Neutral Citation Number: [2022] EWHC 1656 (Comm)

Case No: FL-2019-000012

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
FINANCIAL LIST
COMMERCIAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 28/06/2022

Before :

MR JUSTICE FOXTON

- -

Between :

(1) BANCA INTESA SANPAOLO SPA
(2) DEXIA CREDIOP SPA **Claimant**

- and -

COMUNE DI VENEZIA **Defendant**

- -
- -

JASBIR DHILLON QC, **FRED HOBSON** and **TOM WOOD** (instructed by **Pinsent Masons LLP**) for the **Claimants**
RAYMOND COX QC, SIMON PAUL and **MARCUS FIELD** (instructed by **Osborne Clarke LLP**) for the **Defendant**

Hearing date: 27 June 2022

- -

Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

THE HONOURABLE MR JUSTICE FOXTON

This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be Tuesday 28 June 2022 at 14:00.

Mr Justice Foxton:

1. An issue has arisen at the start of a 5-week trial from which it is apparent that the parties hold fundamentally different views as to which matters form part of the trial (to be determined at this hearing), and which matters have been held over for subsequent determination as necessary.

2. The case is one of a number of disputes arising from the participation of Italian local and regional authorities in swap transactions. In this case, the Defendant ("Venice") has identified a number of reasons why it says it is not bound by two swap transactions ("the Swaps") with the Claimants ("the Banks"), including that it did not have capacity to enter into the Swaps, the persons who purported to commit Venice to the Swaps did not have authority to do so; and that various provisions of Italian law were breached by the Banks which had the effect that the Swaps are void or which give Venice a claim in damages.

3. In order to understand the present dispute, it is only necessary to consider certain of the parties' claims.

4. The Banks alleged that if the Swaps were void and/or of no effect, Venice was in breach of various terms of the ISDA Master Agreement, giving rise to an Event or Default under that Agreement, and/or is liable to it in damages under s.2(1) Misrepresentation Act 1967 and/or in tort in English and/or Italian law and/or that Venice is obliged to indemnify them under a Mandate Agreement in respect of any loss the Banks suffer. Breaking those claims down:

    i) The claims under the ISDA Master Agreement proceed on the basis that if the court finds Venice did not have authority or capacity to enter into the Swaps, the Banks will then be entitled to serve Notice of Early Termination under the Swaps and recover certain sums as (in effect) a debt claim.

    ii) The other contractual claims seek damages on the basis that Venice is obliged to place the Banks in the position they would have been had the Swaps been valid and binding.

    iii) The tortious claims plead that the Banks entered into the Swaps in reliance on various representations made by Venice, that the Banks would not have entered into the Swaps but for the misrepresentation, or but for a breach of duty on Venice's part to provide the Banks with certain information. On that basis, various heads of reliance expenditure are claimed as damages.

    iv) The indemnity claim seeks an indemnity against all losses and liabilities incurred by the Banks in connection with the Swaps.

5. For its part:

    i) Venice alleges that it is entitled to restitution of the net payments made by it under the Swaps.

    ii) Venice also alleges that it was entitled to recover damages under Italian law because the Banks had breached various Italian Regulatory Laws.

6. The latter set of claims included an alleged failure by the Banks to disclose a mark-to-market of the proposed Swaps to Venice before the Swaps were entered into. The nature of the Venice's causation case so far as the damages claims are concerned is not clearly pleaded, para.70 of the Defence and Counterclaim alleging:

> "In consequence, the Banks are liable to pay damages to Venice".

The CMC of 18 March 2021

7. The case came before me for a CMC on 18 March 2021. In advance of that hearing, the Banks had filed a Case Management Information Sheet ("CMIS"), paragraph 14(a) of which provided:

> "On what issues may expert evidence be required?
>
> The parties agree that expert evidence of Italian law (on issues of Italian administrative and civil law) will be required. The Defendant considers a financial expert will be necessary to address technical issues relating to interest rate swaps. The Claimants' position on this is reserved pending: (a) sight of the Defendant's proposed questions for the financial expert (which had not been provided to the Claimants as of the date of this CMIS); and (b) *determination of whether the issues of quantification of close-out values of the various swaps arising from the counterclaim and the alternative claims pleaded in the draft Amended Particulars of Claim should be determined at the main trial, or adjourned to be determined once the validity of the Transactions has been determined.* See further the answer to (22), below."

(emphasis added).

8. Paragraph 22 of the CMIS provided:

> "(c) The Defendant's counterclaim and the alternative claims raised by the Claimants in the draft Amended Particulars of Claim give rise (if the Transactions are void as the Defendant alleges) to issues of valuation of the 'close-out' amounts and associated termination costs of (i) the Transactions and (ii) the back-to-back hedging swaps entered into by the Banks with third party banks. The Claimant will seek an order that those issues of quantification (Issues [X]-[Y] of the [Agreed] List of Issues) should be adjourned to be determined at a subsequent trial, if necessary, in the light of the outcome of the primary issues (including validity of the Transactions)."

9. The Banks' skeleton for that hearing provided:

> "The Claimants have proposed that the *issues of quantification* arising from the damages claim to be introduced by the draft Amended Particulars of Claim be adjourned to be determined at a subsequent trial (if necessary). It appears that this proposal is opposed, although Venice has not explained its position.
>
> The Claimants have proposed in their CMIS that the issues of quantification arising from the damages claim to be introduced by the draft Amended Particulars of Claim ("APOC") be adjourned to be determined at a subsequent trial (if necessary). The relevant issues are Issues 38 (the amount of damages, or

indemnity) and 53 (interest, insofar as it applies to the Claimants) on the Defendant's mark-up of the List of Issues and Common Ground ("Cs' Quantum Issues").

The Claimants provided for this outcome in their Draft Order for Directions. It can be seen from Defendant's comparison version of the Draft Order that Venice has rejected the Claimants' proposed direction at paragraph 23 without explanation. The Claimants infer that Venice opposes the proposal to split the trial, but does not know why Venice takes this stance.

This is unsatisfactory, and it is to be hoped that Venice's position is properly explained prior to the hearing. Nevertheless, in the Claimants' submission adjourning C's Quantum Issues is obviously the sensible course, in circumstances in which:

i) Cs' Quantum Issues arise for determination only if: (i) Venice succeeds in establishing that the Transactions are void; but (ii) *the Claimants succeed in establishing one or more of their alternative claims for damages and/or an indemnity to be pleaded in the APOC.*

ii) If Cs' Quantum Issues are to be determined at the main trial (assuming it were possible to do so, which realistically it is not – see below), *significant factual and expert financial evidence would be required as to the hypothetical termination valuations of the Transactions, and as to the payments required and other costs to be incurred by the Claimants in terminating the back-to-back hedging swaps entered into by them with third party banks*. Such evidence would obviously increase the costs and the time required for trial.

iii) Importantly, *any valuation of the Transactions and the hedging swaps can only be undertaken by reference to a particular valuation date, which ought to be the future date on which the Court determines the Transactions are void*. Plainly, that date (if is to come at all) cannot be identified in advance, such that the necessary calculations cannot be performed until the liability issues have been determined."

(emphasis added).

10. Venice's skeleton provided:

"F. SEPARATE TRIAL FOR QUANTIFICATION ISSUES

35. Finally, it appears from paragraph 14(a) of the Claimants' Case Management Information Sheet that the Claimants also envisage that expert evidence will be required from a separate expert in relation to certain matters arising out of the Claimants' proposed amendments, namely, the quantification of close out valuations of the Transactions. The Claimants had not previously raised this in correspondence. Venice only received those amendments in draft on 4 March 2021 and is yet to plead to the same, as a result of which Venice's position as to the need for such evidence is presently reserved. However, Venice notes the Claimants'

suggestion that these issues of quantification could be dealt with at a subsequent adjourned trial.

36. In principle, Venice accepts that such a proposal is sensible. However, Venice has not yet had a chance to plead to the Amended Particulars of Claim, as a result of which it is not yet possible to define the issues to be determined precisely or exhaustively. Provision will therefore need to be made for the issue(s) to be defined once pleadings have concluded. Venice considers that the issues should be capable of agreement, but, if the parties cannot reach agreement, the matter will need to come back before the court for determination."

11. I have not seen a transcript of the hearing. However, it will be apparent that the Banks' proposal was essentially aimed at a valuation or pricing exercise, the need for which would only arise if the Banks' claims for damages had succeeded and the precise date for which would depend on the judgment following the Main Trial, and that Venice understood might involve a separate expert.

12. There appear to have been further discussions between the parties which resulted in an agreed order being provided to the court on 26 March 2021. Paragraph 29 of that order provided:

> "There shall be a trial of all issues set out in the version of the Agreed Common Ground and List of Issues ("Liability Issues") appended to this Order …. Save for (a) the quantification of any damages or indemnity to which the Claimants are entitled under Issue 38; and (b) the Claimants' entitlement to interest on such sums under Issue 53 ("the Claimants' Quantum Issues").

13. Paragraphs 38 and 53 of the attached Agreed Common Ground and List of Issues provided:

> "Claimants' Loss and Damage
>
> 38. Whether, if Venice was in breach of its obligations under the Master Agreements and/or Events of Default or Potential Events have occurred with respect to Venice, and/or it is liable to compensate the Claimants on any of the other bases addressed in Issues [32-36 above], the Claimants are entitled to damages and/or an indemnity from Venice, and (if so) in what amounts. (APOC §§40B, 40L-M; RDCC §§8(3), 53(3))
>
> Interest
>
> 53. Whether any party is entitled to interest on any sum found to be due to it:
>
> (1) In accordance with Article 1284 of the Italian Civil Code;
>
> (2) Alternatively, pursuant to section 35A Senior Courts Act 1981;
>
> and, if so, at what rate, and for what period. (APOC §40Z; DCC §85; RDCC §57)".

14. Pausing there, the exclusion effected by paragraph 29 of the order of 18 March 2021 would, as a matter of conventional interpretation, have been understood as limited to matters in the nature of computation and valuation, rather than embracing issues of causation and reliance to the extent that they arose. That was certainly true of issue 53 (interest), and is also true of issue 38, which pre-supposes a finding that Venice "is liable to compensate the Claimants on of the other bases addressed in Issues [32-36] above". In those claims which required "but for" causation of some kind, there could be no finding that Venice was "liable to compensate the Claimants" absent a finding on the issue of causation and reliance.

15. The conclusion I have reached on the basis of the wording of the Order is reinforced by the terms of the parties' skeletons, and the Banks' CMIS in which the issue was first raised.

The CMC of 14 July 2021

16. A further CMC was due to be heard before Cockerill J on 14 July 2021. In the event, the further directions were agreed, and an agreed order provided to the court for approval. Paragraph 5 of the Order of 14 July 2021 provided:

> "Paragraph 29 of the CMC order shall be varied so as to provide that there shall be a trial of all Issues set out in the version of the Agreed List of Common Ground and Issues (the "Liability Issues") referred to at paragraph [1] above and annexed to this Order, save for (a) the quantification of any damages or indemnity to which the Claimants are entitled under Issue 39; (b) the quantification of any restitution or damages to which Venice is entitled under Issue 50(2) and (3); and (c) the quantification of any party's entitlement to interest under Issue 54 (the "Quantum Issues")".

17. Issues 50(2) and (3) of the attached Agreed List of Issues and Common Ground provided:

> "Consequences of breach of Italian law or Italian Regulatory Laws
>
> 50. Whether, having regard to the answers to the Issues above:
>
> (1) The Transactions were void under English law (ADCC §14; ARDCC §12; RTDCC §§47-53); and (if so)
>
> (2) Venice is in principle entitled to restitution of the net payments made by it under the Transactions in the amount of €55,168,151.49 or any other amount; and (if so) whether the Claimants are entitled to rely upon a change of position defence (ADCC §§71(e), 83(c); ARDCC §§46, 55; RTDCC §79, 94); or, in the alternative
>
> (3) Banca Opi and Dexia (or either of them) are liable to pay damages to Venice under Italian law in the sum of € 104,481,177 or any other sum. (ADCC §§70, 83(d); ARDCC §§42, 55; RTDCC §79)."

18. I am told that there are no exchanges between the parties which shed any light on what they were hoping to achieve through this order, and, as the hearing was vacated on the basis of a consent order, there are no skeleton arguments to assist. However, the

parties have very different understandings now, the Banks contending that the 14 July 2021 Order did not have the effect of removing issues of causation (including counterfactual questions of what Venice would have done in certain situations) from the Main Trial, and Venice contending it did. Venice has acted consistently with its own understanding, having served no factual evidence to address these issues at this trial. The Banks, consistent with their understanding, have addressed the counterfactual issues which arise on their case (viz what would the Banks had done if the representations as to capacity and authority had not been made).

19. The parties' dispute would appear also to extend to the issue of whether any damages recoverable by Venice would fall to be reduced for contributory negligence (which the Banks have alleged).

20. On 8 June 2022, apparently having forgotten about the order of 14 July 2021, the Banks' solicitors wrote to Venice's solicitors referring to paragraph 29 of the Order of 18 March 2021 as it stood prior to the amendment made on 14 July 2021, and stating:

> "The quantum issues concerning Venice's counterclaim are not referred to in paragraph 29, but the parties have in fact proceeded on the basis that quantum issues for the counterclaim are equally to be dealt with either at the quantum trial, or otherwise following judgement in the liability trial. We note in particular that the parties have not agreed any expert questions concerning §33 and §35 of the Re-Re-Re-Amended Reply to Defence to Counterclaim (A/5/11), or served any expert evidence in this regard.
>
> Venice's counterclaim for sums paid and the fair value of the Transactions (if awarded) would in any case have to be quantified as at the date of the award."

21. That letter referred, once again, to "quantum issues", and placed particular emphasis on accounting and valuation issues ("sums paid" and "fair value"). Venice's solicitors replied on 9 June 2022 stating:

> "We refer to paragraph 5 of the Order of Cockerill J dated 13 July 2021 {D/12/2} pursuant to which the Order of Foxton J dated 13 March 2021 was varied such that the quantification of Venice's restitution or damages under its counterclaim is to be dealt with in the same way as the Claimants' quantum case.

22. The letter therefore expressly equated the position of the quantification of Venice's restitution and damages claims with that which had been adopted in relation to the Banks restitution and damages claims.

What was the effect of paragraph 5 of the 14 July 2021 order?

23. I have no doubt that, on its objective construction, paragraph 5 of the 14 July 2021 order did not remove issues of causation, including counterfactual questions of causation, from the scope of the Main Trial.

24. First, the language of paragraph 29, as amended, does not support that construction. The exclusion of issues of causation and "but for" conduct would not fairly fall within the words "the quantification of any restitution or damages". Further, the wording of paragraph 29(b) assumes that an entitlement to damages will have been established in the Main Trial ("to which Venice is entitled under Issue 50(2) and (3)"). If the court

had found that the Banks had unlawfully failed to provide particular information to Venice, but had made no finding that the provision of such information to Venice would have caused it to act any differently, there would not have been any finding of an entitlement to damages on Venice's part.

25. Second, for the reasons I have explained, I am satisfied that the terms of paragraph 29 as it stood prior to 14 July 2021 (and in particular those which became paragraph 29(a)) did not have the effect of excluding that part of the Banks' damages case which involved causation or counterfactual issues from the Main Trial. It would, in those circumstances, have been very surprising if paragraph 29(b), using very similar wording, was intended to operate differently.

26. Third, the order which Venice claims was made would have involved a very unusual and counterintuitive approach to case management. It would have meant witnesses from Venice addressing the decision to enter into the Swaps being heard at the Main Trial, where the court might be asked to make findings on their conduct and reliability, with the prospect of the same witnesses being asked to come back for a second hearing to address whether they would have acted differently in their decision to enter into the Swaps if certain information had been provided to them and, if so, in what respects. It would also have been very surprising, in a case in which one issue to be determined at the Main Trial was the suitability of the Swaps from Venice's perspective, if the issue of what alternative (and, ex hypothesi, suitable) transaction Venice would have entered into did not form part of the Main Trial.

27. The position is, if anything, even clearer with regard to contributory negligence: it cannot sensibly have been thought that the court would make findings about the process by which Venice came to enter into the Swaps in the Main Trial but leave issues of whether it had acted in a contributorily negligent manner in doing so to a subsequent trial.

28. In response Mr Paul, who argued this issue for Venice and did so with considerable skill, suggested that, properly analysed, Issue 50(2) and (3) in the Agreed Common Ground and List of Issues attached to the Order of 14 July 2021 must have been understood as including issues of causation or counterfactual enquiry, because those issues do not appear anywhere else. I suspect that the difficulty of determining where those issues are dealt with in the Agreed Common Ground and List of Issues arises because of the absence of any sufficiently clear pleading of them, in circumstances in which the Agreed Common Ground and Lists of Issues is (and is meant to be) a document driven by the parties' statements of case. In any event, I do not think this argument helps Venice, because paragraph 29 was not purporting to exclude *all* issues raised by Issue 50(2) and (3) from the Main Trial, but only "the quantification of any restitution or damages to which Venice is entitled under Issue 50(2) and (3)".

Conclusion

29. For these reasons, I am satisfied that those issues of causation and counterfactual conduct raised by the parties' pleaded cases are to be resolved at this trial.

30. I will wait to hear from the parties in relation to any applications which may follow from this determination.