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IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
COMMERCIAL COURT (QBD)
[2020] EWHC 3150 (Comm)



No. FL-2019-00012

Rolls Building
7 Rolls Buildings
Fetter Lane
London EC4A 1NL

Monday, 9 November 2020

Before:

MR JUSTICE BUTCHER

B E T W E E N :

(1) BANCA INTESA SANPAOLO SPA
(2) DEXIA CREDIP SPA

Claimants/Respondents

- and -

COMMUNE DI VENEZIA

Defendant/Applicant

MR J. DHILLON QC and MR G. KEUHNE (instructed by Pinsent Masons LLP) appeared on behalf of the Claimants/Respondents.

MR R. COX QC and MR.C. ULYATT (instructed by Osborne Clarke LLP) appeared on behalf of the Defendant/Applicant.

J U D G M E N T

(via MS Teams)

MR JUSTICE BUTCHER:

- 1 This is an application by the Defendant Municipal Authority to strike out certain paragraphs of the Claimant Banks' Particulars of Claim under CPR 3.4(2)(b) and/or for a stay under section 49(3) of the Senior Courts Act 1981.

The Factual Background

- 2 The factual background to this can be summarised as follows. In making this summary, I should emphasise that it is intended to be uncontentious and not to involve any findings in relation to matters of disputed fact or law. In 2002, Venice had issued €156 million worth of bonds ("the Rialto Bonds") and had entered into an associated interest rate swap with Bear Stearns Bank plc ("Bear Stearns"). As part of a tender process, the two Claimant Banks submitted restructuring proposals in April and May 2007. In July 2007, Venice engaged the Banks under a Mandate Agreement to carry out a restructuring of the bonds as part of which Venice and the Banks were to negotiate terms for the restructuring of the Bear Stearns interest rate swap. The Mandate Agreement contained a choice of Italian law and of the exclusive jurisdiction of the forum of Venice.
- 3 On 1 November 2007, Italian legislation transposing the MIFID directive came into force in Italy. Shortly thereafter, Banca Opi (the First Claimant's predecessor in title) and Venice entered into an Investment Services Agreement ("ISA"). This provided that it was governed by Italian law and conferred exclusive jurisdiction on the Italian courts. It contained provisions in relation to the consulting services which were to be supplied by Banca Opi. In December 2007, Venice entered into interest rate swap transactions with the Banks. A suite of documents was entered into in relation to these transactions, including a 1992 ISDA Master Agreement (Multicurrency-Cross Border) and a schedule thereto. The ISDA Master Agreements and schedules contained a choice of English law and an exclusive choice of jurisdiction in favour of the English courts. They also included a number of representations given by Venice to the Banks.

The Procedural History

- 4 Venice commenced proceedings in Italy by an *atto di citazione* (writ of summons), dated 21 June 2019, issued in the Tribunale di Venezia. In that writ of summons Venice claimed that the Banks had failed to comply with advisory obligations said to have been owed by them to Venice deriving from the Mandate, the ISA to which I have referred and certain Italian legislation. Amongst other things, it was alleged that the Banks had failed to provide Venice with certain information regarding the swap transactions and, in effect, that those transactions were not suitable for Venice. Venice also advanced alternative claims in delict. It claimed that the Banks' breaches of duty caused it to enter into the swap documents under which it contended it had suffered losses of some €55 million-odd as at 24 June 2019 and sought damages in that amount. In those proceedings, Venice does not formally challenge the validity of the swaps, but claims the sums paid and payable under them.
- 5 On 15 August 2019, that is to say just less than two months later, the Banks issued the Claim Form in these proceedings. The Claim Form was served on Venice on the same day.

The Claim Form

- 6 It is important to understand the nature of the claims which were set out in the Claim Form. It was in these terms:

“Brief details of claim

The Claimants’ claims are for declarations in connection with (1) an interest rate swap transaction concluded between Banca Opi S.p.A. (“Banca Opi”) and the Defendant (“Opi Transaction”); and (2) an interest rate swap transaction between the Second Claimant and the Defendant (“**Dexia Transaction**”) (the Opi Transaction and the Dexia Transaction being, together, the “**Transactions**”).

The Transactions were entered into in connection with the restructuring of the Defendant’s indebtedness. The terms governing each of the Transactions are contained in the following transaction documents (“**Transaction Documents**”):

- a) a 1992 ISDA Master Agreement (Multicurrency - Cross Border) between Banca Opi and the Defendant dated as of 21 December 2007, and the Schedule thereto;
- b) a novation confirmation between Bear Stearns Bank plc (“**Bear Stearns**”), Banca Opi and the Defendant dated 21 December 2007;
- c) a trade confirmation dated 21 December 2007 in respect of the Opi Transaction;
- d) a 1992 ISDA Master Agreement (Multicurrency - Cross Border) between the Second Claimant and the Defendant dated as of 21 December 2007, and the Schedule thereto;
- e) a novation confirmation between Bear Stearns, the Second Claimant and the Defendant dated 21 December 2007;
- f) a trade confirmation dated 21 December 2007 in respect of the Dexia Transaction.

On 1 January 2008 Banca Opi merged with Banca Intesa Infrastrutture e Sviluppo S.p.A. and a new entity, Banca Infrastrutture Innovazione e Sviluppo S.p.A., was created. On 21 November 2012, but effective from 1 December 2012, Banca Infrastrutture Innovazione e Sviluppo S.p.A. was divided and the banking activity unit was transferred together with all of its rights and obligations to the First Claimant. As a consequence, all of its rights and obligations under the Opi Transaction were transferred to the First Claimant and the Defendant was duly notified of the transfer on 28 November 2012.

The First Claimant seeks relief in respect of the Opi Transaction and the

Second Claimant seeks relief in respect of the Dexia Transaction as follows:

1. Declaratory relief, including declarations that:
 - a) The Defendant has and, at all material times, had the power to execute and deliver the Transaction Documents and any other documentation relating to the Transaction Documents that it is required to deliver and to perform its obligations under the Transaction Documents and has taken all necessary action to authorise such execution, delivery and performance.
 - b) The execution, delivery and performance of the Transaction Documents, any documentation relating to the Transaction Documents that the Defendant is required to deliver, and the Defendant's obligations under the Transaction Documents does not and did not at any material time violate or conflict with any law applicable to the Defendant, any provision of its constitutional documents, any order or judgment of any court or other agency of government applicable to it or any of its assets or any contractual restriction binding on or affecting it or any of its assets.
 - c) The Defendant had obtained all governmental and other consents that are required to have been obtained by it with respect to the Transaction Documents and those consents are in full force and effect and all conditions thereto have been complied with.
 - d) The Defendant has and, at all material times, had complied in all material respects with all applicable laws and orders to which it may be subject if failure to do so would materially impair its ability to perform its obligations under the Transaction Documents.
 - e) 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 respective terms.
 - f) 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 communication and prior writings with respect thereto.
 - g) In entering into the Transactions, the Defendant:
 - (i) Was acting for its own account and had made its own

independent decisions to enter into the Transactions and as to whether the Transactions were suitable, appropriate or proper for it, upon its own judgment based upon the information and documents it was provided with by the Claimants evidencing the characteristics and risks pertaining to the Transactions.

- (ii) Entered into the Transactions for the purposes of managing its borrowings or investments and not for the purposes of speculation.
 - (iii) Was acting as principal and not as agent or in any other capacity, fiduciary or otherwise.
- h) In respect of the Transactions, the Claimants did not act as fiduciary or agent for the Defendant.
- i) Further or alternatively, in respect of each of the matters in subparagraphs (a) to (h) above the Defendant is estopped by contract from contending otherwise.
- j) The Transactions were entered into in conformity with:
 - (i) Article 41 of the Italian Legislative Decree No. 448/2001;
 - (ii) Italian Ministry of Economy and Finance Regulation no. 389/2003;
 - (iii) Circular of the Ministry of Economy and Finance of 27 May 2004 and 5 February 2007;
 - (iv) Article 1 paragraph 736 of Law No. 296/2006 of 27 December 2006;
 - (v) Italian Consolidated Law on Finance, Legislative Decree 58/1998;
 - (vi) Consob Regulation no. 16190 of 29 October 2007; and
 - (vi) All relevant Italian laws and regulations, to the extent they are applicable to the Transactions.
- k) By reason of subparagraphs (a) to (j) above and in any event, the Claimants have to date complied with and/or discharged each and all of its relevant obligations arising out of or in connection with the Transactions and the Claimants are not liable in respect of any claim relating to the Transactions, or for losses in respect of any claim, under any system of law or regulation, whether by reference to the Transactions, or otherwise, 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 obligations arising out of or in connection with the Transactions (including but not limited to their suitability, their pricing, their notional amounts, their terms, their execution and the circumstances of the Defendant's entry into them) (a "Claim").

- 1) The Claimants are each entitled to an indemnity from the Defendant and/or damages in respect of all loss or damage incurred by the Claimants arising out of, in respect of any Claim brought in breach of (a) to (j) above and in respect of all reasonable out of pocket expenses incurred in the enforcement and protection of the Claimants' rights under the Transactions.
 - m) Each and every Claim is in any event statute barred pursuant to the provisions of the Limitation Act 1980.
2. Further or other relief (including further declaratory or other relief as the Court considers just and appropriate).
 3. Costs."

Acknowledgment of Service

- 7 On 11 September 2019, Venice acknowledged service of the Claim Form, indicating its intention to challenge the jurisdiction of the English court. On 9 October 2019, it applied for an extension of time within which to serve a jurisdiction challenge. On 17 October 2019, Teare J granted Venice an extension of time to 30 October 2019 within which to file its application challenging the jurisdiction. On 30 October 2019, Venice's English solicitors wrote to the Banks' English solicitors indicating that Venice had elected not to challenge the jurisdiction of the English court in relation to the claim, but said that Venice did intend to defend the claim. On the same day, Venice filed a second acknowledgment of service in which it said it would not challenge the jurisdiction of the court.

Developments since the Acknowledgment of Service

- 8 Since that time there have been a number of developments in the Italian and English proceedings. On 13 November 2019, the Banks filed defences in the Italian proceedings. In those defences, the Banks appeared, challenged the jurisdiction of the court of Venice and also put forward their substantive defences to Venice's claim in the writ of summons without prejudice to their challenge to the Venice court's jurisdiction. On 27 November 2019, the Banks served the Particulars of Claim in the English proceedings. I will return to these as it is an application to strike out parts of them with which I am first concerned.
- 9 On 2 December 2019 and 10 January 2020, the Banks filed applications with the Italian Supreme Court of Cassation seeking to challenge the jurisdiction of the court of Venice. On 5 December 2019, the Banks sought from the court of Venice a suspension of the substantive Italian proceedings. The designated judge, Dott.ssa Daniela Bruni, granted that suspension following a hearing of 5 December 2019.

- 10 On 20 March 2020, Venice requested an extension of time within which to serve its Defence in these proceedings. A consent order was agreed which gave Venice a four-week extension, that is to say up until 22 April 2020. On that day, 22 April 2020, Venice served the present application.
- 11 On 1 October 2020, the Banks and Venice filed their final written submissions in relation to the Italian jurisdiction challenge before the joint sections of the Italian Supreme Court. On 6 October 2020, the joint sections of the Italian Supreme Court were convened to hear the challenge. As I understand it, that did not involve an oral hearing but was the date on which the challenge was taken under consideration. It is common ground between the parties before me that a judgment can be expected to be handed down in about March or April next year.

The Application to Strike Out

- 12 As I have said, this is an application to strike out certain paragraphs of the Particulars of Claim under CPR 3.4(2)(b). CPR 3.4(2)(b) is in these terms:
“The court may strike out a statement of case if it appears to the court -
.....
(b) that the statement of case is an abuse of the court’s process or is otherwise likely to obstruct the just disposal of the proceedings...”
- 13 The paragraphs which by the application are sought to be struck out are: (a) paras.6 to 8; (b) the second sentence of para.32 and paras.33 to 36; and (c) the final four words of the first sentence of para.41 (together “the disputed paragraphs”). To explain the suggested significance of those paragraphs, I should say something more about the Particulars of Claim. The Particulars of Claim in paras.1 to 4 plead who the parties are. In paras.4 to 12 is pleaded what is said to be the background: the Rialto Bonds issuance and the Bear Stearns swap are pleaded in para.5; in paras.6 to 8, the Mandate Agreement is pleaded with a summary of certain of its alleged terms; then at paras.9 to 12 is pleaded the Venice City Council’s decision to authorise the restructuring of the Rialto Bonds and the Bear Stearns interest rate swap, which decision led to the restructuring. At paras.13 to 15 are pleaded the basic facts of the swap transaction with Opi; and, at paras.16 to 19, those of the swap with Dexia. At paras.20 to 27, the main terms of those swaps on which the Claimants rely are pleaded; at paras.28 to 31, the Banca Opi merger is pleaded; at paras.32 to 36, the fact of the Italian proceedings begun by Venice is set out. It is worth quoting here those paragraphs in full:

“33. In the Italian Proceedings Venice alleges, *inter alia*, that the Banks:

(1) Failed to comply with their obligations under the Mandate Agreement by advising Venice to enter into the Transactions, since (it is alleged) such Transactions were contrary to or not in conformity with the Italian law rules referred to in paragraph 24, above; and

(2) Failed to comply with their obligations under Article 21 of the

Italian Consolidated Law on Finance, by omitting to provide Venice information necessary to properly evaluate the economic convenience of the Transactions and the risks arising out of the same.

34. Venice does not, in the Italian Proceedings, expressly allege that the Transactions are void or voidable, but nevertheless Venice claims to be entitled to damages for loss alleged to consist of the sums which Venice has paid to the Claimants to date under and in accordance with the Transactions, together with a sum representing the current negative mark-to-market valuation of the Transactions.
35. The effect of Venice's claim in the Italian Proceedings (if successful) would be to reverse the effect of the Transactions, and/or be equivalent to rescinding the Transactions. In the premises, Venice's claims in the Italian Proceedings relate to the Transactions and the Transaction Documents and fall within the scope of the English jurisdiction clauses referred to at paragraph 20, above.
36. On 13 November 2019 the Banks filed their defences in the Italian Proceedings (the "**Intesa Italian Defence**" and the "**Dexia Italian Defence**", and together, the "**Italian Defences**"), denying the claims in full and disputing the jurisdiction of the Court of Venice."

14 Then, at paras.37 to 40, is pleaded what the Claimants contend to have been the effect of the representations in the swap transaction documents. At para.41, there is a plea of time bar. That is in these terms:

"Limitation

41. Further, the Transactions were entered into more than six years before the commencement of both these proceedings and the Italian Proceedings. Without prejudice the foregoing averments or to the burden of proof, each and every Claim (as defined below) is statute barred pursuant to the provisions of the Limitation Act 1980."

15 Then, at para.42, the relief sought is specified. The relief set out is the same as that which is contained in the Claim Form; in particular the declarations sought are the same. The prayer for relief at the end of the Particulars of Claim is for:

- "1. Declarations as set out in paragraph 42 above.
2. Further or other relief, including further declaratory or other relief as the court considers just or appropriate; and
3. Costs."

Venice's Arguments in support of the Strike Out Application

16 What is said in support of Venice's application to strike out is, in summary, this:

1. That the Claim Form is carefully framed solely by reference to the transaction documents, that is to say the documents relating to the swap transactions with the Claimants, and does not refer to the Mandate or the ISA.
2. That when Venice entered an unconditional acknowledgment of service, it did so in relation to a claim under the transaction documents only.
3. There are already separate Italian proceedings relating to the dispute under the earlier contracts (the Mandate and the ISA) "as a result of which it is an abuse of process under CPR 3.4(2) (b) for the Banks to seek, after securing Venice's submission on the basis of the tightly drawn claim...to expand the claim to include matters that are the subject of the Italian proceedings."

17 Mr Cox QC for Venice developed that argument by pointing to cases in these courts dealing with similar situations and, indeed, claims for similar declarations, and, in particular, to the decisions of the Court of Appeal in *Deutsche Bank AG v Commune di Savona* [2018] 4 WLR 151 and *BNP Paribas SA v Trattamento Rifiuti Metropolitani SPA* [2020] 1 All ER 762. He argued that these cases establish that where parties' contractual arrangements contain two competing jurisdiction clauses, the starting point is that a jurisdiction clause in one contract is probably not intended to capture disputes more naturally arising under a related contract and that it is recognised that sensible business people are unlikely to intend that similar claims should be the subject of inconsistent jurisdiction clauses. Mr Cox submitted that these principles form part of the matrix against which the Claim Form is to be construed in circumstances in which the relationships between the parties were governed by multiple contracts with different jurisdiction clauses and where the Mandate and the ISA had contained clauses conferring exclusive jurisdiction on the Italian courts. Further, where Venice had commenced proceedings in the court of Venice alleging that the Banks had breached consulting obligations owed to Venice under those earlier contracts, the Claim Form, given its contents, was to be construed as not raising any plea which might, to quote Mr Frapwell's witness statement, "encroach on the content and subject matter of the Italian proceedings." What was now being sought, Mr Cox said, was to expand the claim made in the Particulars of Claim beyond the deliberately limited claim set out in the Claim Form. This was an abuse the process of the court.

The Banks' arguments on the strike out application

18 For the Banks, Mr Dhillon QC submitted, in summary:

1. That the disputed paragraphs did not introduce any independent claim;
2. That there was nothing inherently abusive in the contents of the disputed paragraphs; and,
3. In any event, Venice's claims in the Italian proceedings are within the scope of the declaratory relief sought in the Claim Form.

Analysis and Conclusions on the Strike Out Application

- 19 The starting point is to recall the nature of the application. It is to strike out parts of a statement of case on grounds of abuse of process. The application is not a challenge to the jurisdiction of the court. The court's jurisdiction is established because by its second acknowledgment of service Venice has submitted to the jurisdiction of this court in respect of the claim in the Claim Form. That establishes jurisdiction under the Brussels Regulation (Regulation (EU) 1215/2012), and specifically under Art.26 thereof. Article 26 prevails over all other jurisdictional rules of the Regulation save for Art.24 (exclusive jurisdiction regardless of domicile), which is not relevant to this case. This means, for example, that if a claim is made in the Claim Form, this court has jurisdiction to determine it even though it might fall within the scope of a jurisdiction clause conferring jurisdiction on another court.
- 20 The issue, therefore, is whether there is an abuse of process in the inclusion of matters in the Particulars of Claim given the terms of the Claim Form. In considering whether the content of the disputed paragraphs of the Particulars of Claim constitute an abuse of process or are otherwise likely to obstruct the just disposal of proceedings, I bear in mind the following guidance:
1. Firstly, in *Hunter v Chief Constable of West Midlands Police* [1982] AC 529, Lord Diplock spoke of there being a misuse of the court's proceedings where it was being used:

“...in a way which, although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right-thinking people.”
 2. As referred to in the notes to the White Book at para.3.4.3, it has been stated in a different context that there will be an abuse of the court's process if that process is used “for a purpose or in a way significantly different from its ordinary and proper use.” As the notes go on to say, there are many categories of abuse and they are not closed. They include cases of vexation, relitigation, pointless and wasteful litigation and litigation with an improper collateral purpose.
 3. The word “obstruct” in rule 3.4(2)(b) means impede to a high extent, as was said in *Atos Consulting Limited v Avis (Europe) PLC* [2005] EWHC 982 (TCC) at [18] *per* Jackson J.
- 21 Here, the principal way in which the disputed paragraphs of the Particulars of Claim are said to be abusive is that they introduce a claim which is not within the Claim Form. The argument was that the disputed paragraphs added a claim which could not be made without an amendment of the Claim Form. I accept that pleadings may be struck out if they raise a new claim which is not within the ambit of the Claim Form. In this context, what I mean by a new claim is one which would constitute a new claim for the purposes of section 32 of the Limitation Act 1980. Most relevantly, that includes the addition or substitution of a new cause of action. In *Jalla v Royal Dutch Shell PLC* [2020] EWHC 459 (TCC), Stuart-Smith J, after citing the well-known formulations as to the a meaning of a cause of action in *Cooke v Gill* (1873) LR 8 CP 107 *per* Brett J, in *Letang v Cooper* [1964] 2 All ER 929 *per* Diplock LJ, and in *Paragon Finance PLC v Thakerar* [1999] 1 All ER 400, said, at [161]:

“The amendment will introduce a new cause of action if there is a material change in the essential features of the factual basis of the old cause of action and the new.”

- 22 In my judgment, the disputed paragraphs of the Particulars of Claim do not plead a cause of action distinct from the cause or causes of action in the Claim Form. It is of considerable significance in this regard that the relief claimed in the Particulars of Claim, and in particular the declarations sought, is the same as that set out in the Claim Form. Further, if one asks whether the disputed paragraphs introduce a change in the essential features of the factual basis of the claim made, I consider that the answer is clearly no. The claim in the Claim Form is based on the terms and effect of the swap transaction documents. Those documents themselves refer to the consulting services provided by the Banks prior to the entry into of the swaps. To refer in the Particulars of Claim to more details of the Mandate Agreement and the ISA does not constitute a change in the essential features of the factual basis of the claim based on the terms of the swaps. Nor, in my judgment, do the references to the Italian proceedings. The claim remains based on the fact of entry into the swap transaction documents and on their terms. The existence of the Italian proceedings may indicate a reason why the declarations sought are being sought, but does not constitute a factual situation which gives rise to an entitlement to a remedy different from that claimed in the Claim Form on the basis of the terms of the swap documentation.
- 23 One particular point which needs to be addressed in this connection relates to para.35 of the Particulars of Claim and specifically to its second sentence. Venice contends that that can be read as a cause of action, namely breach of contract, which is not mentioned in the Claim Form. I can accept that, if that paragraph constituted a plea of breach of the exclusive jurisdiction clause in the swap transaction documentation by reason of the bringing of the Italian proceedings, that might (I do not need to form a final view on this) have constituted a cause of action not included in the Claim Form. However, I do not consider that para.35 itself, or when taken with the remainder of the Particulars of Claim, does advance such a claim. Furthermore, the Banks, by Mr Dhillon, have confirmed that they do not, by that sentence or otherwise in the English proceedings, claim any relief against Venice for breach of the exclusive jurisdiction clauses in the swap transaction documentation.
- 24 Finally, in relation to the disputed words of para.41, I consider that these do not raise a new claim. Indeed, I did not understand that Venice seeks to contend that they do, as opposed to pleading a point which Venice says is misconceived. I do not consider that there is an abuse of the process by the inclusion of these words. Venice can plead to them and plead its case as to their irrelevance and fallaciousness in its Defence.
- 25 On the foregoing basis, I do not consider that the disputed paragraphs can be said of themselves to plead any cause of action distinct from what is contained in the Claim Form and which is reflected in the undisputed paragraphs of the Particulars of Claim. I reject Venice’s case that there is an abuse by reason of the making of a claim which is not in the Claim Form.
- 26 This conclusion probably makes it unnecessary for me to consider whether what is set out in the Claim Form included a claim which was wide enough to have an application to the Italian proceedings in the sense of making a claim which, if successful, would mean that the Banks had a declaration that they were entitled to an indemnity in respect of any liability in such proceedings or for damages in such an amount. Nevertheless, this point was argued and I will express my views on it.

- 27 In my judgment, the Banks are correct to say that the Claim Form is wide enough to embrace a claim of the nature I have just described. Most obviously, this is the case with declaration (k) sought in the Claim Form. In my judgment, the way in which declaration (k) is to be read is that the words “arising out of or in connection with the Transactions” apply to and qualify the phrase “or for losses in respect of any claim.” Even with that limitation, however, I consider that the claims in the Italian proceedings can be said to arise “in connection with the Transactions”, especially given that it is made clear (a) that to be a Claim the claim need not be under English law or be made by reference to the Transactions, and (b) may be in connection with the circumstances of Venice’s entry into of the Transactions. It is notable that this declaration does not include the amendments made to a similar declaration in the Court of Appeal in *BNP Paribas v TRM* (see [109]), and that in the *BNP Paribas v TRM* trial, Cockerill J considered that, even as amended by the Court of Appeal, claims “relating to the transaction” was language wide enough to embrace claims which would fall within the financing agreement in that case (see [2020] EWHC 2436 (Comm) at [204]).
- 28 Accordingly, for these reasons, I do not consider that, even if they can be said of themselves to plead a cause of action, the disputed paragraphs go beyond the claims made in the Claim Form. I should add, which I hope is obvious, but for the avoidance of doubt, that I am, of course, not expressing any views as to the merits of the claim in the Claim Form or as to whether the court will be prepared to grant any or all of the declarations which are there sought.
- 29 I should further mention two other possible bases for a contention that the disputed paragraphs amount to an abuse of the process of the court. One was the suggestion by Venice that the Banks had exploited the Commercial Court’s procedural regime and thus abused the court’s process. This argument ran as follows. Outside the Commercial Court, if a claimant chooses to serve a claim without particulars of claim, particulars of claim must be served within 14 days. The defendant does not have to respond until the particulars of claim are received and the 14-day period for filing an acknowledgment of service does not start to run until the particulars of claim are served. In the Commercial Court, by contrast, pursuant to CPR 58.5(1)(c), the particulars of claim do not need to be served until 28 days after the filing of an acknowledgment of service which indicates an intention to defend; under CPR 58.6(1), the defendant is required to file an acknowledgment of service in all cases, irrespective of whether particulars of claim have been served; and, pursuant to CPR 58.6(2), the normal period of time for filing an acknowledgment of service starts to run from the date of service of the claim form. The Banks, so it is said, exploited the different regime by serving a Claim Form which was “very carefully drafted and deliberately framed” only to refer to the transactions and deliberately omitted any reference to the Italian proceedings. This was done for tactical reasons, to reduce the likelihood of Venice making a jurisdiction challenge and to secure Venice’s submission to the jurisdiction without a jurisdiction challenge. By being deliberately ambiguous in the Claim Form, the Banks had sought to hedge their bets. If Venice had challenged the jurisdiction, the Banks would have pointed to the absence of any reference to the Italian proceedings as evidence that no relevant claim was being advanced. If Venice did not challenge the jurisdiction, then the Banks could say that such a claim was advanced.
- 30 In my judgment, there is no basis which has been established for these allegations of what would, in effect, have been sharp or, at any rate, devious practice. The Claim Form was plainly drawn in what were, at least in some respects, wide terms. Had Venice been in doubt as to its ambit, it could have sought clarification before the service of the second

acknowledgment of service, but did not do so. As I have said, it appears to me that the relief sought in the Claim Form, and in particular in declaration (k), was, on a natural reading, wide enough to extend to the Italian proceedings in the way that I have described.

31 Finally, I have considered whether it can be said that the disputed paragraphs are abusive because irrelevant. This was not how Venice principally put its case. I do not consider that there was a basis upon which the disputed paragraphs could be struck out on this ground. As Mr Dhillon submitted, most of the disputed paragraphs were at least arguably relevant as going to the utility of the declarations sought. In any event, the inclusion of these relatively limited paragraphs cannot be said to give rise to any manifest unfairness or constitute a significant departure from the ordinary course of proceedings (including the ordinary course of pleading of a party's case) and are not such as to create a substantial obstruction to the just disposal of the proceedings. They are not such as to present a difficulty to Venice in doing justice to its case.

32 For these reasons, I reject the application to strike out the disputed paragraphs.

The Application to Stay

33 I turn therefore to Venice's alternative application, which is to stay this action on case management grounds under section 49(3) of the Senior Courts Act 1981 and CPR 3.1(2)(f) until resolution of the jurisdiction challenge in Italy. What Venice says in this regard is that if the court declines to strike out the disputed paragraphs, there is a real risk of parallel proceedings and of inconsistent decisions if the Italian proceedings go ahead; or, if the Banks' jurisdiction challenge in Italy succeeds, then England will be the only forum in which Venice can pursue its claims under the Mandate and the ISA. On either basis, it would be in the interests of justice for the English claim to be stayed pending the outcome of the Italian jurisdiction challenge. The Claimant Banks resisted any such stay.

34 The relevant principles were recently restated by Bryan J in *MAD Atelier International BV v Manes* [2020] EWHC 1014 (Comm) at [82] as follows:

...The principles relevant to the exercise of this discretion can be summarised as follows:

(1) The court has a discretion to stay an action pending the resolution of a claim pending in another forum, but a stay should only be granted in "*rare and compelling circumstances*": *Reichhold Norway ASA v. Goldman Sachs* [2000] 1 WLR 173 at 186 (CA).

(2) "*Exceptionally strong grounds*" are required to justify a stay on case management grounds where the parties have conferred exclusive jurisdiction on the English court: *Mazur Media Ltd v. Mazur Media GmbH* [2004] 1 WLR 2966 at [69]-[70] (Lawrence Collins J); *Jefferies International Ltd v Landsbanki Islands HF* [2009] EWHC 894 (Comm) at [26]. The danger of inconsistent judgments is not a legitimate consideration amounting to exceptional circumstances and does not justify a stay in a case where the court has jurisdiction under the Brussels I Regulation Recast ("*BIR*"), especially exclusive jurisdiction: *Mazur, supra*, at [71].

(3) The court's power to stay proceedings cannot be used in a manner which is inconsistent with the Judgments Regulation: *Mazur, supra*, at [69]; *Jefferies, supra*, at [26]. A defendant should not be permitted "under the guise of case management, [to] achieve by the back door a result against which the ECJ has locked the front door": *Skype Technologies SA v. Joltid Ltd* [2009] EWHC 2783 (Ch) at [22] (Lewison J).

(4) A stay will not, at least in general, be appropriate if the other proceedings will not bind the parties to the action stayed or finally resolve all the issues in the case to be stayed, or the parties are not the same: *Klöckner Holdings GmbH v. Klöckner Beteiligungs GmbH* [2005] EWHC 1453 (Comm) at [21] (Gloster J)."

35 The present case is one where the English court has jurisdiction under the Brussels Regulation under Art.26, and also in respect of at least some, if not all, of the claims in the Claim Form under Art.25. In these circumstances, it would require a showing of exceptionally strong grounds to justify a stay on case management grounds. I do not consider that there are such strong grounds here. The presence of the exclusive jurisdiction clauses in the swap transaction documents weighs against such a stay. Furthermore, a case management stay would not be consistent with the operation of Arts.29 and 30 of the Regulation. Venice has not contended that either of those Articles is engaged. In relation to Art.29, Venice itself contends that the English and Italian proceedings are distinct claims that have distinct subject matters. In relation to Art.30, Venice's decision not to rely on it is doubtless because the Banks' claims could not be heard in Italy due to the exclusive jurisdiction clauses in the swap transaction documents. Given that Arts.29 and 30 are inapplicable for these reasons, a case management stay would circumvent the provisions of the Regulation.

36 In addition, while the jurisdiction of the English courts is established, the jurisdiction of the Italian courts is being challenged by the Banks. A stay of proceedings in courts whose jurisdiction cannot be challenged in favour of courts whose jurisdiction is challenged would rarely be justified on case management grounds. There seemed to me to be no particularly strong grounds which make this a case in which that course should be adopted. The imposition of a stay would delay the English proceedings and not be conducive to dealing with them expeditiously.

37 In those circumstances, I also refuse Venice's application for a stay of proceedings.

L A T E R

38 This is an application which is made by the Banks that the costs, which it is accepted should be paid by Venice in respect of its application, should be assessed on the indemnity basis.

39 In support of that submission, Mr Dhillon makes, effectively, three points. He says that the application was pursued in order to gain a tactical benefit for Venice by delaying the progress of these proceedings; he says that the application as originally made was completely unfocused on the really relevant question; and that the way in which it was put by Mr Cox at the oral hearing was unheralded by what had gone before. He says that, as a result of those features, this is a case which is sufficiently outside of the norm of litigation to merit an order for indemnity costs.

- 40 For Venice, Mr Cox objects to an order for indemnity costs. He says that there is no basis for saying that the application was advanced with the objective of obtaining a tactical benefit. He says that there were genuinely held concerns by Venice and by its legal team as to what exactly was the nature of the claim which it was facing, and that there is nothing very out of the norm in relation to the way in which the application was made. He draws particular attention to the fact that there has been no breach of any rules in relation to its making or progress.
- 41 I consider that this is not a case which is sufficiently outside of the norm to justify an order for indemnity costs. I find that it cannot be said that the whole application was pursued only for the purposes of gaining a tactical benefit and I cannot forebear to remark that it seems to me unfortunate that severe allegations are being made by each side in relation to, effectively, the *bona fides* of what the other is doing. Anyway, the bottom line is that I am not going to make an order for indemnity costs and the costs will be assessed on a standard basis.
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CERTIFICATE

Opus 2 International Limited hereby certifies that the above is an accurate and complete record of the Judgment or part thereof.

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