Negoziazione di derivati e doveri dell'intermediario

I

BUNDESGERICHTSHOF (BGH), 22 march 2011; Chief Justice WIECHERS; Ille Papier-Service GmbH (Plaintiff and Appellant) v. Deutsche Bank AG (Defendant and Appellee)

Intermediazione finanziaria – Servizio di consulenza in materia di investimenti – *CMS Spread Ladder Swap* – Dovere dell'intermediario di valutare la propensione soggettiva del cliente al rischio e l'adeguatezza dello specifico prodotto agli obiettivi di investimento – Sussistenza

Intermediazione finanziaria – Servizio di consulenza in materia di investimenti – *CMS Spread Ladder Swap* – Possibilità di desumere l'adeguatezza del prodotto al profilo di rischio del cliente e la consapevolezza del cliente in merito ai rischi dalle scelte di investimento precedenti e dalla formazione accademica del cliente in ambito economico – Insussistenza.

Intermediazione finanziaria – Servizio di consulenza in materia di investimenti – *CMS Spread Ladder Swap* – Concorso di colpa del cliente che dichiari di aver sottoscritto il prodotto finanziario strutturato complesso nella ingoranza di molti degli aspetti tecnici – Insussistenza

Intermediazione finanziaria – Servizio di consulenza in materia di investimenti – Dovere di informazione verso il cliente dei margini di profitto sottesi ad ogni operazione di investimento consigliata – Insussistenza – Dovere di informare il cliente del valore di mercato iniziale negativo di un *CMS Spread Ladder Swap* negoziato in contropartita diretta dall'intermediario — Sussistenza

Nella prestazione del servizio di consulenza in relazione ad un prodotto finanziario strutturato altamente complesso come il *CMS Spread Ladder Swap*, l'intermediario è tenuto a valutare la propensione soggettiva del cliente al rischio e l'adeguatezza dello specifico prodotto agli obiettivi di investimento (*anleger und anlagegerechte Beratung*), secondo l'art. 31, § 4, *WpHG* (1).

L'adeguatezza di un prodotto finanziario derivato complesso al profilo di rischio di un cliente e la consapevolezza del cliente stesso in merito alla assunzione dei rischi connessi non può desumersi da scelte di investimento precedenti né dalla formazione accademica del cliente in ambito economico (2).

La dichiarazione del cliente di aver sottoscritto il *CMS Spread Ladder Swap* nell'ignoranza di molti degli aspetti tecnici, lungi dal ridimensionare la responsabilità dell'intermediario per concorso di colpa del cliente, ai sensi del § 254 *BGB*, prova invece il completo affidamento del cliente stesso sulla consulenza della banca (3).

L'intermediario non è tenuto ad informare il cliente dei margini di profitto sottesi ad ogni operazione di investimento consigliata. Tuttavia, nel consigliare un *CMS Spread Ladder Swap*, negoziato in contropartita diretta, l'intermediario finanziario che ometta di informare il cliente sul valore iniziale di mercato negativo è responsabile per violazione del dovere di informazione e assume una posizione in conflitto di interessi con quella del cliente (4).

II

THE HIGH COURT OF JUSTICE – QUEEN'S BENCH DIVISION COMMERCIAL COURT, 11 february 2010, n. 211; Mr. Justice Davide Steel; Titan Steel Wheels Limited (Claimant) v. The Royal Bank Of Scotland Plc (Defendant)

Intermediazione finanziaria – Negoziazione di derivati – Facoltà per una società che stipula contratti derivati nell'ambito della propria attività – Esclusione

Intermediazione finanziaria – Negoziazione di derivati – Assenza di prove documentali sulla azione della banca in qualità di *advisor* – Applicabilità del *duty of care* – Esclusione

Intermediazione finanziaria – Negoziazione di derivati – Clausole che limitano la responsabilità dell'intermediario nei confronti del cliente - Validità

Una società che stipula contratti derivati nell'ambito della propria attività non può agire per il risarcimento dei danni in qualità di "*private person*" ai sensi dell'articolo 150 del *Financial Services and Markets Act del 2000* (5).

Nel caso in cui non esista alcun documento scritto da cui si desuma che la banca abbia prestato un servizio di consulenza, né alcuna richiesta scritta da cui si evinca che è stata richiesta o prestata un'attività di consulenza, né alcuna risposta scritta in relazione alle singole operazioni e le conversazioni telefoniche non contengono richieste verbali di ottenere una consulenza, la banca non ha agito quale *advisor* e, pertanto, non è tenuta al *duty of care* in relazione alla negoziazione dei prodotti finanziari (6).

La seguente clausola «ad eccezione dei casi di negligenza, dolo o frode, la Banca non è responsabile per il lucro cessante, la perdita derivante da atti od omissioni compiuti nell'ambito o in relazione a o in connessione con i termini del contratto o i servizi forniti ai sensi dello stesso, qualsiasi diminuzione del valore degli investimenti acquistati o detenuti dalla Banca per conto di Titan, o eventuali errori di fatto o di giudizio di qualsiasi tipo» soddisfa il test di ragionevolezza, dal momento che: (a) vi è totale parità di potere contrattuale; (b) tali clausole rappresentano uno standard per molte banche; (c) non è difficile per il cliente ottenere la prestazione di un servizio di consulenza da una fonte diversa, qualora lo desideri (7).

I

(*Omissis*)

Following the hearing of 8 February 2011, the 11th Civil Senate of the Federal Court of Justice (BGH), as rappresented by Chief Justice Wiechers and Justices Dr. Joeres, Mayen, Dr. Ellenberger and Dr. Matthias, held as follows:

In response to the Plaintiff's appeal on points of law ("Revision"), the ruling dated 30 December 2009 of the 23rd Civil Senate of the Higher Regional Court of Frankfurt am Main (Oberlandesgericht, OLG) is reversed.

In response to the Plaintiff's appeal on points of fact and law ("Berufung"), the ruling dated 4 August 2008 of the 9th Civil Chamber of the Regional Court of Hanau (Landgericht) is amended as follows:

The Defendant is ordered to pay to the Plaintiff the amount of EUR 541,074.00 plus interest at a rate of five percentage points above the base rate since 5 February 2008.

Otherwise, the suit is dismissed and all other appeals are rejected.

The Defendant shall bear the costs of the legal dispute.

So ordered.

The Facts of the Case:

1. The Plaintiff is asserting claims for damages against the defendant bank to compensate for losses suffered as a result of erroneous investment advice received in connection with the conclusion in 2005 of a CMS Spread Ladder Swap contract constructed by the Defendant.

2. As early as February and July of 2002, the Plaintiff, which operates a medium-sized enterprise in the washroom hygiene business, entered into two interest rate swap contracts with another bank under which this bank was obliged, in reference to a nominal amount of EUR 1,000,000.00 for each contract, to pay to the Plaintiff a variable interest rate (respectively, six-month and three-month EURIBOR), in return for which the Plaintiff undertook to pay to the bank a fixed interest rate of respectively 5.25% and 5.29% from this reference amount. Both contracts were entered into for a term of ten years.

3. In two discussions on 7 January and 15 February 2005 which were attended on the Plaintiff's behalf by its managing director as well as its officer vested with general commercial power ("Prokurist"), who holds an economics degree, the Defendant, by means of a written presentation, advised the Plaintiff on the possibility of reducing the interest burden from the two ongoing interest-rate swap contracts. Since the interest rate had fallen dramatically in the meantime, the two contracts had negative market values as of the time the advice was provided – EUR 124,700 and EUR 130,825 – which the Defendant explained in the consultations. On the basis of its prediction that the difference (spread) between the two-year and ten-year interest rates would likely widen significantly in the future, the Defendant recommended a CMS Spread Ladder Swap contract, which the parties executed on 16 February 2005.

Under this contract, the Defendant was obliged, in relation to the reference amount of EUR 2,000,000.00, to make semi-annual payments to the Plaintiff for a period of five years in the amount of a fixed interest rate of 3% p.a., whereas the Plaintiff undertook to pay to the Defendant, on the same dates and in relation to the same reference amount, interest at a rate of 1.5% p.a. in the first year, and thereafter at a variable interest rate equalling at least 0.0%, such variable interest rate being calculated as follows in line with the development of the "spread" (Base Rate A_1 - Base Rate A_2) as specified in the contract deed:

"For the calculation period from 20 February 2006 until 18 August 2006:

1.50% p.a. plus 3 x [1.00% p.a. minus (Base Rate A_1 minus Base Rate A_2)].

For the calculation period from 18 August 2006 until 19 February 2007:

The preceding variable rate plus 3 x [1.00% p.a. minus (Base Rate A_1 minus Base Rate A_2)].

For the calculation period from 19 February 2007 until 18 August 2007:

The preceding variable rate plus 3 x [0.85% p.a. minus (Base Rate A_1 minus Base Rate A_2)].

For the calculation period from 18 August 2007 until 18 February 2008:

The preceding variable rate plus 3 x [0.85% p.a. minus (Base Rate A_1 minus Base Rate A_2)].

For the calculation period from 18 February 2008 until 18 August 2008:

The preceding variable rate plus 3 x [0.70% p.a. minus (Base Rate A_1 minus Base Rate A_2)].

For the calculation period from 18 August 2008 until 18 February 2009

The preceding variable rate plus 3 x [0.70% p.a. minus (Base Rate A_1 minus Base Rate A_2)].

For the calculation period from 18 February 2009 until 18 August 2009:

The preceding variable rate plus 3 x [0.55% p.a. minus (Base Rate A_1 minus Base Rate A_2)].

For the calculation period from 18 August 2009 until the end date:

The preceding variable rate plus 3 x [0.55% p.a. minus (Base Rate A_1 minus Base Rate A_2)].

Determination of Base Rate A_1: average 10-year swap rate (…) "based on EURIBOR" (…)

Determination of Base Rate A_2: average 2-year swap rate (…) "based on EURIBOR" (…)

4. The master agreement for financial future contracts which the parties executed on the same day called for a netting of the respective interest payments, to the effect that only the party which owed the greater amount on a given due date had to pay the difference between the amounts owed. In the absence of good cause, unilateral termination of the contract by either party was barred for a term of three years, whereupon termination was subject to compensatory payment of the contract's current market value. In the presentation documents used during the consultations, the Defendant's discussion of "risks" included, *inter alia*, a reference to the fact that, in the event that the interest rate spread fell markedly, the Plaintiff would have to make greater interest payments than it received. The Defendant described the Plaintiff's risk of loss as "unlimited in theory." At the time of the conclusion, the CMS Spread Ladder Swap contract had a negative market value in the amount of approx. 4% of the reference amount (approx. EUR 80,000), which the Defendant deliberately incorporated but did disclose to the Plaintiff.

5. Starting in autumn of 2005, the Defendant's prediction to the contrary notwithstanding, the interest rate spread relevant to the calculation of the Plaintiff's interest payment obligation fell steadily, with the Plaintiff's interest liability prevailing by the end of the first year. On 26 October 2006, the Plaintiff challenged the CMS Spread Ladder Swap contract, citing fraudulent misrepresentation – a claim the Defendant denied. On 26 January 2007, the swap transaction was terminated against the Plaintiff's compensatory payment in the amount of the then-current negative market value, EUR 566,850.00.

6. The Plaintiff is of the opinion that the swap contract entered into with the Defendant was void because it was immoral in nature (Sec. 138 of the Civil Code (BGB)) and failed to observe the transparency requirement (Sec. 307 para. 1 sentence 2 BGB). In addition, the Plaintiff claims it was the victim of fraudulent misrepresentation (Sec. 123 BGB) at the hands of and received erroneous advice from the Defendant, who had failed to sufficiently apprise the Plaintiff of the risks associated with the swap and recommended a transaction at odds with its risk propensity and investment goals.

7. Under the statement of claim served on 5 February 2008, the Plaintiff sued the Defendant for a refund

of its payment of EUR 541,074.00, as adjusted for interest payments received in the first year of the contractual term, plus interest. In the alternative, in the event that it should prevail either wholly or in part, it originally sought to have the Defendant ordered to provide indemnification for such other damages as may result from the tax authorities not recognising losses from the swap transaction as deductible operating expenses. At the appellate instance, it instead moved, in the alternative, for a declaratory judgment that the Defendant is liable for such other future damages as may yet result from the CMS Spread Ladder Swap contract entered into on 16 February 2005.

The suit was successful in neither court of lower instance. The Plaintiff is now pursuing its prayer for relief by way of this appeal on points of law.

Grounds for the Court's Decision:

8. Insofar as the appeal on points of law is aimed against the dismissal of the principal claim, it is justified. Accordingly, it results in the reversal of the challenged decision and, since further factual findings are not to be expected (Sec. 563 para. 3 of the Code of Civil Procedure (ZPO), in a judgment against the Defendant to the extent that the regional court's decision is hereby amended. Insofar as the appeal on points of law continues to pursue the motion in the alternative seeking a declaratory judgment, it is not successful.

I.

9. The appellate court whose decision is published in ZIP 2010, 921 et seq. has rejected the Plaintiff's claim on account of unjust enrichment as well as its claim for damages, essentially basing its judgment on the following grounds:

10. The CMS Spread Ladder Swap contract entered into between the parties was not void on account of its alleged immoral nature according to Sec. 138 BGB. The construct of private autonomy permits the execution of high-risk transactions. From the Plaintiff's viewpoint, the transaction had the appearance of a speculative bet with the added benefit that none of its own capital had to be wagered and that, under a realistic view realistic return prospects were possible. A high-risk transaction was not immoral even if gains were contingent on favourable circumstances.

11. Even if one were to assume that the contractual provisions constitute general terms and conditions, a view made questionable by the individual negotiation of the calculation formula's wording and the modification of the termination clause, the provision addressing the calculation of the payments to be made by the Plaintiff to the Defendant did not violate the transparency requirement under Sec. 307 para. 1 sentence 2 BGB. It was not apparent how, in the case under consideration, the complicated model could have been represented in a much more simple fashion, especially since a company with experience in business did not warrant the same level of protection as consumers.

12. A case of fraudulent misrepresentation giving the Plaintiff the right to challenge the contract pursuant to Sec. 123 BGB would require that facts requiring disclosure were concealed with some degree of intent. However, since the parties were bound to one

another under a consulting agreement, the question of the scope of disclosure duties had to be examined primarily from a contractual viewpoint.

13. The Defendant did not violate its duties under the consulting agreement. Its advice was given in a manner consistent with the investor profile ("anlegergerecht"). And while the bank dispensing advice had an obligation to inquire into the client's risk propensity (which is disputed between the parties) as a fundamental element of the investment goals, no duty of inquiry applied if and to the extent that the client did not warrant protection on account of its previous experience and knowledge. The fact that the Plaintiff had previously entered into two other interest swap transactions, which it claims merely served the purpose of hedging against the risk of an underlying transaction, may not be a decisive argument in this regard. However, it was significant that the meetings were attended not only by the managing director, but also by an economist who might have been expected to understand the structure of swap contracts and the mathematical formulas used, to the effect that the Defendant was under no obligation to make an issue of the Plaintiff's general willingness to assume considerable risk.

14. The consultation was proper in terms of matching the instrument to the investor ("objektgerecht") as well. Insofar as the Plaintiff claimed that a majority of experts had anticipated a reduction of the "spread," this question could remain open as the expectations were not verifiable. The uncertainty of future developments inevitably led to various viewpoints, which the Defendant was not obliged to mention. Since it was impossible to forecast interest performance years in advance with any assurance, such forecasts were of minor significance and did not warrant further inquiry. That the Defendant promoted the contract as a means of "interest optimization" was unfortunate in terms of its choice of words since a CMS Spread Ladder Swap contract is structurally not suited to the task of hedging against the risks associated with certain credit liabilities. However, this term, which was used in the presentation, should not be held to the academic standards of finance; in the broadest sense, any financial product, which in the event of favourable developments yielded earnings, was a suitable tool for the reduction of existing interest burdens. Moreover, the Defendant was under no obligation to point out that the contract between the parties had a negative market value at the time of closing. This value indicated what the client would have had to pay to the bank by way of compensation in the event of the contract's premature termination, and thus constituted, for the time being, a purely hypothetical amount, which was further subject to permanent changes and could also be called a "snap shot." Given the swap transactions previously entered into with another bank, it could be assumed that the Plaintiff was aware that swap contracts came with different starting prospects, to the effect that, at the time of conclusion, there was no balanced market value.

It was customary for the party wishing to end a contract prematurely to owe some kind of compensation, so that the negative market value,

which resembled an early termination penalty, warranted no special mention or disclosure.

15. Beyond that, the Plaintiff's managing director stated, on the occasion of the hearing, that he had agreed to the contract even though he had not understood the underlying model. By embracing a transaction with significant economic repercussions without the individual authorized to negotiate for and represent the Plaintiff having first gained an understanding of potential consequences, the Plaintiff knowingly took on a risk which it could not pass on to its contractual partner.

II.

16. These arguments do not withstand a legal review in some critical points.

17. 1. It may remain open whether the contract is immoral in nature (Sec. 138 BGB) or fails to observe the transparency requirement (Sec. 307 para. 1 sentence 2 BGB), or whether the Plaintiff's challenge has merit given the Defendant's fraudulent misrepresentation (Sec. 123 BGB), giving rise to a claim on account of unjust enrichment against the Defendant.

18. 2. At any rate, the prayer for relief seeking a payment in the amount of EUR 541,074.00 plus interest is justified because the Plaintiff holds a claim for damages on account of the defendant's breach of its advisory duty.

19. a) According to the appellate court's undisputed and legally correct findings, the parties entered into a consulting agreement.

20. b) Under this agreement, the Defendant is obliged to provide the Plaintiff with advice that is consistent with the investor profile and matches the instrument to the investor (cf. Senate's decision dated 6 July 1993 - XI ZR 12/93, BGHZ 123, 126, 128 et seq.). The specifics and scope of the advisory duty depend on the circumstances present, to the determinative factors being the client's existing knowledge, risk propensity and investment goal on the one hand and the general risks (e.g., economic trends and capital market development) as well as the special risks associated with the investment on the other (Senate's decisions dated 6 July 1993 - XI ZR 12/93, BGHZ 123, 126, 128 et seq., dated 7 October 2008 - XI ZR 89/07, BGHZ 178, 149 margin no. 12, dated 9 May 2000 - XI ZR 159/99, WM 2000, 1441, 1442, and dated 14 July 2009 - XI ZR 152/08, WM 2009, 1647 margin no. 49). While the disclosure to the client with respect to the factors that are of critical importance to the investment decision must be accurate and complete, the assessment and recommendation of an investment must be merely reasonable from an ex-ante viewpoint and in light of the factors mentioned. The risk that an investment decision made on the basis of advice that is consistent with the investor profile and matches the instrument to the investor is subsequently revealed as false is borne by the investor (Senate's decisions dated 21 March 2006 - XI ZR 63/05, WM 2006, 851 margin no. 21, dated 14 July 2009 - XI ZR 152/08, WM 2009, 1647 margin no. 49, and dated 27 October 2009 - XI ZR 337/08, WM 2009, 2303 margin no. 19).

21. c) Based on the appellate court's findings to date, it cannot be assumed that the Defendant properly discharged its duty to provide advice that is consistent with the Plaintiff's

investor profile. According to the findings of the appellate court, the recommended investment, the CMS Spread Ladder Swap contract, represents a high-risk transaction, a "sort of speculative bet."

Whether the Plaintiff was prepared to assume a risk this high is disputed between the parties. The appellate court incorrectly posited that this question was of no concern as the Plaintiff had been represented in the negotiations by an economist (the officer vested with general commercial power), who may reasonably be expected to understand the structure of swap contracts and their mathematical formulas in view of the sample calculations used in the presentation documents, to the effect that the Defendant was under no obligation to make an issue of the Plaintiff's general propensity for risk. This stance does not hold up to legal scrutiny on appeal.

22. aa) The appellate court assumes correctly, in theory, that the advising bank has a duty under BGH case law to inquire into the knowledge, experience and investment goals, which include investment purpose and risk propensity, prior to issuing a recommendation for an investment (Senate's decision dated 6 July 1993 - XI ZR 12/93, BGHZ 123, 126, 129). For financial services providers, such as the Defendant, this duty has also been standardised as a regulatory matter (Sec. 31 para. 2 sentence 2 no. 1 of the securities trading act (WpHG), previous version, or Sec. 31 para. 4 WpHG, current version). The duty of inquiry only lapses if and to the extent that the advising bank is already familiar with these circumstances – for instance, as a result of its long-standing business relationship with – or the previous investment behaviour of– the investor (Senate, l.c., p. 129; Hannöver in Schimansky/Bunte/Lwowski, Bankrechts-Handbuch, 3rd edition, Sec. 110 margin no. 32; Lang/Balzer in Festschrift Nobbe, 2009, p. 639, 644; ad Sec. 31 WpHG; Braun/Lang/Loy in Ellenberger/Schäfer/Clouth/Lang, Praktikerhandbuch Wertpapier- und Derivategeschäft, 3rd edition margin no. 256; Koller in Assmann/Schneider, WpHG, 5th edition, Sec. 31 margin no. 49; Lang, Informationspflichten bei Wertpapierdienstleistungen, Sec. 9 margin no. 16).

23. bb) The Plaintiff asserts that the Defendant did not establish its risk propensity. The Defendant argues that doing so was not necessary in view of the specific consulting situation and the Plaintiff's previous investment behaviour. This is not correct.

24. (1) Even if, as is the case here, the advising bank describes risks using sample calculations and notes a risk of loss that is "unlimited in theory," it cannot reasonably assume with respect to a highly complex structured financial product such as the CMS Spread Ladder Swap contract in question that a client who entered into the transaction is willing to take considerable risk. The investment advisor is specifically required to limit its recommendations to products that actually correspond with the client's investment goals, investment purpose and risk propensity. If it fails to inquire into the client's propensity for risk prior to making an investment recommendation, as case and regulatory law mandate, it can discharge its duty to make a recommendation consistent with the investor profile only by mak-

ing certain that the client understood the disclosed risks associated with the financial product in every respect before an investment decision is made. Otherwise, it must not assume that its recommendation matches the client's risk propensity. For this purpose, the Defendant would have had to make sure that the Plaintiff knows that its risk of loss, as opposed to the Defendant's risk of loss, is unlimited and exists not only in theory but also, in the event of certain interest rate trends, represents a very real possibility. There are no findings in this regard.

25. (2) Contrary to the appellate court's view, it is of no consequence in this context that an economist attended the consultation for the Plaintiff. On the one hand, the BGH ruled on multiple occasions that the client's professional qualifications alone do not suffice as grounds for the presumption of knowledge and experience in connection with future financial transactions so long as there is no concrete indication that such knowledge and experience was actually gained in connection with the pursuit of the client's professional activities (Senate's decisions dated 24 September 1996 - XI ZR 244/95, WM 1997, 309, 311, dated 21 October 2003 - XI ZR 453/02, ZIP 2003, 2242, 2244 et seq., and dated 28 September 2004 - XI 259/03, WM 2004, 2205, 2006 et seq.). This the appellate court did not establish.

The position of executive officer (*Prokurist*) with a medium-sized enterprise in the washroom hygiene business also does not suggest knowledge of the specific risks associated with the investment product at issue here. And on the other hand, the appellate court failed to see that the client's risk propensity cannot be derived from the pertinent knowledge it might have. Such existing knowledge does not affect the duty assumed by the advisor to identify the client's investment goals and identify a suitable product (cf. Braun/Lang/Loy in Ellenberger/Schäfer/Clouth/Lang, Praktikerhandbuch Wertpapier- und Derivategeschäft, 3rd edition margin no. 255; Koller in Assmann/Schneider, WpHG, Sec. 31 margin no. 49 – in each instance, with respect to "professional clients" within the meaning of Sec. 31a para. 2 WpHG, current version).

26. (3) Nor was the Defendant able to deduce a risk propensity commensurate with the CMS Spread Ladder Swap contract from the client's previous investment behaviour. The two interest swap contracts entered into with another bank as early as 2002 exhibit a much more simple structure and are not comparable in terms of risk. This is especially true if, as the Plaintiff claims, it entered into these contracts in order to hedge against the risks associated with a variable-interest loan. If such a related underlying transaction exists with a countervailing risk, the interest swap contract does not amount to a speculative assumption of an open risk position but is solely geared toward the "swap" of a variable-interest loan against fixed-interest debt and entails a waiver of the opportunity to partake in a favourable development of the interest rate (cf. Clouth in Ellenberger/Schäfer/Clouth/Lang, Praktikerhandbuch Wertpapier- und Derivategeschäft, 3rd edition margin nos. 1030 et seqq.; Jahn in Schimansky/Bunte/Lwowski, Bankrechts-Handbuch, 3rd edition, Sec. 114 margin no. 3).

But even if the Plaintiff had indeed entered into the swap contracts in 2002 without a corresponding connection to an underlying transaction, it did not embrace an unlimited risk of loss with these contracts – unlike the CMS Spread Ladder Swap contract. For the former, its payments were calculated on the basis of fixed interest rates, to the effect that its maximum risk was limited to the difference between these interest rates, 5.25% and 5.29%, and "zero." For this reason, no real significance should be accorded to the fact that, at the time the Defendant provided advice, the two 2002 contracts had respective negative market values of EUR 124,700.00 and EUR 130,825.00 as the Defendant notes in this context.

27. cc) To settle the question of the risk propensity of the Plaintiff, who – according to its own pleadings – intended to invest "conservatively," the Senate would have to remand the matter to the appellate court following the reversal of the appellate decision. However, this will not be necessary because it is clear for another reason that the Defendant failed to properly discharge its advisory duty.

28. d) The Defendant's advice was not proper in terms of matching the instrument to the investor.

29. aa) The requirements to be imposed on the advising bank to this extent are considerable for a structured product as complex and risky as the CMS Spread Ladder Swap contract. In contrast with the Defendant's view, the risks associated with this interest bet cannot be fully appreciated merely by understanding the steps comprising the calculation of the liability for variable-interest payments.

Rather, the advising bank must make it clear to the client in a comprehensible and non-trivializing manner that the unlimited risk of loss exists not just "in theory" but may be both real and ruinous depending on the development of the "spread." For this purpose, it is necessary not only to explain all of the elements of the formula used to calculate the variable interest rate (multiplication factor, "strike," link to interest rate of the previous period, client's minimum interest rate of 0.0%) and their concrete effects (e.g., leverage, "memory effect") for all conceivable developments of the "spread," but also to advise the client in no uncertain terms that the risk-reward profile is off-balance between the parties to the interest bet: While the client's risk is unlimited, the bank's risk is – irrespective of its own hedging transactions – limited from the start in that capping the variable interest at 0% ("floor") rules out a negative interest liability on the client's part, which could increase the bank's interest liability fixed at 3% p.a. Not having explained all of these factors, the bank cannot assume that the client understands the transaction's risks. Even in the case of a product this highly complex, a disclosure, the scope and depth of which depend on individual circumstances, must procure that the client's level of knowledge in terms of the transactional risk involved is largely identical with the bank's level of knowledge because a responsible decision as to whether the interest bet is to be accepted cannot be made otherwise.

30. Answering the question whether the Defendant met these considerable requirements for advice that

properly matches the instrument to the investor, which would necessitate additional judicial determinations, is a step that may be omitted as the Defendant committed another breach of its advisory duty.

31. bb) By contrast to the appellate court's view, the Defendant did breach its duty to advise by failing to disclose to the Plaintiff that the contract it recommended had a market value at the time of conclusion that was negative for the Plaintiff and equalled approx. 4% of the reference sum (approx. EUR 80,000.00). The appeal on points of law successfully takes aim at the appellate court's assumption that a disclosure of this nature was not required since the negative market value merely referred to the amount payable by way of compensation in the event of the contract's premature termination – which for the client and at the time of conclusion was entirely theoretical. This does not do justice to the significance of the negative initial value to the client; it is of critical significance to the assessment of the interest bet at issue because it is a manifestation of the defendant's serious conflict of interest.

32. (1) Under the consulting agreement, the bank assumes the duty to issue a recommendation tailored to the client's specific interests. For this reason, it must avoid – or disclose – conflicts of interest that may compromise the advisory goal and endanger the client's interests (Senate's decision dated 19 December 2006 - XI ZR 56/05, BGHZ 170, 226 margin no. 23, rulings dated 20 January 2009 - XI ZR 510/07, WM 2009, 405 margin no. 12 et seq., and dated 29 June 2010 - XI ZR 308/09, WM 2010, 1694 margin no. 5). This principle of civil law has been standardized for regulatory purposes in the area of transactions subject to the Securities Trading Act in Sec. 31 para. 1 no. 2 WpHG (Senate's decision dated 20 January 2009, l.c. margin no. 12).

33. (2) Accordingly, the Defendant had to disclose to the Plaintiff the negative initial value of the CMS Spread Ladder Swap contract, which it deliberately incorporated (likewise: Roller/Elster/Knappe, ZBB 2007, 345, 357; for similar results, see OLG Stuttgart, WM 2010, 756, 762 et seq., and WM 2010, 2169, 2173 et seqq.; l.c. OLG Bamberg, WM 2009, 1082, 1095; OLG Frankfurt am Main, WM 2009, 1563, 1564 et seq.; OLG Celle, WM 2009, 2171, 2174; OLG Frankfurt am Main, WM 2010, 1790, 1795 et seq.; OLG Hamm, BKR 2011, 68, 73; Clouth in Ellenberger/Schäfer/Clouth/Lang, Praktikerhandbuch Wertpapier- und Derivategeschäft, 3rd edition margin no. 1066 item 1258; Hoffmann-Theinert/Tiwisina, EWiR 2011, 9, 10; Jaskulla, WuB I G 1. - 3.10; Koller, WuB I G 1. - 4.08; Langen, DB 2009, 2710 et seq.; Lehmann, BKR 2008, 488, 496; Wolf, EWiR 2009, 763, 764; for what is likely another position against such a disclosure duty, see Weber, ZIP 2008, 2199, 2201).

34. a) When recommending the CMS Spread Ladder Swap contract, in which the profit of one party mirrors the loss of the other, the Defendant, as the advising bank, finds itself in a serious conflict of interest. As a party to the interest bet, it assumes a role that runs counter to the client's interests as the "swap" will turn out favourably for it only if its own forecast as to the performance of the base value – the wid-

ening of the interest difference – will not come to bear, causing the Plaintiff to suffer a loss. As the Plaintiff's advisor, however, it is obliged to look out for the Plaintiff's interests, which is why it should strive to generate the greatest possible gains for the client, which would translate into a corresponding loss for itself.

35. The Defendant means to solve this conflict of interest by not holding onto its role as the Plaintiff's "competitor" for the contractual term, instead passing its risks and rewards associated with the transaction onto other market participants by means of "hedging transactions." This does not have the desired effect.

Following the execution of the "hedging transactions," the Defendant no longer has a stake in the "spread's" development over the term of the swap contract only because it has already covered its costs and locked in its profits by means of these hedges. This the Defendant made possible by deliberately structuring the terms of the swap contract to the effect that it had a negative market value for the client in the amount of 4% of the reference sum (EUR 80,000.00). As the Defendant pleads, the current market value of the contract is determined using mathematical calculation models of a financial nature, which – in consideration of any option components – have the effect of comparing the parties' future fixed and variable interest payments and discounting them to the value date at the discount rates in effect as of the payment dates. Since the development of the variable interest rate is naturally unknown, the client's future payment obligations are calculated using a simulation model based on the forward interest rates computed for the value date. If, using the simulation models available, the "market" puts the risk assumed by the Plaintiff at the time of closing at approx. –4% of the reference amount, this means for the Defendant that its prospects are appraised positively in this amount, and it is this advantage it had others purchase as part of the "hedging transactions."

36. (b) The negative initial market value the Defendant incorporated thus betrays its grave conflict of interest and is further likely to endanger the Plaintiff's interests. If the advising bank draws benefits from the fact that the market currently assigns a negative amount of approx. EUR 80,000 to the risk assumed by the client with the products the bank recommended, there is a concrete risk of the recommendation being driven by factors other than the client's interests. Even though the forecast of a widening "spread" was reasonable at the time of the consultation, to the effect that losses from the swap transaction could not have been foreseen, the investment recommendation, as seen from the client's perspective, does appear in another light entirely once it becomes clear that the highly complex interest-calculation formula for its payments was structured such that the market currently rates its risks as more negative than the countervailing risks of its contractual partner and advisor.

By contrast to the view expressed in the response to the appeal on points of law, it does not matter whether the Defendant's incorporated profit margin was common to the market and did not significantly undercut the client's chances of success. Instead,

what counts is that the integrity of the Defendant's consulting service was placed in doubt when it let others purchase what was, at the time of closing and based on the calculation models, the client's prevailing risk of loss right after such risk was accepted by the client on the bank's recommendation.

37. (c) By contrast to the response to the appeal on points of law, the Plaintiff's need for disclosure did not lapse as a result of its knowledge of the negative market value at the time of conclusion; the appellate court did not make a determination to that effect. And to the extent that it allowed the assumption that the Plaintiff had been familiar with the investment concept entailing negative initial market values as a result of the swap contracts entered into with another bank in the year 2002, to the effect that it further knew that swap contracts were characterised by imbalanced starting prospects, we are dealing with a legal conclusion that does not hold up to the scrutiny associated with a review on points of law. Even if the two other swap contracts had likewise exhibited negative market values for the Plaintiff at the time of closing, which has not been established, it would remain to be demonstrated – and is not apparent – that the Plaintiff was advised accordingly by the other bank. On the basis of the Defendant's presentation documents, it was merely aware that the market values of these agreements had become negative by the time of the Defendant's consultation in early 2005 since the interest had fallen in the meantime.

38. (d) The Defendant accurately pointed out on the occasion of the hearing that a bank recommending its own investment products, as is the case here, is not obliged as a rule to note that it generates income with such products; this would be obvious to the client in such a case (cf. BGH, decision dated 15 April 2010 - III ZR 196/09, BGHZ 185, 185 margin no. 12). The inherent conflict of interest is so obvious that a separate notice need not be provided save in the presence of special circumstances. The conflict of interest requiring disclosure in this case is inherent in neither the Defendant's general profit-making motive nor the specific amount of the built-in profit margin. Instead, the need for disclosure is triggered solely by the particularity of the product it specifically recommended and the risk structure which it deliberately designed to the client's detriment in order to be in a position to "sell" the risk the client assumed as a result of its consulting service directly in connection with the conclusion. Unlike the bank's general profit-making motive, the client can specifically not recognize as much, and that the shift in rewards was disclosed in the terms of the swap contract, as the Defendant notes, does nothing to change that. By its own admission, a more or less complicated financial calculation is required to determine the swap's individual structural elements – one the bank can typically perform, but not the client.

39. e) That the Defendant did not disclose the built-in negative initial value is something it must answer for. Pursuant to Sec. 280 para. 1 sentence 2 BGB, the party subject to disclosure duties must plead and demonstrate that it is not responsible for a breach of duty (cf. BGH, decisions dated 18 January 2007 - III ZR 44/06, WM 2007,

542 margin no. 18, and dated 12 May 2009 - XI ZR 586/07, WM 2009, 1274 margin no. 17; Senate's decision dated 29 June 2010 - XI ZR 308/09, WM 2010, 1694 margin no. 3).

The Defendant did not plead circumstances capable of invalidating such a conclusion.

40. f) According to the presumption of behaviour in accordance with the given disclosure (cf. BGH, decisions dated 5 July 1973 - VII ZR 12/73, BGHZ 61, 118, 122 et seq., dated 16 November 1993 - XI ZR 214/92, BGHZ 124, 151, 159 et seq., dated 7 may 2002 - XI ZR 197/01, BGHZ 151, 5, 12, dated 2 March 2009 - II ZR 266/07, WM 2009, 789 margin no. 6, and dated 12 May 2009 - XI ZR 586/07, WM 2009, 1274 margin no. 22), which basically applies to all of an investment advisor's disclosure deficits, especially in the event of a party's culpable failure to disclose a collision of interest (cf. Senate's decision dated 12 May 2009 - XI ZR 586/07, WM 2009, 1274 margin no. 22), as is the case here, it is clear that the Defendant's breach of duty was the reason for the Plaintiff's investment decision. And the Defendant, which bears the burden of pleading and proof, has not pleaded circumstances opposing – or capable of invalidating – such a conclusion, either. Its pleadings to the effect that nothing indicated that the Plaintiff would not have entered into the swap contract had it been aware of the negative initial market value does not meet the requirements for the presentation of specific circumstances refuting the conclusion.

41. g) By contrast to what the Defendant believes, the claim for damages is not to be reduced to account for the Plaintiff's contributory negligence according to Sec. 254 BGB since the Plaintiff's managing director stated, on the occasion of the hearing before the appellate court, that he had agreed to the contract even though he had not understood the underlying model. According to permanent BGH case law, the party subject to a duty of information is prohibited as a rule under Sec. 254 para. 1 BGB from arguing that the damaged party should not have relied on the information provided and thus bore partial responsibility for the resulting damages.

The opposing view would run counter to the notion underlying the disclosure and advisory duties, according to which the investor may typically presume the advice received to be accurate and complete (BGH, decision dated 13 January 2004 - XI ZR 355/02, WM 2004, 422, 425, and dated 8 July 2010 - III ZR 249/09, WM 2010, 1493 margin no. 21, additional sources available; slated for publication in BGHZ). Consequently, a claim adjustment is not an option here. The Plaintiff's decision to transact the investment without understanding the investment concept specifically denotes such special trust, which moves investors primarily to heed "their" advisors' recommendations and prevents them from asking additional questions or making inquiries (cf. BGH, decision dated 22 July 2010 - III ZR 203/09, WM 2010, 1690 margin no. 15).

42. h) The amount of damages as provided by the Plaintiff, EUR 541,074.00, is undisputed.

43. 3. The alternative motion the Plaintiff submitted, in the event that it should prevail either wholly or in part, with a view to having the Defendant

ordered to bear the costs of additional damages, however, is unsuccessful. As the Defendant already asserted, accurately, before the appellate court, there is no interest in a declaratory judgment (Sec. 256 ZPO), to the effect that the suit is to be dismissed to such extent, with the appeals overturned accordingly. In cases of financial loss only, the admissibility of an action seeking a declaratory judgment depends on the likelihood of damages resulting from the breach in question (Senate's decision dated 24 January 2006 - XI ZR 384/03, BGHZ 166, 84 margin no. 27, additional sources available), and this is what is lacking here. In an attempt to establish possible future damages, the Plaintiff argued that, according to the tax provision of Sec. 15 para. 4 sentence 3 of the income tax act (EStG), losses from forward transactions must not be offset against profits as a matter of principle, to the effect that it faces additional damages in that the tax authorities would not recognise losses from the CMS Spread Ladder Swap contract as deductible operating expenses.

This is not a disadvantage that follows from the Defendant's breach of duty. On the one hand, under Sec. 249 para. 1 BGB, the Plaintiff may merely demand to be placed in the situation it would be in had it never made the investment decision based on advice provided in violation of duties, to the effect that the possibility of offsetting against losses was never available.

On the other hand, the fact that the losses from the transaction in dispute cannot be offset against income from business operations or other sources as a rule owes solely to the legal directive of Sec. 15 para. 4 sentence 3 EStG.

II

(*Omissis*)

Mr Justice David Steel:

INTRODUCTION.

In these proceedings, the Claimant ("Titan") has claimed for losses arising from the alleged mis-selling of two derivative products by the Defendant ("the Bank") in June and September 2007. The bank denies any liability and counterclaims for the costs of closing the transactions out.

Titan is a manufacturer of steel wheels for the "off-highway" vehicle industry. Titan's income is predominantly in euros whereas much of its expenditure is in sterling. Thus it needs to sell Euros and purchase Sterling on a regular basis. Therefore, whilst it may be committed to expenditure in Sterling over the medium term (for example by way of salaries and plant purchase), if the value of the Euro deteriorated Titan would be exposed to a shortfall in available income to meet its expenditure.

The claim concerns two currency swap or derivative products that the Bank provided in June 2007 and September 2007. In a nutshell Titan says that these products were so unusual and complex that (a) Titan's financial controller had no actual or implied authority to enter into them and the facts were such that the Bank knew this;

(b) the Bank advised Titan to take these products which were in fact unsuitable to its needs and thus is liable in negligence; (c) the Bank had a duty under the FSA rules to deal "fairly" with Titan including a duty to ensure that communications or descriptions of the products were accurate and not misleading and that, although the information provided by the Bank contained some health warnings, they did not go far enough.

The Bank on the other hand says that the claim was misconceived: (a) Titan had used these (or quite similar) products for a long period without complaint and the financial controller had actual, implied or ostensible authority to enter into them on Titan's behalf; (b) Titan was well able to work out for itself what was or was not suitable: and it either did so or cannot blame the Bank if its decision to use these products was misguided; (c) there was no advice given and the Bank's contractual terms make it plain that no advice was being given or if it was it should not have been relied upon; (d) there is no duty under the FSA rules which is actionable as a matter of breach of statutory duty by Titan.

The Bank has a counterclaim which represents the loss on the closing out of the two transactions in issue. This is valued at £2.8m plus interest. Whilst there may be some relatively minor issues as to the precise calculation of this figure, Titan accepts that if the claim fails they will have a liability of something like this under the terms of the transactions entered into.

The preliminary issue.

This is the trial of certain preliminary issues as directed by Mr Justice Flaux at a CMC on 30 April 2009 and as amended by the Order of Mr Justice Hamblen on 17 September:

(i) Issue 1: Was Titan a "private person" as defined by the Financial Services and Markets Act 2000 (Rights of Action) Regulations 2001?

(ii) Issue 3: In a series of telephone conversations between a Mr Annetts (Titan's financial controller) and a Ms Plested (a corporate treasury manager of the Bank), did the Bank act in the capacity of an advisor to the Bank and did it owe a common law duty of care in respect of advice given in respect of either (a) the June 2007 Currency Swap Product; or (b) the September 2007 Currency Swap Product? [1]

(iii) Issue 11: Are all or any of the contractual terms exclusion clauses which are subject to the Unfair Contract Terms Act 1977? If so, is the Bank entitled nevertheless to rely on such terms?

The Witnesses.

Titan called three witnesses to give oral evidence:

i) Mr Annetts.

Mr Annetts was the Financial Controller of Titan. He had been employed by the company since 1995.

ii) Mr Akers.

Mr Akers was the Chief Executive Officer of the parent company Titan Europe. Again he had held that position since 1995.

iii) Mr Wicks.

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[1] The order goes on to explain that this issue requires a consideration of, inter alia, the applicability, meaning and effect of the contractual terms referred to in paragraph 13 of the Defence and Counterclaim ("the contractual terms").

Mr Wicks had been the Financial Director of Titan from 1998 to 2004 and thereafter was a director of the parent company.

Titan also put in evidence a statement from Dr. Ellis a consultant with the securities industry. His evidence was fairly uncontroversial.

The Bank called two witnesses:

i) Ms Plested.

Ms Plested was a Corporate Treasury Manager with the Bank who had been in a front office role for foreign exchange business since 1996.

ii) Mr Nicklin.

Mr Nicklin was a Foreign Exchange Structurer within the Bank employed in that capacity since 2001.

Ms Plested and Mr Annetts had dealt regularly with each other since 1997 from which time Mr Annetts had placed a number of contracts for foreign exchange products. It was Titan's case in the main action that Mr Annetts had no authority to enter into some or all of these contracts on Titan's behalf. But for the purposes of the preliminary issues, the principal factual issue to which Mr Annetts and Ms Plested could contribute in their evidence was the extent to which Ms Plested had become the advisor of Mr Annetts and in that capacity had recommended or persuaded Mr Annetts to purchase the June and September products.

In fact the contribution which they could make in their written statements and oral evidence was at most marginal. This was because, quite apart from the usual contemporary documentation, almost all the relevant telephone conversations (during which on the Bank's case Ms Plested has acted in the capacity of "saleswoman" and on Titan's case of "trusted advisor") were recorded and both the recordings and transcripts of them were available to the court.

In this regard particular emphasis was placed on telephone calls on 26, 27 and 29 June 2009 and 18 September 2009. Titan claims that these conversations contained "advice" on the part of Ms. Plested uttered in her capacity as a "trusted advisor" in the field of foreign exchange transactions. In the event, the question as to whether "advice" was in fact tendered is very much a secondary issue to the question in what capacity Ms. Plested was acting. "Advice" can come in many forms including the provision of information, opinions, suggestions, recommendations and so on. Nonetheless, the two issues elide and the precise content of Ms Plested's share of the conversations was subjected to detailed analysis [2].

The Bank submitted that no "advice" was ever tendered. Titan submitted that Ms Plested had clearly offered advice and, if relevant, had gone well beyond merely providing an execution service or even straightforward marketing into the field of expressing views as to the suitability of various products for Titan's purposes and their likely impact. Accordingly it is necessary to review the conversations to see the context of the remarks, their emphasis and their tone as well as their content.

Before embarking on this task it is necessary to divert onto the issue of

[2] Indeed much of it was set out somewhat unhelpfully verbatim and at length in the Particulars of Claim.

disclosure. During the course of the hearing it became clear that notes of various telephone conversations earlier in 2007 produced by the Bank had been prepared much later in the year by Ms Plested at the request of the Bank. These notes were based on further recordings which had been listened to by Ms Plested but had not been disclosed.

A request for further disclosure elicited the response from the Bank that the recordings could not be found and thus must have been lost or destroyed. The notes were quite short and did not contain any material to suggest that the earlier conversations were of any significance in determining the issues. The highest it could be put, as Ms Plested accepted, was that the tone of the June and September conversations was of a piece with all earlier conversations.

After the evidence had been completed but in the somewhat prolonged period before final speeches the Bank revealed that some of the recordings had been found after all, not on the main system (from where they had been deleted) but on Ms Plested's own computer. They were in due course transcribed and included in the trial bundles.

This was unquestionably an unsatisfactory situation. The Bank's failure to search Ms Plested's computer earlier was a potential breach of its disclosure obligations. But equally unfortunate was Titan's overreaction to this development. On the basis that the Bank had earlier made a "false statement" about the relevance of the material, Titan sought wide ranging further disclosure, an opportunity to cross-examine the author of the witness statement producing the recordings and the recall of Ms Plested for further cross-examination. This in turn was the basis of an application to adjourn the period of two days set aside for speeches and to fix another period of 3-4 days to allow for such cross-examination as well as final submissions.

In the result, as appears below, I refused these applications save that I did make provision for half an hour at the beginning of the first day of speeches for further cross-examination of Ms Plested. At that stage I had not read the newly disclosed transcripts and did not want to preclude Titan from putting any significant features of them to Ms Plested [3]. In fact, Ms Plested was unable to attend since a doctor's certificate recorded that she should refrain from work as a consequence of "work related stress related to the Titan Court case".

In due course it became quite apparent to me that the transcripts added nothing to the case. My hesitation in allowing further cross-examination was fully justified:

i) There was no pleaded case that they contained any relevant advice nor was there any application to amend.

ii) Their only value, if any, was to assess the accuracy of Ms Plested's notes: it was quite apparent that, although succinct, they were an entirely fair summary of the conversations.

I add this by way of postscript. The absence of Ms Plested for the re-

[3] Although there could be no dispute as to what was said and Ms Plested's views as to whether she was in fact giving advice would be of little assistance.

sumed hearing was for these reasons not prejudicial to Titan. In any event, it was open to them to make submissions about passages in the transcripts (if necessary by comparison with the notes) which might bear on her credibility. Titan sought to suggest that the notes demonstrated the addition of a spin on the related conversation. As already indicated, I am quite unable to agree. Titan could, if so advised, seek to rely on the emergence of the "stress related illness" as indicative of her want of credibility. To my dismay, such was in due course suggested.

Not content with this point, Titan submitted in closing submissions that further adverse inferences could be drawn from the fact that even now there were 17 notes but only 13 recordings relating to them on Ms Plested's computer, one of them being on the date of the February transaction that was closed out in June. This was said to reflect cherry picking by the Bank in pursuit of a "conscious or unconscious attempt" to identify only those telephone calls which suggested that Mr Annetts was familiar with the products.

It is difficult to see how this proposition could be advanced without alleging some form of dishonest or at least reckless conduct. I entirely acquit the Bank of any such allegation. There is nothing within the material recently disclosed which suggests let alone demonstrates that selective disclosure to advance the Bank's case has been embarked on whether deliberately or not.

One last point on what I regarded as the disproportionate response of Titan to the relatively insignificant defects in the Bank's disclosure. At the end of the evidential hearing on 22 October 2009, I invited the parties to fix a 2 day hearing for final speeches to be preceded by the exchange of written submissions. For the convenience of the parties it was in due course agreed that the further hearing should be a month later on 19 and 20 November 2009.

When faced with the application by Titan for an adjournment to allow time for further evidence and a longer period for speeches, I had to explain that I could not offer a 3 to 4 day period before Easter 2010 [4]. The problem was further exacerbated by the uncertain length of Ms Plested's illness. Further any substantial further delay would have made my task of preparing a written judgment unduly onerous.

Against that background, as explained at the resumed hearing, considerations of convenience gave overwhelming support to completing the hearing without further cross-examination on matters which were at best peripheral. The suggestion that matters be stood down pending a medical examination of Ms Plested on behalf of Titan was, in my judgment, simply unreal.

THE BACKGROUND.

As explained Titan is a manufacturer of steel wheels for the off-highway vehicle industry. In 2007, it had a turnover of £36.5 million. It is a subsidiary of Titan Europe plc, a substantial engineering group with a turnover of

[4] Which would have constituted day 5 of a hearing estimated for 3 days.

£450 million. Titan had been with the Bank for many years. In early December 1997, Titan had executed a treasury mandate for the Bank in respect of a variety of transactions including foreign exchange transactions and currency options the latter to be governed by the 1992 ISDA Master Agreement.

The mandate provided:

"We confirm that the Treasury Transactions we enter into shall be legal, valid and binding obligations upon us. In entering into Treasury Transactions we will act solely as principal and not on behalf of any other person and we will not rely on the skill or expertise of any Bank employee or officer when entering into Treasury Transactions.

…

We acknowledge that telephone dealing will be recorded by the Bank and we may also record such conversations. The Bank is entitled to rely on telephone instructions received in good faith. We acknowledge that the Bank will have no liability for entering into Treasury Transactions in reliance upon such instructions provided the Bank does not act negligently."

The mandate was signed by Mr. Wicks and authorised among others both himself and Mr Annetts to enter into trading transactions. This arrangement was taken further on 25 February 2004 when the Bank wrote to Mr Annetts classifying Titan as an Intermediate Customer [5] and enclosing the Bank's terms of Business.

The letter stated:

"This letter and the Terms of Business supersede any documentation that may have previously been sent to you and will apply to all our dealings…

…Please read our Terms of Business carefully. They contain important information about our respective rights and obligations, including about certain limitations on our liability to you.

When you have reviewed the enclosed documents, you should keep them and this letter for guidance and reference. By conducting business with us you will be deemed to have agreed and accepted our Terms of Business which will therefore become legally binding on you and, in the absence of any other agreement between us and you, will apply to all dealings which we may conduct with you or on your behalf. Your attention is also drawn to the representations and warranties in Clause 3 of these Terms of Business.

If you are in any doubt about the meaning or the legal or financial effect of these Terms of Business or any other documents we provide to you, you should obtain professional advice as necessary.

If you have any questions or if you are dissatisfied with our services under these Terms of Business, please contact in the first instance the Compliance Department…"

The attached terms of business set out the nature of the services which the Bank was prepared to provide to Titan, the basis of such services, and the respective rights and liabilities of the parties in respect of such services:

Cl. 1.4: unless the Bank notified Ti-

[5] Pursuant to COB 4.1.

tan otherwise, the service which the Bank provided was a general dealing service on an execution only basis in identified investments including options and futures. The Clause continued:

"Unless otherwise agreed between us, we will not provide advisory services."

Cl. 1.5: all business which the Bank conducted with Titan was governed by the banking terms.

Cl. 3.10: Titan undertook that, where necessary, it would take independent advice (including legal advice) to ensure that it fully understood the provisions of the banking terms and the legal and financial effects and risks of any transactions the Bank undertook with or for it.

Cl. 4.6: It was provided that any information which the Bank provided to Titan relating to trades was believed to be reliable but no representation was made or warranty given, or liability accepted, as to its completeness or accuracy. Any opinions constituted the Bank's judgment as of the date indicated and did not constitute investment advice or an assurance or guarantee as to the expected outcome of any transaction.

Cl. 4.7: It was provided that the Bank need not see that its dealings for Titan take account of any research which had been carried out for its market makers or otherwise with a view to assisting its own activities. Further the Bank need not see that any information it gave was given either before or at the same time as it was made available to it or an affiliate. It was agreed that Titan may not rely on any such information without independently verifying it and making its own judgment. The clause continued:

"In particular, we do not act as your adviser or in a fiduciary capacity. For the avoidance of doubt, we are providing you with an execution-only service, with no advisory services."

Cl. 4.13: except where expressly agreed to by the Bank or as required by the FSA Rules, the Bank was under no obligation to give any general investment advice or advice in relation to a specific transaction or proposed transaction, to supervise or manage any of Titan's investments or to give any tax advice.

Cl. 4.18: the Bank had no duty to advise on or exercise judgment on Titan's behalf as to the merits of any transaction which it might present to Titan.

Cl. 12.5: except to the extent that the same resulted from its gross negligence, wilful default or fraud, the Bank was not liable for any loss of opportunity, loss resulting from any act or omission made under or in relation to or in connection with the banking terms or the services provided thereunder, any decline in the value of investments purchased or held by the Bank on Titan's behalf, or any errors of fact or judgment howsoever.

Titan initially purchased vanilla forward currency contracts. However from 2000 onwards, Titan purchased 23 structured products from the Bank [6]. The purchase of these products followed a consistent pattern. In

[6] In addition, from 2006 Titan also purchased similar structured products from two Irish Banks.

particular, immediately following each transaction the Bank would forward a "post-transaction acknowledgement" ("PTA") to be signed on behalf of Titan which had various notes:

i. Note 4: that Titan was acting for its own account and had made an independent evaluation of the transactions entered into and their associated risks and had had the opportunity to seek independent financial advice if unclear about any aspect of the transaction or risks associated with it, and it placed, or had placed, no reliance on the Bank for advice or recommendations of any sort.

ii. Note 6: the Bank drew the attention of Titan to its terms of business.

After a short period the Bank would forward a "Confirmation" of the transaction which also contained notes as follows [7]:

a) Under the General Notes, that each party represented to the other party on the trade date of the transaction that, absent a written agreement between the parties that expressly imposed affirmative obligations to the contrary for the transaction:

i) Non-reliance: it was acting for its own account and it had made its own independent decisions to enter into the transaction and as to whether the transaction was appropriate or proper for it based upon its own judgment and upon advice from such advisers as it had deemed necessary. It was not relying, and had not relied, on any communication (written or oral) of the other party as investment advice or as a recommendation to enter into the transaction; it being understood that information and explanations related to the terms and conditions of the transaction should not be considered investment advice or a recommendation to enter into the transaction, no communication (written or oral) received from the other party should be deemed to be an assurance or guarantee as to the expected results of the transaction;

ii) Assessment and understanding: it was capable of assessing the merits of and understanding (on its own behalf or through independent professional advice), and understood and accepted, the terms, conditions and risks of the transaction. It was also capable of assuming, and assumed, the risks of the transaction.

iii) Status of parties: the other party was not acting as a fiduciary or an adviser to it in respect of the transaction.

As already mentioned, all or most of the transactions were entered into following telephone conversations between Mr Annetts and Ms Plested. There is an issue as to whether Mr Annetts had authority to act on Titan's behalf. It is Titan's pleaded case that Mr Annetts was acting "without the knowledge, direction and supervision of the Finance Director or the Board of Directors and was thus on a frolic of his own".

This issue does not form part of the preliminary issues and I propose to make no further finding about it. Nonetheless it is important to note as part of the material relating to the Bank's status vis-à-vis Titan the following:

[7] It is clear that the twenty or so transactions entered into with two Irish Banks were reflected in documentation of a very similar nature.

i) The scale of purchase of foreign exchange products was very large. This is not remotely surprising given the quantum of Titan's Euro earnings.

ii) Titan's published accounts recognised the need for minimising the effect of adverse currency movements. Risk management in that regard was said to be conducted under written policies approved by the Board of Directors.

iii) Mr Annetts explained in his evidence that he had regularly or at least frequently discussed foreign exchange transactions with the Financial Controller of Titan Europe (Sue Bowron) and Mr Wicks [8]. He also made written reports on contracts to Miss Bowron setting out the principal terms.

Quite how the question of Mr Annetts actual or apparent authority will emerge in due course is unclear. He may prove to be a "rogue" trader. But for the moment I accept the Bank's proposition for the purpose of determining the preliminary issues that either foreign exchange issues were conducted and supervised by senior management in accord with board policies or they ought to have been.

The June transaction was entered into against the background of three earlier products bought by Titan from the Bank:

i) One dated 8 February 2007 which involved the sale of up to €1.5m per month by Titan to the Bank over a period of up to 17 months. The amount that Titan was obliged to sell and the period over which there was an obligation to sell depended on the future movement of the Euro against sterling.

ii) One dated 20 February 2007 on similar terms involving an obligation to sell up to €800,000 per month for up to 17 months.

iii) One dated 5 March 2007 on slightly different terms involving an obligation to sell up to €500,000 per month for 10 months.

The products broadly worked as follows:

i) Titan was entitled to sell a base amount of euros each month if the rate of the Euro against sterling rose above a certain level (the "upper level"). Thus Titan would be likely to sell €750,000 per month so long as the Euro rate was above 1.45 (ie £1 - €1.45) at a fixed rate of say 1.45. If, again for example, the rate was €1.50, then the sale of €750,000 at €1.45 would produce £517,241 as opposed to a sale at spot which would produce only £500,000.

ii) If the Euro/Sterling rate was in a band between the upper level and a lower level (the "lower level") then Titan would have no obligation to sell Euros and could trade at spot.

iii) If the Euro-Sterling rate fell below the lower level then Titan was obliged to sell a quantity of Euros at the lower level (and in some but not all cases, a higher quantity of Euros). Thus in this example the product might provide that if Sterling fell below €1.42 Titan would be obliged to sell €1.5m per month at the upper level. (This latter aspect was not part of the 5 March 2007 product.).

In addition the trades had other elements such as "knock-in" and "knock

[8] As regards transactions with Irish banks, Mr Wicks was a regular signatory.

out" terms. Thus a product might extend (knock in) if the Euro fell below a certain level on a certain date; or the product might end prematurely (knock out) if the Euro rose above a certain level at a certain time or for a certain period.

The June transaction replaced these three products. The spot rate had moved adversely to Titan and by mid-April there was a telephone discussion between Ms Plested and Mr Annetts as to a possible restructure. Ms Plested's note summarising that conversation (which I regard as a fair and complete) reads as follows:

"Looking at possible restructure. Confirm current structure protects EUR 2.15m per month and commits them to a maximum of EUR 3.8m per month. GA comments that it has to go lower for that to happen though, which he feels is unlikely. PP says that it seems unlikely but we must consider that if we move to 1.42 for example then you will have to sell EUR 3.8m. GA says they have a minimum of EUR 2-2.5m every month at least with a further EUR 11m being currently swapped forward. PP says that it is important that you do not become over-hedged and the possible consequences of losses as a result. Confirm amounts are ok. Spot is at 1.4720. GA asks can we get 1.45? PP says we could but it would have to be on some sort of leveraged transaction ie with an extension or ratio. GA says he doesn't mind a ratio. of 2:1. PP states that extension looks cheap to tear up at 1.45 as it looks unlikely to take place based on current rates. Trade likely to stop in June so look to firmer hedging beyond. GA states at the end of this 1.45 is what we are trying to achieve".

Mr Annetts reverted to the topic on 18 May and suggested that a restructure be considered sometime in June. Ms Plested and Mr Annetts duly discussed a restructure in a series of conversations between 26 and 29 June. During these conversations it was Titan's case that Ms Plested was "advising" Mr Annetts to take the new product as a suitable replacement. The Bank's case was that Ms Plested was simply "selling" a replacement product.

There are recordings of the conversations which I have listened to (as well as transcripts which I have read). I only propose to summarise parts of them:

i) 26 June.

Mr Annetts was home with his leg up. Ms Plested was in her office. The terms of the existing products were considered against the prevailing spot rate of 1.4855. Put shortly Ms Plested left matters on the basis that an accrual might be the way forward and that if she "came across anything remotely decent" she would contact Mr Annetts.

ii) 27 June.

Ms Plested duly rang back and reported on a discussion within the Bank as to the terms of a single trade to replace the existing three. There can be no doubt that Ms Plested expressed views as to the purpose and merit of entering into the replacement transaction. For example:

P: "And that's it. Uh, if we go below 142.90, which is your participation rate, uh, then you're basically selling €500,000 at 146.80. Um, so what I've looked at doing, and, and you know, I've [unclear], I've had about two or three, two or three of us looking at this, and we think we've come up

with something that looks okay. Um, its basically to get rid of those three transactions. The ones that we've got, the three that we've got in place at the moment, tear them up. Um, because effectively we don't have sufficient protection in your existing one, the larger of the two, the 750 into one and a half. We've got sufficient protection in that and at the same time we've not got sufficient benefits if we go down, uh, too far because you, you're doubling up at 145 aren't you?".

A: "Yes, yes".

P: "Uh, if we go sub 145. So what, what I've looked at is getting rid of all three of them, um, and replacing it with a single trade, um, and the one that we're currently looking at, is protection at 147…".

P: "But overall I think that's a far better position, than what we've currently got at the minute, um, because at the moment we've got, um, this trade that looks a little bit, you know, as though it could turn a little bit nasty, because of we go sub 145, then suddenly you're selling €1,5 million at 148.75 aren't you?".

P: "…Because I think the thing we've done previously is concentrate on getting participation limits very low, when it actually, in actual fact, it's better to concentrate on the protected rate and getting that lower, um, because, you know, ultimately we're paying for participation rates that have not given us any benefits".

She offered to e-mail her suggestion to Mr Annetts at home.

iii) E-mail of 27 June.

This she did later that day in an e-mail which set out her ideas or proposals for closing out the three outstanding transactions and replacing them with a single trade. The nature of the proposal was as follows:

a) The June product was a "ratio trade". It set a "protected rate" and a "barrier rate". The initial contract was for 9 months. At each monthly reset, there were three possibilities:

i) If the £:€ spot rate was above the protected rate (i.e. if the £ had strengthened), then Titan sold €2m (or latterly €1.5m) at the protected rate. This was its hedge against a strengthening pound.

ii) If the £:€ spot rate was at or below the protected rate and had not traded at the barrier rate, then Titan could sell any amount of € at the spot rate.

iii) If the £:€ spot rate was at or below the barrier rate (ie if the £ has weakened), then Titan sold €4m (or latterly €3m) at the protected rate. The additional €2m or €1.5m sold against a weakening pound was therefore the risk element, in that Titan would lose the opportunity to sell those Euros at the more advantageous spot rate. However, even in this event, the rate was the protected rate which Titan had agreed for its hedge.

b) At the end of the 9 month period, if the £:€ spot rate had fallen a certain amount, then the agreement extended for a further 9 months at slightly different rates, and on a €3m/€3m monthly basis.

The e-mail concluded as follows: "The reasons for suggesting this as a possible restructure are:

1. To improve on the protected average rate from 1.4780 to 1.47.

2. Increase the amount protected - from EUR 1.65m to EUR 2m per month.

3. To improve the participation rate on the largest trade - from 1.45 to 1.4285.

4. Should the trade extend, it is with an improved protection rate - from 1.47 to 1.46.

Things to consider are :

1. The extension had been both moved further out (from Dec 07 to Mar 08) and increased in term from 6 months to 9 months.

2. If 1.4285 trades, Titan are committed to sell EUR under the ratio at the protected rate."

It is highly significant in my judgment that although great play is made of the contents of the telephone calls in advancing the claim this e-mail is not relied upon by Titan as containing any advice let alone inappropriate advice.

iv) 29 June.

Ms Plested and Mr Annetts discussed this email on 29 June at some length. The focus of the discussion was the anticipated value of sterling. The spot rate was 148.80 against a protected rate of 144. Ms Plested's view on the structure of the replacement product was as follows:

P: "So the 147 then, because, you know, if you were doing forwards at the moment, for the period that you're looking at, ah, you know, you're nowhere near it, I mean, you're basically getting, um, about 170-odd points, forward point deduction, for the full, to, you know, out to December 2008. So if you're looking at 170 points off and we're at, you know 149, for argument's sake, um, you know, your forward rate's 147 and-a-half, that sort of level, isn't it? And then obviously you've got your participation rates going down anyway. Um, so the actual, um, extension part…I mean I was looking initially, um, at just doing it for this year, with the 12 month extension on the end, and then, and then, one of the guys who was, who was looking at it for me, he was saying, well what about nine months into nine months, does that not suit better? So that you've got nine months guarantee with a potential nine months stuck on the end, and I thought, well, maybe that, maybe that does make more sense so that, you know, you've got more of a guaranteed amount in the front end of your contract, as opposed to just having a six-month rate. But you know, in answer to your question, um, you know your two into four and then your three million straight through, um, for the whole of next year, um you, you know, the amounts do stand…"

As regards future movement she said:

"Well it's, it's you know, we're looking at probably, interest rates going to maybe 6% and you look at the cash markets, you look at, you know, where sterling deposit rates are and you've got 12 month deposit rates that are looking at six and a quarter, you know, and this sort of thing. So, you know, I don't think sterling's going to go, you know, too far in… downwards. I'm thinking that it's, if anything it's going to sort of do what it's done in the last six, 12 months and sort of stay above 145 and you know, head higher, if anything. Um, I mean I know that, you know, Europe are turning around and they're looking at picking interest rates up and that will, you know, attracts something, but you know, we've been here before, ah I'm just, you know, again, I'm not particularly convinced on it. Um, but, you know, I would need to get this re-priced because obviously spot is…"

In fact Ms Plested's computer broke down during the initial conversation and a further conversation took place later in the day. They both were of the view that sterling was likely to strengthen and that any loss would only arise if it fell below 142.85 and even then there would be a further restructure.

"A: I think so, yes, I mean, I don't think I need to talk to anybody really because, uh, nobody's really got a clue…".

P: "[Laughter], yes".

A: "…on anything else…".

P: "You're on it, so…".

A: "I, I mean, we're leaving it to the experts, so…".

P: "Yeah, I mean, you know, you, you, um, from the point of view of, um…".

A: "And, and the one thing I've done is to actually protect it, if it screws, and I think that's the main thing really".

P: "Yeah".

A: "I know I'm not going to make a load of money, nut I'm trying to save us from losing a lot of money. I don't know if you see what I mean".

P: "Yes. I appreciate that, absolutely, yeah".

A: "I mean if I can make some more, fine, but I think the biggest thing is if I stop us from crashing out into the 150-plus scenario. And, I mean, that would really be a problem then".

Ms Plested asked Mr Annetts whether he wanted to put the deal in place. The conversation continued:

PA: "Um, but you know, as it, as that stands that, that is, I, I think it's a decent trade, I really do".

GE: "Oh, okay, yes. Yes, okay. Yeah, yeah".

PA: "It's certainly better than what we've got currently".

GE: "Sure, sure, sure".

PA: "Um, only I think it addresses some issues that are developing, you know…".

GE "Yeah, yeah".

PA: "In terms of like, you know, larger Euro amounts that we need to get, you know, keep a cap on, really".

GE: "Yeah, okay, fine. Excellent, yeah".

PA: "Well, I'll put this in place and I'll get a confirmation to you on your next [?] talktalk.net".

GE: "Yes, yes, that's fine".

PA: "Is that okay?".

GE: "That's, that's fine".

v) Post Transaction Acknowledgement.

This was sent out on 29 June in anticipation of a "legal confirmation". The notes to the standard form are described above. In broad terms the contract operated as follows:

a) Titan would sell and the bank would purchase € 2m per month at 1.4670 if the spot rate was at or above this rate at the monthly "expiry date" (effectively a monthly anniversary of the agreement).

b) If at each expiry date the spot rate was below the upper rate of 1.4670 and had not traded at a rate below a lower rate ie 1.4285 in the previous four week period, Titan would not be under any obligation at all and could sell as many Euros as it wanted at the prevailing spot rate.

c) If at each expiry spot was below the upper rate and had traded below the lower rate during the previous four week period, Titan was obliged to sell €4m at the protected rate.

d) If on the final expiry date (ie 28 March 2008 – after nine months) spot was below the upper rate, the trade continued for a further 9 months.

Mr Annetts replied by email on 2 July: "Please proceed with this trade structure".

vi) Out of the money.

The closing out of the earlier products gave rise to a total cost of €187,824. This was not a topic raised by Ms Plested or queried by Mr Annetts during their conversations. In her oral evidence Ms Plested readily accepted that as a matter of good practice she ought to have drawn attention to the fact that the earlier trades were "out of the money" and the measure of the loss.

In the result however, there was delay in the despatch of the subsequent Confirmation or in Mr Annetts accepting it. In the meantime, the mark to market loss was reported orally to Mr Annetts on 30 June. Full details of the loss were provided in an e-mail dated 9 July:

"The report will show plus and minus figures for each individual option, so probably wont mean a great deal.

The reason for the loss is the close out cost of the 3 outstanding transactions that were recently restructured. The majority of the closeout cost relates to the extension that the Bank owns i.e. RBS owns the right to buy EUR from Titan at the rate of 1.45 where spot on the extension dates is BELOW 1.45.

This MTM loss has been carried forward into your new trade.

So even where spot is favourable today at 1.48, a snap shot MTM valuation may still produce a loss, as this is a measurement of the possibility that spot on the future extension date, could be considerably lower eg at say 1.20 - RBS will have value in their trade".

vii) Confirmation dated 2 July.

This was in standard form as described above. Notably no complaint was made in response about the newly reported loss despite the suggestion in Mr Annetts' second witness statement that if he had been told: "I would not have agreed to this without involving a board member of Titan". Indeed whether he did or did not, he executed the Confirmation on 25 July.

September product.

i) E-mail 18 September.

On 18 September Ms Plested sent an e-mail to Mr Annetts containing a proposal for a further product. (There had been an earlier conversation of which there is no transcript or even note.) The e-mail explained the idea behind the product as follows:

"The idea below gives you the opportunity to outperform the spot and forward rates for your expected EUR requirement. Importantly, it is not a hedge. However, this additional trade does give you the opportunity to achieve rates better than what is available in the market by conventional spot or forward contracts.

The numbers below are based on a minimum of €0.5m per month and a maximum of €1m per month. The basis for the trade is to provide an enhancement to your existing hedge and to run in conjunction with it."

The September product was a "knock-out trade", which meant that it would be terminated in certain identified events. This meant that, as Ms Plested expressly pointed out to Mr Annetts: "Importantly, it is not a

hedge". Under the terms of the transaction, there was an "accrual rate". At each monthly reset, if the £:€ spot rate was above the accrual rate, then Titan sold €500,000 at the accrual rate. If the £: € spot rate was below the accrual rate, then Titan sold €1m at the accrual rate. However, the trade would be terminated, if and when Titan earned more than 10 cents in the Euro against the spot rate.

The e-mail ended as follows:

"General.

The above trade will have credit line utilisation (CLU) of circa £750k. This CLU figure represents with 95% confidence, based on historic rate movement, the most that the Bank would expect to lose in the event of your default on this trade. Clearly this impact would only be felt to this extent in the event of aggressive EUR strengthening. Put another way, according to our calculations, and with a 95% confidence level, this is the maximum negative value that we foresee this trade accruing from a close out/valuation standpoint. Our calculation of CLU is our internal expectation of the maximum close out cost and is by no means a guarantee that this will be the case. In extreme market conditions, this figure could be higher. Please use this calculation as a guide only.

Obviously this trade works best when the spot rate is low and we are currently within 1 cent of the year's low. I've attached a GBP/EUR chart for reference."

It is notable that, as before, no reliance whatsoever is placed by Titan on this e-mail as containing any "advice".

ii) 18 September telephone conversation.

This e-mail was discussed in a telephone conversation between Mr Annetts and Ms Plested on 18 September. Once again it is Titan's case that Ms Plested was providing "advice" during this call while the Bank says that she was simply "selling" the product. Mr Annetts was clearly concerned at the scale of the product albeit he recognised that sterling would have to fall considerably (below 135) to cause any difficulty. Spot was 144 and Ms Plested thought that it was unlikely to fall significantly below 140 [9]. Ms Plested recognised that it was a "big decision" which Mr Annetts might want to take time over. Mr Annetts decided however to "go for it" but asked whether "anyone else was doing the same" to receive the assurance that Titan was not a "guinea pig" and not being "greedy". (It was in fact however a relatively new form of product.).

The resulting contract worked broadly as follows:

i) If at the end of each month the spot rate was above a given rate (this changed as the trade progressed but started at 1.35) Titan could sell €500,000 at this rate.

ii) However if the cumulative differential between the given rate and the spot rate reached 10 cents (ie by adding the difference between the given rate and spot rate at each successive expiry) the whole trade could knock out with no further obligations on either side.

[9] In any event there was the protection afforded by Titan's stockpile of euros.

iii) If the trade did not knock out and if the spot rate at an expiry was at or below the given rate, Titan would sell €1m at that rate.

ISSUE 1: Was Titan a "private person" as defined by the Financial Services and Markets Act 2000 (Rights of Action) Regulations 2001?

Titan has pleaded a statutory cause of action against the Bank under Section 150 of the Financial Services and Markets Act 2000 ("FSMA"). This section provides as follows:

"Actions for damages

(1) A contravention by an authorised person of a rule is actionable at the suit of a private person who suffers loss as a result of the contravention, subject to the defences and other incidents applying to actions for breach of statutory duty.

....

(5) "Private person" has such meaning as may be prescribed."

The regulations promulgated under the FSMA define private person as follows:

"Private person

3. - (1) In these Regulations, "private person" means -

(a) any individual, unless he suffers the loss in question in the course of carrying on -

(i) any regulated activity; or

(ii) any activity which would be a regulated activity apart from any exclusion made by article 72 of the Regulated Activities Order (overseas persons); and (b) any person who is not an individual, unless he suffers the loss in question in the course of carrying on business of any kind;

but does not include a government, a local authority (in the United Kingdom or elsewhere) or an international organisation."

The threshold issue for determination at this stage is whether Titan is a "private person". This raises what should be a short point of construction. It is the Bank's case that Titan, whilst being an incorporated individual, falls within the proviso or exception to Reg. 3(1)(b). It is submitted by Titan that on the true construction of the regulations the question for the Court is whether currency trading of the sort that occurred in 2007 was an integral part of Titan's business as opposed to an incidental part of its business.

On that basis Titan contended that the essential features are as follows:

i) Titan was a manufacturer of steel wheels. It was and is not engaged in the provision of financial services. Its accounts made plain that although it used foreign exchange products for hedging purposes it did not use such products "for trading purposes". Its use of the products can correctly be described as "incidental" to its main business which is manufacturing.

ii) Titan's annual income in euros was anticipated at €36m. The two transactions together took Titan's exposure to €51m according to the email dated 18th September 2007. Thus they exceeded any "hedging" requirements that Titan had and put its entire enterprise at risk.

iii) The products themselves were highly complex and the Bank required specialist proprietary software to understand and analyse them. Titan had no training in or access to such software.

The Bank submits that Titan manifestly sustained the loss in the course

of carrying out its business. The fact that Titan's business was not confined to or focused on investment business is not to the point. The regulations expressly refer to the carrying on of business of any kind. This expression should be, on the Bank's case, given a wide interpretation.

As regards the question of construction, Titan submits that, in the light of its legislative history, a much narrower interpretation of the regulation is appropriate. In further support of this submission, Titan relies on decisions with regard to different but allegedly analogous legislation and upon matters emerging from Hansard and other travaux preparatoires.

I was not entirely clear what meaning Titan contended the phrase "in the course of carrying on business of any kind" should be accorded save that whatever the appropriate meaning Titan's purchase of the June and September products was not in the course of carrying on business. In the result, it appeared that that answer to the question of construction was being put forward in the alternative:

i) It only encompassed one off trading with a view to profit or part of a regular trade which was integral to the principal business of a company; or

ii) It only encompassed trading as a "professional investor".

The initial difficulty with all of these formulations is that they sit uncomfortably with the exception in Reg. 3(1)(a). This exception in regard to individuals relates to the performance of regulated activity. But regulated activities are broadly defined as an activity of a specified kind which is carried on by way of business: FSMA Sect. 22. This strongly suggests that the scope of the exception in Reg. 3(1)(b) embraces a corporation which carries on business of any kind even if does not constitute a regulated activity or something akin to it.

Some considerable emphasis was placed by Titan on the legislative history. I was not persuaded that this of itself furnished any assistance in the interpretation of Reg. 3 but it did provide the scene against which phrases of a similar character in legislation in other fields fall to be considered and also the backdrop of the excerpts from Hansard and various consultation papers relied upon.

The first statutory provision furnishing a cause of action for breach of the regulatory regime was Sect. 62 of the Financial Services Act 1986("FSA"):

"(1) Without prejudice to section 61 above, a contravention of -

(a) any rules or regulations made under this Chapter;

(b) any conditions imposed under section 50 above;

(c) any requirements imposed by an order under section 58(3) above;

(d) the duty imposed by section 59(6) above,

shall be actionable at the suit of a person who suffers loss as a result of the contravention subject to the defences and other incidents applying to actions for breach of statutory duty…..

The 1986 Act represented a wide ranging overhaul of financial services' regulation in the UK including the establishment of the Securities Investment Board. In order to give investment firms the opportunity of becoming familiar with the provisions of the Act, Sect. 62 was not brought into force for six months.

During this period the industry expressed concern that the open ended provision for claims by any investor might encourage strategic lawsuits brought for competitive advantage: see DTI Consultation Paper "Defining the Private Investor" September 1990. This concern led to the inclusion by virtue of Sect 193 of the Companies Act 1989 of a new Section 62A to the FSA:

"62A — (1) No action in respect of a contravention to which section 62 above applies shall lie at the suit of a person other than a private investor, except in such circumstances as may be specified by regulations made by the Secretary of State.

(2) The meaning of the expression 'private investor' for the purposes of subsection (1) shall be defined by regulations made by the Secretary of State.

(3) Regulations under subsection (1) may make different provision with respect to different cases.

(4) The Secretary of State shall, before making any regulations affecting the right to bring an action in respect of a contravention of any rules or regulations made by a person other than himself, consult that person."

The Consultation Paper went on to annex a draft form of regulation defining "private investor" which in all material respects is the same as later adopted in the FSMA Regulation. In proposing the definition the DTI expressed a desire to avoid complexity and to introduce the definition as "brief and as clear as possible". Having drawn attention to the fact that any contractual rights of action would remain unaffected, the paper went on (para 52):

"This proposed definition is intended to have the following effects:

All individuals would retain their s62 rights for all purposes. Individuals who carry on investment business would lose their s62 rights only in relation to any action taken by them, or anything done to them, in the course of that investment business;

All non-individuals would lose their s62 rights in relation to any form of business. Most charities and similar bodies do not carry on any form of business, and would therefore retain their s62 rights only in relation to any action taken by them, or anything done to them, in the course of that business."

The draft regulations were in due course promulgated as the Financial Services Act 1986 (Restriction of Right of Action) Regulations 1991. The wording was in due course adopted in the 2001 Regulations in accord with the recommendation in a consultation paper issued by the Treasury dated December 2000.

Whether such consultation papers were strictly admissible or not, there is nothing in this material which gives substantive support for the proposition that the phrase "in the course of carrying on business of any kind" has the restricted meaning urged by Titan. But Titan relies in addition on observations made by ministers during the course of the passage of the Companies Act 1989 in Parliament which emphasised the exclusion of "professional investors".

In the House of Commons, the Minister for the DTI said:

Part VIII makes a number of individual changes to the Financial Services Act 1986, the Insolvency Act

1985, the Policyholders Protection Act 1975 and the Building Societies Act 1986. Most of these changes are for clarification or tidying up purposes rather than being major policy departures. But I should refer briefly to clause 158 which removes the right of a professional investor to sue under section 62 of the Financial Services Act if he suffers loss as a result of a breach of the rules made under that Act. In considering experience of the working of the Act we have concluded that in respect of professionals--I emphasise professionals--the provision is inappropriate. I stress, however, that there is no change in the position for private investors, who will retain the additional safeguard provided by section 62."

To similar effect, the Secretary of State for the DTI said in the House of Lords:

"Finally, I come to Clause 132, which amends the Financial Services Act 1986 by removing the right of a professional investor to sue under Section 62 if he suffers loss as a result of a breach of the rules made under that Act. Section 62 provides valuable safeguards for private investors but it has been suggested that this provision risked contributing to an excessively litigious atmosphere between professional investment businesses. Such an atmosphere would hinder healthy competition and growth. The definition of "professional investor" is to be included in secondary legislation so that it can be adjusted if necessary in the light of experience and of any changes in the relevant rules."

The Bank submits that this material is inadmissible and, in any event, wholly unhelpful.

In R. (on the application of Spath Holme Ltd) v Secretary of State for the Environment, Transport [2001] 2 AC 349 Lord Bingham stated as follows:

"Mr Parker, for the ministers, submitted that reference should not be made to Hansard, but also that, if reference were made, it was clear that the scope of section 11 was not intended to be so limited. Thus the threshold question arises whether, in this case, resort to Hansard should be permitted.

In Pepper v Hart the House (Lord Mackay of Clashfern LC dissenting) relaxed the general rule which had been understood to preclude reference in the courts of this country to statements made in Parliament for the purpose of construing a statutory provision. In his leading speech, with which all in the majority concurred, Lord Browne-Wilkinson made plain that such reference was permissible only where (a) legislation was ambiguous or obscure, or led to an absurdity; (b) the material relied on consisted of one or more statements by a minister or other promoter of the Bill together, if necessary, with such other parliamentary material as might be necessary to understand such statements and their effect; and (c) the effect of such statements was clear (see pp 640b, 631d, 634d). In my opinion, each of these conditions is critical to the majority decision."

I agree with the Bank that Titan has failed to make out any of the these specified conditions:

i) The legislation is not ambiguous but, as contemplated in the DTI Consultation paper, clear and simple.

ii) Even if the words are ambiguous, the statements do not derive from a minister in a debate introducing a Bill within which the relevant words

appear. The words were in due course contained in the 1991 Regulations which were laid before Parliament after a subsequent consultation paper. In short the regulations were not even in draft at the time of the statements.

iii) In any event, the effect of the statements is not clear and unambiguous. The emphasis is on what is termed a "professional investor" the definition of which was to appear in the secondary legislation. In fact this term does not feature in the regulations and thus the statements provide no material assistance on the term private investor.

Against that background I now turn to the authorities [10]. Titan placed particular emphasis on three cases. First Davies v Sumner [1984] 1 WLR 1301 in the context of the Trade Descriptions Act 1968 s.1(1)(a). In that case the Court was concerned with the sale of a car by a professional courier. Lord Keith held that a sale by a business was not necessarily "in the course" of that business. At p.1305 Lord Keith referred to the previous decision of the Divisional Court in Havering v Stevenson [1970] 1 WLR 1375 and said:

"Any disposal of a chattel held for the purposes of a business may, in a certain sense, be said to have been in the course of that business, irrespective of whether the chattel was acquired with a view to resale or for consumption or as a capital asset. But in my opinion section 1(1) of the Act is not intended to cast such a wide net as this. The expression "in the course of a trade or business" in the context of an Act having consumer protection as its primary purpose conveys the concept of some degree of regularity, and it is to be observed that the long title to the Act refers to "misdescriptions of goods, services, accommodation and facilities provided in the course of trade." Lord Parker C.J. in the Havering case [1970] 1 W.L.R. 1375 clearly considered that the expression was not used in the broadest sense. The reason why the transaction there in issue was caught was that in his view it was "an integral part of the business carried on as a car hire firm." That would not cover the sporadic selling off of pieces of equipment which were no longer required for the purposes of a business. The vital feature of the Havering case appears to have been, in Lord Parker's view, that the defendant's business as part of its normal practice bought and disposed of cars. The need for some degree of regularity does not, however, involve that a one-off adventure in the nature of trade, carried through with a view to profit, would not fall within section 1(1) because such a transaction would itself constitute a trade."

Thus it could be said that there are three types of trade carried out by a business which may be in the course of that business:

i) A one-off trade with a view to profit. Such a case, regardless of how sporadic, would be in the course of the business.

ii) A sporadic series of trades which were not part of the normal practice of the business nor an integral part of the business. This would not be "in the course of the business".

[10] There is no decision on Reg. 3 or its predecessors.

iii) A regular trade which was part of the normal practice of the business in question [11].

The second concerned the Unfair Contract Terms Act 1977 s.12(1) and was to similar effect. In R & B Customs v UDT [1988] 1 WLR 321 the Court of Appeal were concerned with a freight forwarding business and shipping agency that had purchased a car through a finance company, the defendant. The issue was whether the finance company could exclude an implied term as to fitness for purpose, which in turn raised the question of whether the exclusion clause was void under UCTA. In finding that the claimant had traded as a consumer, and after referring to the passage of Lord Keith's judgment in the case of Davies v Sumner Dillon LJ said at p. 330:

"Lord Keith emphasised the need for some degree of regularity, and he found pointers to this in the primary purpose and long title of the Trade Descriptions Act 1968. I find pointers to a similar need for regularity under the Act of 1977, where matters merely incidental to the carrying on of a business are concerned, both in the words which I would emphasise, "in the course of" in the phrase "in the course of a business" and in the concept, or legislative purpose, which must underlie the dichotomy under the Act of 1977 between those who deal as consumers and those who deal otherwise than as consumers.

This reasoning leads to the conclusion that, in the Act of 1977 also, the words "in the course of business" are not used in what Lord Keith called "the broadest sense." I also find helpful the phrase used by Lord Parker C.J. and quoted by Lord Keith, "an integral part of the business carried on." The reconciliation between that phrase and the need for some degree of regularity is, as I see it, as follows: there are some transactions which are clearly integral parts of the businesses concerned, and these should be held to have been carried out in the course of those businesses; this would cover, apart from much else, the instance of a one-off adventure in the nature of trade, where the transaction itself would constitute a trade or business. There are other transactions, however, such as the purchase of the car in the present case, which are at highest only incidental to the carrying on of the relevant business; here a degree of regularity is required before it can be said that they are an integral part of the business carried on, and so entered into in the course of that business."

The third concerned the Copyright Design and Patents Act 1988 s.23(a). In Pensher Security Door Co v Sunderland City Council (1999) (BAIL II: [1999] EWCA Civ. 1223) the Court of Appeal was concerned with an alleged secondary infringement of copyright by reason of the purchase of a security door by the City Council. Aldous LJ considered the cases of Davies v Sumner and R&B Customs and stated:

The words "in the course of business" are words used in other legislation and I can see no reason for giving them a different meaning in the 1988 Act to the meaning attributed to them

[11] Subsequently this test has been known as the "regularity" test.

in other legislation. That was the view taken by Dillon LJ in R & B Customs Brokers Co Ltd v United Dominions Trust Ltd [1988] 1 All ER 847, [1987] 1 WLR 321 when he considered the same phrase used in the Unfair Contract Terms Act 1977. He said at page 329G of the latter report:

'… however, it would, in my judgment, be unreal and unsatisfactory to conclude that the fairly ordinary words 'in the course of business' bear a significantly different meaning in, on the one hand, the Trades Description Act 1968, and, on the other hand, section 12 of the Act of 1977'.

Miss Vitoria submitted that the infringing doors were no more possessed in the course of the Council's business than was a carpet in a solicitor's office. I disagree. As has been made clear in such cases as Davies v Sumner [1984] 3 All ER 831, [1984] 1 WLR 1301 and in R & B Customs Brokers, transactions which are only incidental to a business may not be possessed in the course of that business".

The overarching difficulty with treating those authorities as determining the meaning of "in the course of carrying on business of any kind" is that the phrase in the FSMA regulations is different from the phrase under consideration in these cases, namely "in the course of a business". It renders the additional words "of any kind" redundant.

There are various additional factors which contradict the submission made by Titan:

i) The context is very different. The regulations seek to draw a distinction between natural and corporate persons and between regulated activity and other business.

ii) The authorities cited above are concerned with consumer protection. The protective purpose of the regulations in contrast is to stem "strategic" claims against those conducting regulated activity (all the while preserving recourse to claims in tort or contract).

iii) The phrase "in the course of business" has been held in a different context to justify construction "at their wide face value": Stevenson v Rogers [1999] 1 QB 1028.

I recognise that corporate entities who sustain losses as a result of the purchase of financial products will usually be in business of some kind. As the 1990 consultation paper states, charities and similar bodies are the more obvious exceptions. It follows that a wide interpretation of Regulation 3(1)(b) would exclude little in terms of liability of a regulated body. But I prefer the view that the words can properly be construed as having their wide meaning as contended for by the Bank.

This conclusion is however largely redundant. In my judgment, even if Titan's construction is to be preferred, it readily passes through the accepted gateways. The principal features of the background to the relevant transactions are as follows:

i) Titan's sales are largely made abroad within the euro zone. There was therefore a need to convert large amounts of Euros to Sterling against the background of turnover for Titan alone of £113 million. It followed that it was exposed to the risk of decline in the value of the Euro where its costs were incurred largely in Sterling. The issue was highlighted in the group accounts for 2007:

"The globalisation of the economy and financial markets volatility has

increased the Group's exposure to external factors such as changes in foreign exchange rates, interest rates and commodity prices which in turn make future forecasting of financial and operational performance more uncertain."

ii) To limit that exposure the group (including Titan) entered into forward foreign exchange contracts:

"The Group has transactional currency exposures arising form sales or purchases by operating subsidiaries in currencies other than the subsidiaries' functional currency which are mostly naturally hedged and in certain cases are covered by the use of forward foreign exchange contracts.

The Group operates in a global environment with global customers and, therefore, transacts in a number of currencies which subjects the Group to foreign exchange risk".

iii) These activities were said to be managed on a centralised basis within the whole group.

"Financial Risk Factors

The Group's activities expose it to a variety of financial risks: market risk [including currency risk, fair value interest rate risk and cash flow interest rate risk], credit risk and liquidity risk. The Group's overall risk management programme focuses on the unpredictability of financial markets and seeks to minimise potential adverse effects on the Group's financial performance. The Group uses derivative financial instruments to hedge certain risk exposures.

Risk management is carried out centrally under policies approved by the board of directors. Centrally management identify, evaluate and hedge financial risks in close co-operation with the Group's operating units. The board provides written principles for overall risk management, as well as written policies covering specific areas, such as foreign exchange risk, interest rate risk, credit risk, use of derivative financial instruments and non-derivative financial instruments, and investment of excess liquidity."

The authorities cited above make it clear that in considering whether deals are "in the course of business" the specific nature of the deals and their degree of regularity are relevant. The Bank contended that:

i) Even viewed in isolation the purchase of the June and September products were in the nature of trade.

ii) In any event they formed part of a regular chain of transactions and thus can be treated as an integral part of the business.

The general background of the need for Titan to manage its foreign currency risks is set out above. As regards the structured products (and the specific transactions in June and September in particular) they were by definition not entered into solely by way of a hedge [12]. The motive for entering into them was to make a profit: otherwise all that was required was a "vanilla" hedge to exclude the perceived currency risk. Such was the evidence of Mr. Annetts:

"A. The objective was to protect the exchange rate wherever

possible.

Q. Clearly you wanted to hedge the large balances of euros

[12] Indeed the September product was expressly categorised as not a hedge.

which you were receiving.

A. Yes.

Q. That was vital for risk management. But if that were

your sole objective, you could've continued to do that

by a simple forward.

A. Yes.

Q. Yes. So you must have been looking for rather more than

that by entering into these transactions.

A. Yes, because probably at that point there would have been a considerable change in the quantity of either. Deutschmarks or euros inflowing into the business, because back in 1995 it would be very limited, 2000 would be growing and so on.

Q. Never mind the volume; if you are simply hedging to avoid currency risk, you can do that by a forward, can'tyou?

A. Yes.

Q. So if you go for a structured product, you must be

looking for something in addition to the hedging.

A. Right.

Q. And that was some profit as well.

A. Yes.

Q. Yes. Otherwise you wouldn't have done it that way. It

makes sense, doesn't it?

A. Sure.

Q. Therefore, what you were seeking to do was to hedge your

exposure in such a way that you managed to make some

money on the side as well.

A. Hopefully, yes."

In fact the exercise was fairly successful. As Mr. Annetts duly reported to Mr Wicks, a substantial profit of £260,000 was made out of the structured products purchased in 2006. In reality the products were in the nature of a businesslike speculation which was a mile away from a pure hedge and fairly to be described as one off trades forming part of the business.

In any event, even if the purchase of foreign exchange products was merely incidental to Titan's business, the scale and frequency of the hedging is well sufficient to satisfy any requirement of regularity justifying the categorisation of such activity as being integral with the business:

i) Between 2000 and 2007 Titan purchased 23 structured foreign currency products from the Bank.

ii) In addition Titan purchased 20 similar products from Anglo Irish Bank and Allied Irish Bank.

iii) The overall figures amounted to between €100m and €200m. In 2006 alone (as reported to Mr. Wicks) Titan entered into foreign exchange products worth a total of €25 million.

iv) In addition, Titan also entered into frequent short term swap arrangements.

I reject Titan's submission that this reflected merely sporadic and intermittent activity fully outside the course of Titan's business. To the contrary, the trades were sustained, large scale and a necessary concomitant of Titan's trading. For all the above reason, I hold that Titan was not a "private person" for the purposes of the FSMA.

Issue 3: Did the Bank act in the capacity of an advisor and did it owe a common law duty of care in respect of advice given in respect the June or September Products?

There is a potential overlap between this issue and Issue 11 and the parties were not agreed as to the correct approach. Titan asserted that it was appropriate to determine the existence or otherwise of a duty of care in the absence of any applicable contractual terms and then consider the impact of those terms (subject of course to Issue 11). The Bank urged the reverse. In the event, I am not persuaded that the answer would be different on either approach.

I start with consideration of the terms. As noted above, the Bank's Terms of Business were sent under cover of the letter of 25 February 2004. These were all of a piece with an earlier set of terms (entitled Money Market Regulations) sent out in 2001 in accord with the preceding regulatory regime, the confirmatory letter having been signed and accepted by Mr Annetts on 23 March 2001. There is an issue however as to whether the 2004 terms of business were incorporated since no written acceptance of them was made by Mr Annetts or any other responsible officer of Titan (although it is common ground that neither on receipt or at any later stage was any objection taken to them).

The covering letter made the Bank's position quite plain:

"We hereby notify you that we are treating you as an Intermediate Customer within the meaning and for the purposes of the Rules. Enclosed with this letter are our Terms of Business.

The letter and the terms of Business supersede any documentation that may have previously been sent to you and will apply to all our dealings. However, the Terms of Business provide that certain other agreements which may exist between us in respect of a particular transaction or type of transaction may prevail over the Terms of Business (e.g. ISDA, Master Agreement for OTC derivative Transactions). Please read our Terms of Business carefully. They contain important information about our respective rights and obligations, including about certain limitations on liability to you.

When you have reviewed the enclosed documents, you should keep them and this letter for guidance and reference. By conducting business with us you will be deemed to have agreed and accepted our Terms of Business which will therefore become legally binding on you and, in the absence of any other agreement between us and you, will apply to all dealings which we may conduct with you or on your behalf. Your attention is also drawn to the representations and warranties in Clause 3 of the Terms of Business."

Their existence and applicability were expressly reiterated in the post transaction acknowledgements. There can be no doubt, in my judgment, that reasonable notice was given of these standard contractual terms and that on receipt by Mr Annetts or at least by the subsequent course of dealing were duly incorporated.

These terms expressly provided that the Bank would not provide advisory services and that any opinions expressed by the Bank did not constitute investment advice. Titan was to take independent advice as might be necessary. In that sense the Bank was making it clear that it was only providing an execution service.

The specific terms of each transaction, both as contained in the post

transaction acknowledgements and the confirmations [13] were to the same effect. In particular:

i) Titan was to seek independent advice if required.

ii) Titan placed no reliance on the Bank for advice or recommendations "of any sort".

There can be no doubt about the fact that Mr Annetts accepted the transaction terms. Indeed a documentary record was required of any transaction agreed over the telephone:

i) The June PTA was sent by e-mail to Mr Annetts at his home. It stated:

"Please note that this document constitutes your acknowledgement to the economic terms of the transaction entered into between [the Bank] and yourself and the disclosure on the accompanying schedule"

Mr Annetts replied: "please proceed with this trade structure".

ii) The September PTA in the same terms was signed by Mr Annetts.

iii) Both the June and the September Confirmation stated:

"please confirm that the foregoing correctly sets forth the terms of our agreement by signing a copy of the Confirmation …"

Mr Annetts signed both.

Thus in my judgment the transaction terms formed part of the contracts between Titan and the Bank either by virtue of these signatures or, in any event, by reason of the course of dealing based on the same documentary structure over the previous six years. It is no answer, if the point be alive, for Titan to claim that the June and September products were more "complex" or of a "different nature". Even if a good point, it has no bearing on the issue of incorporation.

I turn to the impact of these terms. In this regard there was some confusion in Titan's case as to whether it was alleging a pre-existing duty of care at the time the products were purchased [14] or that the Bank assumed a duty of care in respect of Ms Plested's "advice". But on either basis, I conclude that the terms outlined, taken as whole, are only consistent with the conclusion that Titan and the Bank were agreeing to conduct their dealings on the basis that the Bank was not acting as an advisor nor undertaking any duty of care regardless of what recommendations, suggestions or advice were tendered.

Indeed such a duty will even be excluded where the bank or investment advisor has been expressly retained to furnish advice but only on terms which exclude responsibility: see Valse Holdings v. Merrill Lynch International Bank [2004] EWHC 2471 (Comm).

The primary contention by Titan in response to these express terms (if incorporated) was that they can only take effect by way of evidential estoppel (which it was said was neither pleaded nor established). In my judgment this submission fails to grap-

[13] Mr Annetts and Mr Wicks routinely signed confirmations on almost precisely the same terms in regard to products sold by Anglo Irish Bank.

[14] A pre-existing duty of care as I understood it said to have emerged in about 2004 arising from the earlier negotiations between Ms Plested and Mr Annetts.

ple with the contractual estoppel created by the relevant terms. In Peekay v Australia and New Zealand Banking Group [2006] 2 Lloyd's Rep. 511, a bank employee had misrepresented the nature of an investment product. But the relevant terms and conditions contained provisions to the effect that the customer knew the true nature of the contract he was entering into and had determined it was suitable. There was also a notice that the customer had taken independent advice and was not relying on the bank.

In the judgment Moore-Bick LJ with whom Chadwick LJ and Collins LJ agreed having recorded an important principle of English law that "underpins all commercial life" to the effect that a person who signs a document knowing it is intended to have a legal effect is generally bound by its terms there is this passage:

"56 There is no reason in principle why parties to a contract should not agree that a certain state of affairs should form the basis for the transaction, whether it be the case or not. For example, it may be desirable to settle a disagreement as to an existing state of affairs in order to establish a clear basis for the contract itself and its subsequent performance. Where parties express an agreement of that kind in a contractual document neither can subsequently deny the existence of the facts and matters upon which they have agreed, at least so far as concerns those aspects of their relationship to which the agreement was directed. The contract itself gives rise to an estoppel: see Colchester Borough Council v Smith [1991] Ch 448, affirmed on appeal [1992] Ch 421.

It is common to include in certain kinds of contracts an express acknowledgment by each of the parties that they have not been induced to enter the contract by any representations other than those contained in the contract itself. The effectiveness of a clause of that kind may be challenged on the grounds that the contract as a whole, including the clause in question, can be avoided if in fact one or other party was induced to enter into it by misrepresentation. However, I can see no reason in principle why it should not be possible for parties to an agreement to give up any right to assert that they were induced to enter into it by misrepresentation, provided that they make their intention clear, or why a clause of that kind, if properly drafted, should not give rise to a contractual estoppel of the kind recognised in Colchester Borough Council v Smith. However, that particular question does not arise in this case. A clause of that kind may (depending on its terms) also be capable of giving rise to an estoppel by representation if the necessary elements can be established: see E A Grimstead & Son Ltd v McGarrigan (CA) 27 October 1999, unreported (BAIL II: [1999] EWCA Civ 3029)".

This approach was adopted by Gloster J in JP Morgan Chase Bank v Springwell Navigation [2008] EWHC 1186 (Comm) and by Aikens J in Trident Turboprop (Dublin) Ltd v First Flight Couriers Ltd [2008] 2 Lloyd's Rep. 581. I detect no basis upon which a different analysis would be justified in the present case. In the alternative the contractual provisions provide an evidential basis negating the coming into existence of a duty of care. I conclude that where, as here, the parties have purported to allocate by contract

their respective roles and the risks involved in their relationship this will in the normal run preclude any wider obligation arising from a common law duty of care: Henderson v. Merrett [1995] 2 AC 145.

This conclusion is fortified by IFE Fund v. Goldman Sachs Int [2007] EWCA Civ 811 where an issue arose as to the materiality of a provision in an Information Memorandum which contained a clause to the effect that the defendant accepted no responsibility for it:

"28. I can start by clearing one or two issues out of the way. First it seems to me that the argument that there was some free standing duty of care owed by GSI to IFE in this case is in the light of the terms of the Important Notice hopeless. Nothing could be clearer than that GSI were not assuming any responsibility to the participants: Hedley Byrne v Heller & Partners [1964] A.C. 465. The foundation for liability for negligent misstatements demonstrates that where the terms on which someone is prepared to give advice or make a statement negatives any assumption of responsibility, no duty of care will be owed. Although there might be cases where the law would impose a duty by virtue of a particular state of facts despite an attempt not "to assume responsibility" the relationship between GSI either as arranger or as vendor would not be one of them. I entirely agree with the judge on this aspect.": per Waller LJ.

It is no answer, as it was suggested, that whilst the terms made it clear that the Bank was not obliged to give "advice" the Bank was not protected if it did in fact advise. There are a number of difficulties with this submission:

i) The terms go much further than relieve the Bank from any obligation to give advice: they provide that any statements are not to be treated as advice nor can they be relied upon by Titan.

ii) It is commercially unreal to separate banking activity into a silent execution service on the one hand and an advisory role on the other.

iii) The impact of the terms is that whether or not Ms Plested proffered opinions, suggestions or even advice during the telephone conversations is irrelevant: the parties have agreed that if the Bank does give advice it is not to be treated as accepting any responsibility.

In other words, if the Bank's activities were to extend beyond mere execution, the contractual terms cater for that situation. There is no question of going beyond or outside those provisions.

Duty of care (absent contractual provisions)

As already recorded, it is accepted that Ms Plested did indeed offer some ideas and recommendations [15] in regard to financial products in the face of the large scale Euro income of Titan. But the question is whether the circumstances established that Ms Plested had status as an adviser such that a duty of care in tendering that advice arose or whether objective analysis identifies her as merely a saleswoman.

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[15] As explained in para 20 above there is no significance as such in the alternative categorisation of any views or recommendations as ideas, opinions, proposals or advice.

I unhesitatingly prefer the latter: see e.g Riggs AP Bank Ltd v. Eurocopy Ch Div 6 November 1998

There are certain features which point strongly against any conclusion that the Bank acted as an adviser or that its advice was relied upon:

i) There is no documentary record of the Bank's status as an adviser let alone any provision for payment of a fee for such services. If there had been an acceptance of an advisory responsibility the commercial expectation would be for the scope of the anticipated advice and the fee basis to be reduced to writing.

ii) There is no written request for advice nor any written response whether in regard to individual transactions or in regard to overall currency exchange programmes.

iii) The telephone conversations contain no express oral request for advice let alone any reference to an agreement to tender it.

iv) Startlingly, the only written observations relating to the June and September products [16] which the Bank correctly characterised as "the bedrock" of the outcome of the relationship are not relied upon as containing any advice.

v) Titan was properly categorised as an "intermediate customer" under the FSMA regime which involves a significant loss of regulatory protection.

vi) Titan shopped around and bought FX products from other banks. The contractual terms were the same. Yet no suggestion is made that any of these other banks were acting in advisory capacity.

vii) The Bank was never even told of the existence let alone the form of these other products: it was thus not in any position to make any overall assessment.

viii) It would be unrealistic to categorise Mr Annetts as an ingénue in the field of financial products. He had been dealing with foreign exchange products for over 10 years. He had purchased some 23 more sophisticated products since 2000 in consultation with Mr Wicks and/or Ms Bowron. Although no doubt paying heed to what Ms Plested had to say, the transcripts of the telephone conversations leave the clear impression that Mr Annetts was exercising his own independent judgment. He was not adopting without query or understanding the views of Ms Plested.

ix) Whilst the Bank might be regarded as more sophisticated than Titan in the field of FX products the crucial parameter was the future Euro/Sterling exchange rate. In that context neither could be treated as more sophisticated than the other whether looking at Ms Plested and Mr Annetts individually or at the teams of people in either camp. In fact both thought (wrongly) that the Euro would not fall below about 1.38.

Indeed having again reviewed the telephone conversations between Ms Plested and Mr Annetts, I have come to agree with the Bank's classification of them as unremarkable exchanges between a financial controller of a large manufacturing company and a saleswoman employed by the company's bank. To the extent that Mr

[16] The e-mails of 29 June and 18 September.

Annetts was accepting or even relying on any suggestions or recommendations from Ms Plested does not reflect a duty of care on her part. Mr Annetts could not reasonably have regarded her as an "advisor".

Although it is suggested that Ms Plested was Mr Annetts "trusted adviser" it is of some note that this phrase did not appear in documentation prior to Mr Annetts' witness statement. That he "trusted" Ms Plested probably goes without saying: he would not have dealt with her at all if not. I treat the phenomenon as no more than a commonplace feature of commercial activity. Further nothing was said by Mr Annetts to Ms Plested to support the proposition in anything other than that sense. To the contrary he appeared to listen to Ms Plested's views, fully understand those views and determine for himself whether the products were worth purchasing. In this regard the enormous stockpile of euros that Titan had accumulated was perceived by Mr Annetts as providing protection against any fall in sterling which might occur despite his expectation (shared by Ms Plested) that sterling would strengthen.

Indeed I would adopt with admiration Gloster J's exhaustive analysis to similar effect of a large number of these issues in Springwell[17]. I conclude therefore that the Bank did not act in the capacity of an advisor and it did not owe a common law duty of care in respect of advice in respect of the June and September products.

Issue 11: Are the Contractual terms subject to the 1977 Act and, if so, is the Bank able to rely on them?

It is accepted by the Bank that Clause 12.5 of the terms of business is a genuine exclusion clause. It was the Bank's case that all other terms merely defined the basis upon which the Bank was providing its services. In my judgment that proposition is correct and, as a result such terms fall outside the provisions of the Unfair Contractual Terms Act.

The point is succinctly dealt with at first instance in IFE v. Goldman Sachs [2006] EWHC 2887 (Comm):

"71…The relevant paragraphs of the SIM are not in my view to be characterised in Substance as a notice excluding of restricting a liability for negligence, but more fundamentally as going to the issue whether there was a relationship between the parties (amounting to or equivalent to that of professional adviser and advisee) such as to make it just and reasonable to impose the alleged duty of care": per Toulson J

A similar point arose in Springwell supra. As Mrs Justice Gloster pointed out any other conclusion would mean that every contract defining the scope of the parties obligations would have to satisfy the requirement of reasonableness. She went on:

"604. The legislation is, in practice, of very limited application in the case of commercial contacts between commercial counterparties. In Photo Productions Ltd v Securicor,[185] Lord Wilberforce said that, in commercial matters generally, when the parties were not of unequal bargaining power, Parliament's intention was one of "leaving the parties free to apportion the risks as they think fit… and respecting their decisions."[186] Tuckey LJ made the same point in Granville Oil & Chemicals v Davis Turner & Co[187]:

"For these reasons I think the Judge reached the wrong conclusion in this case. If necessary I would say he was plainly wrong. I am pleased to reach this decision. The 1977 Act obviously plays a very important role in protecting vulnerable consumers from the effects of draconian contract terms. But I am less enthusiastic about its intrusion into contracts between commercial parties of equal bargaining strength, who should generally be considered capable of being able to make contracts of their choosing and expect to be bound by their terms."

The reluctance of the Courts to interfere in contracts concluded between commercial parties in relation to substantial transactions reflects the strong business need for commercial certainty, as emphasised by Chadwick LJ in EA Grimstead & Son Ltd v McGarrigan[188] (supra)."

In contrast to this line of authority Titan relied upon Smith v. Bush [1990] 1 AC 831 which would not appear to have been cited in IFE or in Springwell. The issue was whether a notice which made it plain that a valuer was not accepting liability to third parties was "caught" by the Act. The proposition advanced was to the effect that the approach should be a two stage test: first the issue whether a duty of care arose in the absence of the contractual terms: second whether the relevant clause had the effect of excluding or restricting the liability which would otherwise have arisen.

The valuer submitted that the denial of responsibility prevented a duty arising in the first place and therefore was not an exclusion clause. At p. 848 Lord Templeman said:

"In Harris v. Wyre Forest District Council [1988] QBD. 835, the Court of Appeal (Kerr and Norse L.JJ. and Caulfield J.) accepted an argument that the Act of 1977 did not apply because the council by their express disclaimer refused to obtain a valuation save on terms that the valuer would not be under any obligation to Mr. and Mrs. Harris to take reasonable care or exercise reasonable skill. The council did not exclude liability for negligence but excluded negligence so that the valuer and the council never came under a duty of care to Mr. and Mrs. Harris and could not be guilty of negligence. This construction would not give effect to the manifest intention of the Act but would emasculate the Act. The construction would provide no control over standard form exclusion clauses which individual members of the public are obliged to accept. A party to a contract or a tortfeasor could opt out of the Act of 1977 by declining in the words of Nourse L.J., at p. 845, to recognise "their own answerability to the plaintiff." Caulfield J. said, at p. 850, that the Act "can only be relevant where there is on the facts a potential liability." But no one intends to commit a tort and therefore any notice which excludes liability is a notice which excludes a potential liability. Kerr L.J., at p. 853, sought to confine the Act to "situations where the existence of a duty of care is not open to doubt" or where there is "an inescapable duty of care." I can find nothing in the Act of 1977 or in the general law to identify or support this distinction. "

At p.856 Lord Griffiths said:

"The Court of Appeal, however, ac-

cepted an argument based upon the definition of negligence contained in section 1(1) of the Act of 1977….

I read these provisions as introducing a "but for" test in relation to the notice excluding liability. They indicate that the existence of the common law duty to take reasonable care, referred to in section 1(1)(b), is to be judged by considering whether it would exist "but for" the notice excluding liability. The result of taking the notice into account when assessing the existence of a duty of care would result in removing all liability for negligent misstatements from the protection of the Act.

The focus of course was the issue of liability for poor service rather than the scope of the service to be provided. Further the decision may have been somewhat overtaken by later decisions in regard to the assumption of responsibility and the move away from any "but for" test in regard to the existence and extent of any duty.

In one sense the point is redundant since I have concluded that no liability did arise even in the absence of the contractual terms. But assuming in favour of Titan that the Act does apply, do the terms including clause 12.5 satisfy the test of reasonableness? It is difficult to see why not:

i) There was complete equality of bargaining power. Titan was a substantial entity that was a customer of the Bank. It was open to Titan to choose any bank and indeed it did take its custom elsewhere.

ii) The terms were not simply standard for the Bank but, it would appear, to many banks including the Irish banks from which Titan bought products.

iii) There was no difficulty in Titan seeking (as the terms expected) advice from another quarter if desired.

The terms were clear and they were regularly brought to the notice of Titan. The thrust of Titan's argument focussed on a discrete proposition to the effect that the information and resources available to the Bank as to the nature and suitability of each product was an order of magnitude greater than that available to Titan.

So far as it goes, this proposition is true as a matter of fact but irrelevant:

i) The Bank's computer programmes enabled it to assess its making of profit which was of no interest to Titan.

ii) Mr Annetts was told of the cost of closing out the February and March contracts before signing the June confirmation: whilst this was a calculation which could only be done with accuracy by the Bank no complaint was made nor questions asked.

iii) The crucial parameter was the spot rate for Sterling/Euro exchange: there was no information or technology available to the Bank which enabled it to predict the future rate to better effect than Titan.

I conclude therefore that with one exception the contractual terms are not subject to the 1977 Act and, in any event, they are reasonable.

(1 – 7) *Misselling derivatives*: le posizione del *Bundesgerichtshof* e della *High Court of Justice* in merito ai doveri di trasparenza dell'intermediario nella negoziazione di derivati nella prospettiva della regolamentazione *EMIR*.

Sommario: 1. Introduzione. – 2. La pronuncia del *Bundesgerichtshof* in tema di *CMS spread ladder swap*. – 3. (Segue). Gli elementi dell'accordo nel *Rahmenvertrag für Finanztermingeschäfte*: il rischio, anche illimitato, come elemento tipologico dello *swap*. – 4. (Segue): i doveri di informazione dell'intermediario nella negoziazione di strumenti finanziari complessi nella decisione del *BGB: anleger und anlagegerechte Beratung*. – 5. Il caso *Titan Steel Wheels Ltd v. The Royal bank of Scotlad plc* in materia di *currency swap derivate products* nella pronuncia della *High Court of Justice*. – 6. (Segue). Legittimazione quale *private person* all'azione di cui alla *section 150 Financial Services and Markets Act 2000*. Qualificabilità della relazione contrattuale tra cliente e intermediario come *advisory relationship* e violazione del *duty of care*. – 7. (Segue). L'indagine della FSA sugli *Interest Rate Hedging Products* collocati presso *non-sophisticated customers* in difformità alla regolamentazione COBS. – 8. I rimedi giudiziali nella prospettiva dei piani di tutela: regole di validità *versus* regole di condotta. – 9. La Comunicazione Consob n. 9019104/2009 e *l'unbundlig* delle componenti dei derivati. – 10. La regolamentazione *EMIR* (Reg. UE n. 648/2012): attenuazione del rischio di credito di controparte e rafforzamento della trasparenza.

1. Introduzione.

La pronuncia del *Bundesgerichtshof* in tema di *CMS spread ladder swap* e il caso in materia di *currency swap derivate products* affrontato dalla *High Court of Justice* trattano, con esiti non coincidenti, il tema della negoziazione di strumenti finanziari derivati, con particolare riguardo ai profili di trasparenza delle informazioni relative ai costi di strutturazione delle operazioni in oggetto.

La dirompente crisi finanziaria e le conseguenti perdite sofferte dalle controparti hanno provocato una proliferazioni di casi giudiziari relativi alla violazione delle regole di condotta soprattutto nei casi in cui la banca opera negoziando in contropartita diretta strumenti finanziari derivati c.d. *OTC (over the counter*) che non presentano profili di standardizzazione, essendo, di contro, strutturati in funzione delle esigenze specifiche del cliente. Il dibattito della giurisprudenza pratica e teorica ruota, allora, intorno a due questioni assai spinose: (i) il grado di trasparenza richiesto all'intermediario in relazione alla complessità degli strumenti negoziati e (ii) la possibile configurabilità di un automatica applicazione

dei doveri di protezione che discendono dalla prestazione del servizio di consulenza [1].

Uno sguardo a queste due pronunce se, da un lato, consente di cogliere il diverso approccio della giurisprudenza teorica e pratica dei sistemi tedesco e inglese rispetto al sistema italiano, da l'altro, sollecita qualche riflessione anche sul recente e massiccio intervento del legislatore europeo finalizzato ad assicurare una armonica cornice normativa al *trading* dei derivati. In questa prospettiva si inseriscono, *de iure condito*, il regolamento n. 648 del 4 luglio 2012, c.d. *EMIR* (*European Market Infrastructure Regulation*), entrato in vigore il 13 marzo 2013, i *Regulatory Technical Standards* predisposti dall'*ESMA (European Securities and Markets Authority)* in attuazione degli obblighi nascenti dal regolamento *EMIR*. In aggiunta, *de iure condendo,* la questione della armonizzazione nello spazio europeo dei criteri di trasparenza nella negoziazione dei derivati è oggetto di discussione nelle sedi di revisioni della direttiva *MiFID (Markets in Financial Instruments Directive)*, nel testo presentato, unitamente al regolamento c.d. *MiFIR (Markets in Financial Instruments Regulation)* il 20 ottobre 2011 e della più recente proposta di revisione della direttiva *MAD (Market Abuse Directive)* del 25 luglio 2012.

2. La pronuncia del *Bundesgerichtshof* in tema di *CMS spread ladder swap*.

Le corti tedesche, negli ultimi anni, hanno esaminato numerosi casi di

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[1] Numerosi gli interventi della dottrina sul tema. Si vedano Sartori, *Autodeterminazione e formazione eteronoma del regolamento negoziale. Il problema dell'effettività delle regole di condotta*, in *Riv. dir. priv.*, 2009, p. 93 ss.; M. Rescigno, *Il prodotto è tossico: tenere lontano dai bambini*, in *AGE*, 2009, p. 145 ss.; Piazza, *Contratto di* swap*, nozione di "operatore qualificato" e buona fede: attualità della questione*, in *Riv. dir. priv.*, 2011, p. 447 ss.; A. Piras, *Operazioni inadeguate su derivati e dichiarazione di operatore qualificato: tutela dell'investitore ex art. 700 c.p.c.*, in *Banca, borsa, tit. cred.*, 2011, II, p. 514 ss.; Girino, *Sviluppi giurisprudenziali in materia di derivati* over the counter*,* in *Banca, borsa, tit. cred.*, 2011, II, p. 794 ss.; Onado, *Il banchiere di ferro di oggi: mi spezzo ma non mi piego (alle regole)*, in *Mercato, concorrenza e regole*, 2011, p. 499 ss.; Caputo Nassetti, *Rinegoziazione dello* swap *e pagamento* upfront *tra collegamento negoziale, novazione oggettiva e rinnovazione del contratto*, in *Giur. comm.*, 2011, I, p. 887 s.; Maffeis, *Contratti derivati*, in *Banca, borsa, tit. cred.*, 2011 p. 604 ss.; Id., *La stagione dell'orrore in Europa: da Frankestein ai derivati*, in *Banca, borsa, tit. cred.*, I, 2012, p. 280 ss. e Barcellona, *Strumenti finanziari derivati: significato normativo di una «definizione»*, in *Banca, borsa, tit. cred.*, I, 2012, p. 541 ss.

violazione dei doveri di informazione e di trasparenza delle banche nei casi di strutturazione di operazioni di *swap* con aziende municipalizzate e con clienti *retail*.

Il *Bundesgerichtshof*, con sentenza del 22 marzo 2011, ha sancito la responsabilità della *Deutsche Bank* per i danni subiti da una società municipalizzata di medie dimensioni, *Ille Papier-Service GmbH*, dalla stipulazione di uno *CMS spread ladder swap* (d'ora in poi *CMS swap*). La pronuncia si segnala come il primo tentativo della Suprema Corte federale tedesca di fissare i principali requisiti di trasparenza che gravano sugli intermediari nella strutturazione di strumenti finanziari derivati.

La Corte ha respinto la richiesta di dichiarare la nullità dei contratti in derivati in violazione dell'obbligo di agire secondo *bonos mores* (*Sittenwidrigkeit*) di cui al §. 138 BGB sulla base dell'argomentazione che, seppur un contratto di *swap* presenta un profilo di rischio/rendimento asimmetrico, ciascuna delle parti ha una possibilità di guadagno, posto che il guadagno o la perdita dipende dallo sviluppo delle variabili cui è collegato lo *swap*: ne risulta che il contratto non può dichiararsi nullo perché "*immorale in natura*", ai sensi del §. 138 BGB poiché "l'autonomia privata consente l'esecuzione di operazioni ad alto rischio" e aggiunge che "transazioni ad alto rischio" non sono *immorali* neppure ove i guadagni siano collegati a circostanze favorevoli eventuali. La Corte ha anche respinto la richiesta di nullità dei contratti per la mancanza di trasparenza nella strutturazione dello strumento finanziario derivato. Infatti il §. 307 BGB, secondo cui i termini e le condizioni di un contratto devono essere trasparenti, si applica ai contratti con formule standardizzate, mentre non trova applicazione, ai sensi del §. 305 b BGB, ove le parti espressamente manifestino il consenso sulle specifiche condizioni contrattuali. La Corte ha respinto anche la richiesta di nullità del contratto per "rappresentazione scorretta", *ex* §. 123 BGB.

La banca, invece, è stata dichiarata responsabile per aver consigliato un'operazione di investimento inadeguata al profilo di rischio del cliente e per aver violato i doveri di informazione, non rendendo noto il *mark to market* iniziale negativo, pari a 80.000 euro. In particolare, negoziando in contropartita diretta gli *swap* con vantaggi competitivi iniziali a suo favore, la banca avrebbe violato le disposizioni in materia di conflitto di interessi (§ 31, 1, n. 2, WpHG - *Wertpapierhandelsgesetz*). Il danno è stato quantificato in 540.000 euro.

3. (Segue). Gli elementi dell'accordo nel *Rahmenvertrag für Finanztermingeschäfte*: il rischio, anche illimitato, come elemento tipologico dello *swap*.

L'acronimo *CMS* sta ad indicare la fattispecie del *constant maturity swap* la cui struttura finanziaria prevede una obbligazione a tasso variabile indicizzato ai tassi *swap* a lunga scadenza del titolo e ha, di prassi, una durata quinquennale e un valore nozionale di riferimento pari ad almeno 1 milione di euro. Nello *spread ladder swap* [2] la banca effettua pagamenti semestrali di interessi calcolati in base ad un tasso fisso nella misura del 3 per cento del valore nozionale di riferimento. Il cliente, di contro, liquida nei due semestri del primo anno alla banca un ammontare pari a 1.5 per cento del valore nozionale di riferimento; dal secondo anno, invece, il cliente paga interessi variabili calcolati in base ad una formula algebrica.

Nella sentenza in esame, la *Deutsche Bank* aveva proposto ad una società municipalizzata di medie dimensioni di entrare come controparte in un *CMS spread ladder swap* che fu materialmente stipulato il 16 febbraio 2005. La banca si impegnava, in particolare, a pagare al cliente un interesse fisso pari al 3 per cento in relazione ad un valore nozionale di riferimento pari a 2 milioni di euro per un periodo di 5 anni. Il cliente, di contro, si impegnava, per il primo anno, al pagamento di un tasso di interesse di 1,5 per cento in relazione al medesimo valore nozionale, e successivamente ad un tasso variabile dipendente dallo sviluppo della differenza tra la porzione fissa dei tassi degli *swap* a 10 e a 2 anni su base Euribor (il c.d. *spread*) [3].

L'accordo in merito allo *swap* fu regolato all'interno di un "Contratto quadro", *Rahmenvertrag für Finanztermingeschäfte*, in cui le parti con-

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[2] In argomento cfr. Fama – Bliss, *The information in long-maturity forward rates*, in 77 *A. Econ. Rev.*, 1987, p. 680; Roller – Elster – Knappe, *Spread-abhängige Constant Maturity (CMS) Swaps. Funktionsweise, Risikostruktur und rechtliche Bewertung*, 19 ZBB, 2007, p. 345; Köndgen –Sandmann, *Strukturierte Zinsswaps vor den Berufungsgerichten: eine Zwischenbilanz*, 22 ZBB, 2010, p. 77, e Lange, *Beratungspflicht einer Bank bei Abschluss eines Zinssatz-Swap-Vertrags*, 27 BB, 2011, p. 1674.

In argomento si vedano le riflessioni sistematiche di Perrone, *La riduzione del rischio di credito negli strumenti finanziari derivati*, Milano, 1999, p. 31 ss.

[3] La formula utilizzata era: tasso di interesse del periodo in corso + 3 x [*strike* – (*CMS* 10 – *CMS* 2)]. La variabile denominata *strike* era fissata all'1%, ma sarebbe scesa nel tempo a 0,85, 0,7 fino ad arrivare a 0,55 sicché il tasso variabile non poteva mai scendere sotto lo zero.

cordavano di liquidare la differenza tra le due posizioni lorde, di modo che sarebbe gravato, sulla parte oberata del pagamento maggiore, di trasferire alla controparte solo lo *spread* tra le due somme dovute, calcolate in base ai tassi, rispettivamente fisso, per la banca, e variabile, per il cliente.

Nelle fasi della negoziazione, la banca aveva fornito al cliente tutte le informazioni relative ai rischi connessi con le due posizioni assunte nello *swap*, chiarendo, in particolare, che, in ipotesi di riduzione dei tassi di interesse il cliente avrebbe contratto perdite e allegando altresì modelli matematici a dimostrazione della possibilità teorica di andamenti vuoi positivi vuoi negativi dello *spread*. La banca aveva, inoltre, agito in maniera trasparente denunciando che la posizione assunta dal cliente era soggetta ad un rischio "teoricamente illimitato".

Quanto ai profili soggettivi, le trattative per conto della società municipalizzata furono portate avanti dal direttore generale e da un impiegato esperto nella materia finanziaria e laureato nelle discipline economiche che, tuttavia, dichiarava alla Suprema Corte Federale di non aver avuto, nella chiusura della negoziazione, piena consapevolezza dei rischi sottesi alla posizione assunta nel *CMS spread ladder swap*.

Al momento della conclusione del contratto, c.d. *trade date*, lo *swap* aveva un valore iniziale di mercato, c.d. *mark to market,* negativo, pari all'8 per cento del valore nozionale di riferimento (80.000 euro). La banca, in tal modo, si assicurava una posizione pressoché immune da perdite di mercato e ometteva di informare sul punto il cliente.

Alla data del 26 gennaio 2007, a causa del decremento dello *spread,* le parti si accordavano per la chiusura del *CMS spread ladder swap* con valore di mercato sfavorevole per il cliente pari a 566.850 euro. Il cliente citava in giudizio la banca ma le richieste venivano respinte dalle corti regionali.

4. (Segue): i doveri di informazione dell'intermediario nella negoziazione di strumenti finanziari complessi nella decisione del *BGH: anleger und anlagegerechte Beratung*.

IL *BGH* ribalta le decisioni di primo e secondo grado e dichiara la banca responsabile per violazione dei doveri di informazione imponendo il risarcimento dei danni. Nella pronuncia emerge che in relazione a prodotti molto complessi e ad alto rischio la banca deve fornire al cliente informazioni capillari al fine di adempiere ai doveri di trasparenza nei confronti del cliente.

La decisione si fonda sui principi di diritto, fissati nella decisione del *BGH* del 6 luglio 1993 [4] *pre*-MiFID, secondo cui, da un lato, il servizio di consulenza si reputa tacitamente concluso quando il cliente nella relazione con l'intermediario riceve informazioni sulla adeguatezza di un investimento per il quale la banca nutre un interesse rilevante; da l'altro, sui profili, noti con l'espressione *anleger und anlagegerechte Beratung* [5], che distinguono, nel contratto di consulenza i doveri di informazione relativi al profilo del cliente da quelli relativi all'oggetto dell'investimento.

Quanto ai profili soggettivi, la pronuncia del *BGH* sottolinea come la banca, ai sensi dell'art. 31, § 4, WpHG, in tema di *Allgemeine Verhaltensregeln* [6], nel prestare il servizio di consulenza, deve valutare le conoscenze ed esperienze nel settore di investimento, la situazione finanziaria e gli obiettivi di investimento; valutazione questa che fornisce il grado di sopportazione del rischio da parte del cliente. Ne risulta che la banca, nel caso di prodotti finanziari altamente complessi, è tenuta a consigliare solo quei prodotti adeguati quanto al profilo di rischio e agli obiettivi di investimento del cliente. Il dovere di informazione comporta, allora, secondo la Suprema Corte, il dovere di accertare che il cliente abbia compreso tutti i rischi sottesi all'investimento proposto. Ribaltando la contraria opinione delle *Oberlandesgericht,* Corti regionali di secondo grado, il *BGH* dispone che il dovere di *disclosure* in merito a prodotti finanziari altamente complessi non è attenuato in ipotesi di clienti che vantino una formazione professionale specifica nei temi economici. A ciò si aggiunga che la dichiarazione del cliente di aver sottoscritto lo strumento finanziario complesso nell'ignoranza di molti degli aspetti tecnici, lungi dal ridimensionare la responsabilità dell'intermediario per concorso di colpa del cliente, ai sensi del *§ 254 BGB,* in materia di *Mitverschulden,* testimonia, invece, il completo affidamento del cliente stesso sulla consulenza della banca.

Quanto all'aspetto inerente alla consulenza sullo specifico prodotto *CMS Spread Ladder Swap*, considerato, in linea con le posizioni delle Corti Regionali, una tipologia di strumento finanziario altamente speculativo, il *BGH* sottolinea come l'intermediario debba assicurare al cliente

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[4] Cfr. *NJW,* 1993, p. 2433 ss.

[5] Cui corrispondono le note espressioni anglosassoni "*know your custmer rule*" e "*know your merchandise rule*". Sul tema amplius Sartori, *Le regole di condotta degli intermediari finanziari: disciplina e forme di tutela*, Milano, 2004, *passim*.

[6] Prima della riforma Mifid la disposizione in materia di adeguatezza era contenuta nella *section 31, §. 2.*

un livello dettagliato di informazione sulle varie componenti di rischio che, nel caso discusso, imponevano la trasparenza sullo squilibrio delle posizioni, essendo l'esposizione al rischio del cliente, ma non della banca, illimitata.

La banca aveva, inoltre, l'obbligo di informare il cliente che la strutturazione del *CMS Spread Ladder Swap*, negoziato in contropartita diretta dalla banca, assumeva, per il cliente, un valore iniziale di mercato negativo, ovvero comportava per il cliente stesso una assunzione di una posizione di rischio maggiore rispetto a quella assunta dalla banca. Il *BGH* sottolinea come, essendo lo *swap* in esame una scommessa sulla variabilità dei tassi di interesse, le posizioni della banca e del cliente sono speculari, sostanziando una perdita per il cliente un vantaggio per la banca stessa. Nel prestare il servizio di consulenza, allora, la banca, ad evitare il conflitto di interessi, ai sensi della disposizione di cui al *§ 31 WpHG*, avrebbe dovuto informare in modo chiaro il cliente che assumeva una posizione iniziale svantaggiata. In altre parole, la banca avrebbe dovuto colmare le asimmetrie informative caratteristiche della posizione contrattuale del cliente con particolare riguardo ai profili di rischio connessi al *mark to market* iniziale negativo per il cliente stesso.

Rilevanti sono gli spunti di riflessione offerti dalla pronuncia della Suprema Corte federale tedesca. Se, in vero, risultano cristallizzati doveri stringenti di trasparenza a carico degli intermediari, non viene invece disposto un obbligo di trasparenza in merito a tutte le voci di profitto della banca né un divieto *tout court* di negoziazione degli *CMS spread ladder swap* né degli strumenti derivati in generale. I profili di responsabilità della banca nel caso in esame sono centrati sul fatto specifico, non necessariamente caratterizzante le posizioni in *swap* in generale, del *mark to market* iniziale negativo. Non si può, allora, da tale pronuncia dedurre una astratta posizione di sfavore della Corte riguardo alla negoziazione dei derivati.

5. Il caso *Titan Steel Wheels Ltd v. The Royal Bank of Scotlad plc* in materia di *currency swap derivate products* nella pronuncia della *High Court of Justice*.

Numerose le pronunce delle Corti inglesi in tema di violazione dei doveri contrattuali delineati nel sistema regolamentare inglese. Merita, in particolare, di essere segnalata la pronuncia resa il 12 aprile 2010 dalla *High Court of Justice*, nel caso *Titan Steel Wheels Ltd v. The Royal Bank of Scotland plc,* che ha respinto la domanda del cliente nei con-

fronti della banca, in relazione alla vendita di *currency swap derivate products*. La Corte, in particolare, ha negato che la banca prestasse un servizio di consulenza, c.d. *advisory service*, e che le opinioni espresse telefonicamente dal funzionario della banca stessa potessero qualificarsi come informazione sull'adeguatezza dell'investimento, negando così l'esistenza di specifici *duties of care*. La Corte ha altresì negato che ci fossero *contractual terms exclusion clauses* soggette ad *Unfair Contract terms Act* del 1977.

Leading case nella materia esaminata è il caso trattato nella sentenza *JP Morgan Bank v. Springwell Navigation Corp,* in cui nell'ipotesi di prestazione dei servizi di investimento secondo la modalità *purely execution style* l'intermediario non è tenuto ad informare il cliente sulla adeguatezza o appropriatezza degli investimenti. L'attore, in particolare, lamentava di aver subito notevoli perdite a seguito dell'acquisto di titoli di debito complessi riferiti a paesi emergenti. In particolare, per l'attore la banca aveva agito come *investment advisor* nei confronti di un cliente caratterizzato da un *low risk approach*. La banca, di contro, negava l'esistenza di una *advisory relationship* con l'attore, che definiva *higly experienced investor* e che, a suo dire, aveva scelto in piena consapevolezza dei rischi i prodotti da sottoscrivere. La Corte ha negato la responsabilità della banca per *negligent misstatement* sul presupposto dell'inesistenza di una *fiduciary relationship* tra le parti e arrivando a definire le richieste della società attrice *fantasy* e *commercially unreal*.

6. (Segue). Legittimazione quale *private person* all'azione di cui alla section 150 Financial Services and Markets Act 2000. Qualificabilità della relazione contrattuale tra cliente e intermediario come *advisory relationship* e violazione del *duty of care*.

Il sistema finanziario inglese, come emerge dalla sentenza esaminata, consente la creazione di una relazione contrattuale tra il cliente e l'intermediario secondo la modalità *execution only*, svincolando, di fatto, l'intermediario dai doveri di consulenza sulla adeguatezza degli strumenti consigliati. In particolare, nel sistema *pre*-MiFID i doveri dell'intermediario dipendono dai termini dell'accordo intercorso con le parti (i) *advisory,* (ii) *discretionary management* ovvero (iii) *execution only client*. Ne risulta che se i termini dell'accordo prevedono la prestazione dell'intermediario secondo la modalità *execution only*, l'intermediario non è tenuto alla *full disclosure* in merito all'operazione proposta.

Le Corti inglesi sembrano così enfatizzare il principio della libertà di contrattazione delle parti fino al limite di sacrificare l'interesse del cliente alla conoscenza dei prodotti negoziati. Nella ricostruzione dei fatti del caso *Titan Steel Wheels Ltd v. The Royal Bank of Scotland plc* la banca aveva, in sede processuale, allegato prove documentali dell'esclusione formale della responsabilità nella scelta di investimento del cliente.

La società *Titan Steel Wheels Ltd* (d'ora in poi *Titan*), specializzata nella lavorazione dell'acciaio esportato nei Paesi dell'area euro, era esposta al rischio di fluttuazione dei cambi, essendo i propri ricavi principalmente in euro e i propri costi in sterline. A tal fine la *Titan* aveva negoziato, in giugno e settembre 2007, due *currency swap* con *The Royal Bank of Scotlad plc* (d'ora in poi *RBS*) con il duplice obiettivo di assicurarsi contro il rischio di cambio e, eventualmente, speculare sulle oscillazioni delle monete in questione. Tassi di cambio sfavorevoli, tuttavia, avevano provocato ingenti perdite nella posizione in derivati della *Titan* che agiva in giudizio allegando che (i) la transazione era talmente inusuale e complessa che gli impiegati della *Titan* si erano affidati alla consulenza della banca per i profili concernenti la materiale strutturazione del *currency swap;* (ii) la banca aveva inoltre consigliato tali prodotti come adeguati al profilo di rischio relativo all'attività principale esercitata e (ii) da ultimo la banca, avendo violato i doveri di protezione, c.d. *duties of care*, consigliando prodotti inadeguati alporfilo di rischio del cliente e quindi era passibile di subire l'azione per danni di cui alla *section 150 Financial Services and Markets Act 2000* (d'ora in poi *FSMA 2000*) [7].

La *RBS*, tuttavia, allegò prove documentali della posizione di indipendenza assunta dalla *Titan* nel contratto, la c.d. *non-reliance clause*, secondo la quale il cliente dichiarava di fare affidamento unicamente sugli elementi desumibili dal contratto e, *ipso facto*, escludeva la possibilità che la banca prestasse il servizio di consulenza. Nonostante le prove fornite riguardo alle conversazioni telefoniche, che pure vertevano sui temi dei derivati sui cambi di moneta, non poteva, tuttavia, essere provata l'esistenza di un contratto di consulenza, non essendoci alcuna evidenza di un contratto scritto, né di una parcella liquidata per tale servizio né un'espressa richiesta di ottenere detta consulenza. Quanto ai profili soggettivi, il rappresentante della *Titan* che aveva trattato i derivati in esame aveva già una esperienza riguardo a strumenti finanziari complessi sic-

[7] La Corte non riconobbe alla *Titan* la legittimazione all'azione di cui alla *section 150 FSMA 2000* poiché il soggetto non era qualificabile come *private person*.

ché la conversazione intercorsa telefonicamente non poteva considerarsi rilevante.

Le questioni di diritto esaminate nella sentenza in oggetto riguardano principalmente tre punti: (i) la riconducibilità della *Titan* alla fattispecie *"private person"* di cui alla *section* 150 *FSMA 2000*; (ii) la configurabilità di una relazione di consulenza tra la *Titan* e la *RBS* e, di conseguenza, l'esistenza di tipico diritto di *common law* qualificato come *duty of care* in riferimento ai consigli forniti dalla banca in merito alla strutturazione dei *currency swaps*; (iii) l'esistenza di *exclusion clauses* soggette all'*Unfair Contract Terms Act* 1977 (d'ora in poi *UCTA*) e la possibilità per la *RBS* di fare affidamento su tali clausole.

In riferimento alla prima questione di diritto, la *section* 150 del *FSMA 2000* riconosce l'azione a tutela della violazione dei doveri di condotta di un intermediario autorizzato solo alla c.d. *private person*, definita, secondo il *Reg. 3(1)(a)FMSA Regulations 2001* come «*any individual, unless he suffers the loss in question in the course of carrying on business of any kind*» ovvero *3(1)(b)FMSA Regulations 2001* come «*any person who is not an individual, unless he suffers the loss in question in the course of carrying on business of any kind*»; ovvero a persone fisiche o giuridiche purché le perdite non siano maturate in riferimento ad una attività economica. La *Titan* argomentava che la fedele ricostruzione delle *FSMA Regulations* implicava che la Corte dovesse considerare se la sottoscrizione di *currency swaps* fosse parte integrante dell'attività della *Titan* stessa ovvero assumesse un ruolo ancillare al *core business* della lavorazione dell'acciaio. *Titan* sosteneva con enfasi di non operare nel mercato finanziario e di non possedere gli strumenti necessari, quali i *software*, per comprendere e analizzare strumenti finanziari complessi quali i *currency swaps*. Di contro, *RBS* sottolineava come il riferimento delle *FSMA Regulations* all'attività di «*carrying on a business of any kind*» fosse passibile di una ampia interpretazione ed estensibile a qualunque attività economica.

La Corte respinge la richiesta della *Titan* anche sul piano formale evidenziando come i *currency swaps* in oggetto formassero parte di una catena di transazioni di ampia scala e valore necessari all'attività principale della *Titan*, potendosi così le perdite qualificare come maturate nel corso dell'attività economica.

Quanto alla qualificazione della relazione giuridica intercorsa tra *Titan* e *RBS*, nonostante i costanti colloqui telefonici tra i dipendente della *Titan* e quelli della *RBS*, la Corte valutata la chiarezza dei termini contrattuali in cui le parti accettavano di agire fuori dal rapporto di consulenza, esclude qualunque violazione del *duty of care*. Secondo la

c.d. *contractual estoppel,* se il cliente sottoscrive il contratto col quale la banca espressamente dichiara di non assumere la responsabilità dell'adeguatezza dell'investimento, il cliente si priva di fatto del diritto di agire contro la banca. A ciò si aggiunga che il grado di professionalità di *Titan*, dimostrato da una consolidata esperienza nella negoziazione di prodotti complessi pone il cliente sullo stesso piano della banca e esclude l'esistenza di uno specifico *duty of care* della *RBS,* poiché il grado di affidamento, c.d. *trust,* del cliente nei confronti della banca è in linea con le normali prassi dell'attività commerciale e non giustifica il sorgere di un *higher legal duty* [8].

La Corte, da ultimo, esamina la riconducibilità agli obiettivi dell'*UCTA* della clausola che disponeva che *RBS* non era responsabile «*for any loss of opportunity, decline in value of investments, errors of fact or judgment or other loss from any act or omission made under or in relation to or connection with terms of business or the services provided under these, except to the extent that they resulted from its gross negligence*». La Corte conclude per il superamento del test c.d. di ragionevolezza di cui alla normativa *UCTA* della clausola in questione sulla base degli argomenti che seguono. Da un lato, (i) sussiste un totale equiparazione di *bargaining power* posto che la *Titan* era nella posizione di scegliere un altro intermediario; (ii) la clausola si avvale di una terminologia standardizzata utilizzata nei formulari di tutte le banche; (iii) *Titan* era in grado di ottenere una consulenza sull'operazione in derivati in modo indipendente; e, da ultimo, (iv) i termine della clausola erano chiari e portati a conoscenza della *Titan* in modo regolare.

Analoga la ricostruzione dei fatti e la regola *juris* applicata nel caso *JP Morgan Bank v. Springwell Navigation Corporation* [9] in cui gli investitori erano imprenditori di successo, classificati come "*sophisticated non-private investors*" nell'ambito della relazione contrattuale con *JP Morgan Bank*. Questi soggetti gestivano, avvalendosi dello schermo societario, un portafoglio di strumenti finanziari collegati ai titoli obbligazionari emessi dalla Russia che, con la crisi del 1998, vennero dichiarati non rimborsabili, con conseguenti perdite nel portafoglio in oggetto. L'attore

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[8] In argomento, per un quadro generale si rinvia a Criscuoli, *Il contratto nel diritto inglese*, Padova, 2001, *passim*.

[9] 2008, EWHCA, 1186. Nello stesso senso anche *Peekay Intermark Ltd v. ANZ Banking Group Ltd*, 2006, EWCA Civ., 386; *IFE Fund SA v. Goldman Sachs International*, 2007, EWCA Civ., 811 e, da ultimo, *Grant Estates Limited v. Royal Bank of Scotland plc*, 2012, CSOH, 133.

lamentava che l'intermediario aveva violato il *duty of care* in riferimento ala dovuta consulenza sulla appropriatezza dell'investimento e si era reso responsabile di *negligent misstatement*. La Corte respinge le richieste del cliente sulla base delle evidenze formali del contratto che non fissava alcun dovere di consulenza da parte della banca.

7. (Segue). L'indagine della *FSA* sugli *Interest Rate Hedging Products* collocati presso *non-sophisticated customers* in difformità alla regolamentazione *COBS*.

Le sentenze riportate dimostrano come l'orientamento giurisprudenziale inglese fondi la qualificazione del contratto sui dati formali della relazione banca cliente e, soprattutto in ipotesi di un investitore professionale, non consenta il riconoscimento della prestazione del servizio di consulenza in forma tacita, ossia non prevista nel contratto scritto.

Sebbene le banche sembrino aver avuto la meglio nelle corti inglese, il tema dei derivati è all'attenzione dei *regulators* d'oltremanica. In particolare, si segnala l'iniziativa in tema di *Interest Rate Hedging Products, Pilot Findings* [10], pubblicato nel marzo 2013 dalla *FSA (Financial Services Authority),* neosoppressa autorità di vigilanza inglese, sostituita in data 1 aprile 2013 dalla *PRA* (*Prudential Regulatory Authority*) e dalla *FCA (Financial Conduct Authority*).

Dall'indagine promossa dalla *FSA* [11] riguardo alla negoziazione di *IRHPs* (*interest rate hedging products*), strumenti finanziari derivati finalizzati a contenere il rischio di oscillazione dei tassi di interesse, da parte di 12 banche inglesi, tra cui *Barcleys Bank Plc, HSBC Bank Plc*, *Lloyds Banking Group* e *Royal Bank of Scotland Plc* è emerso che il 90% dei prodotti collocati presso *non-sophisticated customers* non soddisfa i requisiti minimi posti dalla regolamentazione *COB* (*Conduct of Business*) [12], sostituita a partire dal 1 novembre 2007, a seguito del recepimento della normativa *MiFID,* dalle *COBS* (*Conduct of Business Sourcebook*) [13].

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[10] Documento reperibile sul sito *www.fsa.gov.uk*

[11] Il riferimento è a FSA, *Interest Rate Hedging Products. Pilot Findings*, March 2013.

[12] Le regole delle *COB* (*Conduct of Business*) che si possono leggere in *http://fshandbook.info/FS/html/handbook/COB*.

[13] Il testo delle disposizioni di cui alle *COBS* è reperibile su *http://fshandbook.info/FS/html/handbook/COBS*.

La classificazione dei clienti *pre*-MiFID si fondava sulla tripartizione di cui alla COB 4.1 tra (i) *private customers,* (ii) *intermediate customers* e (iii) *market counterparties*; categorie, queste, traslate quasi meccanicamente nel sistema *post-MiFID* nelle *COBS 3.4*, *3.5* e *3.6* nei raggruppamenti dei (i) *retail clients* (ii) *professional clients* e (iii) *eligible counterparties* [14].

In particolare, le principali irregolarità riguardano le violazione delle regola di cui alla *COBS* 2.2.1, che impone una *appropriate information in a comprehensible form*; la *COBS* 4.2.1, in merito al dovere di informazione *fair, clear and not misleading*; la *COBS* 4.5.2, secondo cui l'informazione deve presentare al cliente *equally the benefits and the risks*; la *COBS* 9.2.1, in merito ai requisiti della *suitability* nella prestazione del servizio di consulenza e, da ultimo, la *COBS* 14.3 che impone all'intermediario la descrizione di *nature and risks of designated investments*.

All'esito dell'indagine della *FSA* le banche coinvolte hanno accettato di rivedere le molte posizioni *IHHPs*.

8. I rimedi giudiziali nella prospettiva dei piani di tutela: regole di validità *versus* regole di condotta.

Il quadro delle tutele giudiziali predisposte dal diritto speciale, interno e comunitario, in punto di violazione delle regole di condotta è largamente incompleto.

La giurisprudenza interna si è interrogata, con esiti contrastanti, sul tema delle conseguenze della violazione delle regole di condotta di cui all'art. 21 t.u.f. e alle norme regolamentari. Ne è risultato un dibattito ricchissimo e estremamente vivace, in cui le soluzioni proposte possono essere sintetizzate in: (i) nullità virtuale, *ex* art. 1418, comma 1°, c.c., del contratto di acquisto degli strumenti finanziari per violazione di norme imperative; (ii) annullabilità per vizi di volontà; (iii) risoluzione per inadempimento [15].

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[14] Sull'impatto della normativa *MiFID* nella classificazione dei clienti nel sistema inglese si rinvia a *FSA, Implementing MiFID's Client Categorisation requirements,* August 2006

[15] Per una ricostruzione delle posizioni della giurisprudenza di merito si rinvia a Cottino, *Una giurisprudenza in bilico: i casi Cirio, Parmalat, bonds argentini*, in *Giur. it.*, 2006, p. 537 ss, che nota come «il dato che emerge è non solo quantitativamente impressionante ma anche qualitativamente rivelatore — oltre che di serie disfunzioni

Tra queste, in particolare, è parsa prevalere la tesi della nullità c.d. virtuale del contratto, argomentando dalla difformità del contratto dal paradigma che ne determina la perfezione strutturale ovvero dalla sua contrarietà contenutistico — funzionale ad interessi ritenuti inderogabili dal legislatore. Dalla prospettiva del cliente, poi, la tutela restitutoria presenta i vantaggi nei termini di un recupero integrale delle somme impiegate nell'operazione.

La soluzione della nullità appare tuttavia criticabile poiché esclude ogni considerazione sul rapporto di causalità fra il pregiudizio patrimoniale lamentato dall'investitore e la condotta dell'intermediario nonché sul possibile concorso di colpa del fatto dell'investitore, con il rischio di traslare sull'intermediario anche la componente di rischio dipendente dal generale andamento del mercato [16].

Dal punto di vista dogmatico, poi, derivare la nullità del contratto dalla violazione delle regole di condotta equivarrebbe a trasformare in regole di validità norme che sono invece dirette a imporre un determinato "contegno" nella fase delle trattative e nell'esecuzione del contratto stesso [17].

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del sistema — di una accentuata diversificazione di soluzioni, dai crescenti margini di incertezza sia per chi adisce l'autorità giudiziaria sia per chi ne subisce le iniziative». Per ulteriori riferimenti agli orientamenti giurisprudenziali precedenti all'intervento delle Sezioni Unite, si vedano, altresì, Tucci, *La violazione delle regole di condotta degli intermediari tra "nullità virtuale"*, culpa in contrahendo *e inadempimento contrattuale*, in *Banca, borsa, tit. cred.*, 2007, II, 632 ss.; Roppo, *La tutela del risparmiatore fra nullità, risoluzione e risarcimento (ovvero, l'*ambaradan *dei rimedi contrattuali*), in *Contr. e impr.*, 2005, p. 896 ss.; Gobbo-Salodini, *I servizi di investimento nella giurisprudenza più recente*, in *Giur. comm.*, 2006, II, p. 5 ss. e, da ultimo, Inzitari-Piccinini, *La tutela del cliente nella negoziazione di strumenti finanziari*, Padova, 2008, *passim*. Sul rimedio della risoluzione si rinvia a Lucantoni, *L'inadempimento di "non scarsa importanza" nell'esecuzione del contratto c.d. quadro tra teoria generale della risoluzione e statuto normativo dei servizi di investimento*, in *Banca, borsa, tit. cred.*, 2010, II, p. 783 ss. e Guadagno, *Violazione degli obblighi di condotta da parte dell'intermediario finanziario: lo stato dell'arte dopo le Sezioni Unite*, in *Riv. dir. comm.*, 2009, I, p. 241 ss.

[16] L'osservazione, condivisibile, è di Perrone, *Less is more. Regole di comportamento e tutele degli investitori*, in *La nuova disciplina degli intermediari dopo le direttive MiFID: prime valutazioni e tendenze applicative*, a cura di De Mari, Padova, 2009, p. 87 ss. e Id., *Servizi di investimento e violazione delle regole di condotta*, in *Riv. soc.*, 2005, p. 1017 ss.

[17] Così già Di Majo, *La correttezza nell'attività di intermediazione mobiliare*, in *Banca, borsa, tit. cred.*, 1993, I, p. 290, che evidenzia come il legislatore ricorra a «*regole di comportamento*, che hanno per oggetto la condotta dei soggetti che esercitano l'attività di intermediazione mobiliare» «e non *regole di validità*, che invece hanno generalmente

Sul tema è, come è noto, intervenuta la Cassazione, con le sentenze del 29 settembre 2005, n. 19024 [18] e, a Sezioni Unite, del 19 dicembre 2007, n. 26724 e 26725 [19].

La Suprema Corte ha affrontato il rapporto tra regole di validità e regole di condotta e, pur non negando il carattere imperativo di queste ultime, ha affermato che la violazione delle regole di condotta può essere fonte di responsabilità precontrattuale o contrattuale a seconda che la violazione si collochi nella fase che precede la stipulazione del contratto di investimento o in quella successiva.

In particolare, si è detto che la violazione dei doveri di informazione del cliente e di corretta esecuzione delle operazioni che la legge pone a carico dei soggetti autorizzati alla prestazione dei servizi di investimento può dar luogo a responsabilità precontrattuale, con conseguente obbligo di risarcimento dei danni, ove tali violazioni avvengano nella fase precedente o coincidente con la stipulazione del contratto d'intermediazione destinato a regolare i successivi rapporti tra le parti; può, invece, dar luogo a responsabilità contrattuale, ed eventualmente condurre alla risoluzione del contratto, ove si tratti di violazioni riguardanti le operazioni di investimento o disinvestimento compiute in esecuzione del contratto in questione.

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riguardo ai singoli atti e/o negozi, fissandone i requisiti e la cui mancanza determina generalmente la invalidità dell'atto» (corsivo dell'A.); Villa, *Contratto e violazione di norme imperative*, Milano, 1997, p. 158 ss. e Perrone, Less is more, cit., p. 90.

[18] La sentenza si può leggere in *Foro it*., 2006, I, p. 1105 ss., con nota di Scoditti, *Regole di comportamento e regole di validità: i nuovi sviluppi della responsabilità precontrattuale*; in *Giur comm*., 2006, II, p. 626, con nota di Salodini, *Obblighi informativi degli intermediari e risarcimento del danno: la Cassazione e l'interpretazione evolutiva della responsabilità precontrattuale*; in *Danno e resp*., 2005, p. 25 ss., con nota di Roppo-Afferni, *Dai contratti finanziari al contratto in genere: punti fermi della Cassazione sulla nullità virtuale*.

[19] Le pronunce della Suprema Corte si leggono, fra l'altro, in *Dir. banc*., 2008, I, p. 691 ss., con nota di Mazzini, *L'ambito applicativo della nullità virtuale e gli obblighi di astensione dell'intermediario nella sentenza delle Sezioni Unite*; in *Giur it*., 2008, p. 353, con nota di Cottino, *La responsabilità degli intermediari finanziari e il verdetto delle sezioni unite: chiose, considerazioni, e un elogio dei giudici*; in *Foro it*., 2008, I, p. 779 con nota di Scoditti, *La violazione delle regole di comportamento dell'intermediario finanziario e le Sezioni Unite*; in *Danno e resp*., 2008, p. 525 ss. con nota di Roppo, *La nullità virtuale del contratto dopo la sentenza Rordorf*; in *Riv. dir. comm*., 2008, II, p. 1189 con nota di Calisai, *La violazione degli obblighi di comportamento degli intermediari finanziari - il contratto di intermediazione davanti ai giudici, fino alla tanto attesa (o forse no) pronuncia delle Sezioni Unite della Corte di Cassazione*.

In nessun caso, sottolinea la Suprema Corte, la violazione dei doveri di comportamento può determinare la nullità del contratto di intermediazione o dei singoli atti negoziali conseguenti, a norma dell'art. 1418, comma 1°, c.c. L'inevitabile radicamento dei doveri di comportamento alle circostanze del caso concreto li rende, infatti, inidonei ad assurgere a requisiti di validità. Ne risulta che le regole di comportamento non attengono alla struttura o all'oggetto del contratto, ma si collocano nella fase delle trattative o nella fase esecutiva e sono finalizzate a consentire all'investitore la valutazione sulla convenienza dell'operazione.

Il doppio regime di responsabilità precontrattuale e contrattuale è connesso con la qualificazione dei contratti di negoziazione come "contratti quadro", mediante i quali le parti prestabiliscono, in conformità alle norme di settore, gli aspetti e le modalità del contenuto dei successivi negozi. Ne deriverebbe che solo la violazione delle regole informative antecedenti alla stipulazione del contratto quadro — riconducibile ad una violazione di cui all'art. 1337 c.c. — si traduce in una responsabilità di tipo precontrattuale. La violazione di tutte le altre regole comportamentali, che devono essere rispettate successivamente alla stipulazione del contratto quadro, integra la fattispecie dell'inadempimento e dunque una responsabilità contrattuale, ferma la possibilità da parte del cliente di invocare, qualora l'inadempimento non abbia scarsa importanza *ex* art. 1445 c.c., il rimedio risolutorio.

Discutibile appare, tuttavia, il rimedio della risoluzione per grave inadempimento, prospettato dalle sentenze gemelle delle Sez. Un., ove la violazione delle regole di comportamento presenti la gravità richiesta dall'art. 1455 c.c. per il venire meno del rapporto sinallagmatico, con i conseguenti effetti restitutori della somma erogata dal cliente all'intermediario per la prestazione del servizio di investimento. Questo rimedio, che pur presenta il vantaggio di una semplificazione nella determinazione delle somme dovute al cliente, sembra di difficile applicazione nelle ipotesi di violazione dei doveri informativi, anche in punto di adeguatezza e appropriatezza, che necessariamente si collocano in una fase che precede la stipulazione dei contratti [20].

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[20] Critico nei confronti del rimedio della risoluzione per grave inadempimento Perrone, Less is more, cit., p. 96 ove l'osservazione che con la sola eccezione delle regole sull'esecuzione e gestione di ordini e sulla specifica disposizione sugli obblighi di informazione *post*-contrattuali di cui all'art. 55 reg. intermediari in materia di gestione di portafogli e operazioni con passività potenziali, gli obblighi informativi sono funzionali a decisioni di investimento da assumersi in modo consapevole, art. 27, co. 2, reg.

Tra gli *obiter dicta* delle citate sentenze va segnalata la riconduzione della disciplina del conflitto di interessi alle regole di condotta: il divieto di compiere operazioni inadeguate o in conflitto di interessi attiene, così, alla fase esecutiva del contratto e costituisce al pari del dovere di informazione, una specificazione del primario dovere di diligenza, correttezza e professionalità nella cura degli interessi del cliente.

Il percorso argomentativo delle Sezioni Unite, che poggia sull'affermazione del tradizionale principio di non interferenza tra norme di comportamento e norme di validità del contratto, non è andato esente da rilievi critici. La tradizionale distinzione tra regole di validità e regole di condotta è stata, infatti, contestata come «datata» [21] e si è proposto di ricondurre le regole di condotta a «obblighi legali di fattispecie», collocati nell'ambito della costruzione della fattispecie contrattuale come momenti strutturali [22]. Se ne è così dedotto che, in ipotesi di operazioni inadeguate o in conflitto di interessi, la sanzione più appropriata dovrebbe

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intermediari, e adeguate e appropriate, artt. 39 ss.; di qui il loro carattere evidentemente pre-contrattuale e l'impossibilità di fondare la risoluzione dell'accordo sulla violazione di obblighi che ne precedono la conclusione. Conforme Roppo, *La tutela del risparmiatore fra nullità e risoluzione (a proposito di Cirio bond e Tango bond)*, in *Danno resp.*, 2005, p. 629 e Albanese, *Violazione delle regole di condotta degli intermediari finanziari e regime dei rimedi esperibili dagli investitori danneggiati*, in *I soldi degli altri. Servizi di investimento e regole di comportamento degli intermediari*, a cura di Perrone, Milano, 2008, p. 65 ss. che nega il ricorso al rimedio risolutorio nei rapporti aventi ad oggetto obblighi di protezione e non prestazioni corrispettive.

[21] Così Maffeis, *Discipline preventive nei servizi di investimento: le Sezioni Unite e la notte (degli investitori) in cui tutte le vacche sono nere*, in *Contr.*, 2008, p. 404, che si esprime nei termini di «fedeltà datata ad una concezione rigida tra regole di validità e regole di comportamento» e Dolmetta, *La violazione di obblighi di «fattispecie» da parte di intermediari finanziari*, in *Contr.*, 2008, p. 80 ss. Nello stesso senso Riccio, *La clausola generale di buona fede è dunque un limite generale all'autonomia contrattuale*, in *Contr. e impr.*, 1999, p. 21 ss. che sottolinea come «alla violazione della regola di buona fede possa conseguire un effetto invalidante del contratto» e Galgano, *Squilibrio contrattuale e mala fede del contraente forte*, in *Contr. e impr.*, 1997, p. 423, che osserva che *«da quando la Cassazione ha equiparato il dolo omissivo al dolo commissivo»* si deve ritenere che *«la violazione della buona fede precontrattuale può produrre effetto invalidante del contratto»*.

[22] Così Dolmetta, *La violazione di obblighi di «fattispecie» da parte di intermediari finanziari*, in *Contr.*, 2008, p. 81, ove l'osservazione che gli obblighi di comportamento degli intermediari, da definirsi nei termini propri di «obblighi di fattispecie», paiono «collocarsi (non in un quadro di trattative, in fatto per di più inesistenti, bensì) nell'ambito della costruzione della fattispecie contrattuale, come momento proprio della stessa». Secondo l'A., p. 85, «la posizione di un rimedio restitutorio risulta coerente con una funzione sanzionatoria della violazione dell'obbligo della legge imposto all'intermediario».

essere la nullità per illiceità della causa [23], per non meritevolezza della causa in concreto [24] o per mancanza dell'accordo [25].

Questa soluzione, superando il tradizionale paradigma liberale dell'autonomia privata, rischia di configurare una tutela paternalistica del debitore [26]. Sotto il profilo dogmatico, poi, solo il legislatore, come sottolineato nelle sentenze della Cassazione, può «isolare specifiche fattispecie comportamentali elevandole al rango di norme di validità» [27]. Tradizionalmente si è sempre negato che le regole di comportamento, e in particolare la clausola di buona fede, possano decidere dell'esistenza di un rapporto obbligatorio [28].

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[23] Maffeis, *Dopo le Sezioni Unite: l'intermediario che non si astiene restituisce il denaro investito*, in *Contr.*, 2008, p. 557; Id., *Discipline*, cit.; Id., *Contro l'interpretazione abrogante della disciplina del conflitto di interessi (e di altri pericoli) nella prestazione dei servizi di investimento*, in *Riv. dir. civ.*, 2007, II, p. 71 ss. e Id., *La natura e la struttura dei contratti di investimento*, in *Riv. dir. priv.*, 2009, p. 67 ss. Così anche Sartori, *La (ri) vincita dei rimedi risarcitori nell'intermediazione finanziaria: note critiche*, in *Dir. fall.*, 2008, II, p. 1 ss.; Piazza, *La responsabilità della banca per acquisizione e collocazione di prodotti finanziari "inadeguati" al profilo dell'investitore*, in *Corr. giur.*, 2005, p. 1031, secondo cui «oltre al comportamento serbato nella fase formativa, è proprio il contenuto complessivo del negozio che resta intriso di contrarietà ai principi di ordine pubblico del contratto» e De Nova, *La responsabilità dell'operatore finanziario per esercizio di attività pericolosa*, in *Contr.*, 2005, p. 709, per l'affermazione perentoria che «sul piano contrattuale il rimedio è quello della nullità e delle restituzioni». Critico sulle posizioni della Suprema Corte anche Calvo, *Il risparmiatore disinformato tra poteri forti e tutele deboli*, in *Riv. trim. dir. proc. civ.*, 2008, p. 1431 ss.

[24] Sul punto cfr. le valutazioni di Tucci, *"Servizio" e "contratto" nel rapporto tra intermediario e cliente*, in *I contratti del mercato finanziario,* a cura di Gabrielli – Lener, in *Trattato dei contratti*[2], diretto da P. Rescigno – Gabrielli, vol. 2, t. 1, 2011, p. 208 s.

[25] Così Gentili, *Inadempimento dell'intermediario e vizi genetici dei contratti di investimento*, in *Riv. dir. priv.*, 2009, p. 23 ss.

[26] Così Perrone, *Obblighi informativi, suitability e conflitti di interesse: un'analisi critica degli orientamenti giurisprudenziali e un confronto con la nuova disciplina MiFID*, in *I soldi degli altri*, cit., p. 6 e nt. 15.

[27] Così Cass. S.U., n. 26726 e 26726, cit. Conforme all'orientamento della Suprema Corte Perrone, Less in more, cit., p. 93; Albanese, *Violazione delle regole di condotta degli intermediari finanziari e regime dei rimedi esperibili dagli investitori danneggiati*, in *I soldi degli altri*, cit., p. 56; Mariconda, *L'insegnamento delle Sezioni Unite sulla rilevanza della distinzione tra norme di comportamento e norme di validità*, in *Corr. giur.*, 2008, p. 235 s.

Contra cfr. la posizione precedentemente assunta da Cass., 16 febbraio 2007, n. 3683, in *Corr. giur.*, 2007, 634, che argomentando da alcune norme speciali afferma il «tendenziale inserimento, in sede normativa, del comportamento contrattuale delle parti tra i requisiti di validità del contratto».

[28] Così D'Amico, *Regole di validità e regole di comportamento nella formazione del contratto*, in *Riv. dir. civ.*, 2002, I, p. 37 ss. per la sussistenza di un rigoroso principio di

Sul piano della funzione, le regole della «validità», attenendo alla struttura del contratto, stabiliscono le condizioni a cui l'atto negoziale deve corrispondere per essere vincolante tra le parti e «hanno per fine di garantire la certezza dell'esistenza di fatti giuridici» [29]. Dall'esigenza di certezza si ricava la necessità di formalizzazione delle regole di validità e l'esigenza che operino su un piano riservato alla valutazione esclusiva dell'ordinamento e ne sia sottratta la competenza ai privati.

Le regole di condotta, invece, sono funzionali ad assicurare la correttezza nelle contrattazioni e «sono (o dovrebbero essere) regole "elastiche" perché risultanti dalla "concretizzazione" *giudiziale* di una "clausola generale" dal contenuto (com'è proprio di tutte le clausole generali) non formalizzato/non formalizzabile» [30]. Da ciò l'incertezza di una prassi giurisprudenziale che ammettesse che l'invalidità di un atto possa dipendere dalla qualificazione di un comportamento dell'intermediario [31].

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autonomia tra regole di validità e regole di comportamento; C. Scognamiglio, *Regole di validità e regole di comportamento: i principi e i rimedi*, in *Europa dir. priv.*, 2008, p. 599 ss.; Ferri, *Appunti sull'invalidità del contratto (dal codice civile del 1865 al codice civile del 1942)*, in *Riv. dir. comm.*, 1996, I, p. 389, ove l'osservazione che «il 1° comma dell'art. 1428 c.c. disciplina il caso della contrarietà a norma imperativa da parte di un *negozio giuridico* (e cioè di un *regolamento di interessi)*, non già di un comportamento»; Mengoni, *Autonomia privata e Costituzione*, in *Banca, borsa, tit. cred.*, 1997, I, p. 9, secondo cui «in nessun caso comunque, secondo la dogmatica del nostro codice civile, la violazione della buona fede è causa di invalidità del contratto, ma solo fonte di responsabilità per i danni» e, p. 11, la clausola della buona fede «non è mai criterio di nullità del contratto o di singole clausole»; Pietrobon, *Errore, volontà e affidamento nel negozio giuridico*, Padova, 1990, p. 104 ss. e Villa, *Contratto e violazione di norme imperative,* Milano, 1997, p. 158 ss. Sotto il codice del 1865 Trabucchi, *Il dolo nella teoria dei vizi del volere*, Padova, 1937, p. 107. Santoro-Passarelli, *Dottrine generali del diritto civile*[9], 1966 (rist. 1981), p. 171, ove l'osservazione che «la contravvenzione al principio di buona fede esplica la sua influenza in altre maniere, obbligando al risarcimento dei danni, o riflettendosi sull'interpretazione o sull'esecuzione del negozio, ma non ne compromette la validità».

Contra, per l'opinione che la sanzione per la violazione dell'obbligo di comportarsi secondo buona fede nella formazione del contratto debba ravvisarsi nella invalidità del prodotto del comportamento lesivo, Sacco, *Il contratto*, Torino, 1975, 669; Id., in Sacco-De Nova, *Il contratto*[3], in *Tratt. dir. civ.* diretto da Sacco, Torino, 2004, p. 244, ove l'affermazione che «là dove l'evento lesivo che corona la condotta illecita sia la prestazione, da parte della vittima, di un consenso viziato, la rimozione degli effetti del contratto può essere il rimedio adatto per neutralizzare la lesione».

[29] Pietrobon, *Errore*, cit., p. 118.

[30] Così testualmente D'Amico, *Regole di validità e regole di comportamento nella formazione del contratto,* in *Riv. dir. civ.,* 2002, I, p. 43.

[31] In argomento sui problemi connessi all'applicazione degli *standards* valutativi Falzea, *Gli* standards *valutativi e la loro applicazione*, in *Riv. dir. civ.*, I, 1987, p. 1 ss.

Nel contesto specifico dei mercati finanziari, poi, la clausola generale deve tener conto dell'interesse all'integrità dei mercati finanziari. Ammettere che l'invalidità del contratto avente a oggetto un servizio di investimento possa dipendere dalla qualificazione del comportamento dell'intermediario alla stregua di mutevoli criteri valutativi extralegali, cui rimanda la regola della correttezza, porterebbe una seria minaccia all'integrità e all'efficienza dei mercati finanziari [32].

Sembra perciò preferibile il rimedio risarcitorio, suggerito dalla Suprema Corte, sia per la possibile rilevanza causale della condotta colposa dell'investitore secondo il paradigma dell'art. 1227, co. 1, c.c., [33] sia per la possibile considerazione, nella determinazione del pregiudizio patrimoniale risarcibile, della causalità alternativa costituita dall'andamento complessivo del I mercato [34].

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[32] A favore della tecnica risarcitoria come «forma elettiva di tutela» in caso degli obblighi di condotta che discendono vuoi dalla normativa regolamentare, vuoi dalle clausole generali Venuti, *Le clausole generali di correttezza. Diligenza e trasparenza nel testo unico delle disposizioni in materia di intermediazione mobiliare*, in *Europa e dir. priv.*, 2000, p. 1049 ss.

[33] Per quanto possa in teoria sostenersi l'applicabilità dell'art. 1227 c.c. anche in ipotesi di invalidità. In dottrina Perrone, Less is more, cit., p. 94; Palmieri, *Responsabilità dell'intermediario finanziario per violazioni degli obblighi informativi e protezione dell'investitore non professionale*, in *Giur. comm.*, 2005, II, p. 526; Scalisi, *Dovere di informazione e attività di intermediazione mobiliare*, in *Riv. civ.*, 1994, II, p. 194. In giurisprudenza Trib. Biella, 12 luglio 2005, in *www.ilcaso.it*; Trib. Milano, 25 luglio 2005, ivi; Trib. Parma, 3 marzo 2006, ivi; Trib. Parma, 21 marzo 2007, ivi. Per la rilevanza del concorso di colpa dell'investitore in materia di responsabilità della Consob per vigilanza sul prospetto, v. Cass., 3 marzo 2001, n. 3132, in *Banca, borsa, tit. cred.*, 2002, II, 19, con nota di Perrone, *Falsità del prospetto e responsabilità civile della Consob; in materia di responsabilità dell'intermediario per il fatto del promotore*; Cass., 29 settembre 2005, n. 19166, in *Danno e resp.*, 2006, 141, con nota di Frumento, *Responsabilità (ex 2049) dell'intermediario finanziario per illecito del promotore-agente*.

Contra, nel senso che l'omissione degli obblighi informativi da parte dell'intermediario è assorbente, sotto il profilo causale *ex* art. 1227 c.c. di un onere di diligenza informativa del cliente Trib. Udine, 21 marzo 2007, in *www.ilcaso.it*; Trib. Venezia, 15 giugno 2007, *ivi*. In dottrina Maffeis, *Discipline*, cit., p. 410.

[34] Roppo *La* tutela, cit., p. 904, in riferimento all'art 23, co. 6, t.u.f. osserva «la norma indica che il legislatore non ha dimenticato la vecchia buona distinzione tra regole di validità e regole di comportamento/responsabilità, e le è pur sempre affezionato: dimostrando di aver ben chiaro che quando è in gioco la violazione di regole di condotta diligente, la ricaduta naturale non si produce sul terreno della validità del contratto, ma sul diverso terreno della responsabilità del contraente». La soluzione della nullità appare non convincente anche per Annunziata, *La disciplina del mercato mobiliare*[4], Torino, 2008, p. 155, che la definisce «una scorciatoia di "comodo", in quanto aggira lo

La regola della responsabilità permette, così, di conseguire un maggior equilibrio nel valutare le circostanze del caso concreto [35], evitando di creare allarmismi nel mercato, dovuti a un arbitrario ampliamento delle cause di nullità ad opera giurisprudenziale [36].

9. La Comunicazione Consob n. 9019104/2009 e l'*unbundling* delle componenti dei derivati.

Nel sistema interno mette conto segnalare la normativa secondaria

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spinoso problema della quantificazione del danno nei giudizi di risarcimento danni per la violazione degli obblighi di condotta».

In dottrina, privilegia la qualificazione in termini di responsabilità precontrattuale Perrone, *Less is more,* cit., p. 99. L'A. osserva che non si deve contenere la responsabilità precontrattuale nelle strettoie del recesso ingiustificato dalle trattative e di un risarcimento limitato al c.d. interesse contrattuale negativo. A ciò si oppone l'art. 1440 c.c. che nel consentire il ristoro del *deceptus* rispetto alle peggiori condizioni contrattuali derivanti dal dolo incidente, positivamente dimostra la possibilità di una responsabilità precontrattuale, pur quando dalla violazione della buona fede nelle trattative faccia seguito la valida conclusione del contratto. La responsabilità precontrattuale diverrebbe, così, il rimedio risarcitorio capace di compensare l'investitore per il pregiudizio conseguente ad una decisione di investimento assunta senza adeguata consapevolezza. Rimedio di portata generale, non limitato alla sola violazione degli obblighi che precedono e accompagnano la stipulazione del contratto quadro. Per un inquadramento della responsabilità precontrattuale in funzione correttiva del contratto Mengoni, Autonomia privata e costituzione, in *Banca, borsa, tit. cred.,* 1997, I, p. 19.

Per l'opposta opinione che il rimedio risarcitorio sia poco agevole per gli investitori, Maffeis, *Discipline*, cit., p. 403 ss.; Id., *Contro l'interpretazione abrogante della disciplina del conflitto di interessi (e di altri pericoli) nella prestazione dei servizi di investimento*, in *Riv. dir. civ.*, 2007, II, p. 71 ss. e Sartori, *La (ri)vincita*, cit., p. 38: ove l'affermazione che la ripetizione dell'indebito, comportando una completa internalizzazione dei costi in capo all'impresa di investimento che ha causato il pregiudizio al mercato costituisce un «robusto deterrente contro future azioni infedeli».

Sul *trade off* tra rimedi risolutori e rimedi risarcitori e sul conseguente impatto sulla sfera comportamentale del cliente cfr. Lewinsohn-Zamir, *The Choice Between Property Rules and Liability Rules Revisited: Critical Observations from Behavioral Studies*, in 80 *Tex. L. Rev.*, 2001, p. 223; Hylton, *Property Rules and Liability Rules, Once Again*, 2 *Rev. L. & Econ.*, 2006, p. 137 ss.

[35] Così testualmente la Comunicazione Consob n. 9019104/2009, p. 4. Sulle implicazioni della determinazione unilaterale del contenuto dei contratti derivati cfr. De Nova, *I contratti derivati come contratti alieni,* in *Riv. dir. priv.,* 2009, p. 15 ss.

[36] Cfr. Consob, Prime linee di indirizzo in tema di consulenza in materia di investimenti – Esito delle consultazioni – 30 ottobre 2007.

di cui alla Comunicazione Consob del 2 marzo 2009, n. 9019104 che ha disciplinato il «dovere dell'intermediario di comportarsi con correttezza e trasparenza in sede di distribuzione di prodotti illiquidi», declinando così i doveri dell'intermediario, di cui all'art. 21 t.u.f. e reg. intermediari, in relazione alle caratteristiche strutturali del mercato primario e secondario dei prodotti derivati.

Il documento evidenzia, come elemento di criticità nella negoziazione di tali strumenti finanziari complessi, vuoi la circostanza che l'emittente nel mercato primario rivesta spesso direttamente anche «il ruolo di distributore, o comunque forma con il distributore un unitario soggetto economico, anche se organizzato in più entità giuridiche»; vuoi la mancanza o la debolezza del mercato secondario che compromettono la «*price discovery*» e la possibilità di smobilizzo delle posizioni [37].

L'Autorità di vigilanza interna, poi, enuclea direttive in punto di trasparenza che, almeno in via teorica, sembrerebbero fronteggiare i problemi di opacità nella negoziazione dei derivati evidenziati dalla sentenza della Suprema Corti federale tedesca. In particolare, la Consob propone misure di trasparenza *ex ante*, raccomandando di effettuare la composizione (c.d. *unbundling*) delle diverse componenti che concorrono al complessivo esborso finanziario sostenuto dal cliente per l'acquisto del prodotto, distinguendo il *fair value*, con separata indicazione della componente derivativa, e i costi, a manifestazione differita, che gravano implicitamente o esplicitamente sul cliente. All'investitore deve, inoltre, essere fornita una indicazione del valore di smobilizzo dell'investimento, ipotizzandone le regole di *pricing*. Al fine di migliorare la possibilità di apprezzamento, da parte del cliente, del profilo di rischio-rendimento, l'intermediario deve, altresì, inserire nel *set* informativo confronti con prodotti semplici, di analoga durata, con adeguata liquidità.

La Consob centra anche la rendicontazione *ex post*, ai sensi dell'art. 56 reg. intermediari, su informazioni dettagliate.

In riferimento ai presidi di correttezza, gli intermediari che offrono prodotti di propria emissione, o che comunque operano in contropartita diretta della clientela, devono dotarsi di strumenti di determinazione del *fair value* basati su metodologie riconosciute e diffuse sul mercato, proporzionate alla complessità del prodotto. Il processo di determinazione delle condizioni da applicare alle operazioni deve essere strutturato in modo da guidare *ex ante* la discrezionalità degli addetti mediante la fis-

[37] Così Comunicazione Consob, 2 marzo 2009, n. 9019104, p. 9.

sazione di precisi criteri che contemplino, ove possibile, anche il ricorso a *provider* esterni. In particolare, le procedure aziendali devono predefinire il livello delle maggiorazioni eventualmente da applicare al titolo quali commissioni per l'intermediario (il c.d. *mark up*).

In relazione alla graduazione delle regole di condotta, la Consob [38], in linea con quanto emerso nella sentenza inglese che si annota, non ha escluso, in via astratta, che i servizi di collocamento o di ricezione e trasmissione di ordini relativi a strumenti finanziari derivati siano realizzati senza essere accompagnati da un'attività consulenziale con conseguente applicazione del regime di appropriatezza di cui all'art. 42 reg. intermediari, in virtù del quale l'intermediario dovrà raffrontare le caratteristiche del prodotto al grado di conoscenza finanziaria e di esperienza del cliente.

Tuttavia, con riferimento ai derivati negoziati *OTC*, la posizione è non dissimile da quella assunta dal *BGH*. L'assistenza fornita alla clientela nella fase di strutturazione di queste operazioni, create "su misura" per il cliente, pur se in una logica di standardizzazione, «presuppone intrinsecamente che il prodotto sia presentato come adatto alla clientela e rende, quindi, imprescindibile l'applicazione del regime di adeguatezza previsto in caso di svolgimento del servizio di consulenza in materia di investimenti» [39].

In tale prospettiva, l'organizzazione dell'intermediario acquista un ruolo preminente. Il processo di valutazione dell'adeguatezza dovrà prevedere, in linea con la dicotomia di *anleger und anlagegerechte Beratung,* l'utilizzazione di una pluralità di variabili afferenti vuoi alle caratteristiche del cliente, vuoi a quelle del prodotto, in relazione al quale dovranno essere valutate separatamente le conseguenze delle diverse tipologie di rischio determinate dall'eventuale assunzione della posizione in derivati: rischio emittente/controparte, rischio di mercato e rischio di liquidità. Al riguardo, è raccomandato all'intermediario di valutare adeguatamente l'*holding period* del cliente e, nella "mappatura" dei prodotti, di considerare il livello di costi della struttura, c.d. *upfront*, che determinano, fina dal momento della genesi dello strumento, costi che incidono sul *pricing* del prodotto.

Nel caso di prodotti con prevalente finalità di copertura (c.d. *hedging*), omogenei dunque a quelli oggetto dell'indagine della *FSA*, l'autorità di vi-

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[38] Così Comunicazione Consob, 2 marzo 2009, n. 9019104, p. 10.

[39] Così Comunicazione Consob, 2 marzo 2009, n. 9019104, p. 9.

gilanza italiana impone all'intermediario di valutare «l'adeguatezza dell'operazione raccomandata rispetto alle reali necessità di *hedging* del cliente» [40]. Dopo la conclusione del contratto, le regole di condotta impongono, poi, all'intermediario di attivare le procedure aziendali che consentano di monitorare nel tempo, per tutta la durata dell'operazione, e sulla base dell'aggiornamento delle informazioni fornite dal cliente o comunque disponibili, l'evoluzione di posizioni coperte o di copertura [41].

Risulta così rafforzato, nel terreno giuridico dei derivati, quel nesso tra regole di condotta e procedure di organizzazione interna che permea l'impianto sistematico delle norme sulla prestazione dei servizi di investimento [42].

L'eventuale difetto genetico di strutturazione del prodotto finanziario è, in linea con la pronuncia del *BGH*, qualificabile come violazione dei doveri di correttezza e trasparenza: violazione che, con particolare riferimento ai prodotti derivati, consegue alla carenza dei profili organizzativi funzionali a una valutazione adeguata del prodotto consigliato o offerto.

Desta, per ciò, qualche perplessità il tentativo, pur motivato dalla comprensibile volontà di tutelare al massimo grado la clientela "debole", di riportare la prospettiva d'indagine sul terreno della nullità dei contratti, per "mancanza" ovvero "non meritevolezza" della causa in concreto [43].

La stipulazione di un contratto derivato, a differenza di un contratto di mero scambio di strumenti finanziari, costituisce a un tempo atto ne-

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[40] Sul tema si rinvia a Inzitari, *Sanzioni Consob per l'attività in derivati: organizzazione, procedure e controlli quali parametri della nuova diligenza professionale e profili di ammissibilità delle c.d. "rimodulazioni"*, in *Giur. it.*, 2009, p. 1693 ss.

[41] In giurisprudenza Trib. Bari, 15 luglio 2010, in *Contr.*, 2011, 244, con note di Orefice, *Operatore qualificato e nullità virtuale o per mancanza di causa*, p. 250 ss., e Pisapia, *Rinegoziazione del contratto e nullità per mancanza di causa*, p. 260 ss.; Trib. Milano, 14 aprile 2001, inedita ma disponibile sul sito *www.ilcaso.it*, che afferma la nullità dei contratti i per difetto di "causa concreta" poiché il *mark to market* negativo, tanto più se non collegato un corrispettivo *up front*, attribuisce ai contratti in parola una funzione speculativa, in contrasto con la tipologia di contrati derivati rimessi alla possibile stipulazione da parte degli Enti locali dall'art. 3 del d.m. 389/2003, secondo quanto disciplinato dell'art. 41, l. n. 448/2001.

[42] In argomento si veda Lobuono, *I «nuovi beni» del mercato finanziario*, in *Riv. dir. priv.*, 2002, p. 48 ss e, da ultimo, Ferro-Luzzi, *Attività e «prodotti» finanziari*, in *Riv. dir. civ.*, 2010, II, p. 133 ss.

[43] Così da ultimo Trib. Milano, 19 aprile 2011, in *www.il caso.it*, che rinvia, per l'irrilevanza sotto il profilo della causa del contratto della finalità speculativa, alle pronunce del Trib. Milano, 3 aprile 2004, in *Giur. comm.,* 2004, II, 530; Trib. Torino, 27 gennaio 2000, in *Giur. it,* 2001, 548; 20 febbraio 1997, in *Giust. civ.,* 1997, 1263.

goziale e mezzo di generazione dello strumento derivato [44]. Superate, anche in giurisprudenza, le teorie che valorizzavano la distinzione tra operazioni di "copertura" e operazioni "speculative" al fine di individuare la causa meritevole di tutela soltanto nell'esigenza di copertura dalla variazione del sottostante, la causa e la sua meritevolezza risultano svincolate dal richiamo alle finalità soggettive [45]. La causa (astratta), infatti, viene individuata, sotto il profilo dello *swap*, «nello scambio di due rischi connessi, riferiti a parametri sottostanti» [46] e, sotto il profilo dell'opzione, «nell'assunzione da parte di ciascun contraente del rischio di variazione del valore del sottostante, con alla fine lo scambio dei rischi secondo il valore del sottostante». Da ciò emerge una sostanziale differenza tra i contratti commutativi e i contratti aleatori, al cui *genus* sono ricondotti i contratti aventi a oggetto strumenti finanziari derivati [47]. Il sinallagma negoziale e la commutatività delle prestazioni, concretatisi nel reciproco impegno allo scambio del differenziale, sussistenti in siffatte operazioni nel momento genetico, possono portare, eventualmente, nel corso del rapporto a uno squilibrio anche imponente delle prestazioni [48].

Ma v'è di più. Il rischio di *fluttuazioni* del valore delle obbligazioni e dell'alterazione delle reciproche prestazioni è in qualche misura elemen-

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[44] Cass., 19 maggio 2005, n. 10598, in *Rep. Foro it.*, 2005, *Borsa*, 11.

[45] Sulla qualificazione dei contratti derivati cfr. Capaldo, *Profili civilistici del rischio finanziario e contratto di* swap, Milano, 1999, p. 28 ss.; Panzarini, *Il contratto di opzione. Struttura e funzioni,* Milano, 2007, p. 334 ss. e, da ultimo, Girino, *I contratti derivati*[2], Milano, 2010, p. 281 ss. e Cossu-Spada, *Dalla ricchezza assente alla ricchezza inesistente – Divagazione del giurista nel mercato finanziario,* in *Banca, borsa, tit. cred.,* 2010, I, p. 401 ss.

[46] Cass., 19 maggio 2005, n. 10598, in *rep. Foro it.*, 2005, *Borsa*, 11.

[47] In riferimento alla prassi di celare dietro l'*upfront* una erogazione di un finanziamento cfr. Maffeis, *Intermediario contro investitore: i derivati* over the counter*,* in *Banca, borsa, tit. cred.,* I, 2010, p. 779 ss.

[48] Complessa appare, altresì, per l'ipotesi del consenso "disinformato", la praticabilità dei rimedi conto i vizi della volontà, condizionata alla prova, quanto al dolo, della condotta maliziosa che abbia determinato la decisione a contrattare e, quanto all'errore, alla prova del suo carattere determinante sul consenso a contrarre. Posto che la qualità di un investimento dipende dal suo rendimento atteso, condizionato da variabili non perfettamente conoscibili al momento della stipulazione del contratto, è ardua la dimostrazione della rilevanza di un errore su una qualità che al momento della stipulazione del contratto è ignota. In argomento si rinvia, per i profili civilistici, a saggio di Pietrobon, *L'errore nella dottrina del negozio giuridico*, Milano, 1963, p. 104 ss.. In argomento si vedano le posizioni, non coincidenti, di Perrone, Less is more, cit., p. 93 e Gentili, *Disinformazione e invalidità: i contratti di intermediazione dopo le Sezioni Unite*, in *Contr.*, 2008, p. 400 ss.

to strutturale "naturale" del rapporto negoziale in esame e non sembra possano desumersi *dalla causa* elementi che impongano una valutazione, peraltro impossibile, del *quantum* dell'alea tale da distribuire in modo teoricamente "equo" il rischio tra le parti e rendere il contratto meritevole di tutela.

Ne risulta che, sotto il profilo dogmatico, non può considerarsi vizio attinente alla meritevolezza della causa l'eventuale "difetto" genetico di "strutturazione" del contratto che preveda una differenza tra i rischi assunti dalle parti. Il vizio, sovente, non attiene alla ripartizione "equa" del rischio -che peraltro, come detto, appare una sorta di *contradictio in terminis*- ma alla violazione dei doveri di informazione sulle componenti del prezzo e sulle modalità di "costruzione" dello strumento finanziario derivato.

Nei casi in cui l'*unbundling* della costruzione iniziale del prodotto riveli l'occultamento di costi a svantaggio del cliente, tanto per una valutazione iniziale sfavorevole all'investitore (*mark to market* negativo), quanto per la (apparente) erogazione di somme a parziale indennizzo della posizione sfavorevole assunta dal cliente (c.d. *upfront* [49]), sembra ci si collochi - quanto meno nella *normalità* dei casi - sul piano della violazione delle regole di condotta, sia in punto di obblighi informativi sia, ove l'intermediario collochi in contropartita diretta i prodotti derivati, in relazione al conflitto di interessi [50].

Naturalmente quanto detto – di qui il richiamo alla *normalità* dei casi – non esclude, non può escludere, che il contratto possa essere viziato da nullità secondo le regole generali, come nell'ipotesi di contratto di *swap* stipulato *esclusivamente* con finalità di copertura di un rischio *ab initio* inesistente.

Ma normalmente, lo si ripete, non è così; sì che l'ipotesi rimane di scuola. L'investitore può stipulare un contratto derivato *anche* (o *principalmente*) con finalità di copertura di un rischio, ma l'intento speculativo è comunque sempre presente. A volte il rischio non è compreso

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[49] Cons. Stato, 7 settembre 2011, n. 5032, (in *Urbanistica e appalti*, 2012, 197, con nota di Bartolini, *Annullamento d'ufficio e sorte del contratto: il caso degli* interest rate swaps*)*; ord. 12 settembre 2011, n. 5103 e ord. 19 ottobre 2011, n. 5628. Va notato come la prima ordinanza aveva nominato quale perito destinato a rispondere al difficile quesito sulla *convenienza economica* proprio al dirigente capo della divisione Debito Pubblico del Tesoro (una sorta di *peritus peritorum*); avendo questi rinunciato, la seconda ordinanza ha nominato un funzionario dell'ispettorato Vigilanza della Banca d'Italia.

[50] Esattamente in questi termini la nota 23 novembre 2007 dei Comuni e Aree metropolitane di Roma e Venezia, pubblicata sul sito *www.dt.tesoro.it*

appieno, perché occultato o minimizzato da chi propone l'operazione, ma si tratta, appunto, di caso tipico di violazione di regole di condotta.

E' interessante rammentare come il Consiglio di Stato [51], quando ha voluto fornire una *stampella* agli enti locali indebitati in derivati, a seguito di operazioni senza dubbio condotte (anche) con intenti speculativi, si sia mosso sul diverso piano della *convenienza economica*, assunta – sulla base di una lettura sagace ma un po' forzata dell'art. 41 della legge n. 441/2001 – quale parametro dell'agire legittimo della pubblica amministrazione. Qui peraltro, e paradossalmente, il giudice amministrativo è intervenuto "da buon padre" a tutelare proprio quegli enti territoriali che hanno fortemente rivendicato il loro diritto a essere riconosciuti *operatori professionali* in ragione della loro capacità tecnica ed esperienza nel valutare gli investimenti in strumenti finanziari [52].

In realtà, chi investe in derivati di norma sa, vuole assumere il rischio dell'investimento – ulteriore e diverso, anche di segno opposto, rispetto all'eventuale rischio *sottostante* da cui vuole coprirsi – e lo fa sulla base di una *aspettativa razionale* [53] di variazione positiva del valore del bene assunto a parametro di riferimento.

Certo, se gli vengono fornite indicazioni carenti o scorrette la valutazione dell'investimento può essere falsata e frustrate le sue aspettative. Ma proprio per evitare questi rischi è stato costruito il sistema delle regole di condotta.

10. La regolamentazione EMIR (Reg. UE n. 648/2012): attenuazione del rischio di credito di controparte e rafforzamento della trasparenza.

L'approccio dei *regulators* europei è nel senso della accelerazione dell'applicazione di misure forti per accrescere la trasparenza e la vigilanza regolamentare dei contratti derivati *OTC* in maniera uniforme a livello internazionale e non discriminatoria.

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[51] Secondo la fortunata espressione dei nobel 2011 Tom Sargent e Chris Sims. Cfr. Sargent, *A note on maximum likelihood estimation of the rational expectations model of the term structure*, in *Journal of Monetary Economics*, 1979, 5, (1), p. 133; Sims, *Macroeconomics and Reality*, in *Econometrics*, 1980, 48, (1), p. 1.

[52] Reperibile sul sito *http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2009:0332:FIN:IT:PDF*.

[53] Il cui testo si può leggere sul sito:
http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2009:0563:FIN:IT:PDF.

In questa prospettiva già la relazione del gruppo *de Larosière*, pubblicata, su richiesta della Commissione, il 25 febbraio 2009, suggeriva di rafforzare i presidi di vigilanza al fine di ridurre il rischio di crisi finanziarie future. Il ruolo svolto nelle crisi dai derivati e le conseguenti misure da adottare è affrontato, in particolare, nella Comunicazione della Commissione del 3 luglio 2009 [54], sul tema «Garantire mercati dei derivati efficienti, sicuri e solidi» e nella successiva Comunicazione del 20 ottobre 2009, «Garantire mercati dei derivati efficienti, sicuri e solidi: azioni strategiche future» [55].

In occasione del vertice di Pittsburgh, il 26 settembre 2009, i *leaders* del G20 ipotizzarono l'emanazione di una disciplina comune che mirasse a realizzare (i) una compensazione di tutti i contratti derivati *OTC* standardizzati mediante una controparte centrale (*CCP*) al fine di attenuare il rischio di credito di controparte e (ii) una segnalazione di tutti i contratti derivati *OTC* a repertori di dati sulle negoziazioni con l'obiettivo di rafforzare la trasparenza. Il Parlamento europeo, con la risoluzione del 15 giugno 2010, in tema di «Mercati dei derivati: azioni strategiche future» [56], si è espresso favorevolmente sull'introduzione dell'obbligo di compensazione e di segnalazione delle operazioni future su derivati *OTC*.

In tale prospettiva il regolamento n. 648 del 4 luglio 2012, c.d. *EMIR* (*European Market Infrastructure Regulation*), entrato in vigore il 13 marzo 2013, e i *Regulatory Technical Standards* predisposti dall'*ESMA (European Securities and Markets Authority)* in attuazione degli obblighi nascenti dal regolamento *EMIR,* fissano una cornice europea comune in materia di regolamentazione dei derivati *OTC*. La nuova regolamentazione prevede, per gli strumenti finanziari derivati *OTC* che superino determinate soglie di rilevanza, l'obbligo di compensazione, presso controparti centrali (*CCP, clearing houses* o *central counterparties*) autorizzati a svolgere detta attività dalle competenti autorità europee. Ai fini della *full disclosure* vengono estesi a tutti i derivati *OTC* obblighi di comunicazione e deposito di tutte le informazioni concernenti le operazioni in derivati *OTC* a soggetti c.d. *trade repositories* che avranno compiti di raccordo con le autorità di vigilanza.

Raffaele Lener - Paola Lucantoni

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[54] Reperibile sul sito *http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2011:236E:0017:0024:IT:PDF.*

[55] *http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2009:0563:FIN:IT:PDF.*

[56] *http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2011:236E:0017:0024:IT:PDF.*