UMR SA of the securities held by it to Barclays;
- Order Barclays and KF jointly and severally to pay UMR SA, as successor to UMR Union, damages corresponding to the amount of the coupons it would have received by placing its investments in an entity that complied with its investment decision, namely one hundred and forty-two million eight hundred and sixty-nine thousand three hundred and seventy euros (€142,869,370), plus the loss suffered by UMR Union in respect of the non-reinvestment of coupons not received since 2009, namely ten million six hundred and eighty-six thousand seven hundred and forty euros (€10,686,740), i.e. a total of one hundred and fifty-three million five hundred and fifty-six thousand one hundred and ten euros (€153,556,110). These amounts are to be paid in full on the date on which the decision is rendered;

IN THE ALTERNATIVE,

- Allow UMR SA, successor to UMR Union, in its appeal against the judgment of the Paris Commercial Court dated 8 December 2022; declare it well founded;
- Overturn the judgment of the Paris Commercial Court dated 8 December 2022 insofar as it dismissed UMR Union’s claims based on the error;
- Declare and rule that the error of substance committed by UMR Union was caused by the actions of Barclays, which vitiated the consent of UMR Union in the context of the disputed subscriptions in 2006 and 2007;
- Declare and rule that the error of substance committed by UMR Union was caused by the actions of KKA (formerly) which vitiated the consent of UMR Union in the context of the disputed subscriptions of 2006 and 2007;

Consequently,

- Declare as invalid the subscription of 21 April 2006 (corresponding to the “trade date” of the Term Sheet of the First Issue) relating to the Certificates;
 - Order Barclays to return to UMR SA, as successor to UMR Union, the sum of one hundred and fifty million euros (€150,000,000) in cash corresponding to the sums paid by UMR Union in respect of the disputed subscription, in exchange for the return by UMR SA of the securities held by it to Barclays;
 - Declare as invalid the subscription dated 26 January 2007 (corresponding to the “trade date” of the Term Sheet of the Second Issue) relating to the Certificates;
 - Order Barclays to return to UMR SA, as successor to UMR Union, the sum of fifty million euros (€50,000,000) in cash corresponding to the sums paid by UMR Union in respect of the disputed subscription, in exchange for the return by UMR SA of the securities held by it to Barclays;
 - Order Barclays and KF jointly and severally to pay UMR SA, as successor to UMR Union, damages corresponding to the amount of the coupons it would have received by placing its investments in an entity that complied with its investment decision, namely one hundred and forty-two million eight hundred and sixty-nine thousand three hundred and seventy euros (€142.869,370), plus the loss suffered by UMR Union in respect of the non-reinvestment of coupons
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not received since 2009, namely ten million six hundred and eighty-six thousand seven hundred and forty euros (€10,686,740), i.e. a total of one hundred and fifty-three million five hundred and fifty-six thousand one hundred and ten euros (€153,556,110). These amounts are to be paid in full on the date on which the decision is rendered;

IN THE FURTHER ALTERNATIVE,

- Allow UMR SA, successor to UMR Union, in its appeal against the judgment of the Paris Commercial Court dated 8 December 2022; declare it well founded;
- Overturn the judgment of the Paris Commercial Court dated 8 December 2022 insofar as it dismissed UMR Union's claims based on the breach of Barclays' regulatory and contractual obligations;
- Declare and rule that the disputed subscription of 21 April 2006 was carried out in breach of the regulatory and contractual obligations of Barclays, acting as an investment services provider, and more particularly of its obligations of loyalty and information towards UMR Union;
- Declare and rule that the disputed subscription of 26 January 2007 was made in breach of the regulatory and contractual obligations of Barclays, acting as an investment services provider, and more particularly of its obligations of loyalty and information towards UMR Union;

Consequently,

- Order Barclays to pay UMR SA, as successor to UMR Union, damages in the amount of three hundred and fifty-three million five hundred and fifty-six thousand one hundred and ten euros (€353,556,110). This amount is to be adjusted on the date on which the decision is rendered;

IN ANY EVENT,

- Declare and order that Barclays' request that the UMR be ordered to pay damages for abuse of process in respect of its incidental motion is unfounded and, consequently, dismiss it;
- Confirm the judgment of the Paris Commercial Court dated 8 December 2022 insofar as it dismissed Barclays' claim for damages for abuse of process;
- Overturn the judgment of the Commercial Court of Paris dated 8 December 2022 insofar as it ordered UMR Union to pay the costs and fifty thousand euros (€50,000) to Barclays and KF, also successor to KKA, each under Article 700 of the Code of Civil Procedure;
- Order Barclays and KF jointly and severally to pay UMR SA the sum of two hundred thousand euros (€200,000) under the provisions of Article 700 of the French Code of Civil Procedure;
- Order Barclays and KF jointly and severally to pay all the costs.

21. According to its latest submissions, sent electronically on 12 December 2023, **Barclays Bank** asked the Court, under Articles 1110 and 1116 of the French Civil Code, Article L.533-4 of the French Monetary and Financial Code applicable at the time of the events, Article 32-1 of the French Code of Civil Procedure and Article 1382 of the French Civil Code, to:

Regarding the main appeal of UMR SA, successor to Union Mutualiste Retraite:

- Find that the consent of Union Mutualiste Retraite was not vitiated;
- Find that Barclays Capital has fully complied with its regulatory obligations;

Consequently,

- Uphold the judgment of the Paris Commercial Court of 8 December 2022 insofar as it dismissed all the claims of Union Mutualiste Retraite;
- Dismiss Union Mutualiste Retraite's claims in their entirety;

In the alternative, should the judgment of the Commercial Court of Paris of 8 December 2022 be overturned insofar as it dismissed Union Mutualiste Retraite's claims based on a breach by Barclays Bank PLC of a regulatory obligation, and should a breach be characterised, to:

- Declare that UMR SA, as successor to Union Mutualiste Retraite, has not suffered any loss of opportunity;
- Consequently, dismiss UMR SA, as successor to Union Mutualiste Retraite, from all its claims for damages;

In the further alternative, should the judgment of the Paris Commercial Court of 8 December 2022 be overturned insofar as it dismissed the claims of Union Mutualiste Retraite based on fraud and error, and should the subscriptions of 5 May 2006 and 14 February 2007 be declared null and void, to:

- Order the necessary reciprocal returns, including the return to Barclays Bank PLC by UMR SA, as successor to Union Mutualiste Retraite, of the full amount of the coupons received between 2007 and 2008, i.e. 19,035,000 euros, as well as the amount of 12,085,000 euros paid to Union Mutualiste Retraite in April 2016;
- Declare that UMR SA, as successor to Union Mutualiste Retraite, has not suffered any damage or loss of opportunity;
- Consequently, dismiss UMR SA, as successor to Union Mutualiste Retraite, from all its claims for damages;

Regarding the incidental motion by Barclays Bank PLC:

- Overturn the judgment of the Paris Commercial Court of 8 December 2022 insofar as it dismissed Barclays Bank PLC's claim for damages for abuse of process;

In a further hearing:

- Declare that UMR SA, as successor to Union Mutualiste Retraite, has committed a breach within the meaning of article 32-1 of the Code of Civil Procedure and article 1382 of the Civil Code, which has caused damage to Barclays Bank PLC;
- Order UMR SA, as successor to Union Mutualiste Retraite, to pay Barclays Bank PLC the sum of 100,000 euros by way of damages;

In any event:

- Order UMR SA, as successor to Union Mutualiste Retraite, to pay Barclays Bank PLC the sum of 300,000 euros under the provisions of Article 700 of the French Code of Civil Procedure;
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- Order UMR SA, as successor to Union Mutualiste Retraite, to pay all the costs.

22. According to its latest submissions, sent electronically on 12 December 2023, **KF** asked the Court, under Articles 23 *et seq.* of the Austrian Banking Law, the Luxembourg Law of 27 July 2003 on trusts and fiduciary contracts, as amended by the Law of 22 March 2004 on securitisation, and Articles 1110 and 1116 of the Civil Code, to:

- Uphold the judgment of the Paris Commercial Court insofar as it:
 - Dismissed all of Union Mutualiste Retraite's claims;
 - Ordered Union Mutualiste Retraite to pay SA Barclays Bank PLC and KA Finanz AG the sum of 50,000 euros each under Article 700 of the Code of Civil Procedure;
 - Order Union Mutualiste Retraite to pay the costs;

In any event,

- Dismiss all of Union Mutualiste de Retraite's claims;
- Order Union Mutualiste Retraite to pay the costs, which will be awarded to AARPI Teytaud-Saleh, Avocats, in accordance with Article 699 of the French Code of Civil Procedure;
- Order Union Mutualiste Retraite to pay KA Finanz AG compensation in the amount of 200,000 euros under Article 700 of the French Code of Civil Procedure.

23. According to its submissions, sent electronically on 10 January 2024, after the proceedings were closed, **Mr [K] [T]** in his capacity as liquidator of KA Finanz AG (i.A.) asked the Court, pursuant to Articles 23 *et seq.* of the Austrian Banking Law (Bankwesengesetz), the Luxembourg Law of 27 July 2003 on trusts and fiduciary contracts, as amended by the Law of 22 March 2004 on securitisation, the Austrian Banking Law and the Austrian Federal Law on the Reorganisation and Liquidation of Banks, former Articles 1110 and 1116 of the Civil Code, Article 802 of the Code of Civil Procedure, to:

- Declare admissible the voluntary intervention of Mr [K] [T] in his capacity as liquidator of KA Finanz AG (i.A.) and the documents submitted in support thereof;
- Acknowledge that KA Finanz AG has been placed in liquidation and that its name should therefore be changed to "KA Finanz AG (i.A.)";
- Uphold the judgment of the Paris Commercial Court insofar as it:
 - Dismissed all of Union Mutualiste Retraite's claims;
 - Ordered Union Mutualiste Retraite to pay SA Barclays Bank PLC and KA Finanz AG the sum of 50,000 euros each under Article 700 of the Code of Civil Procedure;
 - Order Union Mutualiste Retraite to pay the costs;

In any event,

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- ~~Dismiss all of Union Mutualiste de Retraite's claims;~~

- Order Union Mutualiste Retraite to pay the costs, which will be awarded to AARPI Teytaud-Saleh, Avocats, in accordance with Article 699 of the French Code of Civil Procedure;
- Order Union Mutualiste Retraite to pay KA Finanz AG compensation in the amount of 200,000 euros under Article 700 of the French Code of Civil Procedure.

III/ REASONS FOR THE DECISION

Regarding the voluntary intervention of Mr [K] [T] in his capacity as liquidator of KA Finanz AG (i.A.)

24. Since KA Finanz AG-KF was placed in liquidation on 31 December 2023, the voluntary intervention of the liquidator, which is not contested, should be upheld and its new corporate name should be taken into account in accordance with the operative part of the decision, it being noted that in the body of the decision KKA refers to the Austrian bank prior to its nationalisation.

Regarding the main claim

25. UMR is seeking the annulment of the subscriptions of 21 April 2006 and 26 January 2007 on the grounds of vitiated consent, fraud and, in the alternative, error, on the ground of former articles 1116 and 1110 of the French Civil Code in the version applicable at the time of the disputed events.

26. It accused Barclays, with the active assistance of KKA, of deliberately withholding several items of information essential to the decision to invest in the proposed bond issue.

27. In this respect, it criticised the respondents for having, without its knowledge, structured the investment by interposing a Luxembourg trust through which the securities were purchased, and for having kept silent about the profile of KKA (formerly), whose activity was more akin to the speculative activity of an investment bank than that of a finance bank.

28. With regard to the trust's concealment, UMR argued that:

- it gave its agreement to the first subscription of Tier 1 securities for an amount of 150 million euros on the basis of the Term sheet dated 21 April 2006 with KKA (formerly) without any reference to a Trust;
- it was not aware of the existence of a Luxembourg trust, which was presented to it in a draft prospectus on 3 May 2006, well after it had given its consent and executed the transfer order, which it could not reverse;
- it did not receive the e-mail allegedly sent by a Barclays manager on 21 April 2006 at 2.17 p.m. containing a draft prospectus as an attachment.

29. It stated that in reality KKA issued Notes to the Trust on 5 May 2006. On becoming the owner of the Notes, the Trust issued Certificates which were subscribed by Barclays and then registered in the UMR accounts opened with its depository, so that the transaction put in place turned out to be different from the one for which it had given its agreement.

30. It found itself holding certificates when it thought it was holding Notes, these elements characterising the existence of a mistake as to the nature of the securities subscribed to, caused by Barclays with the complicity of KKA (formerly), which had the effect of depriving it of and restricting its rights as a creditor with regard to the bank.

31. Regarding the silence on KKA's actual activities, it argued that Barclays provided it with financial information that led it to believe that it was investing in an entity with a secure profile, whereas at the time of the events, the activities undertaken by KKA did not correspond to this presentation.

32. To this end, it highlighted the fact that it believed that it was investing, on the basis of the documentation provided by Barclays, in an entity that was investing in government bonds or securities issued by the banking sector. This documentation presented it as a bank specialising essentially in the public sector, whereas at that time KKA (formerly) had developed a portfolio of CDS (Credit Default Swaps) and a portfolio of very risky structured credits that did not correspond to its secure investment policy.

33. It pointed out that the rating by Moody's, the rating by Fitch Ratings and the information contained in the Roadshow focus on public sector loans without revealing KKA's real activities, which are particularly risky and highly speculative, and whose scale and total mismatch with its business of financing Austria's public authorities was highlighted by the Austrian Court of Audit's 2012 report and a private expert report by NG Finance drawn up on 4 October 2016.

34. It maintained that it took its decision on the basis of the issuer's deceptively cautious risk profile, which was in line with its investment policy, whereas the Austrian bank, without UMR's knowledge, was developing an ancillary activity within its speculative financial portfolio, which led it to bankruptcy without the 2008 financial crisis actually being the cause.

35. It added that, notwithstanding its status as an investor, it had made an excusable error in this context, given the respondents' fraudulent concealment.

36. In response, Barclays and KKA have a joint position that can be summed up succinctly as follows:

37. They disputed the existence of a vitiated consent at the time of the disputed subscriptions, arguing that they had no intention of concealing any information about the investments subscribed and that UMR had all the information it needed to analyse and make its own investment decision.

38. They maintained that UMR, a qualified and informed investment professional, consented to the subscriptions without any misunderstanding, having full knowledge of the structuring of the investment and the profile of the issuer, ruling out any error or fraudulent manoeuvre.

39. In this respect, they stressed that:

- the detailed information was contained in the information prospectus which UMR claimed not to have received on 21 April 2006 and which, in any event, it acknowledged having received on 3 May 2006 prior to the issue which it was free to renounce;

- UMR had all the information on KKA's structured credit portfolio that it needed to analyse.

40. They pointed out that the decisive factor in UMR's consent was the attractive yield on the bonds issued by KKA and not the structuring of the investment, which was neutral, there being no difference between the Notes and the Certificates from the point of view of the subscriber.

41. They also pointed out that even if a mistake had been made, it was inexcusable in the case of a knowledgeable professional.

42. They added that the UMR has simply suffered from the 2008 financial crisis.

ON THIS MATTER:

Regarding the request to have the subscriptions declared null on the grounds of fraud or, in the alternative, on the grounds of error

43. According to article 1109 of the French Civil Code, in the version applicable to the facts of this case, there is no valid consent if the consent was given only by mistake or if it was extorted by violence or surprised by fraud.

44. The former article 1110 of the Civil Code states that an error is a ground for nullity of an agreement only when it relates to the very substance of the thing which is the subject of the agreement.

45. The mistake must be considered to relate to the substance of the thing where it is of such a nature that without it the other party would not have contracted.

46. For nullity to be declared, the claimant must show both that he falsely believed that the thing had a certain quality and that this was the determining reason for their undertaking.

47. Nullity may also be obtained where the error was not spontaneous but caused by fraud or concealment on the part of the other party.

48. According to the former article 1116 of the Civil Code, fraud is a cause of nullity of the agreement when the manoeuvres used by one of the parties are such that it is obvious that, without these manoeuvres, the other party would not have entered into the agreement. It cannot be presumed and must be proven.

49. Fraud implies that, but for the manoeuvres, lies or reticence of one of the parties, the other party would not have entered into the agreement.

50. If it comes from a third party, in principle it has no effect on the validity of the agreement unless there is complicity between the third party and the co-contracting party.

51. The existence of a vitiated consent must be assessed on the date of the agreement and not in the light of subsequent events.

Regarding fraud or error

52. Fraud presupposes that an error has been made.

53. In this case, UMR is criticising Barclays for misrepresenting the nature of the securities purchased, which were certificates issued through a Luxembourg trust rather than notes purchased directly from the issuer, and the quality of the issuer, KKA.

Regarding investment structuring

54. UMR's reasoning is based on the assumption that it was not informed of the interposition of the Trust that Barclays and KKA imposed on it, both at the time of the first subscription and the second subscription in 2006 and 2007.

55. In support of its claims, it pointed to the Term Sheets for the two transactions, which presented KKA as the issuer of the notes subscribed.

56. However, UMR did not consent to the subscriptions solely on the basis of the Term Sheet, which is only an informative and preparatory document describing the broad outlines of the issue, but with the knowledge of the structuring of the investment through the Information Prospectus relating to this issue of debt securities, which KKA was obliged to draft and which was sent by Barclays prior to the investment.

57. An examination of the subscription term sheet, which is only two pages long and which UMR must have read in its entirety, shows that it clearly states that it is a document provided “*for information purposes only*” and has no contractual value, referring expressly to the Prospectus in that it states that the terms and conditions of the transaction will be agreed “*on the basis of a future agreement on the Prospectus*”.

58. The parties therefore agreed that the agreement would be concluded on the basis of a prospectus containing a description of the transaction, which UMR was to receive or at least request.

59. The information prospectus relating to this issue of debt securities is in fact a detailed presentation of the operation of more than one hundred pages, which mentions on the first page and in large characters the intervention of the Luxembourg trust and which specifies that the securities consist of *Participation Capital Certificates* and that the Luxembourg bank would intervene within a fiduciary framework.

60. Assuming that it did not receive the prospectus by e-mail from Barclays on 21 April 2006, UMR does not dispute that it received the final prospectus on 3 May 2006, which clearly mentioned the use of a trust under Luxembourg law. At that date, KKA had not yet issued the disputed securities, the issue having taken place on 5 May 2006.

61. It was therefore open to UMR to question the transaction or request explanations, notwithstanding the transfer order it had given to its depository on 25 April 2006, the irrevocable nature of which it has in no way established.

62. In fact, as the lower courts held, as long as the transaction had not been finalised, the investor could withdraw if the financial instrument delivered to him did not comply with the contract. This was all the more the case given that payment for the first issue was not made until 5 May 2006, that UMR did not protest in any way, and that it even repeated the transaction a few months later, in 2007, for an amount of €50 million.

63. It follows from the above that it was with full knowledge of the structuring of the investment, which provided for the interposition of a trust in Luxembourg and the delivery of certificates, which is common practice on the international markets, that the issue of the securities pursuant to which UMR received on its securities account the financial instruments corresponding to what it wanted was carried out on 5 May 2006, so that the error, whether provoked or spontaneous, is not established.

64. For the same reason, UMR, which admitted that it was informed on 3 May 2006 of the structuring of the investment and the nature of the securities subscribed, cannot claim that it was by error that it invested in the same products a few months later on 14 February 2007 during the second subscription.

Regarding the quality of KKA

65. UMR maintains that, based on the information available at the time of subscription, it believed it was investing in an Austrian bank specialising in public sector financing and making sound, low-risk investments in line with its investment policy.

66. In essence, it claims that the reality was quite different, that KKA was developing speculative activities that became predominant at the time of the subscriptions, characterised by a growing portfolio of CDS and structured credits that Barclays, acting in concert with KKA, refrained from disclosing in order to obtain its consent.

67. However, it is clear from the documents sent by Barclays to UMR and from the public information available at the time that UMR had clear and complete information on the business of KKA (formerly) on the so-called “risky” assets, which enabled it to analyse the situation and assess the risk of subscribing to the bonds issued by the issuer.

68. The Fitch Ratings research report dated 4 April 2006 clearly mentioned that KKA

(formerly), whose business was essentially focused on public sector financing, *was trying to take an active part in the credit derivatives market (exposure of €1.2 billion at the end of 2004, which has never been called into question.*

69. UMR was able to read in the tables in the documentation prepared for the Roadshow that KKA (formerly) held a substantial portfolio of financial assets as of 31 December 2005, valued at nearly eight billion euros at the time, showing an increase of more than 50% between 2001 and 2005, which has not been denied.

70. Similar information could be found in KKA's previous annual reports for 2005 and 2006, which mentioned the amount of the portfolio of financial assets and its precise breakdown, the reliability of which was not challenged by the audit reports drawn up subsequently, with the exception of an error in the accounting treatment of the CDS portfolio, the influence of which on the accuracy of the amounts invested shown in the detailed tables of investments has not been demonstrated by UMR.

71. UMR does not dispute that, based on KKA's annual reports, it had concrete factual information on the valuation of the CDS portfolio.

72. In fact, it criticises the respondents for having said nothing about the actual strategy put in place by KKA, pointing out that it could not have thought on the basis of these elements that CDSs would be used for anything other than hedging purposes, nor could it have imagined the preponderant role that its highly speculative activity would take on.

73. However, it was up to UMR, in its capacity as a qualified institutional investor within the meaning of the financial regulations in force at the time, capable of understanding the figures, the amount and scale of which were well known, to take an interest in the proportion of these financial assets in order to assess the growth strategy initiated by KKA in this ancillary activity and the risk inherent in any investment, which it was taking on by subscribing to securities issued by the Austrian bank in relation to its requirements for a secure issuer profile.

74. Any misappraisal that it may have made of the financial data, which was not withheld by the respondents and which it was up to it to interpret, in its capacity as a qualified professional investor, cannot constitute vitiated consent.

75. It was therefore in full knowledge of the facts that it took the decision to subscribe twice, in 2006 and a few months later in 2007, on the basis of known and public information that accurately reflected the existence of an ancillary speculative activity alongside its main activity of public financing, which were subsequently de-merged as part of the restructuring of KKA, so that it cannot claim to have been mistaken about the quality of the issuer.

76. It is clear from these elements that as the existence of an error concerning the nature of the securities subscribed and the profile of the issuer has not been established, it was on the basis of an accurate assessment of the facts of the case and for the right reasons that the lower courts dismissed the UMR's claim for the nullity of the subscriptions on the basis of vitiated consent.

77. For these reasons and those adopted by the lower courts, this legal ground of the judgment will be upheld in its entirety.

Regarding the UMR's alternative claim against BB for breach of its obligations

78. UMR claims that Barclays, acting as its agent and investment services provider, breached its regulatory obligations to provide information, transparency and loyalty by concealing the existence of the trust, changing the structure of the investment without informing UMR and switching from Certificates to Notes without informing UMR, thereby leading UMR, contrary to its interests, to invest in a transaction contrary to its investment policy by favouring its client KKA.

79. Barclays, which disputes the existence of a mandate, concludes that the claims should be dismissed, arguing for the reasons already mentioned that the UMR invested with knowledge of the Trust and that it was only after the event, in order not to bear the losses of the 2008 financial crisis, that it initiated these proceedings.

ON THIS MATTER:

80. UMR's claim based on the same grounds as those supporting its application for a declaration of invalidity, which were rejected, cannot succeed.

81. In fact, apart from the fact that UMR has not demonstrated the existence of a mandate, it has been established for the reasons set out above that, with knowledge of the trust, it indirectly subscribed to the bonds issued by KKA, so that it cannot accuse Barclays of any breach of its duty of information, loyalty or transparency, regardless of the business relationship between them.

82. The decision, for these reasons and those adopted by the lower court, will also be upheld on this ground.

Regarding the claim for abuse of process

83. Barclays is seeking to have the judgment of the Paris Commercial Court overturned insofar as it rejected its claim that UMR should be ordered to pay damages for abuse of process, arguing that UMR's action is based exclusively on lies and that it was initiated and pursued for the sole purpose of unfairly passing on to Barclays the burden of the losses it suffered as a result of the financial crisis that brought KKA to the brink of bankruptcy.

84. The UMR, which denies having misrepresented the truth and maintains that it acted in accordance with its rights, opposes this request.

ON THIS MATTER:

85. According to article 32-1 of the Code of Civil Procedure, *"Anyone who brings an action before the courts in a dilatory or abusive manner may be ordered to pay a civil fine of up to 10,000 euros, without prejudice to any damages that may be claimed"*.

86. Such an order presupposes the demonstration of a fault committed in the exercise of the right to act, likely to cause the action to degenerate into an abuse, the award of damages being subject to the existence of a loss causally linked to said fault, in accordance with article 1240 of the Civil Code.

87. In the present case, Barclays has not proved that the UMR abused its right to bring an action, nor has it established the existence of any damage other than that of having had to incur costs for the purposes of its defence, which will be examined below.

88. The judgment will therefore be upheld on this ground.

Costs and expenses

89. UMR, which is unsuccessful in its claims, shall be ordered to pay the costs, and its claims under Article 700 of the French Code of Civil Procedure shall be dismissed.

90. It shall also be ordered to pay each of the respondents the sum of 80,000 euros pursuant to the same article.

IV/ DECISION

On these grounds, the Court:

- 1) Accepts the voluntary intervention of Mr [K] [T] in his capacity as liquidator of KA Finanz AG (i.A.) in liquidation;**
- 2) Upholds the judgment under appeal in all its provisions submitted to the Court;**
- 3) Orders Union Mutualiste Retraite to pay the costs, which will be recovered in accordance with the provisions of Article 699 of the Code of Civil Procedure;**
- 4) Orders Union Mutualiste Retraite to pay Banque Barclays the sum of 80,000 euros (eighty thousand euros) and KA Finanz AG (i.A.) the sum of 80,000 euros (eighty thousand euros) under Article 700 of the Code of Civil Procedure.**

THE COURT CLERK,

THE PRESIDENT,
