Neutral Citation Number: [2014] EWHC 1020 (Comm)

Case No: 2012 FOLIO 277

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 08/04/2014

**Before**:

**THE HONOURABLE MR JUSTICE FLAUX**

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**Between:**

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| **BARCLAYS BANK PLC** | **Claimant** |
| **- and -** | |
| **(1) SVIZERA HOLDINGS BV** | |
| **(2) MANEESH PHARMACEUTICALS LIMITED** | **Defendants** |

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**Mr Daniel Toledano QC** (instructed by **Reed Smith LLP**) for the **Claimant**
**Mr Oliver White and Ms Karishma Parekh** (instructed on a direct access basis) for the **Defendants**

Hearing dates: 31 March, 1 and 2 April 2014

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# Approved Judgment

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

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THE HON MR JUSTICE FLAUX

## The Honourable Mr Justice Flaux:

Introduction

1. The claimant bank (to which I will refer as "Barclays") acted as the Agent and Offshore Security Trustee under a Facility Agreement dated 24 September 2007 with the defendants whereby a syndicate of lenders which included Barclays Capital, the investment bank division of Barclays, lent US$45 million to the second defendant ("Svizera"). Svizera is a Dutch company and is a wholly owned subsidiary of the first defendant ("Maneesh") an Indian pharmaceutical company. Maneesh acted as guarantor under the Facility Agreement.

2. Under the Facility Agreement there was a 30 month moratorium on repayment of principal so that during that period, only interest was payable. Svizera duly made payments of interest as they fell due during the period between 31 October 2007 and 31 December 2010. It also repaid the first two instalments of principal, each of US$2.25 million on the due dates of 31 March 2010 and 29 September 2010. However, thereafter, the instalment due on 28 March 2011 of US$10,125,000 was only part paid late, US$5,500,000 being paid on 7 June 2011 and the instalment of US$10,125,000 due to be paid on 28 September 2011 was not paid at all. On 3 February 2012, Barclays served an Acceleration Notice on Svizera pursuant to the terms of the Facility Agreement, but Svizera did not pay the outstanding balance. On 21 February 2012, Barclays served a demand on Maneesh as guarantor, but Maneesh did not honour that demand. It is evident that the failure of the defendants to honour their obligations was due to impecuniosity.

3. On 29 February 2012, Maneesh wrote to Barclays stating, inter alia: "As the money raised would have been in INR [Indian Rupees] so it was an understanding that 100% FC [foreign currency] loan would be covered by currency hedging…[an] email from Barclays Capital [of] 11 October 2007 confers the process of concluding interest hedging and currency hedging will be executed in a week's time. However Barclays did not allow our company Maneesh … to do currency hedging." This was the first time since the Facility Agreement was entered into that the defendants had raised the issue which is central to their Defence and Counterclaim in the current proceedings, that Barclays had been under an obligation to obtain for the defendants an INR/USD currency swap. It is notable that, in that letter, Maneesh did not suggest that the Facility Agreement was somehow rendered invalid by the failure to procure the INR/USD currency swap. Indeed, on the contrary, the letter sought a restructuring of the original debt.

4. The Claim Form in these proceedings had in fact been issued on 22 February 2012. Barclays claims on its own behalf and on behalf of the other lenders over US$35 million outstanding under the Facility Agreement and unpaid fees and legal fees and costs, together with contractual interest.

5. The Defence and Counterclaim was filed on 29 May 2012. It was evidently drafted by the head of litigation at the solicitors then acting for the defendants, Fladgate LLP and it is he who signed the statement of truth, although Mr Sapte accepted in cross-examination that he had been involved in providing the information it contained. As Mr Daniel Toledano QC, who appeared on behalf of Barclays, pointed out in his Skeleton Argument, although that pleading contains a number of different arguments,

in essence the defendants advance one allegation, that in May 2007 and/or June 2007 and/or September 2007 Barclays represented that it could and would obtain an INR/USD currency swap for Svizera at ordinary commercial rates, to be entered into at the same time as the Facility Agreement. The defendants' complaint is that such a swap was not entered into.

6. This is relied upon as misrepresentation by the defendants. Although there is a pleaded case that this entitles the defendants to rescind the Facility Agreement, at the outset of the trial, Mr Oliver White on behalf of the defendants accepted that, since his clients were not in a position to repay to Barclays the sums advanced, there could not be *restitutio in integrum*, so rescission was not a remedy open to the defendants. In any event, even if that concession had not been made, rescission would not have been available since the defendants had clearly affirmed the Facility Agreement by making the payments of interest and principal due for over three years until they were unable to do so because of their financial state. The only remedy the defendants could pursue is for damages. In the alternative to the claim in misrepresentation, the defendants allege that there was a collateral contract of which Barclays was in breach, alternatively that Barclays was in breach of an advisory duty in tort, alternatively in breach of some contract collateral to the Facility Agreement.

7. Barclays' case is that all these defences are misconceived. It denies that any representation was ever made, contending that the only currency swap ever discussed between Barclays and the defendants was a USD/ Swiss franc [CHF] swap suggested by Barclays as a cost reduction strategy, but ultimately never executed. The only other swap under consideration was an interest rate swap which Svizera was obliged to enter into with Bank of India pursuant to the terms of the Facility Agreement. Accordingly, Barclays contends that the defence fails at first base on the facts. Even if it did not do so, Barclays relies upon a series of contractual terms and contractual estoppels to defeat the counterclaim.

8. In addition to the defences pleaded, in his Skeleton Argument served on the last working day before the trial, Mr White alleged for the first time that Barclays owed the defendants a fiduciary duty and was in breach of that duty by virtue of the negligent advice it gave. The allegation was repeated in a Supplementary Skeleton served at six in the morning of the first day of trial. This allegation is utterly hopeless. Quite apart from the fact that the relevant contractual documentation stated in terms that Barclays was not acting in a fiduciary or advisory capacity (see [15] below), this allegation completely misunderstands and misstates the nature of the relationship between a bank and its customer which save in special circumstances (not present here) is not a fiduciary one. That is confirmed by the very decision on which Mr White relies, *Forsta Ap-Fonden v Bank of New York Mellon SA* [2013] EWHC 3127 (Comm) at [173] per Blair J, following the judgment of Gloster J in *JP Morgan Chase Bank v Springwell Navigation Corp* [2008] EWHC 1186 (Comm) at [573] (affirmed by the Court of Appeal [2010] EWCA Civ 1221). Even if an application for permission to amend were to be made (which it has not been) I would refuse it on the basis that this allegation is bound to fail. In any event, in his oral closing submissions, Mr White effectively accepted that he could not run a case that there had been a breach of fiduciary duty.

9. For good measure, to the extent that, in his Skeleton Argument, Mr White sought to bolster that allegation that Barclays owed the defendants a fiduciary duty by asserting

that Barclays acted as the defendants' agent, that assertion is equally hopeless. A commercial banking relationship is between two principals not a principal and an agent and under the Facility Agreement, Barclays was only agent for the "Finance Parties" i.e. the other banks.

Factual background

10. From about March 2007, Maneesh and Barclays held discussions as to the terms on which Barclays could arrange a syndicated loan for Maneesh to enable it to make two acquisitions, of a 51% shareholding in Tillomed Holdings Limited ("Tillomed") an English registered company and a 40% shareholding in Nostrum Laboratories Inc ("Nostrum") a US company. Maneesh was acting through Mr Vinay Sapte, its Chairman and Managing Director. Initially Mr Sapte dealt with Mr Navin Gupta, head of the Small and Medium Enterprises Team in the Commercial Banking Team at Barclays Mumbai branch, but from some time in May 2007, Mr Anuj Kapoor, a Director of Barclays Capital in Mumbai, took over negotiations and Mr Gupta's involvement reduced.

11. Mr Sapte and Mr Kapoor gave oral evidence before me. Mr Gupta no longer works for Barclays, so he was not called to give evidence, but Mr Kapoor has spoken to him and, in his first witness statement, Mr Kapoor was able to give hearsay evidence of what Mr Gupta had told him denying allegations by the defendants that he, Mr Gupta, had made any of the alleged representations. I found Mr Kapoor an honest and straightforward witness and, apart from a few irrelevant details on which his recollection may have been mistaken, I accept his evidence.

12. I should add that his evidence to me was essentially the same evidence as he gave at the trial last December before Hamblen J of the claim by Bank of India against Svizera under the interest rate swap, where Svizera was running a defence that the interest rate swap was subject to a condition precedent that Barclays would enter into the INR/USD currency swap. In his judgment rejecting that defence ([2013] EWHC 4097 (Comm)), Hamblen J accepted Mr Kapoor's evidence that the only currency swap proposed was the USD/CHF swap and that no representation had been made by Barclays that there would be a INR/USD currency swap, nor any agreement to that effect. Of course, those findings are not binding on me and I have made my own independent assessment of the evidence before me and of Mr Kapoor as a witness. However, the fact that essentially the same evidence was believed by another judge of this Court (albeit without being challenged in cross-examination, in that, having failed to persuade the learned judge to adjourn the trial, Svizera took no part in it) is a matter which enhances Mr Kapoor's credibility overall.

13. In contrast, I did not regard Mr Sapte as a satisfactory witness. As set out in more detail below, I do not accept his evidence that he was seeking an INR/USD currency swap from the outset or that Barclays represented that it could and would obtain such a swap. I was also wholly unconvinced by his explanation for there being no complaint from the defendants between September 2007 and February 2012 that the currency swap had not been obtained, namely that he was very busy on business and travelling a great deal. The truth is that, if there ever had been any sort of commitment by Barclays to obtain the alleged currency swap (a) it is inconceivable that that commitment would not be clearly documented in correspondence between the parties and (b) given that Mr Sapte knew all along (as he was constrained to accept in cross-

examination) that the alleged currency swap had not been obtained, it is equally inconceivable that he would not have complained at the time in late 2007 about the failure to obtain it. Again for reasons set out in more detail below, I consider that, in respect of various other aspects of his evidence, Mr Sapte was not telling the truth to the court or was, at the very least, not being entirely frank in his evidence.

14. On 21 May 2007 Barclays presented Mr Sapte with three documents addressed to Maneesh: (a) a Mandate Letter of that date; (b) Indicative Terms and Conditions and (c) a Fee Letter also dated 21 May 2007. Mr Sapte initialled every page of each of those three documents and he also signed each of the letters at the end agreeing to their terms. His evidence was that, despite signing each page, he had not bothered to read the Mandate Letter because Mr Kapoor had said to him the letter was a formality and he should not worry. I simply did not believe Mr Sapte's evidence about this. It is inconceivable that a sophisticated businessman like Mr Sapte would not have read carefully a document, each page of which he initialled, which was setting out the terms on which Barclays would seek to arrange a US$45 million loan and would simply have taken the word of a Barclays employee whom he had only met for the first time earlier that month. Furthermore, Mr Kapoor's unchallenged evidence in his witness statements was that he had not told Mr Sapte that the Mandate Letter was just a formality and that, as far as he knew, Mr Sapte read and agreed the letter. However, even if Mr Sapte's evidence were true, it makes no difference. Whether he read it or not, it is contractually binding on Maneesh and, as was ultimately accepted by Mr White, on Svizera.

15. The Mandate Letter set out the terms and conditions on which Barclays as Mandated Lead Arranger was prepared to arrange the Facility, on the basis that it would bring in other banks as Mandated Lead Arrangers prior to syndication. For present purposes, the following terms of the Mandate Letter are relevant:

> "8. Syndication
>
> 8.1 The Mandated Lead Arranger shall, in consultation with the Company, manage all aspects of syndication of the Facility, including timing, the selection of potential Lenders, the acceptance and allocation of commitments and the amount and distribution of fees to Lenders.
>
> 8.2 The Company shall, and shall ensure that the other members of the Group, give any assistance which the Mandated Lead Arranger reasonably require in relation to the syndication of the Facility including, but not limited to:
>
> (a) the preparation, with the assistance of the Mandated Lead Arranger, of an information memorandum containing all relevant information (including projections including, but not limited to, information about the Group and how the proceeds of the Facility will be applied (the "Information Memorandum"). The Company shall approve the Information Memorandum before the Mandated Lead Arranger distribute it to potential Lenders on the Company's behalf.

(b) providing any information reasonably requested by the Mandated Lead Arranger or potential lenders in connection with syndication;

(c) making available the senior management and representatives of the Company and other members of the Group for the purposes of giving presentations to, and participating in meetings with potential Lenders at such times and places as the Mandated Lead Arranger may reasonably request;

(d) using best efforts to ensure that syndication of the Facility benefits from the Group's existing lending relationships;

(e) agreeing to such shorter interest periods during the syndication process as are necessary for the purposes of syndication;

(f) entering into a syndication agreement in substantially the same form as the current LMA recommended form of syndication and amendment agreement;

and

(g) making any minor amendments to the Facility Documents which the Mandated Lead Arranger reasonably request on behalf of potential Lenders.

10 Indemnity

10.3

(a) The Company agrees that no Indemnified Person shall have any liability (whether direct or indirect, in contract or tort or otherwise) to the Company or any of its Affiliates for or in connection with anything referred to in paragraph 10.1 above except, following the Company's agreement to the Mandate Documents, for any such cost, expense, fees or liability incurred by the Company that results directly from any breach by that Indemnified Person of any Mandate Document, or any Facility Document which is in each case finally judicially determined to have resulted directly from the gross negligence or wilful misconduct of that Indemnified Person.

(b) Notwithstanding paragraph (a) above, no Indemnified Person shall be responsible or have any liability to the Company or any of its Affiliates or anyone else for consequential losses or damages.

(c) The Company represents to the Mandated Lead Arranger that:

(i) it is acting for its own account, and, it has made its own independent decisions to enter into the transaction contemplated in the Mandate Documents (the "Transaction") and, as to whether the Transaction is appropriate or proper for it based upon its own judgment and upon advice from such advisers as it has deemed necessary;

(ii) it is not relying on any communication (written or oral) from the Mandated Lead Arranger as Investment advice or as a recommendation to enter into the Transaction, it being understood that information and explanations related to the terms and conditions of the Transaction shall not be considered investment advice or a recommendation to enter into the Transaction. No communication (written or oral) received from the Mandated Lead Arranger shall be deemed to be an assurance or guarantee as to the expected results of the Transaction;

(iii) it is capable of assessing the merits of and understanding (on its own behalf or through independent professional advice), and understands and accepts, the terms, conditions and risks of the Transaction. It is also capable of assuming and assumes, the risks of the Transaction; and

(iv) no Mandated Lead Arranger is acting as a fiduciary for or as an adviser to it in connection with the Transaction.

16. Survival

16.1 Except for paragraph 2 (Conditions), 3 (Material Adverse Change) and 15 (Termination) the terms of this letter shall survive and continue after the Facility Documents are signed.

16.2 Without prejudice to paragraph 16.1, paragraphs 6 (Fees, Costs and Expenses), 7 (Payments), 10 (Indemnity), 11 (Confidentiality), 12 (Publicity/Announcements), 13 (Conflicts) and 15 (Termination) to 20 (Governing Law and Jurisdiction) inclusive shall survive and continue after any

> termination of the obligations of any Mandated Lead Arranger under the Mandate Documents.
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> 17. Entire Agreement.
>
> 17.1 The Mandate Documents set out the entire agreement between the Company and the Mandated Lead Arrangers as to arranging the Facility and supersede any prior oral and/or written understandings or arrangements relating to the Facility.
>
> 21. Acknowledgement by Group
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> Where relevant, the Company executes this letter for an on behalf of the relevant members of the Group (including the Company and the Shareholders). The Company undertakes to promptly obtain the written acknowledgement of the Company and/or the relevant members of the Group to the relevant terms and conditions of this letter upon the request of the Mandated Lead Arranger."

16. It is not necessary for the issues I have to decide to set out the terms of the Indicative Terms and Conditions, save in one respect. Since those terms were indicative and stated at the end that they were not an offer or commitment and were subject to negotiation, any suggestion (which Mr White seemed at one point in his cross-examination of Mr Kapoor to be advancing) that Barclays was somehow bound to arrange a Facility with an interest rate of LIBOR plus 215 basis points ("bps") as stated in the Indicative Terms, was completely hopeless. By the time the Facility Agreement was actually concluded, market conditions had changed (and in particular the first stage of the credit crunch, the US Prime crisis had occurred), so that inevitably the Facility could only be arranged at a higher rate of interest.

17. The Fee Letter referred to the Mandate Letter and then stated:

> "(b) If, in connection with the Facility, you and/or any member of the Group proposes to effect any Interest rate or currency hedges or other derivative transactions (together, the 'Proposed Hedging Arrangements'), including currency transactions on a spot or forward basis, you or such member of your corporate group, as the case may be, shall grant to us and/or our affiliates the right of first refusal to provide such hedging and/or derivate services for an amount, equivalent to that part of the Facility, subject to the Proposed Hedging Arrangements provided that the rights granted to us under this paragraph do not create, nor shall be deemed to create, any obligation on us or any of our affiliates to participate in the Proposed Hedging Arrangements;"

18. Mr Sapte asserted in his evidence that Mr Gupta and Mr Kapoor represented in May and/or June and/or September 2007 that Barclays could and would procure an INR/USD currency swap. I do not accept that evidence. If any such representation or assurance had been given, it is inconceivable that, in relation to a series of related transactions which were heavily documented, there would not be some documentary confirmation (either in an email from Barclays confirming the commitment or in an email from Maneesh recording that the commitment had been given) that Barclays had made that commitment.

19. Furthermore, Mr Kapoor's clear evidence was that it was his understanding that the loan would be repaid utilising foreign currency derived from the acquisitions of the two foreign companies and, if needed, from the earnings made by Maneesh from exports. That was the same evidence as he gave to Hamblen J and I see no reason not to accept that evidence in the same way as Hamblen J did. It follows from that evidence that Mr Kapoor had no reason to make the alleged representations because he would simply not have been thinking about INR/USD exposure at all.

20. Mr Kapoor also explained in his evidence that the credit process undertaken by Barclays and the other lending banks was carried out on the basis that the loan would be repaid utilising foreign currency earnings and that had the position been otherwise and the banks had thought that the loan was going to be repaid utilising earnings from the domestic sales of Maneesh in INR, they would have insisted on a INR/USD currency swap as a term of the Facility Agreement, as they did the interest rate swap. Although Barclays did not give disclosure of documents emanating from its credit department (no doubt because such documentation was not considered relevant and the defendants never sought such specific disclosure) I see no reason to draw any adverse inference and no reason not to accept Mr Kapoor's evidence on this point.

21. It is borne out by the Annual Report of Maneesh for the year to 31 March 2007 which was disclosed by Barclays on the second day of the trial and which Barclays evidently had in its possession at the time the credit process was being undertaken. The Profit and Loss Account showed income for the year in question of INR 2,872,219,503.45 in local sales and INR 876,147,558.22 (equivalent at the prevailing exchange rate at the time to about US$20 million) in export sales. Mr White submitted in closing that it should have been obvious to the banks from this Account that an INR/USD currency swap was required. I disagree. In the context of a loan where there was a moratorium for two and a half years, it seems to me that those undertaking the credit analysis within the banks would have been entitled to proceed on the basis that, if export sales continued at the same level, those earnings, together with profits made from the acquisition of the two foreign companies for which the loan was required, would provide the defendants with sufficient foreign currency earnings to service the principal and interest payments under the Facility Agreement. It is no doubt for that reason that the banks did not insist on an INR/USD currency swap.

22. In his oral evidence, Mr Sapte sought to counter that conclusion by asserting (which he had not said in either of his witness statements) that 90% of the earnings from export sales was not available to Maneesh because it had entered into packing credit facilities with two banks, Citibank and Standard Chartered. Those were effectively discounting or factoring arrangements under which 90% of the price under export contracts was advanced to Maneesh by the banks and then repaid once Maneesh was paid by its customers. However, to the extent Mr Sapte was suggesting that only 10%

of export sales was available to repay this loan, that was a false point. Obviously Maneesh had to repay what had been advanced, but it still had the full amount of the relevant sales. The terms of the packing credit facilities simply meant it did not get the money twice over.

23. In any event, even if the point Mr Sapte made about the 90% of the export sales had been a good one, it was not put to Mr Kapoor in cross-examination that he had known or ought to have known about this, nor was there any reason for him to have appreciated that the full amount of the export sales was not available to Maneesh. It follows that, as I have said, I accept Mr Kapoor's evidence as to what his understanding was, from which it follows that he had no reason to make the representations alleged and, as I find, that he did not make them.

24. It was originally contemplated that the borrower would be Maneesh. As an Indian company taking out external commercial borrowing ("ECB"), the approval of the Reserve Bank of India was required. Maneesh needed the first US$12 million of the loan amount by 26 June 2007 in order to pay the first tranche of the acquisition cost of Tillomed. By 18 June 2007, whatever approvals were required had not been obtained, as evidenced by an email of that date from Mr Kapoor to Mr Sapte, in which Mr Kapoor offered a bridging loan of US$12 million or US$15 million if required, to enable Maneesh to meet its funding requirement on 26 June 2007.

25. There is a dispute on the evidence as to whether the delay in approval which had occurred was the responsibility of Barclays or of Maneesh. Mr Kapoor's evidence was that it was the responsibility of Maneesh to arrange the necessary approval from the Reserve Bank of India, but that it was dilatory in doing so and in providing the necessary information to Barclays. Mr Sapte denied that and said that, as Maneesh had a number of existing ECBs, it already had the necessary approval and that the delay which occurred was due to the internal approval process within Barclays. To an extent that is borne out by the email of 18 June 2007, which refers to Barclays being in the final stages of its internal process for finalising the ECB.

26. However, since the bridging loan was granted to Svizera (which as an overseas company was not subject to the ECB approval process with the Reserve Bank of India) that suggests that the delay which occurred was attributable to Maneesh's status as an Indian company and to the fact that whatever approval was required from the Reserve Bank of India had not been forthcoming, whoever was responsible for obtaining that approval, which it is not necessary to decide. That is also borne out by the fact that the borrower was changed from Maneesh to Svizera. Mr Sapte suggested in his evidence that this was done at Barclay's request and Maneesh went along with it, but that is contradicted by the terms of an email of 28 August 2007 from Mr Kapoor to Mr Sapte which states: "…since the borrower has changed from Maneesh Pharma to Svizera (at your request) it is not subject to ECB guidelines". I can see no reason why, contemporaneously, Mr Kapoor should have said that the change of borrower was at Mr Sapte's request if it was not and Mr Kapoor was not cross-examined about this. Furthermore, Mr Sapte did not contradict what Mr Kapoor said at the time, a strong indication that the change of borrower was indeed at the request of Mr Sapte.

27. In any event, irrespective of which party requested the change of borrower, Mr Sapte accepted in cross-examination that the effect was that Svizera stood in the shoes of

Maneesh as borrower, a confirmation that the intention was that Svizera would be party to whatever contractual arrangements had been made by Barclays with Maneesh. In other words, Svizera is contractually bound by the terms of the Mandate Letter. Even if that were not the case, by virtue of clause 21 of the Mandate Letter, Maneesh must be taken to have agreed its terms on behalf of Svizera so that Svizera as the wholly owned subsidiary of Maneesh is contractually bound by the Mandate Letter. The attempt by Mr White to argue in his opening submissions that somehow Svizera was not bound by or did not have notice of the terms of the Mandate Letter was unmeritorious and he abandoned that point in closing.

28. On 27 August 2007 Mr Kapoor emailed Mr Sapte setting out changes from the "original term sheet", evidently a reference to the Indicative Terms and Conditions. These changes included that the borrower would now be Svizera, that the rate of interest would now be LIBOR plus 250-275 bps rather than plus 215 bps, that a corporate guarantee from Maneesh would be required and that the moratorium (i.e. on repayment of principal) would be 2 ½ years. The email also stated that they were targeting 20 September for disbursement of the entire US$45 million in yen to minimise withholding tax implications. It then stated: "While the interest cost has gone up by 40-50 bps, it is very marginal vis a vis the worsening market conditions and US sub prime issues. We would further try and reduce costs due to appropriate hedging structures". Mr Kapoor's evidence, which I accept, is that the "appropriate hedging structures" was a reference to the USD/CHF currency swap, which was a way of reducing cost because of the stability of the Swiss franc. Mr Sapte accepted in cross-examination that this was a reference to that possible swap rather than his alleged INR/USD currency swap.

29. The response to that email from Mr Sapte was that these were drastic changes and that the defendants needed to ponder over the consequences. He said that they had better offers on costing which they didn't take (evidently a reference to alternative sources of funding from other banks) because Barclays were offering a 60 month moratorium which the defendants needed. This was a reference to the provision in the Indicative Terms that the loan was to be repaid in full on the final maturity date, which was defined as being 61 months after utilisation. Mr Sapte went on in the email to say that the increase in pricing should be compensated by Barclays reducing its fees. Clearly this email is an example of the defendants trying to negotiate a better deal in circumstances where Barclays and the other lending banks were under no obligation to contract on any particular terms. Mr Sapte accepted in cross-examination, albeit reluctantly, that this was all part of the process of negotiation.

30. In his reply on 28 August 2007, Mr Kapoor said:

> "Please try to understand that the global and Asian markets are under tremendous pressure and cost of borrowing in the international markets increased by 100-200 bps. In spite of all this we are only asking for a marginal increase in pricing. We will try and limit/not have this increase in other cases…Please be assured that we are offering and negotiating the best terms on your behalf with banks. For instance, in the Tata-Corus deal, the deal was launched in the market a few weeks back, but due to market conditions, the pricing was increased by approx 75 bps. In your case, the overall impact is going to 15-20

> bps….We are looking at a long term partnership with you, and because of that, we have been able to leverage our relationship with banks to make this deal successful in spite of information gaps."

31. This email is one of the emails to which Mr Sapte refers in his first witness statement as containing assurances on which he relied and which he contends is evidence that Barclays was acting in an advisory capacity. That contention is unmeritorious for three reasons. First, upon analysis, the email does not contain anything which could begin to be described as advice. At most this is Barclays as the Mandated Lead Arranger assuring the defendants that it will get the best pricing on the loan which is commercially acceptable to the lending banks, including Barclays itself. As Mr Sapte confirmed in oral evidence, the defendants do not contend that Barclays failed to obtain the best possible terms available at the time the Facility Agreement was entered into.

32. Second, for reasons which I expand below when I consider the relevant principles of law, by Clause 10.3(c) of the Mandate Letter, the defendants represented and thereby accepted that Barclays was not acting in an advisory capacity and that they were entering the transaction on the basis of their own independent assessment of the transaction and the risks involved. The defendants are contractually estopped from alleging that Barclays acted in an advisory capacity or owed them a duty of care.

33. Third and related to the second reason, on the same day as that email, 28 August 2007, Mr Gupta sent Svizera a letter headed "NOTIFICATION" which stated, inter alia:

> "With respect to your relationship with us, which commences as of the date hereof, you should be aware that either Barclays Bank PLC or Barclays Capital Securities Ltd, London ('BBPLC') may act as legal counterparty to transactions with you on an execution only basis….BBPLC has not given you advice on investments relating to the merits of the transaction…"

34. That letter was presumably sent on that day because it was on that day that Barclays was seeking approval to the revised terms, including that Svizera, not Maneesh, was now the borrower. Mr Sapte tried to claim in cross-examination that he did not see this letter until much later and that it did not affect what he contended was the position prior to its receipt, namely that Barclays had acted as his adviser. I was unimpressed by that evidence. Irrespective of when he saw the letter, it was confirmatory of clause 10.3(c) of the Mandate Letter, in other words that, throughout, Barclays was not acting in an advisory capacity but only on an execution only basis. That was also confirmed by Mr Kapoor's evidence that, at that time and until its acquisition of Lehman Brothers following its collapse in September 2008, Barclays Capital did not provide an advisory service but was only a fixed income and derivatives focused investment bank.

35. Thereafter, internal emails within Barclays from Mr Kapoor and others on 5 and 6 September 2007 demonstrate that, so far as Barclays was concerned, the only swaps being considered were the interest rate swap and the cost reduction currency swap i.e.

the USD/CHF swap. The alleged INR/USD swap was never under consideration, further confirmation that the alleged representations were not made. What also emerges from those emails, as was confirmed by Mr Kapoor in evidence, is that the credit department within Barclays was not prepared to provide the cost reduction currency swap to Maneesh and that State Bank of India or Bank of India (both original lenders under the Facility) would be asked to provide this swap.

36. On 10 September 2007, Mr Kapoor emailed Mr Sapte in these terms:

> "Further to our discussions pls find attached the hedging structures for the $45 mio loan. Pls note that these comprise the following:
>
> • Hedging of the US$ Libor (interest rate) risk
>
> • Cost reduction USD/CHF swap-targeting 1.6% saving
>
> Would really appreciate if you could provide your concurrence on the same such that these can be built into the documentation."

The email had two PDF attachments. The cost reduction swap was entitled on the face of the email "Microsoft Word Maneesh Pharma" and the interest rate swap "Maneesh Pharma USD Libor Hedge".

37. The attachment for the cost reduction swap was headed "Maneesh Pharmaceuticals Ltd Cost Reduction Strategy Strictly for Discussion Purposes Only. This is NOT a termsheet." It was then described as a "cost reduction idea on your USD borrowing". It is not necessary to note the details of the proposed USD/CHF swap set out in that document save to note that, as Mr Kapoor said in evidence, in the section "Principal Exchange –On Maturity" instead of saying Maneesh receives "USD Notional" and pays "CHF Notional" which was the basis of the proposed swap, it said Maneesh receives "INR Notional", an obvious typographical error. The attachment for the interest rate hedge was headed in a similar fashion: "Maneesh Pharmaceuticals Ltd USD Libor Interest Rate Hedge Strictly for Discussion Purposes Only. This is NOT a termsheet."

38. Mr Sapte's response to that email just over two hours later was in these terms:

> "Since the loan Borrower is now Svizera…Maneesh cannot be doing this hedge.
>
> How can we get the INR notional in INDIA???
>
> Please explain."

39. It is perfectly obvious that the question about the INR notional was a reference to the typographical error in the attached document which made no sense, hence the request for an explanation. In his oral evidence, Mr Sapte originally accepted that, of course, he knew this document was not about the INR/USD swap, an answer that was only consistent with having read it at the time, However he then sought to backtrack, in order to avoid the conclusion that his response was about the typographical error, by

contending that he had not opened the attachments (not something he had said in either of his witness statements) but had deduced that the documents named Maneesh from the titles of the PDF files on the face of the email. I did not consider this change of tack to be truthful evidence. As Mr Toledano QC submitted, it is nonsense to suggest that the point he made could be deduced from the face of the email and it is inherently implausible that he would not have read the attachments before replying to Mr Kapoor's email.

40. Mr Sapte maintained that "How can we get the INR notional in INDIA???" was a reference to his request for an INR/USD currency swap. However, it is clearly nothing of the sort, but is responsive to the typographical error which had evidently puzzled him, hence the request for an explanation. In my judgment this was also untruthful evidence. It is simply impossible to construe this as a request for an INR/USD swap and Mr Sapte did not intend it to be such a request at the time. This part of his evidence reflected very badly on him and undermined his credibility. The truth is that he merely seized opportunistically in his evidence on this reference to "INR notional", in a completely different context, to support his case that he had been asking for an INR/USD swap. This was a pretty desperate attempt to find some document where he had requested such a swap, when he knew that in truth, there was no such document and that he had never made such a request, whether orally or in writing.

41. It also follows that I reject Mr White's submission, advanced in closing, that there had been a genuine misunderstanding between Mr Sapte and Mr Kapoor with the former thinking that he had asked for an INR/USD currency swap and that Barclays was going to provide it, but the latter failing to appreciate that Maneesh wanted such a swap. I find that Mr Sapte never asked for an INR/USD currency swap and never thought contemporaneously that he had done so. Because Mr Kapoor understood, perfectly reasonably, that the loan was to be repaid from earnings in foreign currency, the idea that such a swap might be required never crossed his mind and there was no reason why it should have done.

42. Mr Kapoor replied to Mr Sapte's email of 10 September 2007 a few minutes later saying that the hedge would be done by Svizera alone. Mr Sapte's response was that: "though we principally agree [which I take to mean agree in principle] we will look at better pricing at the time of closing." In response Mr Kapoor said, inter alia: "We will ensure that the best pricing is available at the time of execution of the swap". In his first witness statement Mr Sapte relies on this as evidence of the alleged advisory relationship and as Barclays providing him with reassurance. In my judgment this contention is unmeritorious for the same three reasons as set out in [31]-[33] above in relation to the email of 28 August 2007. This is no more than Barclays as Mandated Lead Arranger assuring the defendants that, as with the loan so with the swap, it will obtain the best terms available at closing and the defendants have not advanced a case that it failed to do so. In any event the existence of any advisory relationship or duty of care is excluded by the terms of the relevant contracts.

43. Mr Kapoor chased up the following day, 11 September 2007, for agreement to the term sheets for hedging. Mr Sapte replied: "Ok add in term sheets and send for approval". Mr Kapoor then attached the final term sheets for execution. These evidently still had the headings referred to in [37] above. That prompted Mr Sapte to say in response: "The term sheets mentions as for discussion only and that it is not the

final term sheet!!!! Are we supposed to sign this?" Mr Kapoor replied: "Yes it is an indicative term sheet. The final term sheet will be provided to you on the day of disbursement when hedging is done and will be modified for the exact levels prevailing on that day. Pl do not worry. I will ensure that your best interests are taken care of and we achieve the best levels."

44. In his first witness statement Mr Sapte also relies on this exchange as evidence of an advisory relationship with him seeking advice and Mr Kapoor giving advice and reassurance. In my judgment, as with the other two emails relied on of 28 August and 10 September 2007 it is nothing of the sort. Mr Kapoor correctly said in cross-examination that this was a thousand miles from constituting the role of adviser and arose out of the fact that the document Mr Sapte was being asked to sign said that it was not a term sheet. Mr Sapte accepted in cross-examination that there was confusion on his part as to whether to sign. It is clear that that is what was clarified by Mr Kapoor, but that was in no sense advice. In any event, as with the emails of 28 August and 10 September 2007, the existence of any advisory relationship or duty of care is excluded by the terms of the relevant contracts.

45. On 24 September 2007, the Facility Agreement was signed at a special signing ceremony in Singapore attended by Mr Sapte who signed on behalf of both Maneesh and Svizera. Mr Kapoor also attended on behalf of Barclays. The parties to the Facility Agreement were Svizera as Borrower, Maneesh as Guarantor, Bank of India, Barclays Capital, Export Import Bank of India and State Bank of India as Mandated Lead Arrangers, Bank of India, Barclays, Export Import Bank of India and State Bank of India as Original Lenders, Barclays Hong Kong Branch as Agent for the Finance Parties (i.e. the Mandated Lead Arrangers and Original Lenders <u>but not</u> the defendants) and as Security Trustee. The Agreement is a lengthy document and only a few provisions of it are relevant for the purpose of this judgment:

> "**17. GUARANTEE AND INDEMNITY**
>
> 17.1 *Guarantee and indemnity*
>
> The Guarantor irrevocably and unconditionally:
>
> (a) guarantees to each Finance Party punctual performance by the Borrower of all the Borrower's obligations under the Finance Documents;
>
> (b) undertakes with each Finance Party that whenever the Borrower does not pay any amount when due under or in connection with any Finance Document, the Guarantor shall immediately on demand pay that amount as if it was the principal obligor and
>
> (c) indemnities each Finance Party immediately on demand against any cost, loss or liability suffered by that Finance Party if any obligation guaranteed by it (or anything which would have been an obligation if not unenforceable, invalid or illegal) is or becomes unenforceable, invalid or illegal. The amount of the cost, loss or liability shall be equal to

the amount which that Finance Party would otherwise have been entitled to recover,

provided that other than those payment obligations provided for in Clause 12 (Tax gross up and indemnities), Clause 14.2 (Limitation of Liability,), Clause 15 (Other Indemnities) and Clause 16 (Costs and expenses), the aggregate amount (excluding any interest payable by the Guarantor which has accrued on any amount which it has been demanded to pay under this Clause 17.1 but which it has failed to pay) which may be recovered from the Guarantor under the Finance Documents shall not exceed US$50,000,000.

17.2 *Continuing guarantee*

This guarantee is a continuing guarantee and will extend to the ultimate balance of sums payable by the Borrower under the Finance Documents, regardless of any intermediate payment or discharge in whole or in part.

## 21. GENERAL UNDERTAKINGS

21.16 *Hedging*

The Borrower shall, within 7 days from the Utilisation Date, enter into agreements to the extent necessary to ensure that 100% of the amount drawn under the Facility is subject, through swap transactions, caps, collars or other derivative products agreed with the Agent, to either a fixed interest rate or interest rate protection for such period up to the Final Maturity Date and with a final termination date of not less than 5 years from the Utilisation Date and shall maintain the hedging arrangements contemplated under such agreements for such period up to the Final Maturity Date.

## 26. ROLE OF THE AGENT AND THE MANDATED LEAD ARRANGERS

26.2 *Duties of the Agent*

(a) The Agent shall promptly forward to a Party the original or a copy of any document which is delivered to the Agent for that Party by any other Party.

(b) Except where a Finance Document specifically provides otherwise, the Agent is not obliged to review or check the adequacy, accuracy or completeness of any document it forwards to another Party.

(c) If the Agent receives notice from a Party referring to this Agreement, describing a Default and stating that the

circumstance described is a Default, it shall promptly notify the Lenders.

(d) If the Agent is aware of the non-payment of any principal, interest, commitment fee or other fee payable to a Finance Party (other than to the Agent or the Mandated Lead Arrangers) under this Agreement it shall promptly notify the other Finance Parties.

(e) The Agent's duties under the Finance Documents are solely mechanical and administrative in nature. The Agent shall have no other duties save as expressly provided for in the Finance Documents.

26.3 *Role of the Mandated Lead Arrangers*

Except as specifically provided in the Finance Documents, the Mandated Lead Arrangers have no obligations of any kind to any other Party under or in connection with any Finance Document.

26.4 *No fiduciary duties*

Nothing in this Agreement constitutes the Agent or any Mandated Lead Arranger as a trustee or fiduciary of any other person.

26.8 *Responsibility for documentation*

Neither the Agent nor any Mandated Lead Arranger.

(a) is responsible for the adequacy, accuracy and/or completeness of any information (whether oral or written) supplied by the Agent, the Mandated Lead Arrangers, any Obligor or any other person given in or in connection with any Finance Document; or

26.9 *Exclusion of liability*

(a) Without limiting paragraph (b) below, the Agent shall not be liable for any cost, loss or liability incurred by any Party as a consequence of: (I) the Agent having taken or having omitted to take any action under or in connection with any Finance Document, unless directly caused by the Agent's gross negligence or wilful misconduct; or

28.6 *No set-off by the Borrower*

All payments to be made by an Obligor under the Finance Documents shall be calculated and be made without (and free and clear of any deduction for) set-off or counterclaim."

46. What is apparent from the terms of the provisions of Clause 26 in particular is that the Facility Agreement contains similar provisions to those in the Mandate Letter excluding fiduciary duties and any advisory relationship.

47. The defendants allege that the occasion of the signing of the Facility Agreement is one of the other occasions on which Mr Kapoor made a representation that Barclays would procure an INR/USD currency swap. In his first witness statement Mr Sapte said this representation had been made on the plane from Mumbai to Singapore when he and Mr Kapoor travelled together or in Singapore before the signing ceremony. Mr Kapoor denied this saying that they had not travelled to Singapore together and that he had introduced his wife to Mr Sapte in Singapore. He accepted that he and Mr Sapte had travelled back on the plane together but denied making any representation either in Singapore or on the plane. In his second witness statement Mr Sapte accepted he had been mistaken and they had not travelled together to Singapore. He also accepted that Mr Kapoor had introduced him to his wife but he now asserted that the representation was made on the plane home when he and Mr Kapoor were in business class and Mrs Kapoor travelled in economy.

48. Mr Toledano put to Mr Sapte that his recollection of these Singapore representations was imperfect, as he accepted in cross-examination. I would go further and say that he simply invented the evidence about the representation having been made on the plane home. It is also inherently implausible that Mr Kapoor made any representation whilst they were in Singapore, since this seems to have been at least in part a social occasion. If any representation had been made it seems to me there would be some written reference to or confirmation of it, which there is not. Further, if a representation had been made on the plane home that can hardly have induced the defendants to enter the Facility Agreement since it had already been signed. I also reject the suggestion which Mr Sapte seemed to be making that Mr Kapoor only went to Singapore to act in an advisory capacity. As the person who had negotiated the deal, it would be natural for Mr Kapoor to be present when it was signed. He never acted in an advisory capacity.

49. An internal email within Barclays of 1 October 2007 confirmed the "collective discomfort" within the bank about doing any "FX trade" with Maneesh directly (clearly a reference to the USD/CHF currency swap) and that they were using Bank of India for both the interest rate swap and the FX trade. The Bank of India referred this to their credit department since they did not have an existing limit on Maneesh.

50. On 11 October 2007, Mr Kapoor emailed Mr Sapte saying that, as discussed the interest rate swap would be executed that day. He enclosed the final terms and asked Mr Sapte to review them and let him know if he had any queries. The email continued: "The currency hedge will be executed next week (again in line with what was discussed earlier)." Mr Sapte gave evidence that this was confirmation that the USD/CHF currency swap would be executed the following week, but that evidence was predicated upon there having been previous discussion about such a swap, which I have found there had not been. Mr Kapoor's evidence, which I accept, is that this was a reference to the USD/CHF cost reduction swap. Furthermore, in my judgment, Mr Sapte knew that was what was being referred to, because that swap was the only one which had been under discussion.

51. On 16 October 2007 Mr Kapoor sent an email internally within Barclays chasing up the swaps:

> "We need to get the Maneesh swap done asap and push both BOI and SBI for lines. Not only are we late for closing this swap as per the loan agreement, but the client may just end up closing it with Axis or some other bank. If BOI or SBI are getting stuck anywhere, pls have Ashwin/Nikhil speak to them to speeden up matters. Failure to close the interest swap this week and currency swap next week may result in our losing the deal".

52. In the event, as Mr Kapoor explained, although the interest rate swap was executed on 29 October 2007, the USD/CHF currency swap was never executed, because the Bank of India and State Bank of India did not have sufficient credit lines for Maneesh to effect this transaction. In other words, the credit departments did not provide the approval which was being sought earlier in October. Mr Kapoor does not seem to have informed Mr Sapte that the USD/CHF currency swap would not be available after all, but as he said in his first witness statement, Mr Sapte never chased him up about it. Despite Mr Sapte's evidence that he was very busy travelling, he must have known that the USD/CHF swap had not been executed after all.

53. Mr White was critical of Mr Kapoor in relation to the emails of 11 and 16 October 2007, going as far as to suggest that his statement that the currency swap would be executed the following week was reckless and that the statement about Barclays losing the deal betrayed that Barclays was simply acting in its own commercial interests, in breach of the duty of care it owed the defendants. In my judgment, these criticisms are entirely misplaced. Mr Kapoor may very well have thought the currency swap would be executed and the highest any criticism could be put is that when it could not be, because credit approval was not forthcoming, Mr Kapoor failed to inform Mr Sapte. However, as I have already held, Mr Sapte must have known the USD/CHF swap had not been finalised, yet he never chased up about it, so there is nothing in that point.

54. The suggestion that Barclays was acting in its own commercial interests assumes that it was under some relevant duty of care. For reasons I will elaborate below, Barclays did not owe the defendants any duty in tort, but even if it had, at most it would have been a duty to get the defendants the best deal available at the time the transaction was closed. The defendants have no case that either the Facility Agreement or the interest rate swap were not on the best terms available at the time. There is nothing in the suggestion that Mr White seemed to be putting to Mr Kapoor in cross-examination that Barclays had some sort of conflict of interest and put its own commercial interests before those of the defendants. As Mr Kapoor said, it is a question of balancing out the interests: "Banks are in the business of making money, but at the same time serving their clients. So if I were to just combine those two objectives, the philosophy of …Barclays is to make the right profitability in the right manner."

55. So far as the currency swap is concerned, even if, contrary to the conclusions I have reached, the swap being referred to had been the INR/USD swap, a duty of care could not conceivably extend beyond Barclays using its best efforts to obtain the swap. There is simply no evidence that it failed to use such efforts, whichever swap was under discussion. Barclays had no absolute obligation, any more than did the other banks, to provide the swap and if their respective credit departments were not

prepared to give Maneesh the relevant credit approval, that cannot possibly amount to a breach of some duty of care.

The representation case

56. I have already concluded in my findings of fact above that there was no representation made by Barclays to the defendants that it would obtain an INR/USD currency swap. In summary the reasons for that conclusion are as follows. First I accept Mr Kapoor's evidence on this and reject the evidence of Mr Sapte. Second, if there had been any such representation, it is inconceivable that there would not be some documentary reference to it, but there is not. Contrary to Mr White's submissions and, as I have found, the only currency swap referred to in the documents is the USD/CHF swap. Third, the fact that the defendants made no complaint at the time about the absence of a USD/CHF swap notwithstanding that Mr Sapte admitted that he knew the swap had not been obtained and, indeed, that the defendants made no complaint for 4 ½ years until 29 February 2012, after the acceleration notice had been served, points very strongly to this being an *ex post facto* attempt to justify their failure to honour their obligations, and I so find.

57. Even if the representations had been made, I agree with Mr Toledano that they were not relied on by the defendants in deciding whether or not to enter the Facility Agreement. Mr Sapte described himself in his first witness statement as an intelligent and experienced businessman with an understanding of basic finance. Mr Kapoor described him as commercially savvy. In respect of another loan facility for US$15 million from ICICI, he accepted that he had been able to evaluate the risk of currency fluctuations and had decided that a 50% INR/USD currency hedge was sufficient. In relation to this Facility Agreement, Mr Sapte accepted in cross-examination that he entered it on the basis of his own independent judgment, having evaluated the pros and cons and decided it was in the interest of the defendants to do so. He also said in cross-examination that although the defendants had been misled into entering the interest rate swap (a complaint that has been determined against them by the judgment of Hamblen J in *Bank of India v Svizera Holdings*) they had not been misled into signing the Facility Agreement.

58. It seems to me that the evidence referred to in the previous paragraph is fatal to any case of reliance on the alleged representations, but, even if it were not, the terms of clause 10.3(c) of the Mandate Letter give rise to a contractual estoppel against any such reliance. It has long been recognised by the courts that with sufficiently clear words (which the words of clause 10(3)(c) are) acknowledging that the relevant party has not relied upon any representation by the other party in entering the contract, the party may be contractually estopped from alleging that he relied upon a representation in entering the contract. See for example per Moore-Bick LJ in *Peekay Intermark Ltd v Australia and New Zealand Banking Group Ltd* [2006] EWCA Civ 386; [2006] 2 Lloyd's Rep 511 at [57]:

> "57. It is common to include in certain kinds of contracts an express acknowledgment by each of the parties that they have not been induced to enter the contract by any representations other than those contained in the contract itself. The effectiveness of a clause of that kind may be challenged on the grounds that the contract as a whole, including the clause in

> question, can be avoided if in fact one or other party was induced to enter into it by misrepresentation. However, I can see no reason in principle why it should not be possible for parties to an agreement to give up any right to assert that they were induced to enter into it by misrepresentation, provided that they make their intention clear, or why a clause of that kind, if properly drafted, should not give rise to a contractual estoppel of the kind recognised in *Colchester Borough Council v Smith.* However, that particular question does not arise in this case. A clause of that kind may (depending on its terms) also be capable of giving rise to an estoppel by representation if the necessary elements can be established: see *E.A. Grimstead & Son Ltd v McGarrigan* (C.A.) (unreported, 27th October 1999)…"

59. That principle was followed and upheld by the Court of Appeal in *Springwell Navigation Corporation v JP Morgan Chase Bank* [2010] EWCA Civ 1221; [2010] 2 CLC 705 at [141]-[171] per Aikens LJ. The same principle was recognised and applied by Hamblen J in *Cassa di Risparmio v Barclays Bank* [2011] EWHC 484; [2011] 1 CLC 701 at [505] in these terms:

> "The authorities accordingly establish that…it is possible for parties to agree that one party has not made any pre-contract representations to the other about a particular matter, or that any such representations have not been relied on by the other party, even if they both know that such representations have in fact been made or relied on, and that such an agreement may give rise to a contractual estoppel."

60. Although, in his closing submissions, Mr White sought to draw some succour from that case, in my judgment it gives him none. Specifically, the learned judge went on his judgment to consider the effect of a provision in similar terms to clause 10.3(c)(iii) in the present case. Hamblen J found at [525] that the provision gave rise to a contractual estoppel:

> "[525] In the present case by clause 6 CRSM was contractually agreeing that it understood and accepted the risks of entering the transaction and purchasing the Notes. In my judgment if the substance of the claim for misrepresentation is that representations were made which led it to misunderstand the risks of entering the transaction and purchasing the Notes then such a claim would be precluded. It is contractually estopped from asserting that it was induced to enter into the contract by a misunderstanding of the nature of the risks entering the transaction and purchasing the Notes. As in *Peekay*, the specific misunderstanding would be as to the specific matter which it had been contractually agreed was fully understood."

61. In view of the consistent judicial recognition of the effectiveness of provisions such as clause 10(3)(c) to give rise to a contractual estoppel, the suggestion by Mr White that in some way that provision should be struck down as unreasonable under sections 3

and 11 of the Unfair Contract Terms Act 1977 is hopeless. In any event, as Mr Toledano pointed out, section 3 only applies to exclusions or restrictions of liability for a breach of contract. The defendants cannot point to any breach of the Mandate Letter, the Fee Letter or the Facility Agreement.

62. In his closing submissions, Mr White sought to rely upon the judgment of Stanley Burnton LJ in *Axa Sun Life Services Plc v Campbell Martin Ltd* [2011] EWCA Civ 133; [2011] 2 Lloyd's Rep 1 to submit that the claim in misrepresentation could not be defeated by the various provisions relied upon by Barclays, if the misrepresentation being complained of does not relate to the subject matter of the Facility Agreement, which was the defendants' case. However, as I pointed out, that was a case of a defendant relying on an "Entire Agreement" clause which provided that the Agreement superseded any prior representation relating to the subject matter of the Agreement. Stanley Burnton LJ at [34]-[36] made the unexceptionable point that such a clause would not exclude a prior representation which did not relate to the subject matter of the Agreement. That point does not assist the defendants here, since it does not begin to touch the case of a provision such as clause 10.3, which gives rise to a contractual estoppel.

63. In the light of my findings that no representation was in fact made by Barclays, the other ways in which the defendants put their case essentially fall away. That is because those different ways of putting the case are merely legal labels attaching to the same set of facts. Once the factual assumptions on which they are based are demonstrated to be incorrect, none of these other ways of putting the case will assist the defendants. Nonetheless, since the various points were argued I will deal with them, although by the end of his closing submission, it remained unclear which of the various ways of putting the case Mr White still espoused.

Collateral contract

64. The defendants had a pleaded case that the Singapore representations allegedly made in September 2007 constituted a collateral contract, the express terms of which were that the INR/USD currency swap would be arranged within a reasonable time of 24 September 2007, that it would be at the existing rate of exchange of INR 39.74 to the US dollar and that Barclays would obtain an ordinary commercial rate for the swap which was likely to be around 4% of the exchange rate value.

65. Since I have found the Singapore representations were not made, the basis for any collateral contract falls away, but even if it did not, there are a number of fundamental objections to this way of putting the case. First, there is absolutely no evidence, documentary or otherwise to support the agreement of these terms and there would be no basis for their implication. Furthermore, it is inconceivable that if Barclays had agreed in Singapore to obtain the INR/USD currency swap, that would not have been recorded somewhere in the voluminous documentation signed on 24 September 2007. This alleged collateral contract is entirely fanciful.

66. Furthermore, the alleged collateral contract is inconsistent with clause (b) of the Fee Letter which gave Barclays the right of first refusal in relation to any currency hedge but made it clear that Barclays was under no obligation to enter into any such arrangement. It is also inconsistent with clause 26.3 of the Facility Agreement which made it clear that, except as provided in the Finance Documents (i.e. for present

purposes the Fee Letters and Facility Agreement) the Mandated Lead Arrangers had no obligations of any kind to any other party under or in connection with any Finance Document. In my judgment, the alleged collateral contract would be in connection with the Facility Agreement and so caught by that exclusion.

67. As Mr Toledano also pointed out, the effect of clause 10.3(b) of the Mandate Letter was to exclude any liability, whether direct or indirect, in contract, tort or otherwise, of Barclays to the defendants except where the loss allegedly suffered by the defendants resulted directly from the breach by Barclays of any Mandate Document or Facility Document which a court had determined resulted directly from the gross negligence or wilful misconduct of Barclays. That provision precludes any claim for loss pursuant to the alleged collateral contract for two reasons. First, the defendants cannot show any breach by Barclays of the Mandate Letter, Fee Letter or Facility Agreement. Second, even if they could, there is no question of any such breach amounting to gross negligence or wilful misconduct on the part of Barclays. Although in his Skeleton Argument Mr White sought to allege wilful misconduct or gross negligence, no such case was ever pleaded, nor could it be. Even if Barclays had been in breach of some fanciful collateral contract, nothing they did or failed to do gets within a million miles of being wilful misconduct or gross negligence.

Alleged duty of care and advisory relationship

68. Leaving aside unpleaded allegations of breach of fiduciary duty or agency, which I have held are wholly unsustainable, the defendants alleged that by virtue of the various assurances given to Mr Sapte by Mr Kapoor in email and in conversations, the relationship was an advisory one and Barclays owed the defendants a duty of care, of which it was in breach. This case is completely hopeless on a number of levels. For the reasons I have set out in my findings of fact above, Barclays did not in fact give any advice. However, even if Mr Kapoor had given any advice as alleged, as a matter of law there would not have been an advisory relationship or any duty of care.

69. The relevant English law as to when a duty to advise will arise in the case of a bank or other financial institution was comprehensively reviewed and summarised recently by Lord Hodge in the Outer House of the Court of Session in *Grant Estates Ltd v Royal Bank of Scotland Plc* [2012] CSOH 133. That was a case where the claimant alleged that the conduct of bank employees and the regulatory obligations under the COBS rules gave rise to a common law duty of care. In concluding that the claimant's case of negligent misrepresentation and negligent advice failed, the learned judge said this at [71] to [74]:

> "[71] I am not persuaded that GEL can rely on either the acts of the RBS employees or the COBS rules to bring into existence a common law duty of care in relation to the provision of financial advice. In relation to the former it is necessary to consider the effect of the contractual terms which the parties agreed. In many cases involving claims for pure economic loss the courts have resisted invitations to develop the law of tort or delict to impose common law duties in commercial transactions in conflict with the terms on which parties have agreed in their contracts to conduct their affairs and have allocated their respective risks and responsibilities.

[72] Mr Clark referred me to a number of cases which addressed this issue in circumstances which are analogous to those in this case, namely *J P Morgan Chase Bank* v *Springwell Navigation Corporation* [2008] EWHC 1186 (Comm) and, on appeal, [2010] EWCA Civ 1221 ("*Springwell")*; *Standard Chartered Bank* v *Ceylon Petroleum Corporation* (above); *IFE Fund SA* v *Goldman Sachs International* [2006] EWHC 2887 (Comm) and on appeal [2007] EWCA Civ 811, [2007] 2 Lloyd's Rep 449; *Peekay Intermark Ltd* v *Australia and New Zealand Banking Group Ltd* [2006] 2 Lloyd's Rep 511; *Bank Leumi (UK) plc* v *Wachner* [2011] EWHC 656 (Comm) and *Raiffeisen Zentralbank Osterreich* v *The Royal Bank of Scotland* [2011] 1 Lloyd's Rep 123. He referred also to *Titan Steel* (above) and *Wilson* v *MF Global UK Ltd* [2011] EWHC 138 (QB).

[73] In my view the following five propositions in relation to a delictual or tortious duty of care can be derived from those authorities:

(1) It is not sufficient to set up a duty of care to assert the existence of an "advisory relationship". There is a clear distinction between giving advice and assuming legal responsibility for that advice. A salesperson of a financial product may give investment advice or express opinions without becoming an investment adviser and undertaking duties of care as such. Whether the giving of advice gives rise to legal obligations in tort or delict to exercise reasonable care or to advise on certain matters depends on the terms of the legal relationship between the parties: *Standard Chartered Bank*, Hamblen J at [505ff], [544].

(2) The absence of any written advisory agreement is a significant pointer against the existence of an advisory obligation: *Springwell*, (first instance) Gloster J at [440]; *Wilson* v *M F Global*, Eady J at [174].

(3) Parties can enter into a contract which defines the basis of their trading or banking relationship and allocates risk in a way which negates any possibility of a general or specific advisory duty coming into existence: *Springwell* (1st instance), Gloster J at [475] and [478]. The outcome can be expressed in different ways but with the same meaning. The contractual terms can define the parties' relationship in a way that no assumption of responsibility can be inferred. The relationship so defined is not equivalent to that of professional adviser and advisee which would make it just and reasonable to impose a duty of care: *IFE Fund SA*, Toulson J at [70]-[71].

> (4) The contractual delineation of responsibility and allocation of risk may preclude a party from founding on the actual reality which eventuates if he has contracted to accept a particular state of affairs as true. Thus if A and B agree that B will not advise A and A will not rely on any statement by B as advice, the contract will bar A from asserting the giving of that advice and his reliance on it. See, for example, the non-reliance statements in *Standard Chartered Bank* which prevented Ceylon Petroleum Corporation from asserting that advice had been given and relied on ([544]). See also *Peekay Intermark Ltd*, Moore-Bick LJ at [56]; and *Springwell* (CA), Aikens LJ at [156f]. English law treats the matter as a species of estoppel in which issues of unconscionability do not arise, namely contractual estoppel. In Scots law I consider that the correct analysis is that there is a contractual bar and that issues of inconsistency and fairness, which would be relevant in personal bar (Reid and Blackie, *Personal Bar*, chapter 2), do not arise.
>
> (5) The approach in (4) above extends to a retrospective agreement in relation to past events. A and B may agree that their relationship will be on the basis of a certain state of affairs in the past which they know not to be the case, such as that B had not made any representations, and A will thereafter be obliged to act on the basis of that acknowledgement. See *Peekay*, Moore-Bick LJ at [57]; *Springwell* (CA) Aikens LJ at [141] – [171].
>
> [74] The application of those propositions to the averred facts undermines GEL's case of negligent misrepresentation and negligent advice."

70. I agree with Mr Toledano that the application of each of those propositions to the present case undermines any case in negligence here. First, the legal relationship between the parties, as constituted by the Mandate Letter, the Fee Letter, the Notification Letter and the Facility Agreement, is defined to exclude any advisory relationship or duty and those documents are entirely inconsistent with the existence of any such duty and thus no assumption of responsibility by Barclays can be inferred. Furthermore, as Mr Toledano rightly pointed out, it was inherently unlikely that Barclays would have undertaken an advisory relationship, given that at the relevant time it simply did not provide an advisory service and was a fixed income and derivatives focused bank.

71. In any event, the provisions of clause 10(3)(c) of the Mandate Letter would constitute a contractual estoppel precluding the defendants from alleging that they had relied upon any advice, even if they had done so. For the reasons given at [58]-[61] above, there is no basis upon which the defendants could suggest that such a contractual estoppel would not operate in the present case.

72. In his closing submissions, Mr White had what can only be described as a last ditch attempt at reformulating his negligence case. He contended, for the first time, that, by virtue of some process which he described as "reverse construction", clause 8.2 of the

Mandate Letter imposed a "degree of trust and faith" in Barclays as Mandated Lead Arranger to look after the best interests of the defendants, including in relation to the obtaining of the INR/USD currency swap. On that basis there was a duty of care and he submitted that, since there was a genuine misunderstanding between Mr Sapte and Mr Kapoor, what should have happened is that Mr Kapoor should have advised Mr Sapte that since only 20% of the income of Maneesh was in foreign currency, it would be sensible to take out a INR/USD currency swap.

73. Ingenious though this new way of putting the case is, it is completely hopeless. Reverse construction is not a process of construction or of legal analysis known to English law. Clause 8 of the Mandate Letter is dealing with syndication of the loan. By clause 8.1 the Mandated Lead Arranger agrees to manage all aspects of the syndication and in that context, by clause 8.2, the defendants agrees to give assistance to the Mandated Lead Arranger in relation to the syndication, as reasonably required. The clause sets out the various elements of assistance. None of that imposes some "degree of trust and faith" between the parties to a commercial arrangement, let alone imposes a duty of care on Barclays as Mandated Lead Arranger. Even if it purported to do so, any advisory relationship or duty of care would be excluded for all the reasons set out at [69]-[71] above.

74. As for Mr White's formulation of the breach of duty, even if there was a duty, I have already said that I do not accept that there was a genuine misunderstanding. Whilst I accept Mr Kapoor's evidence that, because he understood, quite reasonably, that the loan would be repaid from foreign currency earnings, the idea of an INR/USD currency swap never crossed his mind, I do not accept Mr Sapte's evidence that he wanted an INR/USD currency swap, let alone that he thought he was getting one. Furthermore, there was nothing in the Annual Report of Maneesh which could or should have alerted Barclays or any of the other banks to the need for a INR/USD currency swap: quite the contrary, as I held at [21] above.

75. In the circumstances, like all its other allegations, the defendant's case that Barclays was in breach of a duty of care fails however it is put. I should add for good measure that the defendants would be precluded in any event by the terms of the No Set-off clause 28.6 of the Facility Agreement from seeking to use any of their defences as a defence of set off or as a counterclaim to the claim under the Facility Agreement.

Conclusion

76. It follows that all the defences fail and the counterclaim is dismissed. Barclays is entitled to recover in full the sums it claims against Svizera as borrower and against Maneesh as guarantor, namely:

i) The principal sum owing under the Facility Agreement of US$ 35,355,064.80.

ii) Interest on the unpaid principal sum at the default rate of interest pursuant to clause 8.3 of the Facility Agreement. As at 31 March 2014 such interest stood at US$4,524,265.82. I will hear counsel as to the appropriate figure.

iii) Sums owing under the Agency Fee Letter consisting of US$ 75,000, plus default interest on that sum pursuant to clause 8.3 of the Facility Agreement.

iv) Sums owing under the Offshore Security Trustee Fee Letter: US$30,000, plus default interest on that sum pursuant to clause 8.3 of the Facility Agreement.

v) Sums owing under the Onshore Security Trustee Fee Letter: INR502,530 (equivalent to US$8,717.00 based on an exchange rate of US$1 to INR 57.65), plus default interest on that sum pursuant to clause 8.3 of the Facility Agreement.

vi) In respect of legal fees Barclays is entitled to an indemnity in respect of its costs of enforcement and of these proceedings, plus default interest on that sum pursuant to clause 8.3 of the Facility Agreement.