Neutral Citation Number: [2020] EWHC 3233 (Ch)

Case No: HC-2013-000598

IN THE HIGH COURT OF JUSTICE

BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES

BUSINESS LIST (ChD)

Rolls Building
Fetter Lane
London
EC4A 1NL

Date: 27 November 2020

Before :

MRS JUSTICE BACON

- -

Between :

FINE CARE HOMES LIMITED **Claimant**

- and -

(1) NATIONAL WESTMINSTER BANK PLC
(2) NATWEST MARKETS PLC
(formerly Royal Bank of Scotland plc) **Defendants**

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Brian Hurst (instructed by **Rowberry Morris**) for the **Claimant**
Edward Levey QC and Laurie Brock (instructed by **Dentons UK and Middle East LLP**) for the **Defendants**

Hearing dates: 22–23, 26–29 October, 2 November 2020

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Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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COVID-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by e-mail and release to Bailii. The date and time for hand-down is deemed to be 27 November, 10 a.m.

Mrs Justice Bacon :

1. Fine Care Homes Limited ("Fine Care") is a company that at all material times was engaged in the provision of nursing and care homes. It brings this claim for the alleged mis-selling by the Defendant (which I will refer to as "RBS" or the "bank") of a complex interest rate hedging product ("IRHP") known as a structured collar. Fine Care bought the collar on 19 July 2007, for a term of five years, extendable by two years at the option of the bank. That option was exercised on 19 July 2012, giving a termination date of 19 July 2014.

2. In 2012 a review was conducted by what was then the Financial Services Authority ("FSA") into the sale of IRHPs by numerous banks. As a result of that review, in June 2012 the FSA entered into agreements with a number of retail banks, including RBS, under which the banks agreed to carry out a review of and provide redress in relation to structured collars sold to certain types of customers on or after 1 December 2001. A supplemental agreement was entered into by the relevant banks in January 2013. The collar bought by Fine Care fell within the scope of the products for which RBS was required to provide automatic redress. Accordingly, while Fine Care had issued a claim against RBS in July 2013 to avoid limitation issues, that claim was stayed to allow Fine Care to participate in the review and redress process. Meanwhile the FSA was abolished with effect from 1 April 2013 and its functions were split between the Financial Conduct Authority ("FCA") and the Prudential Regulation Authority. For convenience I will refer to the FCA as including, where relevant, the former FSA.

3. In August 2014 RBS provisionally concluded its review of Fine Care's collar and offered a refund of £384,258.50, calculated on the basis of the proposition that Fine Care would have chosen a "vanilla" collar rather than a structured collar in any event. Fine Care made submissions disputing that analysis, but the bank did not accept those submissions and its final offer remained the same. The review process and the bank's decisions were overseen and approved by an independent reviewer, KPMG, as required by RBS's agreement with the FCA. Fine Care decided not to accept the bank's offer, which therefore lapsed on 1 February 2016 and the present proceedings were revived.

4. Fine Care's claim in these proceedings is that the bank negligently advised Fine Care in relation to the conclusion of the collar, and/or negligently (or in breach of its contractual duties) misstated or misrepresented the effect of the collar in various specific respects. The present trial relates to liability and (if liability is found) the direct loss suffered by Fine Care in consequence of the bank's alleged misconduct. If necessary, Fine Care's further claim for consequential losses is to be tried separately at a later date.

5. In the circumstances of the current Covid pandemic, there was some debate as to the way in which the trial would be conducted. A particular concern was that all of the bank's witnesses were based outside of London, and all of them expressed a strong wish to avoid travelling to London by public transport. The trial was therefore conducted entirely remotely using a secure videoconferencing platform. While there were inevitably occasional problems

with the connection of counsel, the witnesses or the court, these were very minor and rapidly resolved.

6. I should also record at the outset that Mr Hurst, counsel for Fine Care, made repeated complaints about the inadequacy of the time available to him at the trial. I do not accept those complaints. The time allotted to Mr Hurst for his opening submissions, cross-examination of the bank's witness and closing submissions was in every respect longer than the corresponding time available to Mr Levey QC, for the bank. In addition, Mr Hurst provided lengthy written opening submissions which included a skeleton argument, a written "case opening" and a detailed chronology of key events. These were supplemented on the third day of the trial (at my request) by a written summary of the basis of Fine Care's claim. Mr Hurst also provided written closing submissions and a separate note on a question on the evidence raised by me following receipt of his closing submissions. I also permitted him to provide, following the trial, further written submissions on a specific point not covered in his oral closing submissions, and a written reply to Mr Levey's oral closing submissions in lieu of an oral reply. I am entirely satisfied, therefore, that Fine Care has had ample opportunity to present its case for this trial, both in writing and in oral submissions.

Witnesses and experts

7. Fine Care's principal witness was Mr Hassan Somani, who was and remains its controlling director. Mr Somani also describes himself as the controlling director of various related companies, whose involvement I will describe further below. Mr Somani was cross-examined over the course of two days, during which there was no doubt as to his sense of grievance at the bank for the way in which he had been sold a product which, in his view, had "killed off" Fine Care's development plans. He explained that English was not his first language, and he had had limited formal education. He had therefore, he said, relied on what he had been told by the various employees of RBS, and the advice which he said that they had given him.

8. Given the passage of time, it is inevitable that Mr Somani's recollection of the events leading up to the contract for the collar was unclear, and he was (understandably) unable to recall the precise details of many of the discussions that took place between him and the relevant bank employees in 2006 and 2007. It was therefore surprising that, when confronted with the bank's contemporaneous internal records of particular key meetings, he robustly denied the accuracy of those notes and put forward a different account of what had been said. His position was therefore that, in those respects, he had a very specific and detailed memory of what had occurred, and that multiple contemporaneous documents written by different bank employees recording discussions with him gave a substantially fictitious account of the relevant meetings. Quite apart from the improbability of such precise recall of those conversations at this distance in time, Mr Somani's account of events was confused and inconsistent. I do not, therefore, consider Mr Somani to have been a reliable witness, and I do not consider that the bank's internal records were fabricated in the way that he alleged.

9. In addition, Fine Care relied on a witness statement from Mr Samir Pyakuryal, who is the current accountant for Fine Care as well as other companies controlled by Mr Somani. He gave some evidence about the relationship between those companies, but the main thrust of his witness statement was directed at the way that he would or might (under various scenarios) have accounted for various aspects of the collar entered into by Fine Care. Mr Pyakuryal was not, however, Fine Care's accountant at the time that the collar was entered into, so he could not give any direct evidence as to the events of 2006–2007. On that basis he was not cross-examined by the bank and I do not consider that anything turns on his evidence.

10. For its part the bank relied on evidence from two witnesses of fact: Mr Michael Wilkes and Mrs Anna Ellison. During the period to which this claim relates, Mr Wilkes was an area director in the Global Banking and Markets division of RBS. He was the person who was primarily responsible for selling the collar to Fine Care. He emphasised, however, that he had only limited independent recollection of the specific discussions that had taken place over 10 years previously with Mr Somani (who was one of many customers with whom he dealt), and his evidence was therefore made with the benefit of reviewing the contemporaneous documents as well as considering his usual practice at the time. Unsurprisingly, therefore, much of Mr Wilkes' evidence was consistent with the documentary record. As I discuss below, however, I do not consider that Mr Wilkes' formal report of the key meeting of 6 July 2007 was entirely accurate, and his evidence of that meeting in cross-examination was somewhat defensive. I have therefore treated that evidence with some caution.

11. Mrs Ellison was Fine Care's relationship manager at RBS during the relevant period of time. As with Mr Wilkes, she said that her recollection of the events in question was based mainly on her review of the contemporaneous documents, and in some instances she could not recall why certain comments had been made either by her or in documents sent to her. She was, however, able to give evidence on the interpretation and context of numerous documents that related to issues in which she had been involved. I consider that she was a straightforward and reliable witness.

12. In addition to Mr Wilkes and Mrs Ellison, the bank served a witness statement from Mr David Anderson, Legal Counsel in the NatWest Group, who has responsibility for the conduct of the proceedings on behalf of the bank. His evidence related solely to the way in which the bank had carried out searches for sales training materials. It was not challenged and he was not cross-examined.

13. The parties also adduced evidence from two main experts. Mr Berkeley, for Fine Care, is a Chartered Member of the Investment and Securities Institute, with qualifications in financial derivatives and investment management. Mr Croft, for the bank, is a consultant specialising in providing advice on banking and financial market issues, including interest rate hedging. Their expert reports addressed the way in which the sale of IRHPs was regulated, standard practice in the sale of IRHPs, the characteristics of the collar bought by Fine Care, and the risks to Fine Care of buying the collar, in particular the risk of movements in future interest rates, the impact of the bank's internal "credit limit utilisation"

figure for the collar (the "CLU", sometimes referred to as the credit equivalent exposure, or "CEE"), and the possibility of novation of an IRHP. In an addendum to his report, served with Fine Care's reply to the amended defence, Mr Berkeley addressed issues related to the adequacy of the bank's security for the collar and the impact of the security position on the possibility of novating the collar to another company.

14. The experts produced a joint expert statement, in which it was clear that there was a large measure of agreement between them. Their oral evidence confirmed that there was a very limited difference of views. I consider that both experts gave careful and measured evidence that was, on the relevant issues, generally helpful to the court.

15. The exception to this was a separate "aide memoire" prepared by Mr Berkeley, which was produced by Mr Hurst on the second day of the trial to support his submissions on the way in which the collar worked. As I explain further below, Mr Berkeley subsequently accepted that his description of the collar had been materially inaccurate. A further set of workings subsequently produced by Mr Berkeley in an attempt to rectify the position was also replete with obvious errors. It was apparent that on this specific issue Mr Berkeley's analysis was flawed.

16. Fine Care also relied on an expert report from Mr Jonathan Pryor, an audit and financial reporting expert. Mr Pryor gave evidence on various issues concerning the accounting treatment of the loan and the collar. As with the addendum to Mr Berkeley's report, this was relied on by Fine Care in the context of its arguments on security and novation, in response to the bank's amended defence. Mr Pryor's evidence was not challenged by the bank and he was therefore not cross-examined. In the event I do not consider that anything turns on the points set out in his report, and I therefore do not refer to it further.

Factual background

17. Important aspects of the events that led to the purchase of the collar by Fine Care are disputed by the parties. The summary that follows therefore includes my findings on the material points of dispute, on the basis of the evidence before me. It is also necessary to set out what occurred after the conclusion of the collar, since that is relevant to Fine Care's specific allegations of negligence and/or breach of contractual duties.

The 2006 land loan and discussions on hedging

18. Mr Somani was a small but successful hotelier, who by 2005 had decided to seek to expand his business into care homes. To that end he incorporated Fine Care in December 2005, with the intention that the company should build a care home on a site in Harlow. The cost of the land and planning permission was £1.3m, and it was envisaged (at that time) that a further £2.475m would be required to develop the site. Mr Somani's broker introduced him to RBS to seek finance for the development, and Mrs Ellison was appointed as his relationship manager.

19. Mr Somani was keen to complete the purchase of the Harlow site very quickly, and the documentary record shows considerable discussions within the bank as to the basis on which it could lend to Fine Care, given that this would be a new operation in a sector in which Mr Somani had no prior experience. An internal note on 19 December 2005 written by Mr Chris Briddon, a business development manager, indicated that Mr Somani had agreed to hedge interest rates for the total debt likely to accrue on the site. While the bank did not make hedging a condition of its initial loan for the acquisition of the site (referred to by the parties as the "land loan"), Mrs Ellison suggested in internal discussions that hedging should be a condition for the bank to advance the further loan sought by Mr Somani for the development of the site (the "development loan").

20. On 11 January 2006 RBS approved the land loan in the (initial) amount of £600,000, repayable on 31 December 2007 unless extended. Mrs Ellison subsequently arranged for Mr Somani to speak to Mr Duncan Paxman, a salesman in RBS's Global Banking and Markets ("GBM") division, to discuss hedging in relation to the proposed development loan. There was an initial telephone call on 23 January 2006 between Mr Somani and Mr Paxman. Mr Paxman's attendance note of that call records that Mr Paxman and Mr Somani discussed both swaps and collars. There was then a face to face meeting on 22 February 2006 between Mr Paxman, Mrs Ellison and Mr Somani.

21. Between the call and the meeting, Mr Paxman posted a "Healthcare Hedging Brochure" to Mr Somani, which (among other things) explained three types of types of IRHP: an interest rate cap, a collar and a swap, setting out how they worked, their benefits, and the potential breakage costs that might be incurred upon early termination of a collar or a swap. In his oral evidence, Mr Somani denied having received this. However Fine Care's amended particulars of claim specifically plead that this document was provided to Mr Somani. In addition, as noted below, Mr Paxman's note of the February meeting (written on the day of the meeting) specifically recorded that Mr Somani confirmed that he had both received and read the brochure. I therefore do not consider Mr Somani's denials to be credible.

22. Mr Paxman had prepared a presentation for the February 2006 meeting, which set out various potential hedging solutions, diagrams of how they worked, and graphs showing historic fluctuations in the levels of UK base rate. The presentation included a description of a "value collar", which was a type of structured collar. Unlike the other IRHPs in the presentation, the value collar did not require an upfront premium to be paid. Mr Somani accepts that he saw at least some of that presentation, and I consider it probable that the presentation was indeed used by Mr Paxman to discuss the IRHPs that he wanted Mr Somani to consider.

23. Mr Paxman's note of the February 2006 meeting recorded, in particular, as follows:

> "HS had read hedging for health[care] professionals brochure and was interested in an interest rate collar. Explained mechanics of the collar including independence of debt, break costs and exclusion of margin. Developed this on to value collar. HS calculated premiums

> in terms of basis points at 0.18%. HS preferred the value collar feeling that the range was better and that it was unlikely he would be knocked in long enough to fully offset premium.
>
> Briefly discussed swap, HS had paid this a good deal of attention and was most inclined to look at a collar based trade. Would look at his cashflow projection in light of DP's quotes although felt that he would almost certainly go for the knock in collar."

24. Following the meeting Mr Paxman sent Mr Somani a letter containing a notice of regulatory classification, specifying that the bank was treating Fine Care as a private customer for the purposes of the FCA rules. Attached to the letter was the bank's terms of business, which included the following material clauses:

> "3.2 We will provide you with general dealing services on an execution-only basis in relation to … contracts for differences …
>
> 3.3 We will not provide you with advice on the merits of a particular transaction or the composition of any account … You should obtain your own independent financial, legal and tax advice. Opinions, research or analysis expressed or published by us or our affiliates are for your information only and do not amount to advice, an assurance or a guarantee. The content is based on information that we believe to be reliable but we do not represent that it is accurate or complete. …"

25. In addition, Schedule 1 to the letter contained a Risk Warning, providing (among other things) that:

> "This notice cannot disclose all the risks and other significant aspects of warrants and/or derivative products such as futures, options, and contracts for differences. You should not deal in these products unless you understand their nature and the extent of your exposure to risk. You should also be satisfied that the product is suitable for you in light of your circumstances and financial position."

26. The letter drew Mr Somani's attention to the Risk Warning and also asked him to read the terms of business carefully. He was asked to sign and return the letter acknowledging that he had read and understood the notice of regulatory classification and risk warnings, and consented to their terms. Mr Somani signed the letter two days later, on 24 February 2006.

27. Mr Paxman then called Mr Somani on 2 March 2006, with his attendance note of the call recording that "HS felt that value collar was best trade for him". The note also recorded that Mr Paxman had confirmed that the trades were "portable". Later on the same day Mr Paxman emailed Mr Somani a document entitled "Interest Rate Solutions", which noted among other things that as part of its funding package for the Harlow site RBS had asked Fine Care to effect interest rate management to protect against a rise in the UK base rate. The

document continued that "Having considered several interest rate management solutions with RBS, FC would like to further consider a 10 year knock in collar". The document then set out further details of how that instrument would work.

28. Mr Somani's evidence was that Mr Paxman's written accounts of his understanding and views were comprehensively inaccurate. He said that he was led to believe that he was discussing some sort of insurance; he did not know what a collar was, so could not have expressed a preference for any type of collar (whether in the February meeting or the March call); and he did not calculate premiums as suggested in the note of the meeting.

29. I do not consider that this is credible. Mr Paxman's notes of the February meeting and the March call were written on the days of those events. Furthermore, the level of specific detail in both notes, the correlation between the meeting note and the presentation, and the consistency of Mr Paxman's internal records with the 2 March document emailed to Mr Somani, make it unlikely that Mr Paxman's reports were completely fabricated. While I can readily believe that Mr Somani did not emerge from the February/March meeting and call with a sophisticated understanding of the mechanics of the different types of IRHP products he was shown, I do not consider that his understanding was as limited as he now seeks to portray. I also note that Mrs Ellison in her witness statement corroborated Mr Paxman's account that Mr Somani was more interested in "zero premium" products, and she was not challenged on this point in cross-examination; nor was it suggested to her that Mr Paxman's report of this meeting was materially inaccurate in any way.

30. In any event, Mr Somani did not continue his discussions with Mr Paxman after the March call and the information sent to him following that call. The main reason appears to have been that the development of the Harlow site was delayed during 2006. Although the bank agreed to increase the land loan to £997,635 in May 2006 (again on a short-term but renewable basis), the discussions regarding the development loan did not materially progress that year.

The sale of the collar in 2007

31. In February 2007 the bank was provided with an updated valuation of the Harlow site, on the basis of a revised planning application for the development that was proposed. The updated valuation indicated that the value of the underlying land had reduced to £1.25m, from a valuation of £1.3m at the time of purchase. This caused some concern to the RBS credit department ("RBS Credit"), which commented internally on 7 March 2007 that the 80% LTV (i.e. loan to value) on the land loan was "far too high" and a "high risk lend", and that "[t]he time taken to progress the deal does not augur well from the point of view of customer capability".

32. Nevertheless, approval was obtained in principle from RBS Credit for the development loan in the amount of £2.4m, and on 28 June 2007 Mrs Ellison emailed to Mr Somani a document containing the indicative terms on which the bank was prepared to advance the development loan. Page 3 of that document,

headed "Conditions precedent", set out five bullet point conditions for the loan, the fourth of which was "Some form of hedging to be in place on both land loan and development loan".

33. By that time, Mr Somani had also begun discussions with the bank about the refinancing of the debt of one of his other companies, Somani Hotels Limited ("Somani Hotels"), which at that time was held by Allied Irish Bank ("AIB") and was around £4m.

34. On 6 July 2007 Mr Somani met Mr Wilkes, Mrs Ellison and Mr Paul Turner (Fine Care's business development relationship manager) to discuss interest rate hedging. Mr Wilkes was from the GBM division and had taken over the file from Mr Paxman. Prior to the meeting Mr Wilkes reviewed the Fine Care file and spoke to Mr Paxman about his previous discussions with Mr Somani. Mr Wilkes also prepared another notice of regulatory classification letter, with attached terms of business and Risk Warning, in what appears to have been identical terms to the letter signed by Mr Somani in February 2006. This was given to Mr Somani at the meeting on 6 July, and was signed by him there.

35. There are three separate contemporaneous records of what transpired at that meeting. The first is a set of handwritten notes, which Mr Wilkes wrote during the meeting. Secondly, on 13 July 2007, a week after the meeting, Mr Wilkes emailed to Mr Somani a "discussion document" setting out his understanding of Mr Somani's requirements, and going on to provide details of various interest rate hedging products. Mr Somani did not at the time take issue with Mr Wilkes' description of his requirements as set out in that document. Thirdly, at some point following the meeting Mr Wilkes typed up a more detailed report of the meeting.

36. While the typed report gives the most detailed picture of the discussion at the meeting, it is not clear when that document was created. Mr Wilkes' evidence at trial was that he probably wrote it at some point after sending Mr Somani the discussion document on 13 July, and that it was based on a combination of his handwritten notes and his "usual pattern of what has been discussed at meetings with clients". In those circumstances it is possible that some of the report may have been based on standard points that Mr Wilkes normally discussed with clients. There are also various points on which the typed report is not entirely consistent with the other evidence. I have not, therefore, placed decisive weight on that report but have looked at the totality of the evidence available.

37. In addition to the contemporaneous documents, Mr Somani, Mr Wilkes and (to a lesser extent) Mrs Ellison all gave evidence as to what was discussed at the meeting. Since Mr Wilkes and Mrs Ellison both accepted that their independent recollection of the events in this period was very limited, and given my concerns about the rather defensive nature of Mr Wilkes' oral evidence regarding this meeting, I have treated with caution any comments that are not corroborated by the contemporaneous documents. Mr Somani, for his part, made numerous claims in his witness statements about what he says was and was not discussed at that meeting, contending that Mr Wilkes' formal report was materially inaccurate on key points. When cross-examined at trial, however, Mr Somani's evidence as to the discussion was confused, and it was

apparent that he had no clear recollection of the precise details of the discussion. I have therefore likewise placed limited weight on his account of the meeting, where that is inconsistent with the other evidence.

38. With those general comments in mind, the evidence indicates that at least the following occurred at the 6 July meeting:

i) The parties to the meeting started by discussing Fine Care's existing land loan, the proposed development loan of £2.4m, and the additional borrowing of £4m by Somani Hotels (currently, as noted above, with AIB). This is clear from all three contemporaneous documents. It is also clear that this combined package of borrowing formed the overall context for the subsequent discussions, which were not confined to the debt (either actual or projected) of Fine Care, but also encompassed the debt of Somani Hotels.

ii) Mr Somani indicated that he planned a strategy of aggressive growth over the next 5–7 years. This is also set out in all three contemporaneous documents. The handwritten notes and typed report add a comment regarding "40% LTV" and a desire to increase the gearing. This must have been a comment about the overall debt of the companies rather than Fine Care alone (on which the LTV was, as indicated above, by then around 80%).

iii) Mr Somani wished to put in place interest rate protection in relation to around 50% of the debt across both Fine Care and Somani Hotels, for a minimum of five years. The handwritten notes record "protection … 50% total loan", "min. 5 yrs" and the typed report states "Wanted to cover 50% debt". Mr Somani's evidence as to whether this related to Fine Care alone or both companies was very confused. However the handwritten notes include a diagram which makes clear that the discussion concerned hedging in relation to the debt of both Fine Care and Somani Hotels, which is consistent with the discussion at the outset of the meeting concerning the current and future debt of both companies. Mr Berkeley also said in his expert report that his instructions were that Mr Somani wanted to use the hedge for different entities, rather than solely for Fine Care.

iv) The handwritten notes add "£10–12M debt within 5 yrs" which the typed report transcribes as "Looking at £10–15m debt within 5yrs". Mr Somani claimed that these figures related solely to Fine Care. In the context of the discussion I have described, however, it seems most likely that these figures refer to Mr Somani's anticipated debt across both Fine Care and Somani Hotels.

v) The handwritten notes make repeated reference to a figure of £4m which, from the notes, appears to have been the sum that was envisaged to be protected by the hedge. That is also consistent with the 13 July document which referred to "interest rate protection that will cover £4m". In the context of my findings above, I consider that this figure was arrived at on the basis of Mr Somani's expressed wish to protect around 50% of the

debt across both Fine Care and Somani Hotels, looking at the existing debt across both companies, the anticipated development loan, and the projected increased debt over the next 5–7 years.

vi) Mr Somani was given a copy of the Healthcare Hedging Brochure (which as noted above Mr Somani had also received from Mr Paxman in 2006). This is set out in the typed report, and the 13 July document also stated that "you will recall that I handed to you at our meeting a copy of our 'interest rate management for Healthcare professionals' booklet, which outlines the basic alternatives available to you to manage your exposure to fluctuating interest rates." Mr Somani in his oral evidence suggested that he did not receive that document; I do not consider that this is credible given the consistent contemporaneous records indicating that he was indeed given this.

vii) There was at least a basic discussion of some of the different interest rate hedging solutions offered by the bank, which included some products for which a premium was payable and some zero premium products. That is reflected in various comments in the contemporaneous documents. Mr Somani's witness statement also accepts that he was "taken through the range of products", and that he was shown examples of caps for which premiums were payable, as well as zero premium collars.

viii) The typed report suggests that Mr Somani "liked the zero premium ideas" and "did not wish to pay a premium". Those statements are at first blush not entirely consistent with the handwritten notes and the 13 July document, which record that Mr Somani was not averse to paying a premium, if it offered a fair value. In his oral evidence, Mr Wilkes' interpretation of the discrepancy was that Mr Somani would rather not have paid a premium, but was not averse to doing so if the premium was not too expensive. That is a plausible explanation, although nothing turns on this particular point. The material point is that Mr Somani was clearly aware that some of the IRHPs required an upfront premium whereas others did not.

ix) It is common ground that there was a discussion of novation of the IRHP. The typed report states that Mr Wilkes "explained that the interest rate derivative can be 'Novated' in to a different entity in the future if they wished. It may also be novated to another Bank if he wanted to move banks – alternatively on this he could leave the hedge with us provided we retained sufficient security to cover the CLU". In both his witness statement and his oral evidence Mr Wilkes accepted that he had not used the term CLU, but had explained that if Fine Care's borrowing was moved elsewhere while leaving the IRHP with the bank, the bank would need to retain sufficient security to cover its exposure. I accept the general thrust of this evidence: it is easy to see why, in an internal note after the event, Mr Wilkes used a technical term that he probably did not use in the meeting itself. The precise terms of the discussion of security cannot, however, be established: the typed report is vague, and Mr Wilkes' evidence on this point was rather defensive and not always consistent.

x) The typed report contains a box in which Mr Wilkes was required to record the "Potential Solutions suggested". Mr Wilkes recorded the suggested solution as having been a geared collar. Mr Wilkes explained in cross-examination that this was a standard box on the call report, and he said his entry in that regard was not intended to mean that this was the only solution that he had discussed. He accepted, however, that he had specifically discussed the geared collar solution, because that matched Mr Somani's objectives and needs.

xi) Mr Somani says that he was "steered" by Mr Wilkes towards the geared collar because Mr Wilkes made more commission on this than the other products. In fact, a set of handwritten notes by Mr Wilkes made before the meeting shows that the revenue to the bank from the geared collar was (at least according to his calculations) precisely the same as for various alternative options discussed with Mr Somani, and was less than the projected revenue for a 5 year or 7 year swap product. Mr Wilkes and Mrs Ellison also both explained in their oral evidence that the bank's bonus arrangements were such that they did not directly benefit from selling this particular product (still less did they get a "commission" from the sale); rather, the achievement of individual sales targets were simply one factor among others taken into account when determining whether a bonus would be payable. Mr Wilkes therefore said that he was agnostic as to which of the particular products Mr Somani chose, and I accept that evidence. The suggestion that Mr Wilkes was attempting to persuade Mr Somani to buy one specific product to the exclusion of others is also inconsistent with the terms of his subsequent email and discussion document sent on 13 July, which as described below set out indicative terms for various different options alongside the collar that Mr Somani eventually chose.

39. The typed report states repeatedly that Mr Somani "understood that the risk in the optionality pays for the protection", that he "[u]nderstood the risks of the downside" and "fully understands the make up of the options & the risks involved". It also recorded that "We discussed the breakage costs/benefits if come out of the hedging contract early". These statements give an optimistic view of both the level of detail provided and Mr Somani's understanding, which may well not have reflected the reality during the meeting. In particular, it was undisputed that Mr Somani was not given indications as to the magnitude of the break costs in different circumstances; rather, Mr Wilkes merely said that he would have explained that the breakage costs would depend on market conditions at the time.

40. I do not, however, accept Mr Somani's claims that he was "not told about any downside" at all in the meeting; that he did not know what would happen if interest rates went below the floor; and that he understood this to be a "free insurance policy". Given that Mr Somani did understand that there was a premium payable on various of the other IRHP products that he was shown, it is entirely implausible that he would have believed that the bank was offering a hedging product with no cost and no risk whatsoever; still less is it plausible that Mr Wilkes would have presented the product in that way. Indeed, had he

done so, that would have been the clearest possible basis for a misrepresentation claim. Notably, however, as set out below Fine Care's claim is not put on that basis.

41. Following the meeting, on 13 July Mr Wilkes emailed Mr Somani the discussion document to which I have referred above. His cover email noted that:

> "As promised, to allow you to get a deeper understanding and feel for the types of independent protection available, I have attached the following:
>
> - A discussion document outlining the current indicative levels for the protection – in particular I would like to draw your attention to page 7 of the document that shows a couple of zero premium structured solutions for your consideration.
>
> I will liaise with Anna to ensure that we move swiftly to protect your business".

42. In the discussion document itself, after setting out what Mr Wilkes understood to be Mr Somani's requirements, the document noted that "This discussion document is intended to be just that, and I will naturally be in touch with you to fine tune the solution that matches the company's risk strategy & growth philosophy". The document then explained the operation of a swap, a cap and a collar, providing indicative terms (including premiums, where applicable) for each of these on a 5 and 7 year basis, and setting out for each product bullet-point "benefits" and "risks". In addition, the document embedded indicative term sheets for the two zero premium structured solutions referred to in the cover email.

43. The first of those solutions was a dual rate swap. The second was the structured collar that Mr Somani ultimately decided to buy. A revised version of the term sheet for that collar was emailed to Mr Somani later on the same day. A box at the top of that term sheet contained the following explanation of the operation of the product:

> "<u>What does it do?</u>
> Whilst the UK Base Rate remains between the CAP and FLOOR LEVELS, you will continue to pay a variable rate plus lending margin. If UK Base Rate averages above the agreed CAP LEVEL for any rollover period then you will only pay the CAP LEVEL plus lending margin (based upon the agreed notional profile).
>
> If for any rollover period UK Base Rate averages AT or BELOW the FLOOR LEVEL, then you will pay a higher funding cost plus lending margin (again based upon the agreed notional profile) <u>for that rollover period only.</u>
>
> <u>What is the Difference Between This and a Vanilla Collar?</u>
> With this idea, rather than paying a fee to book your protection you are exercising a view:

X There is no premium to pay with this idea; but
X Your funding cost increases as base rate moves lower.
X On the 5th anniversary, RBS have the option to extend the protection for a further 2 years."

44. The term sheet then set out the indicative terms of trade, specifying among other things that the notional amount was £4m, and that if average base rate was below the floor level then the funding cost would increase by the difference between the base rate and the floor level, with a worst case rate of 6.50% plus the lending margin. There was then a "pay off table" setting out the interest rates that would be paid on various average UK base rates, ranging from 4.75% to 7%, followed by the following text:

> "**Benefits**
> - 100% Protection against UK Base Rate rising above 6.50%
> - Zero Premium
>
> **Risks**
> - No compensation is payable by the Bank until/unless the UK Base Rate sets above the Cap Rate
> - If base rate falls below the floor level then your funding cost starts to rise. This leaves you with a best case rate of 5.50%."

45. Below that text was a set of disclaimers which included the following:

> "Nothing in this document should be construed as legal, tax, accounting or investment advice … RBS will not act as the Recipient's adviser or owe any fiduciary duties to the Recipient in connection with this, or any related transaction and no reliance may be placed on RBS for advice or recommendations of any sort. RBS makes no representations or warranties with respect to this material, and disclaims all liability for any use the Recipient or its advisers make of the contents of this material."

46. The disclaimers were followed by a set of numbered notes, which commenced with the text "The following notes are important". These included the following:

> "8. If interest rate derivative contracts are closed before their maturity, breakage costs or benefits may be payable. The value of any break cost or benefit is the replacement cost of the contract and depends on factors on closeout that include the time left to maturity and current market conditions such as current and expected future interest rates. This is illustrated below.
>
> There will be a break cost to you if the interest rates prevailing on closeout are lower than the fixed rate of the swap (that you are paying) or below the floor rate of the collar. There will be a benefit to you if prevailing interest rates are higher than the

> fixed rate of the swap (that you are paying) or above the cap rate of the collar.
>
> 9. You are acting for your own account, and will make an independent evaluation of the transactions described and their associated risks and seek independent financial advice if unclear about any aspect of the transaction or risks associated with it and you place no reliance on us for advice or recommendations of any sort."

47. The main discussion document itself also contained the above disclaimers, as well as a slightly different version of the numbered notes. The note on independent evaluation was in materially the same form as note 9 above; the note on break costs was in materially the same form as the first paragraph of note 8 above, but did not include the second (illustrative) paragraph.

48. There was also a specific reference to the break costs in the opening paragraphs of the discussion document, which drew Mr Somani's attention to the notes on break costs set out in the Hedging for Healthcare Brochure that Mr Somani had received.

49. Shortly after receiving the revised term sheet from Mr Wilkes, Mr Somani sent an email to his accountant (at the time), Ms Hemlata Bountra, saying:

> "Please work out the net effects on these two options and we will discuss the way forward. Its like gambling or one can look at it as [assurance]."

50. In cross-examination Mr Somani accepted that he had had a discussion with Ms Bountra about (and that they had done calculations in respect of) the two zero premium solutions. In re-examination Mr Somani said that he had not done so. I consider that his initial answer was more credible, given the unambiguous terms of his email to Ms Bountra. Mr Somani also claimed that he and Ms Bountra had not understood at the time that the calculations should be based on a notional trade of £4m. The figure of £4m was, however, clearly set out on the second page of the main discussion document ("As a starting point, I have provided you with the options for interest rate protection that will cover £4m over the next 5 to 7 years") and on the term sheet.

51. On the afternoon of 13 July there were internal discussions in the bank as to whether RBS Credit would approve the credit line required for the collar. On 19 July Mr Turner sent a submission requesting approval, stating that "Client is looking to do a CAP and Collar of some sort but exact rates not yet decided upon." He noted that security was not yet in place for this, particularly as the Somani Hotels borrowing had not yet moved to RBS from AIB, but suggested that this should be addressed by taking a personal guarantee from Mr Somani. RBS Credit agreed with the suggestion and agreed to "write the deal initially in the name of Fine Care … with a view to novating to Somani [Hotels] if/when we write that lend".

52. On the afternoon of 19 July 2007 Mr Somani had a telephone call with Mr Wilkes in which Mr Somani confirmed that he wished to hedge the sum of £4m by entering into the structured collar that was the second of the two zero premium options sent to him on 13 July. Mr Wilkes' formal record of that call stated that various points were discussed, including "Breakage Costs/Benefits if the notional profile is reduced, or the trade is terminated by the client at any time in the next 7yrs". Mr Wilkes' evidence was that he understood that Mr Somani had no intention of breaking the collar, and was therefore not concerned that such costs might be incurred in the future.

53. After the collar had been executed, Mr Wilkes sent Mr Somani an initial confirmation of the trade, asking Mr Somani to check and sign it and fax it back. Mr Somani confirmed by email that he had done so, noting that "I understand that I can use this facility for a different business i.e. Somani hotels when I am ready". Mr Wilkes responded that "With regards to Somani Hotels, I will liaise with Paul [Turner] & Anna [Ellison] so that as soon as all the facilities are in place, we can review where the protection sits & how much."

54. At some point in the following weeks Mr Somani was sent a formal trade confirmation for the collar, which he also signed and returned to RBS. Both the initial confirmation and the formal trade confirmation contained a set of notes that were in materially the same terms as the notes set out in the 13 July discussion document.

55. Mr Hurst claimed in his opening submissions that Mr Paxman and Mr Wilkes had followed a "choreographed sales pitch" to sell the collar to Fine Care, and that this was set out in the expert report of Mr Berkeley. In fact, Mr Berkeley said no such thing. Mr Berkeley's report set out the typical IRHP sales process, and commented on the sorts of training that a derivative salesperson would or might typically have undertaken. He attached to his report two training presentations from an external training company, citing these as examples of the "solution-based" sales training that he had received at HSBC and other companies. When Mr Wilkes was cross-examined about the sales training that he had undergone, he readily accepted that he had done a course provided by an external training provider, but said that he had never heard of the particular provider of the courses cited by Mr Berkeley, nor had he been trained in the way set out in the presentations attached to Mr Berkeley's report.

56. I accept Mr Wilkes' evidence on this point. More importantly, however, the key factual question in this case is not how he or others were trained to sell IRHPs in general, but how this particular product was sold to Fine Care. Given the abundance of contemporaneous documentary evidence on that point, as well as the accounts of the key participants in the sale on both sides, reference to training materials (in particular materials used by banks other than RBS) is of little or no relevance, and if anything is liable to distract attention from the specific facts of this case.

The terms of the collar

57. At the start of the hearing there remained a dispute as to the way in which the structured collar at issue in these proceedings actually worked. This was

surprising given that the terms of the collar were set out in the formal trade confirmation, and there was no dispute as to the payments that had been made under the collar. Mr Hurst, representing Fine Care, nevertheless initially contended that the bank's understanding of the financial effects of the product was completely misconceived. Mr Hurst's description of the way the collar worked was supported by Mr Berkeley, both in his expert report and (in more detail) in the "aide memoire" sent to the court on the second day of the hearing.

58. When referred, however, to the relevant terms of the trade confirmation and the schedule of payments made, Mr Hurst conceded that the trial should proceed on the basis of the bank's description of the position. He nevertheless submitted that he was driven to that concession because of an absence of evidence from the bank as to its internal netting structure. I have no hesitation in rejecting that submission. It was not supported by Mr Berkeley, who in cross-examination candidly admitted that his calculations had simply been wrong in this regard. As a matter of principle, moreover, any internal netting arrangements are irrelevant. The relevant question is the terms of the agreement between the parties as to the payments due on both sides. As to that, although Mr Hurst was right to say that the contract was an oral one, he did not advance any argument to suggest that the terms of the contract differed from those set out in the formal trade confirmation; and the payments by Fine Care under the collar undoubtedly corresponded to the terms of that confirmation.

59. On that basis, the effect of the collar was as follows:

    i) The notional value of the collar, by reference to which payments were calculated, was £4m.

    ii) The reference rate of the collar was UK base rate, with the payments due each quarter under the collar being calculated by reference to the average base rate over the previous quarter.

    iii) On each payment date, the bank was liable to pay Fine Care interest on £4m at average base rate, and Fine Care was liable to pay the bank interest on £4m at the following specific rates:

        a) If the average base rate was above 6.50%, Fine Care paid 6.50% (i.e. its payments were capped at 6.50%).

        b) If the average base rate was between 5.50% and 6.50%, Fine Care paid whatever the average base rate was.

        c) If the average base rate was below 5.50%, Fine Care paid 5.50% *plus* the difference between the average base rate and 5.50%, subject to a maximum rate of 6.50%.

    iv) The net effect of the foregoing was that Fine Care was entitled to receive a payment from the bank if the average base rate was above 6.50%. It was therefore protected against a rise in interest rates. The counterpart to that protection, however, was that Fine Care would be required to make a payment to the bank if the average base rate fell below 5.50%, with that

payment increasing the closer the base rate fell to zero. If the average base rate was between 5.50% and 6.50%, no net payment was due in either direction.

v) The initial term of the collar was five years, but at the end of that five-year period the bank had a one-off option to extend the collar for a further two years.

60. Applying those terms, for the first two quarters of the collar no payment was made in either direction, as the average base rate remained between 5.50% and 6.50%. By the first quarter of 2008, however, interest rates were starting to fall, resulting in payments by Fine Care of £4,657.53 in April 2008 (calculated on an average base rate of 5.27%) and £9,972.60 in July 2008 (average base rate of 5.00%). Thereafter the average base rate plummeted in the wake of the collapse of Lehman Brothers and the global financial crisis. By July 2009, two years after the conclusion of the collar, the average base rate had fallen to 0.5%, and it remained at that level for the remainder of the term of the collar. As a result, Fine Care paid the bank a net rate of 6% on the notional value of £4m during that time, equating to approximately £60,000 per quarter or £240,000 per annum.

61. A fall in interest rates of that magnitude – and the consequent large payments required from Fine Care – was wholly unpredictable. Unsurprisingly there was no evidence suggesting that either Fine Care or the bank could have had any inkling, at the time that the contract was concluded, that this would occur.

62. The fall in interest rates also had knock-on effects on both the bank's internal credit line calculation for the collar, i.e. the CLU, and the break costs payable in the event of early termination of the collar. At the time of the collar contract the CLU was calculated as being £240,000. The break cost at any given time was the "mark-to-market" value of the IRHP, which on conclusion of the contract was £37,000 (or very close to this figure). Both figures increased very significantly in the following years, as I set out below.

Events following the sale of the collar

63. After the conclusion of the contract for the collar, there were protracted internal discussions in the bank concerning the refinancing of the debt of Somani Hotels. It is clear that RBS Credit was concerned about the total LTV and serviceability of the debt, as well as Mr Somani's ambitious development plans. These included, in addition to the Harlow project, a plan to construct a further care home on the site of one of the hotels owned by Somani Hotels, namely the Roebuck Inn in Stevenage. An internal submission from Mr Turner stated that Mr Somani was aware of the concerns and was not proposing to carry out the various development simultaneously, but rather proposed to start with the Stevenage care home.

64. The refinancing loan of £4m to Somani Hotels was ultimately agreed in September 2007. The conditions of the loan included a requirement that Somani Hotels had hedging in place that was acceptable to the bank.

65. Attention then turned to the finance for the Stevenage development, which Mr Somani intended would be put into a new company, Fine Care Homes (Stevenage) Limited ("Fine Care Stevenage"). Mr Turner's submission to RBS Credit for the approval of funding for that development noted that the Harlow development loan had been "put on the back burner for the time being with priority being given to the Stevenage development". The agreement for the loan to Fine Care Stevenage was concluded in March 2008; as with the Somani Hotels loan, the agreement included a requirement for hedging to be in place that was acceptable to the bank. The Stevenage development was completed in July 2009 and the new care home opened later that year.

66. Meanwhile, at some point in early May 2008, Mr Somani started to discuss the hedging arrangements across the three loans for Fine Care, Fine Care Stevenage and Somani Hotels. In an email on 12 May 2008 Mr Wilkes said that Mr Somani could leave the collar where it was, split it, or transfer it wholly to either Somani Hotels or Fine Care Stevenage. Mr Somani responded asking Mr Wilkes to place £2m on each of Somani Hotels and Fine Care Stevenage. Shortly thereafter, however, Mr Wilkes left the bank and the collar was not split or novated at that time.

67. Mrs Ellison did, however, progress the bank's proposals for the Harlow development loan, and on 19 August 2008 she sent Mr Somani a detailed email in which she noted that the market had moved since the earlier loans for the Harlow and Stevenage sites were agreed, and therefore proposed a new structure for the development loan for Harlow. She concluded:

> "Myself and Paul [Turner] would love to undertake the Harlow development funding with you, and are already a long way down the route to provide this for you. We already have a professional team in place, soundings from our Underwriting team is positive, security over Harlow is already held, and Bank Accounts for Fine Care Homes Limited are already open, meaning an October start date is achievable here."

68. That loan proposal was not taken further by Mr Somani at the time. In April 2009, however, the issue of novation of the collar was revived in a telephone call and emails exchanged between Mr Somani and Mr Aaron Jones from the bank. It appears from the emails that Mr Somani's instructions had changed, and by then were to split the collar into three trades of £1m, £1m and £2m, with £1m remaining with Fine Care, £1m to be novated to Somani Hotels and £2m to be novated to Fine Care Stevenage. Accordingly, with effect from 24 April 2009, the collar was split through a process of reducing the notional amount of the original collar to £2m and issuing confirmations for two new trades in the amounts of £1m. Mr Somani signed and returned to the bank confirmations for the new trades.

69. The next step was to novate two of the three trades to Somani Hotels and Fine Care Stevenage. That did not happen, for reasons that are now unclear, but it appears that Mr Jones may have been waiting for Mr Somani to sign and return the confirmations for the new trades, and was unaware that these had in fact been provided.

70. A further set of trade confirmations was prepared in early 2010, and those were again signed by Mr Somani at some point, but again the novation did not occur. The reason for this is suggested by an email from Mr Jones to Mrs Ellison on 8 June 2010, which stated that Mr Jones had spoken to Mr Somani "a few months ago", and that Mr Somani:

> "was no longer sure if he need to move the hedging around
>
> - he said the debt may now all be moved into Fine Care Homes Ltd
> - it was left that he would call me if he need to move any of the hedging
> - he never called so I assumed he was happy with the [status] quo"

71. Mrs Ellison replied expressing surprise at this change of plan, and noting that "our preference is to split the trades into the various different parts, where Fine Care Homes Limited has limited assets". Mr Jones said that he would contact Mr Somani again. There is no record of what then occurred, but the collar remained in the hands of Fine Care and was (again) not novated.

72. By the summer of 2010 the bank was becoming concerned about its exposure in relation to Mr Somani's various businesses, particularly in light of reduced trading at the Somani Hotels Epping hotel. That led to a meeting with Mr Somani on 19 August 2010 to discuss the provision of cross-guarantees between his various companies. What occurred at that meeting can be seen from two versions of the meeting agenda (a short version prepared for Mr Somani, and a more detailed version prepared for the bank's internal purposes) and a detailed follow-up email sent by Mrs Ellison to Mr Somani. The bank explained its concerns about the security shortfall for the Somani Hotels loan. There was also a discussion of the Stevenage care home and the Harlow development, with the bank noting in relation to the latter that its development funding criteria had changed such that it would now only fund against existing trading units, but that once mature trading was reached at the Stevenage care home then the bank would be able to make development funding available for the Harlow site.

73. Thereafter there were further discussions about the cross-collateralisation between the companies, with Mr Somani initially agreeing (on 16 September) to certain cross-guarantees and other changes to the loan terms. He also noted that the £4m hedge was still in the hands of Fine Care which had only a £1m loan, "so this has to move to Somani Hotels so as to provide the purpose it was setup for and as you are aware I did instruct but it had taken a long time to do the split before it could be moved". Mrs Ellison replied apologising that the hedge had not yet been restructured, and saying that she would inform Mr Jones of the revision to Mr Somani's intentions in that regard. Mr Jones then moved on to a different role, and Mr Iain Higgs became involved.

74. During October 2010 there were various telephone conversations between Mr Somani and Mr Higgs/Mrs Ellison as to terms of the existing loans to Fine Care, Somani Hotels and Fine Care Stevenage, the development of the Harlow site,

and the novation of the collar. In outline, the contemporaneous documents record that:

i) No agreement could be reached as to the amended terms of, and security for, the existing loans to Mr Somani's companies.

ii) Regarding the development of the Harlow site, Mr Somani had apparently approached some other banks to explore whether it would be possible to refinance this, but was unable to do so while the collar still remained in the hands of Fine Care. RBS's position remained that it was prepared to assist with development finance for the Harlow site once there were mature trading figures at Fine Care Stevenage.

iii) Mr Somani was also considering a sale of the Harlow site as a possible alternative to proceeding with the development. RBS's concern was that if this occurred then it would be necessary to novate the collar (or whatever was left, if some of the break costs had been paid off by the sale) to a company with income or assets. By then, the bank knew that the CLU had reached a figure of around £1.1m, and that the break costs to Fine Care would be around £826,000.

iv) The bank's understanding was that Mr Somani was undecided as to what to do with the collar. In response to a query by Mr Somani as to whether he could move the collar to another bank, Mr Higgs said that this was possible in theory but that in practice it was more common for funders to offer to lend the break costs in order to terminate this sort of contract.

75. In his oral evidence Mr Somani said that he had in fact by then, on the advice of his solicitor, decided *not* to novate the collar to any of his other companies. Mr Levey did not dispute this evidence, and I accept that this is most likely what occurred. Although the bank was (apparently) not aware of this decision at the time, it explains Mr Somani's reluctance to proceed with the novation from 2010 onwards.

76. The Somani businesses were then transferred to the bank's Specialised Relationship Management ("SRM") department, and the collar was discussed further in internal emails to and from that department in February 2011. On 9 February 2011 an email to Mr Mark Barrie in the SRM department commented that Mrs Ellison "was trying to novate the agreement to where the debt sits, but the customer couldn't make his mind up with what he wanted to do". A subsequent email on 14 February 2011 commented that the lack of security for the collar put the bank in a "particularly vulnerable" position with Fine Care, and that the liability should either be secured by a cross-guarantee, or novated, probably to Fine Care Stevenage. The email noted, however, that there was a reluctance to provide a cross-guarantee, as Mr Somani had said that the individual companies were subject to different ownership structures. A further email on 21 February 2011 from Mr Barrie said that:

> "My Credit do not like the present position … 'Fine Care Homes Ltd' and the Harlow land loan is the bit upsetting everyone. Interest only deal, expired, development loan pulled (and unlikely to be put

> back to the table in the near future), plus SWAP/HEDGE liability sat here, when it really needs to sit where the bulk of the debt resides.
>
> In short we need to novate the hedge now …
>
> Novation is the key here and we need to try and nail this/tell the customer what we want to happen next. …
>
> My Credit have insisted on Cross-Guarantees, which he has said would be difficult, but again I need to explain why we need these."

77. On 4 May 2011 there was a meeting between Mr Somani and Mr Barrie. Mr Barrie's report of the meeting noted that:

> "Hassan is now saying that the Hedge Facility is causing him the most trouble and that he has the following concerns:
>
> - He doesn't understand the trade
> - He doesn't have and needs an explanation as to the quarterly debits that hit his account for the Hedge
> - He believes that the Hedge does not match his business loans, primarily as the development funding … for the Harlow … site is no longer on the table
>
> … He is hoping for the trade to be broken and/or a 'deal' to be struck, in recognition of the fact that he shouldn't have this liability, especially where the £3m of dev funding isn't on the table – his words not mine.
>
> … The way out for him is that we break the deal, but he has no funds to cover the market to market cost of doing so. A loan could be an option … Or I have said, split the trade correctly this time …"

78. No progress was, however, made on this; the collar remained with Fine Care and was not novated to any other of Mr Somani's businesses; and in July 2012 the bank exercised its option to extend the collar by two years, giving a termination date of July 2014.

79. Nevertheless, the bank continued to discuss with Mr Somani the ways in which it could finance the Harlow development. In particular, a document with two alternative detailed financing proposals was sent to him in December 2012, leveraged on (and guaranteed by) the Stevenage care home, which by then had reached mature trading and was outperforming previous forecasts. As the proposal document explained, the bank was not willing to increase the existing borrowing on Harlow without additional security providing a link to an income-producing source, in case there were any issues with the Harlow development or its trading figures. An internal document commenting on the proposals confirmed that the request for cross-collateralisation between Harlow and the

mature Stevenage home was sought in order to "mitigate[e] some of the 'spec' element on Harlow".

80. Mr Somani did not ever pursue those proposals, for reasons that are not explained. It is clear, however, that by that time his relationship with the bank had deteriorated, and in July 2013 Fine Care issued a claim form against RBS which initiated the present proceedings.

The FCA review process and the "Rosetta" file

81. As I have already noted, the collar purchased by Fine Care fell within the scope of the review and redress process that RBS had agreed with the FCA. The legislative framework pursuant to which the FCA carried out that review and entered into agreements with banks, including RBS, was set out in the judgment of Beatson LJ in *CGL Group v Royal Bank of Scotland* [2018] 1 WLR 2137, §§12–23. The judgment went on to summarise the main provisions of the FCA's agreement with the banks, at §§24–28. For present purposes it is sufficient to note that the agreement required all sales within the scope of the review to be reviewed for compliance with the principles, rules and guidance contained in the FCA's Handbook, taking into account in particular a set of Sales Standards defined by the FCA for the purposes of this review process.

82. RBS reviewed Fine Care's collar during 2013–2015, during which time Fine Care's claim in these proceedings was stayed. The records created by RBS in that review process were placed by the bank in an internal file referred to as Rosetta. Fine Care sought and obtained disclosure of that file, and Mr Hurst in his opening submissions referred extensively to specific comments recorded in the Rosetta file, taken from the discussions between Mr Somani and the bank leading to the conclusion of the collar contract. I do not consider that this material adds anything to the information before the court, since the comments referred to are nothing more than extracts selected by the RBS review team from the contemporaneous documentary record, the entirety of which is in any event before the court in this case, and which has been supplemented by the witness evidence that I have set out above.

83. Mr Hurst also relied on the fact that the RBS review determined that a number of the Sales Standards agreed with the FCA had been breached. I will address below the relevance of this for the claims ultimately advanced by Fine Care in these proceedings. The overall conclusions of the RBS review were, however, disputed by Mr Hurst on behalf of Fine Care. His objections were rejected by the bank. In particular, in a letter sent to Mr Hurst on 17 September 2015, the bank's IRHP review team concluded that Mr Hurst's objections did not provide grounds to alter the decision in the provisional determination letter. The letter gave a detailed explanation of that determination, which included the following points:

    i) There was no evidence of any undue pressure exerted on Mr Somani by the bank to enter into the collar.

ii) There was no evidence that advice was given to Mr Somani during the sales process, and the bank specifically drew attention to the fact that this was a non-advised sale in the 13 July 2007 discussion document.

iii) Mr Somani was not over-hedged given the debt held by Somani Hotels with another bank, and he was aware of the fact that the hedge was transacted in the name of Fine Care while over £4m of debt was held by a different company.

iv) The explanation provided to Mr Somani in respect of the features, benefits and risks of the collar and alternative products may not have complied with the Sales Standards agreed by the FCA, potential early exit costs may also not have been explained in accordance with those standards, and reasonable steps may not have been taken to enable Mr Somani to understand the risks associated with the IRHP. Nevertheless, had the relevant explanations been given in accordance with those standards, the review considered it likely that Mr Somani would have chosen a vanilla collar, based on his hedging preferences.

v) The review was undertaken on the basis of the sales standards agreed with the FCA for the purposes of the review, and no admission was made concerning any failure to comply with the FCA's COB, PRIN and APER rules and guidance (to which I will refer in more detail below).

84. Fine Care did not accept those conclusions, and did not therefore accept the Bank's offer of redress amounting to £384,258.50, Instead, in October 2016 it resumed the present proceedings.

The issues

85. Throughout the course of the trial it has been very difficult to identify the precise basis of Fine Care's claim against the bank. I note that other judges have similarly struggled in past mis-selling cases (see e.g. the comments of Rose J in her judgment on the consequential issues in *LEA v RBS* [2018] EWHC 1387 (Ch), §8). Ultimately, by the time of closing submissions it was clear that Fine Care put its case on a far narrower basis than originally pleaded. It is therefore appropriate to comment on the issues that are and are not still in dispute.

86. In the first place, following the service of the particulars of claim and defence in the course of 2016 and 2017, the bank applied in June 2018 to strike out a series of claims that sought declarations that RBS had not properly applied the principles and methodology of the FCA review scheme to Fine Care and had not properly evaluated the evidence submitted by Fine Care, that the independent reviewer (KPMG) had not properly reviewed Fine Care's claim for consequential loss, and that RBS should provide full redress and consequential loss to Fine Care. The bank also sought to strike out Fine Care's claim for consequential losses. On 10 December 2018, Penelope Reed QC (sitting as a Deputy High Court Judge) gave judgment striking out the claims for declarations: [2018] EWHC 3328 (Ch).

87. Fine Care's application for permission to appeal that decision to the Court of Appeal was refused on 28 March 2019 by Rose LJ. Mr Hurst nevertheless continued to assert, in his opening submissions, that the bank had failed to carry out the review in accordance with its contract with the FCA, had misled the FCA, and had reached its review decision on a false basis. Given the strike out of the corresponding parts of the particulars of claim, those assertions are of no relevance whatsoever to these proceedings.

88. As to the claim for consequential losses, that was not struck out by Penelope Reed QC, but that had in any event already been ordered to be tried separately following the trial of the other issues in the claim. By the start of the trial, therefore, the issues before me were the questions of liability at common law, and the quantification of direct loss flowing from entry into the collar contract.

89. As to liability, Fine Care put its case in a number of different ways, which fluctuated over time. The contours of the various claims were, in particular, not clearly discernible from Fine Care's particulars of claim, or Mr Hurst's written and oral opening submissions for the trial, or a written summary of Fine Care's case provided on the third day of the trial at my request. From Mr Hurst's written and oral closing submissions, however, it became apparent that the claims had reduced to the following:

    i) The *negligent advice claim*: a claim that the bank had advised Mr Somani as to the suitability of the collar for Fine Care, in circumstances that gave rise to a duty of care on the part of the bank. That duty was breached, it was said, in two specific respects: the bank did not tell Mr Somani that the collar would impede Fine Care's capacity to borrow, whether from RBS or another bank; and the bank did not tell Mr Somani that novation of the collar might not be straightforward, but might require some external security to be provided.

    ii) The *negligent misstatement/misrepresentation claim*: a claim that the information provided by the bank regarding the collar contained negligent misstatements or misrepresentations in the same two respects relied upon in relation to the negligent advice claim. Fine Care had initially (in a combination of its pleaded case, opening submissions and the written summary of Fine Care's case) relied on two further alleged misstatements or misrepresentations, namely a claim that the bank had represented that interest rates were likely to rise to the detriment of borrowers, and a claim that the bank had represented that both the bank *and* Fine Care were entitled to exercise the right to extend the term of the collar by two years. Mr Hurst expressly abandoned both of these in his closing submissions.

    iii) The *contractual duty claim*: a claim that the bank was subject to an implied contractual duty under s. 13 of the Supply of Goods and Services Act 1982 to exercise reasonable skill and care when giving advice and making recommendations, in particular where individuals were carrying out controlled functions in the carrying on of a regulated activity. That duty was said to have been breached in the same two respects relied upon in the negligent advice and misstatement/misrepresentation claims.

iv) Finally, there was a further pleaded *implied terms* claim that it was an express or implied term that in the course of sale of the collar the bank would comply with the rules and principles in the FCA Handbook. In his closing submissions Mr Hurst accepted that the authorities were against him on this point and therefore said that this claim would need to be pursued, if at all, only on appeal.

90. In respect of the claim for direct loss, if it arose, the only issue before me was whether damages should be assessed on the basis that Fine Care would not have entered into any IRHP contract, or some other basis. No specific submissions on this issue were, however, made by either party at the trial. Even if this issue were to arise, therefore, I would not be able to determine the point without further submissions.

The regulatory framework

91. Mr Hurst placed great reliance, in relation to all aspects of the claim, on the regulatory framework applicable to the selling of investments, and in particular the rules and guidance set out in the FCA Handbook. Before considering the specific heads of claim, therefore, it is necessary to consider the relevance of the FCA rules and guidance to the application of the common law principles.

92. The starting point is that giving advice on investments is a regulated activity within the meaning of the Financial Services and Markets Act 2000 ("FSMA"). Pursuant to various provisions of FSMA, the FCA has issued numerous sets of rules and guidance, which are contained in the FCA Handbook. In the present case Mr Hurst referred to the Principles for Business ("PRIN"), the Statements of Principle and Code of Practice for Approved Persons ("APER"), and the Conduct of Business rules and guidance ("COB"). COB applied at the time of the sale of the Fine Care collar, but from 1 November 2007 it was replaced by the Conduct of Business Sourcebook, known as COBS.

93. Under s. 138D FSMA, a contravention by an authorised person of a "rule" made by the FCA is actionable at the suit of a "private person" who suffers loss as a result of the contravention. In this case Fine Care entered into the collar in the course of business, so it is not a private person within the meaning of §3(1)(b) of the Financial Service and Markets Act 2000 (Rights of Actions) Regulations 2001. It is therefore unable to bring a claim for breach of statutory duty directly for breach of the FCA rules on which it relies.

94. Instead, Mr Hurst sought to rely on the rules and guidance of the FCA indirectly, either as being incorporated expressly or impliedly in the bank's contractual duties, or as providing a framework by reference to which the alleged negligent advice and misstatements/misrepresentations should be analysed. It is in that context that he relied on (among other things) the findings in the Rosetta file concerning breaches of the Sales Standards agreed with the FCA.

95. The suggestion of incorporation of the FCA rules in the bank's contractual duties does not need to be addressed further, since that is the basis of the implied terms claim that is no longer pursued by Fine Care at this stage. The

remaining question is therefore the relevance of the FCA framework as informing the analysis of the negligent advice and misstatement/misrepresentation claims. In that regard, as Rose J noted in her substantive judgment in *LEA v RBS* [2018] EWHC 74 (Ch), §166, the authorities are alive to the need to keep the common law causes of action separate from an action for breach of statutory duty by failure to comply with the FCA rules. Rose J cited, in particular, the judgment of the Court of Appeal in *Green & Rowley v RBS* [2013] EWCA Civ 1197, where Tomlinson LJ (with whom Hallett and Stephen Richards LJJ agreed) said:

> "17. The judge also assumed, uncontroversially, that the bank owed to the claimants a duty to take care when making statements in relation to which it knew or ought to have known that the claimants would rely on its skill and judgment – the duty discussed in *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465. This was in relation to what was called at trial the 'information claim'. So far as concerned the suggestion by the claimants that the COB Rules informed the content of this duty the judge observed, rightly in my view, although I paraphrase his language, that the *Hedley Byrne* duty does not comprise a duty to give information unless without it a relevant statement made within the context of the assumption of responsibility is misleading. Thus in so far as COB 2.1.3R refers to a duty to take reasonable steps not to mislead, this is comprised within the common law duty, but in so far as it refers to a duty to take reasonable steps to communicate clearly or fairly, this introduces notions going beyond the accuracy of what is said which is the touchstone of the *Hedley Byrne* duty. The duty imposed by COB 5.4.3R to take reasonable steps to ensure that the counterparty to a transaction understands its nature the judge regarded, again rightly in my view, as well outside any notion of a duty not to misstate, as he characterised the Hedley Byrne duty to be. Accordingly, the judge did
> not regard the content of the bank's common law duty in relation to the accuracy of its statements as in any relevant manner informed by the content of the COB Rules.
>
> 18. By contrast, the judge was prepared to recognise that had the bank
> undertaken an advisory duty, the content of that duty would have been in part informed by the content of COB 2.1.3R and COB 5.4.3R. That approach has been endorsed on at least four occasions by first instance judges, the first of them Judge Raymond Jack QC putting it pithily in *Loosemore v Financial Concepts* [2001] Lloyd's Rep PN 235, 241 where he pointed out that the skill and care to be expected of a financial adviser would ordinarily include compliance with the rules of the relevant regulator …
>
> 23. Parliament has provided, by section 150 of the Financial Services and Markets Act 2000, a remedy for contravention of the rule [i.e. COB 5.4.3R] in the shape of an action for breach of

> statutory duty, or at any rate an action akin thereto. There is no feature of the situation which justifies the independent imposition of a duty of care at common law to advise as to the nature of the risks inherent in the regulated transaction."

96. Tomlinson LJ therefore ultimately rejected (at §30) the claimants' suggestion that the bank owed to them a "common law duty of care which involved taking reasonable care to ensure that they understood the nature of the risks involved in entering into the swap transaction." In relation to the argument that this would provide protection to a claimant who was (like Fine Care in this case) not a "private person" so could not avail themselves of the statutory cause of action, he considered that this was "an invitation to the court to drive a coach and horses through the intention of Parliament to confer a private law cause of action on a limited class."

97. Mr Hurst placed repeated emphasis upon the submissions of the FCA to the Court of Appeal in the *Green & Rowley* case, in which the FCA took the position that banks selling swaps (and related products) should have provided clear information to unsophisticated customers as to the potential level of breakage costs if the customer were to seek to exit the IRHP contract. The FCA did not, however, make any comment on the issue of whether the statutory duty of compliance with the COB rules could give rise to a concurrent duty in tort. Rather, its submissions were confined to commenting on what the effect of the relevant rules was if there *was* a concurrent duty in tort. Those submissions are therefore of limited assistance to Mr Hurst once it is established, as the Court of Appeal found in *Green & Rowley*, that the COB rules cannot create a duty of care where one does not exist on the basis of the common law principles. At most, in a case where a bank did undertake an advisory duty of care, such that (as Tomlinson LJ recognised) the content of that duty might be informed by the COB rules, the FCA's submissions could in turn be taken into account in interpreting those rules.

98. Mr Hurst did not take issue with any specific point of the analysis in *Green & Rowley*. Instead he submitted in general terms that the courts in previous cases had erred in failing to understand the importance of, in particular, the APER code of practice, which among other things requires approved persons to act with due skill, care and diligence in carrying out their controlled functions (Statement of Principle 2). APER 4.2.3 sets out various types of conduct which the FCA considers does not comply with Statement of Principle 2. These include failing to explain the risks of an investment to a customer, failing to disclose to a customer details of the charges or surrender penalties of investment products, and recommending an investment to a customer where there are not reasonable grounds to believe that it is suitable for that customer.

99. As to where those fitted into the common law negligence framework, Mr Hurst accepted that the APER code does not itself create a duty of care. He submitted, however, that it does inform the court of the expected standard of skill and care in common law when an approved person provides either advice or information. On that basis he submitted that a breach of the APER code is indicative of a breach of the bank's duty of care, whether that is an advisory duty or a duty not to misstate facts. He described the APER code as a "much-missed foundation"

for the duties of care which arise in this sort of case, which had (he submitted) never properly been considered in the case-law.

100. I do not, however, consider that the APER code can carry any greater weight in relation to the content of the common law duties of care than the COB rules. If anything, its relevance is even more indirect, given that the APER code does not contain rules as such, and breaches of its principles are therefore not actionable even under s. 138D FSMA. To the extent that it is relevant at all, therefore, if the bank is found to have undertaken a duty to advise on the suitability of an IRHP then the APER code might be taken into account in informing the content of that duty (and therefore the question of whether that duty had been breached) in a particular case. Absent any advisory duty, however, if the claim rests solely on a claim of negligent misstatement, it is difficult to see how the guidance set out in APER 4.2.3 could be of any relevance, since it clearly encompasses duties going beyond a duty not to misstate. I do not, therefore, accept Mr Hurst's submission that consideration of the APER code changes in any material way the framework of analysis set out in *Green & Rowley* and *LEA*.

101. Nor did Mr Hurst in any event identify, in his closing submissions, any specific respect in which the APER code (or indeed any of the other FCA rules) had a material impact on the two central aspects of his case that remained by the end of the trial, namely the alleged impediment to borrowing and the novation issue. As I will set out below, those were quite specific allegations concerning what Fine Care said Mr Somani should have been told in relation to these two issues, which turned on the particular facts of this case.

The advice claim

Legal framework

102. The advice claim breaks down into two issues: first, whether the content of the dealings between the bank and Mr Somani gave rise to an assumption of responsibility and a duty of care to give the advice carefully – in other words an advisory duty; and secondly, if there was an advisory duty in this case, whether that duty was breached in the two specific respects alleged by Fine Care.

103. As to the first question, the distinction between liability for negligent misstatement under the classic statement of principle in *Hedley Byrne v Heller* [1964] AC 465, and liability for breach of an advisory duty, in the context of the selling of IRHPs, was considered by the Court of Appeal in *Property Alliance Group v RBS* [2018] 1 WLR 3529 ("*PAG*"). In that case, PAG's primary case was that there was a *Hedley Byrne* misstatement. As a secondary line of argument, however, PAG had argued that the bank's conduct was a breach of a common law duty to take reasonable care to ensure that the information that it provided, in relation to the swap contracts at issue there, was accurate and fit for the purpose for which it was provided, in order to enable the recipient to make a decision on an informed basis (see §43 of the judgment). The specific breach alleged in that case was the bank's failure to disclose the CLU figure or to provide worked break cost scenarios.

104. The Court of Appeal in *PAG* accepted that the *Hedley Byrne* common law duty of care not to misstate was merely an example of a more general principle that a defendant's assumption of responsibility may give rise to a duty of care, depending on the particular facts (§63). The Court also accepted (at §65) that in "some exceptional cases" the circumstances of the case might mean that the bank owed a duty to provide its customer with an explanation of the nature and effect of a particular transaction, referring to the judgment of Kerr LJ in *Cornish Midland Bank* [1985] 3 AER 513. The starting point was, nevertheless, that a bank negotiating and contracting with another party owes in the first instance no duty to explain the nature or effect of the proposed arrangement to the other party (§66). The Court also rejected the notion that there was a "continuous spectrum of duty, stretching from not misleading, at one end, to full advice, at the other end". Rather, the question should be the responsibility assumed in the particular factual context, as regards the particular transaction in dispute (§67).

105. As to the way in which the court should approach that fact-sensitive question, Rose J in *LEA* highlighted a number of principles that emerge from the cases, which are of equal relevance in this case. In particular:

    i) In all the cases, the courts have carefully examined the emails, call transcripts, presentations and contractual documents generated during the dealings between the parties, to ascertain whether the bank not only sold the products to the customer but also advised the customer to buy its products to an extent that engages a legal responsibility on the part of the bank to ensure that its advice was not negligent (*LEA* §160).

    ii) The courts have analysed the dealings between the bank and the customer in a "pragmatic and commercially sensible" way. Rose J noting the "dangers of dissecting phone calls and email correspondence to extract advice or opinions or personal recommendations from a relationship which the parties have not expressly characterised as a relationship of advisor and client". Rather, the question to be considered is whether the bank has crossed the line which separates the activity of giving information about and selling a product, and the activity of giving advice (*LEA* §§162–163).

    iii) It is also necessary to consider the extent to which the contractual terms state that the relationship between the bank and the customer is not an advisory one. As Rose J noted, this "may prove fatal to the claimant's case", as was the case in *Crestsign v NatWest Bank and RBS* [2014] EWHC 3043 (Ch) (*LEA* §161).

    iv) Although the factual question whether advice was given and the legal question whether the bank assumed responsibility for that advice if it was negligent are conceptually separate, they are closely linked (*LEA* §164). As Gloster J noted at §451 of her judgment in *JP Morgan Chase v Springwell Navigation* [2008] EWHC 1186 (Comm), the real point is not the semantic one as to whether particular recommendations can be characterised as "advice", but rather whether the giving of that advice attracts a duty of care in respect of the views expressed, or a positive duty to give advice on a wider basis.

106. In assessing the facts on the basis of these principles, the test is an objective one, as Lord Steyn noted in *Williams v Natural Life Health Foods* [1998] 1 WLR 830 (HL) at 835F (cited at §51 of *Springwell*):

> "The touchstone of liability is not the state of mind of the defendant. An objective test means that the primary focus must be on things said or done by the defendant or on his behalf in dealings with the plaintiff. Obviously, the impact of what a defendant says or does must be judged in the light of the relevant contextual scene. Subject to this qualification the primary focus must be on exchanges (in which term I include statements and conduct) which cross the line between the defendant and the plaintiff."

The existence of a duty to advise

107. RBS denied that any advisory duty arose in relation to the sale of the collar to Fine Care. Although Mr Levey in his submissions separated the question of whether advice was given from the issue of whether there was a duty of care, I respectfully agree with the comments of Gloster J in *Springwell* that an attempt to parse the evidence to establish whether "advice" was given may lead to a rather semantic debate. The ultimate question is whether the particular facts of the transaction, taken as a whole and viewed objectively, show that the bank assumed a responsibility to advise the customer as to the suitability of the transaction. In this regard I particularly bear in mind the observations in *PAG* that in the ordinary case the bank will owe no duty to explain the nature and effect of the proposed transaction to its customer, but that in "some exceptional cases" such a duty might arise.

108. In this case, it is common ground that the sale of the collar was ostensibly made on a non-advisory rather than an advisory basis. Mr Wilkes was paid by the bank to sell IRHPs; he was not paid by Mr Somani to act as his professional advisor. Fine Care's claim is that the facts nevertheless gave rise to an advisory relationship in which a personal recommendation was expressly or implicitly made. In essence Mr Hurst's argument was that Mr Wilkes was held out by the bank as being an "expert", and was indeed an approved person under FSMA, such that he was subject to the APER code; that Mr Wilkes advised Fine Care to buy this particular collar; and that the bank therefore assumed a duty of care which required it to ensure that the collar was indeed suitable for Fine Care.

109. I do not consider that, in this case, the factual circumstances taken as a whole lead to the conclusion that the bank was assuming a duty of care in respect of advice as to the suitability of the collar.

110. There is no dispute that Mr Wilkes was indeed an approved person subject to the APER code. In that capacity, whether or not he was described as an "expert", there is no doubt that he was (quite properly) introduced to Mr Somani by Mrs Ellison as the appropriate person with whom Mr Somani could discuss the hedging products offered by the bank. None of that, however, means that the bank was assuming a duty of care to Mr Somani. It is quite obviously not the case that in every case in which an IRHP is sold by an approved person (as it will inevitably be, if the bank is complying with its obligations under FSMA) a

duty of care arises to ensure the suitability of that product. Equally, while Mr Wilkes said repeatedly that he was providing information and not advice, his state of mind is not determinative, as noted in *Williams v Natural Life Health Foods* (above). It is, rather, necessary to look at the particular circumstances of the transaction.

111. As to that, Mr Levey noted that Fine Care had been unable to point to anything at all in the exchanges between Mr Wilkes and Mr Somani which contained advice by Mr Wilkes to Mr Somani to buy the collar. Mr Hurst initially responded by providing a list of examples of occasions on which IRHP products in general were presented as being beneficial, for example in the Healthcare Hedging Brochure sent by Mr Paxman, and the 13 July 2007 discussion document sent by Mr Wilkes. However, as Mr Andrew Hochhauser QC (sitting as a Deputy High Court Judge) noted in *Parmar v Barclays Bank* [2018] EWHC 1027 (Ch), §120(5), if a recommendation is to give rise to an advised sale, it must be made in respect of a particular product and not IRHPs generally. That comment was made in the context of a statutory claim under s. 138D FSMA, but it applies equally here. While Mr Wilkes' general statements as to the benefits of IRHPs can, therefore, be taken into account as providing background context, none of those amounted to advice to buy any specific product.

112. I therefore asked Mr Hurst in his closing submissions what he relied upon as containing advice to buy the collar specifically. His response was to say that the 13 July 2007 discussion document, taken together with the previous discussion at the 6 July meeting, implied that Mr Wilkes was recommending the collar.

113. That is a slender foundation for a claim of advice of the sort that crosses the line from a sales pitch to the sort of advice that will engender a duty of care, and I do not consider that Mr Wilkes did cross that line. There is no doubt that Mr Wilkes did specifically discuss the geared collar at the meeting on 6 July, but I have already rejected the suggestion that he "steered" Mr Somani towards that product specifically, whether for commission or other reasons. What is evident, however, is that Mr Wilkes left the meeting with the understanding that Mr Somani's preference was for zero premium products. That is why in his covering email attaching the 13 July discussion document Mr Wilkes drew Mr Somani's attention to the two zero premium solutions for which term sheets had been provided.

114. In it is obvious that Mr Wilkes was particularly commending these products for Mr Somani's attention, and in that very general sense one might say that he was recommending them. Mr Wilkes noticeably did not, however, single out either of those solutions as being more suitable for Fine Care than the other products covered in the discussion document. Still less did he positively advise Mr Somani to purchase the geared collar, and Mr Hurst noticeably did not suggest to Mr Wilkes in cross-examination that he had done so. The discussion document in fact provided indicative terms (including examples of premiums where applicable) for a variety of other IRHPs; and far from suggesting that any one product was particularly suitable for Fine Care, the document noted that Mr Wilkes was expecting to have further discussions with Mr Somani to "fine tune the solution" that matched Fine Care's risk strategy and growth philosophy.

That is inconsistent with the suggestion that Mr Wilkes was advising Mr Somani to buy a particular product.

115. Mr Hurst submits that the interaction between the bank and Mr Somani should be seen in the context of Mr Somani's position as an unsophisticated investor, and Mr Somani claims that he had little or no understanding of the products that were being presented to him. It is common ground that Mr Somani was an unsophisticated investor with no prior experience of IRHPs. As I have already found, however, I do not accept that his understanding following his meetings with Mr Paxman and Mr Wilkes was as limited as Mr Somani now suggests. It is also clear from his email to Ms Bountra on 13 July asking her to "work out the net effects on these two options" and commenting that it was "like gambling" that he understood quite well that the products carried risks as well as benefits. It is also notable that, following the discussion document, Mr Somani did not contact Mr Wilkes to discuss the matter further, nor is there any evidence that he requested any advice from Mr Wilkes between the 13 July presentation and the call on 19 July to confirm the hedge. I do not, therefore, consider that Mr Somani's level of understanding in this case can turn a relationship that was *prima facie* a non-advisory one into one in which the bank assumed a duty of care to advise Mr Somani on the suitability of the transaction.

116. On the facts set out above, therefore, I do not consider that this is the sort of "exceptional case" where the bank crossed the line into assuming an advisory duty towards its customer. If there were, however, any residual doubt on that matter, the bank's terms that were provided to Mr Somani on numerous occasions confirmed that the relationship was not an advisory one.

117. As I have set out above, the bank's terms of business were first provided to Mr Somani following his February 2006 meeting with Mr Paxman. Those included a provision (in clauses 3.2 and 3.3) stating that the bank was providing general dealing services on an execution-only basis and was not providing advice on the merits of a particular transaction. The same terms were given to Mr Somani at the 6 July 2007 meeting. In both cases Mr Somani signed the accompanying letter (which attached the terms) to confirm that he had read and understood it. Disclaimers making clear that the bank was not providing advice were also attached to the 13 July discussion document, the term sheets setting out indicative terms for the collar, the initial conformation of the trade on 19 July, and the formal trade confirmation.

118. Mr Hurst submits that the operation of those clauses is excluded by the requirement of reasonableness in COB 2.5.3 and 2.5.4 and the Unfair Contract Terms Act 1977. He relies, in this regard, on the decision of the Court of Appeal in *First Tower Trustees v CDS* [2019] 1 WLR 637. In that case the Court of Appeal considered the extent to which s. 3 of the Misrepresentation Act 1967 applied to a "non-reliance" clause in a contract, which provided that one contracting party did not enter into the agreement in reliance on a statement or representation made by the other contracting party.

119. Mr Levey, for the bank, accepts that the effect of *First Tower* is that certain clauses in the bank's confirmation of the trade, which provided that the customer had not relied on the bank, are non-reliance clauses of that nature,

which would be subject to the test of reasonableness in UCTA and s. 3 of the Misrepresentation Act. The provisions to which I have referred above, however, are not non-reliance clauses, but are clauses that set out the nature of the obligations of the bank. The clauses at issue in *First Tower* were not of that nature, and at §43 Lewison LJ drew a clear distinction between that sort of clause and the non-reliance clauses in issue:

> "Where, as a matter of interpretation of a non-consumer contract, the impugned term does no more than to describe one party's primary obligations there can be no question of applying the reasonableness test in the 1977 Act. In [*Springwell*] Gloster J put the point thus, at paras 601–602:
>
> > '601. There is a clear distinction between clauses which exclude liability and clauses which define the terms upon which the parties are conducting their business; in other words, clauses which prevent an obligation from arising in the first place …'
> >
> > '602. Thus terms which simply define the basis upon which services will be rendered and confirm the basis upon which parties are transacting business are not subject to section 2 of [the 1977 Act]. Otherwise, every contract which contains contractual terms defining the extent of each party's obligations wold have to satisfy the requirement of reasonableness.'"

120. Lewison LJ went on (at §44) to refer to *Thornbridge v Barclays Bank* [2015] EWHC 3430 (a swaps case) in which HHJ Moulder had considered a clause stating that the buyer was not relying on any communication "as investment advice or as a recommendation to enter into" the transaction. As Lewison LJ commented, that was a clause that defined the party's primary rights and obligations, not a clause stating that there had been no reliance on a representation. Leggatt LJ drew the same distinction at §96 of his judgment.

121. The clauses in issue in this case are therefore not subject to the requirement of reasonableness in UCTA or, by parity of reasoning, COB 5.2.3 and 5.2.4.

122. For completeness, however, I note that there are numerous cases in the context of the alleged mis-selling of derivatives in which similar clauses have been found to be reasonable, including *Thornbridge v Barclays Bank* [2015] EWHC 3430 (QB), §§113–117 and *Marz v Bank of Scotland* [2017] EWHC 3618 (Ch), §§270–275. Each case will, of course, turn on its own facts, and I accept that Mr Somani was less knowledgeable than the claimants in some of the previous cases. I also accept that Mr Somani probably did not read the relevant provisions in the bank's documents. I do not, however, accept that he was unable to do so in the time available, or that he was unable to obtain advice. The documents containing the relevant clauses were repeatedly given or sent to Mr Somani over a course of 18 months, and there is no evidence that Mr Somani was ever put under time pressure to enter into the contract. Some of Mr Hurst's objections effectively asserted that it can never be reasonable for a bank selling an IRHP to a private customer to specify that it is doing so on a non-advisory

basis. I do not accept that submission, which finds no support in the COB rules or any other authority cited by Mr Hurst.

123. It follows that Mr Levey is, in my view, entitled to rely on the bank's contractual terms as confirming that the relationship between the bank and Mr Somani did not give rise to a duty of care to advise Mr Somani as to the suitability of the collar.

124. In light of the conclusions that I have reached above it is not necessary for me to go further and consider the specific breaches of duty alleged by Fine Care under this head of its claim. I will, however, address these for completeness since they were the subject of full argument at trial. I also note that the same allegations are made under the other heads of claim, so it is in any event necessary for me to consider the substance of the points.

The alleged impediment to borrowing

125. In his opening submissions Mr Hurst relied upon a plethora of allegations of breaches of duty. By the end of the trial, however, those had reduced to the two central complaints that I have summarised above. The first of those turned on a claim that Mr Wilkes had negligently failed to explain to Mr Somani that the CLU would prevent Fine Care from refinancing the land loan with (and seeking development finance from) another bank, because the CLU created a contingent liability for which security had to be provided. The particulars of claim alleged, in this regard, that the bank's duty was "to inform Mr Somani of the existence of the risks to his business and business expansion plans by entry into the IRHP namely that the creation of the CLU … would adversely affect or diminish Fine Care's capacity to borrow further to finance his expansion plans for Fine Care". Mr Hurst submitted in his closing submissions that there was an "absolute certainty" that the CLU would inhibit or prevent refinancing, leading to a "high risk or certainty" that it would affect Fine Care's ability to complete the Harlow development, and that this was predictable at the point of sale. Mr Somani likewise repeatedly claimed that the CLU had "killed off" any prospect of Fine Care obtaining the development loan for the Harlow site.

126. The CLU, as the experts agreed, is a bank's internal and subjective estimate of the near worst-case risk to the bank, at any given time, of default by the customer under the IRHP. Each bank's precise method of assessment of the CLU will differ; what is common is that the CLU will change over time depending on the passage of time (all else being equal, the CLU will reduce as the remaining time under the contract reduces) and movements in the market (such as the levels of interest rates, the yield curve and volatility of the market). At RBS the CLU was calculated on the basis of a 95% confidence level.

127. Since the CLU is the bank's estimate of the risk of default to the bank, the experts agreed that the CLU is *not* a contingent liability of the customer. The customer's liability under an IHRP at any given point in time is rather the sum (if any) that the customer would have to pay to terminate the IRHP earlier, i.e. the break cost, which is calculated on the basis of the replacement cost of the contract in the market, referred to as the mark-to-market value. That is different from the CLU, but like the CLU the break cost varies over time depending on

market conditions. In the present case it is common ground that on day 1 of the contract the break cost of the collar was £37,000 (or very close to this figure), and the CLU was £240,000.

128. The expert evidence in this case was consistent with the evidence given in numerous previous cases: in particular, I note that Mr Hochhauser QC reached the same conclusions in *Parmar* §209(3) as to the difference between the CLU and the break costs, on the basis of evidence given by the same experts as in this case. The judge went on to comment, on the basis of the expert evidence, that it was not the general practice of banks to disclose the CLU as part of their sales process when informing clients about the risks associated with IRHPs. That was also the opinion of Mr Berkeley and Mr Croft in this case. In *PAG* the Court of Appeal noted at §79 that this was likewise the position on the evidence in a number of other first instance decisions on IRHPs.

129. In those circumstances the Court of Appeal found in *PAG* (at §§78–81) that there was no basis for holding that there was any assumption of responsibility for the disclosure by RBS of the CLU or the possible size of future break costs. That may be why Mr Hurst ultimately put his case not on the basis of a failure to disclose the CLU itself, but rather on the basis of the fetter on Fine Care's borrowing that he said inevitably arose from the CLU. He accepted that in *Parmar* the court had found that there was no evidence of any borrowing that had been prevented because of the CLU, and that it was not incumbent on the bank to warn the customer of the risk of an impediment to borrowing arising from the CLU (§§215–216). Mr Hurst relied, however, on the last sentence of §216 of *Parmar*, where the judge commented that "there may be other factual situations where the CEE limit could have a significant impact on future borrowing and then such disclosure would be necessary to comply with the obligations under the COBS Rules". Essentially, therefore, Mr Hurst was submitting that this was such a case.

130. The problem with that submission is that the CLU did *not* in this case inevitably create a fetter on Fine Care's borrowing. Quite the contrary, from the bank's perspective the development loan was always a high risk proposition, and that was precisely the reason why the bank required some form of hedging to be in place as a condition of approving the development loan. The bank therefore saw the hedge as a means of facilitating the grant of the development loan, in circumstances where by February 2007 there had been very slow progress on the Harlow site and a reduced land valuation.

131. Mr Hurst's submission was that as soon as the collar was concluded, it was certain to wreck Fine Care's business plans, and would have done so even if interest rates had not dropped dramatically. That submission is, however, flatly contradicted by the evidence, which shows that in August 2008, more than a year after the collar contract was concluded, and even after the market had started to tighten, Mrs Ellison offered Mr Somani terms for his development loan for Harlow, stating that the bank was already "a long way down the route" to providing this and that she considered an October start date to be achievable. That proposal was not taken further by Mr Somani, but there is no evidence to suggest that this was due to any lack of willingness by the bank, nor is there anything to suggest that the bank was impeded in any way by the collar.

132. There is no doubt that by August 2010 the bank was only willing to fund against existing trading units. As set out above, Mrs Ellison proposed that once mature trading was reached at the Stevenage care home the bank would be able to fund the Harlow development, and in December 2012 the bank put forward detailed proposals on that basis, explaining that the cross-collateralisation of Stevenage was required because of the risk involved in funding an entirely new development. That also belies any suggestion that the entry into the collar "killed off" the Harlow development. There is, moreover, nothing in the documents to suggest that at any time during that period the CLU created an impediment to RBS granting development finance for Harlow; rather the reason for the revised proposals was that the bank's lending criteria had by then changed, such that the bank wanted to secure the risk of a new development against an existing income-producing source.

133. It does appear to have been the case that Fine Care's liability under the collar prevented Mr Somani from refinancing the Harlow site with *other* banks when he sought to explore that possibility in or around October 2010, a point that was noted in later internal RBS documents. There is nothing before me that records which other banks had been approached, or what their specific reasons were for declining to lend, but RBS's internal documents suggested that the problem was the liability under the collar.

134. That is presumably why Mr Hurst argued, with the benefit of a great deal of hindsight, that even if the contemporaneous documentation suggested that the CLU was not a lending impediment to RBS from the outset, the bank should have regarded it as such. He also said repeatedly that the bank should have called a witness from its credit department on this point, and submitted that adverse inferences should be drawn from the bank's failure to do so, relying on the judgment of the Court of Appeal in *Wisniewski v Central Manchester Health Authority* [1998] EWCA Civ 596.

135. I do not accept those submissions. As the Court of Appeal made clear in *Wisniewski*, there must be some *prima facie* evidence on the matter in issue before the court is entitled to draw the desired inference. In this case I do not consider that the evidence establishes a *prima facie* case to answer on the part of the bank. The experts agreed that the CLU *could* be material to a bank's decision on how much to lend to a borrower, and that the larger a CLU the less a customer can potentially borrow. But Mr Berkeley explained in his oral evidence that whether this is the case at a particular time depends on the particular circumstances: when markets are benign, the CLU isn't a material issue; by contrast, he said that "when markets were stressed or a customer's position was stressed", a bank might use the CLU as part of its overall credit assessment of the customer.

136. In this case, however, there is not any evidence that in July 2007, when the collar was sold to Fine Care, the markets were stressed or Fine Care's position was stressed such that the CLU would have created a material impediment to borrowing, over and above the fact that Fine Care's position was already highly leveraged. The land loan to Fine Care was (by then) just short of £1m, secured against a property that had been valued at £1.25m. The bank's security therefore comfortably covered its loan and Fine Care's liability for the break cost of the

collar on entry into the contract. Even if the bank had taken into account its own exposure, the CLU was set at £240,000. The bank's own estimate of the near worst-case position was therefore already covered by Fine Care's security.

137. It was, therefore, not inevitable that the collar would impede Fine Care's further borrowing prospects. As Mr Croft said, and I accept, the cause of Fine Care's difficulty with refinancing was the massive reduction in interest rates that occurred from 2008 onwards. In July 2007, however, no-one could reasonably have anticipated that interest rates would fall to 0.5% over the lifetime of the collar. Nor did the bank anticipate the other reason why Fine Care was left with such a large liability, namely the fact that the collar was not novated to other entities, as had originally been envisaged, but remained entirely in the hands of Fine Care. As I will go on to explain, this was not due to unwillingness on the part of the bank, but was ultimately due to the fact that Mr Somani decided not to allow his other companies to take on the liabilities under the collar, once interest rates had fallen as far as they did. There may well have been good reasons for that decision. But I do not accept Mr Hurst's submission that the sale of the collar set in place a chain of events that inevitably led to the refusal of finance, such that Mr Somani should have been warned that this would or might occur.

138. For those reasons, even if I had found a duty of care to arise, I would have rejected the claim that the bank breached that duty in this regard.

The novation claim

139. The second alleged breach of the bank's duty of care is that Fine Care says that the bank should have warned Mr Somani that novation of the collar might require external security to be provided, but did not do so.

140. This claim arises from the typed report of the 6 July 2007 meeting, in which Mr Wilkes recorded that he had explained that the IRHP "can be 'Novated' in to a different entity in the future if they wished. It may also be novated to another Bank if he wanted to move banks". Mr Hurst submits that this should be understood as containing two representations, both of which breached the bank's duty of care by misstating the true position and/or failing to disclose material facts:

    i) A representation that the IRHP chosen by Mr Somani chose would be able to be novated to a different company controlled by Mr Somani. That, Mr Hurst said, omitted to state that novation would only be possible if security was provided by the company to which the collar was novated, or alternatively if some other form of external security was provided.

    ii) A representation that Fine Care would be able to refinance its underlying loan with a different lender. That, Mr Hurst said, was how Mr Somani had understood the reference to novating to another bank; and that, he said, was a misstatement because in fact Fine Care would not be able to refinance with a different bank.

141. The second of those claims is not in any sense a claim about Fine Care's inability to novate, but is simply a reformulation of Fine Care's allegations that the collar left it unable to refinance its borrowing. I have rejected those allegations for the reasons set out above.

142. That leaves Mr Wilkes' representation that the IRHP could be novated to a different entity. There is no dispute between the parties as to what Mr Wilkes said on this point: Mr Somani accepted in cross-examination that what Mr Wilkes told him was that he could use the hedge for his other companies if they wanted it. Mr Wilkes was therefore not suggesting that any other company would definitely have agreed to take on a novation of part of the IRHP. What he was saying was that the bank was willing for the IRHP to be novated in the future to Mr Somani's other companies if that was what Mr Somani and those companies wished.

143. Mr Levey submitted that that representation was correct; that the bank was entirely willing for the collar to be transferred to other companies controlled by Mr Somani (in particular Somani Hotels and/or Fine Care Stevenage); and that the bank did not as a matter of fact require any additional security to be provided by those companies in order for such a novation to take place.

144. I accept Mr Levey's submissions on this point. There is no doubt whatsoever that from the outset the bank was not only willing for such a novation to take place, but anticipated that it would occur. The approval given by RBS Credit even before the trade occurred was given on the basis that the trade would initially be made in the name of Fine Care but would later be novated to Somani Hotels if and when RBS refinanced the debt of that company. On 19 July 2007, after the trade was made, Mr Wilkes confirmed that as soon as "all the facilities are in place" regarding Somani Hotels he could review with Mr Somani "where the protection sits & how much". Over the next years, the bank repeatedly agreed to split and novate the collar, and in April 2009 the collar was indeed split with the intention of transferring £1m of the notional amount to Somani Hotels and £2m to Fine Care Stevenage.

145. While Mr Somani is right to say that he gave instructions to novate the collar which were then not implemented, there is no evidence to suggest that this was due to any concerns by the bank about the security it held for Somani Hotels and Fine Care Stevenage. Rather, it seems that there may have been some miscommunications within the bank which caused the collar not to be novated as instructed in 2008–2009. By 2010, however, the reason that the collar was not novated was not any delay on the part of the bank, but Mr Somani's change of heart. As the evidence shows, by early 2010 it appears that Mr Somani was no longer sure that he wanted to move the collar, and by late 2010 he had unequivocally decided not to do so, his reasons being that he did not want to expose his other companies to the substantial liability that the collar by then represented (which was of course because of the plunge in interest rates). As I have set out above, that was confirmed by Mr Somani in cross-examination.

146. Mr Hurst argued that the real reason that the collar was not novated by the bank was that this would have required the provision of security by Mr Somani or an outside source, and that this was another point on which a credit witness should

have been called by the bank. I do not accept those submissions. It is common ground that by mid-2010 the bank was concerned about its exposure on its various *loans* to Mr Somani's companies, and it therefore initiated discussions with Mr Somani about security for those loans. Mrs Ellison's unchallenged evidence, however, was that those discussions were entirely unrelated to the collar, but arose because of a security shortfall for the Somani Hotels loan and a downturn in trading at the Epping hotel.

147. By contrast, in respect of the *collar*, the bank positively wanted the hedge to be novated, and its internal documents explain why: the hedge liability was sat in a company that was not trading because the bank had been unable to reach agreement with Mr Somani as to the terms of the development loan. As the February 2011 emails within the bank's SRM department made clear, that left the bank in a vulnerable position, and it was therefore encouraging Mr Somani to novate the liability to one or more of his other companies. There is no suggestion in any of the documents that such a novation would have required additional security to be provided. It was only by way of alternative, if the collar remained with Fine Care and was not novated, that the bank suggested that it would want a cross-guarantee from one of the other companies. In other words, the bank's request for security in relation to the collar only arose if the collar remained with Fine Care, not if it was novated.

148. Mr Hurst suggested that this predicament arose because the bank failed to understand the separation between Mr Somani's companies, treated Fine Care as a *mélange* of the different companies, and did not understand that novation might not be possible if the other people interested in the various companies (such as Mrs Somani) refused to allow it, or if Mr Somani himself refused to allow his other companies to take on the risk of the IRHP. I unhesitatingly reject the submission that the bank failed in this regard. The novation discussion arose because, from the outset, Mr Somani indicated that he wished to put in place protection which encompassed the debt of Somani Hotels as well as Fine Care. He repeatedly sought confirmation that the trade could be novated if he wished to do so. That was the basis on which Mr Wilkes confirmed that novation would be possible. As I have already found, Mr Wilkes was not making any representation about the extent to which Mr Somani's other companies would in due course agree to take on the collar, nor did he need to do so.

149. There was only one situation in which (as the bank accepts) it might have required additional security for a novation, and that was the hypothetical situation in which Mr Somani had sought to novate the collar from Fine Care to another company, such as Somani Hotels, *before* that company had refinanced its borrowing with RBS. In that case the transferee company would have a first charge in favour of a different lender (which in the case of Somani Hotels was AIB). Mr Hurst placed considerable reliance on this scenario in his closing submissions. In my judgment, however, there is nothing in that point. It did not arise on the facts, because Mr Somani did refinance with RBS before any discussion of novation of the collar. But in any event, even if that situation had arisen, there is nothing in the evidence before me to suggest that RBS would have been unable to accept (for example) a second charge over Somani Hotels such that there would have been any impediment to the novation. I therefore do

not consider that the bank breached any duty of care by failing to raise this entirely hypothetical point with Mr Somani.

150. The novation claim therefore also fails: even if there was a duty of care, it was not breached for the simple reason that the representation made by the bank was entirely correct.

The misstatement/misrepresentation and contractual claims

151. The misstatement/misrepresentation claims allege a classic *Hedley Byrne* negligent misstatement or, in the alternative, misrepresentation contrary to the Misrepresentation Act 1967. As I have explained, by the end of the trial those claims had reduced to the same two objections as were advanced in relation to the negligent advice claim.

152. The bank has always accepted that it had a *Hedley Byrne* duty not to negligently misstate facts to Fine Care. But as Mr Levey pointed out the alleged impediment to borrowing is not even on its face a representation that could fall within the *Hedley Byrne* principle. In any event, in respect of both that claim and the novation point, the bank denies that there was any negligent misstatement or misrepresentation as alleged. It follows from my findings above that the bank's position is well founded, and the claims of misstatement or misrepresentation fail.

153. The final claim of a breach of an implied contractual duty is likewise based on the same two underlying complaints as relied upon for the negligent advice claim, and therefore also fails for the reasons set out above.

Conclusion

154. I have every sympathy with the situation that Mr Somani found himself in, when interest rates plummeted following the global financial crisis in 2008, leading to large payments being required under the IRHP that Fine Care had purchased. As explained above, a partial refund of those payments was offered by RBS following the review process agreed with the FCA, but that refund was rejected by Fine Care, which pursued these proceedings instead. Having chosen to do so, Fine Care must rely on its common law claims, informed by the regulatory rules and guidance in the specific but limited respects that the courts have recognised.

155. While I fully acknowledge the genuine nature of Mr Somani's sense of grievance, I have found on the facts that the bank did not breach its duties in the ways that Fine Care alleges. Fine Care's claim therefore falls to be dismissed, whether it is put as a claim of negligent advice, misstatement/ misrepresentation, or breach of implied contractual terms.