FL-2022-000005

Neutral Citation Number: [2023] EWHC 3309 (Comm)

Case Nos: FL-2022-000007,
FL-2022-000005,
FL-2023-000015

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
FINANCIAL LIST (COMMERCIAL COURT – KBD)

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Dated:20 December 2023

Before :

MRS JUSTICE COCKERILL DBE

- -

Between :

(1) BANCA NAZIONALE DEL LAVORO S.p.A.
(2) COMMERZBANK AG
(3) DEXIA CRÉDIT LOCAL S.A.

- and -

PROVINCIA DI CATANZARO

- -
- -

Sonia Tolaney KC and Andrew Lodder (instructed by **Bonelli Erede Lombardi Pappalardo LLP, Allen & Overy LLP and Cleary Gottlieb Steen & Hamilton LLP**) for the **Claimants.**
The Defendant did not attend and was not represented.

Hearing date: 19 December 2023

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APPROVED JUDGMENT

Mrs Justice Cockerill:

INTRODUCTION

1. This has been the hearing of the Claimants' (individually **BNL**, **Commerzbank** and **Dexia**, and together **the Banks**) joint applications (the Applications) for summary judgment against the Defendant (**Catanzaro**) in proceedings FL-2022-000007, FL-2022-000005 (Commerzbank) and FL-2023-000015 (Dexia). Those claims are being jointly case managed in the Financial List.

2. The first point to deal with is the absence of the Defendant whether by itself or through legal representatives. The question arises whether I should hear this application, which is capable of bringing proceedings either wholly or partially to an end, in the absence of the Defendant.

3. The law on this is set out in CPR 39.3 which gives the court a discretion to proceed with a hearing or trial in the absence of a party, and in the judgment of the Court of Appeal in *R v Jones* [2001] EWCA Crim. 168, which states principles that were later explicitly approved by the Supreme Court:

> "(1) A defendant has, in general, a right to be present at his trial and a right to be legally represented.
>
> (2) Those rights can be waived, separately or together, wholly or in part, by the defendant himself. They may be wholly waived if, knowing, or having the means of knowledge as to, when and where his trial is to take place, he deliberately and voluntarily absents himself and/or withdraws instructions from those representing him. They may be waived in part if, being present and represented at the outset, the defendant, during the course of the trial, behaves in such a way as to obstruct the proper course of the proceedings and/or withdraws his instructions from those representing him.
>
> (3) The trial judge has a discretion as to whether a trial should take place or continue in the absence of a defendant and/or his legal representatives.
>
> (4) That discretion must be exercised with great care and it is only in rare and exceptional cases that it should be exercised in favour of a trial taking place or continuing, particularly if the defendant is unrepresented.
>
> (5) In exercising that discretion, fairness to the defence is of prime importance but fairness to the prosecution must also be taken into account. The judge must have regard to all the circumstances of the case including, in particular: (i) the nature and circumstances of the defendant's behaviour in absenting himself from the trial or disrupting it, as the case may be and, in particular, whether his behaviour was deliberate, voluntary and such as plainly waived his right to appear; (ii) whether an adjournment might result in the defendant being caught or attending voluntarily and/or not disrupting the proceedings; (iii)

> the likely length of such an adjournment; (iv) whether the defendant, though absent, is, or wishes to be, legally represented at the trial or has, by his conduct, waived his right to representation; (v) whether an absent defendant's legal representatives are able to receive instructions from him during the trial and the extent to which they are able to present his defence; (vi) the extent of the disadvantage to the defendant in not being able to give his account of events, having regard to the nature of the evidence against him; (vii) the risk of the jury reaching an improper conclusion about the absence of the defendant; (viii) the seriousness of the offence, which affects defendant, victim and public; (ix) the general public interest and the particular interest of victims and witnesses that a trial should take place within a reasonable time of the events to which it relates; (x) the effect of delay on the memories of witnesses; (xi) where there is more than one defendant and not all have absconded, the undesirability of separate trials, and the prospects of a fair trial for the defendants who are present.
>
> (6) If the judge decides that a trial should take place or continue in the absence of an unrepresented defendant, he must ensure that the trial is as fair as the circumstances permit. He must, in particular, take reasonable steps, both during the giving of evidence and in the summing up, to expose weaknesses in the prosecution case and to make such points on behalf of the defendant as the evidence permits…"

4. That case concerned criminal trials, but the principles are applied also in civil cases.

5. In this case, despite the caution necessary, I am satisfied that it is appropriate to proceed in Catanzaro's absence. The position is that Catanzaro has not participated in any of the proceedings to date and it is clear it will not respond to, or attend the hearing of, the Applications, notwithstanding the efforts the Banks have made to ensure all documents and each step in the case are brought to its attention. Those steps, outlined in detail in the evidence, are in essence as follows:

    i) The proceedings were validly served. That the proceedings involving BNL and Commerzbank were received and the service accepted as valid is apparent f the Resolution 39/2022 issued by Cantanzaro's Council on 24 June 2022. Dexia's proceedings were validly served in accordance with Italian law.

    ii) The Resolution also makes quite clear both that Catanzaro was aware of the deadline for filing an Acknowledgment of Service and the implications of joining in the litigation and not joining in the litigation. In the light of a consideration of these factors it expressly records an intention not to join in the proceedings.

iii) Particulars of Claim were served by BNL on 19 August 2022, by Commerzbank on 9 September 2022 and by Dexia on 7 October 2022. No acknowledgement was received. No defence was served.

iv) Catanzaro has been aware of the Banks' intention to bring the Applications since at least December 2022 when case management stays was sought by BNL and Commerzbank on the basis that they required more time to prepare the evidence for their intended summary judgment applications. In April 2023 this was explicit in the Banks' applications (again served on Catanzaro by BNL on 6 April, by Commerzbank on 11 April and by Dexia on 20 April) for directions including as to expert evidence for the purposes of a summary judgment application.

v) Catanzaro has not provided any response to the Banks' statements of their intention to apply for summary judgment or suggested any reason why it ought not be granted.

vi) The various documents have also been served on Catanzaro under the contractually agreed process. Catanzaro was invited to participate in the listing appointment for the hearing, and notified of the hearing fixed.

vii) The Claimants' skeleton argument has also been sent to Catanzaro.

6. In those circumstances there is a clear waiver both of the right to legal representation and to presence at the hearing. There is equally strong evidence from which to infer that an adjournment, of whatever length, would be pointless.

7. I should however make clear that, despite the absence of Catanzaro, the case has been the subject of considerable preparation and consideration on the part of the Banks and the Court. The Banks served a skeleton argument of 32 pages, supported by a dense 13 page Annex analysing the declarations sought. I was then given a day's pre-reading time accompanied by an extensive reading list (a copy of which is annexed to this judgment) to ensure that the oral submissions could be focussed, which they duly were. I was able to complete that reading list and dip into some of the materials referenced in the footnotes to the skeleton before the hearing commenced.

8. In summary, the Banks are seeking:

i) Permission to amend their Claim Forms and Particulars of Claim;

ii) Permission to apply for summary judgment pursuant to CPR 24.4(1); and

iii) Summary judgment on part of their claims pursuant to CPR 24.3.

9. The Applications are supported by a main witness statement from Jonathan Kelly, a partner at Clearly Gottlieb Steen & Hamilton LLP (**Kelly 3**), and a statement from Mahmood Lone, a partner at Allen & Overy LLP, updating the Court on developments since Kelly 3 (**Lone 2**), together with expert reports from Professor Rimini on Italian law (**the Italian Law Report**) and Mike

Hodgson on derivative analysis (**the Derivatives Report**). Issues particular to BNL are addressed in a witness statement from Giuseppe Massimiliano Danusso, a partner at Bonelli Erede Lombardi Pappalardo LLP (**Danusso 3**), Commerzbank in a witness statement from Mr Lone (**Lone 1**) and Dexia in a separate witness statement from Mr Kelly (**Kelly 4**).

10. The Claims concern a package of interest rate hedging transactions entered into between each of the Banks and Catanzaro on or around 1 June 2007 (**the Transactions**), as part of a restructuring of Catanzaro's loan portfolio. Banca OPI S.p.A., now Banca Intesa Sanpaolo S.p.A., also participated in the re-financing but is not a claimant. The Transactions were performed for 14 years and net payments of c. €27 million have been made to Catanzaro by the Banks. However, in December 2021, Catanzaro ceased making payments. It gave no notice or explanation. In January 2022 it issued an administrative decision purporting to annul the Transactions.

11. The claim which has resulted from Catanzaro's actions is the latest in a succession of cases heard in the Business and Property Courts concerning English-law governed derivative transactions on standard ISDA terms and subject to exclusive English jurisdiction, in which Italian local authorities have relied on Italian law arguments as to capacity, authority and/or validity as a basis for arguments that the derivatives to which they had agreed are invalid.

12. In this case the Banks are seeking declaratory relief to meet such arguments. They seek declarations in terms that track the wording of the Transaction Documents, together with certain other relief which they say follows from such declaratory relief. This is a form of remedy which has been sought and granted in other, contested, cases, notably in: *Deutsche Bank AG London v Comune di Busto Arsizio* [2021] EWHC 2706 (Comm); [2022] EWHC 219 (Comm) (***Busto***) and *Dexia Crediop SpA v Provincia di Pesaro e Urbino* [2022] EWHC 2410 (Comm) (***Pesaro***).

13. One further case should be mentioned. In *Banca Intesa Sanpaolo SpA and Dexia Credit Local SA v Comune di Venezia* [2022] EWHC 2586 (Comm) (***Venice***) Foxton J had refused the relief sought by the banks. That case was somewhat different in that the question arose in relation to a transaction involving the restructuring of an existing derivative where the new derivative priced-in the large negative mark-to-market position of the earlier derivative. That is not a feature of the Transactions in the present case. That decision has just been overturned: [2023] EWCA Civ 1482 (***Venice CA***), and the judgment of the Court of Appeal will be referred to further below.

14. The Banks, adopting similar arguments to those deployed in the earlier cases, and having served Civil Evidence Act Notices in respect of those judgments so that the Italian Law aspects can be treated as evidence in this case, ask the Court to grant summary judgment on the uncontroversial parts of their claims in respect of which the Applications are made. This will, they say, (i) assist the Banks in the Italian Courts in relation to those matters that fall within the exclusive English jurisdiction clauses that apply to the Transactions; and (ii) likely obviate the need for the rest of the Banks' claims to be pursued to trial in England.

15. As I indicated at the close of oral argument I am satisfied that the application for summary judgment should succeed, for the reasons given below.

BACKGROUND

The Transactions

16. In June 2007, when it decided to enter into the Transactions, Catanzaro's existing borrowing comprised €195,088,391.07 in fixed-rate loans and €21,114,170.52 in conditional fixed-rate loans from Cassa Depositi e Prestiti (**CDP**), which were due to mature on 31 December 2035. Further details of Catanzaro's existing indebtedness are set out in the Derivatives Report at [36] and in Appendix C.

17. Catanzaro was thus exposed to the risk of being saddled with expensive fixed long-term borrowing for decades if interest rates fell (which in the event they did). It wanted to hedge against that risk. As the repayment dates were concentrated in the first half of the tenor of the CDP loans, Catanzaro also wanted to restructure its existing borrowing to smooth the repayment profile, with a view to using the savings to fund its investment priorities.

18. Catanzaro therefore decided to enter into the Transactions. The process by which it did so is set out in Kelly 3. The key points for present purposes are as follows:

19. By Council Resolution 33 of 2 May 2007 (**Resolution 33/2007**), Catanzaro approved its budget for 2007 and its forecast and planning report and multi-year provisional budget for the period 2007-2009, including in particular the use of derivatives (i) to "*reduce and improve the management of [Catanzaro's] debt*" (ii) "*in order to proceed with investment works*" and (iii) "*without recourse to further borrowing*".

20. Significantly, Annex 2 to Resolution 33/2007, to which I was taken in oral argument, identified the €7.51167 million in investment expenditure items that were to be financed from the expected proceeds of the Transactions in 2007. These included (amongst other things) the acquisition of real estate, office furniture and furnishings, school acquisitions, school furnishings and road maintenance. Each of these line items had budget figures attached. So although the final terms of the swaps were still to be negotiated the Council knew the effects down to this level of detail and had approved the entry into the Transactions on this basis. Catanzaro was thus closely managing the entry into of the Transaction and the use of the proceeds.

21. Resolution 33/2007 also expressly authorised Mr Giuseppe Canino, Catanzaro's Manager of Budgetary Planning, Finance and the Accounting Sector (**the Manager**) to:

> "…carry out the [Transactions] to reduce [Catanzaro's] indebtedness and implement all the ensuing initiatives and acts, and anything else necessary, to review the interest rate exposure

(the entire portfolio being currently at a fixed interest rate), so that [Catanzaro] may benefit from the potential reduction in interest rates, in full compliance with the legislation in force regarding derivatives, and specifically with the criteria given in the Decree of the Ministry of Economy and Finance (MEF) no. 389/2003"

22. In Executive Decision 36 of 31 May 2007 (**Determination 36/2007**), the Manager recorded that the plan was to manage existing indebtedness which was mostly fixed and recorded the effect of Resolution 33/2007 as being to authorise him "*to enter into the [Transactions] so that [Catanzaro] may benefit from the potential reduction in interest rates in full compliance with the regulations in force regarding derivatives*" and "*to invest*" the proceeds in the expenditures set out in Annex 2 of Resolution 33/2007.

23. Determination 36/2007 described the procedure Catanzaro had used for identifying potentially suitable interest rate hedging transactions in accordance with the relevant Italian laws, namely an informal market survey soliciting proposals from at least five financial institutions, including the Banks – and then carefully comparing them. Having done that, Catanzaro proceeded to negotiate improved terms, including in particular a lower cap for the interest rate swap. The Determination was clear that the invitation for proposals pursuant to this procedure was "*excluded from the application of the regulations on public contracts*", i.e. it was not a public tender. This is a point of significance relied on by the Banks in this case in relation to Catanzaro's reliance on the self-redress process which is confined to public contracts.

24. Catanzaro's decision to enter into the Transactions on the final (improved) terms offered by the Banks was recorded in Determination 36/2007. This, after lengthy consideration of the relevant law, declared that the Banks' revised proposals fulfilled Catanzaro's criteria and complied with all applicable Italian laws, including specifically Decree 389/2003 (**Decree 389**), the MEF Circular of 27 May 2004, Article 1(736) of Law 296/2006 and Legislative Decree 267/2000 (*Testo Unico Enti Locali*) (**TUEL**). Again, as regards the public/private divide, it was specifically considered and noted at the time that these Transactions were excluded from the requirements of the public tender process.

25. The decision that the Transactions complied with all applicable Italian laws was because (among other things) the Transactions reduced the risks to which Catanzaro was already exposed by its existing borrowing in the following ways:

    i) Each of the Banks had "*high creditworthiness*" and the Transactions spread the credit risk between several counterparties;

    ii) The Transactions included a cap to minimise the Defendant's interest rate risk exposure;

    iii) The current values of the payments to be made by Catanzaro under the proposed Transactions had a decreasing profile overall; and

iv) The proposed Transactions were intended to "*hedge [Catanzaro's] CDP loans*".

26. The Manager, in accordance with the authority conferred on him by the Council under Resolution 33/2007, accordingly approved Catanzaro entering into the Transactions to restructure and hedge its borrowings and the use of the proceeds to fund the investment expenses indicated in Resolution 33/2007.

27. The following day, on or around 1 June 2007, Catanzaro and each of the Banks entered into the Transactions on the terms set out in:

i) a 1992 ISDA Master Agreement (Multicurrency – Cross Border) dated as of 1 June 2007 (**the Master Agreement**);

ii) the Schedule to the Master Agreement (**the Schedule**); and

iii) the Confirmation of the final terms and conditions of the Transaction, dated 1 June 2007 (**the Confirmation** and, together with the Master Agreement and the Schedule, **the Transaction Documents**).

iv) The terms were broadly similar to many others but with some differences. For example in relation to BNL and Commerzbank there was a bespoke non reliance clause and a non-speculation clause.

28. The Transactions have a Trade Date of 1 June 2007 and an Effective Date of 27 December 2006 (BNL) or 31 December 2006 (Dexia and Commerzbank). The Expiry Dates are 27 December 2035 (BNL) or 31 December 2035 (Dexia and Commerzbank). This latter date coincides with the date of the expiry of the underlying loan agreements between Catanzaro and CDP, i.e. the end date for the Transactions matches the maturity of CDP's underlying borrowing, as one would expect for a hedge.

29. The Transactions consist of a Cash Flow Swap and an Interest Rate Swap with a collar:

i) The Cash Flow Swap entails a principal exchange between the parties, corresponding exactly with the principal amounts owed by Catanzaro to CDP, whereby the Banks and Catanzaro, on a half-yearly basis, agreed to swap fixed amounts to smooth Catanzaro's repayment profile, with the result that the Banks were the net payer under the Cash Flow Swap from the Trade Date until June 2016, and Catanzaro the net payer thereafter.

ii) Under the Interest Rate Swap:

a) Catanzaro receives six-monthly payments from each of the Banks of a fixed amount of interest calculated according to the notional amount, effectively reimbursing Catanzaro for the fixed interest paid by Catanzaro to CDP, with an additional payment to Catanzaro if average Euribor for the 6-month period is higher than 5.50%.

b) In return, Catanzaro pays interest at a fixed rate for the first two 6-month periods of the Transactions (3.5% for the first six months and 3.55% for the second six) and at a variable rate thereafter consisting of:

i) a payment by reference to the 6-month Euribor index, subject to a maximum (cap) of 5.74% and a minimum (floor) of 3.85% (which was reduced to 3.75% for the last 5 years of the Transactions); and

ii) an additional 0.25% spread payable to the Banks.

30. It was submitted and I accept that the Transactions are therefore similar to the cash flow and interest rate swap which I considered in *Busto*, as described at [36] and [60]–[68].

31. As in *Busto,* the Transactions benefitted Catanzaro by:

i) smoothing the principal repayments on its borrowing with CDP, which were highly concentrated in the first few years after 2007, thereby giving it a more sustainable repayment schedule over the lifetime of its borrowing from CDP (although the total principal repayments were unaltered). Figure 3 of the Derivatives Report illustrates that the repayment is effectively made to impact Catanzaro more gradually;

ii) the Banks effectively reimbursing Catanzaro for the fixed interest paid to CDP under its loan agreements; and

iii) Catanzaro paying the Banks variable rate interest on its re-profiled debt that could fall below the level of the fixed interest rates on its borrowing from CDP (subject to the floor) with the protection of the cap (in the event that 6-month Euribor increased from its then-current levels).

32. The effect is that, apart from an initial period Catanzaro has paid a lower interest rate than it would have done if it had not entered into the swaps – see Figure 5 of the Derivatives Report.

33. Catanzaro also benefitted from initial upfront payments of €360,193.46 (Dexia), €360,409.67 (BNL) and €1,081,281 (Commerzbank), reflecting each Bank's share of the Transactions.

34. The relevant terms of the Transaction Documents are summarised in BNL's draft Amended Particulars of Claim at paragraphs 18–33; Commerzbank's draft Amended Particulars of Claim at paragraphs 12–22; and Dexia's draft Re-Amended Particulars of Claim at paragraphs 9–23. The Transaction Documents provide the basis for the declarations sought by the Banks. As the Annex to the skeleton argument explains in some detail the declarations in the Claims for the most part exactly track the contractual wording.

35. Also on 1 June 2007:

i) Catanzaro provided declarations to Commerzbank and BNL of its status as a qualified investor pursuant to Article 31(2) of Consob Regulation 11522 of 1 July 1998.

ii) The Manager provided copies of each Bank's Transaction Documents to the MEF in compliance with the provisions of Art 1(737) of Law 296/2006.

36. Dexia's Confirmation was in somewhat different form:

i) Instead of the qualified investor confirmation, Catanzaro provided a statement in the Confirmation as to its experience with investments in financial instruments, financial situation, investment objectives and risk appetite.

ii) It also stated that:

a) the final terms and conditions of the Transaction were communicated by the Manager in execution of Resolution 33/2007 and Determination 36/2007, each of which was "*enforceable for all legal purposes*"; and

b) the Transaction was in full compliance with the applicable legislation, including Art 3 of Decree 389, the MEF Circular of 27 May 2004 and Art 1(737) of Law 296/2006.

Events subsequent to entering into the Transactions

37. From 30 June 2007 to 30 June 2021, Catanzaro and the Banks fully performed their obligations under the Transactions. The payments made are set out in Tables 2 to 5 of the Derivatives Report. In each case, the Bank was the net payer under the Transactions up to and including June 2016, and Catanzaro has been the net payer ever since. That was a direct result of Catanzaro's decision to reprofile its existing borrowing. To date, the total amount paid to Catanzaro by the Banks (€38,274,236 including the upfront payments) significantly exceeds the total paid by Catanzaro (€10,767,206).

38. Catanzaro also routinely approved the Transactions after they were entered into. In particular, the Council each year by resolution approved the relevant financial statements and budgets, which accounted for all the expenses of the Defendant, including those relating to the Transactions, and the relevant payments were made without any suggestion that they were not due from 2007 until December 2021. Catanzaro's auditors also regularly reported on the cashflows from the Transactions and made suggestions as to how these should be managed.

39. On 12 May 2020, the Joint Sections of the Italian Supreme Court of Cassation (**the Italian Supreme Court**) issued Decision No. 8770/2020 in the case of *Banca Nazionale del Lavoro SpA v Municipality of Cattolica* (***Cattolica***), which concerned the legal requirements for Italian local authorities to enter into derivative transactions.

40. About a year later, on 11 June 2021, Catanzaro issued Presidential Decision 143/2021, which (among other things) ordered the Manager "*to identify every possible solution aimed at limiting the impact of the derivatives agreements entered into by [Catanzaro] in respect of the current and future budgets*". Catanzaro subsequently commissioned Finance Active, an external consultancy company, to assess whether the Transactions complied with Italian law and Resolution 33/2007. Finance Active provided Catanzaro with a report dated 23 December 2021 (**the Finance Active Report**), which concluded (among other things) that the Transactions did not meet Catanzaro's objective of reducing its indebtedness and had not been approved by Catanzaro's Council. Shortly after the date of the Finance Active Report, Catanzaro failed to make its scheduled payments to the Banks under the Transactions in December 2021.

41. On 21 January 2022, the Council, by Resolution 5/2022 adopted the findings in the Finance Active Report, determined that the Transactions were financially disadvantageous to Catanzaro, and held that Determination 36/2007 was issued illegitimately, including by reference to Article 3 of Decree 389 and the requirement of economic convenience in Article 41 of Law 448/2001, that the Transactions fell outside the authorisation given by the Council and that there was a breach of Article 42 of TUEL. It should be noted that those points go to material validity or authority. No arguments were raised at this time going to capacity or speculation or contending that the Transactions were otherwise than to finance investments. The Council consequently directed the Manager to take "*all necessary administrative actions to remove, cancel or revoke [Determination 36/2007] and its legal effects*".

42. On 25 January 2022, Catanzaro issued Determination 96/2022, which purported to annul Determination 36/2007 (pursuant to which it had entered into the Transactions) on the basis that the Transactions failed to comply with various requirements of Italian law. Unlike the Council resolution this included breach of the prohibition on non-hedging derivatives, although there is no reference to Article 119 and the substance does not refer to arguments which deal with speculation.

The English Proceedings

43. In February and March 2022, the Banks brought the present Claims seeking (among other things):

    i) Declarations as to the validity and enforceability of the terms of their respective Transactions and the lawfulness of those Transactions; and

    ii) Money judgments on the sums due from Catanzaro under those Transactions (alternatively for damages for breach of contract for the same amounts).

44. As I have already noted, Catanzaro's response to the Claims has been to refuse to engage. Service has been validly effected in each of the Claims. In some instances, Catanzaro has even expressly acknowledged receipt of relevant documents. However it has not filed either an Acknowledgement of Service or a Defence to any of the Claims, apparently because (among other reasons) it

believes that the Banks' Claims "*would … be upheld*" in England and that a default judgment of the English High Court will (or may) not be enforceable in Italy. It is apparent that cost factors also entered into the decision, with the relevant resolution citing both the costs quoted by lawyers who had been contacted and the size of the costs bill paid by Busto Arsizio.

45. The procedural history of the English proceedings is set out in detail in Kelly 3. For present purposes, it suffices to note that:

    i) The claims were issued on 18 February (Commerzbank), 8 March (BNL) and 16 March 2022 (Dexia) and duly served on Catanzaro thereafter.

    ii) The Banks adopted a co-ordinated approach to the Applications, in the interest of saving the Court's time and the parties' costs, and the Court ordered that the Applications be jointly case managed and heard together.

    iii) The Banks were given permission to rely on and serve the Italian Law Report and the Derivatives Report; the agreed list of questions for the experts that formed the basis of these reports was approved by Picken J on 10 May 2023.

The Italian proceedings

46. Each of the Banks also commenced administrative proceedings in the Regional Administrative Court of Calabria (**the TAR Proceedings**). This was to avoid the risk that, by failing to challenge the lawfulness and validity of Catanzaro's administrative decisions within the time limits permitted by Italian administrative law, those decisions would become final and binding as a matter of Italian law.

47. The TAR Proceedings are of limited compass and seek only to challenge the lawfulness and validity of the self-redress administrative decisions purportedly taken by Catanzaro to avoid the Transactions. They were brought expressly without prejudice to:

    i) the exclusive jurisdiction of the English Court in respect of matters relating to the lawfulness, validity and effectiveness of the Transactions and the rights and obligations of the Banks and Catanzaro in respect of the Transactions; and

    ii) the application of English law to the Transactions.

48. The TAR Proceedings remain pending and no hearing has yet been scheduled. They are described generally in Kelly 3 and for each of the Banks in Danusso 3 (BNL), Lone 1 (Commerzbank), and Kelly 4 (Dexia) with a status update in Section E of Lone 2.

Resolution 39/2022

49. On 24 June 2022, Catanzaro's Council held a meeting to discuss the disputes that had arisen between Catanzaro and the banks with which it had entered into

interest rate hedging arrangements (i.e., the Banks plus Banca Intesa Sanpaolo), including the English and Italian proceedings described above. As a result, the Council issued Resolution 39/2022, which (among other things):

i) acknowledged decisions of the English High Court, including specifically *Busto*, which had affirmed the validity and enforceability of interest rate hedging arrangements entered into by Italian local authorities;

ii) acknowledged that BNL and Commerzbank had started proceedings before the English High Court by virtue of the English jurisdiction clause contained in the Transaction Documents;

iii) explained that it had concluded that the Banks' Claims "*would ... be upheld*" by the English Courts and that, in that event, Catanzaro would be exposed to the risk of an adverse costs order in respect of the Banks' costs;

iv) claimed that the TAR had jurisdiction to determine the lawfulness of Determination 96/2022 (by which Catanzaro purported to annul Resolution 36/2007) and its effect on the validity of the Transactions (notwithstanding the exclusive English jurisdiction clauses in the Transaction Documents); and

v) indicated that Catanzaro had decided not to defend the English proceedings and instead to resist enforcement of any default judgment in Italy on the basis of its belief that the effects of Determination 96/2022 on the Transactions and the Transaction Documents falls within the jurisdiction of the TAR.

50. As further explained below, the Banks disagree with Catanzaro's position in relation to the jurisdiction of the TAR.

AMENDMENT APPLICATIONS

51. Each of the Banks seeks permission for certain amendments to their respective Claim Forms and Particulars of Claim pursuant to CPR 17.3. The amendments, to which I was referred in oral argument and which are described in some detail in the evidence, are principally to introduce or update claims for the repayment of sums due pursuant to the Transactions, and to ensure the declarations sought address all aspects of the dispute between the parties and are so far as possible aligned between the Banks.

52. In the light of Catanzaro's non-engagement with the proceedings, it has obviously been impossible for the Banks to obtain consent to the proposed amendments and so permission is necessary. There is no prejudice to Catanzaro in permitting the amendments in the circumstances (it has taken no steps in response to the Claims). There would be significant prejudice to the Banks if the amendments were refused.

53. I therefore have no difficulty in accepting Mr Lodder's submissions that it would be appropriate for me to grant permission for the relevant Statements of Case to be amended in the form in the bundle.

PERMISSION FOR THE SUMMARY JUDGMENT APPLICATIONS

54. Although the Banks are entitled to seek default judgment against Catanzaro, that is a course they are unwilling to pursue. As already noted, Catanzaro's stated reasons for declining to participate in the proceedings include its belief that a default judgment of the English High Court may not be recognised by the Italian courts, either automatically or at all, and so enforcement of any judgment on the Banks' Claims could be resisted more easily in Italy.

55. That perception aligns with the position which this Court encounters not infrequently where enforcement in other jurisdictions is sought, and is supported in the evidence for this application. Kelly 3 explains that a default judgment would indeed be more susceptible to challenge at the recognition and enforcement stage in Italy than a reasoned judgment upon a summary judgment application; and that it would be more difficult for an Italian court, on these facts, to check a default judgment's compliance with public policy, which is typically an essential prerequisite for the recognition of foreign judgments in Italy.

56. The solution to this problem is to proceed by way of summary judgment. Unlike default judgment the summary judgment process requires the claimant to depose to the merits of the claim. CPR 24.5 requires that an applicant for summary judgment states explicitly in the application notice that:

> "(d) … the applicant believes the respondent has no real prospect of succeeding on the claim, defence or issue to be determined;
> (e) … the applicant knows of no reason why the disposal of the claim, defence or issue should await trial;".

57. That statement must either be accompanied by a statement of truth in the application notice or must be supported by a witness statement making the same statements which is supported by a statement of truth. Statements of truth must, under CPR 22, be made either by a party or their legal representative. But that is not all; the application also requires this court to make a positive assessment of the merits. As I have indicated above, that involves a consideration of evidence by the Court, and an oral hearing.

58. Procedurally the Banks require permission to make the Applications pursuant to CPR 24.4(1). That is so, as Mr Lodder, explained because as Bryan J held in *The European Union v The Syrian Arab Republic* [2018] EWHC 1712 (Comm) at [61]:

> "The purposes of the rule are to ensure that no application for summary judgment is made before a defendant has had an opportunity to participate in the proceedings - see Citicorp Trustee Company Limited v Al Sanea [2017] EWHC 2845

> (Comm) at [59]; and to protect a defendant who wishes to challenge the Court's jurisdiction from having to engage on the merits pending such application - see Speed Investments v Formula One Holdings [2005] 1WLR 1233 and Trafigura Beheer BV v Rembrandt Limited [2017] EWHC 3100 (Comm) at [14]."

59. The Banks submit that this permission should be granted because it would be unfair to allow Catanzaro to gain a tactical litigation advantage from its deliberate failure to engage with the English Courts in this way, in circumstances where the Banks will suffer significant prejudice if confined to the default judgment route. Again, I have no difficulty in acceding to this submission. Catanzaro has been served with the Claim Form and all other documents in these proceedings, is aware of the Claims and must be aware of the Applications, and the English court has exclusive jurisdiction to hear the dispute. I am entirely satisfied that Catanzaro has had an opportunity to participate in the proceedings and has chosen neither to challenge the jurisdiction nor to engage on the merits.

60. I note that the case cited by Mr Lodder also confirms at [61(3)] that *"The fact that a summary judgment may be more readily enforced in other jurisdictions than a default judgment [was] a proper reason for seeking permission under CPR 24.4 ..."*

61. I therefore will exercise the discretion to permit the Banks to apply for summary judgment pursuant to CPR 24.4(1).

SUMMARY JUDGMENT

62. The Applications for summary judgment are made pursuant to CPR 24.3 on the basis that Catanzaro has no real prospect of successfully defending the relevant parts of the Claims and there is no other compelling reason why these issues should be disposed of at a trial. The Court will be familiar with the applicable principles, which are summarised in paragraph 24.3.2 of the *White Book 2023* and in *Pesaro*. An excellent recent summary of the principles was given by Henshaw J in *Lex Foundation v Citibank* [2022] EWHC 1649 (Comm), [32]-[35]. But the critical points for present purposes are that the court must consider whether the claimant has a "realistic" as opposed to a "fanciful" prospect of success: *Swain v Hillman* [2001] 1 All ER 91 and that "realistic" claim is one that carries some degree of conviction, ie. a claim that is more than merely arguable: *ED & F Man Liquid Products v Patel* [2003] EWCA Civ 472 [8].

63. In the case of declaratory relief, the proper approach is set out in *Abaidildinov v Amin* [2020] EWHC 2192 (Ch). The Court will grant summary judgment where the defendant had no real prospect of successfully defending the relevant "*claim or issue*", which refers to the underlying facts or matters which are the subject of the declaration. If the applicant can show that the defendant had no real prospect of showing that those matters are wrong, the Court should exercise its discretion to make the declaration in the normal way, rather than by reference to the summary judgment test.

64. Catanzaro has not engaged with the proceedings, and so it has been necessary to try to ascertain which arguments it would have run if it had engaged. The Banks have suggested that I operate on the basis that the arguments it would or could have raised are nonetheless apparent from what it has actually said (in Resolution 5/2022, Resolution 39/2022, Determination 96/2022, and its responsive briefs in the TAR Proceedings); and from the arguments raised by other Italian local authorities in cases in the English Courts, on the basis that it is to be inferred that Catanzaro would have relied on any such arguments as might avail it.

65. These arguments fall into four categories:

    i) Jurisdictional arguments, i.e. that the TAR has jurisdiction to determine these matters rather than the English Courts;

    ii) Capacity arguments, i.e. that Catanzaro lacked the substantive capacity to enter into the Transactions as a matter of Italian law;

    iii) Authority arguments, i.e. that the relevant bodies/individuals within Catanzaro who authorised the Transactions lacked capacity to authorise them as a matter of Italian law; and

    iv) Validity arguments, i.e. that the Transactions are invalid as a result of non-compliance with Italian law.

Catanzaro has not to date shown any sign of taking capacity arguments. However since logically jurisdiction and capacity arise prior to authority and validity, I will consider these arguments first.

Jurisdictional arguments

66. This argument can be found in Resolution 39/2022, where Catanzaro argues that the TAR has jurisdiction to determine not only the lawfulness of Determination 96/2022 (i.e. the administrative decision by which Catanzaro purported, by way of self-redress, to annul the determination by which it originally authorised the Transactions) but also the effects of any annulment of Determination 36/2007 on the Transaction and Transaction Documents. The argument is that, because the TAR has jurisdiction to determine whether certain administrative acts taken by local authorities are valid under Italian law, it therefore also has jurisdiction to determine the private law consequences for a contract entered into pursuant to such an administrative decision - even though that contract is subject to exclusive English jurisdiction.

67. That position is illogical. Catanzaro itself recognised this in an Executive Report in 2020, which stated that *"by virtue of the exclusive jurisdiction clause in the ISDA Master Agreement, the competent judge is the English judge*". It is also contrary to authority. The Court of Appeal held in *Deutsche Bank AG v Comune di Savona* [2018] EWCA Civ 1740 (which involved a jurisdictional challenge by an Italian local authority in relation to substantially identical ISDA documentation), that disputes in relation to the validity or enforceability of

ISDA transactions containing an exclusive English jurisdiction clause are required to be heard in the English Courts. Catanzaro's use of self-redress measures in Italy cannot affect the jurisdictional position. Were matters otherwise any local authority could abrogate an exclusive jurisdiction agreement simply by purporting to cancel a contract by administrative action. That argument was considered and rejected by Hamblen J in *Depfa Bank Plc v Provincia Di Pisa* [2010] EWHC 1148 (Comm) [64]-[65].

68. Nor can it be said that Catanzaro has been unable to challenge jurisdiction and make such points as it wishes to make on the TAR jurisdiction in relation to matters covered by the jurisdiction clause. It has had the opportunity to challenge the jurisdiction of the English Court; that right and opportunity is built into the process for acknowledging service. Nor has that ship entirely sailed; while there is a time limit for acknowledging service under the CPR at any later point Catanzaro could have sought relief from sanctions or an extension of time to file an Acknowledgement of Service to challenge the jurisdiction of the Court on this basis. There are many cases where this has been done, examples being: *Taylor v Giovani Developers Ltd* [2015] EWHC 328 (Comm) at [17] (Popplewell J); *Cunico Resources NV v Daskalakis* [2018] EWHC 3382 (Comm); [2019] 1 WLR 2881 (Andrew Baker J) at [34], [65], [94]–[95]). Catanzaro has not done so.

69. In those circumstances, it is to be taken that Catanzaro has accepted that the English Court has jurisdiction to determine the Claims.

70. If one were to proceed to the merits of Catanzaro's Italian law jurisdiction arguments, the position does not actually improve for Catanzaro. This is carefully explained in Section 5 of the Italian Law Report.

71. The first problem is that there is an explicit 12-month time limit *("in any case no longer than 12 months")* to adopt administrative self-redress measures under Article 21-*nonies* of Law 241/1990. Catanzaro waited 14 years after the Transactions to launch its "self redress" steps. Its reliance, to avoid the time limit, on an argument that the Transactions were entered into as a result of misrepresentation or fraud "*resulting from criminal conducts ascertained by a final judicial decision*" is plainly, on the facts, fanciful in the extreme.

72. The second insuperable problem is that Catanzaro argues that public law self-redress measures are available to it to avoid a contract entered into with a private party outside of a public tender, despite clear Italian Supreme Court authority to the contrary in the shape of Cass Civ SS.UU., n. 23600/2017. As noted above on the facts it is clear that this was not a case of public tender.

73. Third, there is also a decision of the Supreme Court Joint Division n. 22554/2014 which establishes that even if the TAR has jurisdiction to determine whether to annul Determination 36/2007, that such jurisdiction does not extend to determining the effects of such annulment on private law contracts entered into pursuant to it.

74. Even applying Italian law, therefore, the TAR does not have jurisdiction over the subject matter of the present Claims.

Capacity arguments

75. Although Catanzaro has not explicitly invoked capacity arguments thus far, such arguments, which have been a foundation stone of similar cases before these courts, are implicit in Catanzaro's contention in Determination No. 96/2022 that the Transactions violated an Italian law prohibition on public authorities entering into "*speculative*" derivatives. In that connection, Catanzaro cites (i) the Italian Supreme Court decision in *Cattolica* and (ii) Article 41(2) of Law 448/2001, Article 3 of Decree 389 and Article 1(736) of Law 296/2006.

76. This argument has been considered in several recent judgments of the English Court, in particular *Venice*, *Venice CA*, *Busto,* and *Pesaro*, in respect of which the Banks served Civil Evidence Act Notices. As the Banks submitted, these cases establish the following principles of Italian law:

    i) There is no general limitation on the capacity of Italian local authorities to enter into private law contracts, such as derivatives transactions, and Italian law has no principle of an act being *ultra vires* the civil law capacity of a local authority: *Venice* [201] and *Busto* [174], [251];

    ii) Any specific limits on the capacity of Italian local authorities must be specifically prescribed by Italian law: *Venice* [200(ii)] and *Busto* [177]–[179] [184]–[190];

    iii) At the time of the Transactions, there were no such limits on Italian local authorities' capacity to enter into derivatives, save for the following two points which are said to arise from the *Cattolica* decision:

        a) a prohibition on Italian local authorities entering into "*speculative*" derivative transactions (as opposed to hedging derivative transactions): *Venice* [196]–[197] and *Busto* [277]–[280]; and

        b) the requirement under Article 119(6) of the Italian Constitution that Italian local authorities may resort to "*indebtedness*" only as a means of funding investments: *Venice* [233]–[234] [248]–[252], *Busto* [325]–[337] and *Pesaro* [91]–[97].

77. The questions which might then arise had Catanzaro fought these Applications, and which I should therefore consider as part of deciding whether the test for summary judgment is met, are whether Catanzaro has a real prospect of success in showing either that (i) the Transactions were speculative, as a matter of Italian law or (ii) the Transactions were not a means of funding investment expenditure.

78. As noted earlier, the capacity issue has not been worked through in any way by Catanzaro either in the Italian proceedings or in the various resolutions and determinations it has made as to the validity of the Transactions. The identification of these points is a matter of inference, based on the arguments which other local authorities have considered it worth deploying in contested proceedings.

The Transactions were not speculative

79. I accept the submission that Catanzaro has no real prospect of establishing that the Transactions were speculative as a matter of Italian law.

The Transactions satisfy the Consob definition for a hedging derivative

80. As the Court of Appeal held in *Venice CA*, the Italian Supreme Court (in decision 19013/2017) and the Italian financial regulator, Consob, have clarified that a derivative will not be speculative when it satisfies the two conditions set out in the Italian Law Report, i.e.:

i) The derivative must be entered into expressly for the purpose of reducing the riskiness of other positions held; and,

ii) There must be a high degree of correlation between the technical and financial aspects (maturity, interest rate, type, etc.) of the exposure being hedged and the financial instrument used for that purpose.

81. In this case the first condition of the Consob definition is satisfied because the Transactions were entered into by Catanzaro explicitly on the basis that they would reduce the riskiness of its existing indebtedness. Catanzaro set out in Resolution 36/2007 the ways in which the Transactions reduced the riskiness of its existing debt position. It was on this basis that Catanzaro itself took the view, at the time it entered into them, that the Transactions complied with the relevant Italian laws. As Foxton J held in *Venice*, whether a transaction is speculative has to be assessed *ex ante* and Catanzaro's *ex ante* assessment was that the Transactions reduced its risk exposure (rightly as it turned out *ex post*).

82. The second condition of the Consob definition will be satisfied (see the Court of Appeal of Milan Decision 921 of 2021 and the Court of Reggio Emilia Decision 227 of 2023) where:

i) the notional amount of the derivative instrument matches a portion (or the entirety) of the notional amount of the underlying liability;

ii) the maturity of the derivative instrument matches the maturity of the underlying liability; and

iii) the cash flows received (as either interest or principal amounts) match what is due pursuant to the underlying liability.

83. In this case, the notional amount under the Transactions exactly matches the notional amount of Catanzaro's underlying debt and, as explained in the Derivatives Report:

i) the maturity of the Transactions and the underlying debt is identical; and

ii) the cashflows received by Catanzaro (both principal and interest) replicate the cashflows due under its existing borrowing with CDP.

84. As the Derivatives Report makes clear the only existing risks that were affected by the Transactions were (i) the amortisation profile and (ii) the interest rate risk profile:

    i) As regards the adjusted amortisation profile, the Transactions included a vanilla cash flow swap in respect of the capital payments due under Catanzaro's existing borrowing to obtain its desired repayment profile. Every single payment to be made from 2007 to 2035 was known to Catanzaro with certainty when it entered into the Transactions, meaning there was no element of speculation involved. The total repayments were identical to Catanzaro's existing borrowing with CDP. As I put it in relation to the similar derivative in *Busto* at [269]: "*The principal exchange element of the Cash Flow Swap was … essentially straightforward and risk free … easy to comprehend and did not involve any uncertainty … as to cash flows*".

    ii) As regards the adjusted interest rate risk profile, this was a vanilla interest rate swap whereby Catanzaro hedged its fixed rate borrowing with a variable interest rate instrument floating within the range of maximum and minimum interest rates provided for by the cap and the floor of the swap. A derivative will not be considered speculative merely because it swaps a fixed rate for a floating rate. As noted in *Venice* [212(vii)], the Italian Supreme Court held in Decision No 21830/2021 that "*a vanilla IRS swap transaction (the purchaser paying a fixed interest rate in an amount aligned with its underlying borrowing in return for receiving a floating rate on the same amount) was a hedge, and not a speculative transaction*".

85. Accordingly, my conclusion (at [305]–[306]) that the similar cash flow and interest rate swap in *Busto* was not speculative seems to be equally applicable to these Transactions:

> "…a classic form of hedging – seeking to manage and contain the interest rate risks to which Busto was already exposed on its borrowing. The effect of the [swap in Busto] was essentially to restructure and rebalance the amortisation profile of Busto's principal repayments on its existing borrowing – in a way which benefitted Busto by delaying the point at which significant repayments had to be made – and to provide for the payment of a variable rate of interest within a fixed range bounded by a cap and a floor… I conclude that the Transactions were not speculative and were hedging".

<u>None of the indicia of speculation is present</u>

86. The Banks also out of an abundance of caution addressed me on the question of whether there is a realistic argument that a derivative that satisfies the two Consob conditions can nonetheless be speculative (contrary to *Venice CA* [159]–[166]). This was done by reference to the view of Foxton J in *Venice* that the Consob definition was not exhaustive and certain other indicia may be

relevant and by reference to the "*indicia of speculation*" that Foxton J identified in *Venice* [212].

87. As to those four "*indicia*" of a speculative derivative in *Venice*:

    i) Paragraph 212(i): A derivative contract entered into when there was no underlying risk to hedge. Here the Transactions hedged Catanzaro's underlying debt exposure to CDP;

    ii) Paragraph 212(ii)-(iii): A "*significant discrepancy*" between the notional amount, maturity date, exchanged interest rate or cash flows of the derivative and the underlying risk (as Foxton J noted, this indicium is simply the converse of the "*high correlation*" test in the second limb of the Consob definition). Here there is a high correlation between the Transactions and the underlying debt exposure being hedged;

    iii) Paragraph 212(iv): A collar swap in which the mark-to-market (**MTM**) of the cap at the date of the swap was much lower than the MTM of the floor. Unlike the swap in *Venice*, which priced in a large negative MTM from a pre-existing swap transaction that was effectively rolled into the subsequent derivative transaction, there was no pre-existing derivative in this case;

    iv) Paragraph 212(v)-(vii): A derivative that is structured to absorb the negative MTM on prior swap transactions. Also unlike the swap in *Venice*, the forward curve for the Transactions lies approximately half-way between the cap and the floor over the term of the derivative (see the Derivatives Report), i.e. there is no material disparity between the value of the cap and the floor under the Transactions.

88. The Transactions were thus not, on any view, speculative. They were vanilla derivative transactions that effected a straightforward restructure of the amortisation profile of existing indebtedness combined with an interest rate hedge. This is expressly permitted by Article 3(2) of Decree 389.

<u>The Transactions were for investment purposes</u>

89. Catanzaro also has no real prospect of success in showing that it resorted to indebtedness under the Transactions otherwise than as a means to fund investments.

90. Article 119(6) of the Italian constitution permits local authorities to resort to "*indebtedness*" but only to finance their investment expenditure. The meaning of "*indebtedness*" for this purpose is set in Article 3(17) of Law 350/2003, by way of a list of (apparently exhaustive) transaction types. The list specifically excludes restructuring existing borrowing to improve liquidity in a way that does not involve "*additional resources*". That is a phrase which I held at [200] in *Busto* was "*apt to cover swaps which restructure borrowing by adjusting the repayment profile*" as the Transactions do.

91. The list in Article 3(17) was amended from 1 January 2009 (after the Transactions and with prospective effect only) to include the upfront payment component of a derivative, highlighting that derivatives more generally are excluded from the definition of "*indebtedness*" in Italian law (as Foxton J held at [233] in *Venice* and I held in *Busto* [195], [280] and [328]).

92. In *Cattolica*, however, the Italian Supreme Court held that, while derivatives typically do not fall within the definition of indebtedness:

    i) The upfront component of a derivative could constitute indebtedness, even prior to the legislative change that added upfronts to the relevant list of transactions in Article 3(17); and

    ii) Derivative transactions that involve either extinguishing or significantly modifying the underlying debt could themselves involve resort to indebtedness.

93. That aspect of the *Cattolica* decision has attracted some criticism (*Busto* [200]–[202], [325]–[328] and *Venice* [255]–[257]). But even assuming that it would be decided the same way by another Italian court today, it has no bearing on the present Applications because, (i) the only part of the Transactions that could constitute indebtedness for the purposes of Article 119(6) is the upfronts (ii) the upfronts were expressly permitted by law and (iii) the proceeds were used solely to fund investment expenditure.

94. Taking these three points in turn:

    i) First, the Transactions did not affect the underlying debt owed by Catanzaro to CDP. The underlying loans were not extinguished or modified, whether significantly or at all. The effect of the cash flow swap was that the capital payments were restructured to give Catanzaro greater liquidity, which is expressly permitted by Article 3(17) of Law No. 350/2003. Catanzaro still had to make the same capital repayments it had previously budgeted for, it had to do so over the same period, and it incurred no additional borrowing. The positive cash flows Catanzaro benefitted from under the Transactions did not, in any sense, constitute 'new debt' that would have to be 'repaid'.

    ii) For this reason, the Court of Spoleto (no 504/2023) and the Court of Auditors for the Lazio Region (12/04/2022, no. 42), when applying *Cattolica* to cash flow swaps restructuring existing indebtedness, held that only the upfront payment component constituted a form of indebtedness. I reached the same conclusion in relation to the swaps in *Busto* [334]–[342] as implicitly did the Court of Appeal in *Venice CA* in holding [170]–[174] that a hedging derivative without an upfront does not infringe Article 119(6) of the Italian Constitution.

    iii) In addition even if *Cattolica* is right that upfront payments were a relevant form of indebtedness at the time of the Transactions, the upfront payments in this case fell within the rules set out in Article 3(2)(f) of Decree 389, which allows payment of a premium of 1% at the inception

of a derivative. They were therefore permitted, provided the upfront was used to finance investment expenditures.

iv) But perhaps most powerfully, it is clear from the contemporaneous documents cited above that all of the 2007 proceeds from the Transactions, therefore including all of the upfronts (which were paid in 2007), were used for investment purposes. This was expressly stated in Annex 2 to Resolution 33/2007 and Determination 36/2007. Specific sums were assigned to specific clearly described purposes (eg purchasing school furniture or mending roads). Catanzaro has never suggested that the funds were used for any purpose other than to fund investment expenditures. Further, as Professor Rimini explains in the Italian Law Report, as a matter of Italian administrative law, Catanzaro could not have used the proceeds for another purpose without passing a new resolution varying the previous resolutions and the budget, which there is no evidence to suggest it has ever done.

v) In any event, Catanzaro represented to the Banks in Section 3(d) of the Master Agreements that the information contained in Resolution 33/2007 and Determination 36/2007 (each of which falls within the information specified under Section 3(d) in the Schedule) was true, accurate and complete in every material respect, including in identifying the investment purposes to which the proceeds would be allocated. It is therefore estopped from asserting the contrary, as a matter of English law.

95. It follows that, to the extent the Transactions involved incurring indebtedness, which applies only to the upfronts, the proceeds were to be, and were in fact, used for investment purposes. Catanzaro has no realistic prospect of establishing the contrary.

96. As for other possibilities as noted earlier no other capacity argument has been advanced by any Italian local authority with any degree of success in the English Courts. It is therefore, as the Banks submitted, right to describe the possibility of Italian law recognising some other basis for challenging Catanzaro's capacity to enter into the Transactions as being a "fanciful" rather than a "real" possibility.

Authority arguments

97. Catanzaro contends in Determination 96/2022 that the Transactions do not comply with Article 42 of TUEL, which it says required Catanzaro's Council to have approved the Transactions. This argument does not go to Catanzaro's capacity to enter into the Transactions, but rather its authority to do so under Italian law: see *Busto* [373] and Foxton J in *Venice* [304]–[317]. These arguments are of no assistance to Catanzaro in defending the Claims because the Transactions are governed by English law, not Italian law, meaning matters of ostensible authority and ratification are governed by English law. This is a point made in *Busto* [377]–[382] and *Venice* [317].

98. Catanzaro's arguments can be taken shortly:

i) First, as Professor Rimini explains, Article 42 of TUEL was complied with because the Council authorised the Transactions in Resolution 33/2007. I reached the same conclusion on very similar facts in *Busto*, [352]–[364] as did Peter MacDonald Eggers KC at [101] in *Pesaro*. It is notable that Professor Rimini seems to regard this point as entirely straightforward, dealing with it in six lines of his report.

ii) Second, even if that is wrong, Catanzaro held out the Manager as having been properly authorised and/or represented to the Banks that all necessary authorisations had been obtained in compliance with TUEL. This point was conceded in *Venice*. To the extent that it were to arise I would have no hesitation in holding that the Manager therefore had ostensible authority as a matter of English law:

a) By Resolution 33/2007, the Council expressly authorised the Manager to "*carry out the SWAP transactions*" and "*implement all the ensuing initiatives and acts, and anything else necessary*" to that end.

b) The Manager duly purported to act pursuant to that authorisation when he approved the Transactions and the execution of the Transaction Documents in Determination 36/2007.

c) Catanzaro's representations in the Transaction Documents include, among other things, that:

i) it had the power to execute and deliver the Transaction Documents and to perform its obligations under the Transaction Documents and had taken all necessary action and made all necessary determinations and findings to authorise such execution, delivery and performance;

ii) its execution and delivery of the Transaction Documents and performance of its obligations under the Transaction Documents did not violate or conflict with any law applicable to it or any provision of its constitutional documents; and

iii) all governmental and other consents that were required to have been obtained by Catanzaro with respect to the Transaction Documents had been obtained and such consents were in full force and effect and any conditions of them had been complied with.

d) Catanzaro also declared in Determination 36/2007 that the terms of the Banks' proposals were compliant with all applicable laws, including TUEL (and therefore Article 42 thereof): see paragraph 24 above.

e) It is appropriate to grant summary judgment in a situation such as the present where there is a clear and consistent representation of authority, as the Supreme Court held in *Law Debenture Trust Corporation v Ukraine* [2023] UKSC 11 at [74]–[81].

iii) Third, there is ratification as a matter of English law. The relevant acts of ratification included the payments made by Catanzaro pursuant to the Transactions from 2007 to 2021, without any suggestion that the sums were not due, and Catanzaro's approval of its annual financial statements (the amount paid totals to €10,767,206 and it is noteworthy that the financial statements were audited). I concluded that very similar conduct amounted to ratification under English law in *Busto*, [383]–[386], as did Peter MacDonald Eggers KC in *Pesaro* [100]–[101].

99. It follows that Catanzaro has no realistic prospect of defending the Claims on the basis of its authority arguments.

Validity arguments

100. This is the main argument relied upon in the Italian Proceedings. In Determination 96/2022 Catanzaro raises questions of the Transactions' compliance with mandatory rules of Italian law, in particular the allegations that the Transactions (i) did not comply with Article 3 of Decree 389 (ii) lacked the requirement of "*economic convenience*" under Article 41(2) of Law 448/2001 and (iii) did not reduce Catanzaro's indebtedness as required by Article 1(736) of Law 296/2006.

101. The fundamental flaw with these arguments however is that the Transactions are governed by English law, not Italian law, and none of these points goes to capacity: see *Pesaro* [118], *Busto* [316] and *Venice* [331]–[332], [343].

102. Catanzaro has not suggested that provisions of Italian law should apply to the Transactions pursuant to Article 3(3) of the Rome Convention on the Law Applicable to Contractual Obligations 1980 (**the Rome Convention**). Nor would any such argument have any prospect of success: see *Pesaro* [77]–[79], *Dexia Crediop SpA v Comune di Prato* [2015] EWHC 1746 (Walker J); [2017] EWCA Civ 428 (Court of Appeal) (**Prato**) [126]–[137] and *Venice* [338]–[342]. This is not a case where all the elements relevant to the situation at the time of the choice of law are connected with Italy alone. Giving just two examples, the ISDA Master Agreement chosen was the 'Multicurrency – Cross Border' agreement and at least one of the parties to the Transactions is a German bank. There is also clearly no question of illegality of the Transaction Documents in the place of performance.

103. That essentially concludes the matter, and a realistic case – ie a case of the standard necessary to survive an application for summary judgment - cannot survive this.

104. But in any event the Italian law arguments are themselves flawed. As regards Catanzaro's arguments in Determination 96/2022 that the Transactions breach Decree 389:

i) Catanzaro suggests that the Transactions do not fall within any of the types described in Article 3(2) of Decree 389 because Article 3(2)(f) does not permit an exchange of principal amounts. This argument has no prospect of success for the reasons set out in the Italian Law Report. As the Court of Spoleto held in Decision 504 of 29 June 2023 (see paragraph 2.4 of the decision), the re-profiling of the underlying liability to obtain a more linear amortization profile in circumstances when the underlying debt is highly concentrated in the first few years falls within Article 3(2)(f) of Decree 389.

ii) Catanzaro also suggests that the structure of the Transactions means that they do not fall within Article 3(2)(a) to (d) of Decree 389 either. However, this argument also has no real prospect of success because Article 3(2) expressly permits combinations of the types of derivative envisaged by Decree 389: see the Italian Law Report.

iii) A transaction with the same combination of features as the Transactions (a straightforward restructure of the amortisation profile of existing indebtedness combined with an interest rate hedge) was held to fall within Article 3(2) of Decree 389 in *Busto* at [312].

105. As regards Catanzaro's arguments in Determination No. 96/2022 that the Transactions breached the requirement of "*economic convenience*" under Article 41(2):

i) As set out in the Italian Law Report, in order to fall within Article 41(2) it is necessary for the transaction to replace existing debt with new debt. However, the Transactions do not purport to extinguish the existing underlying loans entered into between Catanzaro and CDP.

ii) It follows that any purported requirement of "*economic convenience*" does not apply, as this Court recognised in *Prato* (Walker J). For the same reason, Peter MacDonald Eggers KC granted Dexia summary judgment on the Article 41(2) point in *Pesaro*.

106. As regards Catanzaro's arguments in Determination 96/2022 that the Transactions breach an alleged requirement (deriving from Article 1(736) of Law 296/2006 and a number of other Italian laws and regulations) that derivative transactions shall be aimed at the reduction of the final cost of the debt and at reducing exposure to market risks:

i) As explained in paragraphs 16 to 31 above, the purpose of the Transactions was to adjust the amortisation profile and the interest rate profile of Catanzaro's existing debt to reduce the interest cost of its underlying indebtedness by allowing it to take advantage of a fall in interest rates. That is in fact what has happened: see the Derivatives Report, and in particular Figure 5, which shows the interest rate paid by

Catanzaro has been lower than what it would have paid under its existing borrowing in all periods since June 2008.

ii) In Determination 36/2007, Catanzaro stated that the aim of the Transactions was to reduce its exposure to market risks (see paragraph 24 above) and expressly acknowledged that the Transactions complied with Law 296/2006 (referred to as "*the 2007 Finance Act*") on the basis that (among other things) it hedged Catanzaro's existing borrowing from CDP and the payments under the proposed Transactions had a decreasing profile overall.

107. Finally, Catanzaro also argues that it entered into the Transactions in reliance on allegedly false information which was said to have been provided by the Banks as to the effect of the Transactions and/or as a result of the alleged failure of the Banks to disclose information that they are said to have been under an obligation to provide. The Banks do not accept that they failed to provide Catanzaro with information that they were obliged to provide or that Catanzaro entered into the Transactions as a result of any allegedly false information. For present purposes, however, the short answer to this point is once again that Catanzaro is relying on alleged breaches of Italian law in making this argument, in circumstances in which the Transactions are governed by English law.

108. Accordingly, even if the Italian law arguments going to validity were relevant to the Transactions (which they are not), they are not tenable. As a matter of English law, being the law applicable to the Transactions, Catanzaro has no realistic prospect of showing that these Italian laws affect the lawfulness, validity or effectiveness of the Transactions.

CONCLUSION

109. Accordingly, I accept the submission that Catanzaro has no argument with a realistic, as opposed to a fanciful, prospect of success:

i) Insofar as Catanzaro raises points that go to **jurisdiction**, these have no prospect of success: the relevant contracts are governed by exclusive English jurisdiction clauses and contain express waivers of any objection to English jurisdiction. Catanzaro also could have, but has not, sought to challenge this Court's jurisdiction.

ii) Insofar as Catanzaro raises points that could potentially go to its **capacity** to enter into the Transactions, those points depend on the untenable arguments either (i) that vanilla derivative transactions that had an express hedging purpose and function were somehow 'speculative' or (ii) that restructuring Catanzaro's existing indebtedness expressly to fund investment expenditures somehow involved Catanzaro taking on new indebtedness, or doing so otherwise than for investment purposes.

iii) Insofar as Catanzaro raises points that go to its **authority** to enter into the Transactions: and those points are (i) clearly wrong as a matter of Italian law and (ii) irrelevant in circumstances where questions of ostensible authority and ratification fall to be decided by applying English law and where under English law:

a) it cannot seriously be suggested that the relevant individuals at Catanzaro did not have ostensible authority to enter into the Transactions.

b) the Transactions were in any case repeatedly ratified by Catanzaro over a period of some 14 years.

iv) Insofar as Catanzaro raises other points going to the **validity** of the Transactions under Italian law, those points go nowhere because the Transactions are governed by English law and there is no basis for any suggestion that mandatory rules of Italian law apply.

110. It follows that the Transactions are valid and binding and enforceable in accordance with their terms. Catanzaro made representations in the Transaction Documents. It is bound by those representations, which were also true and accurate.

111. In the circumstances, I am prepared to grant the Banks summary judgment substantially in the terms of the relief requested.

112. The relief requested, which comprises both money judgments and declaratory relief, is set out:

i) by Dexia in paragraphs 8(1)(a) to (f), (h) to (k), (l.A), (m.A), (o) and (p), 8(1A) and (1B) of Dexia's Brief Details of Claim in the draft Re-Re-Amended Claim Form;

ii) by Commerzbank at paragraphs (1)(a) to (o) and (2) to (6) of the prayer for relief in Commerzbank's Brief Details of Claim in the draft Amended Claim Form; and

iii) by BNL at paragraphs 1(1) to (7), (9), (10), (12)-(17) and (25) and 2 to 3 of BNL's Brief Details of Claim in the draft Amended Claim Form.

113. I have been taken through Annex 1 to the Banks' skeleton argument which sets out the declarations that are sought on the Applications, the relevant contractual provisions from which they are drawn (where applicable) and references to the paragraphs of *Busto* and *Pesaro* which considered and granted the same declaratory relief. I have also been taken through a further helpful schedule summarising the Banks' position on the declarations concerning Italian Law. I will direct that both of these documents be provided to Catanzaro together with a copy of this judgment.

114. Having gone through those declarations and debated them in some detail with the Banks' counsel, I am prepared to make those declarations save as follows:

i) The broad legal declaration at 1(b) in the Commerzbank Claim Form and (2) in the BNL Claim Form. I refused to make such a declaration in *Busto,* as the breadth of the wording, while tracking an ISDA term, is plainly capable of covering disputes which have not arisen and which I have not considered. The same concerns are apt here. Further there is now at Dexia (m.A), Commerzbank 1(n) and BNL (9) a specific tailored declaration which reflects the Italian Law arguments deployed either specifically by Catanzaro or which it is to be inferred Catanzaro would have wished to invoke;

ii) Two Dexia declarations ((o) and (p)) which are said to track passages from ISDA, but which it was impossible to follow as I was taken through them live, and which appear to weave together parts of different clauses. Such an approach is plainly susceptible of argument, and without argument having been addressed to it I am not satisfied in either case that this is an appropriate declaration to make. My having raised concerns on these points in oral argument, on consideration they were not pursued by the Banks.

115. For completeness, I note that the Banks do not at this time apply for summary judgment on the declarations for non-liability on the part of the Banks set out at paragraph 8(1)(n) of Dexia's Brief Details of Claim in the draft Re-Re-Amended Claim Form; at paragraph (1)(p) of the prayer for relief in Commerzbank's Brief Details of Claim in the draft Amended Claim Form; and at paragraph 1(21) of BNL's Brief Details of Claim in the draft Amended Claim Form. This is because the Banks do not regard these declarations as being suitable for summary determination, and is without prejudice to the Banks' right to seek these declarations following any trial of their Claims in due course. To that extent therefore this litigation remains in existence.

116. The consequence of this judgment is therefore that these cases remain live as to the following declarations in the Claim Forms:

i) Dexia: 8 (1)(g), (l), (m), (n), (o), (p) and(1A)

ii) Commerzbank: (1)(b) and (p)

iii) BNL: 1. (2), (8), (9) (v) and (vi), (18), (19), (21), (22), (23), (24)

ANNEX: THE COURT'S PRE-READING

1. The Banks' Skeleton Argument;
2. The Third Witness Statement of Jonathan Kelly;
3. The Second Witness Statement of Mahmood Lone;
4. The draft orders;
5. The key resolutions and determinations passed by Catanzaro and referred to above with respect to:
   - 5.1. The decision to enter the Transactions in 2007; and
   - 5.2. The attempt to resile from the Transactions in 2022.
6. Italian Law Report, in particular:
   - 6.1. Executive Summary at [33];
   - 6.2. Statutory framework for Italian local authority to enter derivative transactions at [69]–[98];
   - 6.3. Question 2 on speculative derivatives: and
   - 6.4. Question 3 on indebtedness.
7. The *Venice* first instance decision, in particular:
   - 7.1. [167]–[186] (summarising *Cattolica*);
   - 7.2. [187]–[213] and [222]–[232] (on capacity to enter speculative/hedging derivatives);
   - 7.3. [233]–[267] (on indebtedness); and
   - 7.4. [343]–[350] (on Decree 389 and the MEF Circular 2004).
8. The *Venice* Court of Appeal decision, in particular:
   - 8.1. [159]–[166] (on the test for speculative/hedging derivatives); and
   - 8.2. [170]–[174] (on indebtedness).
9. *Busto*, in particular:
   - 9.1. [60–68] (describing the similar derivative transaction in that case, cf. the description of the Transactions in Kelly 3 [33]–[37]);
   - 9.2. [120]–[155] (summarising *Cattolica*);
   - 9.3. [173]–[306], [365] (on capacity to enter speculative/hedging derivatives);
   - 9.4. [307]–[316] (on Decree 389 and Article 41); and
   - 9.5. [368]–[373] (on Article 42(2)).
10. *Pesaro* at:
    - 10.1. [89]–[97] (on Article 119(6) and Article 30(15)); and
    - 10.2. [102]–[118] (on Article 41, Decree 389 and the MEF Circular of 27 May 2004).
11. The description of the draft amendments in Section F of Lone 1 (Commerzbank), Danusso 3 [29]–[32] (BNL) and Section D of Kelly 4 (Dexia).
12. (Skim reading only): The draft amended pleadings, the Transaction Documents and the Derivatives Report, in particular [38]–[68].