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PARTE PRIMA

ARTICOLI

VARIETA'

PARTE SECONDA

NOTE ED OSSERVAZIONI A SENTENZA

HIGH COURT OF JUSTICE

NEUTRAL CITATION NUMBER: [2014] EWHC 142 (Comm)

Intermediazione finanziaria – Contratti derivati – Comuni italiani – Criteri di validità del derivato

(Art. 41 legge 448/2001; D.M. n. 389 del 1 dicembre 2003; Circolare MEF del 27 maggio 2004)

Swap agreement Interest rate swap agreement. The defendant entered two interest rate swaps with an Italian local authority. The claimant entered a third swap with the authority, which the Italian Court of Auditors of the Regional Chamber of Control for Campania found to be an impermissible derivative transaction under a decree. The claimant issued proceedings against the defendant on the basis that the second swap had been void. The Commercial Court, in dismissing the claim, held that the claimant had failed to show that: (i) the decree did not permit restructuring of principal; (ii) the second swap had resulted in an increasing profile; and (iii) there was a premium.

Case No: 2011 Folio 1194

IN THE HIGH COURT OF JUSTICE

QUEEN'S BENCH DIVISION

COMMERCIAL COURT

Royal Courts of Justice

Strand, London, WC2A 2LL

Date: 31/01/2014

Before :

MR JUSTICE BURTON

- -

Between :

HSH NORDBANK AG (Claimant)

And

INTESA SANPAOLO SpA (Defendant)

- -

- -

David Wolfson QC and Adam Rushworth (instructed by Watson, Farley & Williams LLP) for the Claimant

Sonia Tolaney QC and Tom De Vecchi (instructed by Simmons & Simmons LLP) for the Defendant

Hearing dates: 10, 11, 12, 16 and 17 December 2013

- -

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.

.....

MR JUSTICE BURTON

Mr Justice Burton :

1. This has been the hearing of a claim by HSH Nordbank AG ("the Claimant"), a substantial international bank based in Hamburg, against Intesa Sanpaolo SpA, which, as a result of a merger on 1 January 2008, assumed all existing obligations of Banca OPI (both also substantial banks): I shall refer at all times to "the Defendant" without reference to such change of identity. The Claimant has been represented by David Wolfson QC with Adam Rushworth, and the Defendant by Sonia Tolaney QC with Tom De Vecchi. The hearing lasted 5 days. The only live factual witness was called by the Claimant, being Mr McNicholas, a senior lawyer, formerly practising at the Canadian Bar, then as an English solicitor, and employed as Senior Legal Counsel by the Claimant in its London office from 2005 until 30 November 2011. Each side called an expert on Italian law, Professor Francesco Carbonetti for the Claimant and Professor Francesco Capriglione (who also adopted and presented a report from Professor Marco Sepe, a former legal adviser to the Ministry of Economy & Finance ("MEF") for the Defendant), as experts in relation to Italian banking, financial and corporate legislation. Additionally, each party served a report by an expert

in the general practice as to derivatives, Ms Thu-Uyen Nguyen for the Claimant and Professor Carlo Mottura for the Defendant, most of whose opinions were agreed and provided helpful background. All three Professors gave evidence in Italian, which in this complex area would have rendered my task more difficult but for the excellence of the interpreter.

2. The dispute arises out of interest rate swap transactions entered into with an Italian Local Authority, the Comune di Benevento ("Benevento"), which had underlying loans from Cassa Depositi e Prestiti ("CDP"), a state-controlled company financing local authorities. On 21 February 2005, the Defendant entered into an interest rate swap transaction with Benevento ("the 2005 Swap"). On 4 May 2006, the Defendant and Benevento agreed to restructure the 2005 Swap ("the 2006 Swap"). Then Benevento decided that it wished to see if it could achieve better terms by encouraging competition between banks, and invited tenders in respect of a new swap transaction. Both the Claimant and the Defendant competed. The Claimant put forward a tender which was successful. Its presentation included the following:

". . . [the Claimant] believes that the optimal solution is for [Benevento] to restructure its debts so as to obtain the following benefits:

Minimise the cost of the debt by taking advantage of the opportunities provided by the current favourable market conditions;

Optimise financial outlays;

Comply with current laws on the use of derivative instruments by public entities.

To this end, two restructuring strategies according to the following scheme:

A) Assignment of the existing interest rate swap contract between . . . Benevento and [the Defendant].

. . . Benevento will contact [the Defendant] and arrange for the replacement of [the Defendant] by [the Claimant] in the current interest rate swap contract at market value. Therefore, on the effective date of the assignment, [the Claimant] will take the place of [the Defendant] in the existing contract.

B) Restructuring of the debt

Once transferred, the swap will concurrently be restructured. The restructuring will comprise the flows deriving from the assigned swap and . . . Benevento loan contracts which are not part of this swap."

3. The result of such successful tender by the Claimant was that the Defendant was removed and replaced by the Claimant by a novation of the 2006 Swap on identical terms (save that by virtue of the fact of substitution of the ISDA master agreement for the European Union Banking Federation Master Agreement the novated 2006 Swap was subject to English, rather than Italian law); but such 2006 Novated Swap was, as intended, immediately ("concurrently") replaced by the terms upon the basis of which the Claimant had been successful in the tender, namely the "2007 Swap". The Claimant and Benevento entered into an ISDA Master Agreement dated 3 August 2007, and on or about 6 August 2007 the Claimant, the Defendant and Benevento entered into the Novation Agreement, consisting of an ISDA Novation Agreement and Novation Confirmation, pursuant to which the Claimant made a payment to the Defendant of €8,972,000 ("the Novation Payment"). On 7 August 2007, the 2006 Novated Swap was replaced by the 2007 Swap on the different terms which had been the subject matter of the Claimant's tender, but again subject to the ISDA Master Agreement.

4. Before the introduction of Law No. 448 of 28 December 2001 ("Financial Law 2002"), the ability of Italian municipalities to borrow from

private sector institutions was strictly limited. Financial Law 2002 liberalised the rules governing the financing of municipalities, while not removing all of the restrictions on borrowing previously in place. In addition to such liberalisation, Financial Law 2002 for the first time expressly permitted municipalities to enter into derivative contracts to lower their borrowing costs. Article 41 of Financial Law 2002 provided that a Ministerial decree was to be issued by the MEF, to set out the rules under which municipalities could use derivatives to manage their financial positions. In the exercise of this power, the MEF issued Decree 389 of 1 December 2003 ("Decree 389"), which in Article 3 sets out the permissible derivative transactions. The MEF also issued an explanatory Circular dated 27 May 2004 ("the Circular") in order to "clarify certain aspects regarding interpretation necessary for the correct application of provisions" contained in Decree 389. It is common ground that the MEF both controlled and supervised the compliance of derivative transactions with Decree 389.

5. Article 3 of Decree 389 provides (in material part) as follows, as contained in a translation which was in the end accepted for the purposes of this hearing:

"2. Amortization

1. Contracts for the management of a sinking fund of outstanding principal or, alternatively, to conclude a swap for debt amortization, mentioned in article 41, paragraph 2, Law No 448 of December 28, 2001, may be concluded only with intermediaries with appropriate credit rating, as certified by internationally recognized rating agencies.

. . .

3. Derivative transactions

1. If borrowing transactions are in currencies other than the euro, coverage of the exchange rate risk must be provided through exchange rate swaps,

which are contracts between two parties that take the commitment to regularly exchange flows interest and principal denominated in two different currencies according to the procedures, timing and conditions stated in the contract.

2. In addition to the transactions referred to in paragraph 1 of this article and article 2 of this decree, the following derivative transactions are also allowed:

a) interest rate swap between two parties taking the commitment to regularly exchange interest flows connected to major financial market parameters according to the procedures, timing and conditions stated in the contract;

b) purchase of a forward rate agreement in which two parties agree on the interest rate that the buyer agrees to pay on a capital at a future date;

c) purchase of an interest rate cap in which the buyer is protected from increases in the interest rate payable above the set level;

d) purchase of an interest rate collar in which the buyer is guaranteed an interest rate to be paid, fluctuating within a predetermined minimum and maximum;

e) other derivative products containing combinations of the above that enable the transition from fixed to floating rate and vice versa when a predefined threshold has been reached or after an established period of time;

f) other derivative products aimed at restructuring debt, only if they do not have a maturity subsequent to that of the underlying liabilities. These operations are allowed when the flows received by the interested bodies are equal to those paid in the underlying liabilities and do not involve, at the time of their conclusion, an increasing profile of the present values of single payment flows, with the exception of a discount or premium to be paid at the conclusion of the transactions, not exceeding 1% of the notional of the underlying liabilities."

6. The Circular, which is headed “Transactions in derivative financial instruments (Art. 3)”, reads as follows, in material part, again as translated:

“The types of derivatives transactions allowed, in addition to cross currency swaps to cover the exchange risk in the case of indebtedness in currency, are those expressly indicated in points a) to d) intended in the "plain vanilla" form. In particular, point a) excludes all optional forms, while points b), c) and d) refer exclusively to the purchase by the agency of the instruments there cited. The purchase of a collar implies the purchase of a cap and the contextual sale of a floor, permitted solely to finance the protection against an increase in interest rates furnished by the purchase of the cap. The level of the rate to be paid by the agency once the limits are met must be consistent with both the current market rates and with the cost of indebtedness prior to the derivatives transaction. Regarding the “other derivatives transactions” set out in letters e) and f), it should be clarified that these same must in any case be transferable into combinations of the types indicated in the letters a) to d). These types are in fact considered consistent with the containment of the exposure of the agency to financial risks resulting from the increase of interest rates and therefore with the objective of the containment of the cost of indebtedness.

Concerning the letter f) furthermore, the prohibition of an “increasing profile of actual values” refers, in the context of derivatives transactions, to the payments made by the agency. This prescription is to avoid that derivatives transactions should take place for which the payments by the agency are concentrated close to maturity, the exception being possible discounts or premiums, no greater than 1% of the face value of the underlying debt, so as to allow for the restructuring of the debt in the event that market conditions change with respect to what they were at the moment in which the debt was underwritten. Furthermore, said discount or premium must be determined with re-

spect to the start date (Regulation) of the derivatives transaction and applied exclusively to restructuring transactions provided for precisely in point f). Paragraph 3 limits to the monetary market, that is to say, to short-term interest rates, the realm of parameters by which all the derivatives transactions described in the preceding paragraphs can be indexed."

7. As is recited at the outset of the Report dated 20 December 2007 of an administrative-accounting examination, conducted from 29-30 November 2007, of the City of Benevento by the Department of the State General Accounting Office of the MEF ("the MEF Report"), such report was ordered to be conducted of the City of Benevento by an order made by the MEF "to examine the legality and profitability of expenditures and the proper functioning of the services that, directly or indirectly, affect public finance . . . to examine the Entity's debt, with particular reference to the Interest Rates Swap with sale of complex options". The introduction recited that during the period examined the City had executed three swap contracts, the first two with the Defendant (the 2005 Swap and the 2006 Swap) and the third with the Claimant (the 2007 Swap), transactions which were to be described in detail in the course of the Report and "because this inspection was intended primarily to examine the swap contracts cited above, in particular the last one, the debt situation at the time such contracts were executed will be examined".

8. The MEF Report and its conclusions were referred to the Court of Auditors of the Regional Chamber of Control for Campania which, after a public meeting of 18 June 2008 before five judges, reported on 24 July 2008. It is common ground that the decision of the Court of Auditors ("the Court of Auditors' Decision") was determinative in relation to its conclusions, to which I shall refer, although it is simply persuasive rather than binding on other Italian courts.

9. The Court of Auditors, upholding the MEF Report, found that the 2007 Swap failed to comply with Decree 389 in certain specific and identified respects, reporting in the second paragraph of its conclusions "that the financial transaction in derivatives concluded on 7 August 2007 presents the irregularity described in the grounds and calls . . . for all necessary action for the adoption of corrective measures." There is some degree of dispute, but none material for the purposes of my decision, as to whether the consequence is that the 2007 Swap is thus void, or whether it is voidable to the intent that it subsequently requires to be declared void: it is also apparent that the recommendation as to what was required to rectify the 2007 Swap would have required subsequent consensual variation by Benevento and the Claimant, and this never occurred. As to the 2005 Swap and the 2006 Swap, after considerable addressing of those transactions, which were, as set out above, on different terms from the 2007 Swap, and in particular did not include the terms which the MEF and the Court of Auditors' Decision found to be objectionable by virtue of the absence of a cap and collar on the interest rate and the presence of a series of complex optional alternatives, the MEF found, and the Court of Auditors' Decision upheld, that both the 2005 and 2006 Swaps were, unlike the 2007 Swap, transactions which belonged to the "plain vanilla type", namely that they did not fall outside the format permitted by Article 3. Subject to the fact that it could not from the documentation produced in respect of the 2005 Swap and the 2006 Swap be verified that there was compliance with Article 3.2(f) so far as the existence of an increasing or decreasing profile of payment flows was concerned ("the Caveat"), it was set out in the conclusions of the MEF Report that, "from the examination of the contracts discussed above, it can be seen that the first two swap contracts entered into by the City of Benevento with [the Defendant] were

in compliance with the relevant legal context, while the last contains contract terms that violate the provisions of Decree 389".

10. The Claimant sued Benevento, by a Claim Form issued on 9 June 2010, for a declaration that the 2007 Swap was void, and for return of the sum of €672,697.88 paid to Benevento under the terms of that transaction, and on 13 October 2011 a settlement agreement was entered into whereby Benevento paid the Claimant the sum of €645,000.

11. The Claimant now sues the Defendant on the basis that the 2006 Swap, and therefore the 2006 Novated Swap, was also void for non-compliance with Decree 389 in three specific respects:

(i) Loan element

It is submitted by the Claimant that Article 3.2(f) does not permit restructuring of principal but only of interest.

(ii) Increasing profile

The Claimant asserts that, contrary to Article 3.2(f), the 2006 Swap resulted in an "increasing profile of the present values of single payment flows". It is common ground, as a result of the helpful work carried out by the derivatives experts, that if the calculation is carried out by reference to the aggregate payments made or to be made by Benevento to the Defendant under the 2006 Swap ("Option 3"), there is no such increasing profile, but indeed there is a decreasing profile. The Claimant submits however that, on a proper construction of Article 3.2(f) at Italian law, it requires that the profile be calculated by reference to net payments, i.e. the balance of payments to be made by and between Benevento and the Defendant (the proposition espoused by Professor Carbonetti: "Option 1"): alternatively that the profile should be calculated by reference only to payments of principal (not interest) ("Option 2") (a proposition not supported by Professor Carbonetti, but run by the Claimant, as not excluded by

its expert, and adopted by a late amendment at the hearing for which permission was given). If either Option 1 or Option 2 is the correct construction, then it is common ground, as a result of the work done by the derivatives experts, that the profile would, contrary to Article 3.2(f), be increasing.

(iii) Premium

There was a premium expressly provided for in the 2005 Swap, payable at the outset of the transaction by the Defendant to Benevento, which did not exceed – but was indeed expressly calculated as being – the 1% of the notional amount of the underlying liabilities permitted by Article 3.2(f). In addition, in the 2005 and 2006 Swaps, and indeed to similar effect in the 2007 Swap, there was a term beneficial to Benevento, whereby in respect of the first four semi-annual interest payments, Benevento was to have the benefit of a fixed interest rate rather than the floating interest rate provided for in the underlying loan. The derivatives experts agreed that the value of such benefit to Benevento over the 2 year period in the 2006 Swap (had it continued, although of course in the event it was terminated early, in the event described in paragraph 3 above) was 1.78% of the initial notional amount of the 2006 Swap. The Claimant submits that this amounts to a premium, or in the case of the 2005 Swap an additional premium, rendering the swaps non-compliant with Article 3.2. This is denied by the Defendant, which points out that, although the beneficial nature of these terms was known to and indeed recited by the MEF Report and the Court of Auditors' Decision when considering the terms of the agreements, no criticism was made in relation to the 2005 and 2006 Swaps in that regard, nor any additional finding made in relation to the 2007 Swap, which was found objectionable not in one but a number of different respects.

12. Expert evidence was given in relation to the three questions of Italian law by the two Professors. The derivatives experts gave an opinion as to

the meaning of the word premium by reference to their expertise in derivatives, although, as appears below, Ms Nguyen states that the word premium is not typically used in a swap transaction, so that much of her view depended upon reference to the Oxford English Dictionary. As to the three questions, the Italian law experts differed, and I shall have to reach a conclusion below. However two more general questions underlie the dispute:

(i) It is common ground that Decree 389, and the statutory changes which had led to it, was intended to be permissive of the use of derivatives by Italian Local Authorities in loan swaps, the only question being - how permissive?

(ii) The roles of the MEF as the supervisory body, and of the Court of Auditors, are obviously significant, since each of them considered at length the very 2006 Swap which is the basis of challenge before me. The Defendant plainly relies upon the fact that they each gave the 2006 Swap a clean bill of health, subject only to the caveat referred to above, which it is accepted would not apply to the loan element or premium issues, as to which all the facts were before them; while as to the Increasing/Decreasing profile issue, although they laid down the caveat that they did not have all the figures, as a result of the agreement of the derivatives experts, the effects of the calculations are now clear, depending upon which of the three options I conclude to be correct.

No point is taken that the Claimant was not party to the contract (the 2006 Swap) which it alleges to have been void at Italian law.

13. The first issue for me therefore to decide is whether at Italian law the 2006 Swap and therefore the 2006 Novated Swap were void. The onus of proof is on the Claimant. If I am not so satisfied, then the Claimant fails. If the Claimant succeeds at Italian law, then it will have established the factual basis for its claim at English law, from which it can seek to establish an entitlement in

restitution for the return of the €8.9m paid under the Novation Agreement, and the case is put by Mr Wolfson on two legal bases:

(i) The Claimant, and in particular Mr McNicholas, entered into the Novation Agreement and made the Novation Payment under the mistaken belief that the 2006 Swap was valid, when it was not.

(ii) There was a total failure of consideration.

14. The Defendant submits:

(i) There was no mistaken belief. The Claimant's successful intention in the tender, and in the transaction which ensued from the tender, was to supplant and eliminate the Defendant from the swap arrangements with Benevento, and to enter into with Benevento the different 2007 Swap (which had, on the evidence, a market value to it of €13.6m). The Claimant was interested in the validity of the 2007 Swap, as to which it took some advice, but had no interest in and took no advice about the validity of the 2006 Swap which it was replacing.

(ii) Ms Tolaney relies upon the terms of the Novation Agreement, emphasising that (as set out in paragraph 3 above) the terms of the 2006 Swap and of the 2006 Novated Swap were (so far as concerns compliance with Decree 389) identical, and in particular upon the representations and warranties set out in clause 5 of the Novation Confirmation. In an unnumbered clause following on clause 5, Benevento warranted that it had the power to enter into the novation transaction and to perform its obligations under the novation transaction; but this clause was not guaranteed or warranted by the Defendant. Clause 5 contained relevant warranties and representations by the parties (obviously for this purpose relevantly the Claimant) that:

"5(i) Non-Reliance. It is acting for its own account and has made its own independent decisions to enter into this Novation Transaction and as to

whether this Novation Transaction and the relevant Novation Confirmation thereto, is appropriate or proper for it, based upon its own judgment and upon advice from such advisers as it has deemed necessary. It is not relying on any communication (written or oral) of the other party as investment advice or as a recommendation to enter into this Novation Transaction; it being understood that information and explanations related to the terms and conditions of this Novation Transaction, and the relevant Novation Confirmation thereto, shall not be considered investment advice or a recommendation to enter into this Novation Transaction. No communication (written or oral) received from the other party shall be deemed to be an assurance or guarantee as to the expected results of this Novation Transaction;

5(ii) Assessment and Understanding. It is capable of assessing the merits of and understanding (on its own behalf or through independent professional advice), and understands and accepts, the terms, conditions and risks of this Novation Transaction. It is also capable of assuming, and assumes, the risks of this Novation Transaction and the relevant Novation Confirmation thereto."

In addition Ms Tolaney relies upon Article II Section 2.1(b) of the ISDA Novation Definitions incorporated into the Novation Agreement, whereby (the Defendant being the Transferor, the Claimant being the Transferee and Benevento being the Remaining Party):

"The Transferor makes no representation or warranty and does not assume any responsibility with respect to the legality, validity, effectiveness, adequacy or enforceability of any New Transaction or the New Agreement or any documents relating thereto and assumes no responsibility for the condition, financial or otherwise, of the Remaining Party, the Transferee or any other person or for the performance and observance by the Remaining Party, the Trans-

feree or any other person of any of its obligations under any New Transaction or the New Agreement or any document relating thereto and any and all such conditions and warranties, whether express or implied by law or otherwise, are hereby excluded."

15. Ms Tolaney asserts that each or, in any event, the combination of these terms established that the risk of the invalidity of the 2006 Swap and consequently the 2006 Novated Swap, lies on the Claimant, such that the Claimant paid for the opportunity to achieve the 2007 Swap without any warranty that the 2006 Swap, which it was replacing, was valid, and in any event that there is a contractual estoppel preventing the Claimant from seeking to recover the monies paid.

16. There are subsidiary issues, arising in the event that the Claimant succeeds, of change of position and counter-restitution.

Italian law

17. I deal first with the issues of Italian law identified above. The first is the issue of loan element. The effect of the 2006 Swap was that Benevento's repayments of principal under the new arrangement were shifted to be closer to the final maturity of the underlying debt to CDP, and Benevento paid interest on the basis of the new arrangement, and not on the CDP profile. In effect the Defendant loaned Benevento the money to make repayments to CDP and Benevento repaid this to the Defendant at a lower rate, and with a floating, not fixed, interest rate. Professor Carbonetti's opinion is that Article 3 only permits derivatives that are based on and alter the terms of a pre-existing debt (for example swapping a fixed for a floating interest rate of a pre-existing debt) but not derivatives that create new debt liabilities. He asserts that Article 3.2(f) only permits transactions which consist of combinations of the transactions expressly

permitted in Article 3.2(a)-(d), and an exchange of principal amounts is not thus permissible.

18. Professor Capriglione does not agree that Article 3 excludes restructuring of principal sums, nor that Article 3.2(f) only permits combinations of the transactions expressly provided for in Article 3.2(a)-(d): that would amount simply to a repetition of Article 3.2(e), which expressly permits "other derivative products containing combinations of the above". His opinion is that Article 3.2(f) permits any restructuring of the underlying debt, whether of principal or interest, by the use of a derivative, so long as the conditions are met which are specified in Article 3.2(f) namely (i) the maturity of the derivative is no longer than the maturity of the underlying liability (Condition 1), (ii) the payment flows received by the Local Authority are equal to those paid on the underlying debt (Condition 2), (iii) the discounted payment flows do not have an increasing profile (Condition 3) and (iv) there is no unlawful premium (Condition 4). Both experts agreed that the purpose of these conditions is to prevent municipalities from pushing back the burden of their debt into the future, so as to result in what one might call jam today at the expense of causing a jam tomorrow ('future burden').

19. The Claimant's case, as expanded by Professor Carbonetti, is:

(i) Although he accepts that there is no express prohibition of restructuring principal in Article 3.2, Article 3.2 is intended to be restrictive, and none of the specific vanilla provisions of Article 3.2(a)-(d) address the question of restructuring principal.

(ii) He relies on the explanatory Circular, as set out above, namely the passage which states that the other derivatives transactions set out in (e) and (f) "should be clarified that these same must in any case be transferable into combinations of the types indicated in the letters a) to d)". There is thus, in his

opinion, no room for a permissible transaction relating to restructuring of the principal.

20. Professor Capriglione's opinions are as follows:

(i) There is reference to principal both in Article 2 and in Article 3.1, both of which are expressly preserved by the preamble to Article 3.2 (set out above), so that considerations of principal are not excluded by Article 3.

(ii) There is no provision in Article 3.2(f) that other derivatives are permitted only if they contain "combinations of the above" (as per (e)). The sole mention in (f) of only is in relation to the requirement for fulfilment of the Conditions there set out. (f) cannot be intended simply to be what he describes as what otherwise would be a "pointless repetition of (e)".

(iii) The reference in the Circular to the requirement to be transferable ("riconducibile") means, as he said (Day 3, page 47): "that the transactions in (f) must contain some elements which can be found also in the previous letters, (a) to (d). This does not mean that transferability means that there is a prohibition of adding something else."

The Defendant points to the use of the same word ("riconducibilità", translated as "traceability") in the Court of Auditors' Decision, when it refers to the argument before them whether, in relation to the 2007 Swap, there was traceability to the plain vanilla provisions.

(iv) Reliance is placed, as referred to above, on the fact that the MEF and the Court of Auditors fully understood the terms of the 2006 Swap, which, in regard to restructuring of principal, was identical to the 2005 and 2007 Swaps, yet they made no criticism of the 2006 Swap, or either of the other two swaps, in this regard:

(a) The MEF Report recited that "the additional fixed amounts by the contracting parties were modified to guarantee to [Benevento] a lower financial disbursement through 2022, which would then be repaid after that date".

(b) The Court of Auditors' Decision recited that "[the 2006 Swap] made provision for an adjustment with which, by comparison with the first contract, the fixed additional amounts paid by the contracting parties were changed, so as to ensure a lower financial outlay [for Benevento] until 2022, which would be repaid after that date."

Nevertheless the Court of Auditors upheld the MEF Report with the conclusion that the 2005 Swap and the 2006 Swap "belonged to the plain vanilla type".

21. I am wholly persuaded by the Defendant's case in this regard. No authority has been produced by the Claimant to set against the clear conclusion of the Court of Auditors, and I find it difficult, as did Professor Capriglione, to see what (f) would apply to, given the existence of (e). Professor Carbonetti himself had described (f) as a catch-all. I am not persuaded that Article 3.2 renders void or unlawful any restructuring of principal in such derivatives, provided the Conditions in (f) are otherwise complied with.

22. I turn to the next issue, which is whether the 2006 Swap can be shown to have failed to comply with the condition in (f) relating to there not being an increasing profile of the present values of single payment flows. As set out above, there are three options for my consideration. If I am persuaded that Option 1 or Option 2 applies, then it is common ground that there would be an increasing profile, resulting in non-compliance with (f). If Option 3 were correct, then there was compliance.

23. Professor Carbonetti supports Option 1, and not Option 3, although he accepts that "both of these interpretations could be said to be

consistent with the wording of the Circular". At paragraph 124 of his expert's report he concluded that Option 2 was "incorrect", although noting the content of the Court of Auditors' Decision, to which I shall return. Notwithstanding that, he and Mr Wolfson leave it to me as their alternative case, to be preferred by me to Option 3 if Option 1 fails, and the amendment was produced during the hearing to the effect that:

"Alternatively, it is sufficient (as a matter of Italian law) for a derivative not to be compliant if it has an increasing profile of discounted principal payments by the municipality, and applying this test the 2006 Swap would also be invalid."

24. I shall deal first with Option 1. Professor Carbonetti's opinion is that to assess the net flows, i.e. setting off payments by Benevento against payments to Benevento, best complies with the purpose of avoiding future burden. He accepts that there is nothing in the Article or the Circular which supports the proposition, for the purpose of assessing Condition 2, that the profile of the payment flows must be calculated net. However he submits that payment must mean net payment, asserting that 'payment', or 'pagamento' in Italian, in Italian law means the fulfilment of an obligation to pay a certain amount of money, which can be performed in a number of different ways, e.g. by set off, such that in his opinion the reference to "single payment flows" is a reference to net payment not gross payment. He conceded that this was not supported by any words to which he could point in the Decree, or indeed in the Circular, (to which Professor Capriglione however referred), and that it is not supported by the MEF Report or the Court of Auditors' Decision, which did not address net payment flows in relation to the 2005, 2006 or 2007 Swaps. He also accepts that there is another decision of a Court of Auditors in 2008, to which

he himself referred, and some academic authority, to which, again, he very properly referred in his own report, which do not support the proposition.

25. However he relies on the content of a Report to the Italian Parliament on the Financial Management of the Regions for the year 2011-2012, delivered on 6 August 2013 by an autonomous section of the Court of Auditors. Although there is no reference to any decision or decisions of any Court of Auditors from which the content of this report is drawn, nor have any such decisions been produced by the Claimant to set against the 2008 Court of Auditors' Decision, this Report is plainly significant, by way of a review of the approach of the Court of Auditors to Decree 389. The passage relied upon by Professor Carbonetti is as follows:

"In order to avoid transactions that are purely aimed at meeting liquidity requirements, the aforesaid Circular prohibited IRS transactions whereby the current values of future payments have a progressively increasing profile (i.e. based on which the entity, in the starting period of the contract, will collect a net flow of resources, whereas it will be a net payer in subsequent years)."

Professor Carbonetti relied upon this not entirely clear statement as supporting Option 1.

26. Professor Capriglione did not agree.

(i) Based upon his opinion, the Defendant submitted that Professor Carbonetti's interpretation was wholly inconsistent with the terms of Article 3.2(f). There are (Conditions 2 and 3, set out in paragraph 18 above) two parallel limbs. The first limb requires that "flows received by the interested bodies" (i.e. payments to Benevento) "are equal to those paid in the underlying liabilities". This first limb addresses the question of payments to Benevento. The second limb then relates to payments by Benevento, namely that the operations "do not involve . . . an increasing profile of the present values of

single payment flows". The second limb therefore relates to the obligations so far as payments by Benevento are concerned, and the same word, namely flows, is used in relation to each limb. Since the flows must be gross in relation to the first limb i.e. payments to Benevento, they must also be gross in relation to the second requirement, relating to payments by Benevento. The combination of the two limbs then goes towards satisfying the requirement to avoid future burden. There is thus neither room, nor necessity, for the importation of net into the second limb. The use of the term "single payment flows" supports this construction.

(ii) As to the Circular, Professor Capriglione points out the statement that "the prohibition of an "increasing profile of actual values" refers, in the context of derivatives transactions, to the payments made by the agency". This, he says, plainly supports him.

(iii) Ms Tolaney submits that what she calls a belated reference by Professor Carbonetti to an assertion as to the general meaning of "pagamento" cannot be apt in this case. Quite apart from the structure of (f) and the statement in the Circular, it cannot be apt to refer in general terms to net payments, when there could be all kinds of set offs available as between the parties, not even arising out of the same derivative transaction.

(iv) Whatever may be the effect of the 2013 Report to Parliament, the statement in it is not clear, and may be referring to the interplay between the two limbs. She relies on the decision in relation to this very 2006 Swap by the Court of Auditors, based upon the MEF Report, in which there was no addressing of net flows, and the basis upon which the 2007 Swap was found to be non-compliant (referred to below in relation to the discussion of Option 2) did not involve any consideration of netting at all.

27. Again I am persuaded by the Defendant's arguments, and not persuaded by the Claimant, upon whom the onus of proof lies. Whatever may be the precise impact of the words in the 2013 Report to Parliament, I prefer the clear case as to the construction of the Article, and indeed the Circular, put forward by the Defendant. The existence of the caveat in the MEF Report and the Court of Auditors' Decision is of no relevance, because I am satisfied that Option 1 would not have been the correct approach in any event.

28. I turn to Option 2, namely that in calculating the profile, consideration is to be, or at any rate need only be, given to the profile of the flows of payments of principal by Benevento to the Defendant. If only principal is addressed, then the profile did increase. If the calculation is applied to principal and interest, then the profile decreased. Of course the Claimant is at a disadvantage where such proposition is not supported by either its own expert or the Defendant's expert. But I am, as Mr Wolfson points out, nevertheless entitled to reach my own conclusion on the evidence, and the way that the point is kept alive by the Claimant is by reference to paragraph 124 of Professor Carbonetti's report (after concluding Option 1 to be correct and Option 3 to be arguable):

"I consider that this interpretation (Option 2) is incorrect for the reasons set out above. However, it is clear that in these pronouncements the Court of Auditors considered that in order to establish an 'increasing profile' for the purposes of Decree 389, it is sufficient to identify such a profile in any of the nominal payment flows to be made by the local authority (in those cases, being the fixed amounts payable by the relevant municipality)."

By this the Professor is referring to the fact that both the MEF Report and the Court of Auditors' Decision in relation to the 2007 Swap were satisfied by reference to the figures supplied to them, being in respect of principal only, that

the profile of payments increased. Hence the Claimant's alternative case, based on the Court of Auditors' Decision in relation to the 2007 Swap, that it is sufficient to offend against (f) if the profile of principal payments increases, ignoring the interest payments. Professor Carbonetti does not seek to support this proposition either by reference to anything to be drawn from the construction of the Decree, or from the Circular, or from any logical or purposive basis in terms of the avoidance of future burden. It is difficult to see why if in fact the profile was overall (by reference to interest and principal) decreasing, the fact that one element of it (principal) was increasing should be of any relevance. The case for the Claimant rests upon two factors:

(i) The decision of the Court of Auditors in relation to the 2007 Swap was in fact by reference to a profile limited to consideration of principal payments.

(ii) The so called "and/or" argument, which in fact derived from evidence of Professor Capriglione.

29. As to (i), the Claimant relies upon the fact that the calculation, which was carried out by the MEF in its Report and upheld by the Court of Auditors, of the figures supplied in respect of the 2007 Swap was limited to payments of principal. It was on the basis of those payments that both the MEF and the Court of Auditors concluded that there was an increasing profile of such payments contrary to (f). Both the MEF and the Court of course found the 2007 Swap non-compliant in a number of respects irrelevant and additional to the increasing profile, in particular the absence of a collar and cap on the interest and the complex provisions for optional arrangements in respect of interest, which meant that it was clear that the terms of the 2007 Swap, unlike the 2005 and 2006 Swaps, were not vanilla. However the MEF and the Court did not limit

themselves to their conclusions in that regard, but also considered compliance with the profile proviso in (f), and, as appears from the MEF Report:

"This provision requires that the financial payments by Entities must not imply, at the moment of their entering into, an increasing profile of discounted values of each payment flow. The City of Benevento was concerned about verifying compliance with that provision, directing a request in that regard to its consulting company, Value Solutions SRL."

Value Solutions then supplied information, which was in fact limited to information about the principal repayments, and those figures so supplied, as addressed by the MEF, showed non-compliance with the profile proviso. Value Solutions never supplied any further figures – either because they were not easily available, or because it was clear that if supplied they would have only made the matter worse, or simply through incompetence, but the MEF was content to reach its decision on the basis of the information supplied to it. The conclusion of the MEF was upheld by the Court of Auditors:

"The consultancy firm, faced with the specific request of the Authority, reassured it regarding compliance of the contract with the aforementioned rules. However, as a result of a specific verification operation carried out by the Inspection Service of the MEF, it was recognised that the rate of amortisation (amounts in the fixed amounts paid by Benevento) discounted by the discount rate (discount factor) has a rising profile."

Because of the caveat, the MEF and the Court of Auditors never looked at the figures for the 2006 Swap. I am satisfied that no conclusion can be drawn from this decision, in relation to the only figures that were, after specific request, provided to them in relation to the 2007 Swap, that (f) in some way requires a consideration of whether the profile of repayments of principal increases or decreases, separately from such consideration in relation to interest

payments by Benevento, and without consideration of the aggregate of principal and interest, such as to show, as would be shown in this case, that the profile overall did decrease.

30. As to (ii), it was in fact Professor Capriglione who referred to the use of the words and/or (in Italian e/o). One reference was in a report to Parliament by the Court of Auditors on 3 March 2005 referring to "a liabilities payment scenario where the capital and/or interest repayment charges concentrated towards the maturity date." The other reference was in this Court of Auditors' Decision, where it refers to "a profile for the repayment of debts in which the burden of repayment of the principal and/or interest is concentrated on the maturity date." I am satisfied that these references do not support Professor Capriglione's case, as he thought, but on the other hand equally do not detract from it. It is quite apparent, as he himself explained in re-examination, that, where there is a provision in a contract for repayment of principal only or of interest only, then it will be necessary to address the or, while when there is a provision for repayment of principal and interest, the and is what governs.

31. I am fortified in rejecting Option 2, unsupported as it is by Professor Carbonetti, by the fact that not only is there no support for it in the terms of the Decree or the Circular, but it makes no sense to consider principal and interest separately if in fact the aggregate of the two has a decreasing profile and thus is compliant with (f). I am satisfied, as set out above, that the balance of compliance with the first limb, of consideration of aggregate payments to the municipality, and of the second limb, relating to aggregate payments by the municipality, satisfies the requirements of (f) and the intention of the Italian legislation. I therefore prefer Option 3, but in any event I am not satisfied that the Claimant has proved its case as to either Option 1 or Option 2.

32. I turn finally to the consideration of the Premium issue. Notwithstanding the matter being left slightly open by Professor Capriglione, I am satisfied that the requirement that there be no premium non-compliant with (f) is a self-standing requirement, and not one the consideration of which is contingent upon a prior finding of non-compliance with the other conditions of (f).

33. As set out in paragraph 11(iii) above, there was an express premium in the 2005 Swap of the permitted amount of 1% of the underlying notional amount, together with an express note which read "Premium means the amounts which may be paid to Party B in compliance with the provisions of [f]". The Claimant however submits that the benefit provided to Benevento by virtue of the four initial interest swap arrangements over the first two years of the transaction constituted a further premium.

34. There is no doubt that the MEF and the Court of Auditors considered the 2005, 2006 and 2007 Swaps in great detail, and plainly understood the nature of their terms, and indeed the MEF Report specifically refers to those interest swap exchanges, actually referring to the fact, in relation to the 2007 Swap, that this "provided an advantage for the Entity during the first part of the contractual period." There is no question of any caveat on the conclusions of the MEF or the Court of Auditors in this regard, nor any requirement to know any further figures, because, had it been concluded that this advantage or benefit amounted to a premium, the 2005 Swap would have been automatically void, as the 1% had already been used up. Had the 2005 or 2006 Swaps been concluded to fail to comply with (f) as a result of the existence of this advantage or benefit they would not have been declared, as they were, to conform or to consist of vanilla terms, and the 2007 Swap would have been found non-compliant in relation to this additional ground also.

35. There is a dispute between the experts as to whether the benefit or advantage given by the exchange of interest rates over the first two years constitutes a premium within the meaning of (f). Mr Wolfson skilfully caused Professor Capriglione to accept and acknowledge the difficulty of distinguishing between a payment upfront, or even a one-off favourable transaction, and an advantage gained by there being a favourable interest rate swap over the first 2 years. Professor Mottura, who, like Ms Nguyen was giving evidence without any knowledge of Italian law or the applicability of (f), was also brought by Mr Wolfson to accept that favourable interest rates payable over a period of 2 years in order to enter into a transaction could be regarded as a premium: however he considered that the four favourable exchange rate transactions in this case had to be analysed as part of the structure of the whole transaction.

36. Ms Nguyen appeared to be under the belief, set out in her report, that "given that the 2006 Swap Transaction was an amendment of the 2005 transaction, under which an express premium of 1% had already been paid, I believe the 2006 Swap Transaction may have been structured to allow for the equivalent of a premium to be embedded in the early period cash flows". However that obviously cannot be squared with the fact that the 2005 Swap also contained, in addition to the premium, a similar benefit, and somewhat undermines the persuasiveness of her evidence. In any event, while accepting both that she had no knowledge of Italian law or regulation and that, given that the word premium is not "typically used" in a swap transaction, she could not speak from experience in that regard, albeit able to draw analogies from other transactions, she considered that, by calculating the present value of the first four payments over the first 2 years of the 2006 Swap, that constituted a "transfer of value", or a "positive cash flow payment", in favour of Benevento, and thus a premium.

37. The real issue was, as in relation to the other matters with which I have dealt, as between Professor Carbonetti and Professor Capriglione, in this regard adopting the report of Professor Sepe. Professor Carbonetti effectively put his case on two basis:

(i) The evidence of Ms Nguyen. He said in terms at paragraph 141 of his Report:

"I am not aware of any definition of the terms "discount" or "premium" which has been applied by the Italian courts or considered by academic commentators. In proceedings before an Italian court, the court would be guided on the question of whether a payment (or payments) constituted a discount or premium (and other financial issues) by the financial expert(s) giving evidence to the court. For the purposes of the analysis below, I have relied on the expert report of Thu-Uyen Nguyen as to whether the embedded payments which she identifies constitute a premium payable to Benevento pursuant to the 2006 Swap Transaction."

I do not regard reliance upon the evidence of Ms Nguyen, drawn from the Oxford English Dictionary and from analogies with other transactions, as a safe basis upon which I can form a conclusion as to Italian law. As a matter of Italian law, the Professor accepted that there was no "literal prohibition" in Decree 389 on a transaction allowing for the exchange of fixed rate payments and floating rate payments. As Ms Tolaney points out, in fact, in his own report at paragraph 82, he had accepted that a transaction which allowed a municipality to swap a fixed interest rate for a floating interest rate for a specified period (say the first year of the swap's life) could be permissible.

(ii) He has however relied upon a passage contained in an "Investigation on the phenomenon of financial derivative instruments in the Province and the Communes of Veneto" prepared in 2010 by the Regional Court

of Auditors for Veneto. He refers to the passage at page 62 of that Investigation, which states:

"The part of the Circular of 27 May 2004 that establishes that "any such discount or premium must be settled at the date of execution (settlement) of the derivative transaction . . . " appears not to have always been observed. Some contracts [entered into by municipalities] have been found to contain exchanges of fixed interest rates, normally referring to the initial several six-month periods of the life of the contract, the differential of which was, as a rule, to the advantage of the local authority. . . Those forms of deferred liquidity are in any case excluded from those permitted by the aforementioned decree concerning derivative transactions for local authorities, which precludes the use of transactions such as those in the form of financing unless they fall within the expressly permitted exceptions, such [exceptions] not being susceptible to analogous or extensive application, being limited precisely to the initial up-front sum, which in any case must not exceed 1% of the notional value and must be utilised only in order to allow the recovery of any differential between the market conditions that occur between the confirmation date and the trade date."

Professor Carbonetti relies upon this passage in the Investigation to support his proposition. Although not a decision of the Court of Auditors on any particular transaction, it must naturally be respected as the articulation of the view of that regional court. Professor Capriglione, cross-examined by Mr Wolfson, disagreed with the proposition that this established that the exchange of fixed interest rates in such circumstances constituted a premium. He continued that "allowing a difference between an existing fixed rate and a new fixed rate which is limited to the period of life means admitting the possibility to allow the formation of liquidity. And it is well known that, in a derivative, one of the purposes is to permit, to allow to have a new way of governing liquidity."

38. The Defendant's response to the opinion of Professor Carbonetti, insofar as it relies upon Italian law as opposed to the views of Ms Nguyen, is:

(i) Whatever may be said or meant by the 2010 Investigation by the Veneto Court of Auditors, the fact remains that the MEF and the Court of Auditors examined this very 2006 Swap, and did not find it non-compliant with (f) by reference to the existence of the beneficial terms and additional liquidity provided by the exchange of interest rates over the first 2 years of the contract.

(ii) Apart from Professor Carbonetti's own words referred to in paragraph 37(ii) above, Professor Capriglione adopted the words of Professor Sepe that "there is no prohibition relating to the fact that the parties may settle the derivative transactions under . . . (f) by exchanging fixed rates with mixed rates (fixed for a period and floating for another period) provided that, as in the 2006 Swap, the relevant transaction does not contain any option for the switch between the two rates".

These influential words are persuasive, and it does seem to me clear that the Court of Auditors and the MEF recognised the existence in the 2006 Swap of a benefit or an advantage to Benevento, but did not conclude it to be a premium.

39. I have found this last question a difficult one, but the onus is on the Claimant, and I am not satisfied, notwithstanding the words of the 2010 Investigation, and in the light of the evidence of Professor Capriglione, that the Claimant's case is proved that there was, despite the conclusion of the 2008 MEF Report and the Court of Auditors, a premium offending against (f), or that the structure of the exchange of interest rates over the first 2 years constituted such unlawful premium.

40. Consequently the Claimant has not shown the 2006 Swap to be void, and its claim in the action must fail in limine. Nevertheless I shall continue

to deal with the balance of the case at English law in respect of the Claimant's case for restitution, in case this conclusion be wrong, and the rest of this judgment will be upon the basis of an assumption that the 2006 Swap was void.

41. The circumstances leading to the Novation are set out in paragraphs 2 and 3 above and the rival contentions are at paragraphs 13 to 15 above. In short:

(i) The Claimant submits that it was under the mistaken belief that the 2006 Swap was valid, and it paid €8.9m to obtain a valid contract, and hence that there was an operative mistake and/or a total failure of consideration and that sum must be returned.

(ii) The Defendant submits that the Claimant had no such belief about the 2006 Swap. All it wanted was to clear the way (by a successful tender in which the Defendant was ousted) for the very different 2007 Swap, which it successfully did. The validity or otherwise of the 2006 Swap was irrelevant, and there was then put in place the 2007 Swap, a substantially different transaction, more valuable to it (see paragraph 14(i) above) but also more acceptable (as can be seen from Benevento's accepting the tender) to Benevento, but a transaction which, by virtue of the substantial features which were not present in the 2006 Swap – the absence of a cap/collar, the increased payment profile and the complex optionality of the interest rates - was in any event void in its own right. The Court of Auditors' Decision in relation to the 2007 Swap reads, materially, as follows:

"However, the operation in place is not classified, by type, among those allowed by law in Italy.

The Authority, in fact, has signed an IRS contract with the sale of caps and inclusion of a complex digital option embedded within the contract.

The latter term denotes a range of options that are variously constructed which may introduce further complexity into the contract, among other things, in anticipation of changes in spreads when certain conditions are met, as happens to be the case here.

In recalling the above in "fact", it is clear that the type of contract in question cannot be classed as an "interest rate collar" purchase that represents a combination of caps and floors where the purchaser is guaranteed a level of fluctuating interest rate to be paid within a predetermined minimum and maximum, as stated in Article 3, paragraph 2, letter d) of Ministerial Decree No. 389, 2003.

The collar option defined as "plain vanilla" is in fact a combination of cap and floor intended to define together the maximum amount of the obligation borne by the party liable to pay the variable rate (the Authority) and the minimum amount of yield to be acknowledged to the financial intermediary, as borne out by the same advisor who, in the analysis of the financial situation of the city, submitted that a combination of cap and floor would allow the local authority to limit the risk of interest rate changes within a band of fluctuation . . .

In this respect we should, indeed, highlight the fact that the advisor, when evaluating the proposals received by financial intermediaries, suggested the signing of the only contract which, though having the best market value, sets no maximum limit to the rate that the city might have to pay in the future . . .

Similarly, the operation put into place does not appear to comply with the instructions of the explanatory circular of 2004, when, in reference to the interest rate swap transactions, this excludes the use of any form of optionality . . ."

English law: mistake

42. The foundation of the Claimant's case is the following passage in Mr McNicholas's witness statement:

"137 . . . My belief was that Beltramo [the Italian lawyers whom the Claimant instructed] had approved the validity and effectiveness of the Benevento Transaction Documents (including the Original Benevento Swap) . . .

138 . . . I would not have authorised [the Claimant] to pay over EUR 8 million to receive a novation of a transaction which was not valid and binding."

43. The Defendants do not accept this and challenged that he had such belief, setting against it the matters referred to below. Ms Tolaney did not suggest in cross-examination that Mr McNicholas was lying, but I am satisfied she sufficiently put the Defendant's case to him that his evidence as to his alleged belief was unbelievable. In any event it falls to be set against his own evidence at paragraph 147 with which he concluded his witness statement namely:

"My belief was that the indications and advice that I had received from Beltramo were that the Benevento Transaction would be valid and binding once executed."

That is, of course, a different matter.

44. Mr Wolfson relies upon the passage in the speech of Lord Walker in Pitt v Holt [2013] 2 AC 108 at 114 whereby he states as uncontroversial that:

"It does not matter if the mistake is due to carelessness on the part of the person making the . . . disposition, unless the circumstances are such as to show that he deliberately ran the risk or must be taken to have run the risk of being wrong."

Ms Tolaney accepts that if Mr McNicholas was "utterly stupid", then he would, notwithstanding all the matters relied upon below, be able to say that he was nevertheless mistaken and be believed. But she does not accept that Mr

McNicholas is or was utterly stupid, but rather he is, and was, an extremely experienced solicitor, such that the answer is that he did not turn his mind to the question of whether the 2006 Swap was void, but was only interested in the transaction which was to replace it, and at any rate, insofar as it mattered at all, took the risk that the 2006 Swap was not valid.

45. The evidence of Mr McNicholas can be characterised as follows. There is no sign that he turned his mind to the 2006 Swap at all, as opposed to the 2007 Swap, which replaced it and which would bring in the €4m profit, and which formed the basis of the tender upon which the Claimant did receive advice from Beltramo.

46. He said in his witness statement (paragraph 24) that he was "well aware of the validity issues which may affect derivative transactions concluded with public bodies . . . Whilst I was not aware of the position under Italian law beyond my review of the Beltramo Memorandum, [advice which he had received from Beltramo in December 2006 in relation to the entry by the Claimant into an earlier transaction with Marsala and which recited Degree 389 and, inter alia, Conditions 1, 2 and 3 in (f)] this risk made it very important to obtain appropriate Italian law advice". He also said in an email dated 2 August 2007 to colleagues at the Claimant that they were of the view that they needed to understand the existing 2006 Swap.

47. However he accepted in cross-examination (contrary to the implication in paragraph 137 of his witness statement set out in paragraph 42 above), when it was put to him that he did not take any advice on the 2006 Swap from Beltramo (Day 3, page 136):

"No, I don't think so. I don't recall specific instructions to Susanna Beltramo to do so."

Further in answer to my question (Day 3, page 142) as to whether he asked for or obtained any advice on the validity of the 2006 Swap, the subject of the Novation Agreement:

"I don't remember any specific instructions on that."

48. The advice the Claimant did seek, both in relation to its proposals in the tender and subsequently, was in respect of the 2007 Swap. This 2007 Swap, as set out above, was to be on substantially different terms, and it was those different terms which, as has been seen, in the event led to the intervention and disapproval of the MEF and subsequently the Court of Auditors.

49. With regard to those new terms:

(i) It is plain that he was warned by Beltramo that there was real risk that the terms might not be valid at Italian law. Beltramo included in their advice of February 2007, with regard to the Marsala transaction, an express reservation with regard to the impact of Decree 389, and a warning that a valid transaction would need to comply inter alia with Conditions 1, 2 and 3 in (f). Beltramo made an identical reservation in their similar advice to the Claimant in relation to another proposed swap transaction, with Pozzuoli, in April 2007. Mr McNicholas accepted in cross-examination that Beltramo were in no position to advise as to whether there was in fact compliance with those Conditions, of which they had put the Claimant on notice. He accepted as follows (Day 3, pages 114/5):

"Q. What I think you are saying is the financial modelling of this contract is very complex --

A. That's correct.

Q. -- and therefore the lawyers wouldn't have all the detail, correct? They wouldn't have all the detail necessary to analyse that?

A. That's correct, yes.

Q. That HSH would, however, through you and others take a global picture of that --

A. That's right.

Q. -- together with their advice?

A. Yes.

Q. And one can see that with the specifics of Decree 389 obviously therefore Beltramo couldn't comment on whether the financials met the individual requirements of the law because they didn't have the information?

A. Well, what we would be doing with them is discussing the nature of the hedge, or the hedging options, or how this product is managing the liability, or the potential liability of the local authority. But I mean the fact that an interest rate is high or low is neither here nor there. If it hedges the position of the counterparty, it could be multiples of that.

Q. But when the lawyers point out a risk with it and you don't make any adjustment, you enter the transaction knowing that there is a risk, at least in respect of that.

A. Or that their concern was misplaced, or misunderstood.

Q. Exactly. So you take your own view.

A. Well, it wouldn't be a view taken in isolation. It would be discussed with Beltramo.

Q. But they haven't resiled from their concern in any of the documents I have seen. In fact they have reiterated it.

A. Well, I don't know when that conversation might have taken place, but it would have taken place.

Q. It is not covered in your evidence anywhere, is it?

A. I don't believe so."

(ii) Beltramo's position was made even clearer in their email of 3 July 2007 specifically relating to the 2007 Swap, in which they said:

"As you know, the role of our firm is limited to the review of the documentation and not of evaluation of the compliance to law of the financial terms of the proposed transaction.

However we have the impression that the structure is not in line with the current law restrictions on derivatives (for example, you cannot have the local authority paying a double interest; you cannot purchase/sale twice options, you cannot arrange for amortisation schedule requiring the local authority to pay to you under the swap amounts increasing in the last years of the swap)."

(iii) In his witness statement at paragraph 113, Mr McNicholas had suggested that he did not recall seeing this email at the time. However, even if he did not see it on the same day, any suggestion that he did not see it at a material time was plainly unsustainable, as he himself accepted (Day 3, pages 127-128). The schedules considered by Beltramo at the time and highlighted with queries were in fact supplied to the Claimant. Beltramo's comments were repeated in an email copied to Mr McNicholas on 17 July 2007: and there were further changes by the Claimant, as to which Beltramo's caveats were apparently not taken into account, as Beltramo made clear on 30 July.

(iv) Mr McNicholas asserted, in my judgment unpersuasively, that he was satisfied that all "relevant concerns" had been addressed. Yet he accepted that it was the bankers of the Claimant who were dealing with the structure of the transaction, that the Claimant knew what it had to do to comply and it was a matter for the Claimant whether it did so, and that (Day 3, page 110) "if it didn't comply, there was a risk it would be unenforceable." In the event he did not see the final opinion from Beltramo in respect of the 2007 Swap until much later, after it had been entered into, and that opinion still contained a recitation of the

requirements of Decree 389 without any warranty that they had been complied with.

(v) The reality, as was clear from the cross-examination, was that the Claimant effectively picked and chose as between the various comments made by Beltramo, rejecting some of them as "complete nonsense", and concluding they had sufficiently dealt with the balance of them.

(vi) There was no re-examination.

50. It is plain to me that when and insofar as Mr McNicholas said that he had received, and complied with, advice of Beltramo with regard to the 2007 Swap, including compliance with Decree 389, he is not believable, in the light of the evidence summarised above and in particular Beltramo's express reservations; certainly, as Ms Tolaney points out, Mr McNicholas accepted that there has never been any attempt, as there must surely otherwise have been, to blame Beltramo for negligent advice. I am satisfied that the Claimant, including Mr McNicholas, took the risk which Mr McNicholas accepts that he knew existed, that the 2007 Swap would not comply with Decree 389. His evidence as to how he treated, and when and whether he received, the Beltramo advice, which was plainly caveated, and his assertion (Day 3, page 146) that he understood that Beltramo had given him approval or signed off on the 2007 Swap as compliant with Italian law, including Decree 389, is not credible and does him no credit. But if, and to the extent, I am satisfied that the Claimant accepted the risks in entering into the 2007 Swap, without being confident that it had avoided those risks, it is even clearer that Mr McNicholas cannot have believed that he had had any advice as to the validity of, or absence of risk in relation to, the 2006 Swap.

51. It is Mr McNicholas who is put forward by the Claimant as having been labouring under the relevant mistaken belief on its behalf, and Ms Tolaney

did not accept in any event that his belief would have been determinative, but rather that of the bankers, such as Mr Grasso, who appear to have been making the decisions. But I do not need to decide that point, and am content to accept that it is Mr McNicholas's belief to which I must address myself. I am satisfied that he did not have the belief that the 2006 Swap was valid. He either had no belief at all (and hence did not trouble to take advice), or knew that it, like all such transactions, had risks, but, particularly as it was being immediately replaced by the new 2007 transaction, on which he had had some advice from Beltramo, and with which in any event he was prepared to proceed, he was not troubled by any such risk and accepted it. The Claimant's case based upon mistaken belief must fail. There was no mistaken belief (within Pitt v Holt) due to carelessness: there was no mistaken belief at all.

English law: total failure of consideration

52. In those circumstances the Claimant accepted the risk of the invalidity of the 2006 Swap. Indeed, as Ms Tolaney points out, if the 2007 Swap had not been void (for its own reasons), the question of the invalidity of the 2006 Swap would not have arisen. In the circumstances it is not necessary for me to address the arguments that the same result is achieved by reference to the contractual effect of the clauses of the Novation Agreement, which I have set out in paragraph 14(ii) above. But plainly I must address and resolve those arguments, ably put before me by both counsel. Three matters seem to me to be significant, as Ms Tolaney submits:

(i) that the Novation Agreement must be set in the factual matrix of the tender presentation, to which I have referred in paragraph 2 above.

(ii) that all three of the clauses set out in paragraph 14(ii), on each of which Ms Tolaney relies, can and should be construed not only separately but together.

(iii) that it is significant to take into account one other clause contained within Article II of the ISDA Novation Definitions, namely section 2.1(a)(iii)(A) namely that:

"As of the Novation Date, all obligations of the Transferor and the Remaining Party under the Old Transaction [the 2006 Swap] required to be performed prior to the Novation Date have been fulfilled."

Ms Tolaney submits that it can be demonstrated that the 2006 Swap is thus swept up and cleared away so as to clear the decks for the 2007 Swap.

53. Mr Wolfson relies, in relation to clause 5(i) (Non-Reliance) and 5(ii) (Assessment and Understanding), upon a decision of Hamblen J in Cassa di Risparmio della Repubblica di San Marino SpA v Barclays Bank Ltd [2011] EWHC 484 (Comm) 2011 1 CLC 701 ("Cassa"), in which he addressed those two clauses, in the context of a contract for the purchase of structured notes: and Ms Tolaney then refers to another, subsequent, decision of Hamblen J, Standard Chartered Bank v Ceylon Petroleum Corporation [2011] EWHC 1785 (Comm) ("Ceylon") in which the same two clauses featured in relation to a contract for the purchase of oil derivatives. Section 2.1(b) "no representation or warranty etc" does not arise in respect of either of those two cases, because neither related to a novation. It seems to me sensible to address and construe the clauses in this case first, and then see whether, as Mr Wolfson submits, the decision of Hamblen J in Cassa should constrain or persuade me to a particular construction in this case, which might be different from that at which I would otherwise have arrived.

54. It is, in my judgment, necessary, as Ms Tolaney submitted, to consider, in construing the relevant clauses, both the third paragraph of the preamble to the ISDA Novation Agreement and section 1.9 of the Novation Definitions. The former reads:

"With effect from and including the Novation Date the Transferor wishes to transfer by novation to the Transferee, and the Transferee wishes to accept the transfer by novation of, and the Remaining Party wishes to consent to such transfer by novation and acceptance thereof of, all the rights, liabilities, duties and obligations of the Transferor with respect to the Remaining Party under each Old Transaction . . . with respect to the Novated Amount, with the effect that the Remaining Party and the Transferee enter into a New Transaction corresponding to the Old Transaction (as may be amended and modified from time to time)."

The latter reads:

"'New Transaction' means the New Transaction between Transferees or between a Transferee and a Remaining Party, as the case may be, having such terms as are specified in the New Confirmation, including terms (excluding collateral and other credit support arrangements) identical to those of the Old Transaction, as more fully described in the Novation Confirmation."

It is quite apparent from those provisions, and indeed from the entirety of the factual matrix, which I have already described, that the new transaction, being the 2006 Novated Swap, was, and was agreed, to be in material terms identical to the 2006 Swap (see paragraph 3 above) - while of course the 2007 Swap which was immediately to replace the 2006 Novated Swap was to be entirely different.

55. The Claimant's approach to clauses 5(i) and 5(ii) (set out in paragraph 14(ii) above) is effectively dictated by Mr Wolfson's case that I should be persuaded by Hamblen J's decision in Cassa to construe the clauses restrictively. As I have said, I shall return to Cassa below. Leaving that aside:

(i) Clause 5(i) expressly provides and agrees that the Claimant has made its own independent decisions to enter into the Novation Transaction,

and as to whether it is appropriate or proper for it: that it has made such decisions based upon its own judgment and upon advice from such advisers (in the event Beltramo) as it has deemed necessary. The clause continues by referring to absence of reliance on any communication by the other party, which is, as will be seen, relevant in Cassa but not in this case.

(ii) By clause 5(ii) the Claimant agreed that it was capable of assessing the merits of and understanding (on its own behalf or through independent professional advice), and, in particular, understands and accepts, the risks of the Novation Transaction. The Claimant also agrees that it assumes the risks of the Novation Transaction. I have already found that Mr McNicholas, and through him the Claimant, assumed the risks of the invalidity of the 2006 Swap, and, therefore, the 2006 Novated Swap which was identical, so far as its vulnerability to Decree 389 is concerned. This is however a contractual agreement, irrespective of such factual finding. As set out in paragraph 14(ii) above, Benevento gave certain warranties as to its power to enter into the transaction; but the risks of non-compliance by Benevento must fall within the risks which the Claimant assumed.

56. In addition there are the provisions of Section 2.1(b), also set out in paragraph 14(ii) above. This provided that the Defendant made no representation or warranty and does not assume any responsibility with respect to the legality, validity, effectiveness, adequacy or enforceability of (inter alia) the 2006 Novated Swap, and assumes no responsibility for the performance and observance by Benevento of any of its obligations under (inter alia) the 2006 Novated Swap, all conditions and warranties being excluded.

(i) This clause either adds nothing to, in particular, clause 5(ii) or makes good any alleged deficiencies in it. It spells out in terms the question of

legality, validity and enforceability, the risks as to which were accepted by the Claimant under clause 5(ii).

(ii) Mr Wolfson submits that it is only the legality, validity, effectiveness, adequacy and enforceability of the 2006 Novated Swap which is covered by the provisions of the clause, and not the legality, validity etc of the 2006 Swap. For the reasons set out in paragraph 54 above, this, in my judgment, is unarguable and an absurd construction of the clause. The only respects in which the (identical) 2006 Novated Swap could be invalid are those in respect of which the 2006 Swap would be invalid, i.e. both, or neither, would offend against Decree 389, and by accepting the risks, or assuming the responsibility, in relation to validity etc. of the 2006 Novated Swap, it is the terms and conditions of that 2006 Novated Swap, carried over from the 2006 Swap by the Novation, which are addressed. In any event, if necessary, I accept Ms Tolaney's fallback argument that any doubt is resolved by the addition of the words "or any documents relating thereto", because the 2006 Swap is plainly a document relating to the identical 2006 Novated Swap.

(iii) Mr Wolfson seeks to argue in relation to this clause that the words "does not assume any responsibility" should be construed as relating to an exemption of liability in tort in relation to the duty of care, which has in the jurisprudence of the courts often been ascribed to an assumption of responsibility. This is an ingenious argument, but I am satisfied it is unsupportable. First the words "assume(s) responsibility" are used twice within the clause, and must consequently have the same meaning on each occasion. Secondly there is a quite separate provision in clause 5(iii) that each party is "not acting as a fiduciary for or an adviser to" the other, which is the context in which assumption of responsibility ordinarily arises. In any event in my judgment it is entirely clear that the clause is intended to relate to an allocation

of risk as between the parties. It does not, as Mr Wolfson submits, expressly exempt liability for restitution: but restitution does not arise where, as here, the parties have provided for the event that the bargain is invalid or the bargained-for product is invalid or non-existent. See MacDonald Dickens & Macklin v Costello [2012] QB 244 at para 23 per Etherton LJ and Goff & Jones Law of Unjust Enrichment (8th Ed) at 3.16.

57. Section 2.1(b) in my judgment precludes the claim by the Claimant which seeks to allocate the responsibility for the risks of invalidity of the 2006 Swap (or the 2006 Novated Swap) to the Defendant.

58. I turn to consider Cassa. This was a case involving claims for fraudulent misrepresentation. Hamblen J describes how there were two kinds of alleged misrepresentations, "purchase representations" as to the nature of the product and "restructuring representations" as to the effect of certain steps taken: in the event he found there to have been neither. So far as clause 5 (our clause 5(i)) is concerned, he addressed the question as to whether the representations alleged amounted to investment advice or recommendations. He concluded that neither set of alleged representations constituted investment advice or recommendations. As for clause 6 (our clause 5(ii)) he concluded that a contractual estoppel would apply to the purchase representations, but not to the restructuring representations:

"525. In the present case by clause 6 CRSM was contractually agreeing that it understood and accepted the risks of entering the transaction and purchasing the Notes. In my judgment if the substance of the claim for misrepresentation is that representations were made which led it to misunderstand the risks of entering the transaction and purchasing the Notes then such a claim would be precluded. It is contractually estopped from asserting that it was induced to enter into the contract by a misunderstanding of the nature of the

risks entering the transaction and purchasing the Notes. . . . the specific misunderstanding would be as to the specific matter which it had been contractually agreed was fully understood.

526. In my judgment the substance of the Purchase Representation claim is that representations were made which led CRSM to misunderstand the risks of entering the transaction and purchasing the Notes. The Purchase Representation is in terms a representation as to the risks of purchasing the Notes – it is a statement that the Notes have a very low risk of default. The consequence is alleged to be that CRSM understood the Notes to have a lower risk of default than they in fact had. Moreover, that is a risk of a kind specifically identified in the fact sheets which CRSM had signed and acknowledged. I accordingly hold that (absent proof of fraud) it is contractually estopped from making its Purchase Representation claim.

527. I would not, however, regard the substance of the Restructuring Representation claim as being that representations were made which led CRSM to misunderstand the risks of entering the restructuring transaction. They were statements as to the criteria to be applied in carrying out the restructuring. Although that may have had an impact on the risks involved they are not statements as to such risks nor is the claim based on a misunderstanding of such risks. I accordingly hold that no contractual estoppel arises in respect of such claims under clause 6 (or its equivalent in the restructuring contract)."

Consequently if the restructuring representations had been made he would have held that they had no relevance to acceptance or understanding of the risks, and the claimant would not have been precluded from relying on them.

59. In this case no representations are relied upon. It is certainly clear that in Cassa, Hamblen J was addressing the latter part of clause 5(i) in relation

to the provision that the Claimant was not relying on any communications as being advice or recommendation, and such recommendations as there were, were examined in that regard. In this case no communications are alleged, and the issue is simply whether in fact, without any question of communication, the Claimant can deny that it made all decisions based upon its own judgment and its own advice.

60. Plainly it cannot so deny, but its case is that such judgment, being its own judgment and in part based upon advice from Beltramo, was mistaken. I have already found that it was not based upon any operable mistaken belief giving the Claimant any right of recovery. However I would have concluded that if it could establish such a mistake, of course not induced by any communication from the Defendant, then clause 5(i) would not in my judgment rule out reliance upon it; although the decision in Cassa itself seems to me not to be relevant.

61. Clause 5(ii) is however quite another matter. In Cassa, Hamblen J concluded that, if in fact the restructuring representations were made, they did not relate to or impact upon the risks which the Claimant expressly accepted by the equivalent clause. In this case it is quite clear that there was, as there was in Cassa and indeed in Ceylon, a contractual estoppel whereby the Claimant did accept the risks, and they were, as I have already made plain, in my judgment clearly the risks of invalidity of the 2006 Swap and of the 2006 Novated Swap by virtue of non-compliance with Decree 389. I do not conclude therefore that Ceylon adds anything to my understanding or is required to be wielded in variation or modification of Hamblen J's approach in Cassa. Hamblen J concluded in those cases that the same clause constituted a contractual estoppel such that the transferee was not able to complain (even in the case of

a misrepresentation) about its misunderstanding of the risks or to deny that it had accepted those risks. Clause 5(ii), like Section 2.1(b), or together with it, precludes the Claimant from ascribing any responsibility to the Defendant for the risks of invalidity.

62. I am entirely clear that there was no total failure of consideration for the novation in the event that the 2006 Swap was, as I have found it was not, invalid. The 2006 Swap was, and was effectively, novated to the Claimant. By clause 5(ii) the Claimant understood and accepted the risks of its invalidity, and by section 2.1(b) the Defendant did not assume any responsibility with respect to its legality, validity or enforceability. In any event the Claimant obtained what it bargained for, namely elimination of the Defendant from the picture, and the route to the 2007 Swap, which was the prize it had competed for.

Conclusion

63. For all these reasons, the Claimant's case must fail. In the circumstances I do not address the arguments about change of position by way of the hedge which the Defendant entered into and which it unwound as a consequence of the Novation, as it says it would not have done, or the arguments as to counter-restitution, which have remained embryonic.

64. I dismiss the Claimant's claim.

I DERIVATI DEI COMUNI ITALIANI NELLA VALUTAZIONE DELL'ALTA CORTE DI GIUSTIZIA INGLESE*

SOMMARIO: 1. Premessa. – 2. Il quadro normativo di riferimento. – 3. Tipologia operative e caratteristiche tecniche dei derivati: la non complessità. 4. *Segue*: il divieto del profilo crescente. – 5. Conclusioni.

1. Intervenendo sulla dibattuta questione dei contratti derivati stipulati dagli enti pubblici territoriali italiani, la *High Court of Justice Queen's Bench Division Commercial Court* britannica, con la decisione che qui si annota, ha offerto un significativo contributo alla chiarificazione di una problematica tuttora all'attenzione delle competenti autorità italiane, interessate a definire le modalità procedimentali e la qualificazione tecnico giuridica di fattispecie aventi ad oggetto, per l'appunto, negoziazioni di tal genere[1].

Ed invero, la cronaca giudiziaria recente ha dato ampia informativa in ordine ad una decisione recentemente assunta dalla Corte d'Appello di Milano, in sede penale, su una presunta "truffa" ai danni del Comune di Milano perpetrata da alcuni enti bancari che, con quest'ultimo, avevano effettuato operazioni in derivati[2]. La sentenza di assoluzione con formula piena degli imputati - e, dunque, il venir meno di una ipotizzabile condanna per violazione della legge

* Contributo approvato dai revisori

[1] Cfr., tra gli altri, CAPUTO NASSETTI, *I contratti derivati finanziari*, Milano, 2007, pp. 47 ss.; GIRINO, *I contratti derivati*, Milano, 2010, pp. 9 ss.; MAFFEIS, *Contratti derivati*, in *Banca Borsa Tit. cred.*, 2011, pp. 604 ss.; BARCELLONA, *Strumenti finanziari derivati: significato normativo di una definizione*, *ibidem*, 2012, pp. 541 ss.; HUANG, *A normative analysis of new financially engineered derivatives*, in *Southern California Law Review*, University Colorado, 20; BAKER, *Regulating the invisible: the case of the Other-The-Counter derivatives*, in *Notre Dame Law Review*, n.85, 2010; SAVONA, *Do we really understand derivatives?*, in *Law and Economics Yearly Review*, 2013, n. 2, pp. 281 ss.; PELLEGRINI, *Financial derivatives. Regulation and disputes in the italian legal order*, *ibidem*, pp. 373 ss.

[2] Si veda, per tutti, l'articolo intitolato «Derivati in Comune, la Corte d'Appello di Milano azzera la condanna delle banche», visionabile su ilfattoquotidiano.it, 7 marzo 2014.

n.231/2001 (concernente la responsabilità delle aziende di credito per reati commessi dai propri dipendenti) – affronta una tematica da tempo oggetto di valutazione da parte degli studiosi, oltre che al centro di altre decisioni nelle quali sono state prese in considerazione questioni similari, nella cui scia può dirsi abbia trovato collocazione il recente orientamento della Corte di Milano[3].

Sempre nel solco di una necessaria chiarificazione della problematica in parola rileva, poi, una parallela decisione del Consiglio di Stato del novembre 2012 nella quale è stato negato alla Provincia di Pisa l'annullamento dei contratti aventi ad oggetto derivati[4]; ciò, in base a valutazioni che, nell'approfondimento della natura e dei dati caratterizzanti tale tipologia contrattuale, sono incentrate su un'analisi che non prescinde dalla "convenienza economica" di tali operazioni, valutazioni che fondano la legittimità della tesi sostenuta su un riscontro (nella fattispecie) di mancanza di contrarietà alle prescrizioni normative [5].

Come si è anticipato, analoga importanza riveste la decisione dell'Alta Corte di Giustizia britannica con riguardo ad una controversia promossa da HSH Nordbank AG contro Intesa Sanpaolo SpA e, precisamente, in «a dispute arises out of interest rate swap transactions entered into with an Italian Local Authority, the Comune di Benevento ("Benevento"), which had underlying loans from Cassa Depositi e Prestiti ("CDP"), a state-controlled company financing local authorities».

Ed invero la Corte - attraverso un puntuale esame delle tecniche e dei

[3] Cfr. Corte d'Appello di Milano, IV sez. pen., 7 marzo 2014, con la quale è stata ribaltata la decisione del Tribunale di Milano n. 13976 del 19 dicembre 2012.
[4] Cfr. Consiglio di Stato, 27 novembre 2012, n. 05962/2012.
[5] Per un'impostazione generale della questione, si veda PASSALACQUA, *Derivatives financial instruments and balanced budgets: the case of the Italian public administration*, in *Law and economics yearly review*, 2013, n.2, pp. 447 ss.; CAPRIGLIONE, *The use of "derivatives" by italian local authorities in public finance management. Still an issue*, in *Law and Economics Yearly Review*, 2013, n. 2, pp. 399 ss.

tempi sottesi all'operatività in derivati - respinge la domanda attrice sulla base di motivazioni che non lasciano spazio a dubbi per quanto concerne vuoi la definizione dell'oggetto dei derivati praticabili dai Comuni (e, dunque, l'identificazione dei caratteri strutturali dei medesimi), vuoi la valutazione di alcuni specifici elementi tecnici che possono caratterizzare le operazioni di cui trattasi (in particolare: la presenza di un premio). Da qui le condivisibili conclusioni cui perviene il Giudice inglese nell'asserire che, nella fattispecie a Lui rappresentata, deve ritenersi esclusa la violazione di una 'norma imperativa', cui conseguirebbe la nullità del derivato ai sensi dell'art. 1418, comma 1, del codice civile italiano.

2. In tale premessa - al fine di delineare il quadro normativo di riferimento e, quindi, di individuare i criteri di un corretto *agere* dei Comuni nell'attività in derivati - occorre far presente che, a partire dalla metà degli anni '90 del novecento, le municipalità italiane hanno iniziato ad usare gli strumenti finanziari derivati a supporto delle operazioni dalle medesime poste in essere nell' esercizio delle loro funzioni istituzionali. L'originaria assenza di forme di regolazione speciale, quale all'epoca era dato riscontrare, ha consentito che si determinassero situazioni operative differenziate nelle quali è prevalso talvolta l'intento di un' improprio utilizzo di siffatti strumenti[6].

[6] Cfr. art. 35, comma 5, legge n. 724 del 1994; art. 41, legge n. 448 del 2001; nonché i risultati della «*Indagine conoscitiva sulla diffusione degli strumenti di finanza derivata e delle cartolarizzazioni nelle Pubbliche Amministrazioni*», Senato della Repubblica, Commissione Finanze e tesoro.
Più in particolare, la possibilità per gli enti locali di ricorrere agli strumenti finanziari derivati per finanziarsi sul mercato di capitali è riconducibile all'art. 35 della legge 23 dicembre 1994 n. 724, che consente agli enti locali più "virtuosi" (il comma 2 dell'articolo 35 subordina difatti l'emissione di strumenti obbligazionari all'assenza di situazioni di dissesto o di deficit strutturale ed al non aver proceduto al ripiano di disavanzi ai sensi del D.L. n. 8 del 1993) di "*deliberare l'emissione di prestiti obbligazionari destinati esclusivamente al finanziamento degli investimenti*", escludendo quindi espressamente la possibilità di ricorrere a tale strumento per finanziare le spese di parte corrente. Tale vincolo di destinazione viene poi ribadito dall'art. 202 del d. lgs. n. 267 del 2000 (c.d. Testo Unico degli Enti Locali) il quale prevede più in generale che "*il*

Da qui il riscontro di operazioni che, debordando dai canoni di una rigorosa conformità all'esigenza di copertura (connessa alla ristrutturazione di pregressi debiti), sconfinano nell'assunzione di rischi o, comunque, appaiono finalizzate allo scopo di rinviare a tempi futuri (o più esattamente: a generazioni future) il peso attuale dei debiti contratti dalle Amministrazioni comunali. E' evidente come, in ipotesi del genere, si è dato spazio ad una realtà nella quale si perviene ad un uso distorto dei derivati[7]. Questi ultimi, infatti, spesso non sono risultati volti (come avrebbe dovuto, invece, avvenire) al perseguimento di scopi che non incidessero negativamente sulla interazione tra l'impiego degli strumenti finanziari in questione ed il rispetto delle regole fissate dall'ordinamento (rispetto delle regole, com'è noto, finalizzato all'obiettivo di non alterare le corrette modalità di gestione delle posizioni debitorie dei Comuni e, più in generale, gli equilibri di finanza pubblica).

La particolare complessità della tecnica procedimentale utilizzata facilitava la possibilità di pervenire a risultati difformi da quelli ricollegabili ad un corretto uso dei derivati, sicché all'inizio di questo millennio è apparsa ineludibile al nostro legislatore la necessità di un intervento in materia.

Si comprende, per tal via, la ragione che, a partire dal 2001, ha indotto il regolatore italiano a tracciare un composito quadro normativo finalizzato a contenere l'operatività in derivati dei Comuni entro ben delineati confini[8]. Si è volu-

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ricorso all'indebitamento da parte degli enti locali è ammesso esclusivamente (...) *per la realizzazione degli investimenti*".
Sul punto cfr. LEMMA, *The derivatives of Italy*, in *Law and economic yearly review*, 2013, n.2, p. 480 ss.

[7] Sui derivati come prodotti tossici, strumenti di distruzione di massa, mostri simbolo della finanza deviata cfr. Schroeder, *The snowball. Warren Buffett and the business of life*, Bantam, New York, 2009, pp. 733 ss.

[8] Cfr. AMOROSINO, *Spunti in tema di strumenti finanziari ed enti locali*, in *Il diritto dell'economia*, 2007, n.2, pp. 413 ss.; CORTESE, *Derivati e finanza locale: il caso italiano*, in *Finanza derivata, mercati e investitori*, a cura di Cortese e Santori, Pisa, 2010, pp. 213 ss.;

to assicurare in tal modo il corretto utilizzo di tali contratti, evitando una loro strumentalizzazione negativa, volta cioè a differire nel tempo le criticità di gestioni presenti, se non addirittura bieche forme di speculazione finanziaria.

E' la legge n. 448 del 2001 (cd. finanziaria del 2002) che, nel regolare la posizione degli enti territoriali, fa espresso riferimento all'impiego di tali strumenti legittimandone l'uso ove preordinato ad una ristrutturazione del debito (art. 41, comma 1); si è voluto, per tal via, consentire una riduzione del valore finanziario delle passività totali a carico degli enti stessi previo "*contenimento del costo dell'indebitamento e … monitoraggio degli andamenti di finanza pubblica*" (comma 2).

Tale *ratio* giustificatrice sarà posta a fondamento anche di altre disposizioni normative che in tempi immediatamente successivi disciplineranno la materia, fissando modalità di accesso al mercato dei capitali da parte dei Comuni in linea con i criteri ordinatori dianzi indicati. Rileva, al riguardo, la parte della statuizione sopra richiamata nella quale - ai fini dell'utilizzazione di contratti derivati - viene affidato al MEF il coordinamento dell'accesso ai mercati dei capitali degli enti territoriali. Ed invero, come è dato leggere in tale testo normativo, il "*contenuto e le modalità del coordinamento nonché l'invio dei dati ..*" relativi alla situazione finanziaria degli enti in parola sono stati rimessi a un decreto da emanarsi dal MEF, di intesa con il Ministero dell'Interno, al quale è stata demandata anche l'approvazione delle "*.. norme relative all'ammortamento del debito e all'utilizzo degli strumenti derivati da parte dei succitati enti*".

Col decreto ministeriale 1 dicembre 2003, n.389, è stata attuata detta delega, procedendosi alla puntualizzazione vuoi delle tipologie di contratti derivati consentite alle municipalità, vuoi delle tecniche procedimentali che devono es-

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DELLA CANANEA, *L'ente locale investitore: modelli di regolazione e controllo*, *ibidem*, pp. 173 ss.

sere seguite da questi ultimi al fine di evitare che l'utilizzo dei derivati avvenga per finalità diverse dalla copertura e dalla ristrutturazione. Significativi criteri interpretativi, al riguardo, saranno poi forniti dalla circolare del Ministero dell'economia e delle finanze del 27 maggio 2004 (con cui si completa il quadro disciplinare destinato a porre invalicabili limiti all'azione dei Comuni *in subiecta materia*) precisando in particolare che non sono ammesse «operazioni derivate riferite ad altre operazioni derivate preesistenti, in base alla considerazione che nessun derivato è configurabile come una passività».

E' questo il quadro normativo preso a riferimento dall'Alta Corte di giustizia inglese nella decisione che si annota. La Corte infatti, dopo aver espressamente richiamato la previsione dell'art. 41 della legge finanziaria del 2002, ricorda che «a Ministerial decree was to be issued by the MEF, to set out the rules under which municipalities could use derivatives to manage their financial positions», puntualizzando quindi che «in the exercise of this power, the MEF issued Decree 389 of 1 December 2003 ("Decree 389"), which in Article 3 sets out the permissible derivative transaction ..also issued an explanatory Circular dated 27 May 2004 ("the Circular")».

Rinviando al prossimo paragrafo l'esame particolareggiato della tipologia operativa individuata dal decreto n. 389/2003, va qui segnalato che i Comuni, nel procedere all'attività in derivati non potevano prescindere da una attenta valutazione della relativa *convenienza economica* che, tra l'altro, avrebbe dovuto aver riguardo ai rischi che essi affrontavano, nonché alla valutazione dei vantaggi sottesi alla rinegoziazione di determinate passività in presenza di mutate condizioni di mercato.

A fronte di siffatte prescrizioni vincolistiche sono state registrate linee comportamentali da parte degli enti territoriali, talora difformi dalle indicazioni del regolatore che, a più riprese, ha ritenuto opportuno intervenire ancora con

appositi provvedimenti normativi.

Per completezza d'indagine si richiama la legge 24 dicembre 2007 n. 244 (legge finanziaria per il 2008) volta a rinforzare il previgente sistema di controlli; al fine di fissare limiti alla possibilità di un utilizzo improprio degli strumenti finanziari derivati di Comuni si prevedeva, infatti, a carico di questi ultimi un'intensa attività informativa. Successivamente detta attività veniva *sospesa* dall'art. 62 del d.l. 25 giugno 2008, n. 112, convertito con modificazioni dalla legge 6 agosto 2008, n. 133, poi modificata, una prima volta, dall'art. 3, comma 6, della legge 22 dicembre 2008, n. 203, e quindi dal d.l. 28 aprile 2009, n. 39, convertito con modificazioni dalla legge 24 giugno 2009, n. 77. Da ultimo, la legge 27 dicembre 2013, n. 147 (legge di Stabilità per l'anno 2014), all'art. 1, comma 572, paragrafo 1, lett. b), rende definitivo il divieto per gli Enti locali di effettuare operazioni in derivati (salvo limitate eccezioni)[9].

3. Il complesso disciplinare sopra richiamato consente di individuare le operazioni in strumenti derivati utilizzabili dagli enti territoriali (commi 1 e 2) e, dunque, le condizioni cui, sul piano giuridico, è subordinata la loro proposizione. Al riguardo, rileva in primo luogo la loro ammissibilità in corrispondenza di passività effettivamente dovute, come del resto è testualmente precisato dalla Circolare MEF del 27 maggio 2004 dove si sottolinea che "*nessun derivato è configurabile come una passività*"; criterio che resta fermo anche nei casi in cui il derivato abbia subito variazioni (in conseguenza di rinegoziazioni, conversioni o per aver raggiunto un ammontare diverso da quello inizialmente previsto), come si evince dalla richiamata Circolare laddove si prevede che "*la posizione nello*

[9] Cfr. GAUDIELLO, *Operatività in derivati ristretta per gli enti locali, dopo la Legge di Stabilità 2014. Restano salvi i mutui strutturati ed alcune ipotesi particolari*, in *Rivista di diritto bancario*, gennaio 2014; CAPRIGLIONE, *The use of "derivatives" by italian local authorities in public finance management. Still an issue*, cit., pp. 407 ss.

strumento derivato può essere riadattata sulla base di condizioni che non determino una perdita per l'ente".

Sotto altro profilo, va segnalato che le operazioni derivate sono consentite solo laddove l'indicizzazione si riferisca esclusivamente a parametri monetari di riferimento nell'area dei Paesi appartenenti al Gruppo dei Sette Paesi più industrializzati. Anche su questo punto inequivoco appare l'orientamento della più volte menzionata Circolare MEF, la quale tiene a specificare che il riferimento al mercato monetario deve intendersi nel senso che l'indicizzazione consentita è solo quella relativa a "*tassi di interesse a breve termine*", mentre non sono ammessi "*gli strumenti derivati che contengono delle leve o moltiplicatori dei parametri finanziari, come, ad esempio pagare 2 volte il tasso Euribor" .*

A ciò si aggiunga che la necessaria riferibilità dei derivati alle forme previste dal d.m. n. 389 del 2003 riconduce i contratti consentiti agli enti territoriali ad uno degli schemi negoziali ivi elencati e, più precisamente, ad operazioni di : a) *«swap di tasso di interesse» tra due soggetti che assumono l'impegno di scambiarsi regolarmente flussi di interessi;* b*) acquisto di «forward rate agreement» in cui due parti concordano il tasso di interesse che l'acquirente del forward si impegna a pagare su un capitale stabilito ad una determinata data futura;* c*) acquisto di «cap» di tasso di interesse in cui l'acquirente viene garantito da aumenti del tasso di interesse da corrispondere oltre il livello stabilito;* d*) acquisto di «collar» di tasso di interesse in cui all'acquirente viene garantito un livello di tasso di interesse da corrispondere, oscillante all'interno di un minimo e un massimo prestabiliti;* e*) altre operazioni derivate contenenti combinazioni di operazioni di cui ai punti precedenti, in grado di consentire il passaggio da tasso fisso a variabile e viceversa;* f*) altre operazioni derivate finalizzate alla ristrutturazione del debito, solo qualora non prevedano una scadenza posteriore a quella associata alla sottostante passività ed i flussi con esse ricevuti dagli enti interes-*

sati siano uguali a quelli pagati nella sottostante passività e non implichino, al momento del loro perfezionamento, un profilo crescente dei valori attuali dei singoli flussi di pagamento, ad eccezione di un eventuale sconto o premio da regolare al momento del perfezionamento delle operazioni non superiore a 1% del nozionale della sottostante passività."

Siamo, dunque, in presenza di operazioni ben identificate dal regolatore il quale, al fine di evitare un utilizzo improprio degli strumenti in parola, ha richiesto che tali operazioni fossero attuate nella forma "*plain vanilla*"[10], preoccupandosi, in mancanza di una puntuale definizione normativa di quest'ultima,, di chiarire cosa debba intendersi con tale formula. La disciplina appare orientata, pertanto, da un lato, ad evitare che l'ente territoriale possa assumere i rischi finanziari tipici dell'intermediario "venditore di prodotti derivati"; dall'altro, in un'ottica prudenziale e di tutela, ha voluto limitare i suoi acquisti di derivati a prodotti semplici, standard, di base, tipizzati nella prassi contrattuale.

Va da sé che la forma *plain vanilla* dovrà ricorrere anche nelle fattispecie costituite da combinazioni di operazioni del tipo indicato. In particolare, tale evenienza è riferibile ai derivati di cui alle lettere e) e f) dell'art. 3 del d. m. 389 sopra richiamato. Ed invero, la Circolare del MEF puntualizza, al riguardo, che in entrambi tali casi le operazioni devono essere scomponibili in "operazioni standard". Naturalmente, resta ferma la distinzione tra le operazioni della lett. *e* rispetto a quelle previste nella successiva lett. *f*, essendo le prime delimitate alla sola combinazione di schemi ed opzioni finalizzate ad una rimodulazione degli interessi, laddove le seconde dovranno presentare i requisiti aggiuntivi richiesti dalla normativa (*i.e.* scadenza, uguaglianza dei flussi e profilo non crescente dei valori attuali dei singoli flussi di pagamento).

[10] Cfr. LA SALA e BRUNO, *Dall'obbligazione plain vanilla all'obbligazione strutturata*, in *Le Società*, 2009, n.6, pp. 689 ss.

È questa la lettura del testo normativo data dalla sentenza che si annota, nella quale il Giudice inglese si dichiara «wholly persuaded by the Defendant's case in this regard», allo scopo precisando che «No authority has been produced by the Claimant to set against the clear conclusion of the Court of Auditors, and I find it difficult … to see what (f) would apply to, given the existence of (e). … (the expert of the Claimant)… himself had described (f) as a catch-all. I am not persuaded that Article 3.2 renders void or unlawful any restructuring of principal in such derivatives, provided the Conditions in (f) are otherwise complied with».

Da qui una prima conclusione in ordine ai contenuti della lettera *f*, identificabili in funzione della finalità di perseguire una forma di ristrutturazione del debito attraverso una rimodulazione delle passività dell'ente territoriale, riguardate sia nella parte interessi che in quella capitale e, dunque, in funzione dell'effetto che le operazioni in parola sortiscono nel consentire il passaggio da tasso fisso a variabile e viceversa al raggiungimento di un valore soglia predefinito.

4. Nell'ottica di evitare che i derivati si risolvano in operazioni potenzialmente pericolose per gli enti territoriali, il d.m. 389 del 2003 - come si è anticipato - ha disposto tre condizioni specifiche, da intendersi quali requisiti strutturali del contratto. Ci si riferisce, in particolare, alla loro scadenza, che non deve essere successiva a quella della sottostante passività; nonché alla stretta corrispondenza tra i flussi ricevuti e quelli pagati (dagli enti locali) ed all'esigenza di evitare che si determini, al momento del loro perfezionamento, un profilo crescente dei valori attuali dei singoli flussi di pagamento[11].

[11] A ciò si aggiungano i limiti posti all'eventuale sconto o premio da regolare al momento del perfezionamento delle operazioni, che non deve essere superiore all'1% del nozionale della sot-

Significativo, al riguardo, deve ritenersi il testo della Circolare del MEF sopra menzionata, nel quale si chiarisce che "*tale prescrizione è volta ad evitare che siano poste in essere operazioni derivate i cui flussi di pagamento da parte dell'ente vengano concentrati in prossimità della scadenza*". Si versa, quindi, in presenza di un presidio volto ad evitare inopportuni effetti in grado di trasferire ad esercizi futuri il peso dell'indebitamento esistente. Pertanto, non si tratta solo di assicurare una stretta applicazione del tenore letterale della normativa, né di conformarsi all'interpretazione che della stessa è stata data dalla dottrina unanime e dalla Corte dei Conti.

È appena il caso di ricordare che la sentenza dell'Alta corte di giustizia inglese, nel fare espresso riferimento al testo della menzionata Circolare, mette in evidenza che «c*oncerning the letter f) furthermore, the prohibition of an "increasing profile of actual values" refers, in the context of derivatives transactions, to the payments made by the agency*»; identificando la *ratio* di tale normativa nel fatto che «*This prescription is to avoid that derivatives transactions should take place for which the payments by the agency are concentrated close to maturity*».

Da qui la conclusione cui la Corte perviene in ordine alla regolarità dello Swap oggetto della controversia sottoposta al suo vaglio, rifiutando la tesi dell'attore nella quale veniva erroneamente indicato che «on a proper construction of Article 3.2(f) at Italian law, it requires that the *profile* be calculated by reference to net payments, *i.e.* the balance of payments to be made by and between Benevento and the Defendant (…"Option 1"): alternatively that the profile should be calculated by reference only to payments of principal (not inter-

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tostante passività. Rileva, in proposito, il testo della Circolare secondo cui lo sconto o premio è stato eccezionalmente previsto "*per consentire la ristrutturazione della passività in presenza di condizioni di mercato diverse rispetto al momento in cui è stata contratta"* e lo stesso "*deve essere regolato contestualmente alla data di inzio (regolamento) dell'operazione derivata*".

est) ("Option 2")».

Si esprime piena condivisione della tesi enunciata dal giudice inglese, in quanto da una attenta lettura del testo normativo non risulta in alcun modo la riferibilità a «net payments» ovvero a «payments of principal (not interest)». Sicché si è di fronte al chiaro tentativo di eludere la reale portata disciplinare della normativa dianzi esaminata, vuoi perché sia nel decreto n. 389 che nella Circolare interpretativa dello stesso non v'è alcun richiamo a forme di pagamento netto, laddove è implicita in ogni forma di ristrutturazione del debito la riferibilità al congiunto ammontare del capitale e degli interessi che danno contenuto alle passività prese in considerazione dal derivato. Donde l'inequivoca conclusione del giudice inglese, il quale tiene ad asserire che «in any event I am not satisfied that the Claimant has proved its case as to either Option 1 or Option 2».

In definitiva, come è stato argomentato nella sentenza in commento, le operazioni di cui alla lett. *f* sono liberamente determinabili nelle loro caratteristiche, trovando delimitazione solo nella prescritta finalità di dar contenuto ad una ristrutturazione del debito e, dunque, da effettuarsi nel rispetto degli specifici requisiti previsti dalla disciplina speciale.

5. In chiusura di queste brevi note è bene ricordare le parole di compiacimento espresse dalla Corte inglese in merito alle modalità con cui le competenti autorità italiane, vale a dire il MEF e la Corte dei Conti, sono intervenute nella fattispecie. Particolarmente interessante risulta, infatti, l'affermazione del Giudice di fondare la propria decisione sul fatto che "there is no doubt that the MEF and the Court of Auditors considered the 2005, 2006 and 2007 Swaps in great detail, and plainly understood the nature of their terms".

Se ne è dedotta la completezza dell'indagine ascrivibile alle indicate auto-

rità, per cui il contratto derivato in osservazione è stato ritenuto conforme al dettato normativo della lettera (f) dell'articolo 3, comma 2, del Decreto 389, come interpretato dalla Circolare. Recependo tale conclusione ai fini del corretto inquadramento giuridico dell'operazione in parola, può senz'altro dirsi che la medesima non concretizza violazione alcuna di norme imperative; donde l'esclusione della sua *nullità*, in quanto non sussistono i presupposti per l' applicazione dell'art. 1418, comma 1, del Codice Civile.

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