Neutral Citation Number: [2019] EWHC 969 (Comm)

Claim No: CL-2011-001025
Claim No: CL-2012-000914

IN THE HIGH COURT OF JUSTICE
THE BUSINESS AND PROPERTY COURTS OF ENGLAND & WALES
COMMERCIAL COURT (QBD)

Rolls Building
Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 15/04/2019

Before :

MR JUSTICE ROBIN KNOWLES CBE

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BETWEEN

(1) DEUTSCHE BANK AG
(2) DBS BANK LIMITED
(3) BBK B.S.C.
(4) SHINHAN BANK
(5) LIREF (SINGAPORE) PTE. LTD.
(6) PT. BANK NEGARA INDONESIA (PERSERO) TBK, TOKYO BRANCH
(7) BMI BANK BSC (C)
(8) DB INTERNATIONAL (ASIA) LIMITED
(9) AXIS SPECIALTY LIMITED
(10) DB TRUSTEES (HONG KONG) LIMITED

Claimants

and

(1) UNITECH GLOBAL LIMITED
(2) UNITECH LIMITED

Defendants

AND BETWEEN

DEUTSCHE BANK AG

Claimant

and

UNITECH LIMITED

Defendant

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Richard Handyside QC and Alexander Milner (instructed by **Allen & Overy LLP**) for the **Claimants in CL-2011-001025**
Sonia Tolaney QC and Adam Sher (instructed by **Freshfields Bruckhaus Deringer LLP**) for the **Claimant in CL-2012-000914**

Hearing date: 15 April 2019

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JUDGMENT

I direct that pursuant to CPR PD39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version may be treated as authentic
MR JUSTICE ROBIN KNOWLES CBE

Mr Justice Robin Knowles:

Introduction

1. Unitech Limited ("Unitech") is one of India's largest real estate investment and development companies. There is evidence to the effect that at material times it had a market capitalisation of over US$10 billion. The Claimants are financial institutions with operations internationally or in various parts of the world.

2. This is the judgment of the Court following the trial on the merits of two related actions brought by the Claimants against Unitech. The sums involved exceed US$300 million.

3. At the trial the Court was provided with comprehensive written submissions on behalf of the Claimants, and in addition to the available documentary evidence the Court heard oral evidence from Mr Shah and Mr Harding for the Claimants.

4. Unitech on the other hand has failed to participate at the trial. It has had every opportunity to do so and it is quite clear that its absence is by choice. It did not seek to cross examine the witnesses called by the Claimants, or to advance any evidence of its own at trial.

5. This choice on the part of Unitech is against the following background. Unitech had agreed the jurisdiction of this court and actively engaged in the litigation until June 2017, including by filing statements of case and participation at hearings over several years. Unitech has been kept informed of all material developments and served with all necessary documents. There is no credible suggestion that Unitech's failure to participate at trial is because it is unable to participate or is unable to afford representation.

An outline

6. Unitech Global Limited (UGL) borrowed sums from the Claimants in the first action ("the Lenders") pursuant to a Credit Agreement dated 24 September 2007 ("the Credit Agreement").

7. Unitech, the ultimate owner of UGL, is the guarantor of UGL's obligations under the Credit Agreement pursuant to a guarantee and indemnity ("the Guarantee and Indemnity") forming part of the Credit Agreement.

8. The Guarantee and Indemnity provided by Unitech also extended to UGL's liability under an interest rate swap agreement ("the Swap") entered into between UGL and Deutsche Bank AG ("DB"), the Claimant in the second action, on 19 September 2007. The Swap was part of the same overall transaction as the Credit Agreement. The Swap was terminated in July 2011 upon default by UGL.

9. In the first action the Lenders seek judgment against Unitech under the Guarantee and Indemnity in respect of the unpaid borrowings of UGL. In the second action DB seeks judgment against Unitech under the Guarantee and Indemnity in respect of unpaid sums due under the Swap.

10. There is no dispute that the sums involved were advanced under the Credit Agreement, nor that the Swap was entered into. Unitech contends it has a defence based on allegations

of misrepresentation entitling it to rescind one or more of the agreements with the Claimants ("the Misrepresentation Defence").

11. Unitech has advanced no evidence for trial in support of the Misrepresentation Defence.

12. Pursuant to an order of the Court made by Carr J and dated 20 June 2018, counterclaims asserted by Unitech in both actions were struck out upon its failure to comply with orders made following repeated defaults by it in complying with orders that it pay costs in connection with interlocutory stages of the litigation.

The essential chronology in more detail

13. I am satisfied that the evidence at trial establishes the following facts.

14. UGL was incorporated in Jersey on 26 June 2007 and is a wholly owned indirect subsidiary of Unitech. The discussions which eventually resulted in the entry into of the Credit Agreement commenced around this time. On the Unitech/UGL side, negotiations took place primarily with Mr Sanjay Chandra (the Managing Director of Unitech) and at a more junior level with others including Mr JP Mehrotra.

15. A term sheet signed on behalf of both DB and Unitech dated 6 July 2007 sets out a summary of the then-indicative terms, which included a principal of approximately USD 200 million and bullet repayment after 3.5 years based on a coupon of 6M USD LIBOR plus 250 basis points. At that stage, the term sheet did not refer to any accompanying derivative transaction.

16. By the end of July 2007, matters had progressed sufficiently for DB to send a first draft of the Credit Agreement to Unitech for its initial comments.

17. By the start of August 2007, the effects of serious global difficulties in credit and finance came to be felt, including on liquidity. The indicated margin increased to at least 350 basis points. DB raised the idea of an accompanying derivative transaction which would allow the cost to be reduced. Unitech was receptive to this idea.

18. Different structures of swap to achieve the desired cost reduction were still being discussed internally by DB in early September. An email showed three different trade ideas. On 11 September 2007 DB emailed Mr Chandra, saying "pls find enclosed a few options on the swap. Since, this is an integral part of the deal would request you to go thru them so that we could close them out. I am separately sending the covenants shortly…". DB attached four term sheets for four different swaps.

19. Following further negotiations by email over the financial covenants to be included within the Credit Agreement, on 13 September 2007 Mr Chandra emailed DB with a final offer in relation to the covenants. He also confirmed that Unitech and UGL were "ok" with the swap, from the four offered, that was based on USD LIBOR.

20. By 18 September 2007 the finalisation of the necessary documents for both the proposed loan and the proposed swap was nearly complete, and arrangements were being made for their execution. On 19 September 2007 DB spoke to Mr Chandra, who confirmed that he had given instructions for all necessary documents, including a term sheet setting out the terms of the proposed swap, to be executed.

21. The final term sheet for the Swap was initialled on behalf of Unitech (by Mr Ashish Srivastava) on 19 September 2007 and then by Mr Anuj Malik (head of Unitech in the Middle East) on behalf of UGL. This confirmed entry into the Swap. Under the terms of

the Swap the notional was USD 150 million. DB London Branch was the Floating Rate Payer, and agreed to pay UGL 6M USD LIBOR + 3.25%. UGL was the Variable Rate Payer, and agreed to pay DB a variable rate calculated according to the following formula: 8.00% + 3.00% x N/M, where N was the number of business days during the relevant period where 6M USD LIBOR was > 5.75% or < 4.00% and M was the number of business days in the relevant period. The payment obligations did not arise in circumstances where a "Credit Event Notice" had been served following the occurrence of a "Credit Event", linked to the State Bank of India as the reference entity.

22. The terms of the Swap were subsequently formally recorded in a confirmation dated 15 October 2007 ("the Confirmation"), which was executed on behalf of UGL. The Confirmation set out the commercial terms of the Swap and provided that the parties agreed to negotiate and execute an agreement in the form of the 2002 ISDA Master Agreement, but that pending such execution the Confirmation would form part of an agreement in the form of the 2002 ISDA Master Agreement with certain specified details ("the Master Agreement").

23. The Claimants do not dispute that the Swap is not a perfect hedge of the interest rate risk under the Credit Agreement. The reason for that is that operating as a perfect hedge was not the intention of the Swap: the contemporaneous documents clearly support DB's case that the primary driver of the Swap was as a cost reduction mechanism. In the event, the derivative chosen by Unitech and UGL (i.e. the Swap) did have a partial hedging effect, but this was not its sole (or even primary) purpose.

24. Meanwhile the Credit Agreement and associated security and other documents were executed by the parties on 24 September 2007.

25. Clause 3 of the Credit Agreement provides that moneys advanced under the Credit Agreement ("the Loan") may only be used for "making equity investments in or loans to the Investment Vehicles in accordance with the Business Plan" (or paying "all fees, costs and expenses payable in connection with Facility"). The Investment Vehicles comprised a number of wholly owned direct or indirect subsidiaries of Unitech or UGL that were incorporated in one of Cyprus, the Cayman Islands or the Isle of Man. By clause 6 of the Credit Agreement, the Loan was repayable in four approximately equal instalments. The first instalment was due 24 months after drawdown and the final instalment 60 months after drawdown, i.e. by 24 September 2012.

26. By clause 8.1 of the Credit Agreement, interest was payable on the Loan at LIBOR plus a margin of 3.25%. Clause 8.3 provided that default interest was payable on any overdue amounts at a rate determined by the Facility Agent (DB, Hong Kong Branch) in accordance with provisions set out at clause 8.3(b) (which, in summary, provided for interest at 2% over a rate that would have been payable if the overdue amount had constituted a loan in the currency of the overdue amount).

27. The Guarantee and Indemnity formed clause 15.1 of the Credit Agreement. Unitech guaranteed the punctual performance by UGL of its obligations under the "Finance Documents", which were defined to include both the Credit Agreement and the Confirmation. Unitech also agreed that if, for any reason, any amount claimed by the Claimants under Clause 15.1 was not recoverable from Unitech on the basis of a guarantee, Unitech would be liable as a principal debtor and primary obligor to indemnify the Claimants in respect of any loss incurred as a result of UGL failing to pay.

28. Clauses 21.2 to 21.14 of the Credit Agreement set out various Events of Default, which included at clause 21.2, non-payment by either UGL or Unitech of any amount payable

under the Finance Documents. Clause 21.15 provided that, following an Event of Default, the Facility Agent was entitled to declare any outstanding amounts under the Finance Documents (including the Credit Agreement and the Confirmation) immediately due and payable.

29. Clause 29 of the Credit Agreement dealt with transfers of interests under the Credit Agreement. Between 12 March 2008 and 22 July 2011, the Second to Ninth Claimants also became Lenders pursuant to those transfer provisions. (I take the opportunity at this point to confirm that, Unitech having put the Lenders to proof that all Lenders acceded to the Credit Agreement, I am satisfied on the documentary evidence available at this trial that they did all accede.)

30. UGL failed to repay the Loan in accordance with clause 6. It was consistently in default from early 2009 onwards.

31. In October 2010, the Loan was restructured by way of a term sheet under which UGL and Unitech agreed to a new repayment schedule. The first repayment of USD 20 million under the new repayment schedule was made, the next payment of USD 15 million due on 25 November 2010 was not, and nor were the further payments of USD 2.5 million due on 31 January 2011 and 28 February 2011.

32. Consequently on 11 March 2011, Lenders accelerated the Loan and made demands on UGL and Unitech for repayment of the full outstanding amount of the Loan. No payment was made by UGL or Unitech.

33. As for the Swap, on 25 March 2011 UGL failed to make a payment of USD 5,470,755.79 which was due under the Swap, in breach of section 2(a)(i) of the Master Agreement. This constituted an Event of Default under section 5(a)(i) of the Master Agreement. Notice was given by DB by way of letter to UGL (copying Unitech) on 13 July 2011 of a failure to pay in breach of the Master Agreement and of a failure to pay under clause 21.2 of the Credit Agreement.

34. By a Notice of Early Termination dated 15 July 2011 to UGL (copying Unitech) under section 6(a) of the Master Agreement, DB designated 18 July 2011 as the "Early Termination Date" under the Master Agreement. On 20 July 2011 DB informed UGL (copying Unitech) that the "Early Termination Amount" due on 20 July 2011 pursuant to clause 6(d) of the Master Agreement was USD 11,055,487, and that interest and default interest would continue to accrue under the terms of the Swap.

35. No payment in respect of the Early Termination Amount was made by UGL. On 16 September 2011 DB sent a written Demand Notice to Unitech as Guarantor under the Guarantee and Indemnity demanding payment of the Early Termination Amount plus accrued interest (then amounting to USD 8,025) and noting that interest and default interest would continue to accrue under the terms of the Swap.

The Misrepresentation Defence

36. In their original Defence in action number CL-2011-001025 brought by the Lenders, UGL put forward no defence as to liability, raising only a small number of points going to quantum. Unitech asserted that these quantum points discharged the Guarantee and Indemnity.

37. The (alleged) Misrepresentation Defence surfaced in stages, the first of which was in April 2012. In its final form it has two distinct aspects as pleaded. Unitech first sought to add the second aspect, based on LIBOR, in January 2013.

38. Unitech first claimed that DB made various express and/or implied misrepresentations that the Swap was suitable for UGL as a hedge of its liabilities under the Credit Agreement. Unitech claimed that it relied on those misrepresentations when entering into the Credit Agreement and the Guarantee and Indemnity.

39. Unitech's case in this first aspect may be summarised in a little more detail as follows:

    (1) Unitech alleges that – expressly or impliedly – DB made a (mis)representation which it calls the "Suitability Recommendation", to the effect that "the terms [of the Swap] were appropriate to hedge [UGL/Unitech's exposure under the Credit Agreement] and that its terms were in all other respects suitable for UGL".

    (2) The alleged Suitability Recommendation is said to arise from circumstances including a last-minute recommendation made on or around 19 September 2007 to enter into the Swap where Unitech claims it had no opportunity to consider alternative options.

    (3) The alleged Suitability Recommendation was, alleges Unitech, false on the grounds that the Swap was unsuitable as a hedge including on the basis of (a) a mismatch in notional between the Swap and Loan over time, (b) a mismatch in duration between the Swap and the Loan and the absence of a (zero-cost) option to terminate the Swap in the event the Loan was terminated after two years pursuant to a put/call option, (c) the relatively high cost of the minimum rate payable under the Swap when compared to a possible vanilla interest rate swap, (d) an alleged downward trend in 6M USD LIBOR at the time the Swap was traded, about which DB "must have known" and (e) the alleged fact that, according to Unitech, USD LIBOR was (and was to the knowledge of DB) being manipulated.

    (4) The alleged Suitability Recommendation was, claims Unitech, made fraudulently, because DB knew that the Swap was unsuitable.

    (5) UGL and Unitech relied, it is said, upon the alleged Suitability Recommendation and if it had not been made, would not have entered into the Swap or the Credit Agreement or the Guarantee and Indemnity.

    (6) Unitech is therefore able, it argues, to rescind the Guarantee and Indemnity, such that the Claimants' claims must fail against it.

40. The second aspect of the Misrepresentation Defence is the allegation that DB made various implied misrepresentations about LIBOR, and about DB's involvement in the LIBOR setting process, upon which it is again claimed that Unitech relied when entering into the Credit Agreement and the Guarantee and Indemnity.

41. The burden lies squarely on Unitech to establish its Misrepresentation Defence. It has not done so. Even at the start there is no evidence, for example, to support Unitech's allegation that any express representation was made.

42. That would still leave an analysis, which Unitech is not at trial to advance, of whether representations are to be implied. There is no value in embarking on that analysis because the Misrepresentation Claim must fail on the grounds of lack of reliance: there is no evidence that any of the alleged representations were actually understood or appreciated by Unitech at the time.

43. In Marme Inversiones 2007 SL v Natwest Markets plc and Others [2019] EWHC 366 (Comm) at [279] Picken J underlined that the question of reliance includes a requirement on the part of the party asserting reliance to show that it was aware of the representation at the time that it was made. The Judge went on to show (see [281]-[288]) that the existence of this requirement of awareness is supported by existing authority and by leading textbooks, including authority addressing implied representations.

44. Even assuming that the Misrepresentation Defence has not failed at an earlier stage of the analysis, Unitech has adduced no evidence that anyone at Unitech was aware; that they actually understood that DB was making the alleged Suitability Recommendation or the alleged representations about LIBOR. As to the latter it is of note that the communications with DB did not concern the LIBOR process.

45. In the absence of such evidence, Unitech's claim must fail. Moreover, to the extent that it is possible to draw inferences from the surrounding circumstances, those circumstances do not help Unitech in the present case.

46. I specifically accept the submission of the Lenders that the Suitability Recommendation was an ex post facto construct. As the Lenders rightly point out had Unitech genuinely understood the alleged Suitability Recommendation to have been made, it is difficult to understand why it did not almost immediately raise concerns about these matters and the plain fact that the Swap did not provide a perfect hedge for the liabilities under the Credit Agreement. Although the representation was allegedly made in September 2007, Unitech/UGL did not raise any Suitability Claim until 2012, after their original Defence in the Lenders' Action (which made no such claim) and following the filing of Lenders' application for summary judgment.

Other arguments

47. Although I am able to, and do, decide these two cases by reference to the reliance stage of the analysis, I should add that the Claimants have set out to ensure that the relevant arguments at every stage of the analysis are addressed in some detail in their written submissions. They were concerned to ensure that the Court had all arguments fairly addressed in circumstances where Unitech is not represented.

48. In the result, although it not necessary to enter into each part of the analysis in this judgment, the Court has had the benefit of a fair written presentation of the highest professional quality. I pay tribute to Mr Richard Handyside QC and Mr Alexander Milner (for the Lenders), to Ms Sonia Tolaney QC and Mr Adam Sher (for DB), and to the Solicitors involved.

49. The Court is also grateful for the recognition on the part of the Claimants and their legal teams that in the circumstances of the case it is better for the Court to refrain from determining hypothetical issues beyond the narrow question of reliance, given that on reliance Unitech fails.

50. I do wish however to make the following point clear. Unitech included allegations of fraud in the course of its Misrepresentation Defence. The Misrepresentation Defence now fails but it is to the discredit of Unitech that Unitech should simply leave, rather than take steps specifically to withdraw, allegations of fraud where, as here, it does not intend to attend trial to attempt to substantiate them.

Amounts due, and interest

51. Unitech raised a number of objections to the Lenders' calculations of the sums due under the Credit Agreement. The Lenders do not accept that these objections are valid but in the interests of efficiency and proportionality they are content in these actions not to dispute the objections, and instead to limit their claim to the minimum amount which Unitech can be said to owe to the Lenders.

52. On this basis the total amount due from Unitech at the date of trial, leaving aside the Swap, is USD 293,476,217.37. Taking account of the fact that that figure includes default interest charged in accordance with clause 8.3, the claim does not exceed a guarantee cap of USD 250 million provided in clause 15.9 of the Credit Agreement (even when the Swap is taken into account).

53. The Court will enter judgment against Unitech and in favour of Lenders in the first of the two actions in the sum of USD 293,476,217.37.

54. As regards the Swap, the sums sought by DB comprise the Early Termination Amount and interest. UGL and Unitech were informed of the Early Termination Amount of USD 11,055,487 by notice dated 20 July 2011. No issues arise in relation to that figure.

55. On the face of the pleadings, there is no dispute between the parties that if Unitech is liable as guarantor for the Early Termination Amount, interest accrues using the Credit Agreement Interest Method: Unitech's Amended Defence in the second of the two actions admits the relevant part of the Particulars of Claim. Mr Snelling (of Freshfields Bruckhaus Deringer) gave evidence as to how the interest due has been calculated using the Credit Agreement Interest Method, resulting in total interest due of USD 9,631,833.16. The Court accepts that evidence.