Neutral Citation Number: [2013] EWHC 2793 (Comm)

Cases No: 2011 FOLIO 1199 and 2012 FOLIO 464

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20/09/2013

Before :

MR. JUSTICE TEARE

- -

Between :

DEUTSCHE BANK AG and others	**Claimants**
- and -	
(1) UNITECH GLOBAL LIMITED	**Defendants**
(2) UNITECH LIMITED	

And Between :

DEUTSCHE BANK AG	**Claimant**
- and -	
UNITECH LIMITED	**Defendant**

- -
- -

Thomas Sharpe QC, John Brisby QC, Alastair Tomson and Michael d'Arcy (instructed by **Stephenson Harwood**) for the **Defendants**
Richard Handyside QC and Adam Zellick (instructed by **Allen & Overy**) for the **Claimants in 2011 Folio 1199**
Mark Hapgood QC, Timothy Howe QC and Adam Sher (instructed by **Freshfields**) for the **Claimant in 2012 Folio 464**

Hearing dates: 22, 23, 25, 29 and 30 July 2013

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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 HONOURABLE MR. JUSTICE TEARE

Mr. Justice Teare :

1. There are before the court a number of interlocutory applications in a matter in which there has already been one contested interlocutory application which is the subject of an appeal. The Defendants, who are being sued upon a bank loan (in one action) for a sum in excess of US$150m. and in relation to an interest rate swap agreement (in another action) for a sum in excess of US$11m., wish to amend their Defences to plead a number of new defences. The Claimants say that none of these new defences has any real prospect of success and that permission to amend should therefore be refused. They also say that the existing defences have no prospect of success and that they are entitled to summary judgment in respect of them. And, finally, the Defendants say that the Claimants' applications for summary judgment are an abuse of process which the court should not entertain.

2. The Claimants, at my request, produced a list of the issues which I must determine. They total 23 and have been culled from the 140 pages of skeleton arguments. The list has not met with the approval of the Defendants but I was not provided with a copy of their list of issues until after I had prepared this judgment in draft, using the Claimants' list of 23 issues as a helpful guide to the many issues which arise on the several applications before the court. I have not sought to redraft this judgment in the light of the Defendants' list of 27 issues but have sought to ensure that I have dealt with any additional issues identified by the Defendants which appear to me to require a decision.

3. An outline of the nature of the claims brought by the Claimants can be found in the judgment of Cooke J. on the first interlocutory application; see [2013] EWHC 471 (Comm) paragraphs 3-6. I shall refer to the several Claimants as the Claimants and to the two Defendants as the Defendants without differentiating between them. But on occasion it will be necessary to refer to Deutsche Bank AG, the first Claimant in the lenders' action and only Claimant in the swap action, as DB, to Unitech Global Limited, the first Defendant in the lenders' action and borrower, as UGL and to Unitech Limited, guarantor and second Defendant in the lenders' action and only Defendant in the swap action, as Unitech.

The application to amend the defence in the lenders' action.

4. There is no dispute that the criterion required for granting permission to amend is whether the proposed amendment has a real as opposed to a fanciful prospect of success.

Issue 1: Whether the Defendants are entitled to claim rescission of the Credit Agreement for misrepresentation (notwithstanding the judgment of Cooke J.).

5. This issue arises because the Defendants wish to amend their existing plea that the Claimants misrepresented the suitability of the swap by adding two further particulars of unsuitability which are explained at paragraphs 62-72 of Mr. Brisby's Skeleton Argument. The remedy sought is the remedy of rescission. The debate under this head concerns the amendment to the plea for rescission in principle, not whether the two further particulars of unsuitability are arguable.

6. The Claimants say that the Defendants are estopped by reason of the decision of Cooke J. from raising a defence based upon rescission of the Credit Agreement. The basis upon which Cooke J. held that the Defendants are not entitled to the remedy of rescission for misrepresentation is that the effect of subsequent novations of the Credit Agreement precluded any claim to rescission; see paragraphs 50-51 of Cooke J.'s judgment.

7. The Defendants take a number of points in response. First, they say that they did not have a proper opportunity to address Cooke J. on the question of novation. It seems to me that I must deal with Cooke J.'s judgment as I find it. If the Defendants have any legitimate complaint about the course of the hearing before Cooke J. that is a matter which, if it is to be advanced, must be advanced on appeal. The decision of Cooke J. contains a clear decision as to the effect of novation on the availability of the remedy of rescission. That was an issue raised in the Claimants' skeleton argument before Cooke J. and he dealt with it.

8. Second, the Defendants say that Cooke J.'s remarks about rescission were *obiter* and they rely upon the circumstance that after delivering his judgment orally he revised his judgment at the request of the Claimants to make clear that certain submissions made on behalf of the Claimants were correct. But I must, as I have already said, deal with Cooke J.'s judgment as I find it and as approved by him. As such it contains a clear decision that rescission is not available as a remedy in the light of the novation of the Credit Agreement.

9. Third, the Defendants say that the issue of novation had not been pleaded. However, paragraph 7 of the Particulars of Claim pleads "an assignment or transfer of rights". In the context of the Credit Agreement which uses the word transfer in clause 29.2 to include a transfer "either by way of novation or by way of assignment, assumption and release" that would appear to be a plea which is capable of referring to novation. The pleading certainly appears to have been understood as referring to a novation because the Defendants' draft pleading in response which was before Cooke J. referred to a novation in paragraph 5EA. It is true that the Claimants' pleading seeks relief pursuant to the original Credit Agreement rather than expressly pursuant to a later novated agreement but this is consistent with the language of the Credit Agreement; see clause 29.5(c)(iii). In any event there can have been no doubt that a novation was being relied upon. It was expressly referred to in the Claimants' Skeleton Argument, the Defendants' draft pleading referred to it and Cooke J. dealt with the argument based upon novation.

10. Fourth, the Defendants say that they have put the Claimants to proof of the novations relied upon. But Cooke J.'s decision was premised upon the novations having been proved. He referred to the documents "which show that there were transfers by way of novation"; see paragraph 50 of his judgment. The Defendants are therefore estopped from requiring the Claimants to prove the novations relied upon.

11. I therefore consider that Cooke J.'s decision gives rise to an issue estoppel as to the non-availability of rescission as a remedy. It follows that the Defendants are estopped from alleging rescission of the Credit Agreement based upon misrepresentation. Whether Cooke J.'s decision was right or wrong, whether novation was properly pleaded and whether the Defendants had a proper opportunity to argue the novation

point are matters which, I was told by Mr. Brisby, will be raised before the Court of Appeal in October 2013. They are not matters which I can entertain.

12. Permission to amend the plea in the Defence which seeks rescission must therefore be refused.

13. After the hearing the Defendants' solicitors submitted by letter dated 2 August 2013 that there cannot in practice be an issue estoppel. Reliance was placed upon an observation by Moore-Bick LJ in *R v Helen Chapman* [2013] EWCA Crim 1370 at paragraph 24:

> "Once an appeal has been constituted, however, either by filing a notice of appeal in time or by obtaining an extension of time from the court, the order of the court below, although not formally provisional, is subject to review. In practical terms it is not final…"

14. This observation was made in the context of an application to amend a notice of appeal from a decision of a criminal court to raise a new point based upon a change in the law subsequent to the decision. The court referred to a line of authority pursuant to which the Court of Appeal (Criminal Division) will not normally extend time for filing a notice of appeal in order to allow an appellant to take advantage of a subsequent change in the law. That followed from the principle of finality. However, a distinction was drawn between a case where a notice of appeal had been filed within time and a case where a notice of appeal had not been filed within time. In the former case refusal to allow an amendment of the notice of appeal to take advantage of a change in the law would be inconsistent with the appeal process.

15. The Court of Appeal (Criminal Division) was not concerned with the doctrine of issue estoppel in civil cases but with an application to amend a notice of appeal in a criminal matter. I am not persuaded that the decision or reasoning of the Court of Appeal in *R v Helen Chapman* is of any real assistance to me in deciding whether or not to grant permission to amend the Defence to raise further particulars of unsuitability in support of a claim to the remedy of rescission. The decision of Cooke J. that the remedy of rescission is not available to the Defendants is binding upon the parties unless it is overturned by the Court of Appeal. I must therefore deal with the application to amend the Defence on that basis. If an appeal is allowed from the decision of Cooke J. on this point then my decision refusing permission to amend will be similarly open to appeal and the parties will no doubt agree upon the outcome of any such appeal.

Issue 2: Whether the Credit Agreement is illegal, void and unenforceable for reasons connected to competition law (Article 101 of the Treaty on the Functioning of the European Union and section 2 of the Competition Act 1998).

16. The Defendants wish to argue that there has been a breach of Article 101 of the TFEU and section 2 of the Competition Act 1998 which gives effect to Article 101. It is alleged (i) that the process by which LIBOR was set by the banks until June/July 2013 was an unlawful information exchange between an association of undertakings, namely, the British Banking Association, (ii) that the object or effect of the setting of LIBOR was to prevent, restrict or distort competition and (iii) that there was dishonest

manipulation of LIBOR by DB and other banks. It is to be noted that this argument does not depend upon there having been any dishonest manipulation of LIBOR albeit that if there was any such manipulation that was a further breach of the legislation. The respects in which the LIBOR setting process is alleged to have breached both the TFEU and the Competition Act 1998 are explained in paragraphs 104–119 of the Defendants' Skeleton Argument but it is unnecessary, on this application, to consider those matters. The consequence of such breaches, if established, is that the offending agreements or decisions between the banks are void. The Defendants submit that the Credit Agreement (including the Guarantee and Indemnity) and the swap agreement between the Claimants and the Defendants which are based upon LIBOR are also void.

17. The way the matter is put in the draft pleading is as follows:

> 5GS Therefore the Credit Agreement and the Swap and the Guarantee and Indemnity are agreements which:
>
> 5GS.1 are so closely connected with the aforementioned breaches of Article 101(1) of the TFEU and/or the Chapter 1 Prohibition; and/or
>
> 5GS.2 are so closely connected with the illegal, void and unenforceable Arrangements; and/or
>
> 5GS.3 spring from and/or are founded on the illegal, void and unenforceable Arrangements
>
> that they are illegal, void and unenforceable in their own right.

18. The argument is put in this way in the Defendants' Skeleton Argument at paragraph 122:

> "Given that LIBOR constitutes the basis of calculating the price of money in the Credit Agreement, and is central to the Swap and forms the basis on which the Guarantee and Indemnity was entered into, it is submitted that all three arrangements, indissolubly linked as they are, must fail. This is the legal consequence of illegality and, moreover, is right in policy terms as parties should not obtain any benefit from their illegal conduct."

19. In his oral submissions Mr. Sharpe developed this point by saying that if a term, LIBOR, is void as between the banks it cannot be resurrected by introducing it into the loan agreement and swap agreement between the Claimants and the Defendants. It must be void for all purposes.

20. It hardly needs to be said that if this argument is correct its potential effects are vast. Countless financial transactions worldwide are based upon LIBOR.

21. On this application Mr. Handyside for the Claimants makes one point. Assuming that any alleged LIBOR agreement between the banks is unlawful and therefore void, it is

not arguable that the agreement between the Claimants and the Defendants is also void. Any "horizontal" agreement between the banks may be void but it is unarguable that the "vertical agreement" between the individual bank and its customer is also void.

22. The burden lies upon the Defendants to persuade the court on this application to amend that their argument has a real prospect of success. There is no suggestion that the court at trial will be in any better position to decide this point than the court on this interlocutory application. Whether the "vertical" agreement may be void where the "horizontal" agreement is void is a question of law.

23. Article 101 of the TFEU and section 2 of the Competition Act 1998 provide that agreements between undertakings which breach competition law are void. Mr. Sharpe does not suggest that the Credit Agreement or swap agreement between the Claimants and the Defendants are agreements between undertakings for this purpose.

24. It is common ground that the implications of an illegal and void agreement between undertakings as a result of a breach of Article 101 are a matter for the national law. The suggestion that the vertical agreements between the Claimants and the Defendants are so closely connected to and/or spring from the horizontal agreements between the banks that they too should be considered void picks up the language of the Court of Appeal in *Courage Limited v Crehan* [1999] ECC 455 which in turn appears to have picked up the language in *Fisher v Bridges* (1854) 3 E & B 642 (Ex Ch). In *Courage Limited v Crehan* the tenants of tied public houses argued (i) that their tied house agreements were illegal and void under (what is now) Article 101 (Article 85 at the time) and (ii) that their individual beer supply contracts with their landlord were likewise illegal and void. The landlord conceded that it was arguable that the tied house agreements were contrary to (what was then) Article 85. The Court of Appeal held at paragraph 60 that the beer supply contract could not be considered "so closely connected with the breach of Article 85 so that it should be regarded as springing from or founded on the agreement rendered illegal by Article 85".

25. There is no doubt that any LIBOR agreement between the banks (the "horizontal agreement") and the credit and swap agreements between the Claimants and the Defendants (the "vertical agreements") are connected. The latter make use of the former and are based upon it. But what is the suggested legal basis for saying that because of that connection the vertical agreement must also be void? Mr. Sharpe's written and oral submissions suggest three. The first is that the horizontal and vertical agreements must be regarded as "indissolubly linked" so that all must fail (leaving aside the possibility that the illegal parts may be severed). The second is that such conclusion is right in policy terms because it ensures that the Claimants do not benefit from their illegal conduct. The third is that once void a term cannot be resurrected by it being included in a vertical agreement which is subsidiary to the horizontal agreement.

26. I am not persuaded that any of these arguments leads to the conclusion that the credit and swap agreements between the Claimants and the Defendants are void (subject to the possible effect of severance).

27. As to the first of the arguments (that the horizontal and vertical agreements are indissolubly linked), the agreement between the banks and the agreements between

the Claimants and the Defendants are separate and distinct agreements. There is a link or a connection between the two but it does not follow that if one is void so must the others be. The one is void because it breaches (or is assumed to have breached) competition law. The others do not breach competition law.

28. Similarly, as to the third of Mr. Sharpe's arguments (that a void term cannot be resurrected), any LIBOR agreement between the banks may be void but the provisions in the credit and swap agreements, albeit based upon or derived from any LIBOR agreement between the banks, are legally separate and distinct. It is, in my judgment, misleading to refer to any LIBOR agreement between the banks as having been "resurrected" in the loan and swap agreements. The vertical agreements are separate and distinct from the horizontal agreements, are between different parties and contain their own terms.

29. I am therefore unable to accept that either the first or third arguments advanced by Mr. Sharpe lead to the conclusion that if the horizontal agreement is void so must the vertical agreements be void.

30. My conclusions with regard to the first and third arguments are consistent with the decision of the Court of Appeal in *Courage Limited v Crehan.* In that case the tied house agreements obliged the tenants to purchase their beer from Courage. Thus there was the clearest possible linkage and connection between the beer supply contracts and tied house agreements and yet the fact that the latter were void did not result in the former being void. In *Fisher v Bridges* it was held that a guarantee of a contract which was void on the grounds of illegality was also void. But the connection between the banks' LIBOR agreement and the credit and swap agreements are not comparable to the connection between a principal contract and a contract guaranteeing obligations arising under the principal agreement as in *Fisher v Bridges*.

31. Mr. Sharpe's second argument is based upon public policy. I accept that the policy of English law is to prevent wrongdoers from benefitting from their own wrong. However, the policy of English law is also to respect and enforce agreements. Effect can be given to both policies by enforcing the credit and swap agreement and by granting customers of the banks a cause of action in damages where a bank has engaged in anti-competitive practices. The same point was made by Morgan J. in *Bookmakers' Afternoon Greyhound Services Limited v Amalgamated Racing UK Limited* [2008] EWHC 1978 (Ch) at paragraph 409 where he said:

> "……If the consumer under the vertical agreement wishes to complain that the price charged by the price fixer was excessive then the consumer will have a claim for damages for breach of Article [101(1)]. It is not necessary, in order to protect the position of the consumer, for the law to enable the consumer to say that the contract was from the outset void ….."

32. I am mindful that questions of public policy can be heavily dependent upon the facts of the individual case and therefore will usually be inappropriate to determine at an interlocutory stage. However, in the context of this case (which involves loan and swap agreements no doubt typical of many in the market involving very large sums) I am persuaded that there is no real prospect that the agreements between the Claimants and the Defendants will be held to be void on public policy grounds.

33. I have therefore concluded that there is no real prospect that the Credit Agreement and Swap Agreement will be void on account of the alleged (and for this purpose assumed) breach of competition law. Permission to amend must therefore be refused.

Issue 3: Whether the Guarantee and Indemnity is unenforceable as a matter of English law by reason of Article VIII s.(2)(b) of the IMF Agreement (Bretton Woods).

34. Article VIII s.(2)(b) of the IMF Agreement (which was incorporated into English law by the Bretton Woods Agreement Order in Council 1946) provides as a follows:

> "Exchange contracts which involve the currency of any member and which are contrary to the exchange control regulations of that member maintained or imposed consistently with this agreement shall be unenforceable in the territories of any member."

35. The Defendants say that the Guarantee and Indemnity in the Credit Agreement were issued in breach of Indian foreign exchange control regulations and therefore, pursuant to the IMF Agreement, are unenforceable as a matter of English law. Mr. Brisby submitted that when determining whether a contract is an exchange contract, namely, whether it is a contract to exchange the currency of one country for the currency of another, the question is one of substance not form and the overall transaction must be examined; see *Wilson, Smithett & Cope Limited v Terruzi* [1976] QB 714 and *United City Merchants v Royal Bank of Canada* [1983] 1 AC 168. He said that the Guarantee and Indemnity were in breach of Indian exchange control regulations because the guarantor defendant required permission of the relevant authority which it did not have and because the guarantee was open-ended. These matters are explained in paragraphs 136-141 of his Skeleton Argument. He said that in substance the Guarantee and Indemnity necessarily involved the exchange of rupees for US dollars because Unitech, an Indian company, could only discharge its obligations to the Claimants by first using rupees to purchase US dollars. Since the court must take into account the totality and substance of the transaction, the Guarantee and Indemnity was in fact a disguised rupee exchange transaction.

36. In response Mr. Handyside did not challenge (on this application) the proposition that the Guarantee and Indemnity were in breach of Indian law. Instead, he submitted that the Guarantee and Indemnity are not "exchange contracts" and do not "involve" the currency of India.

37. The IMF Agreement does not define exchange contracts but case law does. An exchange contract is one to exchange the currency of one country for the currency of another; see *United City Merchants v Royal Bank of Scotland* [1983] AC 168.

38. The Guarantee and Indemnity were part of the Credit Agreement pursuant to which UGL borrowed US dollars from the Claimants and Unitech guaranteed the obligations of UGL. Whether or not Unitech could only put itself into a position in which it was able to perform its obligation by first exchanging rupees for US dollars I do not consider that the Guarantee and Indemnity were, even arguably, an exchange contract. Neither as a matter of form nor as a matter of substance does the Guarantee and Indemnity require rupees to be exchanged for US dollars. How Unitech puts itself into a position to perform its obligation is a matter outside the Guarantee and Indemnity.

My approach to this matter is consistent with the observation of Ormerod LJ in *Wilson, Smithett & Cope Limited v Terruzi* [1976] QB 714 at p. 719B where he said

> "It would be absurd to hold that ……the question of enforceability should depend on whether the defendant had available resources in currencies other than the lire, presumably at the date when the contract was made."

39. Of course, where an agreement is an exchange contract in disguise, as in a case where a contract for the sale of goods provides for an amount in excess of the price of the goods to be paid as a means of avoiding exchange controls, the court will have regard to the substance rather than to the form of the contract. But there is no basis for suggesting that the Guarantee and Indemnity within the Credit Agreement were an exchange contract in disguise. Both as a matter of substance and of form they were an obligation to guarantee the obligation of UGL to repay in US dollars a loan which had been made in US dollars together with interest thereon. The guarantee does not "involve" the Indian currency.

40. I have therefore concluded that permission to amend to raise this plea should be refused because it is clear that the Guarantee and Indemnity were not an exchange contract which involved rupees.

Issue 4: Whether the Guarantee is discharged because DB (as original lender) owed (and breached) a duty to Unitech to disclose certain alleged unusual features. The following sub-issues potentially arise:

4.1 Did any duty of disclosure owed by DB extend to the unusual features asserted by the Defendants ?

4.2 Is the remedy for any breach of duty rescission rather than discharge and, if so, are the Defendants entitled to claim rescission (see Issue 1 above) ?

4.3 Would Unitech be liable to indemnify Lenders as principal debtor and primary obligor pursuant to clause 15.1(c) of the Credit Agreement even if DB was in breach of the duty referred to in 4.1 above and even if the consequence of this was that the guarantee in clause 15.1(a) was discharged ?

41. The unusual features relied upon by the Defendants are summarised by their counsel in paragraph 95 of their Skeleton Argument as follows:

i) The Swap was unsuitable for UGL and DB knew it to be unsuitable. UGL was induced to enter the Swap and therefore the Credit Agreement, which contained the Guarantee and Indemnity, on the basis of a misrepresentation made dishonestly.

ii) The USD LIBOR rate by reference to which UGL's liabilities to the Claimants under the Credit Agreement and the Swap were set was not genuinely determined.

iii) DB was party to agreements or concerted practices in breach of EU and UK competition law in respect of the setting of LIBOR which meant that the Credit Agreement and the Swap were founded on an illegality.

42. The Defendants say that these were self-evidently unusual features of the contractual relationship between the Claimants and the Defendants in which Unitech guaranteed the liabilities of UGL pursuant to the Guarantee and the Indemnity. Mr. Brisby submits that the DB was obliged to disclose them to Unitech. He relies upon *Royal Bank of Scotland v Etridge* [2002] 2 AC 773 and *North Shore Ventures v Anstead Holdings* [2011] EWCA Civ 230 in particular to establish the alleged duty.

43. In response Mr. Handyside says that the scope of the limited duty of disclosure recognised by the authorities does not extend to such matters as those relied upon by the Defendants. The first matter relied upon, the alleged unsuitability of the Swap, is not a feature of the contractual relationship between DB and UGL but is a mere matter of opinion. Unitech is able to see all aspects of the transaction which it was guaranteeing. The second matter relied upon, the alleged manipulation of the LIBOR rate, was not a feature of the contractual relationship between DB and UGL but is extraneous to it. The third matter relied upon, the alleged breach of EU and UK competition law, is also not a feature of the contractual relationship between DB and UGL.

44. The submission made by Mr. Handyside therefore requires the court to determine the extent of the accepted (but limited) duty of disclosure and then to determine whether such duty could arguably apply to any of the three matters alleged to be unusual features of the relationship between DB and UGL.

45. Fortunately, the scope of the limited duty of disclosure has recently been considered by the Court of Appeal in *North Shore Ventures v Anstead Holdings* [2011] EWCA 230. Sir Andrew Morritt C. reviewed the authorities between paragraphs 8 and 31 and concluded at paragraph 31:

> "The Guarantee was not a contract uberrimae fidei but was a loan guarantee. The authorities are clear that in such a case the duty of disclosure does not go further than the limit set by Lord Campbell in *Hamilton v Watson* 12 Cl&Fin 109 and by Lord Scott of Foscote in *Royal Bank of Scotland plc v Etridge (No.2)* [2002] 2 AC 773, para.188. Accordingly there is no duty to disclose facts or matters which are not unusual features of the contractual relationship between the creditor and the debtor, or between the creditor and other creditors of the debtor."

46. It is also helpful to note Sir Andrew Morritt's conclusion at paragraph 14 as to what *Hamilton v Watson* decided:

> "…..(1) the creditor is obliged to disclose to the surety any contract or other dealing between the creditor and debtor so as to change the position of the debtor from what the surety might naturally expect, but (2) the creditor is not obliged to disclose to the surety other matters relating to the debtor which might be material for the surety to know. This is consistent with the fact

> that a contract of guarantee is not ordinarily a contract uberrimae fidei, such as insurance, whereunder the insured is required to disclose all facts material to the risk; see *Seaton v Heath* [1899] 1 QB 782."

47. Sir Andrew Morritt thus distinguishes unusual features of the contractual relationship between the creditor and the debtor (or between one creditor and another creditor of the debtor) from matters which might be material for the guarantor to know. The former must be disclosed. The latter need not be. If the obligation were to disclose matters which were material for the creditor to know then the contract of guarantee would be one of uberrimae fidei with a general duty of disclosure of matters which are material for the guarantor to know. But it is clear that a contract of guarantee brings with it a limited, not a general, duty of disclosure. There are many matters which might affect the likelihood that the guarantor may be called upon to pay, for example, whether there is unequal bargaining power between the creditor and debtor, whether the debtor has a realistic business plan or whether the debtor has a poor record of paying his debts. None of these need to be disclosed by the creditor to the guarantor if they are apparent to him. The only matters which need to be disclosed are unusual features of the *contractual* relationship between creditor and debtor. I emphasise the adjective because it shows that reference is being made to unusual features of the relationship between the parties which is contained in and defined by the contract between the parties. The guarantor can be expected to know the usual features of the contractual relationship formed by the Credit Agreement and the swap agreement. But if the creditor and the debtor (or one creditor and another) have agreed terms which create an unusual feature of their relationship which the guarantor cannot be expected to know then there is a duty to disclose that feature.

48. I therefore turn to the unusual features relied upon. For this purpose they must be assumed to be true. The question which arises for decision (and would equally arise for decision at trial were permission to amend granted) is whether they are unusual features *of the contractual relationship* between UGL and DB which DB was obliged to disclose to Unitech.

49. The first suggested unusual feature of the contractual relationship between DB and UGL is that the swap was unsuitable for UGL and that DB knew it to be unsuitable. It is said that UGL was induced to enter the Swap and therefore the Credit Agreement which contained the Guarantee and Indemnity on the basis of a misrepresentation made dishonestly. Mr. Brisby's submission is that the unsuitability of the swap to the knowledge of DB is an unusual feature of the contractual relationship between UGL and DB. Mr. Handyside's submission is that nothing of the contractual relationship between UGL and DB was hidden from Unitech. There is no allegation that there was any term of the swap contract which Unitech would not expect to find. All that is alleged is that the terms of the swap contract were not suitable for UGL to the knowledge of DB.

50. The swap is a feature of the contractual relationship between DB and UGL. But it is not said that the swap or any of its terms were unusual so that, unless informed of them, Unitech could not be expected to know that they were part of the contractual relationship between DB and UGL. Whether the swap was suitable or not seems to me a different matter from whether the swap or its terms were an unusual feature of the contractual relationship between DB and UGL. Of course were it said that a

particular term of the swap was unusual there would have to be a trial to determine whether that term was unusual or not. But I do not understand that to be said. Paragraphs 64-66 of Mr. Brisby's Skeleton Argument explain the alleged unsuitability. Although he describes the swap as "an exotic type of interest rate derivative that was significantly more complex than a standard interest rate swap" there is no suggestion that it is unusual, save in the general submission in paragraph 96 that the unsuitability of the swap was "self-evidently" an unusual feature of the contractual relationship. Unsuitability and unusualness appear to me to be different matters. I have therefore reached the conclusion that the first feature relied upon was not an "unusual feature of the contractual relationship" between DB and UGL.

51. The second unusual feature relied upon is that the USD LIBOR rate by reference to which UGL's liabilities to the Claimants under the Credit Agreement and the Swap were set was not genuinely determined. This can be dealt with more shortly. There is no suggestion that the LIBOR term in the credit agreement and the swap contract was unusual. Any manipulation of the LIBOR rate was extraneous to the contractual relationship between UGL and DB, notwithstanding that the LIBOR term was a key feature of the relationship between UGL and DB. If it had been alleged that the LIBOR term was in some way unusual there would have to have been a trial to determine whether it was in fact unusual. Manipulation of LIBOR may be unusual but such manipulation, as opposed to the LIBOR term, is not a feature of the contractual relationship between UGL and DB.

52. The third unusual feature relied upon is that DB was party to agreements or concerted practices in breach of EU and UK competition law in respect of the setting of LIBOR which meant that the Credit Agreement and the Swap were founded on an illegality. But it is not said that the LIBOR terms in the agreements were unusual. Any breaches of competition law were not part of the contractual relationship between UGL and DB.

53. I have therefore concluded that there is no real prospect of the Defendants successfully arguing at trial that DB's duty of disclosure extended to any of the alleged unusual features relied upon.

54. Issue 4.2 is whether the remedy for any breach of duty is rescission rather than discharge. If it is then, for the reasons given in relation to issue 1, the Defendants are not entitled to claim rescission.

55. *The Law of Guarantees* by Andrews and Millet 6th ed. states at pp.196-7 that the jurisprudential basis of the duty is unclear but suggests that the "most favoured rationale" is that the failure to make disclosure amounts to an implied representation that the undisclosed facts do not exist. Reference is made both to *Bank of India v Patel* [1982] 1 Lloyd's Reports 506 and *North Shore Ventures v Anstead Holdings* (see above). In the former case Bingham J. said at p.514 that non-disclosure in the context of a guarantee "may be held to amount to and to have the consequences of misrepresentation." That suggests that the appropriate remedy is rescission (though Bingham J. later talks of the surety being "discharged" (see p.515)). That misrepresentation is the proper analysis is also consistent with the approach of Sir Andrew Morritt in *North Shore Ventures v Anstead Holdings* at paragraphs 29, 32 and 33. The same analysis is favoured in *The Modern Contract of Guarantee* by O'Donovan and Phillips at para.4-37.

56. If the correct jurisprudential analysis of the limited duty of disclosure is not implied representation it is difficult to know what it is. It is certainly not a duty to disclose matters which are material for a guarantor to know and a more limited duty of disclosure is not known to the law of contract. Both the cases and the textbooks indicate that implied representation is the correct analysis. That is also the analysis suggested by an analysis of the guarantor's position. In the absence of disclosure he would assume that there are no unusual features of the contractual relationship between the creditor and the debtor. Thus a failure to disclose amounts to an implied representation that there are no unusual features. I am therefore satisfied that implied representation is the correct analysis. That being so the remedy is rescission. But, for the reasons I have already given, the remedy of rescission is not available. On that there is an issue estoppel arising from the decision of Cooke J.

57. Issue 4.3 is whether Unitech would be liable to indemnify Lenders as principal debtor and primary obligor pursuant to clause 15.1(c) of the Credit Agreement even if DB was in breach of the duty referred to in issue 4.1 and even if the appropriate remedy is not rescission.

58. Clause 15.1 provides as follows:

> 15.1 Guarantee and indemnity
>
> The Guarantor irrevocably and unconditionally:
>
> (a) guarantees to each Finance Party punctual performance by the Company of all its obligations under the Finance Documents;
>
> (b) undertakes with each Finance Party that, whenever the Company does not pay any amount when due under or in connection with any Finance Document, the Guarantor must immediately on demand by the Facility Agent ….pay that amount as if it were the principal obligor in respect of that amount; and
>
> (c) agrees with each Finance Party that if, for any reason, any amount claimed by a Finance Party under this Clause is not recoverable from the Guarantor on the basis of a guarantee then the Guarantor will be liable as a principal debtor and primary obligor to indemnify that Finance Party in respect of any loss it incurs as a result of the Company failing to pay any amount expressed to be payable by it under a Finance Document on the date when it ought to have been paid. The amount payable by the Guarantor under this indemnity will not exceed the amount it would have had to pay under this Clause had the amount claimed been recoverable on the basis of a guarantee.

59. Clause 15.1(c) provides that if the amount claimed by the Claimants is not recoverable "on the basis of a guarantee" then Unitech is liable to pay the amount claimed as a principal debtor and primary obligor. Thus if there has been a breach of the duty to disclose and if the effect of that breach is to "discharge" Unitech's liability

as guarantor then it must nevertheless pay the sum claimed as a primary obligor. Mr. Brisby sought to resist this conclusion by relying upon the words "any loss it incurs as a result of the Company failing to pay any amount expressed to be payable by it under a Finance Document on the date when it ought to have been paid" as showing that the liability provided by the clause was still that of a guarantor. However, in circumstances where the clause twice refers to the sum not being recoverable "on the basis of a guarantee" I consider that this argument is untenable. I therefore decide issue 4.3 in favour of the Claimants.

60. There are therefore three reasons for refusing permission to amend: (i) there were no unusual features of the contractual relationship which ought to have been disclosed by DB to Unitech; (ii) rescission is the appropriate remedy and the Defendants are estopped from relying upon that remedy; (iii) even if discharge, not rescission, is the appropriate remedy Unitech would still be liable as primary obligor.

Issue 5: Whether certain interest is irrecoverable by DB on grounds of public policy and whether the Defendants are entitled to repayment of certain interest that has already been paid to DB.

61. The plea raising the issue of public policy is in these terms:

> "5GD Further or alternatively, to the extent that the sums claimed herein by the First Claimant against the Defendants are said to represent interest payable by reference to three month and/ or six month USD-LIBOR BBA pursuant to clauses 8.1 and 8.3 of the Credit Agreement, and that the sums so claimed exceed the interest that would have been payable but for the breach of the LIBOR Implied Term pleaded in paragraphs 5GA and 5GB above, such sums are irrecoverable on the grounds that it is contrary to public policy that the First Claimant should be entitled to profit from its own wrong and/or its dishonesty."

62. Thus the basis of this plea based upon public policy is that if, as alleged, the LIBOR rate was manipulated, it is contrary to public policy to permit DB to profit from its own wrong by recovering interest based upon the LIBOR rate. There is however a countervailing public policy, namely, that parties are held to their bargain, in this case, the obligation to pay interest based upon the screen rate of the British Bankers Association. There is, it seems to me, a strong argument for saying that effect can be given to both public policies by enforcing the obligation to pay interest at the screen rate whilst allowing the Defendants a counterclaim for the damage, if any, caused by the alleged manipulation of LIBOR.

63. Since this is a question of public policy which may be heavily fact dependent I have again considered whether this is a matter which ought not to be decided upon an interlocutory application but must be decided at trial. But in circumstances where the consequences of upholding the public policy defence would or might be very extensive (to put it no higher) and conversely the desirability of holding parties to their bargains must be very great I consider that there is no real prospect that the public policy defence will succeed at trial. Proper and adequate effect can be given to the public policy that a person should not be able to profit from his own wrong by the

remedy of a counterclaim for such damage as is shown to have been caused by the alleged wrong.

64. I have reached the same conclusion with regard to the restitutionary claim for repayment of interest which has already been paid to DB based upon LIBOR; see paragraph 47JB of the Draft Amended Defence. To the extent that there is such a claim the amount overpaid can be recovered by way of a counterclaim.

Issue 6: The LIBOR implied term

65. There is no dispute that there is scope for an implied term of this nature. It was suggested by Cooke J. However, there is a dispute as to its drafting. The draft plea is as follows:

> "5GA It was an implied term or contractual warranty in both the Credit Agreement and the Swap (the LIBOR implied term") that the First Claimant would not, either on its own or in conjunction with another Panel member, seek to manipulate the setting of the relevant LIBOR rate by which interest rates in the agreements were set, whether by making false submissions as to the estimated rate at which it could borrow from other Panel members in that currency and tenor in reasonable market size just prior to 11am London time on any given day to Thomson Reuters or otherwise. Such a term is to be implied on the basis that its existence would be obvious and in order to give commercial efficacy to the relevant agreements. "

66. Mr. Hapgood objected to this draft on two grounds. First, the words "seek to manipulate" are irrelevant because they bring within the scope of the implied term unsuccessful attempts to manipulate LIBOR. Second, the draft brings within its scope manipulation of LIBOR which proves to be for the benefit of the Defendants. He suggested an alternative draft as follows:

> "It was an implied term of the Transaction and of the Credit Agreement that DB would not act with the intention and effect of either (a) increasing UGL's payment obligations or (b) reducing the Claimant's payment obligations through manipulating 6 month or 3 month US dollar LIBOR. "

67. Mr. Brisby wished to maintain his draft plea. As to the first objection he said that the words "seek to manipulate" were required because LIBOR was based upon an average of rates and as to the second objection damages would only be sought to the extent that the Defendants' interests had been adversely affected.

68. I am not persuaded that the draft plea is defective in a manner which merits refusal of permission to amend. There may be force in Mr. Hapgood's points but they should be considered at trial when the proper scope of the alleged implied term can be determined in the light of the evidence at trial.

69. Mr. Brisby also wished to advance a case of repudiatory breach of the alleged implied term which would not be dependent upon proof of loss. A further amendment alleging

a repudiatory breach was provided by the Defendants during the hearing pursuant to which it was said that because of the alleged repudiatory breach "Unitech stands discharged from the Guarantee and Indemnity." Mr. Hapgood replied that the alleged repudiation was irrelevant because the Claimants had lawfully terminated the agreement between the parties and had an accrued right to payment of such sums as were due as at the date of such termination. There was a dispute as to whether the alleged repudiation had to be accepted by the Defendants (Mr. Handyside pointing out that there had been no acceptance) or whether discharge resulted automatically from the alleged repudiation.

70. The court cannot on this application determine whether the alleged breach was repudiatory or not. That can only be determined at trial. However, the law of contract is clear. Repudiation of a contract does not automatically bring a contract to an end. Whether a party is released from his outstanding obligations depends upon whether he has accepted the repudiation as bringing the contract to an end. My understanding, derived from issue 7.2 of the Defendants' draft list of issues, is that the only acceptance relied upon by the Defendants is that purportedly made during the hearing. In those circumstances and where, as I understand the position, sums had already accrued due under the credit and swap agreements, the Defendants can have no real prospect of establishing that the alleged repudiation will enable the Defendants to escape liability under the credit and swap agreements. The alleged repudiation may give rise to a claim in damages but whether that claim can be set-off by way of defence depends upon the next issue.

71. I therefore grant permission to amend to plead a repudiatory breach of the alleged implied term and to counterclaim for damages caused by that breach. But I do not grant permission to plead that by reason of the alleged repudiatory breach the Defendants are discharged from sums which had accrued due before the Defendants purported to accept the alleged repudiation as terminating the credit and swap agreements.

Issue 7: Whether the Defendants have a defence of set-off, notwithstanding the "no set-off" clause in the Credit Agreement.

72. The relevance of this issue is whether any of the possible counterclaims which the Defendants may have can be set-off against the Claimants' claim so as to operate as a defence to those claims. The Defendants have sought permission to augment certain breaches of duty alleged against the Claimants; see paragraphs 73-78 of Mr. Brisby's Skeleton Argument.

73. The clause relied upon by the Claimants in this regard is clause 14.5 of the Credit Agreement which provides as follows:

> "14.5 No set-off or counterclaim
>
> All payments made by an Obligor under the Finance Documents must be calculated and made without (and free and clear of deduction for) set-off or counterclaim."

74. Mr. Brisby submitted that where his counterclaim is based upon deceit (as it is with regard both to suitability and LIBOR) "fraud unravels all" and so the clause would not

disable his clients from setting off a counterclaim based upon fraud against the Claimants' claims.

75. However, there is authority for the proposition that a no set-off clause can extend to counterclaims based upon fraud. That is because there is no reason why businessmen should not agree to a clause preventing set-off in terms wide enough to cover fraud on the basis that if allegations of fraud by a lender were made they would be highly contentious and would require to be sorted out separately in a manner which did not impinge on the performance of the loan in the meantime; see *Skipskreditt v Emperor Navigation* [1998] 1 Lloyd's Reports 66 at pp.76-77 per Mance J.

76. That decision was followed by Hamblen J. in *Deutsche Bank v Gulzar Ahmed Khan and others* [2013] EWHC 482 (Comm) at paragraphs 323-329. I respectfully adopt his conclusion that:

> "The clause fulfils a legitimate commercial function by entitling the creditor to prompt payment of monies due and payable so that cross-claims (which may or may not have merit) cannot be used to withhold or delay payment."

77. Accordingly I consider that it is now well-established that the no set-off clause in the present case will disable the Defendants from setting off a counterclaim based upon fraud in defence of the Claimants' claims. The Defendants have no real prospect of establishing the contrary.

78. I have noted from issue 8.1 and 8.2 of the Defendants' list of issues that the Defendants draw a distinction between the application of a no set-off clause where the agreement of which it forms part has been induced by fraud and where the counterclaim relates to fraud. However, the reasoning of Mance J. in *Skipskreditt v Emperor Navigation* applies to both cases. In both cases the allegations of fraud by the lender would be highly contentious and would require to be sorted out separately in a manner which did not impinge on the performance of the loan in the meantime.

<u>The application for summary judgment in the lenders' action</u>

79. There is no dispute that the court may give summary judgment against the Defendants if they have no real prospect of successfully defending a claim or issue. However, before turning to the issues on which the Claimants seek summary judgment it is necessary to deal with the Defendants' submission that the court ought not to address the summary judgment application.

<u>Issue 8: Is the Lenders' summary judgment application (save insofar as it relies upon the judgment of Cooke J.) an abuse of process on the grounds that Lenders did not proceed with their original summary judgment application? If so, should the Court nevertheless decide it, or should it be dismissed?</u>

80. The point made by the Defendants is that the Claimants in the Lenders' Action "abandoned" their summary judgment application in relation to the original defences (quantum only in the case of UGL, illegality in India and alleged breaches of the Credit Agreement in calculating the amounts due in the case of Unitech) after the Defendants had amended their defence to raise a case based upon the alleged

unsuitability of the Swap. Thereafter, directions were given for trial and "a great deal of time and money has been expended in the full expectation that a trial would take place". Thus, it was said, it is an abuse of the process of the court for the Claimants to change their mind and now to proceed with their summary judgment application. The summary judgment application should be dismissed *in limine*. Reliance was placed on *Woodhouse v Consignia* [2002] EWCA Civ 275 and *WL Gore & Associates GmbH v Geox Spa* [2008] EWHC 462.

81. It is necessary to state shortly what happened after the Claimants elected not to proceed with their original summary judgment application. A further amendment was sought by the Defendants to plead a wrongful manipulation of LIBOR. That application was opposed. Cooke J. held that that amendment had no prospect of success and refused permission to amend. Cooke J's decision with regard to rescission not being available in the light of the novation of the Credit Agreement has enabled the Claimants to say that the suitability misrepresentation cannot lead to rescission for the same reason. The Claimants therefore issued their second summary judgment application not only in respect of the suitability misrepresentation but also in respect of the original defences.

82. I shall assume that it can in principle be an abuse of the process of the court for a party to take a certain decision in the conduct of a case and then, after the court and parties have acted upon that decision, change its mind and seek to go back on its original decision. However, whether such change of mind is in fact an abuse of the process must depend upon the nature of the party's original decision and whether there has been any material change of circumstance which justifies the change of mind.

83. When electing not to proceed with their original summary judgment application the Claimants said this, by a letter dated 28 August 2012:

> "After consideration of the new case raised by your clients and the further particulars subsequently provided, our clients have decided not to proceed with their summary judgment application at this stage."

84. Mr. Brisby characterised this in his Skeleton Argument as an agreement to abandon the summary judgment application. But it was not an agreement to abandon the application. Rather, the Claimants themselves decided not to proceed with the application "at this stage". It was not an abandonment for all time; though that does not mean that the Claimants are entitled to resurrect their application at any time. Whether or not they can do must be a matter for the court in the exercise of its case management function.

85. Mr. Tomson noted that the words "at this stage" were not found in the court's order or in the Case Memorandum. That is true but it does not follow that regard cannot or should not be had to what the Claimants actually said when electing not to proceed with their application for summary judgment.

86. There has, it seems to me, been a change of circumstance, namely, the decision of Cooke J. on the application to amend to plead the LIBOR case which has determined

(subject to appeal) that any case based upon rescission of the Credit Agreement for misrepresentation has no prospect of success.

87. In those circumstances I do not consider that the second summary judgment application which was issued promptly after Cooke J.'s decision on the LIBOR application can be said to be an abuse of process. It is true that the original application in respect of the original defences could have gone ahead notwithstanding the amendment to plead the suitability recommendation but it is understandable that the Claimants chose not to proceed with the application at that time when the new pleading raised factual issues which could only be determined at trial. Now that the court has determined that even if those factual issues are resolved in favour of the Defendants the defence of rescission is not available to them it is sensible and appropriate to seek summary judgment because, if the defences presently pleaded have no real prospect of success, then the considerable costs of a trial can be avoided.

88. It was said that in circumstances where the parties have already incurred costs in preparing for trial the application for summary judgment should not be heard on case management grounds. But although some disclosure has been given no witness evidence of fact or of expert opinion has been exchanged (apart from evidence of foreign law adduced by the Defendants). Indeed, the parties have already agreed to vacate the trial date, originally scheduled for January 2014, a fact relied upon by the Defendants in their application for permission to amend. It seems to me that it is not too late to determine the summary judgment application.

Issue 9: Are the issues on the Lenders' summary judgment application too complex to be entertained on a summary judgment application ?

89. This is what Mr. Brisby described as the *Williams and Humbert* point. In *Williams and Humbert Ltd v W & H Trade Marks (Jersey) Limited* [1986] AC 368 Lord Templeman said as follows at pp.435-436:

> "My Lords, if an application to strike out involves a prolonged and serious argument the judge should, as a general rule, decline to proceed with the argument unless he not only harbours doubts about the soundness of the pleading but, in addition, is satisfied that striking out will obviate the necessity for a trial or will substantially reduce the burden of preparing for a trial or the burden of the trial itself."

90. Lord Mackay said much the same at p. 441 and explained that the reason that the court should decline to proceed is that if prolonged and serious argument is required there must be at least a serious risk that the court time, effort and expense devoted to it will be lost since the pleading may not be struck out and the whole matter will require to be considered anew at the trial. This approach was again emphasised by Sir Nicholas Browne-Wilkinson V-C in *Frogmore Estates plc v Berger and others* reported in *The Practitioner,* October 26, 1989. He concluded as follows:

> "In my judgment the proper administration of justice requires the court to limit, so far as is consistent with ultimate justice at trial, the growth of huge interlocutory applications involving investigation of the merits. In all but the clearest cases the

> proper occasion to for consideration of the merits of a case is at trial, after discovery and with oral evidence, not on interlocutory application when the full facts cannot be known. ”

91. This approach was applied and approved in *Morris and others v Bank of America National Trust and others* [2000] 1 All ER 954.

92. I have been provided with 140 pages of Skeleton Arguments, 5 bundles of evidence and 7 bundles of authorities and Mr. Brisby has said (in paragraph 158 of his Skeleton Argument) that the court must examine 19 issues of fact and law in order to decide whether to give the Claimants summary judgment. It is therefore tempting, especially at the end of a long term, to accede to Mr. Brisby’s attractive submission that I should, after only a preliminary view of the issues raised, decide that it is inappropriate to decide the summary judgment application.

93. However, much of the skeleton arguments and evidence and many of the authorities concern the Defendants’ own application for permission to amend. About half of this judgment has concerned that application. Further, Mr. Handyside says that the few points which arise for determination on the summary judgment application (in addition to those which overlap with the issues which arise on the Defendants’ application to amend) are short and easy to resolve and if resolved in his favour will save the considerable expense of a trial. In those circumstances it seems to me that I must at the very least consider Mr. Handyside’s points to see if they are as short and simple as he says. But in doing so I shall keep well in mind not only the guidance in *Williams and Humbert* but also the test for granting summary judgment as described in the authorities relied upon by Mr. Brisby in paragraphs 151-157 of his Skeleton Argument.

94. Mr. Brisby also submitted that if there is to be a trial on the Defendants’ damages claims then there is no need to hear legal argument now. I shall also bear that submission in mind though the point can only have force where the subject of the summary judgment claim is also the subject of a damages claim.

Issue 10: Should Lenders’ summary judgment application be adjourned pending the determination of the Defendants’ appeal against the order of Cooke J ?

95. The appeal from Cooke J. is to be heard in October 2013. The hearing of the applications before me took place between 22 and 30 July 2013. It was not possible to give judgment before the end of term and so the judgment on these applications is likely to be given only a short time before the appeal is heard.

96. Not all litigants have either the energy or the resources of the Claimants and the Defendants in the present case. Many litigants, faced with an expensive appeal in October 2013, might well have awaited the outcome of the appeal before deciding to embark on yet more expensive interlocutory battles. However, neither the Claimants nor the Defendants took that course. The Claimants decided to issue and seek determination of their summary judgment application and the Defendants decided to issue and seek determination of their amendment application. The parties agreed to the hearing of these applications in the knowledge that the appeal would take place at a later date.

97. The question which has been put to the court by Mr. Brisby is whether, on case management grounds, the Claimant's summary judgment application should be determined *after*, rather than *before*, the outcome of the appeal in October. That course also has an obvious attraction for me. However, I am not persuaded that I should accede to Mr. Brisby's submission, for these reasons:

    i) The parties have now incurred the expense of arguing the issues which arise on the summary judgment application.

    ii) Some of the issues which arise on the summary judgment application (for example, the availability of rescission and the availability of set-off) also arise on the Defendants' amendment application.

    iii) Some of the issues which arise on the summary judgment application (for example, the defence based upon Indian illegality and *Ralli Brothers*) do not arise on the appeal.

    iv) In those circumstances it is sensible and proportionate to determine the summary judgment application now. If the Court of Appeal allows the appeal from the order of Cooke J. it should be clear what effect the judgment of the Court of Appeal has on my order.

98. After the hearing the Defendants' solicitors, relying upon the decision of the Court of Appeal (Criminal Division) in *R v Helen Chapman* to which I have already referred, submitted that no decision should be made on the summary judgment application until after the appeal has been determined: "An attempt to found a summary judgment application on a decision under appeal is a waste of time and money." However, it seems to me, that for the reasons set out in the preceding paragraph, I should determine the summary judgment application now, notwithstanding the appeal from the decision of Cooke J.

Issue 11: Whether the (alleged) fact that the courts of New York would not compel Unitech to make payment under the Guarantee and Indemnity entitled Unitech to rely upon the principle in *Ralli Brothers*.

99. This is the first of the points in respect of which the Claimants seek summary judgment. It relates to the well known principle in *Ralli Brothers v Compania Naviera Sota y Aznar* [1920] 1 KB 614 to the effect that this court will not enforce performance of a contract where performance would be illegal in the place of performance. It is so well-known a principle of the English conflict of laws that it is unlikely to require prolonged legal argument.

100. The Credit Agreement is governed by English law (clause 37 of the Credit Agreement), the place of performance for Unitech's obligation as guarantor is New York (clause 14.1) and the English court has exclusive jurisdiction over disputes arising under the Credit Agreement (clause 38.1).

101. The plea of the Defendants is as follows:

> "10.2 Further or alternatively, payment of any sum pursuant to the Guarantee and Indemnity would be illegal under the laws of

> the Republic of India for the reasons explained in paragraphs 11-15 below, and is therefore unenforceable by the Claimants or any of them, under the law of England Wales as well as under the law of India. Further or in the alternative, under the law of the default place for payment under the Credit Agreement – New York- the court will not compel a party to commit an act that would expose that party to a criminal prosecution in a foreign country in which it is incorporated."

102. The defence sought to be advanced by Unitech is that performance of an obligation is excused by this court where (i) the steps taken by a party to perform its obligation (transferring funds to New York) are illegal in the country where that party is incorporated (here, India) and where (ii) on that account it is unenforceable in the place of performance (here, New York). This argument is said to be novel and not to be the subject of any reported decision. A draft amendment to paragraph 10.2 of the Defence provided during the hearing alleged that the New York court would apply Indian law to determine the legality of payment under the Guarantee and Indemnity and on that account would not enforce payment.

103. For the purposes of this argument it is to be assumed that it would be illegal under Indian law for Unitech to transfer funds to New York to make payment there in accordance with the Credit Agreement. It is also to be assumed that a New York court would not compel Unitech to make payment in New York in accordance with the Credit Agreement if to do so would require Unitech to commit an illegal act in India. There is however no allegation and no evidence that performance of Unitech's obligation would be illegal in New York.

104. Consideration of the suggested defence must begin with *Ralli Brothers v Compania Naviera Sota y Aznar* [1920] 1 KB 614. That case is authority for the proposition that performance of an obligation is excused where performance of it is illegal in the country where the obligation is to be performed. The case did not concern the question whether performance of an obligation is excused where performance of it, though not illegal in the country where it is performed, would not be enforced by the courts of that country on account of the fact that steps taken to enable the obligation to be performed would be illegal in the country where those steps would be taken.

105. The scope of the principle established by *Ralli Brothers* was considered by the Court of Appeal in *Kleinwort Sons & Co. v Ungarische Baumolle Industrie Aktiengesellschaft* [1939] 2 KB 678. In that case performance of an obligation was required in England but in order to perform that obligation funds had to be sent from Hungary which would have been illegal by the law of Hungary. It was held by the Court of Appeal that the principle of *Ralli Brothers* did not extend to such facts. Atkinson J. (who was sitting in the Court of Appeal) said at p.700:

> "In this contract the obligation is to pay certain money in London, and the contract is not concerned with the steps which the debtors may have to take to put themselves in a position to pay. It is concerned only with the payment itself, which is to be made in this country. This contractual obligation, in my view, does not come within the exception to the rule stated in Dicey, or by Scrutton LJ. in Ralli's case……."

106. Statements of principle to the same effect were made by MacKinnon LJ at p.694 and by Du Parcq LJ at p.699.

107. The decisions in *Ralli Brothers* and *Kleinwort* establish that the English law of conflicts excuses performance of an obligation where performance would be illegal by the law of the country where the obligation is to be performed but does not excuse performance where, although performance of the obligation is not illegal in the country where performance is to take place, steps necessary to enable a party to perform its obligation would be illegal in the country where such steps would be taken.

108. To the same effect is the decision in *Toprak Mahsulleri Ofisi v Fingrain Compagnie Commercial Agricole et Financiere SA* [1979] 2 Lloyd's Reports 98. That was a case where a Turkish purchaser of wheat who was obliged to pay by an irrevocable letter of credit sought to rely upon the fact that it was unlawful to issue such a letter of credit in Turkey. It was held that Turkey was not the place of performance and that illegality by the law of Turkey was no answer to the sellers' claim. The Court of Appeal followed the decision in *Kleinwort* which was regarded as "settling the law"; per Lord Denning at p. 114. (See also Dicey, Morris and Collins on *The Conflicts of Laws* 15th ed. vol.2 at para.32-098.)

109. Mr. Brisby sought to distinguish *Kleinwort* on the grounds that the place of performance in that case was England, rather than a foreign country. That is true but I do not follow why the result in that case would have been different had the place of performance been a foreign country, where performance was not illegal, rather than England, where performance of the obligation was not illegal.

110. Mr. Brisby sought to distinguish *Toprak* on the grounds that there was no specified place of performance. This is true. The "tenor" of the findings made by the arbitration tribunal was that the sellers were not concerned with the place where the letter of credit was issued, their sole concern being that it should be confirmed by a first class US or West-European bank (see p.105 per Robert Goff J. at first instance). But I do not follow why that assists the Defendants. In the present case there is no dispute that India was not the place of performance and the English law of conflicts, as set out in *Ralli Brothers*, *Kleinwort* and *Toprak* is clear that unless performance is illegal by the law of the place of performance illegality elsewhere is no defence.

111. Mr. Tomson suggested that both decisions could be distinguished on the grounds that in the present case, unlike in *Kleinwort* and *Toprak*, it was clear (as opposed to there being no evidence) that the taking of a step necessary to enable performance of a contractual obligation was unlawful in the country where that step had to be taken. He also suggested that neither *Kleinwort* nor *Toprak* involved three jurisdictions whereas the present case does. I do not consider that either of these distinctions leads to a different result.

112. Mr. Brisby submitted that just as the English court will not enforce performance of an obligation by a party where performance is illegal under the law of the country where performance must take place (see *Ralli Brothers v Compania Naviera Sota y Aznar* [1920] 2 KB 287) so the English court will not enforce performance of an obligation by a party where it is unenforceable in the place of performance on account of it being

illegal for steps to be taken by the party to perform the obligation in the place where the party is incorporated.

113. This submission raises an issue as to the conflict of laws in English law. But the relevant principle of English law is clear. Performance of an obligation governed by English law is unenforceable where the contract requires an act to be done which would infringe the laws of the country where that obligation must be performed. The fact that a party may have to take a step which is unlawful in its own country in order to be able to perform its obligation does not excuse performance of that obligation if its own country is not the place of performance.

114. It appears from the evidence adduced by the Defendants that the New York law of conflicts is different in that the New York court will not enforce an obligation where, although performance of the obligation is not illegal in New York, the place of performance, a party will breach the laws of its own country if it takes steps there to perform its obligation in New York. (If this evidence is correct then New York law appears to have changed since 1979; see *Toprak v Finagrain* at p. 116 per Roskill LJ.) But the fact that the New York law of conflicts is different from the English law of conflicts does not, in my judgment, give Unitech a defence. This court must apply its law of conflicts, not the New York law of conflicts.

115. I have considered whether the court should decline to consider this issue on the grounds that it involves prolonged and serious argument. I do not consider that it does. The relevant principle of the English law of conflicts is clear and shows that the plea in question has no prospect of success. Giving summary judgment now will obviate the necessity to investigate at trial both Indian law and the New York law of conflicts.

116. Certain of the Defendants' damages claims will have to go trial but this issue is independent of them and so the fact that there will be a trial in any event is not a good reason for refusing to give summary judgment.

117. For these reasons summary judgment should be granted to the Claimants on this issue.

Issue 12: Whether the Guarantee could have been discharged for irremediable prejudice by reason of the accounting matters referred to at paragraph 26.1 of the Defence. If so, would Unitech nevertheless be liable to indemnify Lenders as principal debtor and primary obligor pursuant to clause 15.1(c) of the Credit Agreement?

118. This is the second point in respect of which the Claimants seek summary judgment.

119. Paragraph 26 of the Draft Amended Defence sets out three alleged accounting errors and alleges that as a result of them Unitech has suffered serious and irremediable prejudice and is discharged from liability.

120. I have considered the *Williams and Humbert* point. But since the scope and effect of clause 15 of the Credit Agreement has already been considered in the context of the Defendants' application for permission to amend I consider that I should address the entirety of this second point.

121. The accounting matters relied upon have been summarised in paragraph 88 of Mr. Handyside's Skeleton Argument. It is accepted by Mr. Brisby at paragraph 219 of his Skeleton Argument that that summary is correct. The Claimants have calculated the amount due upon the assumption that the Defendants' case as to the suggested accounting errors is correct.

122. The Defendants rely upon an authority of 1862 which states that a guarantee will be discharged by a positive act done by the creditor to the prejudice of the surety; see *Black v The Ottoman Bank* (1862) 15 ER 573.

123. The Claimants say that the leading modern authorities on discharge of a guarantee by reason of a non-repudiatory breach show that a non-repudiatory breach will not generally discharge a guarantee unless the breach is a "not insubstantial departure" from the contract; see *National Westminister Bank PLC v Riley* [1986] BCLC 268 and *The Wardens and Commonality of the Mystery of Mercers of the City of London v New Hampshire Insurance Co.* [1992] 2 Lloyd's Reports 365.

124. Whatever the true basis and extent of this doctrine of discharge of a guarantee, I consider that it is unrealistic to suggest that errors in calculating the amount due and owing under the Credit Agreement can constitute "prejudice" to the guarantor. If there have been such errors then the amount due and owing can be reduced (as has been done in the Claimants' revised claim for summary judgment) and no prejudice will be caused to the guarantor.

125. If that is wrong and there is a real prospect that the guarantee has been discharged on account of accounting errors then that cannot avail Unitech in the light of clause 15.1(c) of the Credit Agreement which, for the reasons I have already given, provides that Unitech shall be liable as primary obligor if it is not liable on the basis of the guarantee.

126. For these reasons I consider that the Claimants are entitled to summary judgment in respect of this issue.

127. The Claimants' claim for the balance (on the basis that there have been no accounting errors as alleged) will have to go trial but that is not a good reason for refusing summary judgment in respect of the sum which is due upon the assumption that the alleged accounting errors are well-founded.

<u>Issue 13: Whether there was an implied term in the Term Sheet that Additional Interest would not be payable in the circumstances alleged in the Defence at paragraphs 32-33.</u>

128. This is the third issue in respect of which the Claimants seek summary judgment.

129. The alleged implied term is as follows:

> "32. It was an implied term of the Term Sheet that Unitech's obligation to provide the Collateral was conditional upon the said provision being lawful, and that if the Collateral could not lawfully be provided UGL would not be required to pay the Additional Interest. "

130. The Claimants say that the suggested implied term is contrary to the Defendants' express promise in the term sheet that they had all the necessary consents from the RBI. I have again considered the *Williams & Humbert* point but Mr. Handyside's response to the suggested implied term appears to be short and not to require prolonged argument.

131. The term sheet provided:

> "Additional Covenants
>
> (e) The Guarantor and the Borrower have obtained all approvals, consents and authorisation required for the due execution and performance of this Term Sheet and represents and covenants that this Term Sheet is their legal binding and enforceable obligation."

132. In the light of this express warranty there does not appear to me to be any room for the suggested implied term. It follows that the Claimants are entitled to summary judgment on this issue.

133. Certain of the Defendants' counterclaims will go to trial but that does not appear to me to be a good reason for refusing summary judgment on this issue.

Issue 14: Whether the Defendants are entitled to claim rescission of the Credit Agreement for any alleged misrepresentation pleaded in the Lenders' action (notwithstanding the judgment of Cooke J.).

134. This is the fourth issue in respect of which the Claimants seek summary judgment. It is the same issue as arose under issue 1 on the Defendants' application to amend. For the reasons given in relation to that issue the Claimants are entitled to summary judgment on this issue.

135. The fact that certain of the Defendants' counterclaims for damages claims will go to trial and are related to the claim for rescission does not appear to be a good reason for refusing to give effect to the issue estoppel arising from the judgment of Cooke J.

Issue 15: Whether the Defendants are entitled to assert a defence of set-off arising from any alleged counterclaims notwithstanding the no set-off clause.

136. This is the fifth issue in respect of which the Claimants seek summary judgment. It is the same issue as arose under issue 7 on the Defendants' application to amend. For the reasons given in relation to that issue the Claimants are entitled to summary judgment on this issue.

137. Mr. Brisby submitted that even if the Claimants are correct as to the effect of the no set-off clause that is no ground for giving (an enforceable) judgment. The court should, it was said, order a stay of any judgment until the counterclaim has been adjudicated. I do not accept that submission. To exercise the discretion to grant a stay in that manner would frustrate the purpose of the no set-off clause and would be contrary to the parties' intentions.

138. For the same reason the fact that there will be a trial of certain of the Defendants' counterclaims is not a good reason for postponing such legal argument as is required on the summary judgment application until trial.

Issues arising on Lenders' application to adopt summary judgment if granted in the Swap Action

Issue 16: If DB is granted summary judgment in the Swap Action, should the court direct that its findings on that application apply equally to the same issues insofar as they arise in the Lenders' action ?

139. If the same issues arise then there is no reason why the court's findings on the application for summary judgment in the Swap Action should not apply equally in the Lenders' Action.

Issues arising on the Defendant's amendment application in the Swap Action

140. Issues 1-7 above also arise in the Swap Action. My decisions on those applications apply equally to the Swap Action.

Issue 17: Whether there is a proper arguable basis for alleging deceit/fraudulent misrepresentation against DB.

141. The additional points taken under this issue by Mr. Hapgood are, I understand, those set out in paragraphs 35-39 of his Skeleton Argument. They relate to what Mr. Hapgood refers to as the "LIBOR deceit by silence claim". However, since I have held that there was no duty to disclose the alleged manipulation of LIBOR, and hence no basis for the "LIBOR deceit by silence claim" it is unnecessary to deal with these further points.

Issue 18: Whether the alleged manipulation of LIBOR could alter the suitability, or otherwise, of the Swap Agreement for the Defendants, and therefore whether the expansion of the misrepresentation and duty of care arguments to refer to the alleged LIBOR manipulation is arguable.

142. I have found it difficult to identify what additional points are encompassed in this issue beyond those encompassed by issues 20-23 which I consider hereafter. I think that the points encompassed by this issue are those raised in paragraphs 50 and 92 of Mr. Hapgood's Skeleton Argument.

143. The first of those points is that "the attempt to incorporate LIBOR into the alleged unsuitability of the Swap is a transparent attempt to re-plead the very allegations Cooke J. rejected when he found there was no duty on DB to disclose alleged LIBOR manipulation and no duty of care as then alleged, and must be dismissed on that basis."

144. Cooke J. held that a plea based upon an alleged implied representation relating to LIBOR was unarguable.

145. The new pleading is certainly a transparent attempt to find another way of introducing into the action the allegation that DB dishonestly manipulated LIBOR. However, it is not to be refused admission to the case on that account. It can only be refused

admission to the case if the new pleading has no real prospect of success. But I am not concerned on this application with the merits of the alleged plea of dishonest manipulation of LIBOR.

146. The second point is that the pleaded representation can only arise if the wide terms in which it is pleaded are acceptable to the Court. "Suitability" has a well understood meaning in the context of financial products. I was not persuaded that it was too wide a term to be acceptable to the court.

147. The third point is that suitability is a mere matter of opinion and therefore not actionable. However, it carries with it a representation of fact that the maker had reasonable grounds for believing the swap to be suitable. That is or can be a representation of fact and on that account actionable.

148. Thus none of these points persuaded me to refuse permission to amend.

Issues arising on DB's application for summary judgment in the Swap Action.

149. Issues 8-11 and 15 above also arise for decision in the Swap Action. My decisions on those issues apply also to the Swap Action. In addition the following issues arise in the Swap Action.

Issue 19: Whether it is arguable that DB assumed a duty of care to Unitech, particularly in light of the relevant disclaimers and the judgment of Cooke J.

150. The essence of the Defendants' case is that DB owed Unitech a duty of care to take reasonable steps to ascertain its experience and sophistication, to ensure that any product was suitable and to ensure that Unitech fully understood any investment or product.

151. The existence of a duty of care is usually so bound up with the facts of a case that it must be a rare case in which one can say at an interlocutory stage that there is no prospect that the alleged duty of care will be established. The Defendants rely upon evidence of the proximity of, and imbalance in, the relationship between the parties which, it is said, meant that a duty of care can readily be found on standard principles; see paragraph 193 of Mr. Brisby's Skeleton Argument. However, Mr. Hapgood submits that there is no real prospect that any such duty will be found to have existed in the present case. This is because of the terms of a disclaimer which Unitech signed which, it is said, make clear that no duty of care of the sort alleged was being assumed by DB. The material terms of the disclaimer are as follows:

> "……this termsheet does not constitute an offer, an invitation to offer or a recommendation to enter into any transaction…..
>
> …DB transacts business with the counterparties on an arm's length basis and on the basis that each counterparty is sophisticated and capable of independently evaluating the merits and risks of each transaction. DB is not acting as your financial adviser or in any other fiduciary capacity with respect to this proposed transaction unless otherwise expressly agreed by us in writing; therefore this document does not constitute

> advice or a recommendation. This transaction may not be appropriate for all investors and before entering into any transaction you should take steps to ensure that you fully understand the transaction and have made an independent assessment of the appropriateness of the transaction in the light of your own objectives and circumstances, including the possible risks and benefits of entering into such a transaction. You should also consider seeking advice from your own advisers in making this assessment. If you decided to enter into this transaction, you do so in reliance on your own judgment…..
>
> Although we believe the contents of this document to be reliable, we make no representation as to the completeness or accuracy of the information."

152. The addressee of the disclaimer would ordinarily be the proposed counterparty to the Swap Agreement, which was UGL. But in circumstances where the disclaimer was signed by both UGL and Unitech the addressee must be regarded as each of them.

153. There is now considerable authority for the proposition that when considering whether a duty of care is owed by one person to another the terms of the relationship between them must be considered and such terms may negate the existence of the suggested duty of care; see *Springwell Navigation v JP Morgan Chase* [2010] EWCA Civ 1221, *IFE Fund v Goldman Sachs* [2006] EWHC 2887 (Comm), [2006] 2 CLC 1056 and [2007] EWCA Civ 811, [2007] 2 Lloyd's Rep 449, *Titan Steel Wheels v Royal Bank of Scotland* [2010] EWHC 211 (Comm) and *Standard Chartered v Ceylon Petroleum Corporation* [2011] EWHC 1785 (Comm). The terms of the disclaimer which were signed by Unitech must therefore be considered when considering whether DB owed a duty of a care to Unitech.

154. In my judgment the disclaimer signed by Unitech is inconsistent with the assumption of any duty of care by DB of the type alleged. The transaction was agreed to take place on the basis that each party is sophisticated and capable of independently evaluating the merits of the transaction. DB is expressed not to be acting as Unitech's adviser. Unitech is advised to take steps to ensure that the transaction is appropriate for it. That being the agreed basis on which the parties dealt with each other, there is, it seems to me, no room for the suggested duty of care.

155. Cooke J. said the same when considering another alleged duty of care; see paragraph 37 of his judgment.

156. It is said that dishonesty is alleged and that that makes a difference. However, in this context I do not see how it can make a difference. The duty alleged is one to take reasonable care. Such a duty is broken where reasonable care is not taken. The fact that dishonesty may be alleged does not enable a duty of care to arise in circumstances where it would not otherwise arise. A dishonest misrepresentation may give rise to a claim in deceit but it was not explained to me how it gives rise to a duty of care.

157. However, the Defendants' issue 23.1 shows that they also seek to say that the disclaimers cannot be relied upon where Unitech's signature to the term sheet and UGL's execution of the swap were induced by a dishonest representation. I accept that this argument enables the Defendants to challenge the reliance placed by the Claimants on the disclaimer. It must be arguable that if Unitech were induced to sign the disclaimer by reason of a dishonest representation then the Claimants cannot rely upon the disclaimer to show that there was no duty of care. For that reason I must refuse summary judgment on this issue.

Issue 20: Whether it is arguable that DB made the express representations set out in paragraph 29(c1) of the draft Defence

158. The allegation in question is that on 19 September 2007 a recommendation was made by DB that UGL should enter into an interest rate swap transaction in order to hedge UGL's exposure to interest rate fluctuations. The Defendants were asked for further information as to this allegation and supplied it. In that further information it was alleged that the recommendation was made by four named persons. Although the exact words used could not be recalled it was said that two named persons were informed "that they should enter into the Swap."

159. It seems to me that that is a clear allegation of an express representation. Mr. Hapgood submitted that the allegation is in fact based upon an implied representation and that there is no allegation of an express representation. Whilst this can be said of the original pleading it cannot really be said of the further information which makes clear that there is such an allegation.

160. The Claimants are not therefore entitled to summary judgment in respect of issue 20. Whether or not the Defendants can establish an express representation must be determined at trial. I note that Mr. Brisby relies upon certain evidential matters at paragraph 180 of his Skeleton Argument to support his case of an express recommendation

Issue 21: Whether it is arguable that there was an implied representation on which Unitech relied particularly in the light of the relevant disclaimers and the judgment of Cooke J.

161. The facts relied upon from which the alleged representation is to be implied appear to be the very same conversation of 19 September 2007 which is said to have given rise to the express representation. I must therefore assume, for the purposes of this issue, that there was no express representation. The implied representation is said to arise from the recommendation that UGL should enter into an interest rate swap transaction in order to hedge UGL's exposure to interest rate fluctuations.

162. The question is whether a reasonable representee in the position of Unitech would have understood that an implied representation of suitability was being made in the terms alleged; see *IFE Fund SA v Goldman Sachs International* [2006] 2 CLC 1056. Mr Brisby placed particular reliance upon the summary of the law by Popplewell J. in *Mabanga v Ophir Energy* [2012] EWHC 1589 (QB).

163. Mr. Hapgood submitted that there was no prospect that any suitability representation could be implied because there was at best a recommendation to enter into "an interest rate swap transaction", not into this particular swap. I am not persuaded that the

Defendants' case that there was an implied representation that this particular swap was suitable has no real prospect of success. Moreover, since the cases for an express or an implied representation are so closely linked (they both arise out of what was said on 19 September 2007) and since the case for an express representation must go to trial, it seems to me that that is a further reason why the case for an implied representation must also go to trial.

164. Mr. Hapgood said that the case for an implied representation must fail when regard is had to the disclaimer signed by Unitech also on 19 September 2007. The form of this disclaimer had been provided to Unitech on 11 September 2007. Mr. Hapgood submitted that, given the terms of the disclaimer signed by Unitech, there can be no realistic prospect that the alleged implied representation will be established at trial. Mr. Brisby retorts (at paragraph 184(a) of his Skeleton Argument) that the disclaimers are only one element of the factual matrix to be brought into consideration and he relies upon certain matters apparent from the documents before the court such as that DB regarded Unitech as "outrightly uneducated" in terms of interest rate swaps.

165. The effect of the disclaimer is raised expressly by issue 22 and I shall discuss it under that head.

166. Mr. Hapgood further submitted that the alleged misrepresentation was too vague and uncertain to give rise to an actionable misrepresentation. I was not persuaded that an express or an implied representation of suitability was too vague or uncertain to be actionable.

167. Subject to the effect of the disclaimer I consider that the Defendants are not entitled to summary judgment with regard to the alleged implied representation.

Issue 22: Whether Unitech is estopped or otherwise prevented from relying upon any representation (express or implied) as a result of the relevant disclaimers.

168. The question under this issue is whether the terms of the disclaimer prevent Unitech from relying upon the alleged express or implied representation by way of estoppel or otherwise.

169. Mr. Hapgood submitted at paragraph 89 of his Skeleton Argument that the disclaimer was sufficient to defeat the alleged express representation of suitability in that the alleged statement is inconsistent with the transaction being on an arm's length basis. I am not persuaded that the alleged misrepresentation is necessarily inconsistent with the disclaimer in that way. The parties can deal with each other at arms' length notwithstanding that one makes a recommendation to the other. It could, I accept, be said that the agreement that DB is not acting as the client's adviser is inconsistent with the making of an oral representation of suitability. But that agreement is linked with the statement that "this document does not constitute advice or recommendation" and the Defendants are relying upon an oral representation of suitability not found in, and which is separate from, "this document". The final part of the disclaimer requires the client to make an independent assessment of the appropriateness of the transaction and that he should only enter into the transaction in reliance on his own judgment. It could therefore be said that, read as a whole, the disclaimer prevents Unitech from alleging that it relied upon an express oral representation.

170. But I am not persuaded that this is a matter which can safely be resolved on an interlocutory application. If there was an express oral representation (as is alleged) it seems to me that the inter-relationship between that express representation and the terms of the disclaimer may well depend upon the precise circumstances in which that representation was made. This question cannot therefore be determined before trial, at any rate with regard to the express representation.

171. Mr. Hapgood's submission can, I think, be put with greater force in the context of the alleged implied representation. In circumstances where the client has agreed that DB is not acting as its financial adviser and that the termsheet does not constitute a recommendation and where DB has said in terms that the transaction may not be appropriate for all investors and that the client should make an independent assessment of the appropriateness of the transaction it is, arguably, fanciful to suggest, notwithstanding the points made by Mr. Brisby, that a reasonable representee in the position of Unitech would understand that an implied representation of suitability was being made by DB.

172. However, I am again not confident that the case on implied representation can be dismissed on this basis on a summary judgment application, essentially for the reasons which I have given with regard to the case on express representation. If there was an implied representation arising out of the recommendation to enter into a swap it seems to me that the inter-relationship between that representation and the terms of the disclaimer may well depend upon the precise circumstances out of which that representation is implied. This question cannot therefore be safely determined before trial.

173. Mr. Brisby further submitted that the terms of the disclaimer will not protect the Claimants in the event of fraud or dishonesty. Were the Claimants relying upon an exemption clause such a clause would not operate to exempt the Claimants from liability in deceit. But the Claimants are not relying upon an exemption clause. They rely upon the disclaimer to establish that no representation was made, which, says Mr. Hapgood, is a logically prior question to the question whether liability for a misrepresentation which was made has been excluded. This is an interesting argument which has the advantage of logic. However, the Defendants also say that if Unitech was induced to sign the disclaimer by reason of a dishonest misrepresentation the Claimants cannot rely upon the disclaimer. That must be arguable. Further, in circumstances where the inter-relationship between the alleged express or implied representation and the disclaimer must await trial so must the inter-relationship between the alleged dishonest representation and the disclaimer.

174. In those circumstances it is unnecessary to deal with Mr. Tomson's further submission that since the disclaimer has not been pleaded by the Claimants there can be no contractual estoppel. At most, he said, there can only be an estoppel by representation which would require reliance and in circumstances where dishonesty was alleged there must be a trial of the issue of reliance.

Issue 23: If the answer to Issue 22 depends on whether the alleged misrepresentation was fraudulent, whether there is a proper arguable basis for alleging deceit/fraudulent misrepresentation against DB, as set out in the proposed pleading.

175. The answer to Issue 22 does not depend on fraud and so there is no need to address this final issue. In any event this issue is said to be the same as issue 17 as to which I have said that there is no basis for the "LIBOR deceit by silence" because there was no material duty to disclose.

Conclusion

176. I hope that the parties will be able to agree the terms of an order to give effect to my conclusions on the 23 issues which I was asked to resolve. My understanding of the overall effect of my conclusions (assisted by the observations of the parties on seeing my judgment in draft) is:

i) The Defendants are granted permission to plead the LIBOR implied term in both the Lenders' and Swap Actions. However, the damages recoverable for the alleged breach can only be counterclaimed. They cannot be set-off against so as to provide a (partial) defence.

ii) The Defendants are granted permission to add to the particulars of their unsuitability claim in both the Lenders' and the Swap Actions. But the remedy of rescission of the Credit Agreement is not available and any damages can only be counterclaimed. They cannot be set-off so as to provide a defence.

iii) Permission to amend to plead the defences covered by issues 2-5 is refused in both the Lenders' and Swap Actions.

iv) The Claimants in both actions are entitled to summary judgment in respect of issues 11-15. The Claimants are not entitled to summary judgment in respect of issues 19-23. The effect of granting summary judgment on the issues in respect of which the Claimants have succeeded is that none of the Defendants' 8 cases as summarised in the box diagram of their cases can succeed as defences in the Lenders' Action. It follows that the Claimants in the Lenders' Action are entitled to judgment in the sum which is due to them assuming that the Defendant's case as to the alleged accounting errors is correct.

v) The Claimants' claim for the balance in the Lenders' Action, and the Claimant's claim in the Swap Action must go to trial as must the Defendants' counterclaims for damages and/or restitution based upon breach of the LIBOR implied term and their counterclaims for damages based upon the alleged breach of a duty of care and for the alleged express or implied representation that the swap was suitable.