



Neutral Citation Number: [2022] EWHC 219 (Comm)

Case No: FL-2018-000003

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

7 Rolls Building  
Fetter Lane,  
London,  
EC4A 1NL

Date: 04 February 2022

Before :

**MRS JUSTICE COCKERILL DBE**

Between :

**DEUTSCHE BANK AG LONDON**

**Claimant**

- and -

**COMUNE DI BUSTO ARSIZIO**

**Defendant**

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**Rupert Allen** (instructed by **Allen & Overy LLP**) for the **Claimant**  
**Kevin Pettican** (instructed by **Pietro Gatto**) for the **Defendant**

Hearing date: 10 December 2021  
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**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.**

**Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii and The National Archives. The date and time for hand-down is deemed to be Friday 4 February 2022 at 10:00am.**

## **Mrs Justice Cockerill :**

1. In the judgment handed down on 12 October 2021, the Court found that the two interest rate swap transactions entered into between Busto and Deutsche Bank in 2007 are valid and binding on Busto and are enforceable in accordance with their terms.
2. There are four issues arising from the Court's judgment. These are:
  - i) What declarations should be made in favour of Deutsche Bank;
  - ii) Whether the proceedings should be stayed to enable Deutsche Bank to seek further relief in these proceedings in the future;
  - iii) What order should be made in respect of costs; and
  - iv) Whether Busto should be granted permission to appeal.

## **The Declarations**

3. Deutsche Bank seeks declarations in the terms set out at paragraphs 1(a) to 1(n) of the Prayer to the APOC. As set out in Appendix A to Deutsche Bank's written opening submissions, 13 of the 14 declarations track the wording of express contractual representations or terms of the Transactions.
4. Busto's position in correspondence was that Deutsche Bank is only entitled to 1 of the 14 declarations that it seeks (i.e. that Busto's obligations under the Transaction Documents constituted and, in the case of the Cash Flow Swap, constitute its legal, valid and binding obligations enforceable in accordance with their terms.) There has therefore been a lively debate on this issue.
5. The leading authority on the question of the scope of declaratory relief is *Rolls-Royce v Unite the Union* [2009] EWCA Civ 387, [2010] 1 WLR 318 at [120].
6. I considered similar questions in *BNP Paribas SA. v Trattamento Rifiuti Metropolitani SPA* [2020] EWHC 2436 (Comm), particularly at [78], a passage to which both parties referred.
7. There was no dispute that the starting point is that the grant of a declaration is a discretionary remedy and although a claimant may have proved his case, he still has to persuade the court both that it should in its discretion make a declaratory judgment, and if it does, that the terms he seeks are appropriate.
8. The Court's approach to the exercise of its discretion is succinctly summarised at paragraph 78 of the *BNPP* judgment:
  - 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. Justice includes justice not only to the claimant, but also to the defendant;

- iv) The Court must consider whether the grant of declaratory relief is the most effective way of resolving the issues raised. 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.
  - 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.
  - c) If the issue in dispute is not based on concrete facts the issue can still be treated as hypothetical.
- vi) Factors such as absence of positive evidence of utility and absence of concrete facts to ground the declarations may not be determinative. 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.

9. In its Written Opening Submissions (at paragraph 88), Deutsche Bank stated:

“DB’s primary claim is for declaratory relief. With one exception, the declarations sought by DB track the wording of the contractual representations and terms of the Master Agreement and Schedule. If the Transactions are within Busto’s capacity and/or if Busto is bound by the terms of the Master Agreement and Schedule, it is submitted that the Court should grant the declarations tracking these express terms following [the decision in *BNPP*]”

10. Busto contends that the decision in *BNPP* is not authority for the proposition that the Court will grant declaratory relief as a matter of course provided that the relief sought tracks the terms of the ISDA Master and Schedule. It points out that in *BNPP* there was a dispute between the parties over whether the contractual arrangements relating to the Transaction were contained only in the Transaction Documents, or whether the contractual arrangements were also contained in the Financing Agreement. Further, this dispute was before the English court in circumstances where there were concurrent proceedings in Italy.

11. It contends that the relevance of the parties’ dispute to the declaratory relief that was granted in *BNPP* is made clear at paragraphs 148 and 149 of the judgment:

“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.

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”.

12. I substantially accept these submissions. The position in *BNPP* was different. In the present case, the dispute between the parties concerns whether Busto had capacity to enter the two interest rate swap transactions and whether it validly did so. There is no dispute in the present case about where the terms of the transactions are to be found. It is therefore necessary to look at the declarations on their own merits in the context of this case.
13. Further in *BNPP* there was no dispute that contractual estoppel was applicable, although there was some debate about whether it operated in the light of the judgment of Leggatt LJ in *First Tower Trustees* and a subsidiary debate about s. 3 of the Misrepresentation Act. Here there has been a debate about contractual estoppel in another context (capacity). I rejected the argument there. The question of contractual estoppel as a basis for justifying the declarations has then been raised again very much as a back up argument in the skeleton for the consequential hearing referring in passing to the *Verona* case at [29]-[33] and to *BNP v TRM* at [176]-[184]. It was argued that “*the Court’s reasoning in [the passage concerning contractual estoppel and capacity at [387-409] of the main judgment] does not cast any doubt on the proposition that a contracting party, such as Busto, is contractually estopped from denying the truth of matters in respect of which it gave contractual representations in valid contracts.*”
14. It is fair to say that the point was squarely pleaded: at paragraph 32 of the Particulars of Claim contractual estoppel is pleaded in clear terms (derived from the leading formulation in the authorities) if not by name. It is also fair to say that in answer to that plea the denial merely engaged the issue of whether the transactions were binding for the central reasons in dispute. No separate defence to contractual estoppel in this context was run. However the point has not been fully engaged with.
15. There are a number of issues which arise in relation to contractual estoppel in the context of representations. These issues have been highlighted in the academic articles to which I made reference in the main judgment (and in a number of other articles). Those issues feed into the caution which must be exercised when exercising the discretion to grant declaratory relief.
16. I therefore do not proceed to make any of the declarations which I make below on the basis of contractual estoppel, but rather on the conventional basis that they reflect issues

in dispute between the parties on which I have explicitly or implicitly made decisions and with an eye to the utility of those declarations.

*Declaration No 1*

“1. The Defendant’s obligations under the Transaction Documents constituted and, in the case of the Cash Flow Swap, constitute its legal, valid and binding obligations enforceable in accordance with their terms”.

17. This declaration is not contentious.

*Declaration 2*

“2. The Defendant has and at all material times had complied in all material respects with all applicable laws if failure so to comply would materially impair its ability to perform its obligations under the Transaction Documents.”

18. This is not based on a representation in the Master Agreement or Schedule, but on Clause 4(c) of the Master Agreement under which both Deutsche Bank and Busto promise that they will “*comply in all material respects with all applicable laws and orders to which it may be subject if failure so to comply would materially impair its ability to perform its obligations under this Agreement or any Credit Support Document to which it is a party*”.

19. Busto contends that:

- i) Neither Deutsche Bank nor Busto has alleged any breach by the other of Clause 4(c) of the Master Agreement or led any evidence in relation to this issue.
- ii) Deutsche Bank has not identified any useful purpose that would be served by the Court making a declaration in these terms – particularly if Declaration 4 is granted.
- iii) It is surely sufficient for the Court to declare that Busto is bound by the Transaction Documents, which it is common ground include Clause 4(c) of the Master Agreement.

20. I agree with Busto on this declaration. This is not a declaration which tracks a warranty or representation in the contractual documentation. It is essentially a step on from a promise made by the parties. There has been no allegation of breach. There has been no dispute about this. The utility of the declaration sought remains unclear. Further, and importantly, this seems to me to have the potential to go wider than the matters in issue between the parties.

21. As I noted in argument it might be different if Deutsche Bank were seeking declarations which tracked actual findings as to breaches of law that had been asserted or rejected. Were such a declaration sought it would more properly reflect a dispute and have a better claim to utility.

*Declaration 3*

“3. The Defendant has and at all material times had the power to execute and deliver the Transaction Documents and to perform its obligations under the Transaction Documents and it has and had at all material times taken all necessary action and made all necessary determinations and findings to authorise such execution, delivery and performance”

22. Proposed Declaration 3 tracks the representation made by Busto (and Deutsche Bank) in Part 5(2)(ii) of the Schedule.
23. Busto again says that it is difficult to see what useful purpose would be served by the Court making a declaration in these terms in circumstances where the Court will be making a declaration that the Transaction Documents constitute Busto’s legal, valid, and binding obligations enforceable in accordance with their terms.
24. On this while there may be an element of duplication, since this question was at the heart of the dispute I will make this declaration.

*Declaration 4*

“4. The execution and delivery of and performance of its obligations under the Transaction Documents by the Defendant does not and did not at any material time violate or conflict with any law applicable to the Defendant”.

25. The declaration sought tracks the representation made by Busto at paragraph 3(iii) of the ISDA Master.
26. Busto again says that it is difficult to see what useful purpose would be served by the Court making a declaration in these terms in circumstances where the Court will be making a declaration that the Transaction Documents constitute Busto’s legal, valid, and binding obligations enforceable in accordance with their terms.
27. On balance I consider that this declaration is sufficiently closely linked to the essence of the dispute. It also has the capacity to dispense with the need for Declaration 2. I will therefore make this declaration.

*Declaration 5*

“5. The Transactions were entered into in conformity with Decree no 389 of 1 December 2003 issued by the Treasury Department of the Ministry of Economy and Finance and the Ministry of Interior and published in the Official Gazette no. 28 of 4 February 2004”.

28. The declaration sought tracks the representation at Part 5(2)(v)(6) of the Schedule.
29. Busto says that here the declaration sought by Deutsche Bank does not follow from the representation made. The Transactions were either entered into in accordance with the Decree or they were not. A representation by Busto that the Transactions were entered into in conformity with the Decree would amount to no more than a statement of Busto’s *belief* on this issue.

30. Busto also points out that Deutsche Bank objected to Busto's attempt to argue that the Transactions breached Article 3 of Ministerial Decree 389 of 2003 on the basis that Article 3 was limited to cases where the local authority was buying, not selling, a floor. That objection was advanced on the basis that it was not pleaded, and the Court accepted Deutsche Bank's objection at [310] of the judgment. While I went on to express a view on what the position would have been "*had the point been pleaded and therefore properly in play*" this is, Busto says, beside the point. Since the point was not properly in play, it would be wrong for the Court to make a declaration in the terms sought.
31. I agree with Busto's submission. It would be wrong for me to make a declaration on a matter which was not in issue; and it is illogical for Deutsche Bank to seek to exclude the point and then seek a declaration on it. My conclusion on the point is in the judgment. Deutsche Bank can always refer to that if the matter arises.

*Declaration 6*

"6. The Transaction Documents constituted and constitute the entire agreement and understanding of the parties with respect to their subject matter and supersede all oral communication and prior writings with respect thereto".

32. The declaration sought tracks the parties' agreement at Clause 9(a) of the Master Agreement.
33. Busto contends that there is no utility in the Court granting a declaration in these terms in circumstances where (unlike the *BNPP* case) there is no dispute concerning where the terms of the Transactions are to be found.
34. This is a matter where the declaration sought tracks the ISDA Master and where, while there may be an element of duplication, one can equally see that there may well be utility in the declaration. I will therefore grant this declaration.

*Declarations 7-9*

"7. In entering into the Transactions, the Defendant 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 appropriate or proper for it based upon its own judgment and upon advice from such advisers as it had deemed necessary.

8. In entering into the Transactions, the Defendant did not rely on any communication (written or oral) of the Claimant as investment advice or as a recommendation to enter into the Transactions, it being understood that (i) information and explanations related to the terms and conditions of the Transactions would not be considered to be investment advice or a recommendation to enter into the Transactions, and (ii) no communication (written or oral) received from the Claimant would be deemed to be an assurance or guarantee as to the expected results of the Transactions.

9. Prior to and when entering into the Transactions, the Defendant was capable of assessing the merits of and understanding (on its own behalf or through independent professional advice), and understood and accepted, the terms, conditions and risks of the Transactions and the Defendant was capable of assuming and assumed the risks of the Transactions.”.

35. As to Declaration 7, the declaration sought tracks (in part) the representation made by Busto at Part 5(2)(vi)(h)(i) of the Schedule.
36. Busto again takes issue with the utility of this declaration and also expresses concern that a declaration in these terms, whilst ostensibly tracking a representation in the Schedule, could be misunderstood as suggesting that the Court has made factual findings about the circumstances in which Busto entered the Transactions that might be argued to exclude or limit any claim by Busto under the Mandate.
37. It points out that as recorded in Deutsche Bank’s Amended Particulars of Claim (paragraph 3), in 2007 Deutsche Bank was retained by Busto to provide assistance pursuant to the Mandate. This assistance included advice on the management of Busto’s debt and the selection of suitable financial instruments. It is common ground that the Mandate is governed by Italian law with the courts of Milan having exclusive jurisdiction over any disputes arising in relation to the Mandate.
38. Busto’s concerns are heightened by the fact that Deutsche Bank pleads (at paragraph 35) that Deutsche Bank has not acted in breach of the Mandate in connection with the Transactions, a plea which is met by Busto with a denial that the High Court has any jurisdiction to determine any dispute or difference between the parties pursuant to the Mandate and that Busto is under any obligation to advance in these proceedings any claim it may have pursuant to the Mandate.
39. Busto’s concerns regarding proposed Declaration No 7 also apply to Proposed Declaration No. 8 and Proposed Declaration No. 9. It reiterates that the parties did not identify as an issue in the case (and the judgment does not address) any potential claims Busto may have against Deutsche Bank pursuant to the Mandate. In these circumstances, the Court should be astute to avoid making any declarations that might be interpreted as suggesting (wrongly) that the court has made findings in respect of potential claims by Busto under the Mandate.
40. Although in one sense this declaration does track the Master Agreement and Schedule I agree with these submissions. As I noted at [205] in *BNPP*, there is a risk that granting of additional relief (beyond the scope of the judgment) could create a confusion that would not otherwise arise. If a declaration adds nothing to the terms of the Master and Schedule, the fact of its having been granted might lead another court to think (wrongly) that it does add something, and conversely if a declaration does take matters further the reason why it is needed should be clear.
41. I would however be prepared to make declarations that reflect the fact that representations to this effect were made. It may be that the existence of a finding that as a matter of English Law a representation was made will be of utility to an Italian Court dealing with a different iteration of the dispute between the parties. Equally I would be prepared to grant a declaration which tracked exactly my own findings (for

example as to understanding of the Transactions) or which was so drafted (for example as to reliance) as to be confined to the Transactions and the documents relating to the Transaction, distinct from material which might pertain rather to the Mandate.

*Declaration 10*

“Prior to and when entering into the Transaction, the Defendant had a specific expertise and experience in transactions having as an object financial investments and thereby it is and was at all material times a professional investor (*operatore qualificato*) pursuant to Article 31 of Regulation no.11522 of 1 July 1998 issued by Consob.”

42. Proposed Declaration No. 10 (Busto’s status as a Professional Investor) tracks the representation at Part 5(2)(v)(4) of the Schedule.
43. Busto says that a declaration in the terms proposed would serve no useful purpose as Deutsche Bank already has the benefit of Busto’s admission on the point at paragraph 50B of the Amended Defence. It was precisely because of this admission that it was not necessary for the Court to actually determine the issue in its judgment.
44. This was an admitted fact and the declaration may well have utility. I will make this declaration.

*Declaration 11*

“11. The Claimant did not act as a fiduciary for or an advisor to the Defendant in respect of the Transactions.”

45. Proposed Declaration No. 11 partially tracks the representation at Part 5(2)(vi)(h)(iii) of the Schedule.
46. I agree with Busto that it does so in terms that are potentially misleading. The representation given by each party is as follows: “*Status of Parties. The other party is not acting as a fiduciary for or adviser to it in respect of the Transaction*”. The representation is concerned with the status of the parties in entering into the Transaction. There is a possibility that Proposed Declaration No. 11 (together with Proposed Declarations 7, 8 and 9) might be taken to suggest that Deutsche Bank did not act as an adviser to Busto pursuant to the Mandate, which it obviously did on the basis of Deutsche Bank’s own pleaded case.
47. I also agree that apart from this, it is difficult to see what useful purpose Proposed Declaration No. 11 is intended to serve. However as with declarations 7-9 a declaration as to the existence of the representation made may be of utility and I am prepared to grant such a declaration.

*Declaration 12*

“12. Within the meaning of the 2000 ISDA Definitions, 'Negative Interest Rate Method' is applicable to the Cash Flow Swap, and 'Compounding' or 'Flat Compounding' is not specified for the Cash Flow Swap, such that section 6.4(b) of the 2000

ISDA Definitions applies where the Floating Amount payable by a party on a Payment Date is a negative number so that the Floating Amount payable by that party on that Payment Date will be deemed to be zero, and the other party will pay to that party the absolute value of the negative Floating Amount as calculated, in addition to any amounts otherwise payable by the other party for the related Calculation Period, on that Payment Date.”

48. Proposed Declaration 12 does not track the representations made in the Master Agreement and the Schedule.
49. Busto originally said that it appears to address matters that have not been pleaded or determined in the judgment. However orally it was sensibly agreed that this was admitted in the Defence, and there was therefore no serious opposition to the declaration being granted.

*Declaration 13*

“13. The Transactions were entered into by the Defendant for the purposes of managing its borrowings or investments and not for the purposes of speculation.”

50. Proposed Declaration 13 (non-speculation) tracks the representation made at Part 5(2)(v)(1) of the Schedule. Busto does not see what useful purpose would be served by the Court making a declaration in these terms. However, Busto accepts that the Court did decide this issue at paragraph 306 of the judgment (“*I conclude that the Transactions were not speculative and were hedging*”).
51. It therefore follows that I should grant this declaration.

*Declaration 14*

“14. The Claimant has to date complied with and/or discharged each and all of its relevant obligations arising out of or in connection with the Transactions (including, for the avoidance of doubt, any obligations arising prior to the execution of any of the Transaction Documents as a result of pre-contractual negotiations between the Claimant and the Defendant or otherwise and any obligations arising after the execution of any of the Transaction Documents, including in either case any relevant obligations arising under or in connection with the Italian Civil Code, Italian Legislative Decree no.58/1998, Regulation no.11522/1998 issued by Consob or Regulation no.16190/ 2007 issued by Consob) and the Claimant has not caused and/or is not liable to the Defendant (whether in or pursuant to contract, tort, statute or otherwise) in respect of any loss or damage arising out of or in connection with the Transactions which may have been suffered or incurred by the Defendant.”

52. Declaration 14 is similar to the declaration which I refused to grant in *BNPP*.

53. In its Written Opening (at paragraph 69) and at the consequential hearing, Deutsche Bank accepted that it was seeking to go beyond the relief the Court was willing to grant in *BNPP* but sought to justify the relief claimed by reference to the Martingale Risk letter and reports.
54. That submission was renewed before me, with Deutsche Bank saying that:
- i) It expressly pleaded that there had been no such breaches and/or liability pursuant to potentially applicable Italian laws or regulations; an allegation which Busto denied without advancing any positive case. It was incumbent on Busto to bring its whole case in these proceedings rather than seeking to hold matters in reserve for future proceedings in Italy.
  - ii) Unlike *BNP v TRM*, this is also a case where Busto disputed the validity of the Transactions and stopped paying the sums due under the Cash Flow Swap; and also where Busto's solicitor has recently written an article criticising the Judgment and questioning whether it will be enforceable in Italy.
  - iii) Busto has also expressly purported to reserve the right to issue proceedings in Italy.
  - iv) Accordingly, there would be utility to granting the declaration sought by Deutsche Bank; the declaration sought is not hypothetical and is responsive to the arguments previously raised by Busto; and it would not be just to deny Deutsche Bank the relief it seeks to shut out claims based on allegations of breach of duty that were previously asserted or other similar allegations.
55. Three issues are raised by Busto. It says that:
- i) The Court has not received evidence on and has not determined the matters that are addressed in the Martingale Risk Report. As stated at paragraph 301 of the judgment, those matters were "*not in issue*" in the proceedings, and consequently the Court has made no findings in respect of them.
  - ii) On their face, the terms of Deutsche Bank's Proposed Declaration 14 would extend to any claim Busto may have under the terms of the Mandate, despite the fact that the Mandate provides for the exclusive jurisdiction of the court of Milan.
  - iii) Further, the terms of the declaration are so wide-ranging that they contemplate the English court declaring that Deutsche Bank has complied with its obligations under various provisions of Italian law in circumstances where there is not even evidence before the English court of what those provisions of Italian law require.
56. While I certainly understand Deutsche Bank's desire to have a declaration of the sort which it seeks here, I am not prepared to grant this declaration. Declaratory relief should really be reflective of the dispute out of which it emanates. This is not so reflective. The Martingale report was no more than a piece of background to the dispute which I saw. The allegations made in it were not pursued in this litigation; and I have not received evidence on them.

57. It is not clear what its utility would be; it is really conceded to be precautionary against an as yet undefined dispute in Italy. In that sense the position was perhaps stronger for a declaration in *BNPP*, where a dispute was pending in Italy and certain allegations had been deliberately edited out of the English proceedings for pursuit in Italy.
58. Further as in that case there may be circumstances in which the declaration sought might be read as impinging on matters which were not before this court and over which this Court does not have jurisdiction.
59. It may be that a more circumscribed declaration, essentially reflecting Deutsche Bank's compliance with the terms of the Transactions, could be crafted and would not be offensive as reflecting the validity of the Transactions which was the actual focus of the dispute before me and the factual state of play against which the dispute was played out. However that is not the declaration sought.

### **Stay**

60. Deutsche Bank has proposed that it should have liberty to apply for further relief in these proceedings, rather than requiring a separate claim or claims to be commenced, if Busto fails to pay any sum or sums due and payable under the Cash Flow Swap in the future. Busto has objected to this provision on the grounds that it is inconsistent with the general principle of finality in litigation.
61. As I indicated in the course of argument I am not persuaded that I have jurisdiction to do so. Once the issues in this case are determined the court is *functus officio*. If it were desired to keep the proceedings live there would need to be an element of the claim which remained "live". Since all issues have been determined there is no such element. There is therefore no basis for the making of such an order. I note that Deutsche Bank did not address the jurisdictional basis upon which this would be possible.

### **Costs**

62. Busto accepts that Deutsche Bank is the overall winner of the proceedings and that the starting point is the general rule (per CPR 44.2(2)) that Deutsche Bank is entitled to an order for its costs; however, it has suggested in correspondence that Deutsche Bank should only recover 75% of its costs on the basis that Deutsche Bank was only partially successful. This is not accepted by Deutsche Bank.
63. Bustos argument ran thus:
  - i) Busto's accepts that, overall, Deutsche Bank has been the successful party with the consequence that the Court will take as its starting point the general rule that Deutsche Bank is entitled to its costs.
  - ii) However, there were significant issues in this case on which Deutsche Bank did not succeed (and on which Busto was successful) which Busto contends should be reflected in the Court's decision on costs.
  - iii) First, Deutsche Bank was wholly unsuccessful on its alternative claim based on Article 1338 of the Italian Civil Code. This was not simply an argument; it was

put forward by Deutsche Bank as an alternative claim in the event that its primary claim failed.

- iv) The Article 1338 claim did not form part of Deutsche Bank's original case but was added by amendment and rendered it necessary for Busto to engage a second Italian law expert (Professor Alibrandi). Absent the Article 1338 claim, Busto would have relied solely on Professor della Cananea.
  - v) In addition to Professor Alibrandi's costs, both sides will have incurred costs in relation to the Article 1338 claim in preparing the case and in relation to the trial itself.
  - vi) Deutsche Bank also failed on other significant and costly issues:
    - a) Contractual estoppel.
    - b) Restitution/Change of Position.
64. Busto suggested that a proportionate order in the region of 75% would be more appropriate.
65. Attractively as this argument was put, I am not persuaded by it. There is a danger, noted in some of the authorities, that proportionate orders end up undermining the general rule that costs follow the event. As noted in many of the authorities, in any litigation - especially complex commercial litigation such as the present case - any winning party is likely to fail on some issues – *HLB Kidsons* [2007] EWHC 2699 (Comm) at [11]; and see also *Sycamore Bidco Ltd v Breslin* [2013] EWHC 583 (Ch) at [11]-[12].
66. In 2011 the Court of Appeal reminded puisne judges that respect has to be had for the “follow the event” starting point. In *Fox v Foundation Piling Ltd* [2011] EWCA Civ 790, the Court of Appeal observed that there had been “a growing and unwelcome tendency ... to depart from the starting point set out in rule [44.2(2)(a)] too far and too often”. There has been no sign in subsequent authorities that they have changed their view on this.
67. That is reflected in the dicta that:
- i) The Court should “avoid an unduly finely detailed division of issues and sub-issues when deciding what costs order to make” – *F&C Alternative Investments v Barthelemy* [2011] EWHC 2807 (Ch) at [19].
  - ii) The Court must always be astute to exercise its discretion on costs to reflect the “overall justice of the case” and to give “real weight” to the fact that one party has been successful overall – *HLB Kidsons v Lloyds Underwriters* at [10].
68. I regard this case as being close to a paradigm case for the application of the “follow the event” rule. The central issue at trial, which took up the overwhelming majority of the parties' time and costs, both in preparation for and at trial, was whether the Transactions were within Busto's capacity and valid and enforceable. Deutsche Bank won on that overarching issue and also on almost all of the numerous issues and sub-issues of fact and law (Italian and English) that were raised or disputed by Busto.

69. The issues on which Deutsche Bank succeeded were by far and away the most important issues in the case. The only issues on which Deutsche Bank was not successful were a very small number of subsidiary and contingent matters that would only ever have arisen if Busto had been correct that the Transactions were not within its capacity.
70. Even the points on which Deutsche Bank lost are in essence ones which it would not have needed to raise if Busto had not resisted Deutsche Bank's claim; they were "backstop" arguments in response to that defence (and in particular in considerable measure to a late and fairly extensive change of case by Busto) and it was not unreasonable for Deutsche Bank to raise them in response to the defence. I also accept Deutsche Bank's submission that they were narrow in scope and took up little time in preparation or in the evidence. Yet further any attempt to assign a cash value to them could only be a very vague and approximate exercise.
71. I therefore consider that there should be no departure from the general rule that Busto should be ordered to pay Deutsche Bank's costs.
72. This conclusion is at the least coherent with the fact that on 27 October 2020, Deutsche Bank made a Calderbank offer to settle the proceedings on the basis of a payment of €500,000 by Deutsche Bank and the Cash Flow Swap remaining on foot, with each party bearing its own costs; a result which would have been more favourable to Busto than the trial outcome.
73. Deutsche Bank's total costs of the proceedings, as per its costs schedule dated 23 November 2021, are £2,823,357.42. Busto (sensibly) accepts that Deutsche Bank should receive an interim payment on account of 50% of its claimed costs, subject to any reduction on the basis of its submission that Deutsche Bank was only partially successful.
74. On that basis the interim payment should be £1.4 million.

### **Permission to Appeal**

75. Busto seeks permission to appeal pursuant to CPR 52.3(2)(a) on the basis of the Draft Grounds of Appeal that were served with its Skeleton Argument for the consequentialis hearing.
76. Permission is sought essentially on both bases permitted under CPR 52.6(1), real prospect of success and also that there is some other compelling reason for the appeal to be heard.
77. I do not consider that there is a real prospect of success.
78. Ten draft Grounds of Appeal are put forward. They are all ultimately concerned with the findings made by the Court in relation to the decision of the Italian Supreme Court in *Cattolica*.
79. There are a number of problems here. The first is that my conclusions on Italian law are conclusions on factual issues, informed by the expert evidence. Such conclusions are ones which the appeal court will inevitably be very cautious about disturbing, since they are rooted in the trial judge's greater opportunities to grapple with the expert

evidence and hear the evidence of the experts: *Dexia Crediop SpA v Comune di Prato* [2017] EWCA Civ 428, [2017] 1 CLC 969 at [34]-[42]. See also *Wheeldon v Millenium Insurance* [2018] EWCA Civ 2403 per Coulson LJ on the reluctance of the appellate court to interfere in findings of fact or expert evidence referring to the “*composite first instance decision which, in the nature of a jig-saw, depended on the interlocking of a very large number of individual pieces, each the subject of oral expert evidence which the appellate court has not heard.*”

80. The second is that an appeal is pointless unless it has an effect on outcome. Here Busto’s case would still fail unless it succeeded on further factual findings. In particular:

- i) Section 9:
  - a) I rejected Busto’s case that section 9 of the *Cattolica* decision was concerned with capacity “by a clear margin” (Judgment [211]). That was a decision which hinged on assessment of the expert evidence, and is therefore a conclusion unlikely to be overturned by the Court of Appeal.
  - b) Even if section 9 of the *Cattolica* decision was concerned with issues of capacity, I found that the section 9 requirements were complied with, as a matter of fact, in relation to the Transactions as Busto was able to make and did make an informed assessment in relation to risk (Judgment [269]-[274]).
- ii) I found for Busto on the law in relation to speculativeness; where Busto lost this point was on the facts on the basis of Busto’s pleaded case [295] or its new case [303]-[305], the latter not being open to Busto [301]-[302]. Again these factual conclusions are unlikely to be changed by the Court of Appeal.
- iii) Busto’s purported case that the Transactions breached Article 3 of Ministerial Decree 389/2003:
  - a) Although I found that it was also not properly pleaded [309]-[310] it would in any event have failed on the facts:
    - i) The alleged breach of Article 3 was not supported by any expert evidence, and was not made out on the factual evidence [311]-[315],
    - ii) Further Article 3 did not limit Busto’s capacity [316].
- iv) Article 42(2)(i) TUEL. I found against Busto on a number of different bases, most of them factual, the structure being:
  - a) The case that Busto sought to advance in closing in relation to breach of Article 42(2)(i) of TUEL was unpleaded [332]-[334].
  - b) In any event, as a matter of fact, the Transactions did not involve a significant modification of existing loans giving rise to new indebtedness [335]-[342] applying the “*indicia*” from the *Cattolica* decision which allowed for “*a sensitive fact based approach*” [349].

- c) Even if City Council approval was required, on the facts it was obtained [356]-[364].
  - d) Even on the double contingency that City Council approval was required under Article 42(2)(i) of TUEL and was not obtained:
    - i) The resolutions of the City Board and Mr Fogliani approving the Transactions would be annulable (not void) and it is now too late for Busto to set them aside [370]-[372];
    - ii) this would not be a limit on capacity [373]; and
    - iii) the Transactions were ratified by the City Council, under English law as the applicable law for this issue, [382]-[386].
81. Further, the proposed appeal is predicated on a challenge to my decision that it was open to me to differ from the Italian Supreme Court in *Cattolica* and an argument that the Court of Appeal is likely to form the view that I erred in considering myself free to do so.
82. However that argument goes nowhere unless Busto can make good an assertion that I then did differ from the Italian Supreme Court in *Cattolica*. However I did not disagree with the decision in *Cattolica*:
- i) In relation to capacity:
    - a) I concluded that section 9 of *Cattolica* was not concerned with capacity [211]. Therefore I did not disagree with anything in that section;
    - b) As a backup I concluded that if it was concerned with capacity there was no hard and fast rule [266], so there was no disagreement;
  - ii) In relation to speculation, I accepted Busto's submission and rejected that of Deutsche Bank: [276-7]
  - iii) In relation to Article 42, I rejected Deutsche Bank's argument that I should prefer the Council of State's decision over that of *Cattolica* and concluded that the two decisions could be harmonised.
83. The "*some other compelling reason*" argument is based in an assertion that there are other cases pending before the Commercial Court in which other Italian local authorities have raised issues similar to those raised by Busto and that "*in these circumstances, it is surely inevitable that the Court of Appeal will come to consider at some point whether the Court's approach to Cattolica is correct*".
84. This test is perhaps more a matter for the Court of Appeal than for this court. However I should record this:
- i) There are other cases which raise issues relating to capacity and Italian public authorities.

- ii) The Court has been informed (when suggesting joint case management) that different Italian statutory provisions apply to different types of Italian public authorities and that therefore the expert issues of Italian law differ. In particular the rules relation to Regione differ from those relating to Comune.

I am not therefore persuaded that the same issue arises in other cases such that a determination of this proposed appeal would resolve other cases.

- 85. In any event, in circumstances where an appeal in this case cannot affect the outcome of this case, I do not consider that the “*some other compelling reason*” test is met.