CL-2016-000583

Neutral Citation Number: [2020] EWHC 2436 (Comm)

Case No: CL-2016-000583

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
COMMERCIAL COURT
QUEEN'S BENCH DIVISION

Royal Courts of Justice,
Rolls Building
Fetter Lane, London,
EC4A 1NL

Date: 11 September 2020

Before :

MRS JUSTICE COCKERILL DBE

- -

Between :

BNP Paribas SA — **Claimant**

- and –

Trattamento Rifiuti Metropolitani S P A — **Defendant**

- -
- -

Mr Adrian Beltrami Q.C. and Mr Christopher Bond (instructed by **Allen & Overy LLP**) for the **Claimant**
Mr Charles Samek Q.C. and Mr James Bickford Smith (instructed by **Collyer Bristow LLP**) for the **Defendant**

Hearing dates: 7, 8 July 2020
Draft Judgment sent to Parties: 4 September 2020

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be Friday 11 September 2020 at 10:30am

Mrs Justice Cockerill:

Introduction

1. This is the trial of a claim for declaratory relief – and at least in part negative declaratory relief - brought by the Claimant ("BNPP"). It concerns the parties' rights under an interest rate hedging arrangement entered into between BNPP and the Defendant ("TRM") on or shortly after 23 March 2010 ("the Transaction"). The Transaction was entered into in connection with TRM's borrowings from BNPP (among other banks) under a Financing Agreement dated 29 October 2008 (and subsequently amended) ("the FA"). Those borrowings were to provide funding for TRM to design, build and operate a waste-to-energy plant in Gerbido, near Turin.

2. The Transaction is governed by English Law and, as the courts here have determined, is subject to the jurisdiction of the English Courts. TRM has previously sought to persuade this court that all disputes between the parties should be determined in Italy, where it is based, and which is the country whose law governs the FA between the parties. Proceedings in Italy are currently at the stage of jurisdictional arguments, but if they proceed then BNP will seek to rely on any declarations this court makes in those proceedings. TRM, consistently with its disinclination for these courts and its continuing position in Italy, brings no counterclaim and seeks no relief from this court. Neither side has called evidence.

The Factual Background

3. Owing to the sensible co-operation of the parties, the factual background can almost completely be taken from the agreed Case Memorandum. I am duly grateful to them.

4. TRM is a project company established on 24 December 2002. At its incorporation, TRM was wholly owned by the Municipality of Turin. Following changes in the ownership structure of TRM in 2012 and 2016, at present 80% of the shareholding in TRM is ultimately owned by IREN S.p.A. ("IREN"), and the remaining 20% is owned by Italian public bodies. IREN is a multi-utility company incorporated in Italy and listed on the Milan Stock Exchange. 51.29% of IREN's share capital is directly or indirectly owned by the municipalities of Genoa, Turin, Reggio Emilia, Parma, Piacenza, La Spezia and by other municipalities.

5. TRM was incorporated to design, build and operate a waste-to-energy plant (together with associated facilities, access roads and landfill) in Gerbido, near Turin ("the Project").

6. BNPP is a bank incorporated in France and headquartered in Paris with branches in (among other places) London and Milan. It acquired the Banca Nazionale del Lavoro in around 2006. It admits in its Reply that it holds itself out as one of the leading banks in Italy.

7. On 22 July 2005, TRM received a concession from the Municipality of Turin to deliver the Project. By way of a call for tenders dated 23 January 2006, TRM sought to appoint a financial advisor for the Project.

8. On 6 July 2006, TRM entered into a financial advisory contract with a consortium of companies led by Banca OPI S.p.A. ("the FAC"). BNPP was not a party to or otherwise involved with the FAC. It had no obligations under the FAC.

9. In early January 2007, pursuant to the FAC, TRM received a preliminary information memorandum ("the PIM"), with recommendations for TRM's financing needs for the Project. Appended to the PIM was a preliminary term sheet ("the PTS"), setting out proposed terms and conditions for the project financing.

10. On 17 May 2007, TRM initiated a tendering process for financing the Project. On 31 October 2007, TRM sent a Call for Tender to ten banks, including BNPP. The Call for Tender referred to a further document, the Notes on Tender, which itself referred to the PIM and the PTS.

11. In response to the Call for Tender, BNPP made a tender. This was expressed by reference to (among other things) its Technical Offer dated 23 November 2007, which set out the services available to TRM. TRM submits that BNPP's Technical Offer outlined a range of activities that it would undertake on TRM's behalf including designing, advising on and implementing the financing structure for the Project. Those activities included "*provision for alternatives for hedging against the risk of interest rate fluctuation and, in accordance with TRM, subsequent definition of the definitive hedging coverage*". In the Technical Offer BNPP stated that "*with regard to TRM, BNPP … will be able to act as a single reference point for all the activities described … which will be carried out entirely by its Italian branch*".

12. BNPP won the tender following a meeting on 19 December 2007. On 1 July 2008, BNPP sent TRM and IREN a presentation on Hedging Products, in advance of a meeting at BNPP's offices on or around 3 July 2008 at which the presentation was given. On 25 July 2008, BNPP sent TRM a MiFID classification letter, informing TRM that it has been classified as a Professional Client.

13. The FA was entered into on 29 October 2008 between TRM as borrower and a syndicate of lenders led by BNPP. BNPP was party to the FA through its Milan Branch as Mandated Lead Arranger, Financing Bank, Agent Bank and Deposit Bank. The FA also defines BNPP as "Hedging Bank" for the purpose of interest-rate hedging arrangements, but BNPP is not party to the FA in that capacity. The FA is governed by Italian Law and contains a jurisdiction clause in favour of the Court of Turin.

14. Under the FA, a financing loan of €375m was made available to TRM, consisting of a Linea Base Commerciale ("the Term Loan") and a Linea Base BEI ("the BEI Facility"). The FA was amended on 21 January 2010 and on 2 July 2010 to remove or add parties other than BNPP and TRM, and was amended again on 30 January 2013.

15. Under the FA, TRM was to pay a floating interest rate against which interest rate hedging contracts were to be made. In the FA, the Hedging Bank is defined as "*[BNPP] in its capacity as counterparty of [TRM] within the meaning of the Tender Documents and Hedging Contracts*" (Article 1.2). Article 17.19 provides that "*[TRM] is committed to sign the Hedging Contracts in accordance with the Strategy of Hedging*". The Strategy of Hedging is defined as "*"the hedging strategy intended to cover the risk of fluctuation of interest on the Loan, as more fully described in Appendix 17.19""*.

16. Appendix 17.19 to the FA provides as follows:

> "1. [TRM] must conclude and maintain derivatives contracts covering the risk arising from interest rate fluctuations on 100% of the total amount disbursed from time to time and not reimbursed under the Base Lines ("Hedging Contracts") from the first Date of Use indicated in the Financing Contract until the Final Expiry date of the Base Lines.
>
> 2. [TRM] must conclude Hedging Contracts exclusively with [BNPP] in its capacity as a Hedging Bank.
>
> 3. Hedging Contracts shall be concluded by [signing] the relative standard documentation as published from time to time by the International Transactions and Derivatives Association, Inc. ("ISDA") and shall refer to the 1992 ISDA definitions.
>
> 4. Except in the case of Hedging Contracts, [TRM] may not enter into any sort of agreement which constitutes a derivative contract."

17. On 30 January 2013, Article 17.19 was subsequently amended to include the following, further obligation on TRM:

> "…to comply with its undertakings under the Hedging Contracts and to abstain from perfecting transactions of any kind whatsoever on financial instruments different from the Hedging Contracts".

18. Also on 29 October 2008, BNPP and the other Financing Banks (but not TRM) entered into an Intercreditor Agreement ("the ICA"). BNPP was party to the ICA through its Milan Branch as Mandated Lead Arranger, Financing Bank and Agent Bank, and through its Paris Head Office as Hedging Bank. The ICA was agreed to be governed by Italian law, with an exclusive jurisdiction clause in favour of the Courts of Milan. The ICA was also amended at the same time as each amendment to the FA, on 21 January 2010, 2 July 2010 and 30 January 2013.

The Transaction

19. Following a further period of negotiation in early 2010 (including a Hedging Side Letter dated 26 February 2010 sent by BNPP's London Branch to TRM), on 23 March 2010 BNPP (through its Paris Head Office and in its capacity as Hedging Bank) entered into the Transaction with TRM. That reflected TRM's interest rate hedging obligations to the lenders under the FA. The Transaction documents (together, "the Transaction Documents") comprise a 1992 ISDA Master Agreement dated 1 March 2010 ("the ISDA Master") and the Schedule thereto ("the Schedule"), and a final Confirmation dated 23 March 2010.

20. The ISDA Master provides that:

> "Section 1(b) - In the event of any inconsistency between the provisions of the Schedule and the other provisions of this Master Agreement, the Schedule will prevail.
>
> Section 13 - Governing Law and Jurisdiction … (b) – With respect to any suit, action or proceedings relating to this Agreement …, each party irrevocably: - submits to the jurisdiction of the English courts, if this Agreement is expressed to be governed by English law …".

21. The Schedule contains the following provisions:

> "Notwithstanding anything to the contrary contained herein, this Agreement is entered into in connection with the [FA]… and [the ICA]…For the purpose of this Agreement, the parties acknowledge the existence of the [FA] and the [ICA] and further acknowledge that (i) their respective rights under this Agreement are subject to the terms and conditions of the [FA] and the [ICA]; (ii) that BNPP is the 'Banca Hedging' (ie. the bank that will provide the 'Contratti di Hedging' pursuant to the 'Strategia di Hedging' as these terms are defined in paragraph 1 (Interpretazione) and annex 17.19 (Strategia di Hedging) of the [FA] and (iii) no derivative transactions shall be entered into hereunder other than those foreseen in annex 17.19 (Strategia di Hedging) of the [FA]…
>
> …In the case of conflict between the provisions of this Agreement and the [FA] and the [ICA], the provisions of the [FA] and the [ICA] as appropriate shall prevail."

This latter provision, referred to as "the Conflicts Provision", is one on which TRM places particular emphasis.

22. The Transaction Documents also contain the following provisions:

i) by Section 13(a) of the ISDA Master and part 4(h) of the Schedule, the Transaction was governed by English law;

ii) by Sections 3(a)(ii), 3(a)(v) and 9(a) of the ISDA Master and part 5(d) of the Schedule (repeated in the final Confirmation), the parties made various representations relied upon by BNPP in support of its claim for the declarations set out in sub-paragraphs 7(1)(a)-(e), (g) and (h) of the Brief Details of Claim;

iii) by Section 9(a) of the ISDA Master it was agreed that the Transaction Documents constitute "*the entire agreement and understanding*" between BNPP and TRM "*and supersedes all oral communications and writings with respect thereto*"; and

iv) by Part 1(h)(i) of the Schedule, in the event of TRM repaying, prepaying or cancelling any loan under the FA, BNPP had the right under Section 6(b)(iv) to

designate an Early Termination Date ("ETD") in respect of the Transaction and to the payment from TRM of any early termination amount.

23. There is a dispute between the parties over whether the contractual arrangements relating to the Transaction are contained only in the Transaction Documents or whether, as TRM argues, the contractual arrangements are also contained in the FA.

24. The essential features of the Transaction as set out in the final Confirmation are:

    i) A Trade Date of 1 March 2010, an Effective Date of 1 April 2010 and a Termination Date of 31 December 2029;

    ii) BNPP is the Floating Rate Payer, and TRM is the Fixed Rate Payer;

    iii) The Notional Amounts to be adjusted over the life of the Transaction from a minimum amount of €0 and a maximum amount of €8.001m as at the effective date of 1 April 2010, increasing to a minimum amount of €332m and a maximum amount of €375m as at 30 November 2014, and then progressively decreasing from 31 December 2014 to 29 June 2029.

25. The Transaction Documents were amended by an agreement dated as of 9 October 2015, which applies the terms of an ISDA Protocol related to regulatory requirements (the "ISDA Amendment Agreement"). There was, but is, following TRM's concession in its skeleton argument for trial, no longer a dispute about the meaning and effect of the ISDA Amendment Agreement and whether BNPP can bring a claim arising out of the ISDA Amendment Agreement in these proceedings, but the parties agree that by paragraph 2 each party represented to each other in respect of the ISDA Master, as amended by the ISDA Amendment Agreement, that "*all representations made by it pursuant to the [ISDA Master] are true and accurate as of the date of [the ISDA Amendment Agreement]*".

Events subsequent to the Transaction

26. Since 6 August 2010, TRM has drawn down the financing loan under the FA in the total amount of €332m. The total amount outstanding as at February 2020 under the financing loan was €254,366,780, of which €132,393,312 was owed under the Term Loan and €121,973,468 was owed under the BEI Facility..

27. TRM has made and continues to make allegations concerning the Transaction. Although it has expressed dissatisfaction with various facets of the Transaction to date, TRM has met all of its payment obligations to BNPP under the Transaction.

28. The dissatisfaction referred to was set out in a letter dated 15 July 2016 to BNPP from IREN on behalf of TRM. This letter stated (among other things) that:

    i) IREN's analysis "*has shown that [the Transaction] has generated a significant negative cash flow for TRM … as well as a negative mark-to-market … both due to an oversizing of the notional value of [the Transaction] with respect to TRM's real hedging requirements*";

    ii) BNPP's "*activity undoubtedly constitutes financial consultancy on investments pursuant to Art.1, clause 5, letter f) of Italian Legislative Decree 58/1998, which*

'has been incomplete and totally inadequate in relation to TRM's investment objectives'"; and

iii) "*we feel it is necessary to set up a meeting as soon as possible in order to discuss together the possible solutions to the issues raised as stated above, so that we can avoid the need for legal action*".

29. These allegations were then discussed at meetings between the parties on 19 September 2016 and 10 November 2016. This correspondence led to the issuing of this claim by BNPP on 23 September 2016. BNPP's case is that a dispute has arisen in respect of the Transaction, and that BNPP is entitled, in particular by virtue of certain provisions of the Transaction Documents, to declaratory relief.

30. In addition, BNPP and TRM/IREN have exchanged correspondence over TRM's request (made by letter dated 14 November 2016) that it prepay all outstanding sums under the FA on the condition that BNPP waive its right to designate an ETD under the ISDA Master that would otherwise have arisen as the result of an Additional Termination Event ("the Waiver").

31. It is common ground that the parties' positions regarding the Waiver are as set out in correspondence and in a press release issued by IREN on 16 December 2016 stating that the condition precedent relating to the early repayment of the financing loan under the FA (i.e., BNPP's grant of the Waiver) had not been met, and accordingly the request by TRM for early repayment was ineffective. No early repayment has taken place of any outstanding sums under the FA. The Claim has been amended to seek a further declaration in respect of the Waiver.

32. The declarations sought by BNPP were set out in paragraph 1 of the schedule to the Claim Form and are now replicated in the Prayer to the Particulars of Claim. They are as follows:

> "1. Declarations that:
>
> a) The obligations of the Defendant under the Transaction Documents, as well as under all other written agreements and/or written notifications and/or documents entered into and/or executed pursuant to the Transaction Documents, constitute its legal valid and binding obligations, enforceable in accordance with their terms.
>
> b) The Transaction Documents, as well as all other written agreements and/or written notifications and/or documents entered into and/or executed pursuant to the Transaction Documents, constitute the entire agreement and understanding of the parties thereto with respect to their subject matter and supersede all oral communications and prior writings with respect thereto.
>
> c) In entering into the Transaction, the Defendant:

i) Was acting for its own account and 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 judgement and upon advice from such advisers as it had deemed necessary.

ii) Was not relying on any communication (written or oral) of the Claimant 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.

iii) Had not received from the Claimant any assurance or guarantee as to the expected results of the Transaction.

iv) Was capable of evaluating and understanding (on its own behalf or through independent professional advice) and understood and accepted, the terms, conditions and risks of the Transaction.

v) Was also capable of assuming, and assumed, the financial and other risks of the Transaction.

vi) Was acting as principal and not as agent or in any other capacity, fiduciary or otherwise.

vii) Had specific competence and expertise to enter into the Transaction and in connection with financial instruments.

viii) Entered into the Transaction for hedging purposes and not for speculative purposes.

ix) Had full capacity to undertake the obligations under the Transaction, the execution of which fell within its institutional functions.

d) Further or in the alternative, in respect of each of the matters in sub-paragraph 1)c) above, the Defendant is estopped by contract from contending otherwise.

e) In respect of the Transaction, the Claimant did not act as fiduciary or an adviser to the Defendant. Further or in the alternative, the Defendant is estopped by contract from contending otherwise.

f) In respect of the Transaction, the Claimant neither owed nor owes any duty or obligation in deciding whether to grant the Waiver or otherwise to grant the Waiver, Further or in the alternative, a refusal by the Claimant to grant the Waiver does not constitute a breach of the terms of the Transaction Documents.

g) By reason of sub-paragraphs l)a) to 1)f) above, the Claimant is not liable in respect of any claim relating to the Transaction, including for losses in respect of any claim, under any system of law or regulation, in contract, tort/delict, statute or otherwise, and including but not limited to claims for breach of duty of care (including without limitation, a duty to advise), breach of contract, breach of fiduciary or other duty including any duty of good faith, non-disclosure, omission, misrepresentation (whether innocent, negligent or fraudulent) or breach of statutory or regulatory obligation arising out of or in connection with the Transaction (including but not limited to its suitability, its pricing, its notional amount, its terms, its execution and the circumstances of the Defendant's entry into it) (a Claim).

h) The Claimant is entitled to an indemnity from the Defendant and/or damages in respect of all loss or damage incurred by it arising out of or in respect of any Claim brought in breach of 1)a) to 1)f) above and in respect of all reasonable out of pocket expenses incurred in the enforcement and protection of its rights under the Transaction.

i) Each and every Claim, insofar as it arises in connection with or by reason of the matters referred to in l)a) to l)e) above, but save for a claim arising in connection with or by reason of the matters referred to in 1)f) above, is statute barred pursuant to the provisions of the Limitation Act 1980."

33. The Claim Form (as amended) was served on 10 March 2017. The Italian Claim (to which I shall revert below) was issued on 14 April 2017. On 8 June 2017, TRM applied to set aside the Claim Form for want of jurisdiction ("the Jurisdiction Application"). The Jurisdiction Application was dismissed by an order of the Commercial Court following a judgment [2018] EWHC 1670 (Comm) ("the Knowles J judgment"), and TRM's appeal against that order was dismissed by an order of the Court of Appeal following a judgment [2019] EWCA Civ 768 ("the Court of Appeal judgment"). TRM applied to the Supreme Court for permission to appeal the Court of Appeal judgment. That application was refused by Order dated 9 January 2020.

The Italian Claim

34. As noted above, the Italian Claim was issued on 14 April 2017. In the Italian Claim, TRM alleges (among other things) that BNPP breached contractual obligations (said to arise under the FA, an implied advisory contract and certain Articles of the Italian Civil Code) and non-contractual obligations (said to arise under certain provisions of the Italian Civil Code, and Italian statutory and regulatory provisions) owed to TRM. There is a mention of breach of contractual obligations assumed by BNPP as the Hedging Bank, a reference which appears to relate to Clause 17.19. TRM also alleges that BNPP's refusal to grant the Waiver constitutes a breach of an obligation of good faith to TRM.

35. In advance of the first hearing in the Italian Claim on 7 November 2017, BNPP was required to and did submit a substantive defence brief. As part of that defence brief BNPP denies the existence of any advisory contract or advisory duties and relies by way of defence on the terms of the ISDA Master and Schedule.

36. In the Italian Claim TRM has advanced contentions about the true construction of the FA and the provisions concerning hedging. In short, TRM contends that on the true construction of Clause 17.19 and Appendix 17.19 of the FA, BNPP was obliged to implement the defined Hedging Strategy and to conclude swaps which only hedged the risk of interest rate fluctuation on the indebtedness necessarily incurred by TRM in implementing the Project. BNPP admits that the contentions identified have been so advanced. It is common ground that these are not issues for this court to determine in these proceedings, since they are for adjudication by the Court of Turin.

37. On 31 October 2017 BNPP had initially issued a jurisdiction challenge to the Italian Supreme Court. The Supreme Court gave judgment on 13 May 2019, declining to rule on jurisdiction on the basis that the English Court was first seised. Consequently, on 14 June 2019, BNPP applied to the Turin court to stay the Italian Claim on grounds of *lis alibi pendens*. On 29 January 2020, the Turin court directed the parties to file their written submissions on the preliminary matter of *lis alibi pendens* by 22 June 2020.

38. The agreed issues for trial are as follows:

    i) Did the Transaction Documents constitute the entire agreement and understanding of BNPP and TRM with respect to their subject matter and supersede all oral communications and prior writings with respect thereto; or was the parties' agreement and understanding with respect to the Transaction also contained in the FA?

    ii) On their true construction, is the effect of paragraphs 2 and 3 of the Schedule to accord priority to a substantive provision of the FA (or the ICA) in the event that it conflicts with a substantive provision of the Transaction Documents: or is the effect of these paragraphs to prevent BNPP from relying on a provision of the Transaction Documents that would have the effect of preventing or inhibiting the making of a claim brought under a provision of the FA (or the ICA)?

    iii) Is BNPP entitled by its amendment set out in sub-paragraph 3(3) of its Re-Re-Re-Amended Claim Form dated 9 May 2019 to bring any claims for relief arising under or in respect of the Transaction Documents as amended by the

ISDA Amendment Agreement and concerning representations alleged to be repeated by that ISDA Amendment Agreement?

iv) If the answer to Issue 3 is "yes", would the date of issue of such claims be the date of the amendment (9 May 2019), or the date of the issue of the original Claim Form (23 September 2016)?

v) Has a dispute that is within the jurisdiction of the Court arisen between BNPP and TRM in relation to the Transaction? What is the effect if any (on BNPP's case) of TRM's failure properly to particularise and/or BNPP's inability to discern the claims which it alleges TRM may bring in the English Courts?

vi) Do each of the propositions pleaded in sub-paragraphs 31(1)-(4) of the Particulars of Claim follow from the Relevant Provisions, and if so, which?

vii) Is BNPP entitled, by reason of the terms of the Relevant Provisions to the declarations sought in respect of the Transaction in sub-paragraphs 1(a)-(e), (g) and (h) of the Prayer?

viii) Would any claims issued by TRM in the English Courts in respect of the Transaction be statute barred? Should the court rule on a hypothetical claim?

ix) In relation to the Waiver, is BNPP entitled to the declaration sought at sub-paragraph 1(f) of the Prayer?

Issues 3 and 4 in this list are no longer live.

The Impact of Jurisdiction decisions

39. The first issue to consider is the effect, if any, of the decisions of Robin Knowles J and the Court of Appeal on jurisdiction. It was BNPP's contention that TRM's Defence seeks directly or indirectly to re-argue a number of points raised in the Jurisdiction Application and that this is inconsistent with the express findings made by the High Court and the Court of Appeal. BNPP relies on the principles of *res judicata*/issue estoppel and abuse of process.

40. TRM does not take issue with the applicability of the principle of issue estoppel where appropriate; but says in large measure it is not appropriate here.

41. The parties do not differ significantly on the law. Where they part company is on whether the jurisdiction decisions are binding determinations on all of the issues relied upon. Whilst TRM accepts that there is *res judicata* on the construction by the English court of the jurisdiction clause in the Master and on the fact that the claim for declarations falls within that jurisdiction clause it says that no other *res judicata* arises.

42. In particular TRM contends that the issue for determination by the court at the stage of the jurisdiction application was only whether BNPP had the better of the argument that the English court had jurisdiction (i.e. in the territorial sense) to grant the relief claimed in the Claim Form; that included whether there was a serious issue to be tried.

43. TRM points me to the judgment of Green LJ in *Kaefer Aislamientos SA De CV v AMS Drilling Mexico SA De CV & Ors* [2019] EWCA Civ 10; [2019] 2 Lloyd's Rep 128.

That deals with the first part of Lord Sumption's three-limb reformulation of the "*better of the argument*" test at [9] in *Goldman Sachs International v Novo Banco SA* [2018] UKSC 34; [2018] 1 WLR 3683 (i.e. that the claimant must supply a plausible evidential basis for the application of a relevant jurisdictional gateway):

> "[73] It is in my view clear that, at least in part, the Supreme Court confirmed the relative test in *Canada Trust*. This is plain from the express endorsement of that test in *Brownlie* and nothing in *Goldman Sachs* detracts from that analysis but on the contrary operates upon the basis that *Brownlie* was correct. The reference to "a plausible evidential basis" in limb (i) is hence a reference to an evidential basis showing that the Claimant has the better argument. It is perhaps relevant that in the Court of Appeal in *Brownlie* Arden LJ expressly linked the formulation of Lord Justice Waller in *Canada Trust* with a concept of relative plausibility (ibid paragraph [23]). The use of "plausibility" as a guiding relative principle in *Brownlie* and in *Goldman Sachs* was not therefore a novelty plucked from a jurisprudential void….
>
> [75] Various points surrounding the test were not in issue in *Brownlie* or in *Goldman Sachs*. The burden of proof remains upon the Claimant: see eg *VTB Capital plc v Nutritek International Corpn* [2013] UKSC 5 at paragraphs [90] - [91]. For the avoidance of doubt the test under limb (i) is not balance of probabilities: … The expression "balance of probabilities" is apt for use at trial when the court can weigh the evidence in its totality but is not therefore an appropriate expression for use at the interim stage. The test is context specific and "flexible": … .
>
> [76] In expressing a view on jurisdiction, the Court must be astute not to express any view on the ultimate merits of the case, even if there is a close overlap between the issues going to jurisdiction and the ultimate substantive merits: …"

44. Reference was also made to Davis LJ's short judgment at [124] where he emphasised that jurisdiction challenges are interlocutory and do not result in a final determination on the merits.

45. TRM also placed heavy reliance on the case of *AmTrust Europe Ltd v Trust Risk Group SpA* [2015] EWCA Civ 437; [2015] 2 Lloyd's Rep 154 not least because that concerned a dispute about whether the contractual arrangements between the parties consisted of a single composite and overarching agreement, a "Framework Agreement" to which an earlier agreement, a Terms of Business Agreement ("ToBA") appended to it as a Schedule, was subordinate, or whether the Framework Agreement and the ToBA were two freestanding contracts.

46. The judgment of Christopher Clarke LJ dealt with the question of the status of such determinations:

> "[72] I agree that, in a case such as this, while a degree of circumspection on the part of an appeal court is called for, the

> court should be less restrained than it would be in other cases. The characteristics of the case to which I refer are (a) that the point at issue has only one "right" answer; (b) that the question is one of the construction of a written agreement, the making of which is not in issue; (c) that there is no significant dispute about the background facts; and (d) that, if the English court is held to have jurisdiction, that question will not be looked at again at trial.
>
> [73] As to (a), whilst a determination as to who has the better side of the argument is an evaluative exercise, it is not the exercise of a discretion. As to (b) the construction of an agreement is, in English law terms, a question of law, although factual questions as to meaning and background may have to be decided first. It is not, itself, a question of "pure" law (which an appeal court would be likely to determine at an interlocutory hearing where jurisdiction was in issue) although the principles on which agreements are to be interpreted may be regarded as such. The ToBA is subject to English law. The Framework Agreement is governed by Italian law, which, in an English Court, is a question of fact. But no evidence has been given that under Italian law the approach to interpretation is any different to that applicable under English law.
>
> [74] As to (d), the rationale for the so called *Canada Trust* gloss is that, in cases to which it applies, (i) the defendant is not within the jurisdiction and will not be made subject to it unless the balance of the argument is in favour of the claimant; and (ii) once the court exercises jurisdiction over him, the question of jurisdiction will not be considered again. Thus, in the present case, even if at trial the court determines that the claim falls within the purview of the Framework Agreement and is subject to Italian law, the action will not cease. It is these considerations which mandate the gloss."

47. TRM says by reference to *AmTrust* at [31], [33] and [38] that no estoppel arises because in a jurisdictional challenge the judge is engaged in an "*evaluative [exercise] on the facts likely to be established at trial*". TRM also draws attention to the fact that in that case both Christopher Clarke LJ and Beatson LJ make clear that the court determining the issue of jurisdiction is not concerned with a determination of the merits and this is so even if "*the same or very similar questions may have to be decided at trial*".

48. TRM contends that the examination of the claims to relief sought by BNPP in the Jurisdiction Application was in the sole context of whether such claims fell within the compass of the English jurisdiction clause in the Master; they were not engaged in making findings "on the merits" of BNPP's claims which would bind the trial judge, let alone that they were making findings on the higher trial-standard of a balance of probabilities.

49. I have no difficulty with much of what TRM contended. It is doubtless entirely right that a court should be slow to find an issue estoppel arising out of a jurisdictional determination – particularly so where, as noted in *AmTrust* at [33] *"the issue is one of*

forum non conveniens or where the documentary evidence contains a sharp clash of evidence about the facts". I have concluded that it is important here to understand what the decisions relied on did determine, before considering whether I am bound by various findings.

50. So far as the first instance judgment is concerned, I can take this relatively quickly, since it is to a large extent overtaken by the Court of Appeal judgment. The salient points are:

    i) At [24] Robin Knowles J concluded in the context of serious issue to be tried that "*there is no question there is an issue between the parties and no question that BNPP's case is serious*";

    ii) At [29] he noted that as to the approach to jurisdiction, as this was an interlocutory hearing it was sufficient to see whether BNPP has much the better of the argument;

    iii) In relation to the declaration sought at paragraph 7(1)(g) he noted that it might be argued at the merits stage that consequences of the width covered by the declaration do not flow from the relevant paragraphs of the agreements, but that logically at the jurisdiction stage this declaration broadly stood or fell with the conclusion on jurisdiction as regards the other declarations. He did however exclude the words "*in any event*" from the declaration as lacking clarity;

    iv) He concluded at [37] that BNPP had much the better of the jurisdictional argument.

51. As for the Court of Appeal judgment, it unanimously rejected TRM's appeal and upheld the Robin Knowles Judgment, via a single judgment given by Hamblen LJ. Its main features were:

    i) It concluded that the starting point was that the English Jurisdiction Clause was intended to capture claims naturally arising under the Transaction, while the Italian Jurisdiction Clause was intended to capture claims arising under the FA (at [69]) and that this was supported by the contractual context of both agreements. The FA was an "overarching finance agreement" and, while it referred to the anticipated hedging arrangements, BNPP did not enter into that agreement in its capacity as "Hedging Bank" (at [72]).

    ii) Appendix 17.19 of the FA anticipated that the "Hedging Contracts" would be on standard ISDA terms, which included an entire agreement clause and a jurisdiction clause in favour of the courts of New York or England. As such, when the Italian Jurisdiction Clause was concluded, it was anticipated that BNPP and TRM would enter into the "Hedging Contracts" in a different capacity, with separate choice of law and jurisdiction clauses (at [73]).

    iii) There was no clear language displacing the natural interpretation that the Italian Jurisdiction Clause encompassed claims relating to the FA, while the English Jurisdiction Clause encompassed claims relating to the Transaction. Each was to apply to claims relating to the separate contracts in which they were contained and was to be mutually exclusive (at [75]-[76]).

iv) The Italian Jurisdiction Clause was to apply to "*claims arising in connection with the background lending relationship set out in the [FA], made between TRM as borrower and … BNPP in its capacity of Mandated Lead Arranger, Lending Bank and Agent Bank*", whereas the English Jurisdiction Clause was to apply to "*claims arising in connection with the specific interest rate swap relationship set out in the Transaction, made between TRM as customer and BNPP in its capacity as Hedging Bank*". Those were the "particular legal relationship[s]" for the purposes of Article 25 (at [78]).

v) As to TRM's reliance on the Schedule and Conflicts Provision, it was not in issue that the FA and the Transaction Documents were connected. Indeed, the FA required TRM to enter into the "Hedging Contracts". That connection did not prevent the parties' relationships under the FA and the Transaction Documents being separate. As to the Conflicts Provision, that would only assist TRM if there was a conflict. The FA and the Transaction dealt with different relationships and were "*complementary rather than conflicting*" (at [85]-[87]).

vi) The fact that any alleged failure by BNPP to implement the "Hedging Strategy" under the FA could give rise to a claim under that agreement did not mean that a claim could not be brought under the Transaction Documents. "*A factual overlap between claims under the [FA] and the Transaction does not alter the legal reality that a claim under the [FA] is a different claim made under a different contract in relation to a different legal relationship to a claim under the Transaction*" (at [88]).

vii) TRM suggested that the amendment to Article 17.19 meant that any claim for failure to comply with the terms of the Transaction also involved a breach of the FA. This was rejected with the court concluding (at [92]):

> "TRM's argument is that this meant that any claim for failure to comply with the terms of the Swap also involves a failure to comply with the FA and that the Swap was thereby somehow subsumed into the FA. However, they remain separate contracts. The amendment does not mean that BNPP is no longer entitled to bring claims under the Swap. It may also be able to bring a claim on the same grounds under the FA, if it so chooses, but that remains a different claim made under a different contract, however great the factual overlap. Moreover, the logical consequence of TRM's argument, as was accepted, is that all claims have to be brought under the IJC so that the EJC is deprived of any effect. This is a legally incoherent and commercially unreal conclusion."

52. I approach this question bearing in mind the authorities (such as *Carl Zeiss Stiftung v Rayner C Keeler Ltd (No 2)* [1967] 1 AC 853) which indicate that the question of issue estoppel is one which is to be approached with caution.

53. Ultimately I broadly accept the argument that the courts in this case have thus far been grappling with the jurisdiction issue and the views which they expressed should (unless clearly stated to be otherwise) be taken to have been in the context of assessing the relevant hurdles (whether there was a serious issue to be tried and which side had the

better of the argument) which informed the decision on whether the English court had jurisdiction to determine BNPP's claims.

54. That is very much the approach which was taken in Robin Knowles J's judgment at [29] & [50]. That is echoed in Hamblen LJ's judgment in the Court of Appeal at [28] ("*Since this was an interlocutory hearing to challenge jurisdiction, it was sufficient for the judge to see whether BNPP had "much the better of the argument"*.")

55. In the end I conclude that while the language of the judgments is sometimes unqualified, the essence of the exercise being performed is, as TRM submits, one of evaluating the questions which are relevant to the decision on founding jurisdiction. So even the decision as regards serious issue, which is not expressed as being to the "*much the better of the argument*" standard, is one taken in relation to a different question. Serious issue to be tried is an assessment of merits which is distinct from the question of existence of an issue for the purposes of the grant of declaratory relief.

56. As a result, one might say that there is no relevant identity of issue or that there has been no relevant previous finding "on the merits". But the result is that no issue estoppel arises. TRM is also right to draw attention to the policy underlying the various doctrines of *res judicata*, namely that there should be an end to litigation and justice demands that the same party shall not be harassed twice for the same cause. The question of jurisdiction is a preliminary question, and it generally cannot be abusive for the matter then to be considered on the merits.

57. Having said that however, I do accept BNPP's submission that the judgments cannot simply be put to one side and ignored. This is not a case where the determinations are based on questions of *forum conveniens* or a clash of evidence on the facts, so as to make them classic evaluative decisions in the sense referred to in *AmTrust*. This is a case where because what is in issue is declaratory relief based on contractual construction issues, there is a very real crossover between the questions which those courts were asked to decide and those which are before me now. It is, of course, open to me to reach a conclusion which diverges from the analysis of Robin Knowles J and/or from Hamblen LJ; but I do consider that it is appropriate that I reach my conclusions bearing in mind the analysis thus far performed by those judges.

The Legal Background – negative declaratory relief

58. The second overarching point taken by TRM related to the correct approach to the granting of negative declaratory relief. Although much of the law in this area was not contentious, there was certainly a difference between the parties as to the approach in the context of negative declarations in the context of contracts incorporating a jurisdiction clause. Before turning to the individual declarations sought it is therefore appropriate to reach a conclusion on this issue.

59. The court's power to grant declaratory relief in a private action lies in section 19 of the Senior Courts Act 1981. Section 19 preserves the jurisdiction of the High Court to exercise "*all such other jurisdiction (whether civil or criminal) as was exercisable by it immediately before the commencement of this Act (including jurisdiction conferred on a judge of the High Court by any statutory provision)*". CPR 40.20 permits the court to exercise its power to grant declaratory relief.

60. The power to make declarations appears to be unfettered, but the grant of a declaration remains a discretionary remedy. Thus although "*a claimant or an applicant may have proved his case, he still has to persuade the court both that it should in its discretion make a declaratory judgement, and if it does, that the terms he seeks are appropriate*": see Zamir & Woolf, The Declaratory Judgment, 4th ed. ("Zamir & Woolf") at 4-01.

61. Particular emphasis was placed by TRM on the special considerations regarding the grant of negative declaratory relief.

62. TRM submitted that the line taken in *Camilla Cotton Oil v Granadex SA* [1976] 2 Lloyd's Rep 10 is good: the use of negative declarations should be carefully scrutinised and their use rejected where it would serve no useful purpose. *Camilla Cotton* was a case concerning a sale of peanuts where declarations were sought regarding the question of agency in the context of there being extant Swiss proceedings whose object was to establish liability, so were effectively a mirror image of the declaratory proceedings. Lord Wilberforce, in the course of a judgment refusing the declarations, stated as follows:

> "The declaration claimed is of a negative character and as Lord Sterndale himself had said a declaration that a person is not liable in an existing or possible action is one that will hardly ever be made. "Hardly ever" is not the same as "never" but the words warn us that we must apply some careful scrutiny. So I inquire whether to grant such a negative declaration would be useful….
>
> …In order to appraise the utility, or otherwise, which a declaration as to the position in English law might possess in Switzerland, it is necessary to examine the claims there made…. Under none of these heads, or otherwise, is there, I repeat, any reliance on English law. English law has, at a late stage in the proceedings, been invoked by the respondents (defendants in Switzerland),…This being the position, not I hope unduly simplified, can it be said that there is any utility, from the point of view of the Swiss proceedings, in allowing the claim stated in par. 1 of the writs to proceed? In my opinion there are several reasons why there is not….
>
> ….it is in principle undesirable that, when an issue of English law is raised, or raisable, in foreign proceedings, the English law to be applied should not be left to be proved in the normal manner by expert evidence in the foreign forum. The alternative, of having it proved by an ad hoc judgment in contested proceedings here is likely to be lengthier, more expensive (they might involve appeals to the Court of Appeal or even this House) and less clear and helpful to the foreign Court. The issues (if any) of English law which might arise for consideration in Switzerland are in themselves simple enough even though capable of some debate, and entirely suitable for expert exposition with text books and authorities."

63. TRM submitted that the court's caution regarding the grant of negative declaratory relief applies particularly in the context of foreign proceedings. In such cases, the English court is concerned that in the case of any negative declarations which might otherwise be made, there should not be an "undesirable side-effect" of interference in ongoing foreign proceedings. Reference was made to *Bank of New York Mellon, London Branch v Essar Steel India Ltd* [2018] EWHC 3177 (Ch) at [22] – [23]. This was said to be authority for the proposition that if and to the extent foreign proceedings were in issue that was a strong indicator that a declaration should not be made. Reference was also made to passages from Zamir & Woolf and the case law emphasising the need to establish clear utility for the declaration.

64. TRM submitted that the underlying issue must be sufficiently clearly defined to render a claim for a negative declaration properly justiciable by reference in particular to *Nokia Corporation v InterDigital Technology Corporation* [2006] EWHC 802 (Pat) at [20 (iii)] applied in *Mexichem UK Limited v Honeywell International Inc.* (*a company incorporated under the laws of the State of Delaware, USA*) [2020] EWCA Civ 473 at [13].

65. TRM also placed emphasis on the case of *Prince plc v Prince Sports Group Inc* [1998] F.S.R. 21 where Neuberger J refused to grant declarations in respect of which the plaintiff had led no evidence and which might be used in foreign (US) proceedings brought by the defendant against it. Again this was both as to the refusal of a declaration where foreign proceedings were in issue and the need for this court to understand, based on evidence, the utility of what was being sought. It was submitted that the onus is on the Claimant to put forward positive evidence to support claim and why the grant of negative declaratory relief would be useful and fair.

Discussion

66. The authorities certainly indicate that a court should be cautious when asked to grant negative declaratory relief because, while negative declarations can perform a positive role, they reverse the more usual roles of the parties and this can result in procedural complications and possible injustice to an unwilling "defendant".

67. In addition a declaration will normally make the issue *res judicata*, so as to prevent the defendant from subsequently bringing an action to vindicate the right denied to him by the declaration. It is the *res judicata* implications of granting a declaration which makes the question of the grant of a declaration particularly acute where there may be a danger of the dispute not being fully contested in the proceedings: see Zamir & Woolf at 4-182.

68. There is however a distinction between caution (approved in the authorities) and reluctance (not approved in the modern authorities). Thus in *Messier Dowty Ltd v Sabena SA* [2001] 1 WLR 2040, Lord Woolf stated at [36] – [41]:

> "I can see no valid reason for taking an adverse view of negative declaratory relief…. The use of negative declarations domestically has expanded over recent years. In the appropriate cases their use can be valuable and constructive. …

> [41] …The approach is pragmatic. It is not a matter of jurisdiction. It is a matter of discretion. The deployment of negative declarations should be scrutinised and their use rejected where it would serve no useful purpose. However, where a negative declaration would help to ensure that the aims of justice are achieved the courts should not be reluctant to grant such declarations. They can and do assist in achieving justice."

69. This was a judgment which was plainly designed as a "re-set" of the jurisdiction. It involved specifically "*treating with reservation*" the more adverse views of Kerr L.J. in *First National Bank of Boston v. Union Bank of Switzerland* [1990] 1 Lloyd's Rep. 32, 38 and in *Saipem S.p.A. v. Dredging VO2 B.V.* [1988] 2 Lloyd's Rep. 361, 371. Against this background it seems to me that it is acceptable to pay less mind than one would usually do to older authorities which strike much the same note. Thus *Camilla Cotton* should perhaps not be seen as the best source for statements of principle; however in truth, I do not see anything in *Camilla Cotton* which is out of step with this approach. To the extent that Mr Samek QC sought to draw out of it statements of principle which went further than this, I do not consider that those principles can safely be drawn out of the case.

70. So far as the issue of whether there should be a reluctance to grant negative declaratory relief in cases involving foreign proceedings, I am not persuaded by TRM's submissions. The cases on which reliance was placed were cases which had a far less clear connection with this court – for example where the foreign process in question involved a third party not before the English Court. They were not cases such as this, where there is an issue about the effect of a contract which contains an exclusive jurisdiction clause in favour of the English Court, and which is governed by English Law. While Mr Samek is quite right that one must be careful not to assume that the proceedings in Italy are themselves in breach of the exclusive jurisdiction clause, it equally must be right that the existence and effect of that clause *vis à vis* the Transaction should not be allowed to be forgotten.

71. Further, as BNPP noted, there are plenty of examples of such declarations being granted in this court in cases with broadly similar issues. It drew attention in particular to two cases which were said to be akin to, but weaker, cases than the present.

72. In *JP Morgan Europe Ltd v Primacom Management GmbH* [2005] EWHC 2426 (Comm), Cooke J granted declarations as to the enforceability and validity of a Senior Facility, subject to English law and the exclusive jurisdiction of the English courts, in a case where there was also a second facility with the same lender. There were extant proceedings in Germany in relation to that second loan facility, but not in relation to the first. Because German law was more favourable to the Defendant there was a fear that attempts might be made to damage or impair the contractual rights under the senior facility by proceedings brought in Germany and by reference to German law particularly given a history of the borrowers having previously brought proceedings against the lenders in breach of exclusive jurisdiction clauses. The seeking of negative declaratory relief was effectively a bid to pre-empt an attempt to damage or impair that facility when there was no dispute yet as regards it. However, as Mr Samek pointed out, that was a case where the dispute was not a vibrant one – the parties had essentially agreed to a form of appropriate relief if in principle declaratory relief was available.

73. The Claimant also pointed to *Merrill Lynch v Commune di Verona* [2012] EWHC 1407 (Comm) in which Teare J granted a series of declarations (on an application where there was no representation by the Defendant) in respect of a swap under an ISDA Master, in circumstances where the counterparty Italian local authority had threatened to issue proceedings for alleged overpayments and commission (but had not yet actually done so). The Judge set out key questions at [17] and held (at [26]) that there was "*a clear and present dispute between the parties*", even though no proceedings had been issued in Italy, and further (at [30]) that the Claimant had a "*legitimate interest in ensuring that the parties chosen forum, this court, resolves disputes concerning the transactions.*"

74. Having said that Teare J declined to order two of the declarations sought. At [37-42] he said this:

> "37. These two declarations do not derive from the representations and terms of the transactions. They are wide-ranging; in short, a declaration that the claimants have no liability to the defendants of any sort whether, contractual, tortious, fiduciary or of any other nature.
>
> 38. No evidence has been led on this topic for the very obvious reason that the defendant has not advanced any case that the claimant has acted in breach of any duty to the defendant.
>
> 39. Although the absence of evidence is understandable, the fact is that the court is being asked to make a declaration of non-liability in the absence of any evidence on the question. That seems to me to be a serious obstacle in the claimant's way …
>
> 42. … I am not persuaded that it is appropriate for the court to make declarations when there is no evidence to support them. I must therefore refuse to make declarations 12 and 13."

75. BNPP suggested that these cases offered powerful parallels. As to the *JP Morgan* case, I am not persuaded that that is quite the case. While there are some parallels with this case, those parallels are not striking; that was a case where the claim had not been objected to, it was not a case concerning ISDA, and while no proceedings in relation to the relevant facility had been launched, there was evidence of material facts.

76. As for the *Merrill Lynch* case, while the facts were plainly much closer in that it was a case which concerned the ISDA Master, combined with threatened proceedings in Italy (though there only threatened), I would nonetheless treat that authority with somewhat less enthusiasm than if it were a case where the declaratory relief had been the subject of argument. Further it seems to me that the caution demonstrated by Teare J in that case in refusing certain of the declarations in the absence of evidence is a not insignificant point.

77. So while I decline to follow the course urged by Mr Samek of regarding cases where foreign proceedings are in issue as per se requiring extreme caution – and the less so where the declarations relate to a contract governed by English Law and subject to an

EJC, I also consider that these two somewhat parallel authorities do not solve the equation for me.

78. Overall I conclude that the interesting argument which I have heard on the authorities has been in danger of over-refining an exercise which is essentially discretionary. The overarching issues relevant to this case which can be taken away from the authorities and which I apply when coming to consider the individual declarations sought are as follows:

i) The touchstone is utility;

ii) The deployment of negative declarations should be scrutinised and their use rejected where it would serve no useful purpose;

iii) The prime purpose is to do justice in the particular case: see *TQ Delta, LLC v ZyXEL Communications UK Limited, ZyXEL Communications A/S* [2019] EWCA Civ 1277 at [37]. "Justice" includes justice not only to the claimant, but also to the defendant: see *Fujifilm Kyowa Kirin Biologics Co., Ltd. v Abb Vie Biotechnology Limited* [2017] EWCA Civ 1; [2018] Bus LR 228 ("*Fujifilm*") at [60];

iv) The Court must consider whether the grant of declaratory relief is the most effective way of resolving the issues raised: see *Rolls Royce v Unite the Union* at [2010] 1 WLR 318 at [120]. In answering that question, the Court should consider what other options are available to resolve the issue;

v) This emphasis on doing justice in the particular case is reflected in the limitations which are generally applied. Thus:

a) The court will not entertain purely hypothetical questions. It will not pronounce upon legal situations which may arise, but generally upon those which have arisen: Zamir & Woolf at 4-036 & *Regina (Al Rawi) v Sec State Foreign & Commonwealth Affairs* [2008] QB 289 at 344.

b) There must in general, be a real and present dispute between the parties before the court as to the existence or extent of a legal right between them: *Rolls Royce* at [120].

c) If the issue in dispute is not based on concrete facts the issue can still be treated as hypothetical. This can be characterised as *"the missing element which makes a case hypothetical"*: see Zamir & Woolf at 4-59.

vi) Factors such as absence of positive evidence of utility and absence of concrete facts to ground the declarations may not be determinative; Zamir and Woolf note that the latter *"can take different forms and can be lacking to differing degrees".* However, where there is such a lack in whole or in part the court will wish to be particularly alert to the dangers of producing something which is not only not utile, but may create confusion.

The Issues

79. The issues in the agreed List of Issues have been dealt with in the following order. As noted earlier Issues 3 and 4 are no longer contentious.

Issue 1: Entire Agreement

80. The issue is:

> "Did the Transaction Documents constitute the entire agreement and understanding of BNPP and TRM with respect to their subject matter and supersede all oral communications and prior writings with respect thereto; or was the parties' agreement and understanding with respect to the Transaction also contained in the FA?"

81. This is a question of contractual construction. There was no issue as to the principles applicable.

82. BNPP's submission is simple: it is that the Entire Agreement clause means what it says, and is effective.

83. The Master begins by providing that BNPP and TRM:

> "have entered and/or anticipate entering into one or more transactions (each a "Transaction") that are or will be governed by this Master Agreement, which includes the schedule (the "Schedule"), and the documents and other confirming evidence (each a "Confirmation") exchanged between the parties confirming those Transactions."

84. As to interpretation, the Master provides that:

> "1. Interpretation
>
> ...
>
> **(b) Inconsistency.** In the event of any inconsistency between the provisions of the Schedule and the other provisions of this Master Agreement, the Schedule will prevail…
>
> **(c) Single Agreement**. All Transactions are entered into in reliance on the fact that this Master Agreement and all Confirmations form a single agreement between the parties (collectively referred to as this "Agreement") and the parties would not otherwise enter into any Transactions."

85. The Master further provides that:

> "9. Miscellaneous
>
> **(a) Entire Agreement**. This Agreement constitutes the entire agreement and understanding of the parties with respect to

> its subject matter and supersedes all oral communication and prior writings with respect thereto."

86. The Schedule provides that:

> "Notwithstanding anything to the contrary contained herein, this Agreement is entered into in connection with the loan agreement dated October 29th, 2008, as subsequently amended by the Atto Modificativo del Contratto di Finaziamento (sic) dated January 21st, 2010 [the FA]… and the relevant intercreditor agreement dated as of January 21st, 2010 [the ICA].
>
> For the purpose of this Agreement, the parties acknowledge the existence of the [FA] and the [ICA] and further acknowledge that (i) their respective rights under this Agreement are subject to the terms and conditions of the [FA] and the [ICA]; (ii) that BNPP is the 'Banca Hedging' (i.e. the bank that will provide the 'Contratti di Hedging' pursuant to the 'Strategia di Hedging' as these terms are defined in paragraph 1 (Interpretazione) and annex 17.19 (Strategia di Hedging) of the [FA]) and (iii) no derivative transactions shall be entered into hereunder other than those foreseen in annex 17.19 (Strategia di Hedging) of the [FA].
>
> Capitalised terms used in this Agreement which are not defined in this Agreement or in the Definitions shall, unless the context otherwise requires, have the meanings and construction set out in the [FA] and in the [ICA], as appropriate. In the case of conflict between the provisions of this Agreement and the [FA] and the [ICA], the provisions of the [FA] and the [ICA] as appropriate shall prevail."

87. TRM resists the submission that the entire agreement clause is effective. It submits that against this background, this is a case of specifically negotiated terms, prevailing over a pre-existing set of standard or printed terms. Reference was made to *The Starsin* [2004] 1 AC 715 at 795-6 [183]-[184] *per* Lord Millett:

> "It is a well-established canon of construction that, where there is inconsistency between the printed terms of a standard form and the terms which the parties have themselves written into the document, the latter should prevail: see Robertson v French (1803) 4 East 130, 136 where Lord Ellenborough CJ distinguished between the written words as "the immediate language and terms selected by the parties themselves" and the printed words of the form as "a general formula adapted equally to their case and that of all other contracting parties upon similar occasions and subjects". The passage has been approved in your Lordships' House in *Glynn v Margetson & Co* [1893] AC 351 (and by Scrutton LJ in *In re an Arbitration between L Sutro & Co and Heilbut, Symons & Co* [1917] 2 KB 348, 361-362.

> This principle is applicable even where the inconsistent provisions are of equal importance and the printed form is appropriate to the particular case as well as to the general. How much more must primacy be given to the written words where they describe the main intent and object of the particular contract."

88. TRM submits that the effect of clause 1(b) of the Master is to resolve inconsistencies between the Schedule and other contractual documents forming the Master in favour of the Schedule and the effect of the canon of construction identified in *The Starsin* is to resolve inconsistences between the bespoke terms of the Schedule and any other standard printed terms of the Schedule in favour of the bespoke terms.

89. It focusses on the first words of the Schedule: "*Notwithstanding anything to the contrary contained herein*". It submits that the effect of these words here is that any other provision of the Schedule, or in the Master, which might otherwise have the effect of a reader concluding that the Master was *not* entered into in connection with the FA and Inter-Creditor Agreement is displaced.

90. TRM relies in particular on the second paragraph of the Schedule:

> "For the purpose of this Agreement, the parties acknowledge the existence of the [FA] and the [Inter Creditor Agreement] and further acknowledge that (i) their respective rights under this Agreement are subject to the terms and conditions of the [FA] and the [Inter Creditor Agreement] …".

91. As to this, TRM submits as follows:

    i) "Subject to" are bespoke words and therefore meaning must be attributed to them;

    ii) They are words of limitation relating to the parties' rights under the Master (including also the standard non-bespoke provisions of the Schedule and the Confirmation) meaning that those rights are not absolute, but rather that they are limited or circumscribed by the terms and conditions of the FA and the Inter Creditor Agreement;

    iii) The corollary of this is that something which is allowed or provided for by the FA or the Inter Creditor Agreement cannot be limited or circumscribed by (i.e. be "subject to") the Master (including also the standard non-bespoke provisions of the Schedule and the Confirmation).

92. TRM says that this approach is confirmed also by other provisions. In particular the Schedule makes clear that the Transaction is part of a wider bargain between the parties, hence the express statement "*that BNPP is the 'Banca Hedging' (i.e. the bank that will provide the 'Contratti di Hedging' pursuant to the 'Strategia di Hedging' as these terms are defined in paragraph 1 (Interpretazione) and annex 17.19 (Strategia di Hedging) of the [FA]).*"

Discussion

93. On its face the meaning of the Entire Agreement Clause is clear and unambiguous. It provides (in standard ISDA Master terms) that the Transaction Documents "*constitute[s] the entire agreement and understanding of the parties with respect to [their] subject matter and supersede[s] all oral communication and prior writings with respect thereto*".

94. That apparent position is reflected by Longmore LJ's statement in *Deutsche Bank v Commune di Savona* [2018] EWCA Civ 1740 [2018] 4 W.L.R. 151 that the ISDA Master is a "self-contained" agreement, exclusive of prior dealings.

95. The question which then arises is whether TRM's approach successfully undermines what seems straightforward on its face. One problem that I face with TRM's case on this issue is that it is now without a pleaded focus, since the amendment was to remove a positive case that "*the agreement and understanding of the parties as respects the transaction was also contained in the FA*" and that the agreement was qualified by the obligations referred to in the Italian proceedings.

96. The result is that the structure for the argument which TRM advances effectively goes nowhere. The point is advanced (not perhaps entirely consistently with the deletion of the positive case) that the provisions of the Agreement are overridden by specific provisions in the FA and the Inter-Creditor Agreement, but TRM does not then move on to identify what are these specific obligations which are said to matter.

97. As for the reliance on the wording of the Schedule, this is another manifestation of the same point. Although much emphasis is put on the Schedule, this effectively points back towards the Conflicts Provision. But the question remains: on what is the Conflicts Provision supposed to be biting? What is the provision of the Master which is offensive, and with what part of the FA does it conflict? There is no identification of a clause which is said to be in conflict with the FA. In those circumstances it is artificial to say that BNPP's case ignores express bespoke terms of the Schedule.

98. There was suggested to be a further problem with TRM's analysis because even if there were another agreement and clause which was in conflict, the effect of the schedule is that the conflicting provision in the Master drops out – and only that provision. Thus the Entire Agreement clause remains even on this hypothesis, essentially unaffected.

99. I am not entirely persuaded of this argument. This certainly does not seem to be how the Court of Appeal saw the point. What they said was (at [86]):

> "'Subject to' has to be read together with the Conflicts Provision… [and] in so far as the FA or the ICA contain applicable terms and conditions which conflict with the terms of the swap, then they are to prevail and the Swap is to be subject to them."

100. However the important point is the first one, and I do not consider that this subsidiary point affects the matter.

101. There was also reliance in the pleading (though not in the arguments before me) on the amendments to Article 17.19 of the FA on 30 January 2013. The FA, in its third amended version, was entered into on 30 January 2013 by way of a Deed of Amendment

of that date. The effect of that Deed was to "*replace*" the previous version of the FA (the 2 July 2010 version) with the 30 January 2013 version.

102. Clause 17.19 of the 2 July 2010 FA stated that TRM "*is committed to sign the Hedging Contracts in accordance with the Strategy of Hedging*." The "*Strategy of Hedging*" was contained in Exhibit 17.19.

103. The 30 January 2013 FA made an important change to Clause 17.19 in that additional words were added, namely "*to comply with its undertakings under the Hedging Contracts and to abstain from perfecting transactions of any kind whatsoever on financial instruments different from the Hedging Contracts.*"

104. TRM submitted that it is clear that the FA is a "*written agreement*" and "*document*" "*entered into and/or executed pursuant to the Transaction Documents] [the Master etc.]*".

105. To the extent that this remained live, it did not appear to me to assist TRM in any argument as to qualifying or undermining the Entire Agreement Clause. The meaning or effect of this amendment is a matter of Italian law and hence not for this Court.

106. I also note that as recorded in the Court of Appeal Judgment at [84], the Conflicts Provision and the amendments to Article 17.19 were two of the reasons put forward by TRM in support of its argument that the Agreement and the FA were not separate agreements but overlapped. This was roundly rejected by the Court of Appeal, which found in terms that the obligations in the Transaction Documents were entire and separate from the obligations under the FA and characterised the argument as one which resulted in a *"legally incoherent and commercially unreal conclusion"*.

107. The approach indicated by a simple reading of the clause is therefore not in my judgment seriously challenged by the arguments advanced by TRM. That *prima facie* approach is also consistent with the fact that, while TRM is a party both to the Agreement and to the FA, BNPP is not a party to the latter in its capacity as the Hedging Bank. There would therefore be something of an oddity if the terms of a separate agreement in which BNPP participated only in an entirely distinct role, could qualify the Agreement. Further the fact, as recorded in the Schedule and relied on by TRM, that the Transaction was entered into "in connection with" the FA is entirely consistent with this. What one is looking at are distinct agreements, which have a connection. That does not affect the Entire Agreement Clause.

108. Finally, TRM's approach would sit uneasily with, while BNPP's argument is harmonious with, the *dicta* in the authorities as to the importance of certainty and clarity in interpreting the ISDA Master. Thus in *Lomas v Firth Rixson* [2010] EWHC 3372; [2011] 2 BCLC 120 at [53] Briggs J said that it should "*as far as possible, be interpreted in a way that serves the objectives of clarity, certainty and predictability, so that the very large number of parties using it should know where they stand*".

109. To similar effect is the *dictum* of Cooke J in *LSREF III Wight Ltd v Millvalley Ltd* [2016] EWHC 466 (Comm); 165 Con LR 58, at [42]: "*consistency, predictability and certainty are essential… An ISDA standard form cannot therefore be subjected to any 'manipulation' of the language used, because of the potential impact on other transactions governed by it*".

110. For all of these reasons I find in favour of BNPP on Issue 1.

111. I should perhaps add that TRM submitted that the Entire Agreement Clause is not apt to exclude liability for misrepresentations because there is no reference to representations (let alone alleged fraudulent ones) at all in the clause. In support of this proposition reference was made to *Inntrepreneur Pub Co v East Crown Ltd* [2000] 2 Lloyd's Rep. 611; *BSkyB Ltd v HP Enterprise Services UK Ltd* [2010] EWHC 86 (TCC); [2010] IP & T 811; *Axa Sun Life Services Plc v Campbell Martin Ltd* [2011] EWCA Civ 133; [2011] 2 Lloyd's Rep 1. This is a point which is better considered together with the issues as to non-reliance and declaration 1(g).

Issue 2

112. The issue is whether on their true construction, the effect of paragraphs 2 and 3 of the Schedule is to accord priority to a substantive provision of the FA (or the ICA) in the event that it conflicts with a substantive provision of the Transaction Documents: or is the effect of these paragraphs to prevent BNPP from relying on a provision of the Transaction Documents that would have the effect of preventing or inhibiting the making of a claim brought under a provision of the FA (or the ICA)?

The submissions

113. TRM's submission was that the effect of the Schedule is to prevent BNPP from relying on a provision of the Transaction Documents that would have the effect of preventing or inhibiting the making of a claim brought under a provision of the FA (or the ICA). TRM says that this follows from the express wording of the Schedule:

    i) The words "*their respective rights under this Agreement*" at (i) in the second paragraph of the Schedule is plainly a reference to the rights which BNPP and TRM (and no one else) have under the Master;

    ii) The provision that those rights "*are subject to the terms and conditions of the [FA] and the [Inter Creditor Agreement]*" means that they are not absolute but rather that they are limited or circumscribed by the terms and conditions of the FA and the ICA;

    iii) It follows that the exercise by either party of any rights which are accorded to either under the terms of the Master is not to prejudice any rights (which includes a right to bring a claim) which either party has under the FA arising out of the terms and conditions of the FA;

    iv) That is confirmed by the third paragraph of the Schedule at which is to the effect that the parties' rights (including the right to bring any claim) prevail over any provision of the Master (including also the standard non-bespoke provisions of the Schedule and the Confirmation) which would have the effect of preventing or inhibiting such rights and thus conflict with the same;

    v) The consequence of that is that BNPP is barred from relying on a provision of the Transaction Documents that would have the effect of preventing or inhibiting the making of a claim and that TRM may bring any claims which it

has (or claims to have) against BNPP arising out of the terms and conditions of the FA.

114. TRM contends that BNPP adopts an overly narrow interpretation of the Schedule. Further, it says that BNPP's argument appears to derive from a passage in the Court of Appeal judgment in this case on jurisdiction at [87]:

> "TRM's argument also assumes that: (i) the fact that some disputes may be resolved under either the EJC or the IJC involves a conflict as opposed to an agreement to parallel jurisdictions, as contemplated by Longmore LJ in the Savona case at [4]; and (ii) the Conflicts Provision applies to collateral agreements such as a jurisdiction agreement and not just to the substantive provisions of the contracts."

115. TRM contends that Hamblen LJ was concerned here only with an argument that there was a conflict between the two jurisdiction clauses.

116. BNPP's submission was that TRM's argument should be rejected for three reasons. First, as a matter of construction, it was said to be hopeless; secondly, it was contended that the defence is unavailable, even on its own terms, because of the facts, and; thirdly, it was said to be an attempt to reopen the jurisdiction challenge.

117. BNPP's case is that the effect of the second and third paragraphs of the Schedule is to accord priority to a substantive provision of the FA or ICA only in the event that it conflicts with a substantive provision of the Master – which does not arise in this case.

Discussion

118. The fundamental problem which I have with TRM's submissions on this point is that, once one proceeds beyond a recitation of the clauses, they lack clarity. For a case which is said to be a matter of construction, the argument appeared to be one which had surprisingly little relation to the clause relied on.

119. The case advanced by BNPP on construction appears by contrast to be firmly rooted in the words of the Schedule and the Conflicts Provision. What it is saying is (subject to the point about exactly how the process of "dropping out" a clause works) it is clear – in case of actual conflict, the Transaction Documents loses. When one looks at TRM's case, however, it is hard to understand exactly how its construction is said to be founded in the words, or how it operates. The Schedule is not worded in terms which readily translate into the construction urged – there is no mention of claims or of inhibition or prevention. Far too much rests on the bracketed assumption "*including the right to bring a claim*".

120. In submissions Mr Beltrami QC for BNPP raised a number of issues with the operation of the construction advocated for by TRM – and in particular how the "inhibition" part of it was supposed to operate. It was notable that in his oral argument Mr Samek QC did not really grapple with these issues.

121. It certainly strikes me as troubling that if TRM is correct it could be the case that rights might arise but may be disallowed if a claim is made, the effect of which would or

might be a defence to a claim which might be brought. The construction sought is therefore for a contractual right which is contingent or fluctuates depending upon, not on a simple contingency, but rather on a process of assessment of the impact of the exercise of that right in foreign proceedings. That seems a fundamentally improbable outcome for the exercise of construction — and the more so in the context of the ISDA Master, in the light of the authorities to which I have referred.

122. Clarity is in this context important – in practical terms apart from anything else. TRM was somewhat dismissive of the authority to which BNPP directed me, that of Wood on Project Finance, Securitisations and Subordinated Debt (3rd ed.) at paragraph 4-037. However that passage seemed simply to confirm what would be manifest from considering the nature of the transactions as a matter of logic – that in a situation where you have a syndicated loan and an industry hedge, absent an agreement as to priority there would be a real danger of conflicting outcomes and unfairness as between different creditors. A clause which sets out the structure of the priorities is thus necessary both for clarity and for fairness.

123. I conclude that both the wording of the clause and the context indicates that BNPP's construction is correct.

124. There were also difficulties with TRM's submission on the facts, in that the clause would only be engaged if there was a valid claim. Here it is not actually said in terms (nor is there evidence that) there is a valid claim. Further at paragraph 31.4 of its Defence TRM expressly avers that the matters in the English contract could not be a defence to the Italian claim ("*to the extent (which is denied) that any of the propositions in (1) -(4) do arise in consequence of any of the Relevant Provisions, and would ceteris paribus have the effect (which is denied) of preventing or inhibiting the making of claims in the Italian Claim*"). That formal position is perhaps not surprising, given that much of the claim in Italy is not brought under the FA but instead under the FAC, as well as in tort and in respect of what are said to be regulatory duties. However it does appear to enshrine a denial that the provisions of the Transaction would have the effect of prevention or inhibition. Hence on TRM's own pleaded case the point would not arise. Further to the extent what is argued for is a conflict if there would be prevention or inhibition of bringing a claim, the point could not apply in circumstances where the Italian Claim has in fact been brought.

125. I therefore conclude that for both these reasons TRM's case on Issue 2 also fails and that BNPP's construction is correct. I do not therefore need to revisit the Jurisdiction Application arguments. However, I note that my conclusion harmonises with the conclusions reached both by Robin Knowles J and the Court of Appeal in that context. They held that, notwithstanding the Conflicts Provision, these were separate agreements. TRM's argument, on the contrary would seem to sit very ill with those conclusions, as it would tend to leave little or nothing for the jurisdiction clause to bite on.

126. Were TRM correct the result would be that, despite those conclusions on jurisdiction, this Court should still refuse to grant any declarations if their effect would or might have a relevance in Italy, and even absent any evidence that it would have such an effect. That may not technically be an attempt to revisit the jurisdiction application, but it is an argument which has a startlingly similar result. I note, in this regard that "startling" is exactly the word used by Gross LJ in *Deutsche Bank AG v Comune di*

Savona. He also noted that would, at its lowest, be "*highly damaging to market certainty*".

Issue 6

127. The issue is: Do each of the propositions pleaded in sub-paragraphs 31 (1) – (4) of the Particulars of Claim follow from the Relevant Provisions, and if so which?

128. This issue as drafted turns on the correctness of the propositions pleaded in paragraph 31 of the Particulars of Claim, and the nature and effect of the provisions of the Master upon which BNPP relies.

129. The case that BNPP pleads at paragraph 31 of the Particulars of Claim is that four propositions follow "*by reason of the terms of the Relevant Provisions set out… above*". Those propositions are:

> "Without prejudice to the foregoing, by reason of the terms of the Relevant Provisions set out in paragraphs 13 to 16 above:
>
> (1) BNPP owed no duty to advise (whether in contract, tort, equity or otherwise) and no fiduciary duty to TRM in connection with the Transaction.
>
> (2) TRM is estopped by contract from contending that BNPP owed any duty to advise or any fiduciary duty to TRM in connection with the Transaction.
>
> (3) BNPP made no actionable representations intended to be relied on by TRM in connection with the Transaction; alternatively TRM did not rely on any representation made by or on behalf of BNPP.
>
> (4) TRM is estopped by contract from contending that BNPP made any actionable representations intended to be relied on to it in connection with the Transaction; alternatively TRM is estopped by contract from contending that it relied on any representation made by or on behalf of BNPP."

130. This issue is however effectively a distraction, because at paragraph 21(1) of its Reply, BNPP pleads that:

> "Paragraph 31 of the POC conveniently and accurately summarises the legal effect of the terms of the Relevant Provisions. But BNPP's entitlement to the relevant declarations sought arises not from this summary, but from the terms of the Relevant Provisions themselves."

131. BNPP says therefore that this is a dispute about nothing. The paragraph in question simply summarises (or purports to summarise) the effect of certain provisions pleaded earlier. The declarations sought derive from the actual wording not this summary. As Mr Beltrami put it in submissions: "*to be absolutely clear, no part of the claim turns on the summary*". This issue therefore shoots at a man of straw – though some of the issues

debated under this heading do emerge in relation to individual declarations. I will therefore deal with the true substance of the issues below under Issue 7, where the issues as to the individual declarations sought, based on the contractual wording, arise.

Issues 5 and 7

132. Issues 5 and 7 were largely taken together in submissions, and I shall echo that approach here.

Issue 5

133. Issue 5 is: Has a dispute that is within the jurisdiction of the Court arisen between BNPP and TRM in relation to the Transaction? What is the effect, if any, of TRM's failure properly to particularise and/or BNPP's inability to discern the claims which it alleges TRM may bring in the English Courts?

134. It was the first question which was at the forefront of BNPP's submissions on issue estoppel, because of the conclusion of Robin Knowles J and the Court of Appeal on jurisdiction and because of the finding of Robin Knowles J that there was a serious issue to be tried and a real dispute between the parties. The question of issue estoppel as regards the jurisdiction question was not in issue.

135. To the extent that the second part of this first question did remain live, BNPP submitted that there is plainly a real and present dispute, because TRM has threatened and then in fact commenced proceedings which deny the rights granted to BNPP under the swap. So in that respect, it submits that the case is much stronger than the *Primacom* and *Verona* cases, because there is actuality as opposed to threat of proceedings.

136. TRM's submission is grounded in the assertion that the declarations sought by BNPP are in substance negative declarations and the need for careful scrutiny at each stage. It submits that it is critical that at paragraph 30 of the Particulars of Claim, BNPP pleads as follows:

> "TRM has not properly particularised any claims it may bring against BNPP in the English courts, whether in the course of the correspondence and meetings set out in paragraphs 21 to 28 above or in the Italian Claim (and nor has IREN). Accordingly, BNPP is unable to identify with precision all facts and matters upon which it will rely in order to refute the various allegations of duty and breach of duty which are, or maybe, made against it. BNPP reserves the right to add to or amend the following in the event that TRM properly particularised is the claims that it seems to advance."

137. Thus, it submits that as far as its pleaded case is concerned, BNPP pleads that the basis for the negative declaratory relief it seeks is the prospect that TRM may, based on the allegations referred to in Section E of the Particulars of Claim, bring claims against it in the English court. On this basis the Italian proceedings are not the basis for the claim; and TRM reminds me that BNPP successfully resisted an application before me for further information as to whether BNPP said that any of the declarations would have the effect of preventing or inhibiting the claim in Italy, in part on the basis that whether

they would amount to a defence in Italy was neither here nor there in these proceedings. TRM say that BNPP has been at best coy about why it wants these declarations.

138. To the extent that reliance is now placed on the Italian proceedings TRM says (in a submission which elides with its submissions on Issue 7) that this is unsustainable in circumstances where BNPP has already pleaded a "substantive defence" brief and does not suggest that the Italian court is not able or properly equipped to grapple with any relevant English law issues which may arise. Further it says that if this Court is simply declaring rights under the contract, what is the utility of having those declarations in Italy where there is no English law claim – the claim is based either on the FA or in tort.

139. On this basis TRM says that the "dispute" on which BNPP relies is one which has not arisen in the English court, and that I cannot properly conclude that such dispute is likely to arise. It points out that no such claim has been brought or intimated; that TRM has served only a Defence and not a Counterclaim too. It has expressly confirmed in submission that it has no intention to bring any dispute here. TRM notes that BNPP is not able (save as regards the separate issue of the Waiver) to identify what claims TRM might bring before the English court. On this basis TRM submits any "dispute" between the parties in the English court is hypothetical and there is no utility in BNPP obtaining declarations from the English court – with the result that the authorities negativing the grant of declaratory relief are engaged.

Discussion

140. On this point while I can to some extent appreciate TRM's frustration with the way that this argument has developed, I am not persuaded that it would be appropriate to shut BNPP out from the possibility of declarations at this stage.

141. It is true that (while it might technically be a reservation of rights by way of pleading point) the pleaded case appears to contemplate a utility for the declarations based on English proceedings, rather more overtly than for the purpose of the proceedings in Italy. It is true also that before me at the CMC Mr Beltrami for BNPP somewhat sat on the fence regarding the purpose for which the declarations were sought, refusing to confirm by way of further information what the purpose of the declarations was *vis à vis* the Italian proceedings.

142. However I have to decide this matter now, based on the material before me, and the positions adopted by the parties at this hearing (which includes the amendment by TRM to withdraw any semblance of a positive case in this jurisdiction). Nor do I consider that there is any unfairness in doing so, for the reasons which follow.

143. The reality is that the Claim Form always made reference to the Italian proceedings as the basis for the relief being sought. That reasoning was itself likely to be capable of being inferred, if it had not been stated, from the timeline which I have set out above.

144. The Particulars of Claim then specifically pleaded the Italian proceedings, and the allegations by TRM in those proceedings, as a basis for the relief sought. The use of the proposed declarations in those proceedings was quite plainly in everyone's mind at the CMC and Mr Samek himself submitted it was really obvious - or "*plain as a pikestaff*"- that the intended use was for those proceedings. I acceded to the submissions for BNPP

at that time, not on the basis that the utility was not directed at the Italian proceedings, but on the basis that the questions asked were not relevant or necessary for this case in this court. Further if there really has been any lack of clarity up to this point (which I am not persuaded there has been), at this hearing BNPP has been quite clear: BNPP intends to use the declarations by way of defence to the Italian claim, if that Italian claim is allowed to continue.

145. On that basis while it may technically be the case that TRM has brought no claim under the Master in the Italian Claim I do consider that there is, or is plainly scope for, a degree of overlap. The centre of gravity of the proceedings is in tort or breach of statutory duty, but it is not quite that simple. The claim is about alleged mis-selling of the Transaction itself. There is a combination of contractual claims, some of them based on an alleged financial advisory contract and some of them based on the loan agreement, as well as the statutory claims and tortious claims. There is specific reference to the hedging obligations. The overlap is perhaps further emphasised by the portions of the Defence which TRM has now deleted.

146. Further, whatever the basis of the claim, it is denied by BNPP in the Italian proceedings- and in part by reference to the terms of the ISDA Master; the contractual rights under the ISDA are specifically pleaded as express defences to the Italian claim.

147. The result is overall a claim which is, on the authorities, comfortably on the right side of the hypothetical/actual divide. Looking at the passage in Zamir and Woolf to which TRM referred me in relation to concrete facts and utility, the learned authors identify four classes of case which will be the wrong side of the hypothetical line:

> "These are:
> 1. Where there is no dispute in existence;
> 2. Where the dispute is divorced from the facts;
> 3. Where the dispute is based on hypothetical facts; and
> 4. Where the dispute has ceased to be of practical significance."

148. None of these seem properly applicable to this case. The bottom line is that regardless of where the parts of the debate take place, there is a dispute between the parties as to whether the picture as to TRM's rights is one which is framed within the Master, or whether, despite the existence of the Master, those rights are different. That is a dispute as to the existence of the rights which BNPP asserts, which is an actual existing dispute. That dispute is not divorced from the facts or based on hypothetical facts. It is plainly not one which has ceased to be of practical significance.

149. As to utility, in broad terms, and without pre-judging any specific declaration, one can see that there is scope for there to be a utility in some declarations. In particular a judgment in England as to the meaning and legal effect as a matter of English law of specific clauses within the Master will be enforceable against TRM in Italy under the Brussels Regulation, and will in any event be of assistance to the Italian judge insofar as she or he is being asked to consider matters of English law within the compass of the dispute which emerges there.

150. As for the submission that the Italian Court is perfectly well fitted to decide these questions without that help, that does seem to me to come perilously close to relitigating the question of jurisdiction which has been decided by this Court and the Court of

Appeal. This Court has jurisdiction over questions relating to the Transaction. To say that the Italian Court could perfectly well decide the issues would be to undercut not just that decision, but also the scheme of the Brussels Regulation. TRM's approach would appear to be one which would apply equally in such cases as *Primacom* and *Verona* – where it was plainly not the approach taken.

151. But in addition, the Master is governed by English Law. To the extent that the Italian Court has to grapple with what the Master means, this Court is best placed to decide that, and the Italian Court is likely to be assisted by that determination.

152. The fact that BNPP has not identified in its Particulars of Claim (or in its Reply or via the attempted Request for Further Information) specifically how each of the declarations it seeks would serve a useful purpose as regards the claims TRM brings in Italy is neither here nor there, particularly when the Italian proceedings are still at an early stage. The authorities in which declarations were granted even before litigation had been commenced elsewhere make good this point, as do the authorities about the lack of need for a material or tangible benefit. Much may on depend what shape emerges from the jurisdictional dispute with which that court will be grappling, but what is already clear is that the provisions are seen as a basis for a defence, and hence that the declarations as to the English law meaning of the provisions have real scope to have a use.

153. The fact that the FA contains an exclusive jurisdiction clause in favour of the Italian Court is also neither here nor there in the light of the determination on jurisdiction. I am not being asked to make any determination as to the meaning of the FA, which is subject to an Italian jurisdiction clause. To the extent that it was submitted that the Italian claim was made in breach of the EJC in the ISDA Master or that I should be astute to hold the parties to their bargain (which might be read as saying the same thing), I do not think that is a matter for me and this hearing. No relief is sought on that basis.

154. I am however asked to make a determination regarding the meaning of certain documents arising out of the separate Transaction which the Court of Appeal has held is a matter for this Court – pursuant to that Transaction's own jurisdiction clause. Again, while TRM says that it has made and makes no claims under the Transaction, the meaning and implications of the Transaction are live in those proceedings.

155. Accordingly, there is no *in limine* objection to the declarations – though the question of whether each declaration should be granted is one which still falls to be considered.

Issue 7 – individual declarations

156. Issue 7 is: Is BNPP entitled, by reason of the terms of the Relevant Provisions, to the declarations sought in respect of the Transaction in sub-paragraphs 1(a), 1(b), 1(c), 1(d), 1(e), 1(g) and 1(h) of the Prayer?

157. One point of general application made by TRM was that any declarations granted should be stated to be "*subject to the provisions of the Schedule"*. I am not persuaded that this is appropriate. Unless there is any limitation on any of the rights established, it would, as BNPP submitted, be wrong to qualify any apparently unqualified rights. No limitation was established to any of the declarations sought; though the existence of arguments which are intended to be pursued elsewhere were made clear. Were I to make

such a qualification without grappling with those points it seems to me that it would materially undercut the utility of the declarations which I do make, because it would either give the impression of a blanket qualification (which is not really suggested to exist) or leave the extent of any qualification unclear, so the Italian Court could not know exactly what was the English Law position. The utility of the declaration would thereby be undermined.

158. Further it would in effect be a less clear way of giving the answer which TRM sought – and which I have rejected – in relation to Issue 2.

159. I reject that submission, therefore. Such declarations as I grant will not be so qualified. Nonetheless I make very clear that I am not purporting to decide here any point which the Italian Court may have to decide about the way that the documents in this case interact as a matter of Italian law or the existence or extent of any qualification under that law which the Italian Court will be asked to rule on - if jurisdiction is accepted. I am considering only the questions of English Law, as to the meaning of provisions of the English Law agreement.

160. With that introduction, I pass on to the individual declarations sought.

Declaration at sub-paragraph 1(a):

161. On this declaration, once one had got past the preliminary points with which I have already dealt, there was no real effective opposition offered by TRM.

162. The main point raised, at least in writing, though it was not pursued orally, related to the amendment to Clause 17.19. This point however is exactly the same argument as one which was run in the context of the jurisdiction hearing and which I have noted above was firmly rejected at [92] of the Court of Appeal's judgment.

163. While this judgment may not be, as I have noted, binding, I do find the analysis persuasive. But I will add that even absent this, I would have been clear in my mind that this argument was misconceived. It is very hard indeed to see how the amendment could in any way be said to be in pursuance of the Transaction. The declaration sought refers to the Transaction and ISDA; as Robin Knowles J found, in another persuasive passage, the Transaction Documents do not include the FA. The suggestion that the FA, which is the original agreement which gives rise to the Transaction, could somehow by means of this amendment become a document "*entered into and/or executed pursuant to the Transaction Documents] [the Master etc.]*." has a considerable sense of "Through the Looking Glass" about it.

164. As for utility, it is not to the point that TRM continues to abide by the terms of the Master, continues to pay all sums due and does not claim in the Italian Claim that the Master is not binding on it. The status of the Master and its terms is in play in the Italian proceedings as noted above. In this context this declaration forms a logical starting point for declarations about its terms and is of sufficient utility to be ordered.

Declaration at sub-paragraph 1(b): Entire Agreement

165. This declaration was also not really challenged independently from the earlier arguments. It follows that it should be made.

Declarations at sub-paragraph 1(c) and 1(d) – main representations and contractual estoppel

166. Paragraph 1(c) contains a number of declarations which BNPP says track the provisions in the ISDA Master:

i) Paragraph (1)(c)(i): that TRM had "*made its own independent decision*" to enter the Transaction and as to whether the Transaction "*was appropriate or proper for it based on its own judgment and upon advice from such advisers as it has deemed necessary*" – this tracks the Non-Reliance Representation in Part 5(d)(i) of the Schedule and page 7(i) of the final Confirmation;

ii) Paragraph (1)(c)(ii): that TRM "*was not relying on any communications (written or oral)*" of BNPP "*as investment advice or as a recommendation to enter into*" the Transaction – this also tracks the Non-Reliance Representation in Part 5(d)(i) of the Schedule and page 7(i) of the final Confirmation;

iii) Paragraph (1)(c)(iii): that TRM had not received from BNPP "*any assurance or guarantee as to the expected results*" of the Transaction – this also tracks the Non-Reliance Representation in Part 5(d)(i) of the Schedule and page 7(i) of the final Confirmation;

iv) Paragraph (1)(c)(iv): that TRM "*was capable of evaluating and understanding … and understood and accepted the terms, conditions and risks*" of the Transaction – this tracks the Non-Reliance Representation in part 5(d)(ii) of the Schedule and page 7(ii) of the final Confirmation;

v) Paragraph (1)(c)(v): that TRM was capable of "*assuming, and assumed, the financial and other risks*" of the Transaction – this also tracks the Non-Reliance Representation in Part 5(d)(ii) of the Schedule and page 7(ii) of the final Confirmation;

vi) Paragraph (1)(c)(vi): that TRM was acting as principal – this tracks the representation in Part 5(d)(iv) of the Schedule and page 7(iv) of the final Confirmation;

vii) Paragraph (1)(c)(vii): that TRM had "*specific competence and expertise*" to enter into the Transaction – this tracks the Non-Reliance Representation in Part 5(e)(i) of the Schedule;

viii) Paragraph (1)(c)(viii): that TRM had entered into the Transaction "*for hedging purposes and not for speculative purposes*" – this tracks the representation in Part 5(e)(ii) of the Schedule;

ix) Paragraph (1)(c)(ix): that TRM had "*full capacity to undertake the obligations*" under the Transaction – this tracks the representation in Part 5(e)(iii) of the Schedule.

167. The declaration sought at paragraph 1(d) then provides the alternative argument based on contractual estoppel. Hence these two arguments stand together. Further, the issue as to whether the Entire Agreement Clause was capable of covering misrepresentations

becomes academic in the light of these provisions – either they are enforceable, in which case the argument as to the ambit of the Entire Agreement Clause becomes academic, or they are not, in which case the Entire Agreement Clause could add nothing.

168. BNPP's argument is that, applying accepted principles of contractual interpretation, it is clear that TRM agreed that BNPP did not make any actionable representations to TRM, and that TRM did not rely on any representations in connection with the Transaction. It says that:

i) By the Validity Representations and the Entire Agreement Clause, TRM accepted that its obligations pursuant to the Transaction Documents represented its legal, valid and binding obligations and that the Transaction Documents were the exclusive source of its obligations in relation to the Transaction.

ii) The objective meaning of sub-paragraph (i) in Part 5(d) of the Schedule is clear. This provision is supplemented by, and is consistent with, the representation in Part 5(e)(i) of the Schedule, which provides that TRM had the competence and expertise to enter into the Transaction. These provisions demonstrate that the responsibility for entering into the Transaction falls on the respective parties.

169. BNPP submitted that there is no ambiguity in the language of those provisions and there is no competing interpretation of them, valid or otherwise. There is no challenge to the validity of the Schedule and TRM's obligations in respect of it. These representations are therefore binding on TRM. BNPP also says that as a result of the Non-Reliance Representations, TRM is estopped by contract from contending that to the contrary.

170. TRM's position was in summary that:

i) In circumstances where the parties' bargain in relation to the "Transaction" was also contained in the FA, none of the declarations sought is justified on the wording in the Prayer. That wording is apt to suggest that the entirety of the parties' bargain was contained in the Master.

ii) If the court was minded to grant any of the declarations under sub-paragraph 1(c), then it should do so only if each declaration exactly tracked the relevant provision in the Master.

171. As regards the declaration 1(d) (which arises only if the declarations at 1(c) have been granted in whole or in part) TRM submitted that the declaration sought should not be made, essentially because BNPP's suggestion that a contractual estoppel in the terms of the declarations sought in sub-paragraph 1(c) might arise "in the alternative" makes no sense. TRM says that BNPP adduces no evidence at all as what utility there would be in the grant of these declarations.

172. In any event it was TRM's submission that such clauses as are in focus here are either not capable of giving rise to a contractual estoppel or should not be held to create one - either as a matter of authority or because they would be subject to the requirement of proving reasonableness under section 3 of the Misrepresentation Act 1967.

Discussion

173. The first point raised by TRM in relation to declaration 1(c) is essentially the same point that was made in relation to declaration 1(a). There is no factually distinct basis for the argument at this stage. It follows that I prefer the arguments of BNPP on this point.

174. So far as concerns the question of exact tracking, it was not clear to me from argument that there were any specific respects in which the declarations sought were said not to track the Master.

175. Declaration 1(d) has two limbs. The first is the dispute on the law as to whether such representations do give rise to a contractual estoppel. The second is as to utility.

176. The relevant authorities start with *Springwell Navigation Corpn v JP Morgan Chase Bank* [2010] EWCA Civ 1221; [2010] 2 CLC 705. That case broadly supports the finding of contractual estoppels arising from such clauses. Aikens LJ said at [143] that:

> "there is no legal principle that states that parties cannot agree to assume that a certain state of affairs is the case at the time the contract is concluded or has been so in the past, even if that is not the case, so that the contract is made upon the basis that the present or past facts are as stated and agreed by the parties."

Further he held that considerations of "*justice and equity*" were said to be irrelevant to the existence of a contractual estoppel at [178].

177. Most pertinently at [170], responding to a submission that the language of this clause did not produce an estoppel, because an acknowledgement or a representation by a party is not the same as an agreement and therefore cannot create a contractual estoppel, the court held:

> "I disagree. The correct analysis must be the same as that in *Peekay*. Springwell signed the terms and conditions more than once. In law it is to be taken as having read and understood them. Therefore the terms are part of the contract for the sale of the GKO LNs and Springwell is bound by them. Springwell and Chase contract for the purchase of the GKO LNs on the basis that Springwell is bound contractually to its statement, or acknowledgement, that no representation or warranty has been made by Chase."

178. TRM pointed to the judgment of Leggatt LJ in *First Tower Trustees and another v CDS (Superstores International) Ltd* [2018] EWCA Civ 1396; [2019] 1 W.L.R. 637 as qualifying that approach and justifying a distinction between warranties/undertakings (which would give rise to an estoppel) from mere representations, which would not. In that case at [94] he stated that:

> "Like Moore-Bick LJ in *Peekay* at [57], 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. But I question whether a clause, such as clause 5.8 of the lease in this case, which says simply that A "acknowledges" that it has not entered into the contract in reliance on any representation made by B, clearly expresses such an intention. It seems to me that such wording is more naturally understood as stating a fact which may or may not be true. That, indeed, is how a similarly worded clause was understood by the Court of Appeal in *Watford Electronics Ltd v Sanderson* CFL Ltd [2001] EWCA Civ 317, [2001] 1 All ER (Comm) 696. If what the parties wish to agree is that A will not assert in any future dispute that it relied on a representation made by B even if A did in fact rely on such a representation, then it seems to me that this is what the clause ought to say. However, a different view was taken by the Court of Appeal in *Springwell* at [170]. No doubt for that reason the tenant did not dispute in the present case that clause 5.8 of the lease has that meaning, and I shall therefore assume that it does".

179. It seems to me tolerably clear from this, that whatever Leggatt LJ might think of the point *obiter*, or might in due course hold in another case, he was not here purporting to or intending to overrule or qualify *Springwell*. It is also worth bearing in mind that the factual situation there was very different (the case concerned the effect of an exclusion clause in a commercial lease and its effect *vis à vis* pre-contractual enquiries which misrepresented the position as regards asbestos on site). Leggatt LJ was not purporting to consider the effect of representations of this sort in this context.

180. TRM also relied on the judgment of Andrew Smith J in *Credit Suisse International v Stichting Vestia Groep* [2014] EWHC 3103 (Comm), a case concerning the ISDA Master agreement, at [303]. Having recognised the principle by reference to *Peekay* and *Springwell* he stated:

> "It is important to distinguish the applicability of this principle to (i) representations made by Vestia in section 3(a), section 3(d) (and the Management Certificate) and the Additional Representations, and (ii) the warranties given by Vestia in the Additional Representations. Mere representations do not, as I see it, engage the principle of contractual estoppel and in any case, as I have explained, I do not consider that the representations in the Master Agreement itself are to be interpreted as applicable to the time when the ultra vires contracts or other transactions were made or purportedly made."

181. I am not persuaded that this authority takes matters any further forward. The reality is that I am bound by *Springwell* – a conclusion which Mr Samek came close to conceding and which was also reached by Hamblen J in *Standard Chartered Bank v Ceylon Petroleum Corporation* [2011] EWHC 1785 (Comm) at [526]-[528].

182. Nothing in *First Tower* or *Vestia* changes that. In any event *Vestia*, like *First Tower*, is *obiter* on this point. Secondly it does not seem a safe reading that Andrew Smith J, in

this brief passage, was seeking to draw a distinction generally between warranties and mere representations, but rather between specific provisions and other specific provisions in that case. In that connection, while the case was a case about the ISDA Master, the declarations being sought were not derived from the ISDA Master but a separate schedule.

183. As I have noted, I am effectively bound by *Springwell*. But to the extent I were not I would consider that, the question might in any event be said to be whether the court can objectively conclude that by the relevant contractual materials the parties did intend to agree in such a way. In that regard, the question seems to be one not of formalism, dependent on the precise wording (representation vs warranty) but of substance. In that context, while that was a case where the word "warranty" appeared, Hamblen J in *Cassa Risparmio della Repubblica di San Marino* said at [515] "*Whether or not the communications are being relied upon as advice or recommendations depends upon the substance of the claim made.*"

184. That being the case one would be engaged not in discerning a dividing line between warranties and representations, but on that intention – an exercise into which the relevant background, including the nature and status of the ISDA would enter. On that basis even if *Springwell* were not binding, I would reach the same conclusion, namely that a contractual estoppel exists.

185. As to the argument by reference to reasonableness and the Misrepresentation Act, this was principally addressed to Issue 6, which as I have found does not arise. It was not addressed either in the skeleton or orally by reference to the declarations itself. However, to the extent that it was, by logical extension, directed to this declaration also, I was entirely unpersuaded of its merits.

186. One starting point is to note that it appeared to be generally directed to the contractual estoppels, without any meaningful attempt to identify which should be said to be exclusion clauses for the purposes of this argument. An exclusion clause must of course be clearly identified.

187. Further the argument faced two other difficulties. The first was the burden of raising the issue (the burden of proof, once the issue is raised, being on the party relying on the alleged exclusion clause to satisfy the requirement of reasonableness under section 11(5) of UCTA). It is as a matter of law at least incumbent on a party wishing to rely on such a provision to put it fairly in issue, which was not done. It cannot be acceptable for a party to (as TRM did here) stay absolutely quiet on the subject until the door of the court, and then play their joker in the form of the Act, asserting that the burden of proving reasonableness has not been discharged by its opponent.

188. This was in effect the point being made by the Court of Appeal in *African Export-Import Bank v Shebah Exploration and Production Co Ltd* [2017] EWCA Civ 845; [2018] 1 WLR 487 when at [18] they said:

> "Before the Act can be held to apply and require an inquiry into reasonableness of any particular term, the party relying on the Act must establish (the onus of proof being on that party) ... (i) that the term is written; (ii) the term is a term of business (iii) the terms is part of the other party's standard terms of business; and

> (iv) that the other is dealing on those written standard terms of business."

189. That point, as Mr Beltrami submitted, has particular resonance where the parties have, as they have here, agreed that the matter should proceed under the Shorter Trials Scheme specifically on the basis that there were no issues on the pleadings which required evidence.

190. It follows that I do not accept the submission that Flaux J was wrong when in *Barclays Bank plc v Svizera Holdings BV* [2014] EWHC 1020 (Comm); [2015] 1 All ER (Comm) 788 at [61]:

> "In view of the consistent judicial recognition of the effectiveness of provisions such as cl10(3)(c) to give rise to a contractual estoppel, the suggestion by Mr White that in some way that provision should be struck down as unreasonable under ss3 and 11 of the Unfair Contract Terms Act 1977 is hopeless. In any event, as Mr Toledano pointed out, s3 only applies to exclusions or restrictions of liability for a breach of contract. The defendants cannot point to any breach of the Mandate Letter, the Fee Letter or the Facility Agreement."

191. Indeed, it seems that that conclusion might very well apply *mutatis mutandis* in this case.

192. The second problem for TRM was that, in the absence of factual evidence specifically addressed to this point, such evidence as there was pointed in the other direction. This is not a case of a consumer transaction, or a case of inequality of bargaining power. The terms were contained within ISDA agreements which are effectively market standard terms and within a bespoke schedule which was agreed between two commercial parties of, the court can properly assume, equal bargaining power. Mr Samek himself described them as "*sophisticated commercial parties*". Indeed, if one party was at a disadvantage it might more readily be thought to be BNPP, given that it was selected following a process of tendering by TRM, as explained above. This would seem to be, as Lord Wilberforce indicated in *Photo Production v Securicor* [1980] AC 827 a paradigm case for "*leaving the parties free to apportion the risks as they think fit*".

193. That certainly was the conclusion reached by Hamblen J in *Standard Chartered Bank v Ceylon Petroleum Corporation* [2011] EWHC 1785 (Comm) at [571]-[573] in a case concerning the ISDA Master which had obvious parallels with the present case.

194. That leaves the question of utility. To an extent this flows from the conclusions I have already reached in relation to the earlier declarations. However it is a question which requires to be separately considered because of the negative nature of this declaration, and the caution which is appropriate in that context. In the light of the fact that this case is not one such as a number of those cited by TRM where foreign proceedings were the proper focus for the disputes overall in the absence of a contract with an English exclusive jurisdiction clause, I am not persuaded that this case falls into the category where such an injunction should "*very rarely be granted*". Further as to utility this declaration really is a clarification of the impact of the earlier declarations. It answers a question which one might logically expect the Italian Court to ask, in the event that

the terms of the Master come into focus. And as I have noted those terms are in focus, albeit (i) they are not central to the dispute and (ii) the precise ambit and course of the dispute is not, given its early stage, clear.

195. It follows that I am prepared to grant the declarations sought.

Declaration at sub-paragraph 1(e).

196. It was accepted that the position in relation to this declaration followed from the decision on 1(c) and 1(d).

Declaration at sub-paragraph 1(g)

197. This was the single most contentious declaration before me, and it is the one which gave Robin Knowles J and the Court of Appeal most pause for thought at the jurisdiction stage, with both making some changes to it.

198. The declaration sought here is the one which is least susceptible of being said to be a positive declaration; Mr Beltrami conceded that it could be seen as a negative declaration. It is also conceded not to track the wording of the Master. It is said to be sought because it gives effect to the legal conclusion of those rights.

199. The parties were broadly *ad idem* in regarding it as a precautionary declaration. BNPP frankly accepted that the reason for definition of "Claim" being broad is that it cannot know what it will face in future. It points to the fact that there have been claims in Italy on a variety of bases. BNPP says: "*we want to ensure that the ingenuity of a claimant doesn't get round what we say the effect of the rights is*".

200. TRM's submission was that the declaration sought was impossibly broad, encompassing everything under the sun, including legal situations which have not arisen yet and which may not arise and there beingno evidence as to the likelihood of their arising; disputes not based on concrete facts and hypothetical situations. TRM contends that BNPP adduces no evidence of what utility such a negative declaration would serve.

Discussion

201. Ultimately, I was not persuaded that it would be right to grant this declaration. The declaration sought, for ease of reference is this – the form amended by the Court of Appeal:

> "g) By reason of sub-paragraphs l(a) to 1 (f) above, the Claimant is not liable in respect of any claim relating to the Transaction, including for losses in respect of any claim, under any system of law or regulation, in contract, tort/delict, statute or otherwise, and including but not limited to claims for breach of duty of care (including without limitation, a duty to advise), breach of contract, breach of fiduciary or other duty including any duty of good faith, non-disclosure, omission, misrepresentation (whether innocent, negligent or fraudulent) or breach of statutory or regulatory obligation arising out of or in connection with the

> Transaction (including but not limited to its suitability, its pricing, its notional amount, its terms, its execution and the circumstances of the Defendant's entry into it) (a Claim)."

202. There are a number of facets which feed into my conclusion.

203. The first is the caution appropriate to approaching a negative declaration. I need to be persuaded that it is appropriate to make this declaration despite the reversal of roles inherent in this type of declaration. Another is the question of utility. There are two facets to this. One is the question of the focus of the declaration. Here, while there are proceedings on foot, the declaration is sought essentially as an insurance against issues which may arise in future. There is no question of pointing to some point or points in the Italian proceedings and saying "*this is why we need this*" – or even saying that that the logical next step from something at present in the proceedings will directly call this point into issue. The issue is not entirely hypothetical, because of the existence of proceedings with a broad focus, but it is at best contingent. It is not like the declarations which mirror actual terms – those terms are specifically pleaded and specifically in issue in the Italian Claim. Here I bear in mind the line indicated in Zamir & Woolf at 4- 182 as well as the caution exhibited on this subject by Teare J in *Verona*.

204. I am troubled by the breadth of the language used, and the absence of tie demonstrated to any specific claim or argument (actual or anticipated). That seems to come close to Zamir and Woolf's second category of a dispute divorced from the facts. The words "*any claim relating to the Transaction*" are so broad as to potentially encompass, notwithstanding the amended (by deletion) wording, claims which would fall within the scope of the FA. Similarly wording such as "*in respect of"*; "*including but not limited to*" (wording described by Mr Samek as *"beloved of lawyers but a recipe for confusion"*); "*including without limitation*" provide indications, which are not effectively negatived, of an uncertain ambit. Those are reinforced by the references to claims arising in relation to *"the circumstances of the Defendant's entry into"* the Transaction, which given the factual background offers obvious scope for lack of clarity.

205. Here I find echoes of what was said in the *Prince* case about the risk that the granting of additional relief could itself create a confusion which would not otherwise arise. There Neuberger J noted that if a declaration added nothing, the fact of its having been granted might lead another court to think (wrongly) that it did add something; and that conversely if a declaration does take matters further the reason why it is needed should be clear – and if it is not, there is a danger of confusion. Another sidelight from the authorities is the point made by Floyd LJ in the recent case of *Mexichem UK Limited v Honeywell International Inc* [2020] EWCA Civ 473 at [18] that *"the extent of generality or particularity of the declaration may affect the utility of the declaration".*

206. I am also troubled by what appears to me to be "boilerplate" drafting. One example is the reference to exclusion of liability in relation to "*any system of law*" without identifying what "*system of law*" or why such wording is necessary (or indeed appropriate for this English court to grant). Another is the reference to delict.

207. Another factor is that there is force in TRM's submission that it should not be left to third parties to try and interpret the wording of a declaration based on submissions. This also links to the concern expressed by Marcus Smith J in the *Bank of New York Mellon*

case as to the potential for interference in foreign process. Here it is not a case of the evidence suggesting that the declaration will have an effect on foreign process. But there is a concern that to the extent that there is any lack of clarity which could result in the declaration as being seen to extend beyond the true logical consequences of the contractually based declarations, it has the capacity to do so. While it was submitted that the declaration is to clarify the earlier declarations, I struggle to see how (i) that is necessary or (ii) how the broader declaration achieves that.

208. Finally, when I look at the authorities I am not steered in another direction by any case where a declaration such as this has been made. BNPP relied heavily on the case of *Verona*. However, that was a case which was not contested and where the point was not therefore fully argued. Further in that case Teare J still granted narrower declarations than this declaration and declined to grant the wider declarations which might be seen as the parallel to the present declaration.

209. Accordingly while I have no difficulty in stating that as a matter of principle the clauses which give rise to the declarations I am granting would be expected to be given their full weight – and that may ultimately have a similar effect to the declaration sought - I am not prepared to make the declaration sought, even as "trimmed" by the Court of Appeal.

Declaration at sub-paragraph 1(h) - indemnity

210. There was not much dispute between the parties that the conclusion on this point effectively tracked the conclusion on the previous declaration. I accept TRM's submission that this is too wide and insufficiently grounded in an actual dispute, in particular when there is no pleaded case, and BNPP advances no evidence, that any loss has been suffered, illustrating *par excellence* that the issue is only hypothetical.

Issue 8- Limitation

211. The Issue is: Would any claims issued by TRM in the English courts in respect of the Transaction be statute barred? Should the court rule on a hypothetical claim?

212. This point is again quite closely related to declaration (g) and the indemnity. Despite BNPP's best attempts I am not minded to grant this declaration. BNPP tacitly accepts that this declaration is hypothetical. However it says that there is a clear limitation issue in that any alleged claim that TRM may bring against BNPP for breach of a common law duty of care, breach of contract, breach of statutory duty or breach of fiduciary (or other equitable) duty in connection with its entry into the Transaction Documents would have accrued on 23 March 2010, which is the date on which TRM entered into the Confirmation, alternatively (at the latest) on 1 April 2010, which is the "Effective Date" of the Transaction. By that date, TRM was "locked into" the Transaction and, at least on the case that it has advanced in Italy, suffered measurable loss by being committed to a transaction which (it claims) was unsuitable, loss-making and overpriced.

213. There is no issue between the parties as to the potential existence of the limitation argument. What is in issue is the appropriateness of granting a declaration - and a declaration in those terms, when it could be referable only to a claim not yet brought or threatened.

214. BNPP itself accepts that it is unusual for a court to grant a declaration that is hypothetical, but it is not impermissible. It says that in *San Juan v Allen* [2016] EWHC 1502 (Ch) Master Clark set out the correct approach:

> "I do not accept the general principle advanced by the defendants' counsel that a declaration will be refused where the relevant facts have not yet occurred. Whether facts are "hypothetical" is a question of fact and degree, depending on the level of uncertainty attached to their future occurrence. As Zamir & Woolf say (at para 4-79) [f]acts should not be treated as hypothetical as long as they are likely [to] occur within a reasonable timescale. Furthermore, even this principle is qualified by them: '*Where, however, there are sensible practical reasons for granting a declaration the courts will do so even though the events with which the declaration deals have not happened and may not happen*.'"

215. BNPP submits that this position is consistent with the statement by David Richards J (as he then was) in *Pavledes v Hadjisavva* [2013] EWHC 124 (Ch) that: "*there is nothing … requiring an actual or an imminent infringement of a legal right before a declaration will be made*".

216. TRM says that there are real grounds for concern about granting a declaration that, if any "Claim" were made, any Limitation Act 1980 defence raised by BNPP would succeed. It says that whether or not such a defence would succeed depends on a host of imponderable factors, for example: (i) the nature of the claim which TRM might bring; (ii) the applicable law of such claim, because the applicable law will determine any issue of limitation of action; (iii) if English law applies so that the Limitation Act 1980 might be engaged, then there are statutory provisions which provide for the extension or suspension of periods of limitation, the application of which depends on the ascertainment of facts.

217. So far as concerns *San Juan v Allen* TRM contends that case was not concerned with the making of declarations of the type sought here.

218. On this issue I prefer the arguments of TRM. In the first place the basis for the utility of the declaration, as drafted, is not made out. It is dubious that the question of English Law limitation can have relevance to the Italian claim and it has been made clear that TRM has no intention of commencing proceedings in England. Certainly its relevance has not been demonstrated. The declaration as drafted is broad, and glosses over such troublesome issues as section 32 of the Limitation Act (or indeed sections 14A, 14B, 21, 28 and 29). I struggle to see how I could properly make a declaration which on its face excluded the possibility of the operation of those sections. Those issues would themselves be sufficient to prevent me exercising the discretion to grant a declaration.

219. However, I would add that I am unpersuaded that the passage from the Master's judgment in *San Juan* is of any great utility here. The case concerned a very different factual scenario. In that passage she is addressing the issue of whether a matter can properly be described as hypothetical or not in the context of prematurity. Neither in my assessment does *Pavledes v Hadjisavva* advance the matter. That case – another building case – was based on very different facts. It was not concerned with an even

arguably hypothetical matter. Rather the issue for the court was whether to grant declarations as to the Claimants' admitted rights in relation to a proposed development.

Issue 9 – Waiver

220. While the declaration regarding BNPP's right to grant/withhold the Waiver does not itself mirror the wording of the Transaction Documents it was not strongly in issue. The declaration sought is said to give direct effect to the actual rights expressly granted. Whilst TRM's right to pre-pay the outstanding loan amounts arises under the FA, it is the ISDA Master and the Schedule which provide that pre-payment constitutes an "Additional Termination Event", which in turn gives BNPP the right to designate an ETD. TRM's request to BNPP was to waive its ETD Right, and so the declaration is concerned solely with BNPP's entitlement under the Transaction Documents. TRM did not point to any provision in the Transaction Documents which would suggest that BNPP has an obligation to grant the Waiver.

221. The main point of contention is whether this was a point which was in issue at all. Although TRM attempted to persuade me otherwise, on an examination of the history of this dispute it is relatively plain that this point is in issue. It may be, as was suggested, something of a storm in a teacup; but a storm of some sort there is. Given the history one can also see a good basis for utility – to the extent that the point may be pursued elsewhere, as seems inevitable if such proceedings go ahead, it will clarify the English Law position.

222. One other point which came into focus was that TRM originally pleaded the alleged existence and breach by BNPP of an Italian law duty of good faith. That contention was deleted by amendment. It might thus be said that it is not a live issue. However plainly there is an intention to pursue the Italian good faith duty there, if the proceedings progress. It may be significant for that court to know that that does not affect the English law analysis of the contractual rights. It will be of utility to the Italian Court to know that as a matter of English Law no such duty arises under the Transaction Documents and that if such a duty does exist its basis must be found elsewhere.

Conclusion

223. It follows that BNPP succeeds in part. It succeeds on Issues 1, 2, 5, 9 and (in part) 7. In relation to the latter, I grant the declarations sought, save in respect of the declarations sought at (1)(g) and (h) and - since BNPP also fails on Issue 8 – 1(i).