Neutral Citation Number: [2024] EWHC 593 (Ch)

Case No: BL-2019-000866

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
BUSINESS LIST (ChD)

Rolls Building
7 Rolls Building
Fetter Lane
London EC4A 1NL

Date: 19/03/2024

Before :

THE HONOURABLE MR JUSTICE ZACAROLI

- -

Between:

(1) FAROL HOLDINGS LIMITED
(2) JANHILL LIMITED
(3) MR AND MRS TPW UGLOW (a firm)

Claimants

and

(1) CLYDESDALE BANK PLC
(2) NATIONAL AUSTRALIA BANK LIMITED

Defendants

And Between: **Claim No. BL-2020-001989**

IVOR GASTON & SON (a firm)

Claimant

and

(1) CLYDESDALE BANK PLC

(2) NATIONAL AUSTRALIA BANK LIMITED

Defendants

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Andrew Onslow KC, Lisa Lacob, Liisa Lahti and Emma Hughes (instructed by **Fladgate LLP**) for the **Claimants**
Bankim Thanki KC, Ian Wilson KC and Richard Hanke (instructed by **DLA Piper UK LLP**) for the **First Defendant**
Patrick Goodall KC, Natasha Bennett and Francesca Ruddy (instructed by **Herbert Smith Freehills LLP**) for the **Second Defendant**

Hearing dates: 9, 10, 11, 12, 16, 17, 18, 19, 23, 24, 25, 26, 27, 30, 31 October 2023, 1, 2, 6, 7, 8, 9, 13, 14, 15, 16, 20, 21, 22, 23, 27, 28, November 2023, 14, 15, 18, 19, 20 & 21 December 2023

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JUDGMENT

Mr Justice Zacaroli:

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PART A: INTRODUCTION

A1. The parties

1. These are claims by four small or medium-sized enterprises ("SMEs") arising out of fixed interest rate loans made to them between 2002 and 2010 by the first defendant, Clydesdale Bank PLC ("CB").

2. CB is a bank registered in Scotland, which traded under the name 'Clydesdale Bank' in Scotland and many parts of England, and under the name 'Yorkshire Bank' in Yorkshire.

3. Until February 2016, CB was a wholly owned subsidiary of the second defendant, National Australia Bank Limited ("NAB"), and was part of the NAB group of companies. I will refer to the defendants, together, as the "Banks".

4. The first three claimants are parties to one action. The first claimant, Farol Holdings Limited ("Farol"), is the parent company of Farol Limited which carries on business as a wholesale supplier of agricultural machinery, equipment and supplies, from its head office in Milton Common, Oxfordshire. The second claimant, Janhill Limited ("Janhill"), is a property investment company based in Macclesfield. The third claimant, Mr and Mrs TPW Uglow ("Uglow"), is a partnership which carries on dairy farming activities in Cornwall.

5. The fourth claimant, Ivor Gaston & Son ("Gaston"), is a partnership which carries on cattle and pig farming activities in Scotland and has brought a second action that has been tried together with the first action.

6. In excess of 900 other claimants, mostly represented by the same firm of solicitors representing the four claimants in these two actions, have commenced proceedings seeking materially similar relief to that sought in these two actions. Those other claims have been stayed by agreement, awaiting the result of these two actions.

A2. The nature of the claims in outline

7. The claims all relate to a product marketed and sold by CB between about 1999 and 2012, called a "Tailored Business Loan" ("TBL"). This was a product that NAB had been successfully selling in Australia for some time before 1999. TBLs took various forms, including variable rate loans, fixed rate loans and a variety of more complex structures involving collars, caps and floors. This case is concerned with only one of them, a fixed rate TBL ("FRTBL"), where the loan was made for a set period (subject to a right of early repayment) for a fixed rate of interest throughout that period.

8. TBLs were not regulated products. They nevertheless required a level of know-how and expertise on the part of the bank selling them. Moreover, a bank that enters into fixed rate loans exposes itself to an interest rate risk. To manage that

risk, it requires capital, systems and specialist staff including interest rate traders.

9. CB's staff did not, whereas NAB's staff did, have the requisite expertise. Accordingly, NAB's employees were closely involved in marketing and selling TBLs to CB's customers. The process was a joint one involving the customer's relationship manager at CB and representatives of NAB's "Treasury Solutions" department. The Treasury Solutions staff had access to market data, to enable them to provide quotes for the purpose of pricing FRTBLs, and worked alongside interest rate traders at NAB.

10. CB did not at the time have the capability to manage the interest rate risk inherent in FRTBLs, so it transferred, at inception of each FRTBL, the entirety of that risk to NAB. NAB then managed the risk assumed under the FRTBLs as part of the management of interest rate risk across its business on a macro- or portfolio-wide basis.

11. The transfer of risk was effected, in relation to each FRTBL, by way of a back-to-back corresponding hedge transaction between CB and NAB (the "corresponding NAB hedge", or "CNH"), which exactly mirrored the terms of the relevant FRTBL in terms of (notional) amount, interest rate and repayment terms. CB was the fixed rate payer, and NAB the floating rate payer.

12. For the customer, the benefit of a FRTBL was that it provided certainty as to the amount of interest it would have to pay over the life of the loan. It was protected from interest rate rises. If interest rates fell, on the other hand, it would continue to be burdened with above market rates of interest for the remainder of the term of the loan.

13. As a result of the global financial crisis in 2008, interest rates fell dramatically, and stayed low for many years. Each of the claimants wished, for varying reasons, to refinance their FRTBLs and ended up repaying the capital amount of the loan early. They did so pursuant to a clause in the standard terms and conditions governing their loan (the "Standard Conditions"), which permitted them to repay early on terms (broadly) that they paid CB an amount equal to any loss, cost or liability incurred or suffered by it as a result of that early repayment. The amounts the claimants were required to pay are referred to as "break costs".

14. Upon termination of a FRTBL, the CNH was also terminated. In relation to each of the claimants, this resulted in a payment becoming due from CB to NAB in an amount equal to NAB's loss under the CNH, calculated as the net present value ("NPV") of the difference between the interest payable by CB to NAB at the fixed rate for the remainder of the term, and the estimated amount of interest NAB would have been due to pay CB at the floating rate for the remainder of the term. This sum was calculated by NAB's traders. CB then typically charged the same amount to the customer as break costs under the FRTBL.

15. This was the way break costs were calculated and charged to Farol, Uglow and Gaston. By the time that Janhill refinanced its FRTBLs, the FRTBLs had been assigned from CB to NAB, under a transaction dated 5 October 2012, called the

"Morph Transaction", pursuant to which all of CB's commercial real estate lending business was transferred to NAB. There was accordingly no longer a CNH in place (although there was a purely internal swap within NAB on the same terms). The break costs charged to Janhill were nevertheless calculated in materially the same way, as the NPV of the difference between interest due at the fixed rate under the FRTBLs and interest at prevailing rates for the remainder of the term (on the basis that this was the return NAB could expect to make on the repaid capital sum over that period).

16. The claims in these actions fall into two parts. The first part relates to the break costs charged by CB to the claimants (the "break costs claims"). The second relates to the fixed element in the rate of interest charged under the FRTBLs (the "fixed rate claims").

The break costs claims

17. At the heart of the break costs claims is the claimants' contention that CB was not entitled to charge break costs in the way that it did. The claimants initially contended that CB was not entitled to charge break costs by reference to the amount it paid under the CNHs, because there were in fact no CNHs. They now accept that there were CNHs, but contend that they did not create any legally binding obligation on CB to pay a sum to NAB in the event of the termination of the corresponding FRTBL.

18. Alternatively, the claimants contend that even if CB was under an obligation to pay NAB under a CNH as a result of termination of a FRTBL, it was not entitled, on the true construction of the Standard Conditions, to charge that sum to the customer as break costs.

19. The claimants put their claims on three bases.

20. First, they contend that the Banks, by (on various occasions) giving the claimants indications of what break costs would be payable if they repaid a FRTBL early, and by relaying to them the amount of break costs that were in fact payable on early repayment, made fraudulent, alternatively negligent, misrepresentations to the claimants. The pleaded representations are that:

    (1) The break costs (or likely break costs) were (or were approximately) the amounts that were stated to the relevant claimant on the pleaded dates; and/or

    (2) CB had a contractual entitlement to charge the claimants in that amount (or substantially similar amount) as break costs in the event of a FRTBL being terminated on that date.

    I will refer to these as the "Break Costs Representations". They are both said to have been made expressly, and the second is also said to have been made by implication.

21. A further implied representation – to the effect that CB had put in place a Hedging Arrangement as defined in the Standard Conditions – was not pursued at trial.

22. Second, the claimants contend that they paid the break costs under the mistaken belief that CB was entitled to charge them. That is said to give rise to a claim in unjust enrichment, to recover the break costs paid.

23. Third, the claimants assert that there is a term to be implied into their contract with CB that CB would not demand payment of break costs to which it was not contractually entitled. Accordingly, they claim damages for breach of contract. An amendment was made by the claimants after the end of the trial, to include a claim for breach of mandate by CB, in deducting the break costs from their accounts.

24. It is common ground that unless the claimants can establish that the CNHs gave rise to no legally binding obligations on CB, or that CB was not entitled on the true construction of the Standard Conditions to charge break costs in the manner that it did, then all of their break costs claims must fail. I address the break costs claims in Part B below.

The fixed rate claims.

25. Each FRTBL is provided at a single overall fixed rate of interest. In offering a FRTBL to a customer, and in the contractual documentation for the loan, however, the overall rate is explained as having two components: a "Fixed Rate" and "Margin". Where I use the capitalised terms "Fixed Rate" and "Margin", it is intended to refer to those terms as defined in the standard form of facility letter. Unbeknown to the claimants, the Fixed Rate itself comprised two elements, (1) a rate that broadly reflected the mid-market swap rate for the size and tenor of the loan on the date of execution of the agreement and (2) additional basis points (up to 50) which represented additional income to CB, referred to internally by the Banks as "Added Value" ("AV"). It is common ground that neither the existence nor the amount of AV was disclosed to any of the claimants at the time they entered into their loans.

26. This has given rise to two bases of claim:

    (1) All claimants contend that the Banks made fraudulent, alternatively negligent, misrepresentations to them in the following terms:

        (a) That the quoted Margin was the only profit for CB from the FRTBLs;

        (b) That the Fixed Rate quoted was a market rate (by which the claimants mean that it was a rate fixed by an external source over which the Banks had no control); and

        (c) That the Fixed Rate did not include any additional margin or profit for CB.

I will refer to these representations as "the Fixed Rate Representations".

I address the fixed rate claims in Part C below. The claimants also plead a case under the Misrepresentation Act 1967, although little if any reference was made to this during the trial. I do not consider this separately because: (1) my conclusions in relation to whether representations were made and relied on, and whether they were made fraudulently, would equally apply to it; and (2) the claim is *prima-facie* time-barred, since each FRTBL was entered into more than six years ago, and s.14A of the Limitation Act 1980 does not apply so as to extend the limitation period: see *Clerk & Lindsell on Torts*, 24th ed., at 30-74.

(2) In addition, Uglow and Gaston contend that by reason of the non-disclosure of AV the relationship between them and CB was an "unfair relationship" within the meaning of s.140A of the Consumer Credit Act 1974 (see Part E below).

A3. Summary of conclusions

27. I have heard and read an extensive amount of evidence at a trial lasting some 12 weeks. I have considered all of that evidence, but refer in this judgment only to those parts of the evidence which I regard as most important to the numerous issues I have been required to determine.

28. In the end, I have concluded that each of the claimants' claims fails. There are many reasons for this, which I develop at length in the remainder of this judgment, but two conclusions lie at the heart of the decision.

29. First, I have concluded that on the true construction of the Standard Conditions (and the earlier standard terms which applied to some of Janhill's claims) CB was entitled to calculate its loss upon early repayment of a FRTBL on the basis of the NPV of the difference between the fixed rate of interest due for the remainder of the term of the FRTBL and interest at the prevailing floating rates for the same period, and that the sum due from CB to NAB upon termination of a CNH was a reasonable proxy for that loss. That conclusion underpins much of the outcome of the break costs claims.

30. Second, I have ultimately taken a different view from that taken by the claimants as to the function of AV, the nature of FRTBLs and what a reasonable customer in the position of the claimants would have understood it was getting (in terms of additional benefit) from them and what the Banks were assuming (in terms of additional burden) in offering them. This provides important context for the alleged implied representations and underpins much of the outcome of the claims based on Fixed Rate Representations and the unfair relationship claim.

31. Much of the trial was taken up with evidence addressing the claimants' claims in deceit, in which 15 individual (mostly former) employees of the Banks were implicated. Significant parts of this judgment are taken up in addressing those claims. I say at the outset, however, that I have not found deceit to be established against any of them.

PART B: THE BREAK COSTS CLAIMS

B1. The outline facts relating to each claimant

32. In this section, I outline the circumstances in which each of the claimants entered into one or more FRTBLs, and later paid break costs.

Farol

33. As at the beginning of 2007, Farol had two existing FRTBLs with CB, as well as an overdraft facility. It was looking to increase and restructure its borrowing. In the course of its discussions with CB (which included discussions with representatives of NAB's Treasury Solutions department), various statements were made to Farol about the rate at which interest would be fixed under a FRTBL, which Farol contends amounted to the Fixed Rate Representations.

34. On 25 January 2007, Farol entered into an amortising £2 million 15-year FRTBL, at a fixed rate of 6.45% (comprising a Fixed Rate element of 5.65% and Margin of 0.8%). The loan was evidenced by a facility letter signed on 25 January 2007 (although this wrongly identified the Margin as 1%).

35. In October 2010, Farol was looking to increase its borrowing, in order to fund the building of a new head office.

36. In an email dated 16 March 2011, CB provided two options for financing the construction of the new head office. Neither of these would have caused Farol to incur break costs but, for Farol's information, the email stated that "the indicative cost to break the agreement in the current market is £246,820." At a meeting on 24 March 2011 between Andrew Pike and Richard Chapman (of CB) and Matthew Vellacott and Martin Jones (of Farol), Farol contends that Mr Pike said that the break costs for Farol's existing lending were £300,000.

37. These statements are said to have given rise to Break Costs Representations. Farol claims damages which it suffered in reliance on those representations. Broadly, it claims that it was unable to refinance by borrowing from another bank at that time, because of the level of the break costs. It claims, as loss, the difference between the interest which it says it would have paid under such alternative lending and the interest paid under the FRTBL to its termination in 2013. It also claims consequential losses, comprised of the amount of profits which it says it lost because the development of its head office was delayed by two years as a result of being unable to obtain alternative lending in 2011.

38. By amendments to the facility letter in June and July 2011, the Margin on Farol's FRTBL was increased from 0.8% to 1%, the payments were changed from monthly to quarterly and the overall interest rate increased to 6.81%. Farol was upset by the way this was done, but this does not form part of its case in this action.

39. In 2013, Farol again approached CB about refinancing. On various occasions from March to November 2013, CB provided statements of indicative break costs, also said to have given rise to Break Costs Representations. Farol repaid

the loan and break costs of £242,400 on 25 November 2013. It claims that it did so in reliance on the Break Costs Representations.

Janhill

40. Between 2002 and 2008 Janhill entered into seven FRTBLs with CB, in a total sum of £5.2 million, as summarised in the following table

TBL Reference No	*Trade Date*	*Maturity Date*	*Amount*	*Interest Rate*
TBLFIR00800	04-Oct-02	04-Oct-12	995,000	6.430%
TBLIFX00802	04-Oct-02	07-Oct-12	500,000	6.555%
TBLFIR02279	13-Jul-05	13-Jul-15	1,028,000	5.950%
TBLIFX02302	01-Aug-05	03-Aug-15	106,000	5.940%
TBLIFX03251	10-Jul-06	11-Jul-16	1,000,000	6.565%
TBLIFX04578	03-Jul-07	03-Jul-17	325,000	7.415%
TBLIFX06766	01-Dec-08	03-Dec-18	1,311,213	5.365%

41. Between 2005 and 2011 there were four phases of restructurings, as a result of which the term of certain of these loans was extended.

42. The first two Janhill FRTBLs (numbered 800 and 802) were governed by a Loan Master Agreement (the "Janhill LMA") until November 2011, when they became subject to the Standard Conditions.

43. On 5 October 2012, CB assigned all of Janhill's FRTBLs to NAB under the Morph Transaction.

44. Certain indications as to break costs were provided by CB to Janhill prior to November 2011 (and are thus governed by the Janhill LMA). In particular, on 1 March 2011, CB emailed Janhill, setting out the "Loan Breakage Costs" for each of the seven loans. These totalled £451,949. Janhill contends that this communication constituted Break Costs Representations. It claims that due to the size of these break costs it was unable to refinance at that stage and, accordingly, that it was in reliance on the Break Costs Representations that it did not do so. It claims as loss the difference between the amount of interest it says it would have paid under alternative lending, between then and when the FRTBLs were terminated, and the amount of interest in fact paid over that period.

45. Janhill then pleads that further Break Costs Representations were made to it, as a result of CB providing indicative break costs on numerous occasions between April 2013 and October 2014. It claims that it paid break costs in reliance on those representations, as follows:

Amount	Payment Date
£11,535	11 December 2013
£17,750	21 March 2014
£4,100	12 September 2014
£85,320	3 October 2014
£64,950	3 October 2014
£38,370	3 October 2014
£100,620	3 October 2014

46. In addition, Janhill brings a claim for consequential loss. It claims that it was required to sell certain properties in order to raise funds to pay the break costs and that, but for the Break Costs Representations, it would not have sold those properties. It seeks to recover as damages the amount of lost income from those properties, and damages arising from the loss of investment opportunities.

Uglow

47. On 2 March 2010, Uglow entered into a £500,000 five-year FRTBL and a £1.5 million five-year FRTBL with CB, both at a Fixed Rate of 3.04%, plus a Margin of 2%. These were part of a larger lending package agreed with CB, including variable rate loans, used to fund the purchase of a farm known as “Stone Farm”.

48. In 2013, Uglow informed CB that it wished to refinance the FRTBLs. In an email from Nigel Martin (Uglow’s relationship manager at CB), Uglow was provided with a summary of “indicative break costs” (£17,700 and £52,101 for each of the FRTBLs).

49. Discussions about refinancing continued. On 29 September 2014, following a request from Uglow to send the “break charges for our loans”, Andrew Farmer, Uglow’s new relationship manager at CB, informed Uglow by email that “[t]he break costs as of today are £21,359 and £7,120.” The refinancing occurred on 12 February 2015. In a letter from CB to Uglow’s solicitors of that date, the break costs were identified as £930 and £2,780 for the two FRTBLs. Those sums were debited from Uglow’s account the same day.

50. These various communications from CB about the break costs are said to have given rise to the Break Costs Representations. Uglow claims that in reliance on the Break Costs Representations made in October 2013 it decided not to refinance, and claims as loss the difference between the interest it would have paid under such refinancing and the interest in fact paid under the FRTBLs until

they were terminated in 2015. It also seeks recovery of the break costs in fact paid in 2015 on the basis that it paid them in reliance on the Break Costs Representations.

Gaston

51. On 12 May 2009, Gaston signed a facility agreement for a FRTBL for £1 million, for a term of 21 years, 7 months and 27 days, at a Fixed Rate of 4.31% plus Margin of 1.5%.

52. Gaston was considering refinancing with another bank from a relatively early stage. In August 2011, it requested an indication of break costs from CB, who responded: "I have enquired about the break costs on the £1m TBL and this is currently £94,530. Obviously this will vary over time however at least this gives you some idea."

53. A few weeks later, on 13 October 2011, CB emailed Gaston again, in relation to a proposal to transfer the borrowing to a limited company. The break costs had by this stage increased to approximately £186,000.

54. In February 2012 (in emails of 10 and 15 February 2012 to Lloyds Bank, with whom Gaston was refinancing, and in an email of 14 February 2012 to Mr Gaston's wife) "indicative break costs" were provided for Gaston's FRTBL. Gaston's refinancing completed on 15 February 2012, at which point the sum of £186,000 was debited from Gaston's account to pay the break costs.

55. These communications are said to have given rise to the Break Costs Representations.

56. Gaston claims that in reliance on the Break Costs Representations, it entered into a swap agreement with Lloyds Bank that replicated the structure of the FRTBL (the "Lloyds Swap Agreement"), and paid break costs in the sum of £186,000 to CB. Its loss is calculated, in essence, as the value of its liability under the Lloyds Swap Agreement.

B2. The Corresponding NAB Hedges

57. As I have noted, all of the claimants' break costs claims depend upon establishing one or other of two matters: that the CNHs did not give rise to legally binding obligations on CB, in particular to pay an amount on termination of the CNH as a result of the early repayment of a FRTBL; or on the true construction of the Standard Conditions, CB was not entitled to charge the break costs that it did.

58. Accordingly, I address each of these matters in turn before going on to consider other aspects of the causes of action.

B2(a). The legally binding nature of the CNHs

59. It is common ground that for every FRTBL (except for those within the commercial real estate business after the Morph Transaction), CB entered into a CNH with NAB. The terms of each CNH matched the terms of the

corresponding FRTBL: the notional amount under the CNH was the same as the capital amount of the FRTBL; the fixed interest rate was the same; and the date, or dates, of repayment of the capital amount under the FRTBL were reflected in the notional amount under the CNH reducing by the same amount on the same dates. The details of every CNH were input into NAB's trade booking systems. Until 2011 this was known as the "Infinity" system and, thereafter, the "Calypso" system. Each of CB and NAB had its own portal access to the system, albeit the entries were input exclusively by NAB's employees.

60. NAB operated a "reconciliation file", the purpose of which was to identify and facilitate correction of any exceptions or errors in the recording of the CNHs, so as to ensure there was no mismatch between the terms of the FRTBL and the CNH.

61. In the face of this evidence, the claimants now accept that the CNHs existed, and that the payment flows to which they gave rise were in fact made. Accordingly, they accept that on every interest payment date under a CNH, the net difference between the fixed rate payable by CB and the floating rate payable by NAB was in fact paid from one bank to the other. They also accept that where customers repaid a FRTBL early and paid an amount by way of break costs to CB, CB paid the same amount to NAB upon termination of the CNH.

62. The claimants also accept that the purpose of the CNHs was to ensure that CB was not exposed to any interest rate risk. Instead, the interest rate risk arising from each FRTBL was transferred via the CNHs to NAB. The reconciliation file was an important part of that risk transfer, because any mismatch between the terms of the corresponding FRTBL and CNH would have resulted in CB assuming interest rate risk.

63. The claimants deny, however, that the CNHs gave rise to contractually binding obligations. They contend that the CNHs were nothing more than a "pass-through" arrangement, such that payments made by customers to CB were passed on to NAB. Specifically, they deny that if a FRTBL was terminated CB had an independent liability to pay NAB an early termination payment under the CNH.

64. I have no hesitation in concluding that there was in existence an agreement between NAB and CB, which dated from the origination of FRTBLs in the late 1990s, under which NAB and CB were required to enter into a CNH for each FRTBL entered into with a customer by CB. Moreover, that agreement was intended to give rise to binding obligations on each of CB and NAB, including an obligation to pay a close-out amount equal to the loss suffered (as the case may be) by NAB or CB on termination of the CNH.

65. Some 24 years have passed since this original agreement. The Banks have therefore been unable to identify which persons, on which occasion or occasions, reached that agreement. I am nevertheless satisfied on the evidence that I have seen and heard that such an agreement was reached.

66. Importantly, my conclusion is that an *actual* agreement existed between the two Banks. That is to be contrasted with the question whether the conduct of two

parties can be said to give rise to an *implied* agreement. Much of the claimants' submissions addressed the latter question and therefore missed the target. My conclusion that an actual agreement was reached is based on: (1) evidence which goes directly to that issue; (2) evidence, predominantly in the form of subsequent documents, that indicate such an agreement had been made; and (3) the logical and necessary inference to be drawn from the fact (as accepted by the claimants) that the purpose of the CNHs was to transfer interest rate risk from CB to NAB.

(1) Direct evidence of there having been an agreement intended to have legal effect

67. The first piece of evidence under this head is an ISDA Master Agreement, originally executed in December 1997 between CB and NAB. Christopher Dobbin, who worked in the Treasury Operations team at CB, and who signed the ISDA Master Agreement on behalf of CB, gave unchallenged evidence that it was intended to cover all derivative trades entered into between CB and NAB, including all of the CNHs.

68. The claimants objected that there were – as a general rule – no written "Confirmations" under the terms of the ISDA Master Agreement in respect of each CNH. That was because a decision was taken at an early stage (as reflected in NAB's documentation standardising the procedure) to "suppress" (i.e. not generate automatically within the booking system) Confirmations. The Master Agreement provides, at clause 9(e) that the parties shall enter into a Confirmation as soon as practicable after each transaction entered into pursuant to the Master Agreement. The failure to do so does not, however, mean that there is no transaction. I accept, therefore, that the fact that Confirmations were suppressed does not detract from the conclusion that CNHs were intended to constitute transactions within the umbrella of the ISDA Master Agreement.

69. Corroboration of the conclusion that the CNHs were intended to be subject to the terms of the ISDA Master Agreement is provided by an amendment to the Master Agreement executed in 2014. This was done in consequence of the European Markets Infrastructure Regulation, which imposed tighter requirements over documenting confirmations under the ISDA Master Agreement, and provided as follows:

> "the Parties agree, confirm and acknowledge that the [reconciliation file] matching the Transactions entered into by Party A and Party B [i.e. CB and NAB] shall severally constitute a Confirmation in respect of each relevant Transaction addressed by such [reconciliation file] without further action on behalf of either Party, and each such Confirmation will supplement, form part of, and be subject to this Agreement and all provisions in this Agreement will govern the Confirmation except as modified therein."

70. Since the reconciliation file related to the CNHs, this was an explicit recognition that the CNHs were intended to be contractually binding.

71. A further recognition of the legal obligations to which the CNHs gave rise is provided by clause 3.4 of the Morph Transaction, pursuant to which NAB and CB released each other from "any and all liability or obligations" arising in respect of "the NAB Swaps", defined as including the CNHs.

(2) Indirect evidence of an overarching agreement

72. Second, there is a large body of indirect evidence of the existence of such an agreement having been made, predominantly in the form of subsequent documentary references to it. These include, by way of example:

    (1) A document prepared by NAB, headed "Roles & Responsibilities", dated October 1999, and relating to a "Packaged Products Package" (which included the TBLs), referred generically to transactions entered into by a regional bank (a "RBT"), which included CB. Having described the procedure for the RBT entering into a loan with a customer, the document then stated: "RBT does derivative trade with NBLT [i.e., NAB London Treasury]", and "Infinity will automatically generate Confirmation re: trade between NAB, London and Regional Bank".

    (2) Another NAB document, headed "Tailored Business Loans; Roles & Responsibilities", dated February 2002 contained similar references. After describing the procedure for the regional bank (i.e., in this case, CB) entering into a TBL with a customer, the document states: "RMS does derivative trade with SIRP". RMS means the "Risk Management Specialists" and SIRP means "Structured Interest Rate Products – NAB London Treasury". It then refers to the NAB derivatives booking systems automatically generating confirmations in respect of the "trade between NAB, London and RB".

    (3) A document headed "IFRS (International Financial Reporting Standards) Project" (undated, but said to date from 4 November 2005) explained as follows:

        "…the original business case written to approve the selling of TBL's confirmed to the COO's of the Regional Banks that TBL's would be hedged on a back to back basis and that no risk would be taken (i.e. that the loan and the derivative would be matched). <u>It was on this basis that the TBL product suite was approved</u>." (emphasis added)

    (4) In a document from February 2006 headed "Tailored Business Loans – Confirmation Process/Data Quality", the standard process operated by the Banks was described as follows:

        "1. Treasury Solutions (sales managers) advise by way of dual addressed email;

        a. Business Loan Admin Leeds of transaction details

b. London traders of derivative details

2. Business Loan Admin pay away loan monies to client, load loan structure and cashflow to TBL App and loan details to KAPITI [CB's loan booking system] …

3. London Traders load derivative with regional bank, matching loan features, to appropriate derivative system in both London and CB books."

73. Importantly, these documents evidence an agreement having been reached before FRTBLs were marketed and sold to customers of CB, under which the entry into a FRTBL would automatically lead to the creation of a CNH, with the inputting of data recording that CNH (in Infinity and Calypso) being undertaken by NAB's employees. It is unnecessary, therefore, to show that on each occasion a CNH was entered into, there was an offer and acceptance between representatives of each of the Banks as counterparties to that transaction.

74. Further corroboration of the existence of CNHs giving rise to binding legal obligations is the fact that collateral was posted on a daily basis between NAB and CB pursuant to the terms of a Credit Support Annex to the ISDA Master Agreement. The purpose of posting collateral is to protect each party to the ISDA Master Agreement against the risk of default by its counterparty. It acts as security for the net liability of each counterparty to the other, valued on a mark to market basis each day. Troy Dwyer, who worked in NAB's collateral team at the relevant time, gave unchallenged evidence as to the process by which collateral was posted as between CB and NAB on a daily basis, to reflect the mark to market valuation of all derivative trades between them. He explained how, although this was done on an aggregate basis, it took into account the mark to market position on each CNH. There would have been no point in carrying out the work required to value each open CNH in order to feed into the overall daily collateral calculation if neither side was in fact exposed to the credit risk of the other under the CNHs, because they did not give rise to legal obligations. To the extent that the claimants suggested that the collateral arrangements all seemed to operate one-way (that is, in favour of NAB), that is the obvious consequence of the fact that CB was the payer of the fixed rate leg under the CNHs, and interest rates fell after most of them were entered into.

(3) The necessary inference from the purpose of the CNHs being to transfer risk

75. The claimants accept (and the IFRS project document from November 2005 quoted above records) that the purpose of the CNHs was to ensure that CB carried no interest rate risk. It necessarily follows that the CNHs were intended to give rise to enforceable legal obligations, because the transfer of risk from one legal entity (CB) to another (NAB) could only be achieved if they did.

76. In terms of interest rate risk management, the CNHs were most needed by CB if interest rates rose, because that is when being the recipient of a fixed rate of interest would have operated to its disadvantage. In those circumstances, the net payment flows under the CNHs would have been from NAB to CB. It would make no commercial sense for CB to have been entitled to that benefit without

being subject to the corresponding burden of being the net payer under the CNHs if interest rates fell.

77. The CNHs would not have achieved their purpose of transferring interest rate risk if they operated only as a pass-through arrangement. On the claimants' case, that would mean that on termination of a FRTBL, CB and NAB would simply walk away from the CNH, with neither side having any obligation to the other. The claimants appear to suggest that this could happen because NAB was CB's ultimate holding company. That ignores, however, the fact that CB and NAB are separate banks, with different shareholders, creditors and regulatory capital requirements. As a separate legal entity, NAB recognised amounts due from CB under the CNH as an asset, and amounts due from it to CB as a liability. If interest rates fell, the CNH represented an asset of NAB. The fact that NAB was CB's parent did not entitle it simply to walk away from that asset.

78. The claimants point to a number of matters in support of their "pass-through" case. They rely on the absence of any contractual framework of offer and acceptance in the creation of each CNH, noting the absence of any involvement of CB's staff in inputting the terms of each CNH into the Calypso and Infinity systems. Although there were numerous agency agreements entered into between CB and NAB, the claimants contend that, on their true construction, they did not authorise NAB to act as CB's agent when entering into the CNHs. They further rely on the lack of knowledge, on the part of various relationship managers and Treasury Solutions partners, of the existence of the CNHs, and the fact that the Treasury Solutions partners did not see themselves as taking a position as counterparty in a swap transaction with NAB. This was compounded, they say, by the confusing evidence of some of the NAB traders, for example Nemanja Jovanovic, who did not appear to appreciate the difference between the FRTBL and the CNH, regarding them both as components of the same transaction. The claimants also rely on the similarity in processes as between the CNHs and the purely internal swaps within NAB following the transfer of the commercial property lending business to NAB in 2012: in both cases the systems showed trades between "books" (or different desks within the business), and the NAB traders regarded the calculation of break costs as functionally the same as between the CNHs and the purely internal NAB swaps.

79. The answer to each of these points is that they assume that in order to establish that each CNH gave rise to binding obligations between NAB and CB it is necessary to establish – through the traditional means of offer and acceptance – the creation of a separate contract between CB and NAB for each CNH. As I have indicated above, however, the reality is that there was an overarching agreement reached between the two banks, at the outset of the marketing and sale of TBLs, for the creation of a CNH every time a FRTBL was entered into, with the terms of each trade being recorded in NAB's systems (to which CB had access) by NAB employees. This practice, once established, was followed at all times thereafter. The basis of the legal obligations created by each CNH is thus to be found in the agreement between the two banks made at the outset of the long-standing practice. The fact that the employees of either bank involved in marketing and selling TBLs, or in the inputting of data to Infinity

and Calypso, were unaware of the legal basis upon which the CNHs gave rise to binding obligations, or were confused as to the legal analysis of what they were doing, is of no consequence.

80. The claimants also point to the failure by CB to appreciate the additional credit risk (in relation to break costs) that it was assuming on entry into a FRTBL, over and above the credit risk in respect of the principal amount of the loan. There was, for example, no approval obtained within CB for such additional credit risk and no evidence of discussions within CB of the implications of assuming that additional risk, including when the pros and cons of the TBLs were identified in comparison with a new product introduced in 2012.

81. It is true that CB did not appear to require credit approval for the *additional* credit risk in respect of potential break costs where a customer terminated a FRTBL early. This contrasted with the position where CB entered into a stand-alone swap with a customer alongside a loan, in which case credit approval was necessary for both transactions.

82. It is not true, however, that CB failed to recognise that it had assumed credit risk in the event of default by a customer under a FRTBL. The fact that losses were borne by CB in the event of customer default under a FRTBL was noted, for example, in a semi-annual product approval review from December 2011. It was recognised in an email exchange copied to David McGill (Head of Treasury Solutions from 2012) in October 2011, that there was a potential problem for CB in the fact that it did not require additional credit approval for the potential break costs exposure on FRTBLs. The fact that this was recognised as potentially problematic reinforces rather than undermines the conclusion that the CNHs gave rise to real obligations.

83. The claimants contend that, even if the CNHs gave rise to legally binding obligations so far as the regular payments of interest under them were concerned, they did not impose any obligation on CB to pay a close-out amount to NAB upon termination of a FRTBL.

84. The Banks accept that the terms of the ISDA Master Agreement neither required a CNH to be terminated on the grounds that a customer repaid a FRTBL before its maturity date (or otherwise defaulted on repayment of the FRTBL), nor entitled either side to terminate the CNH for that reason. They contend, however, that it was part of the overarching agreement reached at the outset that the CNH would indeed be terminated, upon early termination of the corresponding FRTBL.

85. The Banks are unable to point to any record of such a term having been agreed. They contend, however, that it is a necessary implication from the *purpose* of the CNHs – being to transfer interest rate risk from CB to NAB. I agree. If (as I have concluded for the reasons set out above) the CNHs created legally binding obligations, then unless the CNH was terminated at the same point in time as the termination of the corresponding FRTBL, CB would necessarily be exposed to continuing interest rate risk. This is best explained by a simple example. Assume that the FRTBL involved a loan of £1 million for ten years at a Fixed Rate of 5%, and that it is terminated early by the customer after five years, when

the prevailing interest rates for the remainder of the term were anticipated to be 3%. Termination of the CNH at that point would crystallise a loss for NAB (and thus a liability for CB) at the net present value of the difference between 5% and 3% of £1 million over the remaining five-year period. If the CNH was not terminated, however, CB would then be subject to the continuing risk that as a result of further movements in interest rates the value of its liability to pay regular interest instalments to NAB would correspondingly increase. The only way to avoid that continuing interest rate risk would be to terminate the CNH.

86. I have already rejected the claimants' contention that NAB and CB simply could have walked away from the CNHs. A further difficulty with that contention is that if the Banks walked away from the CNH on termination of the relevant FRTBL, then the collateral posted on the previous day, to reflect the mark-to-market position at that date, would have to have been unwound, resulting in a payment from one Bank to the other. There is no evidence to suggest this ever happened, and it would have made no sense to post collateral throughout the life of the CNH if, on termination of the relevant FRTBL, the collateral position would simply be unwound.

87. The claimants object that, notwithstanding all of the above, the "real test" for whether there was a legally binding obligation is whether CB ever made a termination payment to NAB under a CNH where the relevant FRTBL was terminated *but the customer had defaulted on its obligation to pay break costs to CB*. The "real test" was put to Mr Dobbin in cross-examination, but on the false premise that he had said in his witness statement that CB did not pay a close-out amount to NAB if the customer was insolvent. He denied the premise of the question, and confirmed his view that CB did indeed have an obligation to pay NAB on termination of a FRTBL whether or not the customer was able to pay the break costs to CB.

88. That evidence was corroborated by David McGill, who had worked in various roles in Treasury Solutions at NAB before becoming the overall head of Treasury Solutions in 2012. He said in his witness statement: "… the obligation of CB to pay NAB the break cost due under the swap was entirely distinct from and not dependent on the customer's repayment of the FRTBL. If a customer defaulted and failed to repay its FRTBL, the break cost was still due from CB to NAB. While CB was owned by NAB, from my perspective it operated as a separate bank, and the break costs (or gain) associated with the swaps represented a real cost (or gain) as between the banks." I found Mr McGill to be a straightforward and convincing witness. This part of his evidence was not effectively challenged: he was asked whether it remained his evidence, to which he said "yes". The fact that he was not personally involved in entering into CNHs, and so would not have seen them at the time, does not undermine his evidence as to the overall financial impact of the CNHs on each of the Banks.

89. The claimants also complained that there was no instance, in all of the disclosure provided by the Banks, of CB paying NAB under a CNH where the customer defaulted under the FRTBL. As the Banks pointed out, since this case does not involve any customer who defaulted on a FRTBL, it is not surprising that no such example came up in disclosure. During the trial, the Banks produced documents relating to two such examples.

90. The first involves a customer called Maxvale Limited. The documents produced by CB show that £162,482.33 was paid by CB to NAB under the CNH relating to Maxvale's FRTBL, but that no payment of break costs was made by Maxvale to CB. The documents also show CB crediting Maxvale's account with the sum of £105,944.84 as redress in respect of a complaint by Maxvale. The claimants contend that the fact that CB paid redress shows that Maxvale must have paid the break costs in the first place. Since Maxvale is within the wider group of claimants whose claim is stayed behind this action, proof that it had paid break costs, had that been so, should readily have been obtainable. Moreover, as the claimants' solicitors pointed out in correspondence to the Banks' solicitors, the fact that Maxvale is a claimant does not necessarily mean that it *paid* break costs, because the wider group of claimants includes those who have a claim for consequential loss as a result of break costs *indications* having been given to them. I am satisfied on the basis of the documents provided that this is an example of a termination sum being paid under the CNH without a corresponding payment of break costs by the relevant customer.

91. The second example involves a customer called Pigeon Holdings Limited. The documents produced by CB show that, notwithstanding Pigeon's failure to pay quarterly interest payments to CB under three FRTBLs, CB paid the corresponding amounts of interest due to NAB under the three relevant CNHs. The claimants contend that Pigeon did in fact pay the relevant interest payments, because CB debited the amounts to an already overdrawn account of Pigeon. A debit to an overdrawn account, however, merely evidences an increase in the amount owed by Pigeon to CB and is not to be equated with payment of that amount to CB. While this example does not relate to the payment of an amount on termination of the CNH, it nevertheless supports the overall contention that the CNH gave rise to obligations on CB to make payments to NAB irrespective of whether CB was able to collect the corresponding amounts from the customer under the FRTBL.

92. Finally, the claimants contend that the informality of much of the process surrounding the CNHs is consistent with it being a non-binding one. They rely on the fact that, on inception of the CNH, the net present value of the AV included in the Fixed Rate element of the FRTBL (and thus reflected in the fixed rate payable by CB to NAB under the CNH) was paid by NAB to CB. The claimants point to the lack of adequate explanation for that, as well as to the lack of evidence as to the origin of the agreement that a CNH would be closed out on termination of the related FRTBL. I do not accept that the lack of formality, which can be explained by the fact that the arrangements were made between two entities in the same group of companies, points towards there being no intention to create legal obligations.

93. The Banks put forward alternative explanations for concluding that the CNHs gave rise to legally binding obligations, if their primary case based on an overarching agreement failed. These included demonstrating, via the various agency agreements in place between NAB and CB, that NAB personnel acted on behalf of both NAB and CB in entering into each CNH, and making arguments based on the readiness of the court to infer an agreement even where strict compliance with the requirements of offer and acceptance could not be

established (see, for example, *Maple Leaf Macro Volatility Master Fund v Rouvroy* [2009] EWHC 257; [2009] 1 Lloyd's Rep 475, per Andrew Smith J at §242). Given that I have accepted the Banks' primary case I need not address these alternative cases.

B2(b). Construction of the Standard Conditions

94. The principal contractual document entered into between each claimant and CB was a facility letter, setting out the terms and conditions on which CB was prepared to make available a variety of facilities. Clause 2.1 of the facility letter incorporated the Standard Conditions.

95. This form of facility letter was used from about 2005. Of all of the FRTBLs relevant to this action, it was only the first two of Janhill's FRTBLs that were entered into before that date. As noted above, these were initially governed by the Janhill LMA, but by the time Janhill came to pay break costs, even these were governed by the 2005 version of the facility letter and the Standard Conditions. The Janhill LMA remains relevant to the break costs claims only in the context of Janhill's claims in misrepresentation relating to indications as to what break costs would have been payable (even though no break costs were then paid), prior to November 2011.

96. By clause 6.1 of the facility letter, the customer was obliged to repay the principal amount of each loan in instalments on the dates and in the corresponding amounts identified in the confirmation issued by CB in respect of the loan.

97. By clause 3.4 of the Standard Conditions, the customer was given the right to prepay the whole or any part of the loan. By clause 3.2, however, any prepayment of a FRTBL had to be made together with accrued interest, any applicable Prepayment Fee and any "Break Costs". "Break Cost" was defined by clause 8.2 as any "loss, cost or liability" within that clause 8.2.

98. Clause 8.1 contained an "Acknowledgment" by the customer in the following terms:

> "You acknowledge that in order to provide you with a Hedged Facility, we or any of our Affiliates will have entered into an arrangement with a third party to hedge our risk to fluctuations in interest rates (a "Hedging Arrangement") on the assumptions that:
>
> (a) You will utilise the Hedged Facility strictly in accordance with any Requests; and
>
> (b) You will make payments to us strictly in accordance with your obligations under the Loan Documents."

99. Clause 8.2 was headed "Indemnity" and applied upon the occurrence of a variety of trigger events, including that the customer cancelled a Hedged Facility or did not make a payment due under the Loan Documents, or CB

received or recovered all or part of the Hedged Facility other than on its scheduled date for payment or cancelled a Hedged Facility in whole or part or demanded early repayment of any or all of it.

100. In any of those events, it provided as follows (breaking down the constituent elements in clause 8.2):

> (1) “you will pay to us on demand”;
>
> (2) “an amount equal to any loss, cost or liability”;
>
> (3) “which we determine that we or any of our Affiliates suffers or incurs”;
>
> (4) “as a result of the occurrence of those events”;
>
> (5) “including without limitation”;
>
> (6) “any loss, cost or liability incurred by us or any of our Affiliates in connection with:
>
> > (i) maintaining or funding the Hedged Facility”
> >
> > (ii) taking such action as we or our Affiliate may think fit to preserve the economic equivalent of payments that we would otherwise be entitled to receive from you under the Loan Documents in respect of the Hedged Facility or the Hedged Loan”
> >
> > (iii) the termination, closing out, cancellation or modification of any Hedging Arrangement” and/or
> >
> > (iv) liquidating or re-employing deposits from third parties acquired or contracted for in order to fund the Hedged Facility.”

101. By clause 8.3, headed “calculation”, the borrower acknowledged that CB could not calculate the amount of any Break Cost in advance “as this will depend on prevailing market interest rates at the time that the Break Costs are suffered or incurred.”

102. Clause 8.4 provided that in the event that a Hedging Arrangement was terminated, and that resulted in a payment being made to CB by the counterparty to that arrangement (a “Break Gain”), then the Break Gain would be paid to the borrower.

103. By clause 17.4 of the Standard Conditions:

> “Any certificate or determination by us of a rate or amount under a Loan Document is, in the absence of manifest error, conclusive of the matters to which it relates.”

104. The principles of contractual interpretation are well known, and not in dispute. The following passage from Lord Neuberger's judgment in *Arnold v Britton* [2015] UKSC 36; [2015] AC 1619, at [15], encapsulates the approach to be taken:

> "When interpreting a written contract, the court is concerned to identify the intention of the parties by reference to "what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean", to quote Lord Hoffmann in *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38, [2009] 1 AC 1101, para 14. And it does so by focussing on the meaning of the relevant words, in this case clause 3(2) of each of the 25 leases, in their documentary, factual and commercial context. That meaning has to be assessed in the light of (i) the natural and ordinary meaning of the clause, (ii) any other relevant provisions of the lease, (iii) the overall purpose of the clause and the lease, (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of any party's intentions. In this connection, see *Prenn* at pp 1384-1386 and *Reardon Smith…*".

105. The parties are also agreed that where the provisions to be construed are standard terms, then the relevant factual matrix is curtailed: see *Lewison, The Interpretation of Contract*, 7th ed., at §3.171.

106. The claimants contend, however, that the standard explanation of break costs provided by CB to its customers (the "Break Costs Explanation") is relevant to construction, since it was given to all customers and was, according to CB's own documents, not to be changed. A standard explanation or guidance note can, in some circumstances, be admissible as an aid to construction: *Lewison* (above) at 3.39 and 3.40, and the cases there cited.

107. The Banks did not seriously contest this proposition, but pointed out that it was necessary to look also at other standard forms of documents provided to customers, including product profiles. Mr Thanki KC pointed out that all of these documents referred the reader to the TBL documentation, including the Standard Conditions, for the full detail of the provisions relating to break costs.

108. The Break Costs Explanation was structured around four questions: (1) what are break costs? (2) when do break costs occur? (3) what factors may impact on the amount of break costs payable? and (4) what should you do if you are worried about having to pay break costs?

109. The first and third questions are of particular relevance to the issue I have to decide, and I set them out in full:

> "**What are Break Costs?**

When you take out a tailored business loan a (TBL) with us we offer you a choice of different floating rate, fixed rate and hybrid rate products designed to help you manage your financial risk.

Just like any other business we also need to manage our financial risk. We need to be certain that we are able to provide you (and our other clients) with the amount of loan for the period you require at the interest rate calculated in accordance with the terms of the relevant product. In order to do so, we may enter into various arrangements and agreements with third parties.

We enter into these arrangements and agreements on the assumption that we will make funds available to you and that you will pay interest and repay capital to us in accordance with the timetable set out in your TBL. We therefore agree with third parties that they will make funds available to us on particular days in order that we can lend those funds to you, and we agree to make payments to third parties on particular days on the basis that we will be receiving payments from you on those days.

If you vary the timing or amount of the payments that you receive from us, or pay to us, under your TBL we must:

- vary or terminate the agreements and arrangements that we have put in place with third parties, or

- put funds which we have obtained from third parties and which you no longer require to an alternative use; or

- find funds from an alternative source (to replace funds that we had anticipated that we would receive from you) to enable us to make scheduled payments to third parties.

In doing any of these things, we may incur a cost. We call these costs "Break Costs". It is important to realise that Break Costs are brought about by you changing the terms of your agreement with us. This is why we pass on these costs to you."

"**What factors may impact on the amount of Break Costs payable?**

All the following are relevant:

- the amount of the loan,

- the unexpired term and

- prevailing interest rates on the date the Break Costs are calculated compared to the interest rate environment on the date you entered into the transaction.

> Bearing in mind all of the above in certain circumstances Break Costs may be substantial."

Is the economic loss arising from the extinction of the right to receive interest at the fixed rate for the remainder of the term of the FRTBL a "loss, cost or liability" within clause 8.2?

110. The Banks' overarching case is simple: the principal operative part of clause 8.2 obliges the borrower to pay to CB an amount equal to "any loss, cost or liability" which CB determines that it or any of its Affiliates suffers or incurs as a result of, among other things, the early repayment of a FRTBL. The Banks point to the width of that wording, and to the fact that what follows is expressed to be by way of inclusion only and "without limitation". They contend that the language is clearly broad enough to encompass any loss arising from the extinction of the right to receive interest at the contractual fixed rate over the remainder of the term, where what CB receives instead – the early repayment of the capital amount of the loan – is of lesser value. That will be the case wherever the prevailing interest rates at the time of repayment are lower than the prevailing rates at the time that the FRTBL was entered into because CB will then be unable to generate the same return from the use of the repaid capital sum.

111. Neither the Standard Conditions nor the Break Costs Explanation sets out how this calculation is to be made: the amount payable under clause 8.2 is the amount which CB determines its loss to be. In all cases other than Janhill after the Morph Transaction, break costs were calculated by reference to the termination amount payable by CB to NAB on termination of the CNH. In simple terms, that was the difference between the NPV of the fixed rate interest payments that would have been made by CB to NAB and the NPV of the floating rate interest payable by NAB to CB, over the remainder of the term of the CNH.

112. It is the Banks' case, however, that CB suffered loss on early repayment of a FRTBL irrespective of whether it had entered into a CNH. Such loss, expressed as the loss of bargain under the FRTBL, is the difference between the NPV of the fixed rate interest payments that would have been made by the customer to CB, and the NPV of the floating rate of interest that CB could now expect to recover by re-application of the capital sum repaid early, over the remainder of the term of the FRTBL. That – albeit explained as loss of bargain under a loan as opposed to the loss incurred on terminating a swap – is essentially the same calculation as carried out in order to determine the loss arising on termination of the CNH. It was the way that CB calculated the break costs due from Janhill where, following the Morph Transaction, there was no longer a CNH.

113. In other words, while CB's loss (prior to the Morph Transaction) was always in fact calculated by reference to the termination amount due under the CNH, in circumstances where the terms of the CNH precisely matched those of the FRTBL (as to both the fixed rate of interest, the date it was payable and upon what amortising principal amount), the termination sum payable under the CNH can also be seen as a proxy for the loss directly suffered on early repayment of a FRTBL, even if there had been no CNH.

114. The core of the claimants' argument against the Banks' overarching case is that it is an essential pre-requisite of an entitlement to claim break costs, where a customer has repaid a FRTBL early, that CB (or its Affiliate) has suffered an actual, crystallised loss or cost as a result of action taken by it in the external market following that early repayment. That could include any of the specific actions contemplated by sub-paragraphs (i) to (iv) in clause 8.2, such as varying or terminating a hedging arrangement in the external market. What is *not* covered, however, is the loss (which the claimants describe as a "notional" loss) calculated by comparing the NPV of the future income stream under the FRTBL with the anticipated future income stream that CB could expect by re-utilising the repaid capital sum.

115. On the face of it, CB did suffer the type of crystallised loss that the claimants say is required, because upon early repayment of a FRTBL it terminated the CNH, which gave rise to an actual, incurred loss. The claimants contend, however, that termination of the CNHs does not count for this purpose, because the CNHs were not hedging arrangements made in the external market. They contend – as is in fact common ground – that it would not have been possible to enter into a corresponding hedge in the external market for each FRTBL, because the amount of each FRTBL was far too small, except on wholly uncommercial terms. No bank would have done so but would instead have dealt with the interest rate risk arising from entering into FRTBLs along with the interest rate risk arising from its business more generally, by hedging such risk on an aggregate, portfolio-wide basis. That is in fact what NAB did.

116. In my judgment, this point favours the Banks' construction. The factual matrix within which the Standard Conditions are to be interpreted includes the following two points: the inherent unlikelihood that a bank would enter into a separate back-to-back hedge in the external markets for each fixed rate loan to a customer; and, as a consequence, a bank would rarely, if ever, be able to point to specific action taken by it with respect to its external portfolio-wide hedging as a result of the termination of any single fixed rate loan. "Loss, cost or liability" ought not to be interpreted as applying only to circumstances which could rarely, if ever, occur.

117. Conversely, the fact that a bank could not establish a correlation between repayment of a loan and specific action taken in the external market does not mean that it has not suffered loss – by reference to the difference between the fixed income stream and the return it can now expect to make on the repaid funds. The use to which the repaid funds are put provides a pertinent example. A bank could not be expected to earmark returned funds for a specific alternative use, such as another FRTBL in the same amount to another customer. That does not mean, however, that it could not show that, on the basis that the repaid funds are added to its general funds, on which it could now make only a reduced return, it had not suffered a loss by reason of the loss of the contractual right to the fixed rate of interest for the remainder of the term of the FRTBL.

118. In support of their argument, the claimants contend, first, that CB does not "suffer" or "incur" the loss of a future income stream at the point at which a FRTBL is repaid early. I understood Ms Lahti (who presented this part of the argument on behalf of the claimants) to submit (as her primary case) that this

was so, even if CB took action by re-employing the funds repaid early by customer A, by lending them to customer B on the same terms, but at a lower interest rate. This contention is based on the proposition that, in the case of a contract to be performed over time, where the contract is terminated prior to full performance, damages for breach of contract are not "incurred" or "suffered" at the point of breach. (Ms Lahti's secondary case was that, in such circumstances, there is a loss, but that it is necessary to look at what CB actually did. She accepted that at common law, if there is an available market, the loss gets crystallised by reference to the actual steps taken in mitigation.)

119. Ms Lahti's primary case is in turn based on part of the reasoning underpinning the decision in *The Golden Victory* [2007] UKHL 12; [2007] 2 AC 353. In that case, a charterparty entered into in 1998 for seven years provided (by clause 33) that either side may cancel the charter if war broke out between certain countries. On 14 December 2001 the charterers repudiated the charterparty, which was accepted by the owners on 17 December 2001. In March 2003 a war broke out within the meaning of clause 33. The question raised was whether damages for repudiatory breach were limited to the period up to March 2003, on the grounds that even without the repudiation, the charter would in any event have come to an end at that point.

120. The House of Lords (by a majority) concluded that damages were so limited. The principle that damages should be assessed as at the date of breach was not inflexible, and the desirability of achieving certainty in commercial contracts was subject to the overriding compensatory principle that the damages awarded should represent no more than the value of the contractual benefits of which the claimant had been deprived. If, at the date of breach, there had been the real possibility that an event would happen terminating the contract, then the quantum of damages might need to be reduced to reflect the estimated likelihood of that possibility materialising. Where, however, such an event had already happened by the time damages were assessed, estimation was no longer necessary and the court should have regard to what had actually happened.

121. The claimants relied specifically on the rejection of the appellant owners' argument (summarised at §58 of Lord Carswell's speech) that "events subsequent to [the date of acceptance of repudiation] are irrelevant in the assessment of damages, since the loss is crystallised at the date of making the assessment. The only exception to this rule was where the subsequent event could be seen at the crystallisation date to be inevitable or "predestined"." The claimants contend that this establishes that, where a contract is terminated prior to full performance, loss is not "crystallised", and therefore not suffered, at the date of breach.

122. The Banks submitted, and I agree, that the claimants' argument confuses two different issues: the question of whether loss has been suffered and the question as to the timing of the assessment of that loss. *The Golden Victory* was concerned only with the second of these. As Lord Scott pointed out (at §32), the basic principle is that the victim of a breach of contract is entitled to be put in the same position, so far as money can do it, as if the contract had been performed, and that the rule that damages are assessed as at the date of breach can usually achieve that result. All that the case decided was that where the

question whether loss was suffered at all depended upon contingent events, if it fell to be assessed after the contingency had occurred, then loss should be assessed by reference to what had in fact happened after the date of breach.

123. I do not accept, as the claimants contend, that the reference to "crystallising", as used in the argument of the appellant owners in *The Golden Victory*, is to be equated with the concept of a loss having been "incurred". In this respect, I note that in rejecting the appellant owners' argument, Lord Carswell (at §59 and §64) acknowledged that the appellant owners' proposition that subsequent events were irrelevant because loss was crystallised at the point of breach was correct so far as the determination of the *rate* at which a hypothetical new charter was arranged on repudiation, but the same considerations did not apply to determination of the duration. There was no challenge to the proposition that where damages are calculated by reference to the market value of the goods or services due under the contract, these are assessed as at the date of breach, so that subsequent market movements are irrelevant.

124. In *Bunge SA v Nidera BV* [2015] UKSC 43; [2015] Bus LR 987, in affirming the decision of the majority in *The Golden Victory*, Lord Sumption, at §16, similarly distinguished between two questions. The first is, assuming there is an available market, as at what date is the market price to be determined for the purpose of assessing damages? The second is, in what, if any, circumstances will it be relevant to take account of contingencies (other than a change in the market price) if subsequent events show that they would have reduced the value of performance even without the defaulter's renunciation? He continued at §22, with reference to the concept of damages "crystallising":

> "Where the only question is the relevant date for taking the market price, the financial consequences of the breach may be said to "crystallise" at that date. But where, after that date, some supervening event occurs which shows that that neither the original contract (had it continued) nor the notional substitute contract at the market price would ever have been performed, the concept of "crystallising" the assessment of damages at that price is unhelpful."

125. The claimants suggested that this is a case where there was no available external market. In their written closing submissions, the evidence referred to for this proposition was that there was no available external market for a *swap* whose terms mirrored those of any of the FRTBLs in issue in this case. That is not, however, the relevant market. In her oral closing submissions, Ms Lahti identified the relevant market as replacement lending, but submitted that there appeared to be no available market for a replacement TBL "with the exact same payment profile". I consider, however that the relevant market is broader than that: it is the market in which CB could make use of the repaid funds in order to make a return. Such a market undoubtedly existed.

126. I find nothing in *The Golden Victory* to support the proposition that under normal contractual principles, in relation to a contract to be performed over time, the loss of future performance is not "incurred" at the date of breach. There is accordingly nothing in the case to support the contention that the reference to

"loss" in clause 8.2 of the Standard Conditions is limited to loss that is consequent upon CB taking some action following early repayment which gives rise to an actual, crystallised loss.

127. The claimants also rely on the decision of HHJ Pelling QC in *K/S Preston v Santander (UK) Plc* [2012] EWHC 1633 (Ch) ("*K/S Preston*") for the proposition that loss based on the NPV calculation undertaken by the Banks is a <u>future</u> loss which cannot be recovered under an indemnity such as that in clause 8.2.

128. In *K/S Preston* the bank charged a customer break costs on early repayment of a fixed rate loan. The loan terms included the following:

> "i. Interest payable should be fixed for the full term of the loan (the fixed rate period) at a rate determined by the bank and notified to the partnership at or about the day of drawdown of the loan.
>
> ii. In addition to any prepayment costs payable under para. 9, the partnership shall indemnify the bank on demand against any cost, loss, expenses or liability (including loss of profit and opportunity costs) which the bank incurs as a result of the repayment of the loan during the fixed rate period or any further period during which the rate of interest applicable to the loan is fixed."

129. Upon early repayment by the customer, the bank contended that it had incurred the loss of income and/or loss of profit and/or loss of opportunity costs, calculated by multiplying the outstanding balance of the loan by X%, where X% was the difference between the fixed rate of interest under the loan and the rate of interest the bank anticipated receiving on the balance of the loan if re-lent in the market.

130. In fact, the first relevant conclusion of HHJ Pelling QC was that the loss of future income under the contract <u>was</u> within the concept of "loss" covered by the clause. At §34, he rejected the borrower's argument that in principle clause (ii), quoted above, "is incapable of covering losses resulting from the contractual interest lost in relation to the loan over the period of the original term following early redemption".

131. His second relevant conclusion, however, was that because the quantum of the lost future income was, at the point of demand for payment, subject to uncertainties and contingencies, it could not be recovered under the indemnity in clause (ii). He rejected (also at §34) the notion that "…the concept of loss referred to [in clause (ii)] is one which incorporates, not merely loss suffered, but loss to be suffered calculated on various contingencies and assumptions all of which may, if adopted, result in over (or, for that matter, under) recovery".

132. In arriving at this second conclusion HHJ Pelling noted (at §27) that clause (ii) required the borrower to "indemnify" the bank, and that "the use of the word "indemnify" suggests that what is required is for the borrower to indemnify the

bank in respect of a crystallised liability or obligation falling within the class identified: "Thus it is, it seems to me, that, if the bank is to be indemnified in respect of an expense, the expense must have been incurred." He applied (at §28) the same reasoning to the concept of loss:

> "…if it had been intended that the lender should be entitled to recover a sum in respect of a future loss then the clause would not have referred to the word "incurs" but would have used words or words to the effect of "incurs or to be incurred"."

133. He said (at §29) that this was supported by the fact that the trigger event for an obligation to indemnify was a demand from the bank: "It is difficult to see how it is that the borrower can be expected to indemnify the bank on demand in respect of a loss that has not yet been incurred."

134. In rejecting the bank's argument that the plain commercial sense of clause (ii) was that loss, including future loss, ought to be recoverable in one go, HHJ Pelling said:

> "As I have emphasised already in the course of this judgment, the defendant is not recovering damages for breach of contract and thus the rules which would apply for the assessment of future losses in a breach of contract have no direct application to the issue I am now considering. In other contexts where contingent or future losses of uncertain value have to be valued then express statutory or contractual provisions are put in place to enable that to be done. In this particular context, for example, it would have been possible to set out a detailed formula, or even possibly a table, from which any repayment of sums for future loss interest could become ascertained easily and without controversy between the parties. That course was not adopted. It seems to me that the word "loss" is a word of ordinary English meaning and which can only mean a loss which has been suffered at the time when demand is made for an indemnity in respect of it."

135. It would seem to follow from that reasoning, that if the bank waited until the end of the term of the loan before making demand, and at that point could show that it had made less, with the repaid money, than it would have received by way of fixed rate interest payments under the loan, then it could have recovered the difference under the indemnity.

136. The claimants rely upon HHJ Pelling's analysis in contending that, even if loss of bargain is capable of falling within clause 8.2, it is not recoverable because it had not been suffered at the time at which demand was made for payment of break costs by CB. I address this aspect below at [157].

137. The claimants also contend, however, that HHJ Pelling's conclusion that the loss of the future income stream fell within the scope of clause (ii) in *K/S Preston* is distinguishable for a number of reasons; first, whereas there was little guidance within the provisions in *K/S Preston* as to what was capable of coming within the phrase "cost, loss, expenses or liability", there are indications within

clause 8.2 to show that loss of bargain is *not* within the concept of "loss"; second, early termination of the FRTBL is expressly permitted and is thus part of the "bargain", which therefore precludes loss of bargain being claimed as loss; and, third, specific differences in wording are relied on.

138. As to the first point, the claimants contend that the meaning of "loss, cost or liability" in clause 8.2 is informed by the nature and scope of each of the specific examples of loss mentioned in sub-paragraphs (i) to (iv) of clause 8.2. Each of these, it is said, refers to a situation in which CB has incurred a specific cost, loss or liability as a result of having taken action following the relevant triggering event (including early prepayment of the FRTBL). Accordingly, they submit, loss is limited to such a situation.

139. The claimants support this proposition by reference to the "ejusdem generis" principle. This is a guide to, as opposed to a rule of, construction, which states that when there is a list containing matters with some common characteristics that constitute a "genus", then general words which follow ought to be limited to things of that genus: see *Burrows Investments Ltd v Ward Homes Ltd* [2017] EWCA Civ 1577 at §48-49, per Henderson LJ. The principle has no application in this case because there is no list of items *followed by* words of general application. Instead, there are general words followed by examples, expressly said to be without limitation to the width of what appears before: see *Lewison* (above) at §7.141.

140. It is true that the words must be construed in light of the clause as a whole. The suggestion that the examples given in (i) to (iv), even if they constitute a sufficiently defined type or genus, operate to limit the scope of the words "loss, cost or liability" faces the difficulty, however, that they are expressly stated to be "without limitation".

141. I do not, in any event, think that the contents of those sub-paragraphs form a sufficiently coherent type or genus, or should be taken to limit the meaning of "loss, cost or liability" in the way contended for by the claimants.

142. In the first place, not all of them refer to specific action being taken by CB following the triggering event. The first example is "maintaining or funding the Hedged Facility". As applied to the early repayment of the Hedged Facility, that appears to me to encompass loss incurred in connection with the *past* actions of CB in funding the facility to that point.

143. Second, even if the examples all related to action taken by CB following a triggering event, that does not indicate that the general words "loss, cost or liability" must be so restricted. The inclusion of these examples is better explained, in my judgment, as emphasising the breadth of the governing words "loss, cost or liability" by ensuring that *if* CB takes specific action following, for example, early termination of a FRTBL, then any loss incurred in connection with such action is included. It may be, for example, that CB takes action which can subsequently be shown to have increased its loss. Sub-paragraphs (i) to (iv) preclude the customer from contending that such loss is irrecoverable. In this regard it is important to note that clause 8.2 does not provide that the cost *of*

taking the various steps in (i) to (iv) is included, but that the "loss, cost or liability suffered or incurred … in connection with" any of them is included.

144. Third, one of the examples (in sub-paragraph (iv)) is re-employing funds, obtained or contracted for from third parties, which are no longer required by the customer. That will inevitably occur in some form or other whenever funds are repaid early. Ms Lahti submitted that this is relevant only to the triggering event in sub-paragraph (a), that is where the customer does not utilise a Hedged Facility. I disagree. So far as the likely impact on CB is concerned, there is no distinction between a customer failing to take up a loan in the first place, where CB has committed to acquire those funds from a third party in order to provide the FRTBL over a fixed period, or the customer repaying those funds after the commencement of the loan. Even if that is wrong, on Ms Lahti's interpretation the words "without limitation" allow other heads of loss to be added to the list in (i) to (iv) provided they fall within the same type. Loss incurred in connection with re-employing funds returned early is an obvious addition to the list, being no different in type to loss incurred in connection with re-employing funds which the customer does not take up in the first place.

145. Fourth, the subject matter of sub-paragraphs (i) to (iv) includes matters which reinforce the conclusion that the purpose of clause 8.2 is to compensate CB for the loss of the contractually agreed fixed interest over the remaining term of the FRTBL. That is the rationale for including loss incurred in connection with re-employing funds obtained from third parties which are no longer required by the customer. It is also the rationale for including loss incurred in taking steps to preserve the economic equivalent of payments that CB would have been entitled to receive under the FRTBL. It is true, as the claimants point out, that this in terms relates only to loss arising from action taken by CB in seeking to preserve the economic equivalent of that payment stream, as opposed to referring to the loss of the payment stream itself as "loss" recoverable under clause 8.2. As the Banks submitted, however, it would be odd if the cost of seeking to preserve that income stream was within the concept of loss, but the loss of the income stream itself was not. The fact that CB is expressly entitled to claim the cost to it of preserving the bargain supports, in my view, the contention that the loss of that bargain is within the concept of loss in clause 8.2.

146. The claimants rely on the Break Costs Explanation to support the proposition that only losses incurred in taking specific action following early repayment can constitute break costs. The Break Costs Explanation states that "in doing" the various things set out under the heading "what are break costs?" CB may incur costs which it calls "break costs". It is important to read this, however, in the context of the structure of the explanation as a whole. As I have noted, it is structured around four questions. Under the first question, the *rationale* for break costs is explained by reference to the consequences for the bank if a FRTBL is repaid early. Those consequences are expressed in broad terms, sufficiently broad to cover things which CB is bound to do whenever a FRTBL is repaid early. As well as varying arrangements with third parties, it includes putting funds which the customer no longer requires to an alternative use and finding funds from an alternative source to enable CB to make scheduled

payments to third parties. This part of the Break Costs Explanation is *not* however defining what break costs are, or how they are calculated. That is not in fact a question addressed in the Break Costs Explanation.

147. I note that under the fourth question, the factors that may impact on break costs are set out. Those matters are consistent with break costs compensating CB for the loss of fixed rate income for the remainder of the term: they describe precisely the elements of such a claim – the amount and unexpired term of the loan, and a comparison between the fixed rate and prevailing interest rates at the date of early repayment. Overall, I do not think that the terms of the Break Costs Explanation support the claimants' interpretation of clause 8.2.

148. The claimants also submitted that the Banks' argument is difficult to reconcile with the fact that break gains are payable, if clause 8.2 was primarily aimed at ascertaining CB's loss of bargain. I do not find any inconsistency between clause 8.2 permitting recovery of loss of bargain, but clause 8.4 allowing a customer a break gain only if CB received payment under a Hedging Arrangement. Irrespective of whether loss of bargain falls within clause 8.2, the losses recoverable under that clause clearly extend beyond losses incurred in connection with the termination of a Hedging Arrangement (which is only one out of four of the "without limitation" examples given). Clause 8.4 reflects a deliberate choice to limit the circumstances in which a customer could receive a payment, where CB made an economic gain as a result of the termination of a FRTBL, only to the case where CB itself received payment under a Hedging Arrangement.

149. The second of the claimants' reasons for distinguishing *K/S Preston* is that early termination is not a breach of contract but is expressly permitted by the contract. That, however, is no distinction, because the same was true in *K/S Preston*. In any event, the fact that early repayment (i) is built into the "bargain" and (ii) does not constitute a breach of contract, is not a reason for precluding the loss of the future fixed rate income stream from constituting loss within clause 8.2. Although early repayment is permitted, it is only on terms that break costs resulting from the early repayment are paid to CB.

150. The claimants' third reason for distinguishing *K/S Preston* refers to two specific aspects of the terms and conditions in that case. First, the provision that "interest payable should be fixed for the full term of the loan". Ms Lahti, while accepting that the FRTBL was intended to operate on a similar basis, submitted that there was no equivalent express provision in the facility letter or the Standard Conditions. That, however, is not correct. Taking the facility agreement with Farol as an example, by clause 6.1 Farol agreed to repay each loan in instalments on the dates and in the corresponding amounts set out in the Confirmation and, by clause 7.4, agreed to pay interest at the Fixed Rate for each "Interest Period" (which is in turn defined as the first period of three months, or whatever period was agreed between the parties) and each subsequent such period. Taken together, that constituted an obligation to repay the loan only on the scheduled dates for repayment and to pay the fixed rate on all outstanding amounts from time to time.

151. The second distinction is the fact that loss was expressly stated, in *K/S Preston*, to include "loss of profit and opportunity costs". While those words are missing from clause 8.2, that is not a reason in my judgment to construe "loss, cost or liability" as excluding the loss resulting from the extinction of the right to a fixed income stream for the duration of the FRTBL. As the claimants themselves point out, in construing a contract regard is to be had to the framework of rights and obligations established by the common law (see below at [162]). At common law, where a contract is terminated by one party prior to the date for complete performance, the core remedy to which the other party is entitled is to be put in the position as if full performance had been rendered.

152. Standing back from the comparison with the *K/S Preston* case, the claimants contend that if it had been the intention that loss of bargain was included within "loss", then either that would have been expressly identified within sub-paragraphs (i) to (iv) in clause 8.2, or there was no need for any of those sub-paragraphs because it was unnecessary to refer to anything being done by CB other than entering into the FRTBL in the first place. The answer to this point is that already given in answer to the submission that the meaning of "loss" is to be informed by (and thus limited by) the contents of sub-paragraphs (i) to (iv): those sub-paragraphs are not redundant as they emphasise the broad nature of "loss, cost or liability" by ensuring that *if* CB takes any of the contemplated actions following early repayment of the loan, any loss it suffers in connection with that action is recoverable.

153. The claimants also point to the lack of machinery within clause 8.2 for the calculation of loss of bargain, in contrast with clause 8.5(a). The latter provides, in the context of a variable rate loan, that on early repayment of the loan, CB was entitled to be paid:

> "the amount (if any) by which:
>
> (A) the interest which we should have received for the period from the date of receipt of all or any part of that Variable Rate Loan to the last day of the current Interest Period in respect of that Variable Rate Loan, had the principal amount received been received on the last day of that Interest Period;
>
> exceeds
>
> (B) the amount which we would be able to obtain by placing an amount equal to the principal amount received by us on deposit with a prime bank in the London Interbank Market (or if the relevant amount is denominated in euro, the European Interbank Market) for a period starting on the Business Day following receipt or recovery and ending on the last day of the current Interest Period."

154. This, it was submitted, reinforced the conclusion that an equivalent loss of bargain for the remainder of the term of the loan was not recoverable under clause 8.2 in respect of a fixed rate loan.

155. Clause 8.5(a), however, is addressing a different situation. It relates to a variable rate loan, where the rate is determined by an external published source: see the definition of LIBOR in the Standard Conditions. It involves the calculation of loss over a relatively short period (the remainder of an interest rate period). As such, it does not engage any of the rationale for charging break costs (as described in the Break Costs Explanation). Clause 8.2, in contrast, provides for the payment of an amount assessed on a much broader basis ("any loss, cost or liability"), where the loss is likely to extend over a much greater period, and where the loan is based on a contractually agreed fixed rate, not a rate based on an external published source. The fact that a machinery is provided for calculating break costs in the very different context of clause 8.5 does not suggest that the absence of equivalent machinery in clause 8.2 is a reason for excluding the broader meaning of loss for which the Banks contend.

156. I note that the machinery in clause 8.5 achieves the effect of putting CB in the position it would have been in had the contract been performed, albeit that because the contract provided for interest to be fixed only until the next interest payment date, the amount payable is limited to the difference between the rate CB was entitled to receive for the remainder of the relevant interest rate period, less the market rate it could obtain on the funds repaid early. This provides at least some, albeit limited, support for the proposition that break costs are intended to compensate CB for the loss of bargain under a FRTBL.

157. I turn to the claimants' contention (based upon the second of HHJ Pelling's conclusions in *K/S Preston* summarised at [131] above) that even if the loss of fixed income over the remainder of the term falls within the concept of loss, cost or liability, it is not recoverable under an indemnity because it is a future loss and is subject to too many contingencies and uncertainties.

158. Addressing the issue from first principles, I have already rejected the contention (based on *The Golden Victory*) that no loss is suffered at the point of early repayment. Moreover, I consider that CB does at that point suffer a *present* loss, being the loss of the contractual right to recover interest at the fixed rate for the remainder of the term. While the contractual right is to pay interest at a fixed rate for a fixed term into the future, the loss of that contractual right occurs at the point of early repayment and is not a purely future loss.

159. The fact that the valuation of the contractual right depends on an analysis of future contingencies and uncertainties does not mean that no present loss has been suffered. The law has developed well-established techniques for valuing the present loss of a contractual right consisting of a future income stream. That is, in essence, to compare the NPV of the future income stream under the contract with the NPV of the income stream which the innocent party can expect to receive at current market rates.

160. The claimants object that, given the lack of machinery (as to which see above) for calculating CB's loss, coupled with the many uncertainties as to how "loss, cost or liability" in the sense for which the Banks advocate is to be calculated, loss in that sense cannot be within clause 8.2. This is reinforced, they say, by the fact that the only challenge to the Bank's certification of its loss is if there is "manifest error" (see clause 17.4 of the Standard Conditions). The claimants

point, among other things, to the fact that there is scope for disagreement over aspects of the way in which loss – on the Banks' case – is to be calculated: is the appropriate comparison between the interest payable at the fixed rate under the contract and at a floating rate, or at a fixed rate that might be achieved if the sum is re-lent to another customer? If a floating rate is the correct comparator, then should the rate be based on 1-month, 3-month or some other tenor of LIBOR?

161. In this regard, Mr Onslow KC referred me to *Triple Point Technology Inc v PTT Public Co Ltd* [2021] AC 1148, which he described as setting out the modern version of the "contra proferentem" principle. In that case, C agreed to supply a software system to E. If C failed to deliver work within the time specified, it would be liable to pay liquidated damages at the rate of 0.1% of the undelivered work per day. By clause 12.1, C agreed to exercise all reasonable skill and care in performing its services under the contract. By clause 12.3, C's total liability for any claim arising out of the contract was limited to the contract price, save for liability resulting from, among other things, "negligence". The Court of Appeal held that the exclusion from the cap on damages for "negligence" related only to freestanding torts, so the damages for breach of clause 12.1 were subject to the cap.

162. The Supreme Court disagreed, and construed the exclusion from the cap in clause 12.3 as extending to damages arising from the breach of the contractual duty of care in clause 12.1. The claimants rely on a further reason given by Lord Leggatt (with whom Lord Burrows agreed) in support of that conclusion, namely that "clear words are necessary before the court will hold that a contract has taken away valuable rights or remedies which one of the parties to it would have had at common law (or pursuant to statute)": see §106. At §108, Lord Leggatt, having summarised the "modern view" of interpretation of contracts, said:

> "It also remains necessary, however, to recognise that a vital part of the setting in which parties' contract is a framework of rights and obligations established by the common law (and often now codified in statute). These comprise duties imposed by the law of tort and also norms of commerce which have come to be recognised as ordinary incidents of particular types of contract or relationship and which often take the form of terms implied in the contract by law. Although its strength will vary according to the circumstances of the case, the court in construing the contract starts from the assumption that in the absence of clear words the parties did not intend the contract to derogate from these normal rights and obligations."

163. He then quoted with approval the following passage from Lord Diplock's speech in *Photo Production Ltd v Securicor Transport Ltd* [1980] AC 827, 850-851:

> "Since the obligations implied by law in a commercial contract are those which, by judicial consensus over the years or by Parliament in passing a statute, have been regarded as

> obligations which a reasonable businessman would realise that he was accepting when he entered into a contract of a particular kind, the court's view of the reasonableness of any departure from the implied obligations which would be involved in construing the express words of an exclusion clause in one sense that they are capable of bearing rather than another, is a relevant consideration in deciding what meaning the words were intended by the parties to bear."

164. Mr Onslow KC submitted that the Banks' construction fell foul of this principle, particularly when account was taken of clause 17.4 of the Standard Conditions, because it involved the Banks deciding for themselves what loss they had suffered, without the customer having any opportunity to intervene or complain.

165. The claimants also referred me to *Sara & Hossein Asset Holdings Ltd v Blacks Outdoor Retail Ltd* [2023] UKSC 2; [2023] 1 WLR 575. In that case, under the terms of a lease the tenant was obliged to pay the landlord such sum as the landlord certified as being payable, which was to be conclusive in the absence of manifest or mathematical error or fraud. The Supreme Court, by a majority, held that the provision was enforceable, in the sense of requiring the tenant to pay such sum as had been certified and to do so without set-off, but that this did not preclude the tenant subsequently challenging the sum claimed. In reaching this conclusion, Lord Hamblen (speaking for the majority) saw considerable force in the proposition that:

> "in circumstances where there are so many potentially arguable issues which may arise, in relation to both out-of-scope costs and excluded costs, it would be most surprising for the parties to agree that they could be determined conclusively by the landlord without representation or recourse, including in relation to issues as to the landlord's own negligence."

166. He considered, citing Lord Diplock in *Modern Engineering (Bristol) Ltd v Gilbert-Ash (Northern) Ltd* [1974] AC 689, at 717, that "It is well established that in interpreting a contract one starts with the presumption that neither party intends to abandon any remedies which arise by operation of law and that clear words are necessary to do so".

167. Ms Lahti submitted, in reliance on *Sara & Hossein*, that I should construe "loss" as not extending to loss of bargain because to do so, in circumstances where CB is left to determine its loss without reference to any contractual machinery, would be wholly uncommercial.

168. I am not persuaded by these arguments. Insofar as the clause confers a right for CB to determine what loss it has suffered, it does so clearly and unambiguously. Similarly, the limited scope of challenge is set out unambiguously in clause 17.4. Even on the claimants' interpretation of clause 8.2, it is open to CB to base its loss on any number of possible variations in the steps that it takes, for example loss in connection with redeploying funds. The same uncertainties, however, as to the terms on which funds are redeployed (e.g., fixed, or floating interest rates, and in the latter case based on what tenor of LIBOR) remain.

169. The question remains whether the *K/S Preston* decision dictates a different answer. In my judgment, it does not. There are material differences between the contractual terms in that case and this.

170. First, although clause 8.2 is headed "indemnity", the clause itself does not contain that term. The heading is for ease of reference only (see clause 21.2(b)). To the extent that HHJ Pelling's reasoning was based on the fact that the word "indemnify" suggests that what is required is a crystallised liability or obligation, the same reasoning does not apply in this case. (I was referred to authorities on the interpretation of indemnities, but I need not address these as the parties were in agreement that the scope of an indemnity, as with any contract, is to be determined by its terms and context.)

171. Second, unlike in *K/S Preston* (where the obligation to indemnify on demand was not coupled to the repayment of the loan), in this case, in the event that the customer prepaid the loan, it was required to do so "together with … any Break Costs". Accordingly, the possibility of the bank waiting until loss had actually been crystallised before demanding payment of break costs does not exist in this case. As the Banks pointed out, the fact that the break costs were payable together with the prepayment of the loan means that the break costs will always and inevitably be based on a loss, cost or liability which had not *at that time* been actually incurred. It is not realistic to think that CB would itself take action – so as to crystallise a loss, cost or liability – before the customer has actually prepaid the loan, because there is nothing which obliges a customer, having given notice of intention to prepay the loan, actually to make the prepayment.

172. Third, the absence in *K/S Preston* of a provision equivalent to that in clause 8.2 defining the amount payable as such loss, cost or liability *which CB determines it suffers or incurs*, meant that the uncertainties as to the calculation of loss presented a greater problem, and supported the conclusion that the obligation of indemnity was limited to crystallised loss, cost, liability or expense.

173. In contrast with the above provisions, I do not think that the language of clause 8.2 – "you will pay to us an amount equal to any loss, cost or liability which we determine that we or any of our Affiliates suffers or incurs" – requires that CB can only certify as loss an actual, crystallised loss resulting from action taken by it following the relevant triggering event in clause 8.2.

174. Accordingly, I consider that the conclusion reached by HHJ Pelling in *K/S Preston* is distinguishable in this case. If that is wrong and if (contrary to the above) the *K/S Preston* decision is authority for the proposition that loss based on a comparison of the NPV of the future amounts payable at a fixed rate and prevailing rates at time of prepayment is not within a provision such as clause 8.2 *because it is a future loss*, then I consider (for the reasons I have set out at [158] above) that it would have been wrongly decided, and I would decline to follow it.

175. Both parties relied on the fact that clause 8.2 applies both to circumstances that would constitute a breach of contract and those that would not. The claimants contend that "loss" can be used in a variety of contexts and with a variety of shades of meaning (see *Benyatov v Credit Suisse* [2023] EWCA Civ 140; [2023]

ICR 534, at §113) and that, since clause 8.2 applies to circumstances that do not constitute a breach of contract, loss should not be equated with contractual damages. The Banks contend that since it does apply to circumstances that constitute a breach of contract, it is to be expected that loss extends to the sort of loss that arises on breach. I consider this to be a largely neutral point: I have sought to construe clause 8 by reference to its terms and context, without making an assumption either way.

176. For the above reasons, I conclude that the Banks' overarching case on the construction of clause 8.2 is correct. I have addressed this at some length, notwithstanding that CB calculated break costs by reference to a loss or liability incurred having taken a specific step (terminating the relevant CNH), for three reasons. First, because if CB was entitled to charge break costs by reference to the NPV of the difference between the fixed rate of interest payable under the FRTBL and interest which it was likely to receive on the returned sum at prevailing floating rates, and the termination amount payable under the CNH is a proxy for that loss, then CB *was* entitled to charge the break costs which it in fact charged customers. The claimants would not be able to succeed in respect of any of the causes of action asserted in relation to the break costs (misrepresentation, restitution or contract).

177. Second, the answer to the question whether a CNH is a Hedging Arrangement within clause 8.2 is in any event influenced by the approach taken to the overarching case. If loss calculated on the basis of a comparison between the NPV of the future interest payable for the duration of the term of the FRTBL at the fixed or prevailing floating rates is within clause 8.2, then the argument for excluding loss calculated by reference to the termination of a CNH is considerably weaker.

178. Third, it is necessary to address the overarching case in relation to Janhill's break costs claims insofar as they relate to break costs indicated by the Banks, or payment of break costs, after the Morph Transaction. After that transaction, break costs were charged on the basis of the NPV of the difference between fixed and floating interest rates, without there being in place a CNH.

Is a CNH a Hedging Arrangement within clause 8.2?

179. Hedging Arrangement is defined as an arrangement "with a third party" which CB "or any of our Affiliates" has entered into in order to hedge their risk to fluctuations in interest rates.

180. The claimants contend that NAB is not a "third party", because it is an Affiliate: since a Hedging Arrangement is one that "we" or an "Affiliate" enters into, the third party that is the counterparty to the agreement must be someone other than an Affiliate, otherwise the clause would be contemplating an agreement between an Affiliate and itself. That is supported, it is said, by the fact that the ordinary meaning of "third party" is someone <u>independent</u>, and that if it had been intended to mean any separate legal entity (as the Banks contend) it would have used language such as "counterparty".

181. Even if those submissions are wrong, the claimants contend that where (as here) both CB and an Affiliate have entered into a hedging agreement, then, it is the Affiliate's hedging agreement that constitutes the "Hedging Arrangement" within the definition in clause 8.1. That is because the clause says we "or" any of our Affiliates will have entered into an arrangement with a third party, and that contemplates only *one* relevant Hedging Arrangement. That is supported, they say, by the phrase "to hedge our risk in fluctuations in interest rates". That must mean, it is said, the interest rate risk originating from the Hedged Loan *as transferred to the Affiliate*: for an Affiliate to manage the risk at all, the risk must have been transferred to it in some way.

182. This is also said to be supported by commercial sense. The inclusion of "Affiliate" reflects the fact that management of the interest rate risk is done by another entity within the group. Moreover, the CNH was only needed because NAB wanted to sell TBLs to CB's SME customer base, and CB did not have the expertise to do so, so NAB had to engage in hedging the risk. Further, the internal arrangement was on off-market terms to generate "treasury income", because of the inclusion of AV in the Fixed Rate and despite the treasury income being shared between the two banks.

183. The claimants contend that the context further supports their construction. They rely on the following: the Break Costs Explanation referred to the fact that, in order to manage their financial risk, "We" agree with "third parties" but made no reference to an "internal" swap with NAB; NAB's employees gave the explanation of break costs to customers; the Banks' employees did not think there was a distinction between CB and NAB, nor did at least some of the customers; and, when other customers (albeit not the claimants) asked for details of the Hedging Arrangements in the market, they were told that the identity of third parties was commercially confidential.

184. Attractively as these arguments were presented, I do not accept them. As Mr Thanki KC submitted, however close the commercial relationship between CB and NAB was, it is CB that entered into a FRTBL with a customer. CB alone is identified as a party to the facility letter. The Confirmation is sent on a document with CB's letter-head. The Standard Conditions expressly define "we" and "us" as CB. Nothing in the Break Costs Explanation undermines the clear wording of the Standard Conditions in this respect. The fact that some customers, and even some employees, did not distinguish for various reasons between CB and NAB is irrelevant to the construction of the Standard Conditions. Equally irrelevant is the fact that employees of NAB were involved in selling the FRTBLs to customers, particularly since they did so acting on behalf of CB, and introduced themselves to customers as such.

185. The Banks' construction does not mean, just because an Affiliate can be a "third party", that the clause contemplates an agreement between an Affiliate and itself: it contemplates an agreement between CB and a party other than it (which may include an Affiliate) or an agreement between an Affiliate and a party other than *it*.

186. Nor do I accept the claimants' argument that where, as happened, CB entered into a hedging agreement with NAB and NAB then entered into a hedging

agreement in the external market, it is the latter alone which constituted the "Hedging Arrangement" within clause 8.1. As Mr Thanki KC submitted, CB's risk could only be hedged by an Affiliate if it did so on behalf of CB. If, as happened in practice, CB hedged the risk by transferring the risk to NAB under the CNHs, then whatever NAB did thereafter by way of interest rate risk management was in respect of *its own risk*, not that of CB. What it did was to manage the interest rate risk arising under the CNHs together with all other interest risk across its business, on a portfolio wide basis. NAB's portfolio wide hedging arrangements did not, therefore, hedge the relevant risk referred to in clause 8.1, and thus cannot be a "Hedging Agreement" as defined.

187. In all the circumstances, I consider that the undefined phrase "third party" in clause 8 is to be construed in its natural sense as an entity other than CB.

188. I do not find there to be anything uncommercial in that conclusion. Having taken the decision not to carry any interest rate risk itself, and entered into the CNH to achieve that purpose, CB undoubtedly did suffer a loss equal to the termination sum paid to NAB under the CNH as a result of the early repayment of the relevant FRTBL. Moreover, as I have already concluded for the reasons set out above, the amount which CB has to pay under the CNH is a reasonable proxy for its loss arising as a result of early repayment even if it had not entered into any hedging agreement.

189. Much was made by the claimants of the "uncommercial" nature of the CNH itself. It was common ground that CB could not have entered into a CNH for each separate FRTBL with a market counterparty, other than on uncommercial terms, because the principal amount was too small. The claimants contend that no treasury team within a bank would do so, nor would they hedge for the full term of the loan, or for the full amount: in the real world, hedging is a much more nuanced process, taking account of the treasury team's own perception of likely interest rate movements, its appetite for absorbing some risk, or for off-loading some or all of that risk; the one thing a bank would not do is commit to terminate a particular external hedge agreement simply because one or more of its fixed rate loans was terminated.

190. What the claimants were describing, however, was the process by which a bank *manages* its interest rate risk, on a portfolio wide basis. The point of the CNH was that CB did not want to, and was not in a position to, manage interest rate risk, so it transferred it to NAB. For that purpose, it was (as I have explained above) essential that each CNH precisely matched the relevant FRTBL and that the CNH terminated upon termination of the FRTBL.

191. In light of my conclusions that (1) "loss" under clause 8.2 is not limited to an actual, crystallised loss consequent upon taking action in the external market; (2) the calculation of that loss involves comparing the NPV of fixed and floating interest rates for the remainder of the term of the FRTBL; and (3) the termination payment due under the CNH is an appropriate proxy for such loss, I do not accept that the fact that the CNH is not a hedge that could or would have been entered into as part of a normal hedging strategy in the external market means that it does not satisfy the definition of Hedging Arrangement within clause 8.

192. The claimants placed particular reliance on a further feature of the CNH which it described as uncommercial, namely the fact that the fixed rate under the CNH matched precisely the Fixed Rate under the FRTBL, so that it included up to 50 basis points of AV. That meant that, immediately upon execution, the mark to market value of the CNH was negative from CB's perspective, because the fixed rate was up to 50 basis points above market rate.

193. I do not accept that this precludes the CNH from qualifying as a Hedging Arrangement. The Fixed Rate payable under the FRTBL is the rate to which CB is contractually entitled, and the CNH protects it from any variations in that interest rate. I raised in the course of argument the different point that, because the NPV of the AV element of the Fixed Rate payable over the life of the FRTBL (and thus over the life of the CNH) was paid on inception of the CNH by NAB to CB, it could not be said that CB's loss, calculated by reference to the termination sum payable under the CNH, included that sum. That was because, although on termination of the CNH it was liable to pay the NPV of the remaining fixed rate payments (including AV) to NAB, so far as the AV element was concerned, it was merely repaying the sum which NAB had already paid it.

194. If that point was correct, however, it would support a wholly different case – that the calculation of loss was wrong because it included the NPV of the remaining AV. That is not a case advanced by the claimants. I note for completeness that CB do not accept that the point is correct, but since it is not a case advanced by the claimants, and it does not affect my conclusion as to the construction of Hedging Arrangement, I say no more about it.

195. Given my conclusion on the construction of clause 8.2, it is strictly unnecessary to determine whether the claimants can establish the remaining elements of any of the causes of action relating to break costs. I do so, in order to resolve any factual issues that arise, in case this matter goes further and my conclusions so far are overturned.

B2(c). Construction of the Janhill LMA

196. The claimants addressed the construction of the Janhill LMA only in their written opening submissions and did not develop it in oral submissions. As I note above, the definition of economic cost in the Janhill LMA is relevant only to the claim in fraudulent misrepresentation which Janhill asserts in respect of indications of break costs provided to it by the Banks prior to November 2011. It was not put, however, to any of those said to have had the relevant dishonest knowledge that they were aware of the relevant provisions of the Janhill LMA or that CB was not entitled to charge break costs in the way that it did on the basis of them. Although not formally abandoned, the claimants advanced no submissions in closing based on the Janhill LMA.

197. I nevertheless address, briefly, the question of construction raised on the pleadings.

198. By clause 6.2 of the Janhill LMA, upon occurrence of an "economic cost event", which included early repayment of the FRTBL, CB was entitled to "determine

the amount (if any) of the economic cost (having regard to the prevailing market interest rates at the time of the determination) and notify you of that amount. You must pay us the amount so notified when we specify."

199. By Schedule 1, "economic cost" was defined as:

> "what we calculate to be the costs and losses we have suffered as a result of an economic cost event occurring. These costs and losses include, but are not limited to, agreements and other arrangements in connection with a loss or reduction of return or other costs associated with changes in market interest rates or the termination or reversing of any other agreement or arrangement entered into by us (either generally or in the course of our business or specifically in connection with this agreement) to fix or limit our effective cost of funding in relation to the facility with you."

200. The claimants suggest, and I agree, that to make complete sense of this definition, words such as "cost and losses arising from" need to be inserted in the third line in front of "agreement and other arrangements".

201. In their written opening, the claimants focused on the words in the definition of economic costs after the words "These costs and losses include but are not limited to…".

202. For reasons similar to those I have set out above in relation to clause 8.2 of the Standard Conditions, I conclude that the operative words "costs and losses we have suffered as a result of an economic cost event occurring" are broad enough to include CB's loss calculated by reference to the difference between the NPV of the fixed rate interest due for the remainder of the term of the FRTBL and the NPV of interest at a variable rate over the same period. I find nothing in the remainder of the Janhill LMA to limit the wording. Irrespective of whether the CNHs fell within the remainder of the definition, therefore, the break costs indicated to Janhill before November 2011 would (if early repayment had been made at the time) have constituted a cost or loss to CB within the Janhill LMA.

203. Insofar as reference is to be made to the standard explanation of break costs given to customers at the time, i.e., the equivalent of the Break Costs Explanation given in relation to the Standard Terms, that explained (among other things) break costs in a way that provided clear support for that conclusion. It (unlike the later Break Costs Explanation) contained a section headed "How are Economic Costs calculated", and stated:

> "Economic Costs are calculated on the basis of the change in cashflows to us as a result of any alteration to or cancellation of a TBL. Taking the Fixed Rate TBL as an example, in calculating the Economic Cost on a Fixed Rate TBL, we would calculate today's value of the outstanding interest payable by you at the rate agreed under the Fixed Rate TBL Offer Letter.

> We would then calculate today's value of interest that could be earned by us if we were to reinvest the funds for the remaining period of time, ie from the time you have requested to break the facility to the original expiry date agreed to in the Fixed Rate TBL Offer Letter. The rate of this calculation is based on the market rate for the remaining term of your facility on the day you have requested to break the original facility.
>
> The difference between these two values then determines whether there is an Economic Cost or benefit to you from breaking this facility. If the value of interest which could have been earned by the bank for the remaining period of your facility is less than the value of the interest owed by you under the agreement then you will pay us an Economic Cost. If the opposite is true, then we will pay you an economic benefit."

204. Moreover, I conclude that the CNH is "an agreement and other arrangements in connection with a loss or reduction of return or other costs associated with changes in market interest rates". The claimants contend that the CNH does not fall within this definition because, as a result of the fixed interest rate including AV, any loss arising on its termination is not "associated with market interest rate movements". That is wrong: the losses CB incurred under the CNHs was clearly associated with interest rate movements. The claimants also repeat the contention that the CNH was not a hedging agreement in any real sense, which I have rejected above.

<u>B3. The claims in misrepresentation</u>

205. I have set out the Break Costs Representations said to have been made, both expressly and impliedly, at [20] above.

<u>B3(a). Misrepresentation: the law</u>

206. The essential elements of a claim in deceit are well-established and not materially in dispute in this case. They are summarised, for example, in *SK Shipping v Capital VLCC* [2020] EWHC 3448 (Comm); [2021] 2 Lloyd's Rep 109, per Foxton J at §112-§117.

207. First, it is necessary to establish that a representation – that is a statement of fact on which the representee is intended and entitled to rely – has been made by the representor to the representee.

208. The question whether a representation has been made and, if so, in what terms, is determined objectively, according to the impact that whatever was said may be expected to have on a reasonable representee in the position and with the known characteristics of the actual representee: *Raiffeisen Zentralbank Osterreich AG v Royal Bank of Scotland PLC* [2010] EWHC 1392 (Comm); [2011] 1 Lloyds Rep 123, at [81].

209. In the case of an express representation, the Court must consider what a reasonable person would have understood from the words used in the context in

which they were used; in the case of an implied representation, the Court must consider what a reasonable person would have inferred was being implicitly represented: *IFE Fund SA v Goldman Sachs International* [2006] EWHC 2887 (Comm); [2007] 1 Lloyd's Rep 264, at [50].

210. In considering this objective question, it may be useful to consider whether a reasonable representee would "naturally assume that the true state of affairs did not exist and that, if it did, he would necessarily have been informed of it": *Geest v Fyffes* [1999] 1 All ER (Comm) 672, per Colman J at p.683, but this does not water down the requirement to demonstrate clear words and conduct of the representor from which the representation can be implied: *Property Alliance Group Ltd v Royal Bank of Scotland plc* [2018] EWCA Civ 355; [2018] 1 WLR 3529, at §132.

211. Second, the representation must be false.

212. Third, the representation must be made either knowing it to be untrue, or recklessly not caring whether it was true or not.

213. Recklessness is not to be watered down into something akin to negligence, however gross: *Vald Nielsen Holding SA v Baldorino* [2019] EWHC 1926 (Comm), per Jacobs J at §148. In *Derry v Peek* (1889) 14 App Case 337, Lord Herschell said, at p.374:

> "fraud is proved when it is shown that a false representation has been made (1) knowingly; (2) without belief in its truth; or (3) recklessly, careless whether it be true or false. Although I have treated the second and third as distinct cases, I think the third is but an instance of the second, for one who makes a statement under such circumstances can have no real belief in the truth of what he states. To prevent a false statement from being fraudulent, there must, I think, always be an honest belief in its truth."

214. Of particular importance in a case of implied fraudulent representations, is the need to show that the representor understood that the relevant representation was being made, in the sense in which it is alleged to have been understood and relied on by the claimant: see, for example, *Cassa di Risparmio della Repubblica di San Marino SpA v Barclays Bank Ltd* [2011] 1 CLC 701 at [221]. Unless the representor was aware of this, and aware of the fact that the statement as understood in that way was false, or was reckless as to its falsity, their deceit could not be established.

215. Fourth, the representor must intend the representee to rely on the statement in the sense in which it was false.

216. Fifth, the representee must in fact have been induced to take action – for example entering into a contract – in reliance on the representation. The misrepresentation need not be the only reason for the representee's decision to enter into the contract, but the representee will have no cause of action if it would have entered into the contract on the same terms even if the

representation had not been made. If it is proved that a false statement is made which was material – in the sense that it was likely to induce entry into the contract – then there is an evidential presumption (of fact, not law) that the representee was so induced. The presumption is stronger if the representation was made fraudulently.

217. The relevant question in this respect is whether the claimant would have entered into the contract if the representation had not been made at all, not whether it would have done so if it had been told the true position: see *Raiffeisen* (above) at [180], approved by the Court of Appeal in *SK Shipping Europe Ltd v Capital VLCC 3 Corp* [2022] EWCA Civ 231; [2022] 1 Lloyd's Rep 521, per Males LJ at [61].

218. The identification of the appropriate counterfactual if the statement had not been made, however, is a question of fact, and in some cases this may necessarily involve asking what would have happened if the truth had been told. That might be the case where, if the representation had not been made, the true position would have been revealed as a result of questions asked by the representee: *Raiffeisen* at [182] to [185]; *SK Shipping* at [61]. Even then, however, the "truth" is that which is sufficient to correct the falsity of what was said: *Raiffeisen* at [192] to [193].

219. It is well established that the representee must have understood, at the time, that the representation – in the sense that the court ascribes to it – was being made: see, e.g. *Cassa di Risparmio della Repubblica di San Marino SpA v Barclays Bank Ltd* (above), per Hamblen J at §224, citing *Raiffeisen* at §87. As Hamblen J pointed out, this is probably not a separate requirement of a misrepresentation claim but rather is part of what the claimant needs to show in order to prove inducement. That follows from the fact that the essential question is one of causation: was the claimant induced to take action in reliance on the representation made? If the claimant did not appreciate at the time that the representation was made in the sense pleaded by the claimant, then it cannot show that, but for that representation being made, it would have acted differently.

220. There was some debate, particularly in the parties' written submissions, as to whether there is a distinct requirement in all cases that the representation must be "actively present" to the representee's mind, or that the representee must have given "contemporaneous conscious thought" to the representation at the time it was made. This is a question that has been given extensive recent consideration in *Leeds City Council v Barclays Bank Plc* [2021] EWHC 363 (Comm) ("*Leeds*"); [2021] QB 1027, *Loreley Financing (Jersey) No 30 Limited v Credit Suisse Securities (Europe) Limited* [2023] EWHC 2759 (Comm) ("*Loreley*") (both Cockerill J), and in *Crossley v Volkswagen AG* [2021] EWHC 3444 (QB); [2023] 1 All ER (Comm) 107 (Waksman J).

221. The issue identified in the relevant passages in those cases was that sometimes the court has found that a misrepresentation was relied on, apparently without a finding that the representee gave conscious or active thought to the representation (see for example the cases conveniently summarised at §380 of *Loreley*). An extreme example (discussed from §105 of *Leeds*) is the

representation by a diner at a restaurant, made by the conduct of ordering a meal, that they have an intention to pay for it (see *DPP v Ray* [1974] AC 370, a criminal case but often cited in the cases dealing with misrepresentation in civil law). It is highly unlikely that the waiter who took the order gave any thought to whether such an implied representation was being made.

222. As Cockerill J noted, at §423 and §424 of *Loreley*, the cases in which inducement has been found without distinct evidence of understanding or awareness are where the representation is simple and cannot be missed by the representee, and where it is at the heart of the transaction. In such cases, it might be said that the fact represented, albeit implied from some other conduct or statement, is so obvious it goes without saying. Unless, therefore, the representee actively thinks about it and decides *not* to rely on it, it might be said that it goes without saying that the representee relied on it. That would explain, for example, cases where someone who gives their opinion on a matter – where the facts are not equally known by both sides – may be held to make an implied statement "that he knows facts which justify his opinion": *Smith v Land and House Property Corp* (1884) 28 Ch D 7, at p.15. It will be rare, if ever, that a representee thinks further than that they trust the person giving the opinion and assume that he knows facts which support it. Yet the court is unlikely to require evidence that the representee actively thought at the time that the representation was being made.

223. I doubt the utility (as did Cockerill J) of breaking down this causation question into distinct elements and seeking to find a single universally applicable test for those elements. It is essential to keep in mind that in every case it is necessary to show, as a matter of fact, that the claimant's decision to take the action (or refrain from taking action) which caused it loss must have been caused by the representation made by the defendant. The evidence required to satisfy that requirement will differ greatly depending on where on the spectrum the case lies (from "it goes without saying", at one end, to a complex representation said to be implied from conduct and statements, at the other).

224. In relation to the Break Costs Representations, whether or not there is such a requirement is academic, since I am satisfied for the reasons set out below that the claimants understood at the time that the simple form of representation (i.e., that the amounts quoted were the break costs to which CB was contractually entitled) was being made.

225. The point is of most relevance to the implied Fixed Rate Representations. As developed in Part C below, these are inherently complex representations. In each case, the pleaded implied representation is far from the obvious or only interpretation of what was expressly said or done. It is well established that where there is any ambiguity in the conduct or statements relied on in support of an implied representation, it will always be necessary to establish that the representee appreciated at the time the representation was made that it was being made in the sense relied on by the claimant: see, for example, the decision of the Court of Appeal in *Spice Girls Ltd v Aprilia* [2002] EWCA Civ 15; [2002] EMLR 27, at §67, distinguishing cases such as *E.A. Grimstead & Sons Ltd v McGarrigan*, unreported, Court of Appeal 27th October 1999, referred to by

Waksman J in *Crossley* at §81. Without such understanding, the essential causal link cannot be established.

226. The claimants' claims are put, in the alternative, on the basis of negligent misstatement. The elements of that cause of action are materially the same as the claim in deceit, save for the following. This is not a case where the claimants are alleging that the Banks owed a duty of care to provide any information or explanation about the FRTBLs. The only duty alleged is to take care that the statements they did make were truthful. So far as CB is concerned, in circumstances where (as between it and its customers) it alone had the means at the time the representations were made of knowing how the break costs were calculated, and thus whether the calculations were carried out on the correct basis according to its own standard terms, and where CB did not take advice to confirm that the break costs it charged were properly chargeable, I consider that it did owe a duty to take care that the statements were true and that the duty would have been breached if the statements were untrue.

227. The position in relation to NAB is more complicated. The parties pointed out, on receipt of a draft of this judgment, and contrary to what I had indicated in that draft, that the Banks had not accepted that a duty of care was owed, and was breached if the Break Costs Representations had been false. I refer below – in the context of the discussion on deceit at [240] to [244] – to the difficulties in establishing that NAB made any representations at all. If and to the extent that NAB's liability depends on establishing its vicarious liability for its employees, then I did not understand the claimants to contend that any of NAB's employees who made a representation were themselves liable in negligent misrepresentation, for which NAB could be vicariously liable. I will hear further from the parties at the hearing to consider consequential matters whether it is necessary or desirable, in light of the other conclusions in this judgment, to reach findings as to whether NAB itself made any of the Break Costs Representations.

B3(b). Certain issues common to each of the claimants' claims in misrepresentation

228. The nature of the statements made by the Banks to each of the claimants which are said to give rise to the Break Costs Representations are broadly similar. They consisted of the customer being told, as of a particular date or dates, the "break fee" or "break costs", or "indicative" break costs or fees, in the context of enabling the customer to know how much it would need to pay if it redeemed the FRTBL on the relevant date or dates.

229. The claimants' case is that in making those statements, the Banks represented that this was the amount of break costs that were contractually due under the contract with the customer.

230. The Banks contend that a reasonable person in the position of the claimants would not interpret the Banks' statement in providing that information as giving rise to such a representation but would understand no more than that CB had made a determination that the relevant sum was due. They contend that the claimants were entitled to question the quotations, and their contractual basis, as they have in fact done in these proceedings. These were, they say, no more

than indications provided pursuant to the contractual machinery in clause 8.3(a) of the Standard Conditions.

231. In my judgment, in circumstances where, as between the Banks and the customer, the Banks alone knew (and had any means of knowing) how the break costs were calculated, then a reasonable customer would indeed interpret the Banks' statement that £x of break costs are payable, as meaning that this was the sum that was due under the contract, i.e. it was a sum which CB was contractually entitled to charge by way of break costs.

232. This is reinforced by the fact that clause 8.3(b) of the Standard Conditions, on which the Banks rely, states that CB will provide an indication of the Break Costs "that would be incurred". That implies that the indication given is of the break costs that the customer would be *obliged* to pay under the contract, and not merely an indication of what CB determined the amount to be without reference to whether it was due. I do not accept the Banks' contention that, because the indications as to break costs were given pursuant to the contractual machinery in clause 8.3(a), they could not, as a matter of law, constitute actionable representations, if they otherwise satisfied the requirements of an actionable representation (they were statements of fact, made with the intention of being relied upon by the customer).

233. The answer to the Banks' argument that the contractual basis of CB's determination could be challenged is, first, that in reality the time critical nature of the break costs indications meant that they had to be acted on immediately and, second, since the customer did not know the basis on which CB had reached a determination, it was impossible to know whether it was open to challenge.

234. It is difficult to think what else the reasonable customer would think was being represented. The Banks' contention involves it having stated something to the effect of: this is the amount we are asking from you, but we make no statement as to whether it is an amount we are contractually entitled to demand from you by way of break costs. It may well be that in other circumstances (where, for example, both parties have as much knowledge of, and the means of knowing, what is due under a contract between them) that a demand by one party for payment under the contract carries with it no representation that the sum demanded is one to which that party is contractually entitled. I consider, however, that where the Banks alone have the means of knowing the basis on which break costs are charged, then the indication as to what is payable by way of break costs is to be construed as an express representation that such amount is due under the contract.

235. I address below the question whether the claimants understood at the time that a Break Costs Representation was being made, by reference to the evidence of each claimant. In each case, however, I am satisfied that the relevant claimant understood – when taking any of the alleged actions in reliance on the Break Costs Representations – that the simple form of representation was being made. Had they not understood that representation to have been made, I would expect the claimants to have immediately asked the relevant representative of the Banks making the statement to come back with the amount which *was* in fact due under the contract. I also find that such representation was made to all

claimants with the intention that it be relied on by them. Where, as here, the representations were typically made in response to a request from the customer for an indication of break costs, it must have been obvious to the Banks that the customer would rely on the Banks' answer.

236. Given my conclusions on the two issues at the heart of the break costs claims, none of the Break Costs Representations was in fact false. I need to assess the question of dishonesty, therefore, on the hypothesis that my conclusion on those issues is wrong.

237. The issue of dishonesty is also one that is common to all claimants, as it depends on the state of mind of four senior executives within the Banks who had no contact with any of the claimants.

B3(c). Dishonesty

238. The claimants do not allege that the representatives of either of the Banks that made the Break Costs Representations knew or ought to have known that the representations were false. The Banks' liability in deceit is instead said to depend on the knowledge of two senior executives within CB and two senior executives within NAB (I will refer to these collectively as "the four executives"):

(1) Miles Storey, who was UK Treasurer for CB from November 2010 for almost ten years.

(2) David Thorburn, who worked for CB in various roles between 1978 and 1983, and again from 1993 until 2015. He was appointed Chief Operating Officer in 2002, an Executive Director in 2008 and Chief Executive Officer in 2011.

(3) Richard Golding, who was Head of Markets (UK and Europe) at NAB from September 2005 until 31 March 2015.

(4) Neil Pickard, who was Head of Treasury Solutions at NAB from 2005 until early 2013. Mr Pickard passed away on 15 October 2015.

239. It is common ground, in relation to the claim against CB, that provided (1) an agent of CB was aware that representations are being made; (2) they knew the representations were untrue, or were reckless as to whether they were false; and (3) they were in a position to intervene to prevent the representations being made, but did nothing, then CB is liable in deceit: see *Chitty on Contracts*, 35th ed., at §10-062 ("[I]f one agent makes a statement honestly believing it to be true, but another agent or the principal himself knows that it is not true, knows that the statement will be or has been made, and deliberately abstains from intervening, the principal will be liable.")

240. The Break Costs Representations were all made by agents of CB. Even where the particular representor was employed by NAB (and irrespective of whether it might be said that the representation was also made on behalf of NAB), since it was CB that was in a contractual relationship with the customer, and entitled

to be paid break costs, any indication given to a customer as to the amount of break costs payable would have been given on behalf of CB. Mr Storey and Mr Thorburn were employees of CB, so their knowledge counts for the purpose of establishing liability on the part of CB.

241. So far as the claim in deceit against CB is concerned, the Banks contend that the knowledge of Mr Golding and Mr Pickard is irrelevant, as they were employees of NAB, not CB.

242. The Banks also contend that the deceit claim against NAB faces a more fundamental difficulty, namely that none of the representations made to customers about break costs (whether by employees of CB or of NAB) was made by or on behalf of NAB. There is considerable force in this point. The representations were all about *CB's* contractual entitlement to charge break costs, so that the reasonable customer in the position of the claimants would understand the representation to have been made to it by CB.

243. The claimants do not accept this, but also suggested a way around it. They contend that it was NAB employees (the traders) who calculated the amount of break costs due, and who provided that information to a representative of CB who in turn provided it to the customer. They contend that NAB is therefore liable because its employees made an indirect representation to the claimants: see *Chitty* (above) at 10-038 ("There may be said to be three types of representees: first, persons to whom the representation is directly made and their principals; secondly, person to whom the representor intended or expected the representation to be passed on; and thirdly, members of a class at which the representation was directed.")

244. I do not think this meets the point. Even if the point were properly pleaded (which the Banks deny), assuming that NAB's traders passed on information as to the *calculation* of the break costs to employees of CB, that was for the purpose of CB being able to tell its customer what break costs were due under its contract with them. It is difficult to extract from this a statement made *by NAB* as to the amount that was due under the contract between CB and the customer. That is particularly so, given that what the NAB traders were in fact calculating was the termination sum due from CB to NAB under the CNH.

245. I do not need, however, to decide these points. Given the seriousness of the allegations of deceit made against the four executives, I address the substance of those allegations and, for the reasons set out below, I conclude that none of them had the requisite deceitful or reckless state of mind. The finer points about attributing knowledge of NAB's executives to CB and on whose behalf any representations were made, or were pleaded to be made, do not therefore arise.

246. In respect of each of the four executives it is alleged that:

(1) They knew that break costs were being calculated and charged on the basis of the close-out amount due under the CNH, i.e. a back-to-back hedging arrangement for each FRTBL between CB and NAB (I will refer to this as the "CNH Loss Basis");

(2) They knew that representations were made to customers that break costs were charged on a basis that was in accordance with the terms of the contract with them;

(3) They knew that the CNH Loss Basis was not a proper basis for calculating the break costs that were due from the customer to CB, because they knew that the only basis upon which break costs could be charged to a customer was if CB or NAB incurred an actual, crystallised loss as a result of taking a step – for example terminating a hedging arrangement – with a market counterparty who was independent of the NAB group;

(4) Alternatively, they knew there were very real doubts as to whether break costs were chargeable on the CNH Loss Basis, and simply did not care what explanations were given to customers, or whether customers were wrongly being charged break costs; and

(5) It was within their power, as senior executives, to stop break costs being charged on that basis.

247. I accept that the first two propositions were made out, at least in relation to Mr Pickard, Mr Storey and Mr Golding. They were aware of the part played by the CNHs in calculating break costs. They each accepted that they understood that customers would have been told by CB what break costs were due and would rely on CB to get the calculation right. The remainder of the claim, however, faces considerable, and in my judgment insurmountable, hurdles, for the reasons set out in the following paragraphs. These are to be read in conjunction with the Appendix to this judgment, which addresses in greater detail the claimants' case against the four executives.

248. In the first place, the claim requires a finding that each of the four executives believed (contrary to the conclusion I have reached in this judgment) that the CNHs did not create any legally binding obligations, or that on the true construction of clause 8 of the Standard Conditions it did not entitle CB to charge break costs on the CNH Loss Basis. It also requires a finding that, notwithstanding they held that belief, they nevertheless determined that CB should continue to charge break costs on that improper basis.

249. These are inherently improbable conclusions, particularly in respect of four senior, long-standing executives within the Banks, with otherwise good reputations and no obvious (or suggested) motive. While the burden of proof remains the same for serious allegations such as these, "the inherent improbability of an event having occurred will, as a matter of common sense, be a relevant factor when deciding whether it did in fact occur. As a result, proof of an improbable event may require more cogent evidence than might otherwise be required": *Birmingham City Council v Jones* [2023] UKSC 27; [2024] AC 168, at §51(2).

250. Far from there being cogent evidence, there is no evidence at all that the legal nature of the CNHs or the true interpretation of clause 8.2 was ever considered by the four impugned executives, save in one minor respect involving Mr

Pickard and Mr Golding in 2005. The conclusion that the CNHs did not create legally binding obligations, or that clause 8.2 does not permit break costs to be calculated on the CNH Loss Basis would not have been obvious ones to reach. There is in my view nothing to support the view that anyone within the Banks thought that the CNHs were not binding. As for construction, even if my conclusion to the opposite effect on this issue is wrong, the amount of written and oral argument addressing the point during the trial indicates the unlikelihood that the four executives, none of whom was a lawyer, reached that conclusion themselves. It was not put to them that lawyers were ever instructed to advise on the issue, and there is no evidence that they were.

251. The one exception (which is described at more length in the Appendix) relates to events in 2005 and 2006. A concern was expressed to Mr Golding, in an email from Claire Shields, a Treasury Solutions manager, on 2 June 2005, in the context of a complaint that had been made to the Financial Ombudsman Service ("FOS"), that there may be a problem in the eyes of the FOS in showing that NAB was an "arms length" counterparty. The email quoted part only of clause 8.2, including the reference to terminating a "Hedging Arrangement". The following year, Mr Pickard was involved in an exchange with the FOS, in which a concern was expressed that CB's loss on termination of a FRTBL was outside the scope of clause 8.2 because it was a future loss. As I explain in the Appendix, I am satisfied that Mr Pickard had no such concerns, and that any concerns that others within the Banks may have had were overcome. The explanation of break costs given to the FOS was in accordance with the CNH Loss Basis and the counterparty to the CNHs was clearly identified as NAB.

252. The possibility that each of the four executives reached a conclusion on these legal points independently is highly unlikely, but apart from it being put (for example to Mr Golding) that he had been "told by someone" that the CNH Loss Basis was improper, the claimants did not put forward a case that the four of them had discussed and agreed among themselves that the CNH Loss Basis was not permitted. Had there been such discussion, particularly as to the need to get legal advice, this would surely be reflected somewhere in the documentary record, but it is not. Although, as in many cases, complaints were made about disclosure on both sides, it was not suggested that the Banks had deliberately destroyed or failed to disclose damaging documents.

253. I accept that the fact that lawyers were not instructed is not determinative, since a case in recklessness might be made out if the four executives appreciated that it was doubtful that the CNH Loss Basis was permitted, but refrained from instructing lawyers to advise because they would rather not know. The points about the unlikelihood of them coming to that realisation independently, and the lack of any documentary support for them having discussed such a conclusion between them, however, still stand.

254. In the absence of any direct evidence that the four executives considered the binding nature of the CNHs or the construction of clause 8 and concluded that it did not permit the CNH Loss Basis, the case in deceit was instead premised on an inference to be drawn from what was said, or more importantly *not* said, about the calculation of break costs to a variety of third parties, including the

FOS, the FCA, MPs, complaining customers (other than the claimants in this action) and a Treasury Committee.

255. Specifically, the claimants contend that the requisite dishonest (or reckless) state of mind of each of the four executives is to be inferred from the fact that, when providing explanations about break costs to third parties (either to the knowledge of, or with the participation of one or other of them), the Banks did *not* say that break costs were charged to customers on the CNH Loss Basis, and did *not* refer to the CNHs. The claimants contend that the only reason for not doing so was because the four executives knew that the CNH Loss Basis was improper. Details of the most significant instances relied on by the claimants, and the case against each of the four executives, are contained in the Appendix. I set out here the fundamental reasons why I reject that case.

256. At the heart of this case is the allegation that the four executives appreciated that the basis on which CB was in fact charging break costs was improper and must be kept secret from outsiders. Given the large number of employees who were likely to become aware of the existence of the CNHs and their relevance to calculating break costs, the achievement of this dishonest purpose would have necessitated a wide-scale conspiracy, over many years, to prevent anyone from revealing the existence of CNHs. For this to have been carried out without any trace in the contemporaneous documents would be remarkable.

257. There is in any event a fundamental problem with this aspect of the claimants' case. It is important, for this purpose, to understand the reason why the claimants contend that the CNH Loss Basis was an improper basis to charge break costs.

258. The claim as originally advanced was that it was improper because there were no CNHs at all. This was abandoned prior to trial, and replaced with the arguments that there were no legally binding CNHs or that on its true construction clause 8.2 did not permit the CNH Loss Basis. While not contending that this precluded the claimants from running the point, the Banks pointed out that at a case management conference held in December 2020, leading counsel for the claimants conceded that if the claimants lost on the question of whether the CNHs existed or were legally binding, then "the deceit claim goes away, because we do not assert that if it was simply a matter of construction that meant that these sums were not due, there was a deceit."

259. At trial, as this judgment reflects, the deceit case was indeed put on the basis that the four executives must have known that the CNH Loss Basis was not permitted on the true construction of clause 8.2. The *reason* the claimants contend that it was not permitted is because "loss, cost or liability" within clause 8.2 excludes any loss other than an actual, crystallised loss caused by CB or one of its affiliates taking some action in the external market, as a result of the early termination of a FRTBL. Payment to NAB under a CNH therefore did not count because the CNH was not a transaction with an external market counterparty.

260. This was put expressly, for example, to Mr Thorburn in cross-examination: "you'd been told that the bank's contractual documentation required there to have been a real loss suffered by the bank in the market?".

261. That means that, if the four impugned executives had indeed understood that the CNH Loss Basis was improper, because – as the claimants allege – it did not reflect an actual, crystallised loss in the external market, it would have been equally important that it was kept from outsiders that CB was calculating break costs on the allegedly "notional" basis of the NPV of the difference between interest at the fixed rate under the FRTBL and the floating rate CB could expect to receive on the returned funds. That would have been, on the claimants' case, improper for the same underlying reason the CNH Loss Basis was improper.

262. That is, however, precisely how break costs were explained in many of the instances on which the claimants rely to establish deceit on the part of the four executives. The following (which are explained more fully in the Appendix) are examples:

(1) In Ms Wilkinson's responses to the customer of Mr Blanksby, while not making reference to the CNH, the customer was provided with a precise breakdown of the break costs by reference to a spreadsheet containing a standard NPV calculation, with the explanation: "It compares the Interest Rate on your Fixed Rate Loan schedule, to current market rates for the same schedule & term. It is therefore the difference in the interest payments falling due under the Fixed Rate Loan, in comparison to those achievable in the current market, which provide the cost to exit the Fixed Rate".

(2) It was what Mr Campbell told the Court of Session in the case brought by Mr Glare: he said that break costs represented "the difference between what a customer is paying and the market interest rates at that time".

(3) It was the explanation given in both the draft "case specific" explanation of break costs approved by a "Project Control Board" ("PCB") established in 2013 (which, as described in the Appendix, confusingly described the calculation as if there were bi-lateral cashflows as under a swap) and in the version of that explanation provided to Farol, which contained essentially the same calculation, but without using the language of a swap. It was also the explanation contained in the draft letter to the FSA placed before the PCB meeting, but which was later excised from the letter: this made clear that there was no back-to-back swap, but nevertheless described the "economic consequences" for the bank if the loan was repaid early in terms of the bank being required to utilise funds returned early at a lower rate than that provided for in the contract with the customer.

(4) It was the explanation provided in the briefing note for Mr Thorburn's evidence to the Treasury Committee: "In simplest terms the Bank looks at the interest rate at which the protection was set within the loan and the prevailing rate at the point the loan contract is broken by the customer. If the prevailing rate is lower than that applied to the loan a cost arises. The bank calculates this cost over the remaining term of the fixed interest protection to establish what the overall cost of the break is … If the Bank does not pass on this cost to the customer when a loan is repaid before the

period for which the loan is fixed then there is an economic cost to the Bank."

263. Those explanations would have revealed that the break costs charged by CB were not dependent upon, and calculated by reference to, specific action taken in relation to arrangements with third parties in the market. If the four executives had understood that the CNH Loss Basis was not permitted because clause 8.2 permits only the loss, cost or liability incurred in taking specific action in the external market, it would have made no sense to permit third parties to be told that break costs were calculated by reference to an NPV calculation of fixed and floating interest rates.

264. The claimants submitted that, at least in some of these explanations, there was nevertheless reference to NAB having hedged in the market. For the most part, however, those references were to hedging on a portfolio wide basis, so that there was no direct correlation between the repayment of a single FRTBL and action taken in respect of NAB's portfolio-wide hedging.

265. In theory, it might have been the case that the four executives believed that the CNHs did not constitute a Hedging Arrangement within clause 8.2, simply because (as the claimants contend) they were not an arrangement with a market counterparty outside the NAB group, without also appreciating that this was because "loss, cost or liability" required there to be an actual, crystallised loss arising from a step taken in the external market as a result of the repayment of a FRTBL. For completeness, I do not accept that the claimants have established that that was the belief of any of the four executives.

266. As the Banks submitted in closing argument, however, even if the four executives did think that the CNHs could not be relied on because they were "internal" arrangements, the case in deceit must fail if they nevertheless believed that break costs in the same amount could be charged on the "notional" NPV calculation basis. If that was so, then they would have had an honest belief that CB was entitled to charge the amount in fact charged to the claimants.

267. That was indeed their evidence. Each of Mr Thorburn, Mr Storey and Mr Golding said that they understood that, whether or not a CNH was in place, CB suffered a loss on early repayment of a FRTBL, which could be calculated as the difference in the NPV of the contractually fixed interest and the interest recoverable on re-employing the funds at the then prevailing rates. They understood that this was the same as the loss suffered by NAB upon termination of the CNH.

268. Mr Thorburn's evidence was that he was unaware of the CNHs. He understood that break costs were being charged to customers on the basis of an "NPV calculation". He referred to this, variously: as calculating the "lost income stream"; as the price at which the fixed interest rate under the broken FRTBL could be replaced "at current market rates"; and "the present value of a contracted income stream, compared to what you can now achieve in the marketplace, the difference between the two". He regarded this as reaching the same result as reached when calculating the termination value of an interest rate swap, where the fixed leg mirrored precisely the fixed rate terms of the FRTBL

(i.e., including the rate, interest payment dates, amount of principal and dates for repayment of principal).

269. Mr Storey's evidence was to similar effect. He was aware of the CNHs, and aware that break costs were in fact calculated by reference to the termination sum payable under the CNHs. He did not, however, view their existence as critical to CB's *entitlement* to charge break costs.

270. If there had been no CNH, he said that "[y]ou would have utilised the cash flows of the fixed rate loan and applied the calculators that were used for the interest rate swap to the fixed rate loan to create a discounted NPV." He said that, "from an economic interest rate risk perspective" this was no different from the calculation of break costs that was in fact carried out, on the basis of the CNH, but it was "just another way of doing it."

271. Mr Golding's evidence was that he was not aware of the precise basis on which CB charged break costs to its customers. As Head of Markets at NAB, there was no reason for him to have been familiar with the terms of the contract between CB and its customers. He was aware, however, that an integral part of the break costs charged to the customer was the termination amount payable by CB to NAB under a CNH.

272. As to that, Mr Golding was cross-examined by reference to the email which Claire Shields sent to him on 2 June 2005, in connection with the complaint to the FOS (referred to at [251] above), in which she said that it may be difficult to show that NAB suffered a loss in the market akin to that which it charged CB on termination of the CNH. Mr Golding's answer was to stress the importance of a mark-to-market transaction, such as the CNH:

> "if there is a value in a transaction one party has a positive, one party has a negative. So when you break the transaction, somebody will be enhanced -- enriched and somebody will be losing money and therefore whilst you cannot identify necessarily a equal and opposite NAB trade with the market, you are actually saying that within the overall book there is a profit and loss relevant to that transaction that is on their books."

273. Importantly, he viewed the loss that a bank suffers on early repayment of a fixed rate loan as essentially the same as that which would be suffered on termination of a CNH. He said his understanding of the way in which break costs were charged to a customer with a fixed rate loan was by reference to the value of the lost fixed rate income stream for the remainder of the term, as compared to the return the bank could obtain on the money at prevailing floating rates, and that this was functionally the same as the calculation of the loss suffered by NAB under the CNH.

274. I accept that these three individuals did understand the amount lost by CB on early termination of a FRTBL to be essentially the same as the amount due under a CNH. This reflects my own conclusion as to the nature of recoverable break costs under clause 8.2. The same understanding was shared by others, against whom no allegation of dishonesty is made. Of those, the evidence of David

McGill (Head of Treasury Solutions from 2012) – who provided consistent, clear and straightforward evidence – was particularly compelling. He was asked about a Treasury Solutions member (Lynne Anderson) having claimed confidentiality in responding to a customer's request (in 2012) to see the third-party hedging arrangements made by CB. He agreed that he could not think of a reason not to refer to the CNH. He was then shown an internal email to Ms Anderson, in which she was told that there was unlikely to be an identical trade by NAB in the market. It was put to him that, following that exchange, Ms Anderson could not have thought that break costs could properly be charged on the CNH Loss Basis, to which he responded:

> "I'm slightly confused at the issue of this because the bank chose to hedge it immediately to NAB. The bank didn't need to hedge that if they didn't want to, but they chose to do it. That was their choice. If the client − if they hadn't hedged that back-to-back or swap and the client broke at the same time, the cost would have been the exact same basis, because there's two cash flows, there's − they're saying: what would that loan cost today, what would it cost when you took it out, and we want the difference between those two on a net present value. So the swap is a good way of getting what that price is, but in reality, whether the Clydesdale had done a swap or didn't do a swap is irrelevant based on, the breakage cost is worked out on two cash flows, rather than a swap in itself. But because of the way that the bank worked, there was that equal swap and there would be a swap broken at the same time."

275. The fact that this was how break costs were calculated in relation to the Janhill FRTBLs, following the Morph Transaction when the CNHs ceased to be of any relevance, *and* that the claimants do not contend that any of the Break Costs Representations made after that time were deceitful, provides support for my conclusion. It is also supported by the fact that (as I have summarised above) the explanation given to third parties often reflected the broader loss analysis based on the difference between the NPV of fixed or floating interest streams for the remainder of the term of the loan.

276. The claimants criticised the evidence of, in particular, Mr Golding and Mr Storey in this respect, contending that they gave inconsistent answers about whether break costs were charged on the "notional" basis or the CNH Loss Basis. I need not recite all the passages in the cross-examination referred to by the claimants. I am satisfied from the evidence of each of them taken as a whole that they were saying: (1) in fact, there were CNHs in place, so that the calculation of break costs was undertaken by reference to the amount CB had to pay NAB on termination of the relevant CNH; but (2) their understanding of the entitlement to charge break costs was that it was not dependent on the existence of CNHs, because an actual loss was suffered by reason of, and calculated by reference to, the lost fixed rate interest income stream for the remainder of the term; and (3) the calculation of that loss was essentially the same as the amount paid to terminate the CNH which mirrored exactly the terms of the relevant FRTBL.

277. The above points are sufficient, in my judgment, to find that the allegations of deceit are not made out against any of the four executives. For completeness, I address in the Appendix many of the points of detail relied on by the claimants in support of their overall case that the requisite intention is to be inferred from the way in which break costs were described over many years to various third parties, and that the absence of reference to the CNHs or the CNH Loss Basis can only be explained by the conclusion that the four executives knew it was improper.

278. Although it is enough to find that the absence of reference to CNHs was *not* due to the belief by the four executives that the CNH Loss Basis was not permitted under clause 8.2, there are a number of plausible reasons why the CNHs were not referred to.

279. Given the wide variety of circumstances within which the explanations were given, the reasons for the omission will likely vary as between different instances relied on, but the possibilities include the following:

(1) There were significant differences in the understanding of the position among different employees of the Banks. Some (including Mr Thorburn himself) were unaware of the CNHs.

(2) There was clearly confusion among some of the employees. An extreme example is Mr Jovanovic, who had no real understanding of the difference between a FRTBL and a CNH. He viewed NAB as being on the other side of a swap transaction with a customer. He was plainly wrong about that, but it was not necessary, given his specific role, for him to have an understanding of the true legal position.

(3) This ties in with a particular source of confusion being whether an FRTBL contained an "embedded swap". It did not, but this was a common allegation (and terminology which some within the Banks adopted) made in the context of complaints of mis-selling of interest rate hedging products, an FSA enquiry, and criticisms in the press and by prominent customer support groups. Against that background, it is understandable if there was a nervousness around mentioning swaps in the context of the FRTBLs.

(4) While the level of involvement of each of the four executives in the instances relied on varied, typically they had little real involvement in the detail. I describe the extent to which each of the four executives was, or was not, privy to each of the instances relied on by the claimants, in the Appendix. It was a common theme in the evidence of the surviving three, that as senior executives of the Banks, they were not involved in reviewing contractual provisions or detailed explanations to third parties about break costs. They would not be expected to do so, unless something was flagged as a problem for their attention. As I have noted above, neither the question whether the CNHs were legally binding nor the question whether the CNH Loss Basis was compliant with clause 8.2 was flagged with them as a problem.

(5) In relation to all of the instances from 2011 onwards, they should be seen in the context that what *had* been flagged for the attention of the four executives was the concern that interest rate hedging products had been mis-sold to customers. That was a major focus of the FSA review, the Banks' own review conducted in parallel, complaints in the press and from customer support groups, and of the proceedings before the Treasury Committee. Importantly, the mis-selling concerns assumed that CB (and other banks who were under the microscope) *were* entitled to charge the break costs on the basis they did, but raised complaints that the potential for the *size* of the break costs which were charged had not been adequately explained to customers at inception of the FRTBLs.

(6) This is borne out, in particular, by the documents relating to the proceedings of the Treasury Committee in 2014. The briefing pack prepared for Mr Thorburn (which was intended to provide him with background and potential answers for a range of topics which might be raised by the committee) was focused on broader issues of mis-selling and made only passing reference to the manner in which break costs were calculated. Nothing in that documentation raised any concern over CB's contractual entitlement to charge break costs. These documents corroborate Mr Thorburn's answer repeatedly given in cross-examination (which I accept) that the Banks' (and his) principal focus, so far as interest rate hedging products, including FRTBLs, were concerned, was on mis-selling. He accepted that break costs were indeed a significant cause for concern, but that was in the sense that, once customers raised their worries over having to pay very large break costs, that led to the concern whether the product had been mis-sold.

(7) Five out of the nine specific instances on which the claimants rely postdate the Morph Transaction in October 2012. A plausible explanation for not mentioning the CNHs in those instances is that they had no continuing relevance to the way in which break costs were charged for a significant proportion of outstanding FRTBLs. It is more understandable, therefore, that general explanations provided about break costs focused on the economic rationale which applied across the board (and applied to CB and NAB) rather than on the precise manner in which CB calculated the break costs under the FRTBLs it retained. Moreover, two of the instances relied on were specifically in the context of FRTBLs within the commercial lending business *after* it had been transferred to NAB, as to which the CNH Loss Basis was irrelevant.

(8) Relatedly, it may well have been the case that some within the Banks approached the explanation of break costs without having in mind the distinction between CB and NAB, and instead thought of the NAB group as a single entity. In other words, they were looking to explain the economic (not legal) basis of break costs across the group. That would explain those occasions when an explanation given did allude to the transfer of risk from CB to NAB, going on to explain that NAB managed its risk in the market, without expressly referring to the CNHs (see for example Mr Campbell's evidence to the Court of Session in 2015).

While it was legally accurate to identify *CB's* loss as the amount payable to NAB under the CNHs, that would not have been something which a Bank employee – who had in mind trying to justify break costs on an economic basis at the group level – would necessarily have thought of.

(9) Moreover, it is important to distinguish between two things: an explanation of the economic rationale for break costs, and an explanation of the way in which break costs were calculated. The former would not necessarily have involved a discussion of the CNHs, but could properly have focused on the wider market arrangements entered into by NAB.

(10) The distinction between the rationale for break costs and their calculation was made by Ms Anderson, for example, in referring to the reason why the Banks would not reveal to customers details of "third party arrangements" in the Standard Conditions: see [24] of the Appendix for the details.

(11) Much of the claimants' criticism fails to draw this distinction. In some of the instances relied on by the claimants it is likely that it was the former that was being explained. For example, in the response to Mr Blanksby's customer in an email of 8 September 2011, reference was made to the fact that CB "makes funds available to [the customer] on the basis that he repays interest and capital in accordance with the timetable set out in the tailored business loan. In order to be able to offer the fixed rate product the Bank enters into contracts with third parties in the market whereby the market makes funds available to the Bank on particular days in order that we can lend funds to the customer. The Bank therefore agrees to make payments to the market on specific dates on the basis that the customer adheres to the repayment timetable in the tailored business loan".

(12) A further possible explanation for some of the lack of clarity in various of the responses relied on by the claimants is that, on occasion, the Banks' employees failed to draw a clear distinction between these two things.

B3(d). Issues particular to Farol's claim in misrepresentation

(1) Whether Farol understood the Break Costs Representations to have been made

280. Mr Vellacott's evidence was that whenever he was given indications by CB as to the break costs payable, he believed that the amounts had been properly calculated, and that Farol paid the break costs because he believed CB was entitled to charge Farol that amount. Mr Jones said that he assumed that the figures given by CB were the right figures.

281. The Banks contend that it is impossible, on this evidence, to conclude that the Break Costs Representations were actively present to the mind of Farol. In relation to the simple representation to the effect that the sums indicated by CB were the break costs due (i.e. contractually due) on early termination, it seems

to me self-evident that, although Mr Vellacott and Mr Jones spoke in terms of their belief or assumption, that belief or assumption was induced by the simple form of representation I have found was made.

(2) Reliance, causation and loss

282. Farol claims three heads of loss.

(1) First, it contends that in reliance on the Break Costs Representations made in March 2011, it decided not to terminate its FRTBL and instead continued to make payments under the FRTBL from then until 25 November 2013. It claims that it has therefore lost the difference between the interest paid under the FRTBL and interest it would have paid under a variable rate loan (based on LIBOR) from 16 March 2011 until 25 November 2013.

(2) Second, it contends that in reliance on the Break Costs Representations it paid the break costs claimed by CB on 25 November 2015 in the sum of £242,400.

(3) Third, it claims as consequential loss the profits it says that it lost as a result of the two-year delay in the redevelopment of its head office at Milton Common, which it estimates at £4 million.

283. As to the first head of loss, Farol was not looking to repay the FRTBL in March 2011. It was instead looking to increase its borrowing so as to finance its new head office development. Mr Vellacott accepted in cross-examination that he had not asked for indicative break costs, and that "We weren't actually at that point looking to break [the FRTBL]. We wanted every scenario to understand that the new loan was commercially correct." Accordingly, I find the Farol did not refrain from terminating the FRTBL in reliance on the Break Costs Representations.

284. As to the second head of loss, the last of the pleaded Break Costs Representations made to Farol was in an email dated 7 November 2013. Although this was some two weeks before its account was debited with break costs, and the final amount was slightly different, I accept that Farol's decision to pay the break costs (or, more accurately, to permit CB to debit the break costs from its account) was as a result of the indication given (most recently on 7 November 2013) as to the break costs which were due.

285. The Banks contend that, by this stage, Farol did not believe that CB was entitled to charge break costs, and paid them under protest. Alternatively, it had taken advice from a solicitor (Jamie Champkin) on the issue. Either way, it had not relied on any Break Costs Representations.

286. Farol had indeed sought the assistance of Mr Champkin and, through him, threatened to bring a claim against CB, notably in an email of 7 November 2013 from Mr Champkin to Mr Poole. The threatened claim, however, arose out of the events of 2011: Farol claimed that it was pressured into agreeing to the increase in Margin and the change in the frequency of payments under the

FRTBL. It was on the basis of those events that Mr Champkin asserted that the FRTBL was a voidable agreement.

287. There is no suggestion in Mr Champkin's email that Farol disputed CB's entitlement under the agreement (assuming it was not avoided) to charge break costs. Mr Champkin simply sought to use the threat of a claim to persuade CB to forego the break costs. He wrote: "It has occurred to my clients that if for example Clydesdale was to now forego any claim to entitlement to or to charge any break fee at redemption through Lloyds Bank, then that would undoubtedly be given due consideration by my clients in determining if how and when to proceed with any claim against Clydesdale."

288. The Banks contend that Mr Vellacott admitted in cross-examination that he thought there was a "big question mark" over CB's entitlement to charge break costs. His evidence, however, was that this was because he thought the agreement was voidable as a result of the events of 2011. Such a belief is not inconsistent with paying the break costs in reliance on the Break Costs Representations.

289. Farol's third head of loss, its claim for consequential loss, is as follows. It claims that it had planned to build its new head office at its existing site, Milton Common in Oxfordshire. Having requested funding from CB in October 2010, and obtained planning permission in November 2011, the building work would have started in the winter of 2011. By reason of the Break Costs Representations in March 2011, however, it was unable to begin building work until November 2013, and claims the additional net profit it says it would have earned had it had the benefit of the increased office capacity sooner.

290. Much of Mr Vellacott's complaints centred around the contention that Farol was unable to refinance in 2011 because CB had delayed in providing a response to the initial request for funding the development of Milton Common. This is irrelevant, however, because that delay is not said to give rise to any cause of action.

291. The foundation of the pleaded claim for consequential loss is that but for the Break Costs Representations made in March 2011, Farol would have been able to obtain the further funding necessary to carry out the redevelopment at an earlier stage than it was in fact carried out.

292. The claim fails, in my judgment, because of the lack of evidence that the Break Costs Representations were causative of the fact that Farol did not obtain that funding in 2011 (or at any time between then and 2013).

293. On 16 March 2011, CB did provide indicative terms for two options to provide Farol with a further £1.5 million to assist with anticipated costs of developing Milton Common. Neither of these options would have required Farol to pay any break costs in relation to the FRTBL.

294. Mr Jones' evidence in cross-examination was that, although Farol did make contact with other banks around this time with a view to refinancing, these did

not go very far because of the lack of appetite among banks at that time for taking on new customers, following the financial crisis.

295. It was put to him that, as at May 2011, Farol thought it was still worthwhile speaking to other banks. He said that Farol was "so cross" (in relation to the terms offered on 16 March), and that it thought it was "stuck", because of the break costs and because at that time banks were rebuilding their balance sheets. He expanded on the latter point:

> "And so we were going out and talking to banks, but there was very little appetite at that point from banks to take on new customers. All they were doing, from my recollection of that period of time, was all they were doing was hankering down and building their balance sheets up."

296. As Mr Jones himself pointed out, if Farol was going to refinance with another bank, it would need to borrow sufficient funds to repay the whole loan, not merely the break costs. In response to questioning from me, he confirmed that Farol had had preliminary discussions with other banks, but these did not get anywhere because the financial market was such that they were not able to lend to Farol at that time.

297. There is nothing in the contemporaneous documents to show that it was the existence of the break costs that was an impediment to refinancing in 2011. I asked Mr Jones whether his conversations with other banks got so far as distinguishing between (a) asking another bank to lend sufficient funds to repay the loan, and (b) asking that other bank to lend enough so as to be able to repay the loan plus the break costs. He said:

> A. I don't remember. I can't remember. I don't know if we were just talking generally about moving banks. I imagine we were talking about there was a break cost. Whether we got on to -- I don't remember any numbers from any of these guys saying, yeah we'll lend you the money, we'll lend you the money to break the costs and here's the cost of doing so.
>
> MR JUSTICE ZACAROLI: And you didn't get that far because?
>
> A. As I say I don't think -- my recollection was that I don't think there was a massive appetite."

298. It is for Farol to prove the causal link between the Break Costs Representations and its inability to obtain refinancing from another lender. I find that it has failed to do so.

299. That conclusion is reinforced by the fact that when Farol did in fact refinance, in 2013, it obtained a loan from Lloyds Bank which was sufficient to cover both the loan and the break costs. If (contrary to Mr Jones' evidence quoted above) the reason Farol did not obtain refinancing in 2011 was because it did not make serious efforts to do so, there was no evidence to suggest that – had it made such efforts (and there were banks with an appetite to lend at all) – it could not have

obtained funding on the same basis that it did in 2013, i.e. sufficient to repay the break costs.

300. The claimants had no answer to these points. In their written closing submissions they refer to the fact that Farol's management were highly regarded by CB and to Farol's dissatisfaction with the terms offered by CB for the new lending, in particular their anger at CB's insistence on increasing the Margin on the FRTBL to 1%, and the high indicative Margin on the proposed new lending. They then assert that "But for the break costs, and the underhand tactics used to tie Farol in to the restructured FRTBL, Farol would almost certainly have moved to another bank in Spring 2011" and that "it is significantly more probable than not that Farol would then have obtained funding for the Milton Common development with another bank if it had made serious attempts to do so".

301. The reference to the "underhand" tactics of CB has nothing to do with the pleaded case that Farol's consequential losses were caused by the Break Costs Representations, and the assertion that they were so caused fails to engage with the evidence I have referred to above.

302. The above is sufficient to reject Farol's consequential loss claim: the essential springboard for the claim, that it could not refinance in 2011 because of the break costs, is not made out. It is unnecessary to address, therefore, the numerous other reasons advanced in the Banks' closing written submissions for rejecting the claim.

303. It is also unnecessary to determine what the quantum of the claim would have been. Farol claims two heads of loss: (1) the loss of rental charged by Farol (which is a holding company) to Farol Limited, which occupied the Milton Common site and operated the business from it; and (2) the profits that Farol lost, as shareholder in Farol Limited, by reason of the delay.

304. The experts agreed that the quantum of the first head of loss was £230,351, being the increased rent that was paid by Farol Limited to Farol, upon completion of the redevelopment, on the assumption that it had increased two years earlier. The Banks' expert caveated that agreement, on the basis that he had assumed that the rent was charged on an arms' length basis and at market value. The Banks contend (and there was no answer to this point) that there was no lease agreement between Farol and Farol Limited, and that rent was set by the common directors of the two companies as part of a more complex set of intercompany arrangements. On the basis of the very limited evidence and argument on this point, I would if necessary, however, have concluded that the most appropriate measure of Farol's loss in respect of the lost rental was the rent that was actually paid by Farol Limited, irrespective of whether this was a market rent.

305. As to the second head of loss, the claimants' forensic accounting expert, Mr Cameron Williams, attempted to calculate the lost profits of Farol (as shareholder in Farol Limited) by reference to the lost profits of Farol Limited. Leaving aside the question whether this was purely reflective loss, and thus irrecoverable (an issue of law which it is unnecessary to determine given that is

academic), he did this by adopting a "drag-back" approach, which was to assume that everything that happened after the two-year period would have happened two years earlier.

306. He acknowledged, however, that there were serious limitations to this approach, because many of the events which happened in the real world may – for other reasons – have not happened during the previous two years. In a supplemental report he said that based on the information that he had been provided with, he was unable to tell which of the events ought in any event to be excluded from the drag-back analysis. He recognised that, on the basis of the information he had, he could not say whether any of the events would not in fact have occurred earlier for other reasons. That is reflected in his overall conclusion, that the quantum of the loss on this drag-back approach was within a range of £0 to £9 million.

307. There was no factual investigation at trial of matters which would need to be explored in order to determine which events in the real world would or would not have occurred on the drag-back approach.

308. The claimants contend that the court should just do its best, citing cases such as *Marathon Asset Management LLP v Seddon* [2017] EWHC 300 (Comm) at §164-165, for the proposition that the court will attempt so far as reasonably possible to assess loss even where precise calculation is impossible. They contend that it would be appropriate to award £4 million.

309. It might have been appropriate to try to reach an assessment of loss on the basis of such evidence as was available, if it was common ground among the experts that at least *some* loss could be established. That, however, is not the case. As I have noted, the claimants' own expert acknowledged that the right answer might be £0. In my judgment, the missing piece of the jigsaw in this case is evidence that the delay *caused* any loss at all. Without such evidence, I would if necessary have determined that Farol had failed to establish this aspect of its claim.

B3(e). Issues particular to Janhill's claim in misrepresentation

(1) Whether Janhill understood the Break Costs Representations to have been made

310. Mr Sutton's evidence was that when Janhill was first quoted break costs, in March 2011, "we believed that the Bank was entitled to charge them". Robert Gittins' evidence in relation to the break costs quoted in March 2011 was that, although he was staggered at the size of the break costs, "as the Bank was quoting them, we presumed they were giving us the right figures. We believed we had to pay those sums because the Bank who knew how to calculate them had told us that is what the costs were." When discussing the later payment of break costs, he said "We paid these break costs because the Bank told us this was what we had to pay". As with Farol's case (see above), I consider that this clearly establishes that Janhill understood the simple form of Break Costs Representation to have been made at the time.

(2) Causation and loss

311. There are two parts to Janhill's case on causation and loss. First, it contends that in reliance on the representations it paid the break costs of £322,645 when terminating the loans early.

312. The Banks contend that, by the time that Janhill came to pay the break costs in 2013 and 2014 it had already investigated possible claims against CB and was aware that it had grounds to challenge CB's entitlement to charge break costs. Accordingly, it cannot have relied on the Break Costs Representations.

313. It is true that Janhill had, in May 2012, actively considered CB's entitlement to charge break costs. Mr Sutton emailed Mark Moor (from Treasury Solutions) on 28 May 2012, saying "With the uncertainty over Yorkshire Bank we feel we should more fully understand our position re breakages". He asked for their current position "…and some advice as to how we can track it ourselves over the coming months."

314. Mr Moor replied on 28 May 2012, enclosing spreadsheets for each of the FRTBLs showing how the break costs were calculated. He explained: "…it takes the present value of the floating rate and compares this to the present value of the fixed rate for each period until the end of the term. The difference is the break cost or gain. Rates are taken off the GBP yield curve which gives rates from 1 month to 60 years, these rates change on a daily basis with market factors such as political and economic news affecting the curve plus [o]f course any movements or potential movements in Interest/LIBOR rates."

315. On 29 May 2012, Mr Sutton asked CB for a copy of the Standard Conditions, which he received the following day. In cross-examination, he said that by this stage Janhill was concerned at the way CB was charging break costs and wanted to see the contractual basis for it. He did not remember whether Janhill sought advice on this from their solicitors.

316. In the section of this judgment dealing with limitation in respect of Janhill's claim, I refer to documents from a year later (in 2013) which demonstrate that Janhill was on notice of matters sufficient to demonstrate a worthwhile claim in negligent misrepresentation. As I record there, the reason Janhill did not pursue investigations at that time was a reluctance to put its head "above the parapet".

317. In my judgment, these matters – although sufficient to cause Janhill's negligent misrepresentation claim to be time-barred – are not enough to negate the conclusion that in paying break costs in 2013 and 2014 it was relying on having been told by CB that the sums indicated were due. But for the Break Costs Representations, it is difficult to see why Janhill would have paid the amounts that it did.

318. Second, Janhill contends that in reliance on the Break Costs Representations it decided not to terminate its FRTBLs on 1 March 2011, and continued to make fixed rate payments under each of them until it was repaid (on the dates referred to above). It contends that but for the representation made in March 2011 it would have refinanced by entering into a variable rate loan with either CB or another lender.

319. The evidence in support is principally a passage in Mr Sutton's witness statement, where he said that Janhill was unable either to terminate the FRTBLs in March 2011 or to refinance with another bank "given the size of the break costs".

320. I reject that evidence. After Mr Sutton had been taken in cross-examination through a number of documents which revealed the financial problems facing Janhill in March 2011, which he accepted he had not had in mind when drafting that particular part of his witness statement, he agreed that there was no realistic prospect either of repaying the FRTBLs or of refinancing with another bank at that time, irrespective of the level of break costs.

321. Janhill's portfolio was based in the Macclesfield area. The outlook for the commercial property sector there (as in much of the country) had significantly worsened since the global financial crisis in 2008-2009. Mr Sutton accepted that there had been an adverse impact on asset values of commercial properties, such that there were real concerns over Janhill's compliance with the loan to value ("LTV") ratio covenants across the FRTBLs (being 70% of the value of Janhill's property portfolio).

322. As recorded in the minutes of a meeting of Janhill's directors on 8 March 2011, CB had expressed concerns over breach of the LTV covenants and had asked for cash flow forecasts for the remainder of the year. Due to a number of factors, Janhill's cash flow was under serious pressure. These included that one of its largest tenants, Eazyfone (providing rent of £12,000 per month) had given notice to quit, and capital repayments on the loans were due to commence (£1,000 per month from July 2011 and £8,000 per month from October 2012).

323. So far as refinancing with another bank was concerned, the general outlook at the time was bleak. Mr Sutton agreed with the evidence of the Banks' expert, Mr David Beaumont, that lending to real estate businesses was severely curtailed from 2008-2009 onwards. The contemporaneous evidence demonstrates that the only bank with whom Janhill had even preliminary discussions at that time was the Cooperative Bank ("the Co-op"). The basis on which it might lend was indicated in an email from the Co-op on 18 March 2011. The proposal included an LTV of no higher than 65%, full repayment within 15 years, and a Margin of between 2.5% and 3%. Mr Sutton's reaction at the time is evidenced by his reply to Mr Asplin on 5 April 2011:

> "Having dug into our current position and repayment schedules I see no way of us improving our cash flow situation with a full repayment period of 15 years. We currently have 15-year agreements with bullet repayments on completion. This along with increased interest rates would put us in a tougher place than remaining where we are."

324. In addition, the LTV ratio offered by the Co-op was tighter than that in the FRTBLs. The possibility of refinancing with the Co-op was not pursued any further. Evidence as to Janhill's actual financial position and attempts at refinancing was put in cross-examination to Janhill's own lending expert, James Penman. He had not seen these in preparing his report. As a result of seeing

them he was unable to support the proposition that Janhill would have been able to refinance at all in 2011.

325. I find that there was no realistic possibility of refinancing with the Co-op or any other lender in March 2011, whether or not the amount to be refinanced included the costs of breaking the FRTBLs. Accordingly, I reject the contention that Janhill relied on the Break Costs Representation made in March 2011 by refraining from terminating the FRTBLs and refinancing.

326. Janhill also claims substantial consequential losses in the following circumstances. On 21 March 2014, Janhill sold a property known as The Green, or Belgreen House, ("The Green") to a limited liability partnership operated by Mr Sutton and his wife called Hollins Property LLP ("Hollins"), for £900,000. On 19 September 2014, Janhill sold property at 1, 3, 3a and 5 Mill Lane and 2, 4, and 6 Broken Banks ("Mill Lane/Broken Banks") to a company owned by David and Carolyn Gittins called Ceda Properties (North West) Ltd ("Ceda") for £565,000.

327. The consequential losses claimed (in an amount of approximately £2 million) include the loss of rental income from the two properties, the capital loss arising on their forced sale at an undervalue and the loss of investment opportunities.

328. Janhill contends that these properties were sold to fund the break costs, and that the properties would not otherwise have been sold. It is not alleged that the sales themselves were at an undervalue.

329. I reject these contentions for the following reasons.

330. First, by 2014, CB had made its position clear: it was not prepared to extend the FRTBLs beyond their current terms. In October 2014, two of the FRTBLs (with residual balances of £330,000 and £766,000) and the further variable rate loan of £360,000 were due to expire. Unless Janhill could refinance the FRTBLs, therefore, it needed to find £1,456,000 by October 2014. Since that would have involved repayment at maturity, it would not have incurred any break costs. That capital sum was a far more significant incentive to selling properties in 2014 than the need to pay break costs.

331. Second, on 1 April 2013 a formal valuation of Janhill's portfolio was undertaken, which revealed an LTV ratio of 79.69%, and thus a breach of the LTV covenant. CB issued a reservation of rights letter. This meant that there was no realistic prospect of refinancing the portfolio with another bank, irrespective of whether the amount to be refinanced included break costs. I have already referred above to the preliminary discussions with the Co-op. In October 2012, Janhill approached HSBC, but (according to an email from Mr Sutton to Janhill's accountants on 22 October 2012) "they have very little appetite for us". Mr Sutton said that the LTV they required was similar to the Co-op, or even tighter. Approaches appear to have been made on behalf of Janhill by a Paul Smith of Duff and Phelps in about June 2013, but he reported back that "I have appetite from Nationwide and Shawbrook thus far in the 55 to 65% space. Barclays is a no and Santander response awaited". Janhill also approached Handelsbanken, who declined to deal with them.

332. Third, as Mr Sutton accepted, as the maturity dates of the FRTBLs approached, the issue of break costs would either disappear altogether or be significantly reduced (as the amount of break costs is heavily dependent on the time left to expiry of the loan). It was for Janhill to choose whether to break any of the loans early.

333. Fourth, it is clear from email exchanges between Janhill and CB in late 2013 and early 2014 that Janhill's decision to break some of the loans early in order to generate positive cash flow, was for reasons other than to pay break costs and was made against advice to the contrary from CB, who warned Janhill of the risks of doing so:

(1) On 21 November 2013, Robert Gittins sent to Philip Cooper, a manager in NAB's commercial real estate team, points "relating to our exit strategy for loans expiring in the third quarter of 2014". He said:

> "We would propose breaking TBL IFX 09871 and partially repaying this loan leaving the balance on interest only (to be cleared at the sale of the next property- either Mill Lane or 1-3 Charter Way in early 2014). Breaking this loan actually has a positive effect on cash flow as can be seen from the attached document (Cash flow after sale of Mill Bank) … The planned sales to directors and shareholders will minimize any effect on cash flow as salaries and dividends can be adjusted to reflect the rental incomes received by the purchaser. We have letters of mortgage approval for these sales which we can forward if required."

(2) On 3 January 2014, Robert Gittins emailed Mr Cooper:

> "We have been thinking of ways to achieve an earlier exit from our loans with NAB and would like your opinion on the following proposal. We are still progressing with the sale of Mill Lane to David Gittins at 650k and Mike and Claire look like they are in a position to purchase The Green (Belgreen House) at the valuation of 900k, rather than Charter Way, increasing the receipts from the sales from £1,150,000 to £1,450,000. We are considering the possibility of breaking the remaining loans (the following calculations are based on the break costs supplied by you in October 2013 so should be a worst-case scenario) and utilising the positive effect this has on cash flow to raise deposits to facilitate the refinance of some of the remaining properties in the portfolio. Although breakage will obviously have a negative effect on the LTV in the short term, we will be able to achieve a phased reduction in the borrowings and reduce the LTV to a level where the remaining portfolio can be refinanced with another lender."

(3) Mr Cooper's response on 6 January 2014 was as follows:

> "As you can appreciate breaking the fixes will incur substantial costs and I do think you should take legal advice

> on that matter before taking any action. I have no idea if [sic] interest rates will go over the next two years, but I worry that a rise in rates could see you as a company coming back to the Bank saying that you paid a far higher breakage cost than if you had held on. I am not saying that would happen, but I need to play devil's advocate to put the point across."

(4) Those concerns were reiterated in a further email from Mr Cooper on 7 February 2014:

> "There is one area that gives us some concerns and that's when you break hedges and pay fees. Normally its something that only happens in extreme circumstances, but in this case it helps you out and we in return get a reduction in the debt term. We would strongly recommend that you take professional advice from both your accountants and solicitors and then confirm to us that you have done so and that you are still happy to go ahead."

(5) Robert Gittins subsequently confirmed (by email of 30 May 2014) that Janhill had discussed the implications of breaking the fixed rate loans with their solicitors and accountants.

(6) In cross-examination, Mr Sutton accepted that the strategy at the time had been to sell sufficient properties to make the portfolio "re-bankable".

334. This demonstrates in my view that The Green and Mill Lane/Broken Banks were sold for reasons other than the need to fund the break costs. I note in any event that the amount raised from the sale of the properties was in excess of £1.4m, whereas break costs were in the region of only £320k. There was clearly no need to sell both of them.

335. Fifth, so far as Mill Lane/Broken Banks is concerned, it had long been Janhill's intention to sell the property. That had been considered in September 2011, in order to repay the overdraft facility and the £360,000 variable rate loan. At that time, Robert Gittins told Dean Smith: "As well as providing a solution to our immediate funding requirements the sale of Mill Lane would rationalise the Janhill portfolio, which, with the exception of 9 Chester Rd. would become exclusively commercial in its make up and, we believe, would prove to be a much more marketable proposition in the future."

336. Although this was not pursued at that time, the reason was (as explained by Robert Gittins in an email to Dean Smith) that it would not then generate sufficient funds to guarantee that Janhill met its 70% LTV ratio, and that this was more sensibly achieved over a longer period.

337. Accordingly, had the point arisen for decision I would have rejected Janhill's claim for consequential loss.

<u>B3(f). Issues particular to Uglow's claim in misrepresentation</u>

(1) Whether Uglow understood the Break Costs Representations to have been made

338. Mr Uglow's evidence was that he accepted that CB was charging sums which it had a right to charge, and that "we had to pay those sums to break the lending". He never had any idea how the break costs had been calculated: "I just trusted the bank to charge us the right amounts."

339. As with Farol and Janhill, I consider that this clearly establishes that Uglow understood the simple form of Break Costs Representation to have been made at the time.

(2) Causation and loss

340. Uglow's case is that in reliance on the Break Costs Representations, it decided not to terminate the FRTBLs on 15 October 2013. It claims that but for the representations it would have refinanced by entering into a variable rate loan with Lloyds Bank or Barclays Bank with the same margin (2%) over LIBOR. Accordingly, it claims loss measured by the difference between the interest paid under the FRTBLs, and the interest it would have paid under a variable rate loan from 15 October 2013 to 12 February 2015, being £66,582.

341. As the Banks pointed out, there is no evidence that Uglow was looking to refinance in October 2013 and, while it had investigated refinancing with Lloyds Bank in February 2013, it had not then asked CB to provide an indication of break costs. Moreover, at that time, it was seeking indicative rates from Lloyds Bank in connection with the possibility of switching an existing variable rate loan onto a fixed rate. In the autumn of 2014, Uglow was again in contact with Lloyds Bank about refinancing. Lloyds Bank provided a paper comparing floating and fixed rates. It described a risk management strategy as being about providing a degree of certainty. When Mr Uglow was reminded of this, he agreed that it neatly summarised why Uglow was keen to enter into another fixed rate loan: "…that report that got commissioned by Lloyds highlighted to us that any rise in interest rates was gonna be fairly catastrophic to our business." When Uglow did refinance with Lloyds in 2015, it did so on fixed rate terms. In light of these matters, I find that – if no Break Costs Representations had been made, and Uglow had refinanced earlier than it did so – it would not have refinanced by entering into a variable rate loan. Had it been necessary to do so, I would have found that its claim for loss under this head failed.

342. In addition, Uglow claims the amount of the break costs it paid (£3,710) as loss arising from the Break Costs Representations. If Uglow's claims had been made out, then I find that the amount of the break costs actually paid would be recoverable as damages.

<u>B3(g). Issues particular to Gaston's claim in misrepresentation</u>

(1) Whether Gaston understood the Break Costs Representations to have been made

343. Mr Gaston's evidence was that "we did not know how the break costs were calculated and every time the bank gave us figures, we believed those were the

amounts we had to pay to break the loan then. We assumed that they had done the calculation correctly because the bank knew how to calculate the break costs and we didn't."

344. As with the other claimants, I consider that this is sufficient to show that the simple form of Break Costs Representation was understood by Gaston to have been made.

(2) Causation and loss

345. Gaston's claim for loss is limited to the cost to it of funding the payment of the break costs which it paid in the sum of £186,000. In order to do so, it entered into a swap agreement with Lloyds Bank. There is an obvious error in Gaston's pleading in this respect, but the Banks clearly understood the claim to be based on (1) the present value of Gaston's liability to Lloyds under the swap, less (2) the difference (a sum of only £250) between the amount received from Lloyds under the swap and the amount paid by Gaston to CB as break costs.

346. The parties' experts are agreed that the present value of Gaston's liabilities under the Lloyds swap was £229,639 as at the trade date, and £173,588 at the date of its termination.

347. In principle, had Gaston's claim been made out, I would have found that its loss in funding the break costs which it paid was recoverable. I received no submissions, however, on whether that cost was represented by the present value of the Lloyds swap on the trade date, its termination date or the date of the experts' reports, and I make no findings in this respect.

B4. The alternative claims in contract and unjust enrichment

348. The alternative bases of the claimants' case in relation to break costs involve mostly arguments of law. Since these do not arise on the basis of my primary conclusions, I will deal with them only shortly.

B4(a). Unjust enrichment

349. The claimants claim recovery of the break costs on the grounds of unjust enrichment either against CB or NAB.

350. The elements of a claim in unjust enrichment are well known. Each claimant must establish: (1) that the defendant has been enriched; (2) that the enrichment was at the claimant's expense; and (3) that there existed an "unjust" factor.

351. As against CB (in relation to all the payments of break costs other than those made by Janhill after the Morph Transaction), on the assumption that CB was not entitled to charge the break costs paid by the claimant, the first two elements of the claim are clearly made out: CB was enriched (by the amount of the wrongly paid break costs), at the claimant's expense (because it was the claimant that paid them).

352. As to the unjust factor, the claimants contend that this is also clearly made out, on the basis that they acted under the mistaken belief that CB was entitled to

charge the break costs. Mistake – whether as to fact or law – is a well-established unjust factor.

353. CB defends the claim on two bases. First, there was no unjust factor because the claimants did not apply their minds to the question of whether CB was entitled to charge the break costs and, in those circumstances, they cannot make out that they were acting under a relevant mistake. Second, CB changed its position by paying the same amount it received from the claimant by way of break costs, to NAB under the CNH.

354. As to the first defence, in *Pitt v Holt* [2013] 2 AC 108, Lord Walker (at §108) contrasted mistaken conscious beliefs and mistaken tacit assumptions, on the one hand, from mere causative ignorance and held that the former is, but the latter is not, sufficient to found a claim in unjust enrichment. He commented, however, that the court "should not shrink from drawing the inference of conscious belief or tacit assumption when there is evidence to support such an inference".

355. I have no doubt that in this case, each of the claimants at least tacitly assumed that CB was entitled to charge the break costs that it claimed. Since the Banks alone knew how it had determined the break costs which it claimed were due, it is not surprising that the claimants trusted that the Banks had got it right. That is so even in the case of claimants who were actively investigating whether CB was entitled to charge the break costs they did. I am satisfied that – at the time – they paid them because they believed that CB was entitled to them.

356. CB's change of position defence is that: (1) it entered into a CNH, upon the relevant claimant entering into a FRTBL; (2) it terminated the CNH upon termination of the FRTBL; and (3) it paid to NAB sums equivalent to the break costs charged to the claimants.

357. It relies on *Banca Intesa Sanpaolo SpA v Comune di Venezia* [2023] Bus LR 384; [2024] Bus LR 228 (overturned in part on appeal, but not in relation to this aspect: [2023] EWCA Civ 1482). In that case, Comune di Venezia (Venice) entered into interest rate swap transactions with banks. At the same time the banks entered into back-to-back hedging transactions. The swap transactions between Venice and the banks were held not to be valid or binding. In defence to an action by Venice against the banks in restitution for recovery of the amounts paid under the swap transactions to date, the banks relied on the defence of change of position, consisting of the entry into and performance of obligations under the back-to-back swaps.

358. Foxton J quoted, at §412, the summary of the defence of change of position provided by Lord Burrows in *A Restatement of the English Law of Unjust Enrichment* (2012), at p.117:

> "(1) The defendant has a defence to the extent that— (a) the defendant's position has changed as a consequence of, or in anticipatory reliance on, obtaining the benefit, and (b) the change is such that the defendant would be worse off by making

> restitution than if the defendant had not obtained, or relied in anticipation on obtaining, the benefit.
>
> (2) But the defendant does not have this defence if— (a) the change of position— (i) was made in bad faith, or (ii) involved significant criminal illegality, or (iii) constituted the taking a risk with loaned money, or (b) the weight to be attached to the unjust factor is greater than that to be attached to the change of position (as, for example, where the unjust factor is the unlawful obtaining of a benefit by a public authority)."

359. He concluded, at §413:

> "I can find nothing in that summary which would deny the Banks a change of position case where they had entered into back-to-back transactions by which they assumed (conditional) payment obligations in anticipatory reliance of receiving essentially the same payments from Venice. Indeed, the routine and objectively foreseeable nature of that anticipatory reliance, and its "back-to-back" nature (with the Banks' anticipatory reliance essentially mirroring the anticipated receipts) would seem to make this a paradigm case for the availability of the defence of change of position."

360. This question has to be addressed on the assumption that CB was not entitled to recover, as break costs from a customer, the amount that CB was required to pay NAB on close-out of the CNH. If that is right, it is counter-intuitive that CB can nevertheless defend a claim by a customer to recover the break costs wrongly claimed from it, on the grounds that CB has changed its position by paying that amount to NAB.

361. I consider, had it been necessary to resolve this issue, that the answer to that conundrum lies in the following distinction from the position in the *Banca Intesa Sanpaolo* case. There, the bank assumed conditional payment obligations in anticipatory reliance on receipt of sums which – assuming the contract with Venice was valid – it was actually entitled to receive from Venice. In contrast, in this case, while it may be said that CB assumed payment obligations under the CNH in anticipatory reliance on the receipt of the sums properly due from the customer under the FRTBL, it was objectively never entitled to receive the break costs upon termination of the FRTBL. Accordingly, it cannot be heard to say that it entered into the CNH in anticipatory reliance on receiving those break costs.

362. It is therefore unnecessary to consider the claimants' alternative case against NAB, on the basis that the FRTBL and CNH were co-ordinated transactions.

363. In relation to Janhill's claim, where the break costs were paid after the assignment of Janhill's FRTBLs to NAB pursuant to the Morph Transaction, CB asserts a defence of ministerial receipt. This operates either as a defence to the claim, or as a denial that the agent has been enriched: see Goff & Jones, 10th

ed., §28-03; *Test Claimants in the FII Group Litigation v HMRC* [2021] 1 WLR 4354, per Lord Reed and Lord Hodge at §172.

364. Clause 6.1 of the Morph Transaction provided that, from the Effective Time, CB held all amounts received by it under (among other things) the FRTBLs that had been assigned to NAB, on trust for NAB. It then obliged CB to pay all such amounts to NAB, and prohibited it in the meantime from transferring those funds to anyone else or using them for any other purpose. The obligation to pay the sums over was "subject to and in accordance with the Servicing Agreement", but neither party identified anything relevant in that agreement to the analysis.

365. Given that CB was, following the Morph Transaction, essentially acting as a conduit for the collection of amounts due under the relevant FRTBLs on behalf of NAB, it has a good defence in ministerial receipt.

366. While (as I understood it) NAB supports CB's defence to Janhill's claim against CB, it also disputes Janhill's claim against it (NAB). It does so on the basis that, notwithstanding the Morph Transaction, CB remained the lender of record and Janhill's contractual counterparty, in receiving the break costs CB acted on its own behalf rather than as NAB's agent, and this was not affected by the fact that it held the money that it received on trust for NAB.

367. Ms Bennett (who argued this part of the case for NAB) relied on the judgment of Lord Reed in *Investment Trust Companies v Revenue & Customs Comrs* [2017] UKSC 29; [2018] 1 AC 305, per Lord Reed at §72. He was there considering the possibility that a payment to an agent, who was liable to account for it to its principal, could give rise to a direct claim in unjust enrichment against the principal. Ms Bennett submitted that such a claim was precluded here because it only operated in cases of agency. I disagree. That case involved payments made by the claimants to managers, and a subsequent payment by managers to HMRC. The reasons given by Lord Reed as to why the claim failed in that case included the fact that there was no challenge to the judge's rejection of a connection between the two payments, and the fact that the payments to the managers formed part of their general assets, so there was no question of being able to trace the payments into the hands of the commissioners, so as to regard them as having benefitted from the initial payments.

368. In this case, the fact that CB could do nothing with the break costs received from customers, other than hold them pending payment to NAB, and in the meantime held them on trust for NAB, establishes in my view that there was a direct transfer of value from the claimants to NAB sufficient to give rise to a claim in unjust enrichment.

<u>B4(b). Breach of contract</u>

369. The claimants plead that it was an implied term of their loan agreement that, in the event of early repayment, CB would not demand, or require payment of, or provide an indication to the claimants of, or charge the claimants, a sum by way of break costs to which it was not contractually entitled.

370. CB has denied this claim throughout, on the basis that it is not possible to imply a term that CB would only make demand for break costs to which it was contractually entitled. It emerged during the trial, however, that CB did not dispute that its entitlement – pursuant to clause 18.2 of the Standard Conditions – to debit a customer's account with any amount due and payable from the customer was (as is self-evident) limited to such amounts as are in fact due and payable. Accordingly, it would be a breach of mandate for CB to deduct an amount that was not contractually due.

371. CB disputed, however, that the claimants had pleaded a breach of mandate claim. It seemed to me that the broad plea of implied term (including that CB was not entitled to "charge the claimants" a sum to which it was not entitled) was sufficient to include a breach of mandate claim. The claimants nevertheless served an amended pleading, to plead an express claim in breach of mandate. CB did not formally object, and I allowed the amendment to be made. CB served an amended defence on 12 January 2024, in which it: (1) objected that the relevant accounts had not been identified so the claim was inadequately particularised; (2) denied that there was any breach of mandate because CB was contractually entitled to charge break costs in the way that it did; and (3) denied that a breach of mandate would entitle the claimants to any relief other than nominal damages.

372. I have received no submissions on the points raised in CB's amended pleading. Accordingly, and as this point does not actually arise for decision, I say nothing more than that where – as appears to be the case in relation to each of the claimants – the break costs were deducted from a customer's account by CB, if CB was not entitled to charge break costs in that amount, then there would be a claim to the return of the overpaid sums, on the basis of breach of mandate.

373. That leaves the claimants' alternative claim that it was a breach of an implied term in the contract for CB to provide indications of break costs based on an incorrect interpretation of the contract. This raises a potentially novel point of law, as to the circumstances in which there may be implied into a contract an obligation to render accurate invoices: see the case-law summarised by Foxton J in *Rolls-Royce Holdings PLC v Goodrich Corporation* [2023] EWHC 1637 (Comm) at §251-255. The possibility of it being a breach of contract here arises from the fact that the information as to the manner in which break costs were calculated lay wholly within the Banks' knowledge, and – given the time critical nature of break costs – customers had very little time within which to act on the indications given. I need not decide this point, and it is one which is best decided in a case where it actually arises for decision.

PART C: FIXED RATE REPRESENTATIONS

C1. Introduction

374. Each of Farol, Janhill and Uglow claims that they entered into their respective FRTBLs in reliance on the Fixed Rate Representations.

375. Aspects of each claimant's claim need to be addressed separately, particularly the allegations that express representations were made. The core of the claims in respect of the implied Fixed Rate Representations is, however, the same among all claimants: the implied representations said to have been made to each claimant are in precisely the same terms, namely that the quoted Margin was the only profit for CB from the FRTBL, the Fixed Rate quoted was a market rate, and did not include any additional margin or profit for CB; and largely the same matters are said to have given rise to those implied representations.

376. Before turning to deal with each claimant, therefore, I address the question whether, on an objective basis, the implied Fixed Rate Representations were made as a result of the core matters upon which each of the claimants relies.

377. Before I do so, however, I note that one area of dispute is whether NAB (as opposed to CB) could have any liability to the claimants in respect of the Fixed Rate Representations. As NAB contended, to the extent that any of its employees made statements to the claimants which are said to have constituted one of the representations, then that employee was – to the belief of the claimant – making that statement on behalf of CB. The *representation* was therefore one made by CB.

378. By the end of the trial, it was common ground that, in relation to the claim in negligent misrepresentation, the claimants were not alleging that the individual representors were themselves liable in tort for the statements made, and therefore it was not alleged that NAB was vicariously liable in respect of the representations made by its employees. The claimants maintain, however, that where NAB employees acted fraudulently, they were themselves liable in tort, and NAB could therefore be vicariously liable in fraudulent misrepresentation. For reasons I develop below, I have concluded that the necessary elements of a claim in fraudulent misrepresentation are not made out. It is accordingly unnecessary to consider this issue further. In reviewing the other aspects of the claim, therefore, it is unnecessary to distinguish between statements made by employees of one or other of the Banks.

<u>C1(a). The objective question: would a reasonable representee in the position of the claimants have understood that the implied representations were being made?</u>

379. At the heart of each claimant's case is the contention that the Fixed Rate Representations were implied from the Banks' words and conduct in separating out the overall fixed rate of interest, both in the TBL documentation and throughout the sales process, into the Fixed Rate element and the Margin element.

380. Thus the facility letter defined the interest rate payable under a FRTBL (at clause 7.4) as the aggregate of the applicable "(a) Margin; (b) Fixed Rate; and (c) Mandatory Costs."

381. The distinction between Margin and Fixed Rate was repeated on numerous occasions in communications by the Banks to each claimant. While the Margin was agreed early in the process, customers were told that the Fixed Rate could not be finalised until the agreement was executed, because it was based on

market prices that could change. It would, therefore, be finalised on a booking call (on a recorded line) with a member of the Banks' specialist Treasury Solutions at the end of the process. This was reinforced by the Fixed Rate being referred to, variously, as the "current rate" (on any particular day) or as having moved, either in favour of, or against, the customer.

382. The claimants contend that, having separately identified the Margin and Fixed Rate in this way, the Banks could not thereafter decide not to disclose "the AV margin" without misstating the position: the identified Margin was implicitly represented to be the only income the Banks derived from the FRTBLs. In other words, this was sufficient in itself to give rise to the Fixed Rate Representations.

383. I see the force of this submission, which is essentially a 'half-truth' case: what is not said can be as important as what is said and can render that which is said untrue: see for example, *Oakes v Turquand* (1867) LR 2 HL 325, Lord Chelmsford (at pp. 342-3). By saying something about their income, the Banks were implicitly representing that this was all that there was to say about it. Having fully reflected on this, however, and having regard to the whole of the context in which the representations are said to have been made, I have concluded that the core matters relied on by the claimants would not have caused a reasonable person in the position of the claimants to have understood that the Fixed Rate Representations were being made, for the following reasons.

384. First, it is important to see what customers were expressly told about the Fixed Rate in the standard TBL documentation. Far from it being referred to as a market rate in the facility letter, it was defined as: "in relation to any Loan, the fixed rate of interest <u>agreed by you and us</u> by reference to which interest will be calculated on that Loan". Clause 7.5 provides that "When you make a Request for a Fixed Rate Loan, <u>you must agree</u> with our Treasury Representative the Fixed Rate by reference to which interest will be calculated on that Fixed Rate Loan".

385. The reason for requiring the Fixed Rate to be agreed at the point that a formal Request was made was explained in the standard form of strategy letter provided to customers: because the rates were "based on" market prices that may change instantaneously. This was not saying that the Fixed Rate *was* a market rate.

386. In contrast, where the facility letter identified something which was a market rate – in relation to variable rate loans – it did so expressly; identifying (via a cross-reference to the definition of LIBOR in the Standard Conditions) a Reuters' screen rate at a particular date and time. If, as the claimants contend, the Fixed Rate was an external market rate over which CB had no control, then the obvious thing to do would be to identify the source where such rate could be found.

387. The claimants objected that, in practice, the Fixed Rate was presented as something which a customer could take or leave, rather than something to be *agreed*, in the sense that it was open to negotiation between the customer and CB. Whether or not the Fixed Rate was something which a particular customer could have negotiated, however, is beside the point. The facility letter made it clear that the customer was required to agree to the Fixed Rate offered by CB

in order for the loan to be advanced. It is the contrast between this provision and the identification of a market rate (for example LIBOR) which points to the Fixed Rate being something other than a market rate.

388. The strategy letter, which identified options for "interest rate protection", also contrasted (when illustrating each form of TBL) "the rate you pay" (i.e. the Fixed Rate) with a "market rate" (LIBOR). It stated that certain parameters of the TBL – specifically "protection levels, minimum rates, and trigger rates" – could be changed. The fact that Fixed Rate was used interchangeably in the document with "the protection or 'worst case' rate", suggests that it was one of the parameters that could be changed. The "product profile" for a fixed rate loan facility similarly contrasted the "one fixed interest rate" applied for the term of the loan with "market interest rates". While not determinative, these references reinforce the view that the Fixed Rate was something other than a pure market rate.

389. Second, the possibility of the implied representations having been made must be viewed in the wider context, the most important aspect of which was that TBLs were sold to customers as a "product", from which they could derive a real benefit, and for which in my judgment the reasonable customer would expect to pay something in addition to its lending Margin.

390. The parties relied on the fact that Margin was agreed separately, between the customer and the relationship manager, at an early stage in the process. The claimants rely on this to support the contention that the Fixed Rate was something other than Margin. I agree that the Fixed Rate was something different from the Margin, but do not think this would convey to the reasonable customer that the Fixed Rate therefore contained no element of income for the Banks.

391. The strategy letter came from a manager in the Treasury Solutions team, not from the customer's relationship manager. It was headed "Interest Rate Protection – Tailored Business Loan" and offered "several interest rate solutions". It described the process of "interest rate risk management" as being "converting an unacceptable risk to an acceptable risk", and offered the TBL as a "packaged solution with a known protection (worst-case) interest rate at all times." Customers were referred to the "product profiles" for a full description of the pros and cons.

392. The letter stated that "Rates quoted do not include your Credit Margin", which had typically been agreed with the relationship manager early in the process. Importantly, it was the same whichever of the various TBL products the customer agreed to enter into, including if the customer opted not to take any interest rate protection but entered into a plain floating rate loan.

393. Any reasonable customer would have appreciated that it acquired something of substantial benefit by entering into an interest rate protection product, such as the FRTBL, beyond the benefit it obtained from a floating rate loan. By ensuring certainty as to the interest rate over the term of the loan it acquired immunity from rises in interest rates. The reasonable customer would expect to pay for that benefit. Moreover, they would appreciate that the bank that offered that

product was itself assuming additional burden and risk which it would expect to be paid for.

394. As noted above, a lender offering fixed rate loans will necessarily require specialist staff to market and sell the loans, a treasury department to manage the interest rate risk, and additional capital; none of which is required if the bank is simply offering variable rate loans. If a customer in the position of the claimants did not appreciate this themselves, they would be expected to be working with advisors who would have done so (CB's standard documentation contained numerous reminders to the customer to consult their own financial advisors before entering into a TBL). The TBL documentation – in particular the Break Costs Explanation (see [106] above) – made express reference to at least some of the additional things CB would need to do in order to make a FRTBL available to a customer.

395. Each of the products offered within the umbrella of a TBL was priced either by reference to one or other interest rate (there may be multiple interest rates identified in a collar or cap, for example) or by an interest rate plus a premium. No additional margin was quoted separately for any of them (as I have noted above, it was stated merely that the quoted rates did not include "your Credit Margin"). Accordingly, I consider that the reasonable customer would have expected the quoted rate and/or rate and premium to have contained an element of additional income for the Banks.

396. In my judgment, therefore, what was conveyed to the reasonable customer, in identifying the specific fixed rates that applied to one or other of the TBL products separately from the Margin, was no more than that the rates were those which CB was prepared to offer the customer for that product.

397. This point has greater force where a customer (such as Janhill or Uglow) was offered a variety of different TBL products, so that they could see that the Fixed Rate element varied from product to product, but the Margin stayed the same. It still holds true, however, for a customer such as Farol, where the strategy letter identified only a FRTBL as the product that was offered. The facility letter, for example, makes it clear that the Margin (which is defined as a certain percentage number) is the same whichever type of TBL is requested by the customer.

398. Standing back from the detail of the TBL sales process and documents, moreover, I consider that the reasonable customer would not have been thinking about how CB had arrived at the Fixed Rate or what it comprised. None of the claimants in fact ever asked the Banks about the composition of the Fixed Rate or the income the Banks were taking. The reasonable customer's focus would in my view have been on, at most, two things: whether the overall rate offered to them, in view of their perception of interest rate risks going forward, made it worthwhile to purchase the interest rate protection offered; and whether they could do better with another bank. This reinforces, in my view, the conclusion that the reasonable customer would not have understood the Banks to be telling them anything about the composition of the Fixed Rate.

399. The claimants made much of the fact that since market prices could change daily, or even hourly, and because with a more complex loan, where the capital was repaid in instalments, a bank would need to undertake some work before offering a rate, it was not possible to compare the overall rates being offered by different banks, and all that they could compare was Margin. The evidence shows, however, that other banks were prepared to offer indicative rates for fixed rate loans to certain of the claimants. As I explain in more detail below, each of the claimants was able to compare rates offered by other banks, either at inception of their FRTBLs or later on when considering refinancing.

400. The claimants rely on the "useful test" from *Geest v Fyffes* (above at [210]) to contend that, the Banks having chosen to separate Margin from the Fixed Rate, customers would naturally assume that there was no income element in the Fixed Rate or, had there been, they would in all the circumstances necessarily have been informed of it. In my judgment, in view of the points made above, the opposite is more likely to be true: a reasonable customer, appreciating that it was being offered a product which gave it additional benefits and which involved the Banks in additional burden and risk, would *not* naturally assume that the Fixed Rate it was being offered was a pure market rate without any element of income or that – if there was – they would have been informed about it.

401. As to the various elements of the sales process relied on, each of the claimants cite, as conduct giving rise to the implied representations, multiple occasions when the Fixed Rate was referred to as being "current", or changing, and as something that could only be pinned down when the loan was executed, on a telephone call with a specialist member of the Treasury Solutions team. All this, however, is a consequence of the fact (as customers were told) that the Fixed Rate was *based on* market prices. That in itself says nothing as to the content of the Fixed Rate other than it at least *includes* an element which depends on, and therefore moves with, external market rates. The fact that customers were then updated on the movements in the Fixed Rate over time adds nothing to this analysis. A rate which is based on market prices will inevitably move in that way. Nor, in my view, does the fact that the rate was provided by the Treasury Solutions department add anything in this respect. It is to be expected, given the sensitivity as to timing, that at the point at which the rate is pinned down, it is done so with somebody with access to the market data on which the rate is based.

402. Accordingly, I am not persuaded that the matters that lie at the heart of the claimants' case would in fact have led a reasonable customer in the position of the claimants to conclude that the Fixed Rate Representations were being implied.

C1(b). Four other preliminary matters relevant to each of the claimants' claims

403. I address the following further issues, which are common to each of the claimants' claims, before turning to the individual claims of Farol, Janhill and Uglow.

(1) The subjective question: did each representee understand the representation to have been made, in the pleaded terms, at the time?

404. As I have noted, when setting out the elements of a cause of action in deceit above (at section B3(a)), it is a key requirement – in order to establish causation – that the claimant understood at the time, from the pleaded words and conduct, that the implied representations were made to them.

405. I also noted the debate about whether it is necessary in every case to prove that the representation was actively present to the mind of the representee. So far as the implied Fixed Rate Representations are concerned, I consider that it is indeed necessary to show that each claimant understood, at the time, that the implied representations were being made in the terms pleaded by the claimants. If any statement is (objectively) to be spelt out from the words and conduct of the Banks, then it was at best ambiguous. This is far from the type of case where the thing that was left unexpressed was so obvious that it went without saying.

406. It is accordingly not enough that one or other representative of the claimants independently believed in the existence of the thing said to have been represented, if they did not understand it to have been represented to them by the pleaded words and conduct.

407. The Banks pointed out a number of discrepancies between the witness statements of the claimants' witnesses and the pleaded representations. The claimants objected that it was wrong to look for a literal correspondence between the terms of the representations and the evidence as to the representee's state of mind at the point of reliance. It is instead a matter of "assessing all the evidence." Mr Onslow KC submitted that the defendants' approach was a recipe for the "lawyering" of witness statements, i.e. having a witness artificially "trotting out" the terms of the representation without giving their own account.

408. It is true that the court should have regard to the whole of the evidence, although where, as here, the claimants have extensive legal representation, the witness statements are the most important source of the evidence being given by each witness; it is there that the evidence in support of their case is supposed to be found. It is also true that witness statements must be in the witness' own words.

409. I consider, however, that the claimants' submission goes too far, and places the recollection of the witness and the pleaded representations in the wrong order. Although, chronologically, the pleading comes before witness statements, it is an essential pre-requisite of a claim in implied representation (certainly the claims in this case) that it is based on the evidence of the relevant representees that they understood the implied representations to have been made to them. It is accordingly necessary for the representee to be able to give evidence that, on the basis of what was expressly said to them, they understood something else to have been implied, *and* that what they understood to be implied was – in substance at least – the same as the pleaded representation.

410. Whereas in the case of implied terms in a contract (where the question is an objective one), it is to be expected that the implied term, and the reasons it is to be implied, will be driven by legal advisers, that is not so in the case of an

implied representation. Legal ingenuity might establish that all sorts of other statements are to be implied from the words and conduct of a representor, but unless the representee was led to the same conclusion at the time, a claim in misrepresentation cannot be made out.

411. For example, one of the claimants' arguments is that the implied representations arose from the provisions relating to Margin, Fixed Rate and Fees in the facility letter, or from the dictionary definitions of "cost of funds" or "margin". Unless a representee had read those provisions or knew of those definitions at the time, however, and was led by them to believe that they gave rise to the implied representations, they cannot be relevant to establishing the claim so far as that representee is concerned.

412. The fact that precisely the same representations are said to have been implied to each of the claimants, and much of the same material is said to have given rise to those implied representations, means that it is important to scrutinise the evidence of each alleged representee carefully, to see whether they understood and relied on implied representations in those terms at the time.

(2) Aggregation of conduct

413. An issue debated in closing was whether it is necessary to consider separately whether each alleged communication said to give rise to a representation did in fact constitute a representation, or whether it is sufficient to view them as a whole. The answer depends on the question being asked.

414. If the question is whether an implied representation was made at all, then it is permissible to view statements to a representee made on different occasions as a whole, to determine whether at the point in time the representee purported to act in reliance on the representation, the words and conduct of the Banks up to that point gave rise to the pleaded implied statements.

415. Even here, however, care must be taken not to conflate statements made to *different* persons (e.g., different employees of the same claimant) unless there is evidence that the person or persons who constituted the decision makers of that claimant were aware of each of these statements.

416. If, on the other hand, the question is whether a particular representor was dishonest, then it is necessary to examine what *that* representor did and said, and their state of mind, on the particular occasion said to give rise to an implied representation by them.

(3) Identifying the counterfactual for the purposes of establishing reliance

417. There was also disagreement between the parties as to the identification of the correct counter-factual in considering reliance and inducement. I have set out the test that I consider needs to be applied at [218] above. The point is of particular importance given that the evidence of the claimants was typically couched in terms of: "If I had known that there was additional hidden margin…". That evidence is to the point only if, had the representation not been made, the existence of AV would have been revealed. That, in turn, depends

upon what communications, said to give rise to the representations, are excluded from the counterfactual.

418. There is a spectrum of possibilities. If, at one end of that spectrum, I were to find that the only matter which gave rise to a representation was that the Fixed Rate was described as a market rate, either expressly or impliedly, then the correct counterfactual is one where that description was not made. In those circumstances, given that the make-up of the Fixed Rate was not otherwise asked about or discussed, it is difficult to see why any reference would have been made to AV. At the other end of the spectrum, if I were to find that the implied representations arise simply from the fact that the Banks told customers that the rate was made up of the Fixed Rate and Margin, then it seems that the only way a misrepresentation could have been avoided was by making it clear that the Fixed Rate included an element of income. In theory, it might have been avoided by the Banks only ever talking in terms of the overall rate of interest for the FRTBL. That, however, was unlikely to have happened given that TBLs were marketed as enabling customers to choose between different options, where the Fixed Rate element (but not the Margin) varied.

(4) Intention to induce

419. As Christopher Clarke J noted in *Raiffeisen* (above, at §222) the rule that a representation must have been made with the intention that it should be acted on is less easy to apply in respect of implied representations, because the representor may not have appreciated what the court later found him to have said by implication. Nevertheless: "if [the representor] intended what he said to be relied on by the representee in deciding whether to contract he must be taken to have intended that the representee should rely on the objective meaning of what he said".

420. In the circumstances of this case, if (contrary to my primary conclusion) the Fixed Rate Representations were made, then they were made in circumstances where, to the Banks' knowledge, the customer was contemplating entering into a FRTBL. I have little doubt that any representation would have been made with the intention that it be relied on.

421. I turn to consider the Fixed Rate Representation claims of each of Farol, Janhill and Uglow.

C2. Farol's claim in respect of the Fixed Rate Representations

422. On 26 January 2007, Farol entered into a FRTBL for £2 million at a Fixed Rate of interest of 6.45% for 15 years. This comprised a Fixed Rate of 5.65% and a Margin of 0.8%, although the facility letter wrongly stated the Margin to be 1% (because it failed to take account of a late reduction in the Margin agreed immediately prior to the execution of the loan).

423. For Farol, I heard evidence from its managing director, Matthew Vellacott, and its *de facto* finance director, Martin Jones.

424. Farol's relationship manager at CB at the time was Steven Coward. The Treasury Solutions manager who dealt with Farol's FRTBL was Kevin Horne. The Treasury Solutions associate who made the booking call (with Mr Jones) to confirm the details of the loan is now known as Susan Smith. I mean no disrespect by referring to her, as she is referred to in all the contemporaneous documents, by her maiden name, Susan MacKenzie.

425. Neither Mr Horne nor Mr Coward still works for either of the Banks, and neither of them has given evidence. Ms MacKenzie provided a witness statement and attended for cross-examination.

The express representation

426. Farol pleads one express representation, namely that sometime in late 2006 or early 2007 Mr Coward told Mr Vellacott that the Fixed Rate was a "market rate".

427. The allegation that Mr Coward made an express oral representation to Farol that the Fixed Rate *was* a market rate is based solely on Mr Vellacott's purported recollection. There is no contemporaneous record of anyone from CB telling anyone from Farol that the Fixed Rate was a market rate. While I do not doubt that Mr Vellacott gave evidence that he believed to be accurate, there are a number of reasons to doubt that his recollection was in fact accurate in a number of key respects, including this one.

428. He had, unsurprisingly, a poor recall of events from 2006 and 2007. He made a point in his witness statement, for example, of Farol's existing lending with CB being on variable rates. In fact, as at December 2006, Farol already had two <u>fixed</u> rate loans with CB. When this error was pointed out to him, he said "I couldn't remember that long ago". An important aspect of Farol's case is the fact that the Margin agreed was originally 1%, but was reduced to 0.8% sometime in January 2007. This was a matter which particularly concerned Mr Vellacott, because he said he was outraged when CB told him, in 2011, that he had *mistakenly* been charged Margin at 0.8% since the inception of the FRTBL and that it would revert to 1%. Despite this, and despite Mr Vellacott claiming generally to have been "fixated" on Margin, he had no recollection of the fact (as was pointed out to him when giving evidence at trial) that at around the beginning of December 2006 the Margin had been agreed at 1.25%, but then reduced shortly before Christmas 2006 to 1% before later being reduced to 0.8%.

429. His purported recollection of the circumstances of the express representation has also changed over time. In the short form particulars of claim served by Farol on 1 May 2019 it was claimed that it was Mr Horne who described the Fixed Rate as a market rate in a telephone call – apparently with Mr Vellacott – on 26 January 2007. There is evidence that Mr Jones, but not Mr Vellacott, had telephone calls with representatives of CB on 26 January 2007, but Mr Jones does not suggest that any such representation was made to him. The suggestion that Mr Coward had made such a representation to Mr Vellacott did not appear until Farol's re-stated particulars of claim in May 2021.

430. When these discrepancies were put to Mr Vellacott, he offered various possible explanations: that the call had been with Mr Jones, and he may have listened in; that both Mr Coward and Mr Horne might have referred to market rate; and that "I think it was general terminology that market rate was – what was implied to me was market rate being fixed rate." In referring to the occasion when he asked for the Margin to be reduced to 0.8%, he said: "Mr Coward mentioned that the market rate moved on the telephone to me when I changed the margin", but later accepted that Mr Coward may simply have referred to the "market" having moved. He also accepted that he could not say whether he had been told that the Fixed Rate *was* a market rate or that it was *based on* market rates.

431. It was in fact clear from Mr Vellacott's evidence that he drew no distinction between the concept of something being "based on" a market rate and a "market rate". It is common ground that Farol was told that the Fixed Rate was *based on* market prices. Mr Vellacott expressed this by an analogy with the sale of eggs:

> "But an omelette is based on eggs. It's still eggs. It's the same thing, surely. It's based on market rates, it's market rates. As far as I'm concerned, it's market rates. I don't know how the basing on, whatever it is ––sorry, I shouldn't bring it to a courtroom, that sort of simile. But that is what ––we see that as being a market rate, and "based on market rates" is our assumption, as poor tractor dealers, that it's a market rate that we're dealing with."

432. Accordingly, I reject the contention that CB expressly represented to Farol that the Fixed Rate was itself a market rate. If Mr Coward said anything at all about market rates to Mr Vellacott, it was no more than that the Fixed Rate element of the FRTBL was based on market rates.

The implied representations

433. Farol also pleads that the Fixed Rate Representations were implied from the following communications:

   i) A strategy letter sent to Farol under cover of an email of 22 January 2007 from Mr Horne, which provided an indicative Fixed Rate on 23 January 2007 of 5.57%, and stated "Rates are based on market prices that may change instantaneously";

   ii) Mr Coward quoted a Margin of 1% over an indicative Fixed Rate of 5.45%, and subsequently stated to Farol that the market rate had increased by 0.2% and therefore the Fixed Rate would increase by 0.2%;

   iii) Mr Coward, in response to a request from Mr Vellacott, agreed to reduce the Margin by 0.2%, so that the overall rate remained the same;

   iv) An email from Mr Horne to Mr Jones of 23 January 2007, in which Mr Horne told Mr Jones that the "Cost of Funds today would be 5.65%" (which was equivalent to the Fixed Rate);

v) An email from Mr Horne to Mr Jones of 26 January 2007, with the subject line "Today's Rates", in which Fixed Rates were provided for 15 and 10 year terms loans;

vi) CB told Farol that the Fixed Rate would be agreed separately with a member of the treasury and financial markets team on a telephone call. Farol relies on the fact that the call was indeed arranged between Ms MacKenzie and Mr Jones on the day of drawdown of the loan for the purpose of Farol obtaining the Fixed Rate from Ms MacKenzie and that, on that call, Ms MacKenzie said that the Fixed Rate was 5.65%, the Margin was 0.8%, the all-in rate was 6.45%, and that would be "booked" that day.

The objective question: would a reasonable person in Farol's position have understood that the alleged implied representations were made?

434. Most of the matters Farol relies on (the fact that it was told that rates were based on market prices, that the Fixed Rate had moved, its description as "Today's Rates", and the process of setting up and holding a call to agree the Fixed Rate with a representative from Treasury Solutions) reflect the core argument made by all claimants (see [379] above). I have already concluded that this did not objectively give rise to the Fixed Rate Representations.

435. So far as reliance is placed on the description of the Fixed Rate as "Today's Rates" in the subject line of Mr Horne's email of 26 January 2007, I note in any event that the subject line came from Mr Jones' email to which Mr Horne's email was a reply. In other words, Mr Jones had asked for "today's" rate because he knew that the Fixed Rate depended on market prices and thus could change. The only new information being communicated to him by Mr Horne, therefore, was the precise rate.

436. As to what was said on the recorded call with Ms MacKenzie, she simply confirmed the details of the loan, i.e. the borrower, the amount, the start and end date, the fact that it was fully amortising, the Fixed Rate of 5.65% and the Margin of 0.8% making an all-in rate of 6.45%. None of this amounted, in my view, to the Fixed Rate Representations. At its highest, it repeated the separation of the Margin and Fixed Rate elements of the FRTBL, but taken in context – for the reasons I have set out above – that would not lead a reasonable person to understand the Fixed Rate Representations to have been made.

437. Farol relies also on the fact that, when the market rates moved against it, the Margin, not the Fixed Rate, was reduced. It contends that this communicated to Farol that CB did not control and so could not reduce the Fixed Rate element. I disagree. The highest that the point is put in Mr Vellacott's evidence is that, when the rates moved against him, <u>he</u> asked that the Margin be reduced. In other words, it was his decision to negotiate the Margin element. That provides no evidence of any statement by CB. It does not rule out the possibility that Mr Vellacott did so because it had previously been represented to him that this was the only part of the rate that he could negotiate. Indeed, that was the evidence in his witness statement. His evidence, however, was that the reason he believed that the Fixed Rate element was non-negotiable was because "Mr Coward had

said that the fixed rate was a market rate". It follows, from my finding that Mr Coward did not say this, and that the most that was said to Farol (for example in the strategy letter) was that the rates offered were *based on* market rates, that Mr Vellacott's belief was the product of his own misunderstanding of what it means for a rate to be based on market rates.

438. The other aspect of the sales process on which Farol specifically relies is the reference, in Mr Horne's email of 23 January 2007 to "cost of funds". The claimants contend that this implied that the rate was set as CB's cost of funding the loan to Farol, and that this would have been an external market rate.

439. The immediate context was that on 22 January 2007 Mr Horne sent Mr Jones the strategy paper "with the current rate" and fixed rate product profile. Mr Jones replied to say that, as he had mentioned to Mr Coward, he "wanted to go 10 years and pay the break-fee for the old loans upfront", and he asked, "What's the rate on this basis?" Mr Horne's reply was: "Assuming that you mean to keep the loan repaid over the 15 years, but only fix the rate for the first 10 years, the Cost of Funds today would be 6.65% plus 1% lending."

440. There are a number of points to make about the use of this phrase. Mr Coward did not say that it represented the cost to the bank, and I do not think that a reasonable customer would have thought that was what he meant, particularly in light of the context to which I have referred above in dealing with the core arguments of the claimants.

441. I do not think that a reasonable customer, who gave thought to the issue, would in any event have thought that a bank acquired funds, at a specific rate, to on-lend to that customer. I explain in the section of this judgment dealing with the unfair relationship claim that the Fixed Rate was in fact based on a mid-market swap rate, which was not a rate at which any bank could acquire funds. The reasonable customer would not, unless they enquired about it, have known this, but I consider they would have appreciated that a bank will have funded itself on a broader basis, and from a broader variety of sources, than simply going into the market to borrow £x to enter into a FRTBL for £x to a customer.

442. The phrase was clearly being used as a label for the Fixed Rate: it was used in response to the question "what is the rate?". Given that the overall rate was fixed, it made obvious sense to use an alternative label when referring informally to the (defined term) Fixed Rate, in order to distinguish it from the overall rate which was itself fixed.

443. It is a phrase which CB had used in its standard TBL documentation prior to 2007 in a way which clearly referred to the cost *to the customer*. Such documentation had, I infer, been provided to Farol in connection with the TBLs it entered into in 2004, and which were refinanced by the FRTBL in 2007. This described a fixed rate facility as having "a fixed cost of funding applied for the term of the facility" and stated one of the benefits as establishing "a known funding cost for a predetermined period".

444. So far as the evidence indicates, this was the only occasion on which the phrase was used by Mr Horne or anyone else from the Banks in communications with

Farol. It was at a very late stage in the process, and there is nothing in any of the contemporaneous documents (or Mr Vellacott's or Mr Jones' witness statements) to suggest that the cost at which CB could acquire funds in the market had been mentioned before or was of any interest to Farol.

445. In these circumstances, I do not consider that a reasonable person in the position of Farol would have thought that Mr Horne was – by using the phrase "cost of funds" – intending to volunteer in this email information about what it cost CB to acquire funds in the market to lend to Farol. They would not, accordingly, have understood him to represent that the Fixed Rate was to be equated with the market rate at which the bank acquired money in order to lend to Farol, and nothing more.

446. The Banks make two other points against the implication of the Fixed Rate Representations. First, that the two existing FRTBLs, despite being entered into on the same date for the same term, were at slightly different Fixed Rates. Second, that discussions took place between CB and Mr Jones in late December 2006 or early January 2007 about the Fixed Rate being increased to reflect the break costs due upon early termination of the existing FRTBLs. The defendants contend that a reasonable person, with that knowledge, could not have believed that the Fixed Rate was a pure market rate or the rate at which CB would itself acquire the funds to lend to Farol.

447. I accept the force of the first point. The difference in the rates of the two existing FRTBLs was small (one was at 5.78%, the other was at 5.7%). But if the Fixed Rate was simply an external rate at a particular time and date, then there would be no reason for there to have been any difference.

448. As to the second point, although Mr Jones did not accept this, I am satisfied that one of the options discussed with him was that instead of the break costs either being paid in cash, or added to the capital sum of the new FRTBLs, they would be "blended" into the Fixed Rate, thereby increasing it slightly. Mr Jones made handwritten notes, sometime in December 2006, which recorded two possibilities for a 15 year fixed rate loan; one was at 5.25% and the other was at 5.35%, the increase explained by the inclusion of £12,000 "to cancel existing loans". In an email to Mr Coward of 2 January 2007, Mr Horne referred to a discussion with Mr Jones, in which the options for dealing with the break costs included lending Farol the amount necessary to pay them, or blending the break costs into the new rate.

449. Nevertheless, I do not think that the point assists the Banks. That is because this was a discussion about adding, for a specific and disclosed reason, a few basis points to the Fixed Rate. If the Fixed Rate had otherwise been represented to be a pure market rate, then it is not inconsistent with that representation for CB and Farol to agree a slight increase in the rate for that reason.

450. Standing back from the detail of each communication relied on, I consider that viewing them as a whole and in the context of the TBL documentation and the sales process as a whole, the reasonable person in Farol's position would not have understood the Fixed Rate Representations to have been made.

Inducement and Reliance

451. Farol's case is that, had it known of the AV, it would have chosen to enter into a variable rate loan. Alternatively, it would have sought to negotiate down the Fixed Rate to the "proper" market rate, by which it means such rate as excluded all the AV. It claims this would have been 5.33%.

452. I can deal with the claim that it would have entered into a variable rate loan shortly. Leaving aside whether the correct counterfactual is one in which the AV was revealed (see further below), I do not accept that Farol would, even in that case, have foregone the protection of a fixed rate loan and entered into a variable rate loan instead.

453. It was pointed out in cross-examination to Mr Vellacott that the 3-month LIBOR rate at the relevant time was 5.59%. He was asked whether he would have taken the very slight initial reduction of 0.06% from the Fixed Rate element of the FRTBL in return for the loss of certainty that a fixed rate loan provided, to which he said: "No, no we would have stuck with the fixed rate."

454. That accords with common sense. I would find it surprising if a customer who had decided to gain protection against interest rate rises by entering into a fixed rate loan, and who was satisfied with the overall fixed rate offered, would have opted to enter into a variable rate loan if the bank told them that the Fixed Rate was not a pure market rate but included income for the bank.

455. It also accords with the overall evidence of Mr Vellacott and Mr Jones which was to the effect that they recognised the security that a fixed rate gave. In this regard, Mr Jones had indicated to CB at the beginning of December 2006, before any alleged representation had been made, and before indicative rates had been provided by CB, that he was keen to progress matters "as he is concerned rates were hardening".

456. While not determinative (because it is possible that a representation might be actionable if it persuades a representee to continue with a course of action already decided upon), I note that Farol's decision to enter into a fixed rate loan was made at its board meeting on 3 January 2007, before any of the communications relied on as giving rise to the Fixed Rate Representations were made to it. Mr Jones agreed that after that time, "it's really just a matter of ticking boxes".

457. Accordingly, even if Farol had been told of the existence of AV I find that it would not have entered into a variable rate loan.

458. I turn to consider the alternative case that Farol would have sought to negotiate a reduced Fixed Rate.

459. The first question is (on the assumption that my conclusion that no Fixed Rate Representation was objectively made is wrong) whether Farol was induced to enter into the FRTBL in reliance on any representation made by the Banks. As I have already noted, that requires Farol to establish that it understood, at the time, the Fixed Rate Representations to have been made.

460. Mr Vellacott's witness statement contains limited evidence relevant to what he understood at the time. He does not reference any of the communications pleaded by Farol as giving rise to the implied representations except for his conversation with Mr Coward and the circumstances in which the rate was negotiated down to 0.8%.

461. As to the former, he said in his statement that "we always understood that there was only one thing we could negotiate, and that was the margin and <u>that was purely all the bank was taking out of it</u>" and "we understood that [the Fixed Rate] was <u>the rate [CB] were buying money from in the market</u>". The only source he gave for his belief, however, was the fact that "Mr Coward had said that the fixed rate part was a market rate." I have already rejected his evidence that Mr Coward said this, and concluded that at most he would have said that the Fixed Rate was *based on* market rates. It follows that the only source of Mr Vellacott's understanding as set out in his witness statement is, at most, his mistaken interpretation of what Mr Coward had said on the telephone.

462. Mr Vellacott also said in his witness statement that when he was originally quoted a Margin of 1%: "[l]ooking at the margins of other banks to get a feel for it, 1% seemed a fair rate at the time". In fact, as he revealed in cross-examination, he did not himself look at any rates offered by other banks. At first he said that "I asked other people with different industries", but then admitted that this was based solely on a conversation with a business associate, probably "a demolition man", of whom he asked a lot of questions and who may have suggested that 1% was a fair Margin. He also said that the reason he asked a business associate about Margin was because what he did at the time was to compare Margins, believing that "the rest of it was untouchable" and because "most banks offered up a similar design to their borrowing with margin element and fixed element, and 1% was a fair margin". This indicates, however, that his belief that the Margin was the only part he could negotiate pre-dated the communications from CB said to give rise to the representations, and that its source was his experience with banks, generally, and not anything said to him by CB.

463. The claimants contend that Mr Vellacott's evidence remained very clear during his cross-examination. He repeatedly said that he thought the Margin was the only piece that could be negotiated. For example, he said: "I thought the fixed rate element was untouchable and the only piece we could talk to the bank about was the margin over the fixed rate. Because that is our understanding all the way through this".

464. When asked where his understanding – that the Fixed Rate was the rate CB was buying money from in the market – came from, he said: "it was implied everywhere … why would you split the margin? Why would you have a hidden margin? Because we were told that the rate was the market rate and the cost of funds".

465. Later on, when asked whether he ever had a conversation with the Banks on how the loan was funded, he said: "I never had -- I wouldn't have actually asked for the exact journey that that money came from or that fixed rate, because it was implied all the way through that: the margin was the only thing that could

be negotiated. That was the only thing. Whether it was implied through wording, whether it was implied in conversation, whether it was because the other thing was called market rate, it all led toward the margin being negotiated. Not the fixed rate."

466. I agree that Mr Vellacott remained steadfast in cross-examination. These passages, however, (and many others to similar effect) did not take matters further than his witness statement. General statements about Farol's "understanding all the way through this", or "it was implied everywhere", or "Why would you have a hidden margin?" illustrate the understandable difficulty Mr Vellacott had in distinguishing between what his belief, generally, was at the time, what he thinks he was led to believe by the words and conduct of the Banks, and what he now thinks in light of everything he has learned since, including the way the claimants' case on implied representations has been expressed in the pleadings. His reference to the implication arising from the Fixed Rate being called "cost of funds" is telling in this respect. There is no evidence that Mr Jones told him at the time that Mr Horne had used that phrase, so it is highly unlikely it informed any part of his contemporaneous thinking.

467. Mr Jones' evidence in his witness statement was that he believed that the Fixed Rate was the bank's cost of borrowing the loan from the market. The basis for that belief is said to be "what Mr Horne said". The only references in the statement to anything said by Mr Horne (prior to the FRTBL being entered into) is to passages in three documents: (1) the reference in the strategy paper provided to Farol on 22 January 2007 which referred to interest rates being "based on market prices"; (2) Mr Horne's reference to the rate being the "Cost of Funds" plus a Margin, in his email of 23 January 2007, and (3) the subject line of "Today's Rates", in Mr Horne's email of 26 January 2007 providing Fixed Rates for different loan terms.

468. Mr Jones refers also to the conversation that Mr Vellacott had with Mr Coward about reducing the rate because interest rates had moved against Farol. As to this he said: "Steven Coward basically swallowed the point two difference and the only way to do that was to take it out of his margin. So it was made very clear to us that the margin was for them and the rest of it was down to the market." He does not suggest, however, that he was privy to those discussions at the time. I place no weight, therefore, on his evidence as to what was said in them.

469. I think it highly unlikely that the references in the three documents, on which Mr Jones said he relied, would in fact have led him to understand that Mr Horne was making the Fixed Rate Representations. As to the first and third matters, they indicated no more than that the Fixed Rate, being based on market prices, could change from day to day. This is something of which Mr Jones was no doubt already aware: see the internal note of the Bank from early December 2006, to which I have already referred, which records Mr Jones indicating a desire to get on with arranging a FRTBL because he had seen that "rates had hardened". He acknowledged, when this was put to him in cross-examination, that he may well have acquired this knowledge by looking at published sources of fixed interest rates. This was before anything was said to him which is relied on as giving rise to the Fixed Rate Representations.

470. While (as with Mr Vellacott) I find Mr Jones to have been doing his best honestly to recollect events from 2007, I consider that his evidence on these points has been coloured by knowledge acquired since then, and by his involvement in and knowledge of the way the case is advanced by the claimants overall. He has limited recall from 2007. He could not remember, for example, discussions with CB about how the break costs under the existing TBLs would be dealt with and does not recall the discussion with Ms MacKenzie on 26 January 2007. The way matters are put in his statement is mostly reconstruction ("I have seen from the documents") rather than direct recollection.

471. That leaves the reference, in Mr Horne's email of 23 January 2007 to "cost of funds". For the reasons set out above (at [441]), I am doubtful that this passing reference, used as a label for the "Fixed Rate", would have led Mr Jones to understand the Fixed Rate Representations to have been made at the time. In particular, there is nothing in any contemporaneous document to suggest that the way in which the bank funded itself, or how it arrived at the Fixed Rate, was ever mentioned or was of any interest to Farol. Mr Jones said he did not ask the bank how they calculated the Fixed Rates, but denied that was because it didn't matter to him, saying: "But they were our trusted partner and I assumed that those rates that they were giving me, based on conversations and emails, that they were either market rate or cost of funds." An assumption, unless reasonably induced by something said by the Banks, is not enough to establish an implied representation. Like Mr Vellacott, in cross-examination Mr Jones said that he did not understand at the time there to be a difference between a rate that *was* a market rate and one that was *based on* a market rate. He said that he now understands there to be a difference, but at the time "I did not think that there was any hidden margin in there."

472. My scepticism is increased by two further points. First, there had been no reference to this, as something which gave rise to the Fixed Rate Representations, in any of Farol's pleadings prior to December 2022. Mr Jones was unable to explain why that was so. He accepted that the email did not refer to the bank's cost of funds, but said: "my belief is [i.e., referring to what he now thinks] that that's what it cost them and therefore that's what it was costing us." Second, there is no evidence that Mr Jones mentioned this reference to cost of funds to Mr Vellacott. Had it been something which Mr Jones regarded as important at the time, then he would almost certainly have brought it to the attention of Mr Vellacott who, as managing director, would have been principally involved in making the decision to enter into the FRTBL.

473. For these reasons if, contrary to my conclusion above, the Fixed Rate Representations were objectively to be implied from the words and conduct pleaded by Farol, I find that neither Mr Vellacott nor Mr Jones understood that implied representations in the terms pleaded were made to them at the time.

474. When it comes to deciding what Farol would have done, if the Fixed Rate Representations had not been made, evidence consisting of speculation, 17 years after the event, is to be treated with even greater caution. It is speculation carried out through the lens of all that has been learned since. That includes being involved in preparing a case in deceit based on the discovery of "hidden margin".

475. The description "hidden margin" implies active concealment by CB and also equates what was not disclosed with the "Margin" that was revealed and defined in the facility letter. Even where the correct counterfactual is one in which AV was disclosed, it would not have involved Farol simply being told that the Fixed Rate contained "margin" that was functionally equivalent to the other "Margin". It would instead have involved the Banks explaining that AV, although it was income for the Banks, differed from the lending "Margin", in that it was income relating to an additional service or product provided by the Banks which involved additional risk to that in offering variable rate loans.

476. Mr Vellacott's evidence on this issue is also likely to have been coloured by the events of 2011, when CB insisted that Margin had to that point been charged at 0.8% by mistake and that it would be increased to 1%, and offered terms for new lending which included a heavily inflated Margin to compensate CB for the fact that the Margin on the FRTBLs was now out of sync with the market. These were matters that Mr Vellacott expressed anger about, in the witness box, on a number of occasions. This would explain why he *does* recall the reduction in Margin from 1% to 0.8%, but has no recollection of the prior agreement to reduce the Margin from 1.25% to 1%.

477. The first question is to identify the appropriate counterfactual. That depends on identifying the words and conduct which gave rise to the Fixed Rate Representations. It is here that the rolled-up nature of the representations causes difficulties. As I have noted in dealing with this question at a general level, if the separation of Margin and Fixed Rate was enough to give rise to the implied representations, then it is difficult to see how AV would not have been revealed in the counterfactual. If, on the other hand, the only representation found to have been made was the express representation that the Fixed Rate was a market rate, then the counterfactual is one in which only that representation is removed, in which case there would be no reason to think that the counterfactual included Farol being told about AV.

478. Similarly, if most of the matters relied on in Farol's pleading were removed from the counterfactual (Mr Coward telling Mr Vellacott that the Fixed Rate was a market rate; Farol being told that the Fixed Rate was based on market prices; Mr Horne referring to it, in communicating with Mr Jones, as the cost of funds, and implicitly describing it as "Today's rate"), I do not think that the AV would have featured in the counterfactual. There is no evidence that Farol ever asked, or was interested in, what the Fixed Rate was based on, or what it consisted of, and I find that neither Mr Vellacott nor Mr Jones would have thought to enquire about it if nothing had been said about it by the Banks.

479. If AV would not have been mentioned in the counterfactual, then that is the end of the matter, because Farol's case in reliance is premised on it having been told there was "an additional hidden margin" (per Mr Vellacott) or that "the fixed rate included a lot of additional margin too" (per Mr Jones).

480. If AV would have been mentioned in the counterfactual, then Mr Vellacott says that he would have asked for the hidden margin to be taken out, and Mr Jones said if he had known there was "further negotiation on the interest rates", then they would have "gone harder" at the negotiation.

481. It does not necessarily follow, from the fact that the Fixed Rate included additional income for the Banks, that the Fixed Rate was up for negotiation. I accept, however, that, depending on the customer and the precise circumstances of their loan, the Banks were on occasion prepared to negotiate the Fixed Rate down by reducing the amount of AV they included. Some of the Banks' witnesses accepted that this was so: Jonathan Palmer (a manager in NAB's Treasury Solutions team who dealt with Janhill); Amy Collins (now Amy Woolman, from the Treasury Solutions team who dealt with Uglow); Megan Robertson (now Megan Coad, also from the Treasury Solutions team who dealt with Uglow); and Ms MacKenzie (who, while she dealt with Farol, had no involvement in setting the AV for Farol's FRTBL). As the level of AV was left to the discretion of the relevant Treasury Solutions partner, it is not possible to generalise across all Treasury Solutions partners and across all customers.

482. Farol's pleaded case is that the Fixed Rate would have been reduced to a pure market rate, i.e. without *any* AV. Given the Banks' policy of charging AV, and its reasons for doing so, I consider it is unrealistic that they would have been prepared to forego the AV altogether, particularly when CB had reduced the lending Margin to 0.8%.

483. In determining the likelihood of the AV having been reduced at all in Farol's case, I take into account the following matters.

484. First, there is no evidence from the person who would have carried out any negotiation on the part of CB (Mr Horne), but I am not asked to, and do not, draw any inference adverse to the Banks from him not being called. I am therefore left with making what inferences I can.

485. Second, Farol was content with the indicative overall rate of interest at the outset of discussions with CB and remained content with the overall rate following the reduction in the Margin to 0.8%.

486. Third, as I have already noted, in contrast to the pejorative way in which Mr Vellacott's evidence is expressed (i.e., as to what he would have done had there been no "hidden" margin), in a counterfactual where AV was revealed, there would have been no concealment, but transparency. Moreover, that transparency would have indicated the likelihood that any bank offering fixed rate lending would charge above and beyond the lending Margin that it took on a variable rate loan.

487. Fourth, Mr Vellacott described himself as someone who was used to negotiating with farmers, and who would "negotiate" whatever he could negotiate: "If I could have known that I could negotiate every element of that loan, I would have negotiated it".

488. Fifth, as against this, however, in a revealing moment in his cross-examination, when he was being questioned about what he would have done if CB had refused to negotiate on the Fixed Rate, Mr Vellacott said: "Well, I think -- the thing that has shocked me more than anything in dealing with this -- I'm not trying -- I'm trying to -- I just want to put a point across here that I trusted what was going on, and if I was entered into that again, I would have paid more money for

transparency. I would've done, okay." In the counterfactual in which this issue arises, there would have been transparency as to why there was AV and what it was for, as I describe above.

489. Taking these matters in the round, I find that on balance even if the Banks had explained the addition of AV within the FRTBL, Farol would still have entered into its FRTBL on the same basis.

Falsity, negligence and deceit

490. There is no real dispute that if the Fixed Rate Representations were made, then they were false. There is no need, for the reasons set out in [377] and [378] above, to consider NAB's liability in negligence. CB accepted that it owed a duty not to make negligent misstatements. CB disputes that it breached that duty, but the only matters relied on in its Defence are that (1) it did not make the statements and (2) if it made the statements they were true. I find that if (contrary to my conclusions on those prior issues) CB had made untrue statements then it would have breached the duty not to make negligent misrepresentations. (This applies equally to the claims by Janhill and Uglow.)

491. The Banks strongly deny, however, that any of their employees were guilty of deceit. The case on deceit involves a number of elements that are common to the claimants' claims. Accordingly, I address this in a separate section of this judgment: see section C5 below.

Loss and damage

492. The parties adduced expert evidence in connection with the Fixed Rate Representation claims. They reached agreement as to the quantum of loss, if Farol had entered into a variable rate loan instead of the FRTBL, but this is academic since I have rejected that claim.

<u>C3. Janhill's claim in respect of the Fixed Rate Representations</u>

493. The FRTBLs that Janhill entered into are set out at [40] above. Its first two FRTBLs were entered into in October 2002, with the remaining five FRTBLs being entered into on various dates between 2005 and 2008.

494. Janhill's relationship manager from about 2002 to 2014 was Dean Smith (who did not give evidence at trial). A number of the communications said to give rise to the fraudulent representations were from him. The booking calls, when the terms of the FRTBLs were finalised, were with various associates in the Treasury Solutions team. Each of these is said to have made one or more fraudulent misrepresentations. I heard evidence from each of these: Jonathan Palmer, Sharon Ellis, Michael Corcoran and Hazel Wilkinson.

495. I heard evidence on behalf of Janhill from each of Robert Gittins, who was a director of Janhill from May 2008, his brother, William Gittins, a director from May 2008 until November 2011, and Michael Sutton, who also became a director of Janhill in 2008. Prior to 2008, it was William and Robert's father, David Gittins, who was the director and principal decision maker of Janhill.

The express representation

496. Janhill pleads one purported express representation, in relation to the first and second Janhill FRTBLs, made during a telephone call on 4 October 2002 between Mr Palmer, a manager in NAB's treasury solutions team, and Robert Gittins.

497. The transcript of the recording made of that call shows that Mr Palmer introduced himself as being from "Yorkshire Bank Risk Management". He referred to Robert Gittins' earlier call with Paul Tabberner (another Treasury Solutions partner at NAB). Mr Palmer said he wanted to confirm a couple of things with regard to some "fixed rates" being put in place for Janhill. He said "both of them have been set at cost of funds of 5.29" and that Margin was "1 and an eighth over cost of funds" for the new money (the loan of £500,000) and "1 and a quarter" for the existing debt (£995,000). In response to a question whether he was happy to put those through, Robert Gittins said "yes, we are."

498. Janhill relies on Mr Palmer's statement that the loans had been "set at a cost of funds of 5.29". That is not, in fact, an expression of any of the pleaded representations. It could only amount to a representation that the Fixed Rate was a market rate and contained no income for CB if substantially more was implied into it.

499. I understand the claimant's case to be that a reasonable person in the position of Janhill would have understood that statement to refer to the *bank's* cost of obtaining funds in the market, and that this was a rate set by the external market.

500. I reject that case. In considering what representation a person in the position of Janhill would reasonably have understood was being made in the telephone call, it is necessary to have regard to all the circumstances that would have been known to the reasonable person in Janhill's position. That includes the documents which passed between CB and Janhill, even though Robert Gittins did not see them at the time.

501. The documentation in relation to the first two Janhill FRTBLs differed from that used in respect of the other FRTBLs for these four claimants. It included the following.

    i) The Master Loan Agreement between Janhill and CB, dated 22 January 2002. This set out a procedure for entering into loans, comprising a request by the customer, a "GLF Letter" indicating conditions to be satisfied, and individual offer letters for each loan. It stated that CB would charge interest on loans at the percentage rate per annum determined by CB in accordance with the mechanism stated in the relevant offer letter.

    ii) On 18 December 2001, CB sent Janhill a letter, following a meeting to discuss strategies, setting out six options for a TBL, including a vanilla fixed rate loan, a delayed start fixed rate loan and a "Fixed Trigger Rate" loan. The Fixed Rate offered was different as between each of the six options. Within one of the options, the discounted rate loan, the Fixed

Rate offered changed over the life of the loan. A graph accompanying each option contrasted the Fixed Rate, as "the rate you pay" with "LIBOR (market) rate". Under general notes and disclaimers, the following appeared: "Rates are based on market prices that may change instantaneously and will not be firm until dealt on a recorded Dealing Room telephone line." For four of the options identified in the strategy paper, the benefits were said to include "Known worst case cost of funds".

iii) A further strategy letter dated 25 March 2002 was sent to David Gittins. It identified Janhill's risk profile as "Risk Averse". Next to "Budget rate", it said: "Feel that a Cost of Funds at 7.5% would be suitable as a budget level."

iv) On 16 September 2002, a further strategy letter was sent to David Gittins. This provided four options, for which different Fixed Rates were identified. As with the letter from December 2001, the accompanying graph for each option showed both the Fixed Rate ("rate you pay") and "LIBOR (market) rate". In one of the options, involving a capped rate element, the cost of the cap would be embedded in the Fixed Rate (increasing it from 5.30% to 5.46%). The capped rate element was said to give Janhill "…the comfort of ultimate protection at 6.5% cost of funds…"

v) A GLF Letter dated 27 September 2002 was sent to Janhill. At para 3 it indicated five different fees (including Margin at 1.125%) that would be incurred by Janhill during the term of the facility, and noted that a Product Fee may also be incurred, depending on the type of loan chosen by Janhill.

vi) An offer letter dated 27 September 2002 was also sent to Janhill, giving an indicative interest rate of 6.465%, and stating that the interest rate for the FRTBL was: "the rate per annum determined by us to be the aggregate of our fixed interest rate as notified to you in the confirmation plus Margin and mandatory costs."

vii) A product profile document supplied to Janhill prior to entering into the FRTBL stated that "A Fixed Rate Facility has a fixed cost of funding applied for the term of the facility", and identified, as one of its benefits, that it "established a known funding cost for a predetermined period", which protected the customer against rising interest rates. It also noted that, regardless of the current LIBOR rate, the agreed fixed rate would apply.

502. The numerous references to "cost of funds" or "cost of funding" in this documentation unambiguously referred to the cost to Janhill of the funding from CB. A reasonable person in Janhill's position, with knowledge of those documents, would in my view have understood Mr Palmer to be using the phrase "cost of funds" consistently with the way it was used in those documents.

503. It is true that, in some cases, the interest rate set out in those documents and referred to as the cost of funds appears to have been the all-in rate (including Margin). In other cases, however, for example the strategy letter of 18 December 2001, it is expressly identified as exclusive of Margin. In any event, I do not think that the reasonable person in Janhill's position, with the benefit of having seen the above documents, would think that Mr Palmer was referring to the entirely different concept, of the cost to the bank of acquiring funds in the market, merely because he broke out the interest rate on the call into the two constituent parts.

504. The contention that Mr Palmer's statement would have been understood as identifying the Fixed Rate as a pure market rate is also inconsistent with the variety of rates being offered for the different products set out in the strategy letters. Even though the different rates offered were all-in rates, it is not suggested that the variations were due to different amounts of Margin, so the reasonable person in Janhill's position would have understood that CB was offering a different fixed element of the all-in rate for the different products. This is also reinforced by the comparison, in relation to each of the products referred to in the strategy letters, between the rate Janhill would pay (which was fixed) and a market rate (LIBOR).

505. Accordingly, I reject Janhill's case that Mr Palmer's statements in the telephone call on 4 October 2002 would have been understood by a reasonable person in Janhill's position as representing that the Fixed Rate of 5.29% was either a market rate or the cost to CB of obtaining funding.

506. Moreover, I do not accept that Robert Gittins understood at the time that such a statement was being made to him. His witness statement consists of reconstruction not recollection. He said that he "noted" from the call with Mr Palmer on 4 October 2002 (which I take to mean that he now notes from the recording of that call) that he had been told that the Fixed Rate of 4.29% was the "cost of funds". He said he "would have understood" that cost of funds meant the actual cost of CB's borrowing in the market and that, as such, this would be much the same whichever bank he went to. It was – to him – the actual cost of the money without any additional charge or profit added to it. He said that the purpose of his call with Mr Palmer was to get that day's rate, to see if it had changed from the rate Mr Smith had previously given him. He said that when he was told that the rate he had previously been quoted was still available "this reinforced my understanding that the fixed rate quoted on the phone was the market rate for borrowing money on the day. It was, I thought, non-negotiable."

507. To the extent that this amounted to purported recollection at all, it was undermined by the fact that he accepted that he had no recollection of the call and was unable to say what he understood at the time from Mr Palmer's statement. When asked whether the assumption he now says he has (that a Fixed Rate is the rate generated from the LIBOR curve from the wholesale market for the period of the loan) was one he had in 2002, he said: "I can't remember 2002". When it was put to him that he may not have had any clear understanding at that point of what Fixed Rate meant, he said: "I might not have done, no."

508. His lack of memory is unsurprising since – as he accepted in evidence – he was not closely involved in this aspect of the business in 2002. He had not seen any of the documents surrounding the setting up of the FRTBL in 2002, including the Janhill LMA or the correspondence with CB. He did not become a director until 2008, and his father – David Gittins – had at all times prior to that been the main decision maker. Even if a representation was made on the call, it could only have had causative effect if it was made known to the decision maker, but there is no evidence that Robert Gittins told his father about it.

The implied representations

509. Janhill also pleads that, via a number of communications from various employees of the Banks to one or other of Robert Gittins, Mr Sutton and William Gittins (and on one occasion David Gittins), the Fixed Rate Representations were made by implication. The communications relied on fall into the following categories.

510. First, Mr Smith, on behalf of CB, on various occasions between 2002 and 2008, stated to Janhill that Treasury representatives would confirm, or would advise Janhill of, the interest rate for the FRTBLs. It is pleaded that he "communicated that this would be a market rate". There is no pleaded instance of any express statement by Mr Smith that the Fixed Rate was a market rate: the most that can be said is that it is to be implied from the express communications relied on. Those are:

i) An email of 28 June 2005 from Mr Smith to Mr Sutton, stating that one of his treasury colleagues would make contact "to advise of the current fixed rate";

ii) An email of 11 July 2005 from Mr Smith to Robert Gittins, stating:

> "I recently had some discussions with David & Rob regarding the fixing of the new debt for a 10-year period given that forward fixed rates were standing extremely competitive standing at around 4.75% - the good news is that the rates are still around this level (you can fix in for 10 years at 4.77% + your margin) and I presume therefore that David will still wish to lock into these. Can you please confirm that this is the case and I will ask one of our Treasury team to contact you prior to completion tomorrow to confirm the interest rate that will apply."

iii) An email dated 5 December 2007 from Mr Smith to Mr Sutton, stating:

> "fixed rates have dropped again and you could probably fix in over 5 years at around 5.45%".

511. Second, the fact that Mr Smith on behalf of CB discussed and agreed with Janhill the Margin applicable to each FRTBL before the relevant facility letter was issued.

512. Third, the fact that CB stated, on each occasion, that the Fixed Rate would be agreed separately with a member of the treasury and financial markets team on a telephone call, and those telephone calls were then arranged.

513. Fourth, on the following booking calls, CB told Janhill that Margin would be added to the Fixed Rate to get the all-in rate:

i) 13 July 2005 and 16 September 2005 between Mrs Sharon Ellis, an associate in NAB's treasury solutions team, and Mr Sutton;

ii) 3 July 2007 between Mr Michael Corcoran, an associate in NAB's treasury solutions team, and Mr Sutton; and

iii) 1 December 2008 between Ms Hazel Wilkinson, an associate in NAB's treasury solutions team, and William Gittins;

iv) On a telephone call on 10 July 2006, between Mrs Ellis and David Gittins, Mrs Ellis referred to where the Fixed Rate "was this morning" and said that she was getting this rate booked.

The objective question: would a reasonable person in Janhill's position have understood the pleaded representations to have been made?

514. Janhill's case involves additional complexity because it relates to FRTBLs entered into on six different occasions, over a period of six years. Although, as I have already noted, in deciding whether CB's words and conduct gave rise to an implied representation upon which Janhill relied in entering into a FRTBL, it is permissible to view the words and conduct in the round, it is nevertheless necessary to address separately in relation to each FRTBL what words and conduct gave rise to a representation inducing Janhill to enter into it.

515. That is not, however, the approach adopted by Janhill. The pleaded case is that the words and conduct summarised above, as a whole, gave rise to the Fixed Rate Representations, which induced Janhill to enter into all of the FRTBLs. Any communication which postdates entering into a FRTBL cannot have induced Janhill to enter into it, and it cannot be assumed that a representee had in mind, when entering into a transaction in 2008, a representation made in an email in 2005. This would need to be addressed specifically in evidence (which it is not).

516. In the end, however, I do not think that this matters. That is because Janhill's case on implied representations essentially reflects the core case advanced by all claimants. The four categories of communications I have summarised above boil down to: Janhill being told that the Fixed Rate was something that changed over time (because it was referred to variously as "current", "standing extremely competitive" or having "dropped" and had to be locked in at the point of entry into the loan); and the process which involved the Margin being agreed first and separately from the Fixed Rate.

517. The TBL documentation relevant to the Janhill FRTBLs entered into from 2005 onwards is the same as that relevant to Farol's FRTBL. I have already rejected

the idea that a reasonable customer would have understood from such matters that the Fixed Rate Representations were being implied, taking into account the terms of that documentation and the wider context. None of the specific communications pleaded by Janhill adds anything further. In particular, nothing said or done by CB related to the issue which lies at the heart of the Fixed Rate Representations, namely how and on what basis CB had arrived at the Fixed Rate element offered to Janhill in relation to each of the FRTBLs. This was not a question Janhill ever asked of CB, and CB did not volunteer information about it.

518. The TBL documentation relevant to the first two Janhill FRTBLs was different, but I do not think it changes the outcome. I have summarised key aspects of that documentation above, and similar points emerge from it. Janhill was told that the rates were based on market rates, from which it necessarily followed that they could change over time and would need to be finalised at the point the loan was entered into. Nothing in it, however, said anything – other than that it was based on market rates – about CB's processes for determining the Fixed Rate to offer.

519. The reasonable customer in Janhill's position would have seen that the Fixed Rate being offered varied from product to product and could, in the case of a capped rate, include the cost of the cap. That, together with the fact that Janhill at various times also had a variable rate loan, to which the same lending Margin applied, cuts across the idea that the Fixed Rate was a pure market rate.

Inducement and Reliance

520. Janhill's pleaded case is that if the Fixed Rate Representations had not been made, then it would have entered into variable rate loans with CB or with another lender for (in each case) the same amount and term.

521. The evidence in support consists of a line in Robert Gittins' statement: "If we had understood that the fixed rates were not just the day's market rate, we would have preferred to have stuck with variable rate loans with known margins of between 1.25% and 1.5% (as we had previously)." That last reference was to an earlier passage in his witness statement, where he said that Janhill's uncertainty with regard to the benefit of fixing was illustrated by the fact that they fixed only one of the TBLs entered into in October 2002, and that was for only £500,000. He was wrong about that, however: both this and the other loan (for £950,000) were fixed. Moreover, Janhill had also entered into a previous fixed rate loan with Cheshire Building Society in 1997 and, by 2005, 40% of Janhill's borrowing with CB was fixed.

522. When this discrepancy was pointed out to Robert Gittins, he accepted that fixed rate borrowing continued (in 2002 and beyond) to be a very important part of Janhill's overall borrowing ("It did, and I think there are obviously benefits to fixing").

523. Mr Sutton made no mention in his statement of the possibility of borrowing at variable rates. He said only that if Janhill had not understood the Fixed Rate was a market rate it would "not have simply accepted this rate" but would have

sought to negotiate it down (although it is not Janhill's case that it would or could have negotiated down the rate on any of its FRTBLs). In cross-examination, Mr Sutton was realistic in accepting that there were good reasons for Janhill to borrow at fixed rates, because its main source of income was rent from tenants, while a main expenditure was interest on its borrowings, and it was important for cash-flow purposes to match income to outgoings:

> "Q. And let's be more specific: that's why Janhill Ltd did take fixed rate loans, isn't it?
>
> A. Yeah, I mean there are times when you may look at the market and you think it's incredibly high and it's only going to come down, so you might take a variable rate yes. But generally that would be the case, yes."

524. The claimants' lending expert, Mr Penman, agreed that commercial landlords will generally prefer lending at fixed rates, for the same reasons as Mr Sutton gave.

525. Before 2008, the key decision maker for Janhill was David Gittins. Documents from 2005 suggest that he was "risk averse", and actively looking to borrow at fixed rates. For example, a CB file note from 2005 read: "Customer mentioned they did not want any other product offering as want the certainty of repayments – therefore just want to focus on the fixed rate offering." There was no evidence from David Gittins to contradict this.

526. Taking account of the above points, I find that even if Janhill had been aware of the AV (which is to put its case as to the appropriate counterfactual at its highest – see my comments on Farol's equivalent case above), it would not have entered into variable rate loans. Accordingly, even if Janhill was successful on the other aspects of its claim in fraudulent misrepresentation, the claim would in any event fail.

527. It is accordingly unnecessary to consider the extent to which Janhill relied on the Fixed Rate Representations in entering into the FRTBLs, but I do so here for completeness.

528. The only evidence from Janhill as to its understanding at the time it entered into the first two FRTBLs in October 2002 is from Robert Gittins. I have set out above the reasons for dismissing the contention that Robert Gittins understood at the time that the alleged express representation was made to him. Those reasons apply equally to the contention that he understood at the time the implied representation was made to him.

529. More generally, I do not accept that Robert Gittins at the relevant times understood the Banks to be making the Fixed Rate Representations to him. Aside from his evidence (in paragraph 15 of his witness statement) as to what he understood from the communications with the Banks in 2002, there are only two other relevant passages in his witness statement. First, at paragraph 16, he referred to the fact that in 2002, Janhill already had loans with another bank, and said: "therefore, when [CB] quoted a lower margin, *given our*

understanding that the fixed rate was the market rate that would mean the overall figure for the loan would in fact be lower." It is clear from this that any understanding he had pre-dated the first of the FRTBLs and was not based on anything said to him by the Banks.

530. At paragraph 17, he said that "in my mind, the Bank had to get the money from somewhere and the fixed rate part was what it would cost them on that day." He does *not* say that this is what he understood the Banks to be telling him at any time, whether by reference to the particular communications pleaded or otherwise. In any event, nothing said by anyone on behalf of the Banks addressed the question of the cost to the bank of acquiring the funds in the market – other than (potentially) the reference to "cost of funds" by Mr Palmer in the conversation in September 2002, of which Robert Gittins had no memory.

531. Similarly, in his witness statement, Mr Sutton said that it was his "understanding" that the Fixed Rate was non-negotiable, but he did not give any evidence that he understood at the time that any of the communications relied on by Janhill to which he was privy gave rise to that understanding, or more importantly, any of the pleaded implied representations. Indeed, it appears from his evidence that "we always checked the margin in comparison to previous loans or what was available in the market" that he acquired this understanding independently of anything said or done by the Banks.

532. A likely indicator to Mr Sutton's understanding is his lack of reaction to being told (albeit some time later, in 2009) that the bank took additional income from a fixed rate loan. In December 2009 Mr Sutton emailed Mr Smith, in relation to the possibility of fixing the rate on an outstanding variable rate loan of £360,000. He asked: "what are the implications to us when we fix?". Mr Smith responded: "…as you know a fixed deal does produce some income for the bank and what I was simply saying is that this would be recognised with any pricing negotiations/decisions made." It was put to Mr Sutton in cross-examination that this suggested he was aware that fixing a rate would produce additional income for the bank, to which he said "yes".

533. He did go on to suggest that he might have understood this to be by way of an increase in the Margin. That does not help, however. Janhill does not suggest that anything in the Margin agreed between it and CB was to take account of the additional income for the Banks in relation to the fixed rate lending, yet Janhill had long had both fixed rate and floating rate loans with CB and, as was stated in terms in a letter from CB to William Gittins, copied to Mr Sutton, dated 26 September 2008, the same Margin applied to all of the loans.

534. William Gittins was involved in only one of the communications said to give rise to an implied representation – the telephone call with Ms Wilkinson on 1 December 2008. In fact, Janhill had already signed the facility letter for the relevant FRTBL, and the rate had already been agreed. William Gittins also did *not* say that anything Ms Wilkinson said in that call was understood by him as any of the pleaded representations. He just said; "my understanding was that the margin was where the Bank was making its money". He also referred to the fact that "we used to compare different lender's Margins to work out how

competitive they were." In cross-examination, he accepted that nothing said by Ms Wilkinson indicated anything about CB's margin or profit.

535. The claimants point to passages in the cross-examination of each of the Janhill witnesses in support of this aspect of their case on reliance. As for Robert Gittins:

i) When asked about the assumption that he made that the Margin was the only negotiable part of the rate, and that there was nothing which indicated that the bank led him to that assumption, he said:

> "At the time we assumed that that was the case. The fact that you had to book calls on a -- to ascertain the rate on a particular day. The fact that market rates were mentioned in emails and reference to LIBOR curves, the rate had fallen, and "you can fix now for such-and-such", we just assumed that we were -- believed that we were paying a market rate, and the income or profit for the bank was generated by the margin and the loan arrangement fee."

ii) A little later, when asked again where his belief that the Fixed Rate was the bank's cost of funds came from, he said:

> "There were a number of reasons. Fixing the rate on the day, because the rate might have changed, led us to believe that we were accepting a rate based on whatever LIBOR curve was on that day for the particular period. Cost of funds, which we believed were the bank's cost of funds."

iii) He was asked on two occasions about whether he had a clear understanding of what "Fixed Rate" meant in 2002. On one occasion, he said that he did understand it to mean a market rate. On another occasion, he suggested that he might not have done. The former is consistent with paragraph 16 of his witness statement (see above), and is also consistent with the witness statements of William Gittins and Mr Sutton, that they always compared the *Margin* offered by different banks because that was the part they thought was negotiable.

536. I treat these answers, insofar as they purported to give a recollection of what Robert Gittins thought at the time, with caution. He did not rely on any of these matters in his witness statement as having induced the relevant understanding, and I consider that they were influenced predominantly by what he has learned in the course of preparing for this case. The reference to "cost of funds" is the most telling, because that was a phrase that was used in one telephone call of which he has no recollection, and in documents at the time of the first two FRTBLs which he accepted he would not have seen at the time. Similarly, I do not believe that there is any email mentioning market rates and LIBOR curves which he has any recollection of seeing at the time as giving rise to the representations. Rather, he has seen these in preparation for this case. There are indeed such emails in disclosure, but they are in the context of discussing a variety of lending options, including variable rate loans. The mere fact that they

mention market rates and LIBOR provides no support for any of the implied representations (and Janhill does not plead that they do).

537. As for William Gittins, the passages relied on in the claimants' closing submissions merely (1) restate that it was his "belief" that the Fixed Rate was a market rate, and that all banks would be lending at the same market rate (which is why he only ever spoke about the Margin when comparing with other banks), and (2) refer to things which he did not know, e.g. that there was an income element built into the Fixed Rate, or that the Fixed Rate was not "set by the market".

538. In the first of the passages from the oral evidence of Mr Sutton relied on in the claimants' closing, he was merely reiterating his *belief* that the Margin, but not the Fixed Rate, was negotiable. When asked in re-examination what this was based on, he said "Because we believed the fixed rate was ... the rate at which the bank banked the money." He did *not* say that it was because of anything said by the Banks. In another passage relied on, in answer to a question whether he thought that Ms Ellis and Mr Corcoran were being dishonest on the booking calls, he said that "I had this vision of how cash was booked, of these guys being from treasury sitting there with their computers, they talked to me, and then once the confirmation has been made they press the button and the money is booked. That's my – that's how I justified what was going on. And that interest rate would be there or thereabouts of what was discussed." This falls quite a way short of saying that he understood at the time that the Banks (whether on the calls or through the process more generally) were representing to him that the fixed rate was a pure market rate. In any event, this answer was prefaced with; "in retrospect and looking back…".

539. Accordingly, I find that even if the Banks' conduct gave rise objectively to the Fixed Rate Representations, that was not appreciated by any of the alleged representees at the time.

C4. Uglow's claim in respect of the Fixed Rate Representations

540. In late 2009, Uglow was looking for finance to purchase a new property, Stone Farm. It required £2 million, which represented 100% of the value of the property. It was then banking with NatWest Bank Plc ("NatWest"), but they were not prepared to lend 100% of the purchase price. Accordingly, Uglow approached CB.

541. The partnership consisted of Rob Uglow, and his parents. Rob Uglow, alone, provided a witness statement and attended trial to be cross-examined. Uglow was assisted in arranging the FRTBLs by two advisers, Mr Mike Feneley, a farm consultant, and Mr Vince Edwards, Uglow's accountant. I deal further with their involvement below. Neither of them gave evidence.

542. From the Banks, I heard evidence from Nigel Martin, Uglow's relationship manager at CB, from Amy Collins (now Amy Woolman), the Treasury Solutions partner involved with the sale of the FRTBLs to Uglow and from Megan Robertson (now Megan Coad), the Treasury Solutions associate who confirmed the details of the loan on a booking call with Mr Uglow. Meaning no

disrespect, I will refer to the latter two by their maiden names, Ms Collins and Ms Robertson.

543. Uglow entered into two FRTBLs on 2 March 2010, one for £1.5 million and the other for £500,000, both at a Fixed Rate of 3.04% plus Margin of 2%. It also entered into a variable rate loan with CB at the same time (also with a Margin of 2%).

544. Uglow pleads one purported express representation, namely that the Fixed Rate was "the Bank's cost of funds". It relies, first, on the following passage in an email of 20 November 2009, from Mr Martin to Mr Uglow: "for indication purposes we would be looking at some 2% above 1 month Libor (currently 0.53%) or 2% over 'Cost Of Funds' for a fixed rate loan – as at today that would give a 5 year fixed rate of say 5.7%". It also relies on a passage in the outline terms and conditions sent by Mr Martin to Uglow on or about 11 December 2009, in which it was stated that "fixed/hedged" rates would be "2.00% + Cost of Funds".

545. Uglow also pleads that the Fixed Rate Representations were made by implication from a number of communications from various employees of the Banks to Uglow, as follows:

i) Mr Martin discussed and agreed the Margin of 2% before the facility letters were issued;

ii) Ms Collins told Mr Uglow in an email dated 2 March 2010 that "rates are subject to change on the day of dealing in accordance with market movements" and "we will Fix in the Market at 3.04% plus your 2% credit margin – all in rate = 5.04%";

iii) CB stated that the Fixed Rate would be agreed separately with a member of the treasury and financial markets team on a telephone call, and such a call was arranged with Ms Robertson;

iv) Ms Robertson quoted a Fixed Rate on the booking call on 2 March 2010, stating that the Margin would be on top of the Fixed Rate and that the Fixed Rate would be "locked in" with "the traders" that day.

Express representation

546. So far as the purported express representation is concerned, it is in fact nothing of the sort. Neither of the documents relied on makes any reference to the Fixed Rate being the *bank's* cost of funds. If any of the pleaded representations was made in either Mr Martin's email of 20 November 2009 or the outline terms and conditions sent on about 11 December 2009 at all, therefore, it can only have been by implication.

547. No other express representation was pleaded or referred to in Mr Uglow's witness statement.

548. In the course of his cross-examination, however, Mr Uglow for the first time said that he recalled a discussion with Mr Martin round the kitchen table at home, in which he asked Mr Martin what was meant by "LIBOR" and by "Cost of Funds". He said he had never come across the terms "LIBOR" or "cost of funds" before. He remembered Mr Martin explaining what LIBOR was, "because I thought banks lending each other money was a very strange thing." He said that "He said something about LIBOR being the inter-bank lending rate or something, and the cost of funds was the cost of them going out into the marketplace to retrieve or, you know, to get money."

549. There are good reasons to doubt the accuracy of this purported recollection. The question of whether any of the Fixed Rate Representations was made to Uglow must have been well in mind for Mr Uglow and those assisting him in preparing the pleading and his witness statement. The absence of any reference to an express representation in those documents is a strong indication that it was not something Mr Uglow recalled when they were prepared (in May 2019 and February 2023 respectively). Mr Uglow could not explain why there was no mention of what Mr Martin had said in either of them.

550. The only meeting referred to in Mr Uglow's statement is the one with Ms Collins and Mr Martin in January 2010. He said in cross-examination that he did not remember the details of that meeting, other than that it happened. He had not, for example, remembered that although it was due to be a meeting with Ms Collins, Mr Edwards and Mr Feneley, Ms Collins was delayed by the weather so that by the time she arrived Mr Feneley and Mr Edwards had left.

551. According to an email from Mr Uglow to Mr Martin on 2 December 2009, they had met at the Uglows' home that morning. This appears to have been the first meeting following Mr Martin's email of 20 November 2009 in which he referred to "Libor" and "Cost of Funds". Mr Uglow made no reference to that meeting in his witness statement.

552. Another reason for doubting the accuracy of Mr Uglow's recollection in the witness box is that he acknowledged his understanding of what Mr Martin said was, and remains, limited. While he said that Mr Martin had described LIBOR and cost of funds as being different, he was unable to articulate that difference. He said that he thought cost of funds meant "the marketplace cost of funds", or "it means where the money came from as in cost of funds". When asked how that differed from his understanding of LIBOR he said:

> "LIBOR is a mystery to me. And it still is. But as Mr Martin explained, it was the lending of money from one bank to another. Quite how that is different, I don't know."

553. Subsequently, he accepted that Mr Martin might well have said only that the cost of funds or the Fixed Rate was *based on* market rates: "He could have, but that wasn't what I understood."

554. The practice of identifying the overall rate payable under a fixed rate loan by reference to "costs of funds" and margin does not appear to have been unique to CB. (I have referred above to Mr Vellacott's experience that it was common

for banks to offer fixed rate loans in this way). Mr Uglow accepted that NatWest – who as I describe below sought to retain Uglow's business when it found out about CB's involvement – had also been talking to him about cost of funds. When Uglow sought to refinance in 2013 and 2014, both Lloyds and Santander quoted indicative rates on the basis of costs of funds plus margin. Uglow has not retained any of the documentation relating to its existing banking relationship with NatWest but, on the basis of the above evidence, I find it unlikely that the reference to "cost of funds" in Mr Martin's email of 20 November 2009 was the first time Uglow (including, that is, Mr Uglow's parents – who were also at the meeting with Mr Martin in early December 2009) had heard that phrase.

555. Based on Mr Uglow's evidence and the contemporaneous documents, I think it doubtful that Mr Martin told Uglow that the Fixed Rate element of the FRTBL equated to the cost to the bank of acquiring funds in the market.

556. It is not surprising, since there was no mention of such an explanation having been made by Mr Martin at a meeting with Uglow either in the pleading or Mr Uglow's witness statement, that it was not dealt with by Mr Martin in his witness statement. The claimants, however, rely on what Mr Martin said in cross-examination, as supporting the contention that he would have explained the phrase "cost of funds" to Mr Uglow in the way that Mr Uglow now says he did.

557. Mr Martin's evidence was often confused and contradictory. On the basis of his evidence, and having reviewed carefully the transcript, I have concluded that this was due both to his limited understanding of the Treasury Solutions aspects to the TBLs and to his difficulties in distinguishing recollection from reconstruction. Certain of his answers undoubtedly suggested he may have explained "cost of funds" to Mr Uglow as the cost to the bank of acquiring funds in the market. Other answers suggested that was not the case.

558. Having been shown his email to Mr Uglow of 20 November 2009, Mr Martin was asked if he had heard people in Treasury Solutions use the phrase "cost of funds". He said: "Not only in Treasury Solutions. It was a wording I'd come across in banking before. Others using it." He was then asked: "And doesn't "Cost Of Funds" means the cost to a bank of borrowing funds? Isn't that the banking meaning, that term?", to which he replied:

> A. Generally, yes, that's the cost of obtaining funds for the bank, for loan account borrowing, asset finance borrowing or other borrowing products, normally."

559. At this point, he was being asked about the general banking meaning of the term. It was then put to him that he explained to Mr Uglow, at a meeting at his house, "what cost of funds means, which is the cost to the bank of borrowing", to which he said:

> "I explained to him that that was a number that was given to me essentially by the Treasury Solutions partner, to which we needed to add the 2%, as it turned out to be, margin."

560. Although this answer was expressed as if it was his actual recollection, it was clear from Mr Martin's witness statement that he had no actual recollection of discussions with Uglow at the time. (When asked what his email of 20 November 2009 conveyed, he said: "Well, I've used cost of funds, and don't believe that we had any detailed discussions exactly as to what those cost of funds were.") It was, however, consistent with the comment in his witness statement as to what he thinks he would have done at the time, if he had been asked by a customer about the Fixed Rate: "I would simply say that the fixed rate was the rate advised by the TS representative on the date the FRTBL was entered into. I generally tried to avoid discussions like that because the specifics of the fixed rate were part of the TS Partner's role which I did not want to encroach on."

561. His evidence that he would have told customers that the Fixed Rate was simply the rate which he would get from Treasury Solutions was not specifically challenged. He reiterated it on other occasions, when asked, for example, why he did not separately mention AV: "because – my understanding of the cost of funds, it included that AV. It didn't need to be quoted separately. I believed I made it clear it was the number the treasury partner would have given them plus their 2%".

562. The claimants rely on the following passage in his evidence:

> "Q. So you say you understood it to be the number, the fixed rate they're going to get, part of what they're going to pay, but you also say, as you said earlier, that the general meaning in the banking industry and what you have explained to the Uglows is: that is the bank's cost of borrowing?
>
> A. Yeah, I -- it's the cost of the bank getting the money to give to the Uglows in the marketplace."

563. I treat this answer with care. The question rolled together two things: the general industry meaning of the phrase, and what he had told the Uglows. His answer was in terms directed at the former. Moreover it was suggested to him that he had already said that this is how he explained it to the Uglows, which, as I have noted above, was not the case.

564. The claimants also rely on a later passage, where Mr Martin was again asked about the use of the phrase "cost of funds" in his email to Mr Uglow, and his understanding that this was "the cost to the bank of going to acquire funds in the marketplace" to which he responded: "yes, and delivering those to be available to Mr Uglow". He was asked what he meant by these additional words, and said:

> "Well, simply getting them from the marketplace, something has to be done to get them to the Uglows, and there's going to be some transaction costs involved in doing that or delivery costs involved in doing that."

565. Mr Martin's evidence as to his understanding of AV was particularly confused. In his witness statement, he said "I am" aware that the Fixed Rate offered to customers by the Treasury Solutions representative incorporated an element of AV. He then said that his understanding "was" that typically around 35 basis points were included in the single Fixed Rate figure quoted to customers.

566. In cross-examination, he said that (although he now understands this) he had not understood at the time that AV translated into specific basis points being added to the Fixed Rate charged to customers. He understood it, instead, as something that involved a payment between the Banks, from NAB to CB, as an incentive to local business managers to sell TBL products. Even this, he thought, was not a real payment, but was something he referred to as "wooden dollars". By this he meant that it was a notional sum credited to his branch which went towards meeting targets for treasury income (an explanation which is in fact consistent with his witness statement, where he used the same term).

567. When asked about the comment in his witness statement that AV was typically 35 basis points, he said: "That's a figure, yeah, that had been paid across as treasury income based on the deals that I'd done". In a later exchange on the question whether AV was negotiable, he said: "How the reward got to us, if you like, I didn't understand. I knew that it came through somewhere between 35, 40 basis points typically." When it was put to him that the difference between him and the customer was that he knew there was additional margin in the Fixed Rate, he said:

> "I knew there was reward paid into my bonus pot from it. Exactly how that rate had been worked out, I didn't really concern myself with."

568. He was asked whether he knew what the number (i.e. the Fixed Rate) provided by the Treasury Solutions partner was made up of, to which he replied: "I did not. It was a number given to me by the treasury partners and I wasn't aware of what the component parts of that were." He was then asked whether he was aware, in particular, that it was made up of a market rate which the traders saw on a computer screen, to which they added some basis points, to which he said: "I knew they went to a computer screen and picked a number, but how they then interpreted that number and what they did to that number, I wasn't aware of. It just came to me as this is the ––what I call the cost of funds, the 2 –point whatever it was ––3.04% scenario."

569. In follow-up questioning, when Mr Martin was reminded that he had said in his witness statement that he had understood that typically around 35 basis points were "included in the single fixed rate figure that was quoted to customers", he said: "I was aware that we got rewarded in terms of the 35 basis points, as it's saying there … I wasn't aware that 35 basis points was a direct add-on to the market rate. I was aware that when the market rate and whatever was sold to customers I was rewarded with 35 basis points towards my bonus pot." He said he thought that, so far as what the Uglows paid was concerned, "it must have included the 35 basis points somewhere along the line."

570. When the inconsistency with his witness statement was again pointed out, he said that the understanding set out in his witness statement, that the Fixed Rate offered to the customer included the additional basis points of AV, was "certainly my understanding now. I'm not sure I was fully au fait with that at the time we were doing deals." As to his understanding at the time:

> "I knew 35 basis points came into the calculations, but I wasn't aware at the time that it was, if you like, the added margin. I was rewarded with 35 basis points, but assumed that that was just a nominal token payment for having done the fixed rate."

571. Mr Martin was taken to examples of slides from training sessions for regional managers put together by Treasury Solutions personnel, but he had no recollection of them. The claimants point to Ms Collins' evidence that relationship managers would have needed to understand the "basic information" about AV.

572. I nevertheless find that Mr Martin lacked that basic understanding, leaving these matters to the Treasury Solutions partners to explain this to customers. I formed the strong impression that Mr Martin's strengths as a branch manager lay in forming relationships with his customers, in understanding their businesses and in arranging straightforward loans. In contrast, when it came to interest rate hedging products such as the FRTBLs, he relied on the Treasury Solutions people from NAB. I consider that at the time he did indeed have a very limited understanding of how the Fixed Rate on a FRTBL was determined, and what it comprised.

573. So far as AV is concerned, I find that his understanding was limited to the fact that adding AV (typically in the region of 35 or 40 basis points) resulted in a capital figure which was credited to his branch's income targets. This limited understanding is consistent with the fact that in the contemporaneous documents he referenced "Treasury Income" as the capital sum produced by multiplying basis points by the amount of the loan and its term: see, for example, his email to senior colleagues on 17 November 2009 ("£80,000 Treasury Income (40bp on £2m x 10 years").

574. Having regard to all of the above, on balance I find that Mr Martin did not explain that the Fixed Rate element in the FRTBL was the cost to CB of acquiring funds in the market to lend to Uglow.

The implied representations: would a reasonable person in Uglow's position have understood that the alleged implied representations were made?

575. Aside from the question whether Mr Martin expressly told Mr Uglow that the Fixed Rate was the rate at which CB acquired funds in the market (and the references to cost of funds in some of the documentation), the matters relied on by Uglow as giving rise to the implied representations do not go beyond the core matters relied on by all claimants, which I have addressed above.

576. For the reasons there set out, I do not think that the reasonable customer in Uglow's position would have understood the Fixed Rate Representations to have been implied from those matters.

577. One additional factor in the case of Uglow is that it entered into both fixed rate and floating rate loans at the same time, each with the same Margin. Indeed, from early in the process – in Mr Martin's email to Mr Uglow of 20 November 2009 – the indicative offer was 2% over either Libor (variable rate loan) or cost of funds (fixed rate loan). This bolsters the point I have made above, that a reasonable customer would appreciate that a bank offering fixed rate lending would undertake additional burden and risk for which it would naturally expect to be paid.

578. So far as the references to "cost of funds" are concerned, for reasons that I have already developed in relation to Farol's claim, I do not think that the reasonable customer would have thought that by labelling the Fixed Rate "cost of funds", CB was intending to volunteer information about what it cost it to acquire funds in the market. When put in context, I consider that this would have been understood simply as such a label, and was not intended to convey anything about how the Banks had arrived at the Fixed Rate.

Reliance and causation

579. It is Uglow's pleaded case that had it known of the AV it would have sought to negotiate the Fixed Rate down to the "proper" market rate, by which it means the rate offered less all of the AV. Mr Uglow, in his witness statement, also said that if it had not been possible to negotiate the Fixed Rate down, he would have gone for a variable rate loan. I reject that (unpleaded) possibility, because it was a condition of the lending offer to Uglow that it entered into a fixed rate loan. For reasons similar to those that apply to Farol's case, I also reject the possibility that CB would have been willing to forego *all* AV. Uglow has not provided any reason to think that it would have done so.

580. The first question is whether, if any representation was objectively made, it was understood by Mr Uglow to have been made in the sense pleaded by the claimants.

581. In his witness statement, Mr Uglow referred to the documents he had received from CB in advance of entering into the FRTBLs and explained what he believed or assumed from what was said in them. He explained what he understood by the phrase "2% over Cost of Funds", as used for example in the email from Mr Martin of 20 November 2009, by way of analogy: if the bank was selling oranges to him for £1.50, but purchasing them in the market at £1.00, then the former was the "cost" to the bank, to which it added 50p "margin". In the same way, he assumed that the "cost of funds" was the cost to the bank of going into the market to obtain funds to lend to him. Similarly, when Ms Collins said in her email of 2 March 2010 that CB would "fix in the market at 3.04%", he understood that to mean that the cost to the bank of acquiring the funds fluctuated, and was being fixed on that date at 3.04%. Since he understood the Fixed Rate in this way, he believed that the only part of the overall rate he could negotiate was the Margin.

582. I accept that, if Mr Martin did tell Mr Uglow that the Fixed Rate was just the rate at which CB acquired funds in the market, or the references to "cost of funds" did give rise objectively to an implied representation to that effect, then Mr Uglow is likely to have understood that representation to have been made to him at the time. At least this would have reinforced his simple (albeit unrealistic) understanding that a bank offering a loan could be compared with a retailer selling oranges.

583. The next question is to identify the correct counterfactual if such representation(s) had not been made. The relevant counterfactual is one in which nothing was said about the rate being "cost of funds" or that this meant it was the rate at which CB acquired funds in the market. If that information had not been volunteered by Mr Martin, I do not believe that Uglow would have asked about the composition of the Fixed Rate. I have no reason to think that Mr Uglow, who was content with the overall rate being offered, would himself have had reason to ask.

584. Uglow's advisors, Mr Feneley and Mr Edwards were both well known to Mr Martin, as they acted for numerous farming clients in the Devon and Cornwall area. Mr Uglow sought to downplay their involvement, but it is clear that they – in particular Mr Feneley – played an important role in the negotiations with CB. The first in time communication from Mr Martin is an email to Mr Feneley thanking him for his messages and emails, and discussing possible lending structures. Mr Feneley was closely involved in subsequent meetings and communications with CB.

585. Mr Uglow accepted, and Mr Martin corroborated this, that Mr Feneley and Mr Edwards would have had considerable experience of bank lending to farmers, and would have had at least a general awareness of indicative interest rates from a range of banks. I have not heard evidence from them, because Uglow has not called them. In Mr Feneley's case, Mr Uglow said in re-examination that he had cancer, but I have no information as to whether that would have precluded him from at least providing a witness statement. I have no information as to why Mr Edwards has not been called to assist Uglow's case. I nevertheless infer, given their wider experience, that, even if Mr Uglow did not appreciate it, they would most likely have understood that a bank offering fixed rate lending would have priced additional income into the rate being offered, certainly where the borrower's Margin was the same across its variable and fixed rate loans. Accordingly, I do not think that they would have either themselves asked, or prompted Mr Uglow to ask, how the Fixed Rate offered by CB had been determined or what was comprised within it.

586. If that is wrong, and if the existence of AV had been revealed in the relevant counterfactual, I do not think it would in fact have made any difference to the outcome in the case of Uglow. Much of my reasoning in relation to Farol's claim is, in this respect, equally applicable here. The possibility of negotiating the Fixed Rate down because Uglow was told about the AV must be seen in light of the following:

i) As I have noted, the lending request was, from the outset, a challenging one given that Uglow sought 100% of the value of the property to be purchased.

ii) Although Mr Uglow made much of the fact that the Margin was the only part he thought he could negotiate, he had not in fact negotiated the Margin. It was explained to him in Mr Martin's email of 20 November 2009 that 2% was a slightly higher rate than CB might otherwise have offered, to allow for the fact that the loan was to be on an interest only basis to start with. It was noted, however, that once the debt servicing was proven, and the term loan extended on an interest and capital repayment basis, then CB may look to reduce the Margin, potentially to 1.8%.

iii) Mr Uglow was content with the overall rate of interest being offered.

iv) He was also content with the price at which the capped rate loan, which he entered into around the same time, was offered to him. He accepted, when asked in cross-examination, that the Banks received income from that product, but he had not sought to negotiate it.

v) Notwithstanding that, as Mr Uglow said in cross-examination, NatWest – once they discovered Uglow was in discussion with CB – "tried very hard to keep us", they were unable to match the rate offered by CB. Uglow has not retained any emails relating to the communications with NatWest at that time. In an email from Mr Uglow to a business associate in 2015, he said that CB had been the best option when Uglow purchased Stone Farm, "even beating our old bank so we jumped across". Mr Uglow accepted that NatWest had given Uglow indicative rates for the proposed lending, but they could not match CB.

vi) It follows from my conclusion that a bank would naturally charge more for undertaking fixed rate lending, that *other* banks would have been pricing additional income into their fixed rate products. As I have already noted, I consider that Messrs Feneley and Edwards would have understood that. I consider that their views would have been a material consideration in Uglow's decision to enter into the FRTBL.

vii) The notion that CB would, in Uglow's case, have been willing to negotiate down the overall fixed rate was not put to either of the two people who would have been involved in that decision; Mr Martin or Ms Collins. That may be understandable in Mr Martin's case, since his evidence was that he believed the Fixed Rate was not negotiable. Ms Collins was asked in general terms whether the Banks might negotiate on AV, and she accepted that they might, but she was not asked whether that would have been possible *in this case*. That omission is important, given the nature of the request and the absence of any reason (for example because CB was aware that another bank was willing to offer better terms) for negotiating a reduction in the overall rate.

587. I conclude, therefore, that even if the AV had been disclosed to Uglow, it would have been more likely than not to enter into the FRTBLs on the same terms.

C5. Deceit and the Fixed Rate Representations

588. The claimants allege that eleven employees of the Banks made the Fixed Rate Representations knowing that they were false or reckless as to their falsity.

i) Farol alleges deceit against each of Ms MacKenzie, Mr Coward and Mr Horne;

ii) Janhill alleges deceit against each of Ms Ellis, Mr Corcoran, Ms Wilkinson, Mr Palmer and Mr Smith;

iii) Uglow alleges deceit against each of Ms Robertson, Mr Martin and Ms Collins.

C5(a). Matters common to each of the claims

589. The claim in deceit must be considered in relation to each of these persons separately, in relation to each occasion on which they are said to have made a Fixed Rate Representation. There are nevertheless a number of matters on which the claimants rely, and objections taken by the Banks, which are common to all the allegations of deceit. I address these common matters in this section, before turning to the claims of each of Farol, Janhill and Uglow.

Limited involvement of alleged representors

590. Seven of the alleged representors had no involvement in the process of selling the relevant FRTBLs to the claimants other than that they confirmed with the customer, in the booking call on a recorded line at the end of the process, the terms of the loan. They are said to have made the implied representations on that call by referring to the interest rate in terms such as: "the Fixed Rate is x%, the Margin is y%, making an overall rate of z%".

591. It was common ground that these employees, in doing so, were following a general practice or system that was well-established within the Banks. The claimants made much of the fact that this general practice included the setting of AV, and the amount of AV charged in each case being reported and discussed internally, including very shortly before the booking call took place, but the existence of AV *not* being volunteered to the customer. The general practice was reflected in the Treasury Solutions Desk Manual (which dates from April 2009, but which described a process that was essentially already in place). The manual set out the steps to be followed in booking a FRTBL. It referred in numerous places to AV in the context of pricing the transaction, and AV was identified as one of the matters to be communicated internally to the trading desk. The checklist of matters to confirm with the customer on the booking call, however, omitted AV.

592. The relevant witnesses agreed that they were following general practice. When asked about why it was the practice not to volunteer AV, some were unable to

say more than the fact that this was the way they had been trained and was the way that it was always done. Others referred to the fact that the AV was built into the overall price to reflect the extra service being provided by the Banks and, as with any other product sold by the Banks, it was not customary to volunteer how that product had been priced.

593. Some witnesses also said that if a customer enquired whether there was additional income for the Banks in a FRTBL, then they would have been told about it, and referred to instances where that had happened (see, for example, Sharon Ellis, Jonathan Palmer and Amy Collins). There is no evidence – save when Mr Sutton was told that a fixed rate deal produced some income for the bank (see above at [532]) – of any of the four claimants in these two actions having been told at any point about AV, but I nevertheless accept the evidence as to what sometimes occurred with other customers (which was not expressly challenged).

594. The claimants contended that the presence of such a system was important, because the general practice was "either actually or potentially inherently deceptive". That is based on the claimants' proposition that the very fact of identifying lending Margin separately from the Fixed Rate implied the Fixed Rate Representations. Having rejected that proposition, it follows that I disagree with a central theme of the claimants' case on deceit – that those involved in the booking calls must have appreciated that what they were saying gave rise to the alleged implied representations. In any event, I consider that the very fact these employees were following an established practice points in the other direction. First, in my view it is inherently unlikely that those making the booking calls gave any thought to what they were doing beyond relaying, as they had been asked to do, the terms of the loan which had been agreed with someone else within the Banks, in most cases, very shortly before the call.

595. Second, if the claimants are right then each of the seven people (indeed *all* of the Banks' employees that participated in booking calls) must have been equally aware of implying false statements in terms of the pleaded representations in every booking call with every customer entering into a FRTBL. It is not the claimants' case that anyone within the Banks devised the system with the intention of defrauding customers, or that there was any agreement among the Banks' employees that they would mislead customers. The improbability of these seven – and in reality many more – Bank employees having independently engaged in systematically deliberate (or reckless) behaviour is such that cogent evidence would be needed to establish that they did so.

The relevance of the existence of a general practice

596. The claimants rightly point out that it is no answer, for any particular employee who was aware that they were making false representations, to say that they were merely following an established practice. In closing submissions, however, the claimants contended, with specific reference to the decision of the Court of Appeal in *Brown Jenkinson & Co Ltd v Percy Dalton (London) Ltd* [1957] 2 QB 621, that the hurdle for establishing deceit was somehow lower where the relevant Bank employees were following an inherently deceptive system.

597. In that case, exporters wished to ship a quantity of orange juice to Hamburg. The plaintiffs (the shipowner's agent) knew that the barrels containing the orange juice were old, frail and leaking, such that a "claused" – or qualified – bill of lading should be given. The plaintiffs nevertheless gave a clean bill of lading, on condition that they received an indemnity from the exporters against the consequences of doing so. The shipowners had to make good the loss arising when the barrels were leaking on delivery at Hamburg. They sued the exporters under the indemnity. The Court of Appeal held that the indemnity was unenforceable on the grounds of illegality, because it was a promise to indemnify the shipowners against loss from the making of a fraudulent misrepresentation.

598. The evidence showed that the shipowners had sought to follow a well-known commercial practice in providing a clean bill of lading against an indemnity from the exporter. The claimants rely on the following passages in the judgment of Morris LJ. At p.629, he said: "It is, I think, clear that the plaintiffs did not desire that anyone should be defrauded. In agreeing with the defendants, they did not have any such desire as their real purpose." Having concluded that they had nevertheless committed the tort of deceit, he said, at pp.632-633: "The conclusion thus reached is one that may seem unfortunate for the plaintiffs, for I gain the impression that they did not pause to realize the significance and the implications of what they were asked to do. There was evidence that the practice of giving indemnities upon the issuing of clean bills of lading is not uncommon." At p.634, he said: "Some of the considerations to which I have referred may denote that in this particular case the plaintiffs, not being actuated by bad intentions, did not realize the viciousness of the transaction."

599. They also point to the following comments of Pearce LJ, at p.638, "theirs was a slipshod and unthinking extension of a known commercial practice to a point at which it constituted fraud in law." At p.640, he said, that the practice was kept within reasonable limits, but that the plaintiffs had gone outside those limits: "They did so at the defendant's request without, as it seems to me, properly considering the implications of what they were doing."

600. Mr Onslow KC drew from this case three points. First, that the claimants were not required to prove that the Banks' employees were "consciously cheating the claimants". Second, that it was not an answer to say that the claimants were following a practice. Third, that some of what was said as to the "frankness and candour of the plaintiffs and of their witnesses and, indeed, about sympathetic understanding" had particular resonance in this case, "…with regard to the evidence of some of the defendants' witnesses … in particular some of the booking call witnesses."

601. This last point was an implicit acknowledgement of the difficulties in establishing the requisite standard of guilty knowledge on the part of many of the Banks' employees. I reject, however, the contention that the standard of knowledge is to be watered down by reference to the *Brown Jenkinson* case. There was no doubt in that case that the shipowners knew full well that they had made statements that were false, and were intended to be acted on by third parties. Their argument against the application of the illegality doctrine was that in so doing they did not intend those third parties ultimately to be harmed,

because they could make good any loss suffered, which could be recouped under the indemnity. It was this which Pearce LJ had in mind when he said, at p.640:

> "Here the plaintiffs intended their misrepresentation to deceive, although they did not intend that the party deceived should ultimately go without any just compensation."

602. There is nothing in the case to suggest that the requirement to prove that the representor knew that the representation was false, or was reckless as to its truth, is to be watered down in any way.

Failure to cross-examine the witnesses on the terms of the implied representations

603. The Banks contend that it was a feature of the claimants' cross-examination of the witnesses accused of making the Fixed Rate Representations, that they elided the terms "AV" and "margin". It was consistently put to them that they were telling customers something to the effect of "there is only one margin" or that "the fixed rate is something other than margin". This, it is said, was inherently confusing, because Margin was a defined term in the facility letters, which meant lending or credit margin, and that although this shared with AV the fact that it was income for the Banks, it was not the same thing as AV, and was not understood by the Banks' witnesses to be the same thing as AV. To put the case in deceit properly to witnesses, it would have been necessary to put to them that they understood at the time that they were communicating to the customer that there was no *income element* in the Fixed Rate and that the "Margin" (as defined in the facility letter) represented the only income for the Banks.

604. I consider this to be fair criticism. Since the TBL documentation undoubtedly drew a distinction between "Margin" (defined as a particular percentage) and the "Fixed Rate" (defined as that agreed with the customer), the statement "there is only one Margin" was self-evidently true.

605. An example of this is the cross-examination of Ms Ellis, who participated on booking calls with Janhill. It was put to her that when she told the customer that "his margin is 1% when in fact it's 1.5% --- but then there's VA of 0.5% added, if he's not being told that, he's not being told the truth, is he?"

606. As I understand the claimants' approach, they sought to overcome this problem by contending that the terms "AV" and "margin" were used interchangeably within the Banks. This was done by reference to isolated references in the Treasury Solutions Desk Manual (dating from April 2009), where – for example – there was a reference to "Anticipated margin/VA to be earned by Treasury". The problem, however, was that when this was put to witnesses, the most that they agreed to was that the terms were used interchangeably in that document. None of them accepted that that was how the terms were viewed either by them or generally within the Banks.

607. So far as Ms Ellis is concerned, she said that she thought that the additional income added to the Fixed Rate was referred to internally as "AV" and not margin. She was then shown the references in the Desk Manual and it was put

to her that the terms were at this point used, internally, interchangeably, to which she said: “It suggests that in there, yes. I would have used the term VA, but yes.”

608. It is relevant in this context to note that much of the claimants’ criticism of various witnesses – for example that they were being evasive or failed to answer the question by simply repeating that they understood themselves to be telling the customer no more than that “the margin is x% and the fixed rate is y%” – is misplaced, given the failure to make clear in the questions, for example, that “the only margin” was intended to mean “the only income being made by the Banks”.

609. I have used Ms Ellis as an example, but this was an issue that pervaded the cross-examination of the relevant witnesses.

Confusing reconstruction and recollection

610. A further common theme of the cross-examination of the Banks’ witnesses was the failure to distinguish clearly between (1) being asked to speculate, now, as to how the words they used at the time would have been interpreted and (2) their understanding, at the time, as to what representation they had communicated to the customer. Putting aside the potential relevance of the former question to other aspects of the case, it is the latter question alone that is relevant to the case in deceit.

611. In some instances, it was not clearly put to the witness at all. For example, Mr Corcoran – who was on a booking call with Mr Sutton of Janhill – was first asked whether Mr Sutton “would have understood” that there is “one margin” on the loan. This called for speculation, now, as to what he would have communicated to Mr Sutton. When the issue as to what timescale Mr Corcoran was being asked about was raised, he was then asked “at the time … what do you think Mr Sutton believed that 6.15% to be?”, and “at the time you must have known that what those words communicated to Mr Sutton was that the fixed rate was not negotiable”. Neither of those questions put to Mr Corcoran that he understood he was making a representation in terms of the Fixed Rate Representations.

Motive

612. While motive is not an element of a claim in deceit, it can be of evidential value in explaining why otherwise improbable conduct might have occurred. In this case, the claimants contend that various of the Banks’ employees were motivated by personal gain to sell FRTBLs to customers and that, to that end, they were prepared to mislead customers into believing there was no income or profit element in the Fixed Rate.

613. This contention was based, first, on the fact that treasury income, of which AV formed a part, counted towards income targets, of different branches of CB and of individual employees involved in the sale of TBLs. In turn, at least with Treasury Solutions Partners, meeting income targets was a factor, along with others, which fed into their bonus entitlement. There is evidence of league tables

being prepared, comparing the performance – in terms of treasury income generated – by different employees and different branches.

614. It is also based on documents, such as slides used at training days for associates working with relationship managers, revealing the ways in which the relationship managers were encouraged to sell TBLs. An example is a set of slides dated 22 August 2008 for an "Associate Training Day", prepared by Graeme Batstone and Grant Goodall from Treasury Solutions. One of these slides (out of 69) was headed "Identifying and Winning IRRM [interest rate risk management] Business", and contained the following bullet points:

- For deals over £500,000 look to make hedging a condition of sanction.
- Revisit your back book- your members' circumstances may have changed .... The rates we can now provide may be more attractive than when the loan was drawn down.
- Remember- total borrowing need not be hedged, a member can hedge a portion of their debt.
- On initial discussions with a new member try to ascertain whether they have hedged in the past, they may want the same level of service from us.
- If you are under pressure to improve a members' lending margin consider suggesting that the customer hedges in return for the reduced margin. In many circumstances the value-add derived from Treasury Solutions will more than compensate this.
- If the member is considering leaving his borrowing on a floating rate loan provide them with exposure analysis, i.e. precise figures detailing the impact of a 1% increase in base rate on their borrowing. We can provide this analysis for you -please contact your Treasury Solutions Partner.
- For loans over £100,000 and under £250,000 remember that we offer Small Fixed Rate loans- a simple way of generating Treasury income for yourself.
- Does your member have debt elsewhere? Bear in mind that we can offer a "stand-alone" hedge provided they can satisfy the Credit Risk.

615. Another example is a set of slides dated 9 February 2007 prepared by Richard Cavell and Susan MacKenzie headed "Treasury Solutions: Associate & Partner Training". Speaker's notes were added to the first slide ("Introduction and Welcome"), including one that read: "Most important to yourselves V/A generation". Speaker notes to a later slide which included the bullet point

"Income Maximisation" read: "Solutions we provide clients can also be profitable to you".

616. There were varying reactions among the Banks' witnesses to whom these documents were put in cross-examination. Some (for example Jonathan Palmer, who was a Treasury Solutions partner at NAB, and Mr Cooper) seemed uncomfortable with some of the contents. Mr Palmer said that he was surprised that a Treasury Solutions partner would suggest "that type of behaviour", with respect to the recommendation to suggest that the customer hedges in return for a reduced Margin, and he did not believe that was how "the general team would have worked". Others (for example, Ms MacKenzie and Ms Collins) were candid in their recognition that they were part of a sales team, and that the training sessions were about encouraging branch managers to spot opportunities for selling products which were profitable to the Banks.

617. These documents would be of particular relevance to a mis-selling claim, i.e. a claim that customers were persuaded to enter into TBLs when it was not appropriate for them to do so, or without being provided with sufficient information as to the consequences upon early termination. The possibility of such claims was at the forefront of the FSA review in around 2012. It is *not* however, any part of this case.

618. Their relevance to this case is said to be that, together with the system of income targets and bonuses, they incentivised the Banks' employees to ensure that customers were not aware of AV. It is common ground that it was *not* the practice of the Banks to volunteer that the Fixed Rate included AV. I accept the possibility that a particular employee, faced with a customer who was keen to negotiate a reduction in the income the Banks were making on the transaction, might be further incentivised not to reveal the existence of AV in the Fixed Rate. There is nevertheless an important gap to be bridged between not volunteering that AV existed and actively representing to a customer that there was no additional income in the Fixed Rate. The latter is inherently less likely behaviour.

619. Whether a particular employee crossed that bridge between not revealing AV and making a knowingly false representation needs to be assessed on an individual basis. One point of general application against that conclusion, however, is that the personal benefit to any employee, via the bonus derived from meeting income targets, was relatively small. In the case of some, Ms MacKenzie for example, it was negligible, as the bonus was determined by performance against a set of non-financial targets.

<u>C5(b). Farol's claim in deceit</u>

620. The fact that, having scrutinised the communications between CB and Farol in far greater detail than any of those involved at the time could have done, I have concluded that a reasonable person would not have understood the Fixed Rate Representations to have been made, is not a promising starting point for concluding that those who made the relevant communications to Farol knew themselves to be making statements that were false. That is particularly so where the relevant person was privy to only some of those communications.

621. Of those accused of deceit in relation to Farol, the only person I heard evidence from was Ms MacKenzie. She had no involvement with Farol's FRTBL other than to confirm its terms on the booking call with Mr Jones on 26 January 2007.

622. In order for Ms MacKenzie (or, through her, either of the Banks) to be liable in deceit by reason of what she said on the call, it is imperative that she understood that what was said gave rise to the Fixed Rate Representations.

623. She had no recollection of the call. It is clear from the transcript of the recording that she understood she was simply confirming details of the FRTBL which Mr Jones had already agreed with Mr Horne. Moreover, in doing so she followed established procedure. Although she could not remember the call, she was confident that she would not have understood herself to be making any implied statement that the Fixed Rate did not include any additional profit beyond the lending Margin, or that the Fixed Rate was a clean market rate. While not strictly relevant to Ms MacKenzie's state of mind, I note that Mr Jones accepted in cross-examination that the understanding he says he had as to the nature of the Fixed Rate did not come from anything said by Ms MacKenzie on the call.

624. During cross-examination, she explained her general understanding that since a fixed rate loan was a product sold by the bank which involved a different and additional risk to a floating rate loan, the Fixed Rate would include an element of income for the bank. She did not see it, in this respect, as different to a fixed rate mortgage or a foreign exchange transaction: "my view at the time was that it was an additional service that was provided by NAB, and any bank, any business would have some income in that service to -- you know, in order to provide it to customers." That was true, she thought, whether or not a separate entity (NAB) had been brought in to assist with selling FRTBLs: "I mean, the bank, being a business, would charge for that service." She also thought that this was something customers, even less sophisticated customers, would have understood.

625. When asked why she thought it was the practice not to volunteer the amount of AV included within the Fixed Rate when relaying the details of the FRTBL to the customer, Ms MacKenzie said that she supposed it was profit to the bank, and throughout her training it was not something that was done before.

626. Whether or not she is right about what customers would have understood, I accept her evidence that she viewed the Banks as providing a product or service which gave rise to additional risks for the bank and which naturally therefore generated additional income which was built into the price, or rate, offered. Evidence to this effect was given by each of the witnesses who gave evidence on behalf of the Banks. I find it inherently believable that it was second nature to those in the Banks who were involved in selling TBLs to customers to regard them as "products" which were "priced" in such a way that they included income for CB.

627. Overall, I accept Ms MacKenzie's evidence, which was straightforward, clear and consistent. She had no hesitation in accepting that *if* she had told Mr Jones that the Fixed Rate was a clean market rate, or that the only income Farol would be paying was 0.8%, then those statements would not have been true. She

maintained, however, that she would not have understood herself to have been saying any such thing. I consider it inherently unlikely that someone in her position, following an established procedure for confirming terms of a transaction on a recorded line, which she was told by a colleague had already been agreed with the customer, would have given any thought to whether in so doing they were making any implied representation at all. I find that she was neither deliberately nor recklessly deceitful.

628. The claimants point to various passages in Ms MacKenzie's cross-examination which they claim establish that she knew she had made the Fixed Rate Representations and that they were false, and that her evidence was in various respects evasive. I have considered all of these points (which extend over 11 pages of written closing argument) but it is not a useful exercise to address all of them in this judgment. The criticisms I make above (eliding Margin and AV, not putting to the witness that they were making representations in the terms alleged, and not distinguishing between time-frames) apply to many of the points made by the claimants. I address a few of them, in the following paragraphs, but make it clear that I do not think that any of the passages relied on establish the requisite state of mind.

629. The claimants point to Ms MacKenzie's acceptance in cross-examination that she was communicating to Mr Jones on the call that "the fixed rate was something other than the margin". They describe as "untenable" her denial that Farol would have thought the Fixed Rate was therefore a market rate. Ms MacKenzie's speculation, now, as to what Farol might have understood from what she said on a call which she cannot remember, is of marginal, if any, relevance to her state of mind at the time. Aside from that, the statement that the Fixed Rate was something other than the Margin is manifestly true, but that says nothing about whether the fixed rate loan was priced in a way to include further income for CB. I do not accept, as the claimants contend, that Ms MacKenzie was evasive because she sought to suggest that her recollection was "limited". It is unsurprising that she has no recollection of what was for her a routine call nearly 17 years ago. In those circumstances, her comment that the Fixed Rate was something other than Margin was a fair one, in response to questions which repeatedly asked her to confirm that by telling Mr Jones that the Fixed Rate was 5.65%, she was telling him that that was the market rate on that day. Similarly, I reject the contention that, in repeating that all she thinks she was telling him was that the rate was 5.65%, she was failing to answer the question.

630. The claimants recognise in their written closing argument the possible argument that Ms MacKenzie's admission that the Fixed Rate was something other than Margin was no more than her accepting that the lending Margin was separate from the Fixed Rate. As I have already noted, I consider that is indeed all that Ms MacKenzie was accepting. The claimants contend that cannot be right, because Ms MacKenzie had by this stage accepted that she knew that AV *was* margin and that the two terms were used interchangeably. This overstates, however, Ms MacKenzie's admission: all that she accepted was that in one document shown to her, the Treasury Solutions Desk Manual (referred to above) dating from two years after the relevant time, AV and additional margin were used interchangeably.

631. The claimants cite a passage in Ms MacKenzie's evidence concerning that Desk Manual as illustrating her evasiveness, because she (1) first said it wasn't in place when she worked on the desk; (2) then admitted that the manual just described ordinary practice; and (3) then "edged back" from this by suggesting the manual was really intended for those picking up somebody else's deal. I find nothing inconsistent, let alone evasive, in these answers. Nor do I find her answers in relation to the training presentation which she had prepared evasive: it was put to her that she was "training people on how they set about maximising their income on products such as these". The fact that she, reasonably, disagreed with this pejorative description of the document, while accepting that it was about showing associates how income was made, does not amount to evasiveness.

632. Mr Horne and Mr Coward are also accused of dishonesty in relation to the Fixed Rate Representations that they are alleged to have made. Neither of them is still employed by the Banks and neither was called to give evidence: the Banks were unable to locate Mr Coward and Mr Horne was unwilling to participate.

633. The claimants do not point to any evidence which indicates that either of Mr Horne or Mr Coward was aware that they made the Fixed Rate Representations, other than to repeat the evidence upon which the implied representations are based, and contend that they must have been aware of what they were saying. Given my conclusions as to what a reasonable person would have concluded from the communications between the Banks and Farol overall, it follows that such a person would not have understood the representations to have been made from the more limited conduct involving, respectively, each of Mr Horne and Mr Coward. I am not, therefore, satisfied that either of them was aware that his words or conduct gave rise to the representations, or that either of them had the requisite state of mind to establish a claim in deceit.

C5(c). Janhill's claim in deceit

634. Mr Palmer is accused of dishonesty in the course of his telephone call with Robert Gittins on 4 October 2002. He had no recollection of the call, which is unsurprising after such a long time, and in view of the fact that this was his only interaction with Janhill. In his witness statement, he said that he used the phrase "cost of funds" in the sense of the cost to the customer of borrowing the money for the period of the loan.

635. When it was put to him that his explanation of what is meant by "cost of funds" made no sense, because the cost to the customer includes the Margin, he accepted that what he meant was that it was the fixed cost part of the overall charge. He regarded that as "the important part that the customer has been focusing on under this particular process." It was also put to him that he cannot suggest that Robert Gittins would have thought he was describing part of the cost to Janhill of borrowing the funds. In support of this proposition, he was referred to various definitions of "cost of funds" to be found on the internet and in finance textbooks today, namely the cost to the lender – typically a bank – of borrowing money in the financial markets. Mr Palmer said that he did not think he thought about what the term meant at the time, and that it was just a term he used, to make life easier for customers: "We don't want to make it more

complicated but the cost of funds is the basis, the basic cost on which we will add the lending margin for this fixed period."

636. It was also put to Mr Palmer that he must appreciate "here today" that using the term "cost of funds" and speaking separately about the Margin that had been agreed, in the context of the booking call, would communicate to Robert Gittins that the rate of 5.29% does not include any margin. Mr Palmer did not accept that, referring again to his belief that cost of funds was the cost of funds that CB was prepared to lend on a fixed rate basis for five years. In any event, what Mr Palmer now might think was meant by what he said in 2002 is irrelevant. It was not put to him that he understood himself to be making such an implied statement in 2002, and I reject the contention that he did.

637. I accept Mr Palmer's evidence as to his understanding of "cost of funds". It is consistent with the way in which that phrase was used in CB's documentation, as summarised above. This makes it clear that, at least in 2002, the phrase did not carry the fixed meaning for which the claimants contend. I find it more likely than not that Mr Palmer intended "cost of funds" to carry the same meaning as in CB's contemporaneous documentation, i.e. as a label for the Fixed Rate element of the overall fixed rate.

638. The claimants' case against Mr Palmer in their closing written argument largely relies on the argument that the Fixed Rate Representations are the ordinary and natural consequence of the language which Mr Palmer used, and that he was clearly aware of the words he was using. They also rely on the fact that he knew there was AV which was not being disclosed, and his knowledge of at least some of what Janhill had been told by others and of where his function sat within the wider process. None of this meets, in my judgment, the points I have made above. I reject, therefore, the contention that Mr Palmer understood himself to be making the pleaded representation to Robert Gittins. I find he was neither deliberately nor recklessly deceitful.

639. Insofar as it is suggested that Mr Palmer presented the Fixed Rate as a non-negotiable rate (not itself a pleaded representation), that has to be seen in the context of the particular purpose of this call. The terms had already been agreed with Janhill by Mr Taberner, and the purpose of this call was to confirm the terms on a recorded line. The rate confirmed by Mr Palmer was the same as that already agreed with Mr Taberner. There was no expectation of anything being negotiated on this call. That says nothing, however, about whether the Fixed Rate offered by CB was, per se, something which was negotiable, and I find no reason to conclude that Mr Palmer understood himself to be representing that the Fixed Rate was something that was non-negotiable.

640. Ms Ellis is accused of dishonesty in the course of her telephone calls with Mr Sutton on 13 July 2005 and 16 September 2005 and with David Gittins on 10 July 2006. She denied, in her witness statement, that she understood she was making any statement to the effect of the Fixed Rate Representations. I accept her evidence on this. I have referred in section C5(a) above, dealing with matters common to each claim, to the elision of AV and margin, in cross-examination of Ms Ellis. When questioned about each of the booking calls she conducted with Janhill, she was asked whether she was communicating that "there was

only one margin". Her agreement to this (qualified on occasion by "yes – the lending margin – yes") was clearly not an admission that she had communicated that the only income the Banks were getting was the Margin.

641. When shown the few documents in which AV and margin had been used interchangeably, she accepted that, in those documents at least, the terms were so used, but denied that *she* would have used the term margin to refer to AV.

642. It was put to her that if the customer is being told that the Margin in the deal is, for example, 1% he is not being told the truth, to which she said: "I wouldn't say he's not being told the truth, because the customer is aware, the terminology that his margin is his lending margin, and the fixed rate payable is the fixed rate payable." While she accepted that the customer was not being told about the AV, she considered that the "customer's being told the fixed rate in which the bank are willing … to be provided for them".

643. Throughout her evidence, Ms Ellis continued to draw a distinction between Margin and the Fixed Rate, for example, when it was suggested to her that Janhill was not being told the truth, when they were told that the Margin was 1.265%, she said:

> "A. It depends how you look on the ––like, as I said, the information that was presented to the customer, that we separated things into lending margin and fixed rate. I do agree that clearly we haven't expressively said there is a margin on top of the fixed rate, because we were classing it as a fixed rate.
>
> Q. But the only margin or profit, whatever you try to call it, that the customer knows about is the 1.25% that's in his facility letter?
>
> A. They're aware that's the lending margin.
>
> Q. That's the only margin the customer is aware of, isn't it, Mrs Ellis?
>
> A. Yes, yes, and the fixed rate."

644. Ms Ellis is also alleged to have known that she was falsely implying that the fixed rate was a market rate. She was asked whether she communicated to David Gittins in a call on 10 July 2006 that the fixed rate "was the market rate on that day", to which she said: "It was – yes, a market rate, yes". I note that it was not suggested that she knew at the time that she was making such a statement, and she knew it to be false.

645. In re-examination, she was asked what she had meant by "market rate", when giving that answer, to which she said: "that was the rate in which [CB] would offer the customer for the period of time the customer is looking to fix for." I accept this evidence, which echoed evidence she had previously given during cross-examination, to a question as to why a customer would have thought that NAB's involvement in the transaction entitled it to a higher rate of interest:

> "A. It wasn't necessarily NAB's involvement.
>
> Q. What was it then?
>
> A. It was the market —you know, the market rate in which we were willing to offer the fixed rate at. So it was a cost of delivering that solution for the customer.
>
> Q. It was a market rate plus the added value plus the additional margin, wasn't it, Mrs Ellis?
>
> A. It was a market rate which I took from the pricing model so I can't say whether it was a market rate that we were actually ––that was, like, on the market at that point in time, because we used a pricing model to be able to determine what that rate was."

646. I found Ms Ellis to be a straightforward and honest witness. I accept her evidence that she saw AV as a component in the Fixed Rate offered to customers, and something different from the Margin. It was not in fact put to her in terms that she thought at the time that she was communicating to Mr Sutton that the only profit (or income) that CB was making on the FRTBL was the lending or credit Margin. In any event, I reject the contention that she was guilty of dishonesty or recklessness in her communications with Mr Sutton or David Gittins.

647. Mr Corcoran's only involvement with the Janhill FRTBLs was to confirm the terms of the sixth Janhill FRTBL in the telephone call with Mr Sutton on 3 July 2007. He had no involvement in agreeing the terms of the loan. He had no recollection of the call, but the practice at the time would have involved him being told the Fixed Rate and the Margin applicable to the loan, as already agreed with Janhill, by the Treasury Solutions partner and then simply repeating those terms over the telephone with Mr Sutton on a recorded line. While he knew that it was the practice to include AV in the Fixed Rate, he would not have been aware of the amount of AV included in the Fixed Rate for the sixth Janhill FRTBL. I have referred above at [611] to the fact that it was not put squarely to Mr Corcoran that he knew at the time that he was making a false statement. In any event, I have no doubt that Mr Corcoran did not understand himself to be doing anything than confirming, as he had been asked to do, the terms of the FRTBL with Mr Sutton. I reject the claim that he either knew or was reckless as to whether anything he said was false.

648. Ms Wilkinson's only involvement with the Janhill FRTBLs was to confirm the terms of the seventh Janhill FRTBL with William Gittins in the telephone call of 1 December 2008. She has no recollection of the call, or of William Gittins.

649. In her witness statement, she said that – having heard what she said on the call ("You're fixing the rate on the first 10 years at a rate of 4.1 … and you will have your margin rate on top of that … that means your all-in-rate's 5.365") she did not consider she had made any of the alleged representations, or said anything that was untrue. Much of the cross-examination of Ms Wilkinson was conducted

as an exploration as to what she now thinks customers might have understood from the various matters expressly communicated to them.

650. When she was asked about the specific call with William Gittins, she was asked whether she would have meant him to understand that “there is only one margin in this loan” and “the fixed rate is something different from the margin”.

651. Her answer – that she considered herself to be doing no more than confirming, as she had been asked to do, the details of the loan – is consistent with William Gittins’s understanding of the call. The fact (as I have noted above) that he did not think anything said by Ms Wilkinson indicated anything about CB’s margin or profit, although not determinative, supports the view that she did not think so herself.

652. I found Ms Wilkinson to be an honest witness. She provided candid and open answers to cross-examination about the Banks’ internal documents relating to meeting targets, commenting, for example, that “It was a sales team. I mean, I sold interest rate products. That was my job.” She accepted that it was not the practice to volunteer to customers that there was AV included in the fixed price offered, but said that if customers asked then it was her experience that they would be told.

653. Like other witnesses whose only involvement in a relevant FRTBL had been to participate in a booking call as a Treasury Solutions associate, I find that Ms Wilkinson regarded the call as a formality, the purpose of which was to confirm the details of a transaction already agreed with Janhill by Mr Moor, the Treasury Solutions partner. I reject the contention that she knew or was reckless as to whether she had made a false statement on the call.

654. Dean Smith did not give evidence. He was contacted by CB’s solicitors but declined to get involved. The claimants’ case against him in their written closing submissions was, in essence, that the pleaded communications by him to Janhill “admit of no ambiguity”, that his reluctance to give evidence must be viewed against “the very strong misrepresentations” made by him, and that he clearly knew about AV and was motivated to earn income. As should by now be clear, I take a different view about the matters that would (or would not) reasonably have been implied by what he said to Janhill. Accordingly, I do not accept that he would have understood himself to be making the Fixed Rate Representations. For reasons I have already given, the facts that he was aware of AV, that it generated income, and even if (although I need make no finding about this in his absence) he was motivated to sell FRTBLs by the income to be made from them, are not enough to conclude that he was prepared to make false statements to Janhill. The claimants have not, in my view, identified anything to bridge that gap, and I conclude that he was neither deliberately nor recklessly deceitful.

C5(d). Uglow’s claim in deceit

Mr Martin

655. As I have noted above, although Mr Martin’s evidence was contradictory and confusing, particularly as to his knowledge of AV at the time, I find that was

due to his lack of understanding and his difficulty in disentangling recollection from reconstruction, and not because he was being deliberately evasive or dishonest.

656. Insofar as it was put to him that he knowingly made false statements to Uglow, this suffered from the failure to identify clearly the alleged representation. I have addressed at length above the questions and answers concerning his explanation of "cost of funds". As to the representation that there was no income in the Fixed Rate, it was put to him that he was conveying to Mr Uglow that there was "just one margin, which is a margin of 2%" (which suffers from the elision of Margin and income: see [603] above).

657. To the extent that Mr Martin accepted that he may have communicated to Uglow that the Fixed Rate was not negotiable (itself not a pleaded representation), he said he believed that to be the case. I accept that evidence, so that he was clearly not dishonest in this respect either.

658. The close involvement of Mr Feneley and Mr Edwards in the discussions concerning Uglow's FRTBLs means an attempt to mislead Uglow would involve misleading them as well. I find it particularly unlikely that Mr Martin would have sought to mislead them. He worked with them closely in connection with other customers of CB. I see no reason why he would risk the reputational damage that he would suffer, as a respected bank manager within a relatively small farming community, if his deceit was discovered. I conclude that he was neither deliberately nor recklessly deceitful.

Ms Robertson

659. Ms Robertson had only one interaction with Uglow. She confirmed the terms of the Uglow FRTBLs with Mr Uglow over the telephone on 2 March 2010.

660. The immediate context of the call appears from the transcript: she introduced herself as calling from the dealing room, "just to confirm the details of your two fixed rate tailored business loans"; she then said; "just stop me if anything sounds different from what Amy's been talking to you about…"; and, when she mentioned the Fixed Rate of 3.04% she clarified: "okay, so that's as Amy confirmed with you?". This shows that Ms Robertson's expectation was that all of the matters she ran through with Mr Uglow had already been agreed by him with Ms Collins.

661. Ms Robertson has, unsurprisingly, no recollection of the call. Her cross-examination sought to elicit what she "must have known" at the time.

662. In their closing submissions the claimants make the following points: Ms Robertson was "clearly aware" of her own conduct in booking the FRTBL, and her words used on that call; she accepted that she would have understood that Mr Uglow believed the Fixed Rate to be non-negotiable; she accepted that she must have known she was communicating that there were two components to the FRTBL – a Fixed Rate "which is just a market rate which is being locked in with the traders" and Margin; and that she accepted that if she had told Mr

Uglow that she had "locked the rate in with the traders", that would have communicated to him that she had obtained the rate from them.

663. None of this establishes deceit on her part. The fact that she was aware of her words and conduct says nothing about whether she understood she was implicitly making false statements. By the time of the booking call, since everything had already been agreed, she naturally had no expectation that there was anything left to be negotiated.

664. As to her apparently having said "I've locked the rates in with the traders", I do not accept that she did so. The audio recording of the relevant passage of the booking call is not crystal clear, but it sounds much more like she said "I'll have that locked in with the traders". That is supported by the fact that the sentence begins "Well what happens now is…" and that what follows (as is clear from the intonation of the call) is a list of things that would indeed happen next. A moment later, she said: "I will go ahead and lock these in if you're happy for me to do so." That makes no sense, if she had already locked the rates in with the traders.

665. The high point of the cross-examination from the claimants' perspective was the following exchange:

> "Q. So I'm putting to you, because I just want this to be clear, that at that time, you must have known that what you were communicating on that call ––which is standard practice, I'm not saying you did anything different –– is that there are two components to the overall rate. There's an agreed margin and there's a fixed rate which is just a market rate which is being locked in with the traders?
>
> A. Correct.
>
> Q. And you didn't have any reason to think that Rob Uglow would've understood it any differently?
>
> A. No reason to understand that he would think differently."

666. At face value, this might be taken to be an acknowledgement that she must have known she made a representation, that the Fixed Rate was just a market rate, i.e. that it contained no AV. I do not accept that she made such an acknowledgement. She had, shortly before this, confirmed the evidence in her witness statement that the Fixed Rate was the rate CB was prepared to offer on the day, which she knew contained AV. It was not clearly put to her, in the passage quoted above, that she must have known that she was saying to Mr Uglow that there was no additional income in the Fixed Rate, and I do not think she understood the question in that way. Other questions amounted to her having represented that there was "only one Margin", and therefore suffered from the elision between margin and AV which I have addressed above.

667. Accordingly, I find that the claim in deceit (whether deliberate or reckless) against Ms Robertson is not made out.

Ms Collins

668. Ms Collins was the Treasury Solutions partner involved in the Uglow FRTBLs. She had no recollection of the Uglows or any of her dealings with them.

669. I reject the claimants' contention that Ms Collins must have known she was making false statements (or was reckless in so doing) because that was the natural and ordinary meaning of the language she chose to use. It was not, as I have already found.

670. The claimants contend that since Ms Collins knew that AV was a margin (because on occasion she referred to AV as the "margin on a fixed rate") she must have known that by disclosing the Margin (of 2%) she was communicating that it was the only margin. She denied this, maintaining that she thought that all she was communicating by "the Fixed Rate" was the rate that the bank was prepared to offer at the time. I reject the claimants' description of this as implausible. Ms Collins, like all of the Banks' witnesses who understood AV, drew a distinction between the lending or credit Margin and the income priced into the Fixed Rate. When it was put to her that Uglow's margin, assuming the AV was 40 basis points, was in fact 2.4% she said:

> "that's not how I would have described it. So even if I was having a discussion with a customer about how much income was being taken or what rate we were providing, I don't think I would say: so your actual margin is 2.4% … I think I've never really thought of it in that way…"

671. I accept this was her genuine view. When she was shown the training presentation slides, to which I have referred above at [614], she candidly accepted that, as well as being a way of helping customers manage cash flows, it was about getting business managers to put as much TBL business before their customers as possible: "…yes, it was a sales process. Yes, it was a way of making income for the bank". Later, she repeated this sentiment: "So it was a sales process, so we were selling our product and we made money from selling that product. That was the reality."

672. The claimants criticise Ms Collins for saying only that "I'm not sure" when it was put to her that in circumstances where a customer is told he is paying a combination of Fixed Rate and Margin, he would understand the Fixed Rate to be something other than margin. This was, however, a reasonable response to questions which required her to speculate as to what a customer might have thought.

673. She was also criticised for "resorting" to saying that the manner in which she sold FRTBLs was in line with the "general sales process". I do not find anything suspicious in this, particularly since, as I accept she did, she viewed the FRTBL as a product providing a particular benefit to customers, with the price embedded in the rate that was offered. This was a view, as I have already noted, which was shared by a number of the Banks' employees, and accords with my own view of the FRTBL. Whether or not I am right in that respect, I am satisfied that Ms Collins and the other employees accused of deceit did see it that way,

and did not see themselves as misleading customers in the way they carried out the sales process.

674. I found Ms Collins to be a candid and careful witness: she was candid in her description of the sales process in relation to FRTBLs, from which the Banks made money; she accepted that the Fixed Rate was in theory negotiable, but that a customer would not know there was an income element to be negotiated unless they were told about it.

675. The claimants contend that Ms Collins had a clear profit motive for hiding AV, citing the celebratory emails between her, Mr Martin and others, and the emails leading up to the booking call in which the focus was on preserving AV. I am satisfied, however, that she did not give into this profit motive by making deliberately or recklessly false statements to Uglow.

PART D: LIMITATION

676. The causes of action in respect of the Fixed Rate Representations accrued when the relevant claimant suffered damage by incurring a liability to pay interest at a rate that included AV, i.e. when it entered into a FRTBL in reliance on the representations. In each case that was more than six years before the commencement of the action, and it is common ground therefore that all of the claims in deceit and negligence in relation to the Fixed Rate Representations are *prima facie* time-barred.

677. The break costs were paid by Farol, Uglow and Janhill within six years of the commencement of proceedings. The claims in deceit and negligent misrepresentation are therefore not time-barred, so far as they relate to the actual payment of break costs. Nor would claims in unjust enrichment, breach of contract or breach of mandate have been time-barred.

678. Farol's claim that it suffered loss in reliance on the Break Costs Representations made in March 2011 is, however, prima facie time-barred, as is Janhill's claim that it suffered loss in reliance on the Break Costs Representations made to it in March 2011. These are academic, given that I have rejected both claims. I nevertheless set out below my findings of fact on the question of limitation as it applies to these claims.

679. Gaston's claim is governed by Scots law. The parties were agreed on the applicable principles. Section 6(1) of the Prescription and Limitation (Scotland) Act 1973 bars each of the claims advanced by Gaston in this action unless the proceedings were served within five years of the "appropriate date", which is the date when the relevant obligation became enforceable. Gaston's claim was served on 9 November 2020. In relation to each of the causes of action pursued by Gaston, the relevant obligation became enforceable at the latest when Gaston paid the break costs. Since that was before 9 November 2015, all of the causes of action (misrepresentation, unjust enrichment and breach of contract) are *prima facie* time-barred.

D1. Extension of the limitation period - legal principles

English law

680. The claimants rely on the extension of time in cases of fraud (under s.32(1)(a) of the Limitation Act 1980) and in negligence (under s.14A of the Limitation Act 1980).

681. Section 32(1)(a) provides that where the action is based upon the fraud of the defendant, the period of limitation shall not begin to run until the claimant has discovered the fraud, or could with reasonable diligence have discovered it.

682. Section 14A of the Limitation Act 1980 applies where the "starting date", defined as the "earliest date on which the claimant first had both the knowledge required for bringing an action for damages in respect of the relevant damage and a right to bring such an action", falls after the date on which the cause of action accrued. Where it applies, it creates a new limitation period of three years from the starting date.

683. By s.14A(6) and (8), the "knowledge required for bringing an action for damages in respect of the relevant damage" means knowledge:

> (a) of the material facts about the damage in respect of which damages are claimed;
>
> (b) that the damage was attributable in whole or in part to the act or omission which is alleged to constitute negligence; and
>
> (c) of the identity of the defendant.

684. By s.14A(10), a person's knowledge includes knowledge which he might reasonably have been expected to acquire (a) from facts observable or ascertainable by him; or (b) from facts ascertainable to him with the help of appropriate expert advice which it is reasonable for him to seek.

685. There is a close relationship between the test to be applied under the two sections: see *Loreley* (above) per Cockerill J at §147. The parties did not point to any relevant difference for the purposes of the issues I need to decide in this case.

686. A recent summary of the principles relating to section 32 was provided by Cockerill J in *Loreley* (at §148). Of particular relevance in this case, these include:

> "i) The burden of proof is on the claimant because section 32 constitutes an exception to the ordinary regime: see *Paragon Finance v Thakerar* [1999] 1 All ER 400 at 418 per Millett LJ (endorsed in *FII* at [203]);
>
> ii) The claimant must be "on notice" of the need to investigate whether there has been fraud and/or concealment. This is sometimes referred to as a trigger. This can be engaged whether or not the claimant has actual knowledge of it, so long as the claimant could with reasonable diligence have discovered the

trigger: see *OT Computers v Infineon Technologies AG* [2021] EWCA Civ 501 at [47]:

> "…Although some of the cases have spoken in terms of reasonable diligence only being required once the claimant is on notice that there is something to investigate (the "trigger"), it is more accurate to say that the requirement of reasonable diligence applies throughout. At the first stage the claimant must be reasonably attentive so that he becomes aware (or is treated as becoming aware) of the things which a reasonably attentive person in his position would learn. At the second stage, he is taken to know those things which a reasonably diligent investigation would then reveal".

iii) The meaning of the words "could with reasonable diligence": The Supreme Court in *FII* endorsed as "authoritative guidance" the following statement by Millett LJ in *Paragon* at 418:

> "The question is not whether the plaintiffs should have discovered the fraud sooner; but whether they could with reasonable diligence have done so. The burden of proof is on them. They must establish that they could not have discovered the fraud without exceptional measures which they could not reasonably have been expected to take…In the course of argument May LJ observed that reasonable diligence must be measured against some standard, but that the six-year limitation period did not provide the relevant standard. He suggested that the test was how a person carrying on a business of the relevant kind would act if he had adequate but not unlimited staff and resources and were motivated by a reasonable but not excessive sense of urgency. I respectfully agree."

687. There has been some debate in the authorities as to whether the test is that the claimant must have sufficient knowledge to plead its case, or to justify embarking on the preliminaries to the issue of a writ, i.e. recognising that a worthwhile claim arises. It is now established that the worthwhile claim test is applicable for the purposes of s.32(1)(b) (where a fact relevant to the right of action has been deliberately concealed by the defendant) and s.32(1)(c) (where the action is for relief from the consequences of a mistake): see *Test Claimants in the FII Group Litigation v Revenue and Customs Comrs* [2022] AC 1 ("*FII*"); and *Gemalto Holdings BV v Infineon Technologies* [2022] EWCA Civ 782; [2023] Ch 169 ("*Gemalto*").

688. The position in relation to s.32(1)(a) was expressly left open in *FII* (see Lord Reed and Lord Hodge at §191), but, in *Gemalto*, the Court of Appeal considered (obiter) that the logic of the reasoning of the Supreme Court in *FII* extended equally to fraud claims, under s.32(1)(a). As Sir Geoffrey Vos MR noted in *Gemalto* (at §45), however, there is unlikely to be a difference in most cases. That includes, in my view, this one.

689. In relation to the Fixed Rate Representation claims, since the cause of action is premised upon the claimant having understood that one or other of the Fixed Rate Representations was made to it, each claimant with a viable claim must have known that a representation had been made. What remains is whether each claimant was sufficiently on notice that the representation was false, because AV was embedded in the Fixed Rate. Knowledge of that fact leads inevitably (on the way the claimants' case is advanced) to knowledge of the possibility of deceit (since the Banks must have known about the existence of AV) and of the claimant's damage being attributable to the making of the Fixed Rate Representations.

690. The essential question, therefore, is whether the claimants can establish that there were no facts either observable or ascertainable by them which put them on sufficient notice that there was additional income in the Fixed Rate.

691. In relation to the Break Costs Representation claims, the claimants must be taken to have known that the representation was being made to them, so the essential questions are: (1) whether they were sufficiently on notice that the representation was false because CB was not entitled to charge break costs that it did; and (2) if so, whether they were sufficiently on notice that there were those within the Banks who knew the representations were being made and knew they were false.

692. For the claims in negligence, the cut-off date is 3 May 2016. For the claims in deceit the cut-off date is 3 May 2013.

693. In relation to section 32, the fact that a claimant with reasonable diligence could have discovered that it had *a* claim against the defendant, such that the claim is statute-barred, does not mean that another distinct cause of action against that defendant is also statute-barred: *Duke of Sussex v MGN Ltd* [2023] EWHC 3217 (Ch) ("*Sussex*"), at §1393. I consider that the same approach applies to s.14A.

694. Much of the Banks' case against Farol and Uglow is based on publicity surrounding possible claims against banks, including CB, who offered fixed rate loans. This consisted of newspaper articles and the website of the NAB Customer Support Group (the "Support Group").

695. In *Sussex*, various claimants sought damages in respect of phone-hacking. In concluding that some claims were time-barred, reliance was placed on extensive media coverage of phone hacking. That included the Leveson inquiry which had found that phone hacking was likely to be very widespread in many newspapers. Fancourt J applied (at §1489) the following test: what a person in the claimant's circumstances, who has suffered unexplained wrongs, who desired to know the answer and pursue the matter, would reasonably have been alert to, and could reasonably have found out without the use of exceptional measures.

696. At §1422 of his judgment, Fancourt J identified some important questions to be asked of each individual claimant. Relevant to the question of publicity are the following:

> "iv. What level of attentiveness to publicity about phone-hacking or the cause of her injury is it reasonable in the circumstances to expect the claimant to have had?
>
> v. Was there anything of which the claimant became aware that put her on notice that she should investigate or inquire further?
>
> vi. Was there something to which the claimant should reasonably have been attentive that would have put her on notice to investigate or inquire further?
>
> vii. If the claimant was not misled, or ceased to be misled, what publicity can a reasonably attentive claimant actively seeking to investigate her losses be expected to have been aware of?"

697. The circumstances in the *Sussex* case were very different from those before me. As Fancourt J pointed out at §1418, the claimants were persons who had suffered, on their own case, substantial injury from MGN's publication of their private information, and they were very aggrieved at the way in which they were treated. They were therefore to be treated, for the purpose of s.32(1), as "persons who are desirous of discovering how their injuries were caused." In contrast, unless and until Farol and Uglow discovered that there was additional income built into the Fixed Rate in their FRTBLs they did not know that they had suffered any damage at all: the overall fixed rates were ones with which the claimants were content, at the time they entered into their FRTBLs.

698. The Banks rely, against all claimants, on a number of press articles and other articles which could be found on the Support Group website.

699. In relation to the fixed rate claims, this consisted of the following materials, which were published by 2 May 2013, the cut-off date for the claims in deceit:

(1) One article in the Telegraph from 29 June 2012, headed "Q&A: rate swap scandal", relating to the mis-selling claims faced by Britain's four biggest banks, and including reference to those banks having added between 0.3% and 0.8% to the swap rate when quoting a Fixed Rate to the customer.

(2) One article in the Daily Mail from 7 November 2012, headed "Special Investigation: Forced off the rails by banks gravy train", relating to a claim in Scotland brought by Mr Glare (who founded the Support Group) against the Banks. It included emails internal to the Banks which detailed the impact of AV on the pricing of loans.

(3) Three articles published in the Scottish Herald, including one from March 2013 which quoted an unnamed source within the Banks referring to the additional percentage points added to the Fixed Rate to generate profit and meet income targets.

(4) Detailed references on the Support Group website to AV being added to fixed rate loans.

700. The Banks also rely, for the purposes of the negligence claims, on a further article in the Scottish Herald from 2 May 2016, making explicit reference to banks (including CB) routinely adding 0.5% to LIBOR rates in loans such as the FRTBLs.

701. I have no doubt that a reasonably attentive person in the position of Farol, Janhill or Uglow, who had seen those articles, would have been sufficiently alerted to the possibility of AV having been added to their loan to recognise there was a worthwhile claim to be investigated. The question is whether a reasonably diligent person would have been prompted to look for them.

702. In relation to the break costs claims, the Banks rely on a number of press articles and pages from the websites of the Support Group and of another activist group – "Bully Banks". I can deal with this point quite shortly. While there were some articles which questioned the contractual basis on which the Banks were charging break costs, the principal focus of these materials was on the alleged mis-selling of interest rate hedging products. As noted in the context of the break costs claims, the evidence of senior executives within the Banks (Mr Thorburn, for example – see the Appendix) was that the potential problem for the Banks was the mis-selling claims arising out of the fact that customers were faced with very large break costs. If the publicly available material was not sufficient to bring to Mr Thorburn's (or other executives') attention that there was potentially a problem with CB's contractual entitlement to charge break costs, then I do not think it was sufficiently widespread to have been something which, absent some particular reason for looking for it, a reasonably diligent customer in the position of Farol or Janhill would have been alerted to.

703. The question, again therefore, is whether a reasonably attentive person in the position of Farol and Janhill would have been alerted to those articles and websites.

Scots law

704. So far as Gaston's claim is concerned, s.6(4) of the Prescription and Limitation (Scotland) Act 1973 provides as follows:

> "(4) In the computation of a prescriptive period in relation to any obligation for the purposes of this section—
>
> (a) any period during which by reason of—
>
> > (i) fraud on the part of the debtor or any person acting on his behalf, or
> >
> > (ii) error induced by words or conduct of the debtor or any person acting on his behalf,
>
> the creditor was induced to refrain from making a relevant claim in relation to the obligation … shall not be reckoned as, or as part of, the prescriptive period:

> Provided that any period such as is mentioned in paragraph (a) of this subsection shall not include any time occurring after the creditor could with reasonable diligence have discovered the fraud or error, as the case may be, referred to in that paragraph."

705. I did not understand the Banks – on the assumption that one or more of Gaston's break costs claims was sustainable – to dispute that Gaston was induced to refrain from making a claim on one or other of the bases referred to in s.6(4)(a). The critical question, therefore, is whether (the onus being on the Banks) Gaston could have discovered the fraud or error at some time prior to 9 November 2015.

<u>D2. Limitation - Farol</u>

Fixed Rate Representation claim

706. So far as the publicly available material is concerned (the press reports and the website), I do not think that the reasonably diligent person in Farol's position would either have come across them or would have had reason to go looking for them, absent some particular triggering event. There was not the sort of widespread publicity of the fact that additional income was included in the fixed rate loans which means it would be bound to have come to Farol's attention. As with all claimants, unless and until Farol learned about AV there was no reason to think it had suffered harm at all.

707. The Banks contend that Farol was specifically alerted to the existence of AV by an email to Mr Jones dated 11 April 2012 from Richard Chapman of CB, saying "following our recent meeting and Matt's request to have a look at the loan, I have chatted this through with Claire Thomas, our Treasury Advisor". This email forwarded an email from Claire Thomas of the same date which, in addition to providing a break costs figure, set out indicative Fixed Rates for a £1.5m loan for different terms. In each case, the Fixed Rate was "including 50 bps", and the "Est v/a" was identified in a specific amount.

708. I accept that a reasonably diligent person who had read the forwarded email would have been alerted to the possibility that CB was adding – and therefore may well have added in the past – additional basis points to the Fixed Rates. I do not think, however, that Mr Jones read the forwarded email, or that a reasonably attentive person in his position would have done so. It is important to note that all the information Mr Jones wanted was in the email from Mr Chapman: break costs and indicative rates for restructured lending. That did not in terms refer to the email below from Ms Thomas, and there would have been no reason for Mr Jones to have read beyond Mr Chapman's email.

709. The Banks sought to make much of the fact that Mr Jones had printed out the email from Mr Chapman and written at the top: "James Moore – 50% now and then monthly". It was put to Mr Jones that this read "point five zero percent", and was a reference to the 50bps in the email from Ms Thomas. Mr Jones denied that. When he was asked to read it, he read it as "fifty percent", and pointed out that this was connected by an arrow to the name "James Moore". I accept this evidence. There is a clear link between the reference to Mr Moore and the

"50%". Moreover, the reference to 50% now and the rest monthly makes no sense if it is referring to the 50bps in Ms Thomas' email.

710. As noted above, Farol did engage a lawyer in relation to its FRTBLs in 2012, Jamie Champkin of J R Champkin Ltd. He sent an email on behalf of Farol on 7 November 2013, in which it was contended that the term loan agreement was a "voidable agreement". The context for the letter was Farol's desire to move its banking to Lloyds, and the fact that substantial break fees were due on termination of the FRTBLs. The grounds on which it was said that the agreement was voidable related to the events of 2011, when the terms were re-negotiated. The email included references to "mis-selling, but the law calls it economic duress". None of this indicates that there was any reason to believe that there were grounds for a wholly different claim, based on the inclusion of AV in the Fixed Rate. The Banks pointed to one sentence in the email: "We are also concerned at what we believe to be an embedded swap arrangement the sole purpose of which was to force my clients to render more fees and income unto Clydesdale". It was Mr Vellacott's and Mr Jones' evidence that their concerns at this point related to the events of 2011. That is corroborated by the content of other emails around this time. The email was evidently a relatively unsophisticated attempt to persuade CB to let Farol off the break charges. This does not, in my view, support the proposition that Farol should have been alerted to the possibility of AV being added to the Fixed Rate so as to undertake investigations.

Break Costs Representation claim

711. There is no evidence that Farol in fact came across any of the publicly available articles or web pages in which CB's contractual entitlement to charge break costs was raised. The Banks point to a number of matters which, they say, would have caused a reasonably diligent person in Farol's position to see these materials.

712. First, the fact that Mr Vellacott and Mr Jones accepted that they were monitoring press reporting about possible claims against CB, and – at least occasionally – "googling" related issues from 2013. Unless, however, in so doing they came across the relevant materials, I do not think this helps the Banks, particularly since as I have pointed out above, the principal focus of the publicly available materials was on mis-selling.

713. Second, the fact that Farol – by 2012-2013 – had become frustrated with (and was "absolutely fuming at") CB. This was, however, about delays in the Milton development project (addressed at [289] above), and their perceived mistreatment in the 2011 restructuring of the FRTBL. This was not a reason, in my view, to have alerted a reasonably diligent person to the possibility of the claims advanced in this trial.

714. Third, the fact that in 2012 and 2013 Farol took advice from Mr Champkin and that, by this stage, it was clearly seriously investigating claims against CB. I have dealt with Mr Champkin's involvement above, in relation to the Fixed Rate claims: the claims that he was considering, and threatening, related to the events of 2011. The Banks point to a reference in one of Mr Champkin's emails to the

break costs being a "penalty", and suggest that he must have considered the contractual terms. I disagree: as I have pointed out above, this was part of a relatively unsophisticated attempt to persuade CB to drop the break costs charges. It does not suggest to me that Mr Champkin was alerted to a possible claim that the break costs charge was not permitted under the contractual terms.

715. For these reasons, I accept that a reasonable person in Farol's position would not have been alerted to the Break Costs Representations claim before the cut-off date of 2 May 2016. It follows that they would not have been alerted any earlier than that so as to render the claim in deceit time-barred. In addition, the points I make below in connection with Janhill's deceit claim would also apply to Farol.

D3. Limitation - Janhill

Fixed Rate Representation claim

716. Janhill accepts that it was aware of the existence of AV within the Fixed Rate element of the FRTBLs by at least January 2015, when it made a complaint to the Banks about hidden margin. It is common ground, therefore, that any claim in negligent misstatement is time-barred. The Banks contend that its claim in deceit is also time-barred because it either had, or could with reasonable diligence have obtained, the requisite knowledge by 2 May 2013.

717. I have already referred to the fact that in 2009, Mr Sutton was told that a fixed rate loan involved additional income for the Banks, in terms that implied that this was something he already knew ("as you know…").

718. In 2012-2013, Janhill was actively following the publicity in the national press about alleged mis-selling of interest rate hedging products by CB. By the beginning of 2013, Janhill was a member of the Support Group. Robert Gittins received a number of emails relating to that Support Group, which he forwarded to Mr Sutton. He said that he would look at the Support Group website from time to time.

719. Mr Sutton said that he would have skimmed the emails forwarded to him and discussed them with Robert Gittins. One such email, dated 27 January 2013, among many sent to Robert Gittins which he forwarded to Mr Sutton on 8 February 2013, read as follows (the sender and recipient being blanked out):

> "Dear All, Here is a link to a website that shows a historical record of interest rates at a glance …
>
> Here is an FT link that enables you to look up historical swap rates of any term and on any date…
>
> If you had a fixed or partially fixed rate product through a TBL, by using these links you can see what was happening to swap interest rates on the completion date of your loan. Don't forget to look at the swap rate that corresponds to the term of your TBL

> and not the LIBOR rate. The swap rate is the rate that the treasury team at NAB would have used.
>
> After looking up my own rate, I could see that the rate that was given by the trading floor to the treasury salesman was approx 0.5% higher than the rate shown using the FT link. I am not sure if there is a technical reason that will eventually explain this, but at first view, it looks like the trading floor were adding 0.5% onto the market swap rate for their own benefit."

720. This, as Mr Sutton accepted, is the essence of Janhill's fixed rate misrepresentation claim. He did not specifically recall carrying out the exercise suggested by the email, but said that "one would assume that either myself or Robert would have had a look at that, yes."

721. In my judgment, the matters that were brought to Janhill's attention by 2013 were sufficient to cause a reasonably diligent person to make further investigations, and those investigations would have led the reasonably diligent person to conclude that there was a worthwhile claim. Janhill was introduced, in late 2012, to a specialist claims advisor and solicitors' firm, but chose not to follow that up. Robert Gittins and Mr Sutton both said that Janhill was concerned about making claims against CB, given that it still had substantial borrowing from it, because they did not want to put their heads "above the parapet". That is of no relevance to the test which I have to apply based on the reasonably diligent person.

722. Accordingly, I find that had Janhill had a claim in deceit, it would have been time-barred before the date this action commenced.

Break Costs Representation claim

723. I have referred above to the fact that Janhill was concerned, by May 2012, at the way CB was charging break costs, and was reviewing the contractual basis for it having done so. In a letter dated 15 January 2016 to the FOS, Robert Gittins said this: "The date we became aware of the true nature of break costs and their volatility and then consequently to think that the loan had been mis-sold was 28th May 2012". Robert Gittins and Mr Sutton were, from that time onwards, taking a keen interest in the ongoing investigations into mis-selling of interest rate hedging products by, among others, CB.

724. In addition, Janhill was specifically told, for example in an email from Mark Moor to Mr Sutton of 28 May 2012, that break costs were calculated by taking the present value of the floating rate and comparing it to the present value of the fixed rate for each period until the end of the term. It was therefore on notice from that time that break costs were being charged on a "notional" loss basis which, the claimants contend, is impermissible for the same underlying reason that the CNH Loss Basis is impermissible.

725. By the beginning of 2013 Janhill had joined the Support Group, which shared information concerning customers' complaints about the TBLs. Mr Sutton agreed that he and Robert Gittins kept up to date with the website. In January

2013, Mr Sutton forwarded a link to the website, noting that it made "interesting reading".

726. It is true that, as at May 2012, Janhill's focus appears to have been on whether the loan had been mis-sold, rather than on CB's contractual entitlement to charge break costs. The latter, however, was something that it was aware of by the early part of 2013, as demonstrated by the following.

727. On 17 March 2013, an email with the subject heading Support Group was forwarded to Robert Gittins. He forwarded it to Mr Sutton the next day. The original email was to Simon Bain at the Scottish Herald. It read:

> "Thanks for getting the bank to confirm that there were no micro hedges. This is what we suspected all along.
>
> The next issue is this.
>
> Two law firms, including Balfour Manson, have confirmed that the bank will not be able to enforce the transfer of a breakage penalty if there was no micro hedge assigned to the loan. This is because section 8.2 of the banks T&Cs refer to "costs" and not to a specific penalty (such as a percentage of the loan as with domestic mortgages).
>
> Assuming that they are right about this, then all TBL customers will be able to move to a new bank without incurring a breakage penalty and claim damages (both direct and consequential) for what has been in effect an illegal "lock in". By admitting this, whilst trying to support their argument for exclusion from FSA scrutiny, have now brought the next part of the battle forward, which is now a question of law, which has been answered already by two independent law firms. We now require either an admission by the bank (unlikely) or FSA or FOS intervention in response to the bank trying to make an SME liable for a breakage cost which does not exist."

728. A week later, on 24 March 2013, Robert Gittins received a further email with the subject "NAB Customer Support Group", forwarding an email from the Support Group to the FSA. This referenced a statement CB had made to the Scottish Herald that TBLs were "not linked to an identifiable and distinct swap arrangement", then included an extract from clause 8.2 of the Standard Conditions and continued: "Question: If the TBL is not linked to an identifiable and distinct swap arrangement, then how can the bank declare a cost? It has been confirmed by two law firms who specialise in commercial litigation that the bank will be unable to "determine" a cost in a court of law and therefore no cost is enforceable. Therefore, the bank is unable to enforce any TBL breakage penalties."

729. Robert Gittins forwarded that email to Mr Sutton the next day. The fact that he also attached a pdf of "Terms & Conditions" indicates that he must have read the email, and appreciated its significance. The level of Mr Sutton's engagement

with the 17 March email is demonstrated by the fact that a month after receiving it, he forwarded it on – although the name of the recipient has been blanked out.

730. On 9 April 2013, Robert Gittins was sent a copy of the agreed note of Douglas Campbell's meeting with Clive Betts MP (a document relied on in support of the claimants' allegations of deceit for its reference to TBLs having been macro-hedged only – see [57] of the Appendix). He forwarded that email to Mr Sutton the same day.

731. I am satisfied on the basis of the above facts, that by March 2013 at the latest, Janhill was aware of sufficient matters to satisfy either the statement of claim test or the worthwhile claim test in respect of a claim in negligent misrepresentation. Of the elements of that claim: Janhill must have known that (1) the representations it now relies on had been made to it, (2) it was arguable that the representations were, on the basis that CB had no entitlement to claim break costs from it, false, and (3) CB was arguably in breach of a duty of care in making a false statement. It also knew, given the size of the break costs quoted to it, that any claim was worthwhile. A negligence based claim, in relation to the Break Costs Representations, was therefore statute barred by March 2013, long before the cut-off date of 2 May 2016.

732. The position in relation to the deceit claim is more difficult. The fact (if it were true) that break costs were charged on an incorrect basis does not mean that either those making the representations to Janhill, or others within the Banks that were aware representations were being made, knew that the representations were false.

733. On one view, the limitation issue in this context gives rise to an absurd question: when would a reasonably diligent person in Janhill's position have appreciated it was worthwhile to plead a fraud which I have found does not exist. The most that I can do is address this by reference to the way the claimants put their case, and ask: could a reasonably diligent person have discovered, more than six years before the action commenced, the matters which the claimants rely on in alleging deceit?

734. Although the claimants' misrepresentation claim has altered over time, it has always been based on the assertion that the CNH Loss Basis was not a proper basis for charging break costs, either because there were no CNHs, they were not enforceable or they did not constitute "Hedging Arrangements" within clause 8.2. The allegation of fraud, itself, has always been based on an inference to be drawn from two matters: (1) break costs were charged on the CNH Loss Basis, but (2) the Banks, to the knowledge of the four impugned individuals, when explaining break costs to third parties, referred to the FRTBLs as having been hedged on a macro-basis, and did not refer to the CNHs.

735. I accept that a reasonably diligent person in the position of Janhill would have been alerted to the documents I have referred to above, which made reference to the Banks hedging on a macro-basis. There is nothing in those documents (or other documents relied on by the Banks on this issue), however, that would have suggested to Janhill that break costs were in fact charged on the CNH Loss Basis. Without that knowledge, the foundation for the deceit claim as advanced

by the claimants is missing. As Sir Geoffrey Vos MR said in *Gemalto* (above, at §46) "…in a fraud case, if there were an essential fact about the fraud claim that the claimant had not discovered, without which there would have been no fraud, it would make sense to say that the claimant had not discovered the fraud."

736. Accordingly, had it been necessary to do so, I would have concluded that Janhill's claim in deceit was not statute-barred.

The Janhill settlement agreement.

737. Following a mis-selling complaint by Janhill relating to its FRTBL numbered TBLIFX09870, CB offered Janhill a settlement in a letter dated 17 March 2015. Janhill accepted that offer, and received compensation in the sum of £37,068.84. It is common ground that the settlement agreement constituted a broad compromise of all non-fraud claims (including all the break costs claims) in relation to TBLIFX09870.

738. Janhill contend, however, that it was induced to enter into the settlement agreement by the Break Costs Representations. Since I have rejected the Break Costs Representations claims, the settlement agreement remains binding on Janhill.

739. Moreover, the Banks contend that since: (1) the break costs in relation to TBLIFX09870 were paid after the transfer of the loan to NAB; (2) the settlement was also entered into after that transfer; and (3) no misrepresentation claim is alleged in relation to break costs charged after the Morph Transaction, there can in any event be no claim to rescind the settlement agreement. There was no answer to this point in the claimants' closing submissions. For this further reason, therefore, the settlement agreement stands, and bars any of the break costs claims in relation to TBLIFX09870.

D4. Limitation - Uglow

Fixed Rate Representation claim

740. As against Uglow, the Banks point to the fact that, by 2 May 2013, Mr Uglow had been comparing indicative all-in rates offered by CB against those offered by other lenders: since there was quite a difference between those rates, it must follow that there was no "market rate" for a Fixed Rate element of a FRTBL. The rates offered were, however, for varying terms of loan, and offered on different days. Given that interest rates can fluctuate from day to day, I do not accept that this was enough to indicate that Mr Uglow's belief – that the Fixed Rate element was the rate at which the bank acquired funds – might be wrong.

741. The Banks also rely upon the same publicly available information as in their defence to Farol's claim. I find, however, that Uglow was in materially the same position as Farol. For the same reasons I have given in relation to Farol, therefore, there was nothing to trigger Uglow to go looking for press articles or at the Support Group website.

742. In relation to the claim in negligence, the Banks rely on the fact that by at least 1 May 2015, Uglow had begun to investigate possible claims in respect of its FRTBLs. It engaged a consultancy firm, Verita Treasury, to pursue complaints against CB with respect to mis-selling of interest rate products. This initially related to the capped rate loan which Uglow took out at the same time as its FRTBLs, although in May 2016 it appears that Verita Treasury had mentioned "another possibility of catching them mis selling the fixed loan this time…"

743. The Banks contend that, having started this process, a reasonably diligent person in Uglow's position would have discovered the matters (such as the Support Group website) which Janhill in fact discovered. I do not accept this. What Uglow had been triggered to investigate was the mis-selling to it of the TBLs. That would be sufficient to render any claim in negligence relating to such claims statute barred after three years. In my view it would not, however, cause wholly distinct claims based on misrepresentation as to the existence of AV to be statute barred.

D5. Limitation - Gaston

744. The Banks contend, on the basis of the same publicly available information relied on as against the other claimants, that a reasonably diligent person in Gaston's position would have discovered the Banks' fraud, or its error in refraining to bring a claim, prior to 9 November 2015. A number of the press articles relied upon were in the Scottish Herald, which the Banks contend increases the prospects of a reasonable diligent person in Gaston's position having picked up on the issue.

745. The Banks also contend that Mr Gaston had a strong sense of grievance against the Banks from at least 2012, and that a reasonable person with such a sense of grievance would undoubtedly have been sufficiently proactive to have discovered the articles and website pages that demonstrated there was a worthwhile claim. He admitted in cross-examination that after his relationship with CB broke down, in 2011, he was looking to get compensation.

746. Mr Gaston's complaints were, however, about mis-selling, not about the possibility that CB was not contractually entitled to charge break costs in the way that it did. That was the subject of a formal complaint to CB which he made in March 2016, and of a complaint to the FOS in August 2016. The FOS's letter to CB in response to the latter complaint, made reference to the fact that Gaston had complained to CB in 2011 about mis-selling, in connection with the size of the break costs he was faced with.

747. Generally, as to the press articles, Mr Gaston's evidence was that his wife read the Daily Mail, but that neither he nor she subscribed to the Scottish Herald. In fact, the Banks do not point to any article in the Daily Mail relating to the break costs claims. Mr Gaston also admitted carrying around in his brief case an article from Farmers' Weekly about CB facing complaints from customers. Since this article was not produced in evidence, it is not known whether it referred to mis-selling claims or to doubts as to CB's contractual entitlement to charge break costs. The likelihood is, given that this reflects the great majority of press articles, that it was about the former.

748. Moreover, the fact that, even as late as 2016, Gaston's complaints were about mis-selling (which assumes that the break costs were contractually due) reinforces the conclusion that it was not by then aware of the material that indicated the possibility of claims as advanced by the claimants at trial.

749. Accordingly, I conclude that a reasonably diligent person in Gaston's position would not have been aware of matters that indicated a worthwhile claim based on the contention that break costs had been charged on an improper basis. As to the fraud claim, additionally, the same points I have made in relation to the other claimants apply equally to Gaston.

750. For these reasons, if Gaston had otherwise had sustainable causes of action in relation to the break costs claims, they would not have been time-barred.

PART E: UNFAIR RELATIONSHIP

751. S.140A of the Consumer Credit Act 1974 ("CCA") provides as follows:

> "(1) The court may make an order under section 140B in connection with a credit agreement if it determines that the relationship between the creditor and the debtor arising out of the agreement (or the agreement taken with any related agreement) is unfair to the debtor because of one or more of the following–
>
> (a) any of the terms of the agreement or of any related agreement;
>
> (b) the way in which the creditor has exercised or enforced any of his rights under the agreement or any related agreement;
>
> (c) any other thing done (or not done) by, or on behalf of, the creditor (either before or after the making of the agreement or any related agreement).
>
> (2) In deciding whether to make a determination under this section the court shall have regard to all matters it thinks relevant (including matters relating to the creditor and matters relating to the debtor).
>
> (3) For the purposes of this section the court shall (except to the extent that it is not appropriate to do so) treat anything done (or not done) by, or on behalf of, or in relation to, an associate or a former associate of the creditor as if done (or not done) by, or on behalf of, or in relation to, the creditor.
>
> (4) A determination may be made under this section in relation to a relationship notwithstanding that the relationship may have ended."

752. By s.140B(1) of the CCA, the Court may make an order which, among other things, requires "the creditor, or any associate or former associate of his, to repay (in whole or in part) any sum paid by the debtor or by a surety by virtue

of the agreement or any related agreement (whether paid to the creditor, the associate or the former associate or to any other person)".

753. The principal claim is against CB, because the credit relationship was with CB. Relief is also sought against NAB, however, on the basis that it is a former associate of CB. I will first address the claim against CB.

754. The burden is on CB to prove that the relationship was not unfair: s.140B(9). That does not, however, absolve the claimant from pleading, and proving, the facts from which the unfairness is said to arise: *Smith v Royal Bank of Scotland* [2023] UKSC 34; [2023] 3 WLR 551, per Lord Leggatt at §40.

755. It is the fairness or otherwise of the relationship arising out of the credit agreement (and not of the credit agreement itself) which the court must determine (see *Smith v RBS*, above, at §18). The assessment required by s.140A is broad and open-ended. The unfairness must stem from one of the three matters specified in ss.(1) but "it would be hard to cast the possible causes of unfairness more broadly than this", and there is no restriction on the matters to which the court is to have regard: *Smith v RBS*, per Lord Leggatt at §22.

756. The leading case is *Plevin v Paragon Personal Finance Ltd* [2014] UKSC 61; [2014] 1 WLR 4222. The claimant entered into a credit agreement with the lender in the sum of £34,000, repayable over ten years. The loan was arranged by a broker, so the claimant had no contact with the lender, apart from a single telephone call for money laundering compliance purposes. The broker arranged for the claimant to take out payment protection insurance ("PPI"), from the lender's designated PPI provider. The claimant paid for this by way of a single up-front premium, of £5,780, added to the loan. The lender received commission from the PPI provider, and itself paid commission to the broker, in respect of both the loan and the PPI. In total, 71% of the PPI premium paid by the claimant was made up of commission. A "borrower's guide" provided to the claimant in relation to the PPI cover informed her that "commission is paid by the lending company", but the amount of commission was not disclosed to her.

757. In a claim against the lender seeking relief under s.140B of the CCA, the claimant alleged an unfair relationship (1) because of the failure to disclose the amount of commission, or (2) the failure to assess the suitability of PPI for her needs.

758. On the first point, which is the relevant point for present purposes, the Court of Appeal concluded (in agreement with the recorder at first instance) that the failure to disclose commission did not render the relationship unfair in circumstances where the underlying regulatory structure (the Insurance Conduct of Business Rules (the "Rules")) did not require the disclosure of commission to a consumer.

759. The Supreme Court disagreed, holding that in determining whether non-disclosure of commission had made the relationship between the lender and the claimant unfair, the question was not whether there had been a breach of duty under the Rules, but whether a creditor's relationship with a debtor was unfair.

The considerations relevant to that question were wider than those relevant to the application of the Rules.

760. These included, per Lord Sumption (with whom the other members of the Court agreed) at §17:

(1) the characteristics of the debtor, including their sophistication or vulnerability;

(2) the facts which the debtor could reasonably be expected to know or assume;

(3) the range of choices available to the debtor; and

(4) the degree to which the creditor was or should have been aware of those matters.

761. On the facts, since any reasonable person would have questioned whether a transaction in which more than two thirds of a premium was going to intermediaries represented value for money and was a sensible transaction to enter into, and since the lender had been the only party who, by reason of its knowledge of the total amount of commission, could have removed that source of unfairness, its failure to disclose the amount of commission fell within s.140A(1)(c).

762. At §10, Lord Sumption, having noted that s.140A is deliberately framed in wide terms with little in the way of guidance about the criteria for its application, made the following general points:

(1) Where the terms as between debtor and creditor are not intrinsically unfair, unfairness in their relationship will often stem from the fact that the relationship is so one-sided as substantially to limit the debtor's ability to choose.

(2) The existence of features that operate harshly against the debtor does not necessarily render the relationship unfair, as those features may be required in order to protect what the court regards as the legitimate interest of the creditor.

(3) The unfairness must arise from one of the three categories of cause listed at s.140A(1)(a) to (c), that is: any terms of the agreement or a related agreement; the way in which the creditor has enforced any of his rights; and any other thing done, or not done, by or on behalf of the creditor whether before or after the making of the agreement or any related agreement.

(4) The great majority of relationships between commercial lenders and private borrowers are probably characterised by large differences of financial knowledge and expertise, but it cannot have been Parliament's intention that the generality of such relationships should be liable to be reopened for that reason alone.

763. Lord Sumption's reasons for concluding that the relationship was unfair are set out at §18:

> "A sufficiently extreme inequality of knowledge and understanding is a classic source of unfairness in any relationship between a creditor and a non-commercial debtor. It is a question of degree. Mrs Plevin must be taken to have known that some commission would be payable to intermediaries out of the premium before it reached the insurer. The fact was stated in the FISA borrowers' guide and, given that she was not paying LLP for their services, there was no other way that they could have been remunerated. But at some point commissions may become so large that the relationship cannot be regarded as fair if the customer is kept in ignorance. At what point is difficult to say, but wherever the tipping point may lie the commissions paid in this case are a long way beyond it. Mrs Plevin's evidence, as recorded by the recorder, was that if she had known that 71.8% of the premium would be paid out in commissions, she would have "certainly questioned this." I do not find that evidence surprising. The information was of critical relevance. Of course, had she shopped around, she would not necessarily have got better terms. As the Competition Commission's report suggests, this was not a competitive market. But Mrs Plevin did not have to take PPI at all. Any reasonable person in her position who was told that more than two thirds of the premium was going to intermediaries, would be bound to question whether the insurance represented value for money, and whether it was a sensible transaction to enter into. The fact that she was left in ignorance in my opinion made the relationship unfair."

764. The Banks relied also on *Deutsche Bank v Khan* [2013] EWHC 482 (Comm), where it was alleged that an unfair relationship arose from various terms in a loan agreement. In that context, at §346, Hamblen J listed a number of factors, derived from earlier authority, likely to be of relevance. Many of these do not apply where the unfairness is said to arise out of something which is *not* disclosed (as opposed to arising from the disclosed terms of the contract), but some (which I highlight in the following two paragraphs) are of wider relevance.

765. In relation to the fairness of the contract terms, Hamblen J identified the following factors: whether there are sound commercial reasons for the term; whether it represents a legitimate and proportionate attempt by the creditor to protect its position; to the extent that a term is solely for the benefit of the lender, whether it exists to protect him from a risk which the debtor does not face; and the scale of the lending and whether it was commercial or quasi-commercial in nature (a court is likely to be slower to find unfairness in high value lending arrangements between commercial parties than in credit agreements affecting consumers).

766. In addition, in relation to the creditor's conduct before and at the time of contracting, Hamblen J identified as relevant factors: whether the creditor applied any pressure on the borrowers to execute the agreement (if an agreement

has been entered into with a sense of urgency it will be relevant to consider to what extent responsibility for this lay with the debtor, as distinct from the creditor); and whether the creditor understood and had reasonable grounds to believe that the borrower had experience of the relevant arrangements and had available to him the advice of solicitors.

767. Where the court finds that the relationship is unfair, then the general purpose of an order under s.140B is (where the relationship has come to an end) to reverse any damaging financial consequences to the debtor of the unfairness that the court has identified: *Smith v RBS* (above, at §25). The order made should reflect and be proportionate to the nature and degree of unfairness which the court has found; it should not give the claimant a windfall, but should approximate, as closely as possible, the overall position which would have applied had the matters giving rise to the perceived unfairness not taken place: *Carney v NM Rothschild and Sons Ltd* [2018] EWHC 958 (Comm), per Waksman J at §101, and the cases there cited.

768. The pleaded case of Uglow and Gaston is the same: their respective relationship with CB was unfair "by reason of the non-disclosure of the additional basis points included in the fixed rate".

769. The particulars pleaded in support of the essential plea, that the non-disclosure of the AV rendered the relationship unfair, boil down to the following matters.

770. First, they repeat elements of the claims in misrepresentation. Even though the misrepresentation claim by Gaston was abandoned, and even if Uglow's claim does not succeed (as I have concluded), the claimants contend (and I accept) that elements of the misrepresentation claim are relevant to the overall case on unfair relationship. The elements relied on are broadly the same in both cases, except that some aspects of Gaston's claim were abandoned following his cross-examination:

(1) The practice of agreeing Margin separately, but leaving the Fixed Rate to be agreed on a separate call with the representative from Treasury Solutions, represented that there was no additional margin in the Fixed Rate;

(2) The employees of the Banks knew that Uglow (but not Gaston) believed the Fixed Rate was an external market rate; they knew that both Uglow and Gaston would simply accept the rate quoted to them; they also knew that Uglow and Gaston had no means of checking whether the Fixed Rate was an externally set rate; and they knew that there was in fact AV within the Fixed Rate; and

(3) The Banks chose not to disclose the AV.

771. Second, they contend there was a stark inequality between the claimants and the Banks, in respect of their knowledge and understanding of how the Fixed Rate had been determined.

772. Third, they contend that the practice of adding significant hidden basis points to the market rate before quoting Uglow a Fixed Rate, in order to generate treasury income, to meet internal targets, fell below the standard of commercial conduct reasonably to be expected of banks providing loans to SME customers.

773. In their written and oral submissions, the claimants rely on numerous additional matters:

(1) The Uglow family was naïve, and trusted CB as its banker (citing, for example, meetings around the kitchen table, and the fact that Mr Martin was a respected and well-known bank manager).

(2) Uglow's lack of knowledge of swaps or hedging products.

(3) Similar points are made about Mr Gaston's lack of knowledge and sophistication.

(4) The Banks' employees were motivated to sell FRTBLs so as to earn treasury income (with incentivisation programmes, such as income targets set for individuals, and for branches, and the performance of individuals and branches being publicised so as to generate competition between them). A high point of the claimants' case in this respect is the bullet point in one of the presentation slides for branch managers I have referred to above (see [614] above), recommending that if they are under pressure to improve a member's lending Margin, they should suggest that the customer hedges in return for the reduced Margin, because in many circumstances the "value-add derived from Treasury Solutions will more than compensate this." They also cite the evidence from Ms Anderson (the Treasury Solutions manager who worked on the Gaston FRTBL), who volunteered that a branch manager would have been influenced, when offering a Margin, by the fact that additional income would be made through a fixed rate product.

(5) Contemporaneous emails showed Mr Martin and his senior colleagues celebrating the closing of the Uglow deal because of the treasury income it generated.

(6) The high level of AV charged – estimated to be the full 50 basis points, by reverse engineering the Fixed Rate.

(7) The lack of any explanation for not disclosing AV, other than it was "standard sales process".

774. In their written closing submissions, the claimants say that the hallmarks of an unfair relationship claim are all present in each of Uglow's and Gaston's case: non-disclosure of a material element of the Fixed Rate; a substantial amount of hidden margin (where the Treasury Solutions partner who set it could not provide a proper justification); and marked inequality of knowledge and understanding.

775. I have carefully considered these points, and the development of them at length in the closing written submissions. I am satisfied, however, that the non-disclosure of AV did not cause CB's relationship with either Uglow or Gaston to be an unfair relationship within the meaning of s.140A of the CCA.

776. A number of the reasons for this conclusion have already been canvassed in dealing with the Fixed Rate Representation cases.

777. The starting point is the conclusions I have already reached as to the nature and purpose of AV. The claimants seek to paint AV as additional margin of the same nature as the credit or lending Margin, so that CB was only revealing half of the overall picture in relation to that single concept of "Margin". I accept that AV can be described as "margin" in the broad sense of that term meaning any income element for the bank over and above its external costs in providing the loan. That is, however, an overly simplistic view.

778. In the first place, AV does not represent the difference between what it actually cost the bank to borrow funds in the market to lend to a particular customer, and the Fixed Rate. Banks are funded from a variety of sources, and would not typically go into the market to acquire money to fund a particular loan to a customer. The market price, to which NAB's traders referred, when determining the Fixed Rate element of the FRTBLs was instead taken from the mid-rate for swap rates on the Banks' systems. That does not represent a rate at which a bank could acquire funds, because a counterparty would add a spread to that price for the purposes of a real trade. It is not so simple, therefore, as the oranges, grain and tractors analogies which various of the claimants' witnesses described.

779. Second, AV has a different purpose and function to the lending Margin. As I have already noted, the same lending Margin was applied, under a FRTBL, to all of the possible variations of loan, including the plain variable rate loan. For anything other than the variable rate loan, however, the customer obtained significant additional benefits, and the bank assumed additional burdens and risks. In the case of the relatively straightforward fixed rate loan, the customer obtained the valuable benefit of obtaining cash flow certainty by removing any exposure to interest rate movements, while CB assumed the corresponding burden of being exposed to that risk.

780. Ms Lacob, who presented this part of the case for the claimants, disputed that AV, at least in the amounts added to the claimants' Fixed Rates, reflected actual costs incurred by the Banks and submitted that this was "very much about profit", in the same way as lending Margin. She submitted that any costs which the Banks incurred in relation to providing a fixed rate loan were miniscule compared to the amount of AV charged: the cost of funding the loan was already within the Margin; the cost of providing the fixed rate was limited to the market swap rate, to which NAB traders had already added 2-3 basis points for the traders' time, and hedging in the market; and there were at most 40 Treasury Solutions personnel. None of this, she submitted, justified the £24 million which she calculated was generated in Treasury income from TBLs each year.

781. I do not accept this. There was no evidence addressing the actual cost incurred by the Banks in providing TBLs, so as to establish that it was only a small

proportion of the overall income generated in relation to TBLs, and no expert evidence to support the submission that the Banks' costs of providing a fixed rate loan is all encapsulated in the market swap rate on which the Fixed Rate was based. The submission also ignored the wider costs involved in a bank offering interest rate hedging products.

782. Such evidence as there was on these points, elicited from Mr McGill in cross-examination, contradicted the claimants' submissions. He candidly accepted that AV included profit, but insisted it also included a lot more. In particular, he did not accept that the cost of providing the fixed rate loan was limited to the market swap rate. He was happy to label this the "base cost", but said that the actual cost included numerous other things: salaries, systems and facilities which enabled the Banks both to sell TBLs and to manage the risk. Referring to the market swap rate, he said: "that is a market price for £50 million on a six-monthly rollover basis. That would be it. But if the bank only did that, they would go bust, because they've got huge amounts of cost to deal in the market and those things."

783. I have already noted that the Fixed Rate was based on a mid-market swap rate. It is correct that the NAB traders added 2-3 basis points to that. I heard evidence from Rhys Fish, an interest rate trader at NAB from 2005 to 2007, and the person with responsibility for the interest rate trading book from 2010 to 2013. He described the 2-3 basis points as the trader's "execution cost", and saw it as covering the cost of the trader's time plus a small amount of profit for the trading desk. He also said that he thought it included something to cover the risk inherent in the fact that NAB did not hedge the risk under each CNH individually, but waited until there was a sufficient volume to hedge in the market. Mr McGill, in contrast, identified this risk as one of the things that AV was intended to cover. I need not resolve that difference of view, since I accept Mr McGill's evidence that the burden, in terms of risk and cost, which the Banks assumed in offering interest rate hedging products such as the FRTBLs went considerably further than the isolated elements identified by Ms Lacob.

784. In the absence of evidence which addressed this point, it is not possible to conclude – as Ms Lacob submitted – that the actual cost to the Banks of providing FRTBLs was only an insignificant portion of the AV charged to customers. I accept that a significant element in the AV is likely to consist of profit to the Bank (in the sense of income in excess of the value to be ascribed to each the elements of cost and risk incurred in relation to the FRTBLs), but I consider it unsurprising that a bank would seek to make a profit from its lending business. I do not think that it is an indication of an unfair relationship that the additional income included in the Fixed Rate itself included an element of profit, without that being explained to customers.

785. A reasonable customer who applied any thought to this would not have expected, in my view, to obtain the additional benefit arising from a fixed rate loan, or cause CB to incur the costs associated with assuming additional risk, without paying for it. Wherever a customer enters into a fixed rate product it accesses (as was put during argument) a different part of the bank – that part which includes specialist employees who market and sell fixed rate products, and others who manage the risks arising from assuming interest rate risk, and

which requires the bank to hold additional capital. In this case, it so happens that at the relevant time all those functions were carried out by a different entity, NAB, but the same would be true even if those functions were carried out by the same bank that offered variable rate loans.

786. CB could have chosen to explain the make-up of the price of the hedged products that it provided under the umbrella of TBLs, by splitting out the component parts of the fixed rate element being offered. One of its senior executives, after the event when "hidden AV" had arisen as an issue with at least some customers, took the view that it would be better going forward to price a fixed rate loan purely on the basis of the appropriate swap rate, so as to create "absolute transparency", with the flexibility on pricing remaining through the relationship manager's ability to "flex" the credit risk Margin. It is not known to what extent, if at all, that senior executive's view was shared across the Banks.

787. I agree that this would have produced greater transparency. It does not follow, however, that the fact that CB chose not to explain the price of its hedged products in that way rendered the relationship with the customers unfair. The fact that this view was held by a senior executive within the bank is of little relevance. So too is the fact that a relationship manager, Mr Martin, having explained that he did not understand that the addition of AV translated into adding basis points to the fixed rate of interest charged to the customer, accepted in cross-examination that it would have been fair to disclose that fact to the customer. Even if his view was relevant, the fact that it would be fair to disclose something, does not mean that its non-disclosure rendered the relationship unfair for the purposes of s.140A.

788. It is also important to keep in mind the essential feature of the FRTBL, which is to enable the customer to fix the rate at which it pays interest for a specified period. What is of prime relevance to any customer will be the overall rate, because it is that which it will have to pay, and against which it can compare both current (variable) rates (to decide whether fixing the rate is in its interests) and indicative offers from other lenders (so that it can decide whether to borrow from CB or another lender). All of the claimants accepted the importance of the overall rate. Mr Gaston went further, saying that it was the overall rate that was of importance to him *and* it had not been relevant to him how the bank had come up with the rate that was offered.

789. It is true that any lender asked to offer a fixed rate loan would need to understand particular details of the proposed loan (particularly the amount and repayment schedule), but the fact that it was possible to obtain at least indicative rates from other banks with which CB's offer could be compared is demonstrated by what Uglow and Gaston did. I have already mentioned, in dealing with Uglow's Fixed Rate Representation case that it obtained an indicative offer from NatWest, which could not match CB's offer.

790. Mr Gaston refused to accept that he had obtained indicative offers from any other bank prior to entering into his FRTBLs. The contemporaneous emails referred to negotiations that he was having with another bank, specifically Barclays. Mr Gaston refused to answer any questions about that other bank,

claiming it was not relevant. I find, from the various references in the contemporaneous emails, that Mr Gaston did indeed obtain an indicative offer from another bank, but that CB's offer was the best he could get. He accepted that if he had been offered better terms by another bank he would have used that in negotiations with CB. Indeed, he did seek to negotiate down one aspect of the overall offer from CB, relating to the payment for solicitors fees, by reference to what the "other bank" had offered. The fact that he did not do the same as respects the overall rate reinforces the conclusion that he could not obtain better rates elsewhere.

791. There is no question of any lack of transparency as to the overall rate of interest CB was prepared to offer for a FRTBL. It is not suggested, for example, that it offered indicative rates without AV, and then surreptitiously added AV at the last minute. Uglow and Gaston had the information that mattered throughout the sales process, for the purposes of deciding whether to enter into a fixed rate loan at all, and for comparing indicative offers they might choose to get from other prospective lenders.

792. Turning to the four factors Lord Sumption identified as being relevant at §17 of *Plevin*.

The characteristics of the debtor, including their sophistication or vulnerability

793. Debtors who are entitled to the protection of s.140A fall within a wide spectrum. Although the claimants sought to paint each of Uglow and Gaston as naïve, they were businessmen, with existing business banking relationships. They are far from the end of the spectrum consisting of vulnerable individuals. Moreover, the TBL documentation warned them to obtain independent advice, which both of them did.

794. Although the claimants seek to play down the role of Uglow's advisers, in particular Mr Feneley, I have already found that he played a significant part in relation to Uglow's FRTBL. I reject the suggestion in the claimants' written closing submissions that just because Uglow's advisors, Mr Feneley and Mr Edwards, had an existing relationship with Mr Martin, they were somehow not sat on Uglow's side of the negotiation with CB. The reason they had an existing relationship with Mr Martin was because they acted for a number of other farming clients who were customers of CB. That is relevant in supporting the conclusion that they would have had substantial experience of various types of lending, including fixed rate loans, and can properly be described as relatively experienced and sophisticated.

795. Gaston also had the benefit of an adviser, a Mr Andrew Bell of Active Business Partnerships (who assisted him in liaising with CB and with the other bank or banks from whom Gaston sought indicative offers at the time).

The facts which the debtor could reasonably be expected to know or assume

796. I have already addressed the fact that a reasonable customer would not have thought that it could obtain the significant benefits offered by a fixed rate loan for nothing, or that the bank would assume additional burden and risk without

charging some additional income. That, I consider, is something which a debtor in the position of Uglow and Gaston – either themselves or through the advisers they were advised to consult – could be expected to know or assume.

The range of choices available to the debtor

797. Unlike the position in *Plevin*, there was a competitive market in fixed rate lending. As already described above, each of Uglow and Gaston tested the competition but found CB to be offering the best terms.

798. It necessarily follows, from my conclusion that a reasonable customer would expect a bank offering a fixed rate loan to charge more for doing so than for lending at a variable rate, that it is to be expected that other banks did the same.

799. Either those other banks did, or did not, disclose such additional income. At an interlocutory stage of this action, the Banks applied to adduce expert evidence that other banks also charged – and importantly did not disclose – additional income for fixed rate loans. This was said to be relevant to the standards of commercial conduct reasonably to be expected of banks. I refused that application, on the basis that the question whether it fell below reasonable standards of commercial conduct for a bank to hide income was not answered by reference to how many other banks were also doing so.

800. If the other banks from whom Gaston and Uglow obtained indicative rates did disclose that they charged additional income for providing fixed rate loans, then that would reinforce the conclusion that Gaston and Uglow should reasonably have expected CB to charge additional income. They would hardly have expected CB, in contrast to other banks, to provide this product or service for nothing. If other banks also did not reveal the additional income, then that does not alter the fact that there was a competitive market for fixed rate lending, such that Uglow and Gaston were free to choose not to accept CB's offer.

801. This is certainly not a case (see Lord Sumption's comment at §10 of *Plevin*) where the relationship was so one-sided that it substantially limited the debtor's ability to choose.

The degree to which the creditor was or should have been aware of those matters

802. CB knew of the relative sophistication of Uglow and Gaston. The respective relationship mangers were entitled to take the view, in my judgment, that on the spectrum from sophisticated to vulnerable, Uglow and Gaston were nearer the former. They knew that both Uglow and Gaston made use of advisers. CB also knew that there were other lenders offering fixed rate loans to SME customers, and that in order to obtain the business of Uglow and Gaston they needed to compete with those other lenders.

803. The ultimate conclusion in *Plevin* was that in the circumstances of that case, non-disclosure of the level of commission *per se* did not cause the relationship to be unfair. The relationship was ultimately found to be unfair in *Plevin* due to the inordinate size of the commission. As Lord Sumption put it (at §18) there is a tipping point in terms of size, where the non-disclosure renders the

relationship unfair. That point was easily passed in that case, given that over 71% of the premium paid by the borrower for PPI was commission:

> "Any reasonable person in her position who was told that more than two thirds of the premium was going to intermediaries, would be bound to question whether the insurance represented value for money, and whether it was a sensible transaction to enter into. The fact that she was left in ignorance in my opinion made the relationship unfair."

804. The present case is very different. AV was at most 50 basis points (i.e. 0.5%), compared to overall fixed rates of 5.04% for Uglow and 5.81% for Gaston. Even if viewed as a capital sum (which is less appropriate, given that it was not paid as a capital sum by the customer), this was typically in the region of £40,000, compared to a £2 million 5 year loan for Uglow, and a £1 million 21 year loan for Gaston. Either way, the amount of AV charged was relatively small. A tipping point is intrinsically difficult to identify with precision, but in my judgment the amounts concerned in this case fall far short of it.

805. That is reinforced by the fact that there was a competitive market for fixed rate loans, which placed a natural commercial restraint on the amount of income CB could realistically charge for its fixed rate lending. Too much, and the overall rate ceased to be competitive. The fact that, notwithstanding the amount of AV added to the FRTBLs for Uglow and Gaston, the overall rate was better than that offered by other banks at the time, seriously undermines, in my judgment, the argument that the amount of non-disclosed AV was such as to render the relationship with either of them unfair.

806. In contrast to the position in *Plevin*, I do not think that the reasonable person in Uglow's or Gaston's position would have been bound to question, if they had known about the AV, whether the FRTBL offered value for money. Irrespective of what elements went into the AV, they knew that the FRTBL offered value for money because (1) they were content to take the certainty of the overall fixed rate, as compared with the risk of borrowing at a variable rate in light of the known current variable rate and their perception of the risk of it rising in the future; and (2) they were aware that it was better than the alternative indicative rates they had received from elsewhere.

807. My conclusion is not affected by the internal incentive programmes within the Banks, or the "self-congratulatory" tenor of some of the internal correspondence, upon which the claimants rely.

808. Once it is accepted that it is legitimate for a bank to charge for the additional work and risk involved in offering hedged interest rate products, I do not think that the fact that the bank's employees are offered incentives for directing customers towards buying products which will produce that income renders the relationships that are then entered into unfair. Nor do I think that the relationship was rendered unfair because AV did not simply cover the Banks' identifiable costs, but also involved a significant element of profit for the Banks.

809. It is again important to note what this case is *not* about. It is not about the mis-selling of FRTBLs, in the sense of selling them to customers for whom they were unsuitable. A programme of internal incentives, creating inter-branch competition, might be relevant to such a claim. For completeness, I note that the relevant employees involved in the sale of the FRTBLs to Uglow and Gaston insisted that (while recognising there were clear benefits to the Banks, in terms of treasury income generated) they either recommended the fixed rate loans to Uglow and Gaston, or encouraged them in their wish to enter into them, because they considered that it was in their customers' interest. I do not see any inconsistency between that position and Mr Martin and his colleagues celebrating the income that the Banks earned from the entry into the loans.

810. Importantly, I do not accept the claimants' submission, as put in closing argument, that they have "proved that AV was being added to meet income targets." Incentivising relationship managers to encourage their customers to purchase hedging products that generated income for the Banks is very different from the Treasury Solutions partners (who were the ones who determined the amount of AV to add) adding AV at all, or increasing the amount of AV in particular cases, so as to meet income targets.

811. As to the amount of AV, the claimants rely on the fact that it was wholly within the discretion of the Treasury Solutions partner, up to the limit of 50 basis points. Given my conclusions, first, that non-disclosure of AV did not in itself cause the relationship to be unfair and, second, that even at 50 basis points, it was far from reaching the tipping point which might have caused its non-disclosure to render the relationship unfair, I do not think anything is added to the unfair relationship case by the fact that the precise level was left to the discretion of the Treasury Solutions partners. To leave it up to the discretion of the individual Treasury Solutions partner, without (until a date some time in 2012) a principled set of criteria, could be regarded as problematic: it meant that two customers with precisely the same loan parameters could be offered different Fixed Rates at two different branches, and it produced greater uncertainty for the Banks as to the level of income they could expect from selling the hedged products. If, as I have concluded however, the relationship is not otherwise unfair within s.140A, I do not think it is rendered unfair by this factor.

812. Nor do I think it is rendered unfair because in the specific case of Uglow, Ms Collins, who set the rate, said at trial that she would find it strange if she had added 50 basis points. It is not in fact known precisely what the AV was, and I note that the documentation indicated that 40 basis points was identified at the outset of the Uglow deal. If there is no unfair relationship where the AV added is 30 or 35 basis points, I find it difficult to find that the tipping point for rendering a relationship unfair is reached by adding 10-15 more basis points. The fact that a former trader, Mr Jovanovic, who was not himself involved in setting AV on any trade, said he thought that to set 50 basis points on the Uglow deal "would be in my eyes excessive" is of little or no weight.

813. A specific point is made on behalf of Uglow, based on an internal email after the deal was finalised, referring to the treasury income for Mr Martin's area: "62% as a result of Nigel's Uglow deal c.58k income. More to go in the next

two weeks am hoping we will be at 67% by the end of next week. That puts us just behind Oxford on the SW plan board. Oxford are at 73%". The claimants contend that this admits of no interpretation other than that the Uglow income had helped the Exeter office close the gap in their competition with the Oxford office. I do not think this email supports Uglow's case on unfair relationship. The claimants do not, I think, ask me to infer from this that the *purpose* of charging AV, or of setting it at the level it was in the Uglow deal, was to meet income targets. I would not, in any event, draw that inference. The email merely evidences an awareness on the part of Mr Martin's colleagues of the fact that the Uglow deal was good for the Exeter branch, when considering competition for income generation between branches.

814. They also refer to Mr Martin's evidence in cross-examination as to why he proposed 40 basis points of AV: "I could have put in 35%, but then you're sort of underselling yourself in terms of expectation, when you're trying to garner support for the area director for the pricing sign-off." They suggest that this was a frank admission that the purpose of adding an extra 5 basis points was in order to "meet a new target figure". I do not read his evidence that way: he was simply explaining that in order to get the deal signed off with his superiors, an important factor was to ensure that the deal generated sufficient income for the bank. Mr Martin, as relationship manager, was not in any event involved in setting the level of AV.

815. For these reasons, I conclude that the relationships between CB and, respectively, Uglow and Gaston, were not unfair relationships within the meaning of the CCA. It is accordingly unnecessary to consider whether it would have been appropriate (had a finding of unfair relationship been made) to make any order against NAB.

PART F: CONCLUSION

816. For the reasons set out above, I dismiss the claimants' claims.

817. I thank all leading and junior counsel and those instructing them for the high quality of their oral and written submissions, and for the courteous and professional manner in which the trial was conducted on all sides.

Appendix: the allegations of deceit against Mr Thorburn, Mr Pickard, Mr Storey and Mr Golding (the "four executives")

1. As I have noted in the body of the judgment, the claimants' case against the four executives is that they must have known that the CNH Loss Basis of calculation of break costs was improper because, when giving explanations of break costs to third parties, the Banks – with their assistance or to their knowledge – failed to make mention of the CNHs or the CNH Loss Basis and/or gave explanations inconsistent with the CNH Loss Basis.

2. The claimants' allegations in this regard are wide-ranging. They rely generally on the absence over many years, of any explanation given to third parties of break costs being charged on the basis of the CNH Loss Basis. Without limiting the breadth of their attack, the claimants relied in particular on nine instances, developed in Appendix 1 to their opening submissions (the "Appendix 1 Documents") which I address under the following nine sub-headings.

(1) A complaint to the Financial Ombudsman Service (the "FOS") in 2005-2006

3. In 2004 an unidentified customer complained to the FOS about break costs he had been charged under a TBL. This was not a FRTBL, but a more complex variety involving a cap and a collar.

4. The first thing to note about this incident, is that the FOS *was* told about the CNHs. It therefore contradicts the claimants' essential case that the Banks failed to inform third parties about the CNH Loss Basis.

5. The claimants rely, however, on internal discussions leading up to the meeting with the FOS and on earlier versions of a slide presentation for use at that meeting, in which CB considered portraying its back-to-back hedging arrangement as one with a "market counterparty", which "may" be NAB although, in the particular example, *was* NAB "as it may be able to offer better rates than its competitors".

6. The claimants say that this was not a truthful account, because in reality (as many of the Banks' witnesses confirmed) the counterparty to the CNH was *always* NAB. It would not have been possible to enter into a back-to-back swap in respect of each TBL in the market, because no market counterparty would have been willing to enter into a swap for such a small amount.

7. There is no record of the meeting with the FOS. In the final version of a slide presentation for use in a meeting with the FOS, however, the back-to-back hedge was stated unequivocally as being with NAB. It described the impact which breaking the TBL had on the CNH, and that the cost of breaking the CNH was the basis of the break costs charged to the customer. This accurately summarised the CNH Loss Basis.

8. Mr Pickard and Mr Golding are said to have been involved in the explanation given to the FOS. Mr Pickard attended the meeting with the FOS in July 2005, reporting that it had gone well, and that "the penny well and truly dropped" for the FOS.

9. Mr Golding's involvement was minimal. He received an email from Claire Shields, a manager in NAB's Treasury Solutions team, on 2 June 2005. Ms Shields expressed concern, in the context of the explanation given in the TBL documentation (which talked about "suffering or incurring" a loss as the trigger for charging the client), that because the counterparty to the trade entered into by CB was its parent company, this was "an area which could go against us. We would be unable to prove, 'ultimately .... i.e. that NAB suffers those same break costs in the market". She said she was unsure of the legal position of the "NAB-CB relationship", and would revert that issue to group legal.

10. I infer that whatever concerns there were among some within CB at relying on the cost of terminating a hedge arrangement with its parent as the basis of break costs were overcome, since that was precisely the explanation given to the FOS.

11. The claimants also rely on a subsequent follow-up with the FOS in relation to the same complaint, in February 2006. The FOS had by this point identified a new area of concern, namely that the losses claimed by the bank related to "future losses" and the contractual wording at that date (which pre-dated the Standard Conditions) entitled CB to recover the losses it had "suffered". Mr Pickard's view, as expressed in internal emails in early March 2006, was that CB suffered a loss immediately the TBL was broken "and we are left with a position to replace in the market". This, I note, reflects the Banks' case at trial.

12. The claimants rely on a sentence in an email from Mr Pickard dated 8 March 2006 in which he said: "I have been over and over this and have changed many times. I only hope the word "have" does not bring this whole case down around I [sic] ears, otherwise the legal team will be in the dock themselves". If, which I do not accept, the Banks concluded that the use of the phrase "have incurred" was problematic, it is irrelevant to nearly all aspects of the claims in this case, because it is not to be found in the Standard Conditions from 2005 onwards. Mr Pickard went on to explain (consistently with the case the Banks have advanced at trial) why a loss was incurred by CB at the point at which the TBL was broken.

13. I see nothing suspicious in this email, and I do not read Mr Pickard's reference to having "changed many times" displaying a concern over CB's entitlement to charge break costs in the way that his emails had consistently explained.

14. Finally, the claimants suggest that the FOS's concerns were never satisfied, because CB settled the relevant customer's complaint by paying £350,000, when it had previously offered £30,000. That suggestion is based on a line in an email from Ms Shields in April 2006 that "[redacted] was fully provided at £350k". This refers, however, only to the provision that had been made in respect of the relevant customer, which more likely refers to the provision in respect of the loan, not the value of the payout in respect of the complaint. Moreover, a payout of £350,000 in circumstances where less than 10% had been offered, would hardly be "great news!", which is the phrase with which Ms Shields started the email.

(2) The response to a customer of Mr Batstone in 2008

15. This related to a complaint by another unidentified customer, which was sent to Graeme Batstone in Treasury Solutions. This customer also had a more complex TBL, not a FRTBL. The customer was assisted by his son, a hedge fund securities solicitor. The customer sought answers to a number of questions as to how break costs were calculated, including what financing arrangements or hedging arrangements CB had entered into. The customer referred to the "Break Costs Document" which simply explained that there will be costs associated with repaying the loan, e.g. as a result of hedging/financing arrangements being terminated.

16. The claimants' essential submission is that in answering these questions, there does not appear to have been mention made of the CNH. They point to apparent confusion among those within CB (and in particular Mr Pickard) as to whether the customer's TBL had been hedged on a back-to-back basis or on a portfolio-wide basis. In the response to the customer, although there is reference to the bank managing its loans at a portfolio level, the explanation of the interest rate derivatives used by CB did not in fact refer to hedging at the portfolio level.

17. As to the calculation of break costs, the response to the customer said this:

> "The borrower agreed to the predefined interest rate profile for the full term. If this is to be exited before maturity, the current market value of the interest rate profile is combined with the accrued interest on the loan. The current market value of the interest rate profile will typically be positive to the borrower (i.e. a break benefit) if interest rates have risen since the deal date, and negative to the borrower (a break cost) if applicable interest rates have fallen since the deal date. In this case interest rates have fallen, and the current market value of the future interest rate profile is a cost to the borrower."

18. When the customer persisted in asking for "the actual trades" that CB entered into on behalf of the customer, Mr Pickard emailed Helen Jenkin, a senior manager within Treasury Solutions, saying: "clearly the customer has not understood that we are not going to provide him with information of how we have hedged his trades, as this is done on a portfolio level as mentioned in the response pre-Xmas". Insofar as this was a reference to the hedging arrangement entered into by CB, it was clearly wrong. I note, however, that Mr Pickard was fully aware of the existence of the CNH, and of its role in the calculation of break costs (as is evident from his involvement with the FOS referred to above). The most likely explanation for his response, therefore, is that he thought the customer was seeking the details of hedging arrangements entered into by NAB, to deal with the risks that had been transferred to it under the CNHs. In any event, since Mr Pickard's comment was made in an internal email, it is not evidence of him providing a misleading explanation to a third party.

(3) The response to a customer of Mr Blanksby in 2011

19. This related to another customer's complaint about the basis on which his break costs had been calculated. The customer had apparently been told by Mr Blanksby that CB had "placed a hedging arrangement specifically against my

loan and can therefore easily show the breakage cost." He was then told, by Hazel Wilkinson (from Treasury Solutions), that CB had "backed out" the TBL in the market place, not on an individual deal basis, "mainly as a result of the underlying volumes required to trade with Market Counterparties". This was clearly wrong. Ms Wilkinson (who is not accused of dishonesty in this respect) gave evidence at trial. She said that she was unaware of the existence of the CNHs. I accept that evidence. More importantly, there is no evidence that any of the four executives saw her response.

20. The customer then pressed CB to explain how it could have specifically determined the cost to it of the TBL being broken, pointing out that if hedging was done on a pooled basis, the bank could not prove the exact cost to the bank, and saying: "I hope it is not just hinged on comparing to prevailing fixed rates as you did because that becomes a notional cost and not actual cost to the bank".

21. In fact, in a subsequent response from Mr Blanksby on 8 September 2011, the customer was assured that a hedge facility had indeed been set up for his loan, and that if the customer terminated the TBL early then the bank was in debt to the market, which was the cost passed on to the customer. The claimants point to the ambiguity in this statement: the bank was in debt to the "market" only if NAB counts for this purpose as a market counterparty.

22. Later explanations provided (for example by Ms Wilkinson) to the customer as to the way in which break costs were calculated – by reference to the NPV of the fixed rate compare with the future interest rate curve – contained an accurate summary of the calculation carried out, albeit that they did not refer expressly to the CNH.

23. Only Mr Pickard, of the four executives, is said to have been privy to this exchange. His involvement was peripheral at best. He was copied in only to the later emails which explained the calculation of break costs by reference to "market standard" practices involving the NPV of the fixed rate and future interest rate curves. There is no evidence that either the earlier explanation from Ms Wilkinson, which wrongly referred to CB having hedged the FRTBLs on a portfolio basis, or the ambiguous response from Mr Blanksby on 8 September 2011, was seen by Mr Pickard.

(4) The standard Treasury Solutions Break Costs response in 2012

24. In 2012, a further unidentified customer emailed Lynne Anderson (of Treasury Solutions) asking for details of the arrangements entered into by CB with third parties, on the basis of which CB appeared to be claiming entitlement to break costs. Ms Anderson responded that the bank's dealings with third parties were confidential, explaining that the information on third party arrangements contained in the Standard Conditions was included only to help customers understand why break costs were applied if the loan was repaid or restructured.

25. When the customer persisted in its complaint, Ms Anderson sought advice from a colleague, Sabrina Murray (an "Embedded Risk Consultant" at NAB), who advised her to say that this was standard practice and that if the customer is unhappy he can make a formal complaint. Ms Murray added that there was

unlikely to be an identical trade by NAB in the market, and "we would not want to go down the route of attempting to explain this to the customer when we are not obliged to do so." This reply was copied to the legal department.

26. A month later, standard internal guidance was provided for dealing with customer complaints. This covered what to do when a customer requested a meeting, or a copy of their recorded call or of their file. It also covered what to do where a customer asked for sight of "third party arrangements" referred to in the Standard Conditions. The guidance echoed what Ms Anderson said in the email referred to above: "The reference to these obligations in the T&Cs is only there to assist the customer in their understanding of why break costs apply to their transaction." It advised telling customers:

> "In respect of the hedging arrangement, the background to this is that Clydesdale arranges an interest rate protection product with a customer. Clydesdale's parent company, National Australia Bank, then buys itself protection for this product. However, there is no direct single contract entered into in the market that mirrors CB's deal with you. NAB aggregates CB hedges in large numbers and goes to the markets on that basis.
>
> Our TBL documentation and the TBL strategy papers you would have received make it clear that, in order to be able to offer an interest rate protection product, CB has to enter into a transaction with the financial markets to protect itself. The mechanics of how CB does this are commercially sensitive and confidential to CB."

27. The claimants rely on the fact that it made no reference to the CNHs. That is true, although I note that it did identify that it was CB's parent that arranged interest rate protection in the market, and that it did so on an aggregate basis. What it fails to identify is the intermediate step by which risk was transferred to NAB (i.e. the CNH) and the fact that it was CB's loss on termination of the CNH that was used to calculate break costs. Its focus was clearly on the hedging which NAB undertook in the external market, since it was that alone which could be described as "commercially sensitive and confidential". As against this, the guidance did not purport to identify how break costs were calculated at all, as opposed to explaining their rationale. Its purpose was to explain why CB would not give customers sight of the third party arrangements referred to in the Standard Conditions.

28. Only Mr Pickard is said to have been implicated in this instance. In September 2012 he was sent a draft email with an invitation to have a look at it prior to it being distributed. The draft email contained guidance on the process to be followed in the event of a customer complaint. It attached the guidance note. There is no evidence that Mr Pickard responded to the email, or that he read the draft guidance note that was attached to it. Had he responded, it is not known whether he focused on the process points in the email, rather than the detailed response which the guidance note indicated should be given to customers seeking documentation.

(5) Explanation given to the Secretary of State for Scotland in 2013

29. This relates to a request from the Secretary of State for Scotland in early 2013. The request was described, in an email from James Honan (in-house solicitor at CB) to Mr Pickard of 25 January 2013, “as to how NAB aggregate hedging of the risk of bundled fixed rate TBLs leads to break costs becoming payable.” Mr Honan said that “we are keen to make sure we understand the technical principles behind this. We have a high level of understanding but looking to finesse this.” This followed an earlier internal email from Mr Honan in which he referred to the fact that customers were “ever increasingly” challenging the way in which CB “backed out” its fixed rate loans in the market, and how breaking those triggered break costs. He asked for assistance in finding the appropriate person to discuss this with, as “there are currently a couple of explanations in circulation, neither of which I am 100% comfortable resting our hat on.”

30. By May 2013, Douglas Campbell, head of corporate support at CB, had agreed to provide an explanation to the Secretary of State. His reply to the Secretary of State is not in evidence. The claimants contend, however, that he would have given an explanation similar to that which he gave to the Court of Session in Scotland, when giving evidence in a case between a customer (John Glare) and CB, in September 2015. They contend that, in answer to questions as to how CB hedged the TBLs, Mr Campbell referred only to macro hedging, and made no reference to the CNHs. They rely in particular on the following exchange:

> “Q …I think that there was at one stage a public statement on behalf of the bank to the effect that the bank does not micro hedge and what it does is macro hedge.
>
> A. That's right. It's our portfolio management of interest rate risk that I have just explained.
>
> Q. And that is what is meant by macro hedging?
>
> A. Yes.”

31. It is important, however, to read this exchange in context. Immediately prior to it, it was put to Mr Campbell that CB would not – except in cases of very large loans – individually hedge loans. His response was that because CB did not possess the expertise to trade derivatives, it was NAB that carried out hedging, and that it did so on an aggregated basis. In answer to the specific question that it was a different company, the parent company, that carried out the hedging, he said: “They [i.e. NAB] take all of the bank’s overall sterling interest rate risk from tailored business loans and any other transactions on the day and they trade that daily.”

32. While he did not refer to the CNHs in terms, therefore, he did refer to a process whereby the interest risk assumed by CB on entering into FRTBLs was transferred to NAB, which then carried out interest rate hedging on a portfolio-wide basis.

33. I note that in response to an earlier question as to how break costs were actually calculated, Mr Campbell explained it in terms of an NPV calculation of the interest due under the contract and interest which the bank could expect to receive on the returned funds. He summarised it as:

> "it's the difference between the interest rate that a person's paying and the interest rate in the market if we were to buy a similar amount of funds at that time."

34. Mr Pickard and Mr Golding are implicated in this instance. Their involvement was again peripheral at best. Mr Honan initially emailed a number of colleagues asking whether they could find someone in NAB with "some time to discuss the technical and principle background to embedded fixed TBLs". That email was forwarded to Mr Golding and Mr Pickard with a request that they nominate someone for the task. They both responded with a suggestion. Subsequently, Mr Pickard (and one other, Chauncy Stark) were asked whether they had time to discuss Mr Campbell's proposed response with him.

35. None of this supports the claimants' case that Mr Pickard and Mr Golding were party to knowingly false explanations by Mr Campbell about the way break costs were calculated. That is particularly so when the evidence relied on for the conclusion that Mr Campbell's explanation was false (his testimony in the subsequent case before the Court of Session) was not in fact inaccurate.

(6) An explanation given to a Nomura Bank analyst in 2013

36. In early 2013, an analyst at Nomura Bank had raised a concern, having read an email from a disgruntled customer published on the NAB Customer Support Group website. The email contained allegations of mass mis-selling TBLs by CB to SMEs in the commercial property sector. Specifically, it described a problem facing NAB, having acquired the commercial property TBL business from CB, arising from the fact that a number of SMEs were defaulting on their loans. It alleged that NAB had entered into "IRSA" (a hedging agreement) on the day of completion of a TBL, that, on early termination of the TBL, NAB terminated the IRSA, "writes a cheque out to the counterparty and simultaneously debits the SME's account". This was said to create a problem for NAB because SMEs were defaulting on their obligations, meaning that NAB would be liable under the IRSAs without the ability to recover from customers.

37. The claimants contend that dishonesty on the part of Mr Golding and Mr Pickard is to be inferred because: (1) the email had been forwarded to Mr Golding by Craig Horlin (a senior manager in Group Investor Relations for NAB), who said he was looking to respond with "a summary of our historical process for the entry into a fixed rate loan, some explanation of the dynamics/financial dimensions of the book and the estimated break costs in the portfolio"; (2) Mr Golding forwarded that request to Mr Pickard and Mr McLintock asking them to take a look and correct any factual inaccuracies; (3) Mr McLintock's "corrections" to the email failed to correct the statement that, on default by the SME, NAB broke the IRSA with the counterparty and passed on the resulting cost to the SME.

38. It is important to note that the email published on the Customer Support Group website was specifically referring to the commercial property lending business, which had by this time been transferred to NAB under the Morph Transaction. The CNH Loss Basis of calculation of break costs was accordingly not relevant in this instance. The claimants do not allege that fraudulent misrepresentations were made, after the Morph Transaction, in respect of break costs for FRTBLs that were transferred to NAB.

39. In any event, Mr McLintock's comments and corrections included reference to the transfer of risk from CB to NAB. He referred to the fact that as CB held a retail licence, it was unable to run open positions, so had to match all exposures, so that "for accounting purposes all CB loans are matched exactly to an underlying market instrument to remove their market risk, the market risk is borne by NAB". The reference to an "underlying market instrument" can only have been to the CNH.

40. The claimants also rely on the fact that neither Mr Golding nor Mr Pickard sought to correct the impression given by Mr McLintock's comment in the email that break costs resulted from NAB "writing a cheque" to a counterparty in the market. This was wrong, to the extent it suggested that break costs were calculated by reference to the amount of such a cheque. To the extent that it provided an explanation for the rationale of break costs, it was still inaccurate since, because NAB hedged its risks on a portfolio-wide basis, it was unlikely to have taken specific action in relation to its external hedging on termination of any one FRTBL.

41. There is nothing in the email chain to suggest that Mr Pickard took any interest in the email thread at all (he had by then ceased to be Head of Treasury Solutions). As for Mr Golding, the cross-examination on this topic was unsatisfactory because for most of it he was under the impression that the underlying email was sent from somebody within investor relations in NAB, whereas it was from a complaining customer. He had – unsurprisingly – no actual recollection of the email chain in question. His role, in any event, was limited to getting Mr McLintock to deal with it. He accepted that he would probably have read it but, if he did, he did not pick up on the inaccuracy I have identified above. Given his limited involvement, I find that evidence inherently plausible. The email from the disgruntled customer contained a number of other matters which the Banks would no doubt have regarded as inaccurate, but which were not 'corrected' in Mr McLintock's comments.

(7) IRSR PCB approved letter in 2013

42. By the end of 2012, the Banks had set up a "Programme Control Board" (the "PCB") to review their response to the FSA's review of interest rate hedging products. On 1 March 2013, the PCB met to consider a draft letter to the FSA, the purpose of which was to explain why FRTBLs were not to be included in the Banks' own review of their interest rate hedging products.

43. The claimants rely on the draft of the letter that was before the PCB meeting on 1 March 2013, as a further example of inaccurate break costs explanations being provided.

44. The draft of the letter that was before the PCB meeting contained the following:

> "Unlike standalone IRHP products, fixed rate TBLs provide SME customers with a single cash flow. Customers with fixed rate loans are not contracted into a swap or any other derivative in the market. Instead, in order to be able to provide customers with fixed rate payments, the bank considers whether it is necessary to take action to hedge its overall risk in the wholesale money market. However, when it does this, it does so on an aggregated, bank-wide basis. Fixed rate TBLs are not linked to an identifiable and distinct swap arrangement.
>
> I have attached samples of the information that we provide to customers who take out fixed rate TBLs.
>
> You will see that these explain the economic consequences if the fixed rate loan is broken early. Generally speaking, if interest rates are higher than when the fixed rate TBL was agreed, the customer would receive a payment equal to the benefit that the bank would gain. However, if interest rates are lower at the point the contract is broken than when the fixed rate TBL was agreed there would be a cost incurred by the bank that is passed on to the customer.
>
> These costs result from the difference in the cost of the funds that the bank secured to lend to its customers compared to the cost of funds at the time of repayment. In the current low interest rate environment, this means that the bank has to utilise any funds that have been returned early at a lower return than when they were first made available to customers. This is different to the break costs associated with standalone products, which become payable because a distinct, identifiable swap linked to the loan is broken.
>
> While the main differences between standalone IRHPs and fixed rate TBLs mainly relate to cashflow and how risk is hedged by the bank, there are other differences too."

45. The meeting of the PCB is recorded as having approved the draft letter "subject to (a) minor comments in relation to break costs (b) submitting the final wording on calculation for final legal sign-off".

46. In fact, most of the above passage (including the entirety of the explanation of break costs) was later removed from the version of the letter as sent to the FSA.

47. All that remained of it was the following, immediately after the statement that the FSA had already agreed that FRTBLs were to be excluded from the scope of CB's review:

> "Fixed rate TBLs are not linked to an identifiable and distinct swap arrangement, and fixed rate TBL customers are not contracted into a swap or any other derivative in the market."

48. The second half of that sentence was undoubtedly true. The first half was ambiguous. If it meant that customers did not enter into a standalone swap with CB, linked to the FRTBL (as happened with some other varieties of TBL) then it was correct. If, however, it meant (as the claimants contend) that there was no link between the FRTBL and a swap entered into by CB with a third party, then it was clearly not correct.

49. In parallel with the letter to the FSA, CB prepared a paper containing an explanation of break costs. A draft of this paper survives. It explained that any cost or gain arising from the early repayment of a FRTBL would be calculated by reference to prevailing market conditions. It continued:

> "The following cash flow shows the calculation of a break cost on the Fixed Rate Tailored Business Loan in the name of ABC Limited.
>
> You paid a fixed rate at x.xx% and on the xx xx 20xx (the date in which we were instructed to terminate the Fixed Rate) there were xx months left until expiry, being the xx xx 20xx.
>
> The cash flow shows the notional amount, fixed rate, the monthly rollover dates, and then two columns showing the interest payable by you at the fixed rate. The first column (PV Disc) is the NPV of each of the fixed interest amounts payable. The next two columns show the interest you would receive on an equal and opposite transaction at current rates; again the PV Disc column shows the NPV. The Current Rates column shows the interest rate applicable for each roll period at current rates and the final column DF shows the discount factor applied to calculate the NPV.
>
> The break cost is calculated by taking the total of the PV Disc-fixed column (£xx,xxx.xx payable by you) and deducting the total of the PV Disc- current column (£xx,xxx.xx payable to you) to give the net break cost of £xx,xxx.xx."

50. As the claimants pointed out, this explanation is one that uses the language of a swap transaction, particularly in its reference to "notional amounts" and "the interest you would receive on an equal and opposite transaction."

51. In fact, however, there is no evidence of this version of the document being sent to a customer. Farol was sent a document that was apparently a modification of this draft, which contained essentially the same calculation, but without using the language of a swap. The version sent to Farol is in the following terms:

> "When you enter into a Tailored Business Loan and decide to close out the transaction before its scheduled maturity date you

may have to pay breakage costs or you may receive a break gain, dependent upon subsequent market movements. Any cost or gain will be calculated by reference to prevailing market conditions.

These break costs may be substantial.

The following cash flow shows the calculation of a break cost on the Fixed Rate Tailored Business Loan in the name of FAROL HOLDINGS LIMITED TBL (IFX32825).

Your Fixed Rate TBL has a fixed rate of 5.81% and expiry date of 26/01/2022.

The cash flow shows the repaid amount, your fixed rate, the interest payment dates, and the interest that is due to be paid on those dates. The following columns show the Present Value (PV) of those future interest payments (PV Fixed), the current expectation for LIBOR for that interest period (Forward Rates), the interest that would be payable at each of those interest rates (Interest Payable - Forward), the PV of those interest amounts (PV Forward) and finally the Discount Factor (OF) which is used to calculate the PV.

The break cost is calculated by taking the total of the PV Fixed column, shown in cell M3 (£344,592.52 that you would have paid for the Fixed Rate TBL) and deducting the total of the PV Forward column, shown in cell N3 (£102,204.68 that the bank will receive when applying those funds elsewhere) to give the net break cost of £242,387.83.

Definition of 'Present Value - PV'

The current worth of a future sum of money or stream of cash flows given a specified rate of return. Future cash flows are discounted at the discount rate, and the higher the discount rate, the lower the present value of the future cash flows. Determining the appropriate discount rate is the key to properly valuing future cash flows, whether they are earnings or obligations.

Also referred to as "discounted value".

Definition of 'Net Present Value - NPV'

The difference between the present value of cash inflows and the present value of cash outflows."

52. The claimants rely particularly on the absence, in either version, of any reference to the CNHs. Each of the four executives is implicated, because all four were members of the PCB. I refer to their specific involvement below, when considering the case against each of them.

53. The letter's purpose was a limited one: explaining the reason for excluding FRTBLs from the Banks' review. In that context, I do not find it surprising (or suspicious) that the version sent out contained no reference to the CNHs.

54. So far as the initial draft of the letter is concerned, the passage relied on was summarising the samples of information provided to customers, said to "explain the economic consequences" of breaking a fixed rate loan, as opposed to the mechanics of calculation or a legal analysis.

55. This is also an example of an occasion where the explanation given (replicated in the draft case specific explanation paper, and the version sent to Farol) was based on the NPV of the difference between a fixed and floating rate, *without* attempting to justify this by specific action being taken by CB or NAB in relation to a transaction in the external market. In relation to any FRTBL forming part of the commercial lending business, that was an accurate description. In relation to the FRTBLs that remained with CB, it described the correct economic analysis, but missed out that this was in fact done by way of valuing the termination amount due under the CNH. One plausible explanation for the lack of reference to the CNHs is the fact that this was after the Morph Transaction and that what was wanted was a simple explanation of the NPV calculation which covered all TBLs.

56. As I point out at [261] of the main judgment, if – as the claimants allege – the four executives were aware that the CNH Loss Basis was an improper basis for calculating break costs because break costs had to be linked to specific action in the external market, then the explanation of the NPV calculation on which break costs were based would have given the game away.

(8) House of Commons meeting in April 2013

57. Mr Campbell had given an explanation for break costs to Clive Betts MP at a meeting at the House of Commons on 20 March 2013. Mr Betts' note of that meeting, which was agreed with NAB, was copied to Mr Golding for his information. It included the following passage:

> "…NAB stated that, having borrowed the money it lent on fixed terms, it was itself locked into the life of loans in question so that if loans were terminated early or interest rates reduced, then NAB faced additional costs. NAB stated that break costs were not penalties as such but were the economic costs it faced when fixed rate business loans were repaid early or went into default. NAB argued that in most cases the loans under discussion would not have been financed individually but would have been funded by Yorkshire Bank or Clydesdale Bank through drawing from loans negotiated by the banks in the money markets. … This was macro-hedging, not micro-hedging, and this is why NAB had not included tailored business loans in the current review of interest rate hedging products.
>
> NAB has subsequently stated that: 'Fixed rate TBLs are not linked to an identifiable and distinct swap arrangement, and

fixed rate TBL customers are not contracted into a swap or any other derivative in the market.' At the meeting, however, I had understood that while there might not be a one for one match between each smaller TBL and each identifiable swap arrangement there is a link between a swap arrangement and a number of TBLs, NAB's standard terms and conditions being invoked to have customers fund [these] swap arrangements…"

58. As the note made clear, however, the meeting was in response to requests for clarification regarding NAB's policy with regard to the UK commercial property market. It is another instance, therefore (like the complaint forwarded by the Nomura analyst referred to above), where the context was the commercial property lending business which had by this time been transferred to NAB. The CNHs and the CNH Loss Basis were therefore irrelevant, so the lack of reference to them did not render what was said misleading.

(9) Treasury Committee briefing in 2014

59. Finally, the claimants rely on a briefing paper provided to Mr Thorburn in advance of him giving evidence to a Treasury Committee in June 2014. So far as break costs are concerned, the briefing paper contained a limited number of potential questions and answers to assist in Mr Thorburn's preparation for the Select Committee. The claimants rely on the following passages:

> "**So are all your fixed rate loans hedged on an aggregate across this book or individually?**
>
> The vast majority of our fixed rate loans are hedged on an aggregated basis. However, there are a small number where we have hedged individual loans. However, I would stress that the product works in exactly the same way for customers regardless."
>
> …
>
> "**How are break costs calculated?**
>
> In simplest terms the Bank looks at the interest rate at which the protection was set within the loan and the prevailing rate at the point the loan contract is broken by the customer. If the prevailing rate is lower than that applied to the loan a cost arises. The bank calculates this cost over the remaining term of the fixed interest protection to establish what the overall cost of the break is. Conversely, if the prevailing rate is higher than that fixed within the loan a gain arises which is passed to the customer at the point at which the loan is broken.
>
> **If you don't apply break costs when someone terminates a loan early would this result in a loss to the Bank?**

This would depend on the specific loan and when it was taken out. The Bank would look at the rate at which the interest rate protection was set and the prevailing rate at the point the contract was broken. If the prevailing rate is lower than that applied to the loan a cost arises. If the Bank does not pass on this cost to the customer when a loan is repaid before the period for which the loan is fixed then there is an economic cost to the Bank. Conversely if the prevailing rate is higher than that set within the loan fix a gain arises which is passed to the customer.

Do you make a profit from break costs?

No, break costs represent the cost to the Bank of a customer breaking their agreement before the loan has reached maturity or the period for which the loan was fixed. In the event there is a break gain at the time the loan is broken the Bank passes this to the customer…"

60. The claimants point to the fact that at no stage in this explanation is any reference made to the CNHs and that, insofar as the briefing note referred to CB's hedging of FRTBLs, the reference to hedging on an aggregate basis was untrue.

61. There are, however, some important points of context to note in relation to this briefing note. First, the Committee was conducting a broad enquiry into lending to SMEs. The briefing paper prepared for Mr Thorburn covered 46 pages, and ranged over a number of subjects. The main focus of the paper was to respond to allegations of mis-selling to customers. There is nothing in the briefing paper – or any other document from this time – to suggest that CB's legal entitlement to charge break costs in the way that it did was a matter of concern. The passages noted above, on which the claimants rely, are themselves part of a section where the anticipated line of attack from the committee was mis-selling, as exemplified by the following question and suggested response:

> "**The crux of the matter here is break costs is it not. Do you deny that many customers would not have entered into these loans either at all or for the periods they did if they had been aware of the potential break costs?**
>
> We believe that neither the Bank nor our customers could have reasonably predicted that interest rates would fall to their current level and remain there for such a prolonged period."

62. Second, as I have already noted, by this time the commercial real estate lending business had been transferred to NAB, and that so far as concerns break costs incurred by customers in that part of the business, the lack of reference to CNHs was appropriate.

63. This is another example where the explanation given for the calculation of break costs was one which would have given the game away, if Mr Thorburn thought

(as the claimants allege) that they could only be charged by reference to the cost arising to CB or NAB from taking specific action in the external market.

The case against the four executives

64. The principal reasons for rejecting the case that any of the four executives was deceitful (either deliberately or recklessly) are set out in the main body of this judgment. In this section, I address some additional reasons for rejecting that case against each of them.

Mr Thorburn

65. Mr Thorburn occupied different senior roles over his long career at CB: from 2002 he was Chief Operating Officer, from 2008 he was an Executive Director and from 2011 he was Chief Executive Officer.

66. His evidence was that, while he was aware that CB had transferred to NAB the interest rate risk assumed on selling FRTBLs, he did not know the mechanics of how this had been achieved. He was specifically unaware of the existence of CNHs, and so did not know that break costs were charged by reference to the amount paid by CB to NAB on termination of a CNH.

67. He also said that he had not had cause to review the Standard Conditions.

68. As a general point, I accept Mr Thorburn's evidence that, given his senior position within CB, he would not have been concerned with matters of detail, such as the terms and conditions of contracts with customers, or the mechanics of how interest rate risk was passed from CB to NAB, unless specific issues were raised for his attention. His evidence, which I accept, was:

> "If I thought there was a problem in this area I would have been all over it like a rash, you know. If you look at my track record at the bank, and we had many problems, everything else, bigger problems than this, if someone flagged a problem, I got involved in it, it would be transparently reported to everyone. We would pay whatever price we had to and we would deal with it. There's no incentive for me here to try and hide something, sweep something under the carpet. None at all."

69. As there is no evidence that the legality of the way in which CB charged break costs was ever in issue, I find Mr Thorburn's evidence that this was not a matter he was required to deal with entirely plausible. He was not a lawyer, and would naturally have relied on advice from lawyers if an issue was ever raised. As the claimants themselves point out, however, there is no evidence that Mr Thorburn – or any of the other of the four executives – received or asked for advice from lawyers on this issue.

70. The claimants contend that Mr Thorburn's evidence was implausible, identifying specific occasions when they say he must have become aware of the CNHs. He was cross-examined about emails in 2001 and 2002 which evidenced him becoming aware of customer complaints about the process and complexity

of the TBL documentation. There was nothing in this to suggest that the complaints related to the entitlement to charge break costs, or that Mr Thorburn would have needed to become acquainted with the documentation or the basis on which break costs were in fact charged. He was cross-examined about an audit report, copied to him in 2009, which identified a reconciliation issue relating to the TBLs and the "swap hedges". Mr Thorburn had no memory of this, but said that he would almost certainly not have read beyond the first page of an audit report which gave a "satisfactory" rating and noted only a "one star" reconciliation issue. That was plausible evidence, which I accept.

71. The claimants contend that Mr Thorburn's concerns about "embedded swaps" demonstrate that he must have been aware that the CNH Loss Basis was an improper basis for charging break costs. This is a non-sequitur. Mr Thorburn's evidence – which I accept as being consistent with the numerous documents referring to embedded swaps in the context of the FRTBLs – was that there was a great deal of misunderstanding in the context of mis-selling as to whether the FRTBL had a swap embedded in it. One of the issues which prompted the FSA review was the fact that banks had sold swaps alongside loans, including where there was a mismatch between the swap and the loan. This generated a lot of heat around whether fixed rate loans had swaps "embedded" in them. Mr Thorburn explained that two issues were going on. First, as could be seen from press articles at the time, different people had different views about whether a swap was embedded. He referred to this as a "very circular debate … which kind of missed the point." Second, few people within the Banks saw the whole picture so far as TBLs were concerned, and so were prone to use inconsistent language around this topic.

72. His view was that because the customer did not enter into a swap or derivative with CB, there was no embedded swap. As he put it in cross-examination:

> "Well, there was no embedded derivative. That was the point. And I think there was an awful lot of energy around whether there was one or not. And there's no -- certainly at that point in time there was no clear definition of what an embedded swap or derivative was, and I think there was a lot of confusion in people's minds as to -- and a lot of inconsistent language and so on which was unhelpful in that period. The view that we took was, if the customer does not contractually enter into a swap or a derivative as part of that TBL, there's no embedded derivative. And that was the position we took."

73. He was plainly right about this. A swap involves an exchange of cash flows, based around a notional principal amount. The FRTBL was an actual loan of funds to a customer generating a single cash-flow from the customer, which provided certainty to the customer by removing the risk of fluctuations in interest rate. At most, what can be said is that the economic consequences for the bank of terminating a fixed rate loan early are similar to those which would occur if the customer had entered into a variable rate loan coupled with an interest rate swap that exactly mirrored the amount and term of the loan.

74. I accept Mr Thorburn's evidence that his understanding throughout was – at a relatively high level of generality – that break costs were in fact charged on such a basis. I also reject the claimants' contention that his evidence in the witness box was inconsistent with his witness statement. It is true that he did not go into detail in his witness statement as to his understanding of the basis on which break costs were charged. What he did say, however, was that the understanding he had at the time was reflected in the break costs explanation paper which CB provided to customers prior to 2005. This was a document which was sent to him prior to the Treasury Committee hearing in 2014, and which explained break costs in terms of the NPV of the difference between fixed and floating rate interest streams.

75. It was surprising that he was sent, in 2014, a copy of a break costs explanation paper that had not been used for some years, but this is indeed the only version that is evidenced as having been provided to him.

76. I see no reason why the fact that Mr Thorburn was concerned with the "embedded swap" issue would have led him to question (where no concern had otherwise been raised) CB's contractual basis for charging break costs. As he put it:

> "You know -- I'm sorry, but I was running a bank in the middle of a banking crisis then. I was also on the group executive of NAB and travelling regularly to Australia. I did not have the time to concentrate on wordsmithing letters to customers. I had to rely on the people around me, on the risk management control frameworks, on problems being highlighted to me. With this product range at the time, there are alarm bells going off in relation to mis-selling. No one is coming to me telling me that we've got a problem with break costs, so I'm not focusing on it at all."

77. Mr Thorburn's evidence that he never had reason to apply his mind to the basis for charging break costs was challenged by reference to documents he was sent in the context of the PCB. Specifically, on 10 July 2012 he was sent an email by Michael Webber (head of legal services at CB) which Mr Webber had sent to the FSA, attaching various documents including the Standard Conditions. Mr Thorburn had no memory of receiving this email. He thought, however, that it was unlikely he would have read the attachments. He believed this email was sent to him so as to inform him that Mr Webber had done what he had agreed to do, namely send relevant documents to the FSA. That is a plausible explanation, consistent with the fact that Mr Webber started the email with "as agreed yesterday…". Moreover, I have already noted that it is implausible to expect someone of his seniority, who has no legal training, to review standard terms and conditions unless there was a specific point raised with him (which there was not).

78. The claimants also made much of Mr Thorburn's preparation for the Treasury Committee hearing. Overall, I find Mr Thorburn's repeated answer – that so far as he was concerned this was all about mis-selling – to be plausible and honest. I have summarised the key documents relied on by the claimants above. So far

as the briefing paper for the Treasury Committee is concerned, its focus was clearly on mis-selling, with only a handful of questions on break costs. It was put to Mr Thorburn that he must have been interested in investigating the legal basis for charging break costs given the size of the problem and the numerous complaints. As he explained, however, break costs were the effect, but not the cause, of the complaints. The fact that customers with FRTBLs were facing large break cost liabilities when interest rates fell was what triggered them to complain about mis-selling. It was the mis-selling aspect with which he was concerned.

79. I also note that both instances in the Appendix 1 documents relied on against Mr Thorburn contained a version of the NPV calculation that Mr Thorburn says reflected his understanding at the time. I find nothing in those instances, therefore, to undermine Mr Thorburn's evidence.

80. The claimants' fall-back argument is that if Mr Thorburn was not aware of the CNHs or the CNH Loss Basis of calculating break costs, he ought to have been. It was "reckless" of him not to discover the truth, and his lack of enquiry, coupled with his position as someone put forward to give public evidence to the Treasury Committee "evidences at least reckless indifference" as to the basis for charging and calculating break costs.

81. This argument misses the target. This case is not about the accuracy of – or culpability for – answers given to the various third parties – including the Treasury Committee – referred to above. To have the requisite state of mind for an action in deceit, Mr Thorburn must have appreciated the risk that what *the claimants* (at least, generically, as customers of CB) were being told – that the break costs indicated to them were those that were due under the contract – was not true, but decided not to investigate whether that was so. Where – as I have already noted – the legality of the way in which break costs were charged was not a matter raised with him, I am satisfied that this was not a risk which he ever appreciated.

82. An example of this argument was in relation to Mr Thorburn's evidence as to his high-level understanding of how break costs were charged. The claimants contend that his "general sense from his past experience as a banker that the NPV of a loan could be calculated by comparing real and notional cash flows" was "insufficient" for someone in his position to claim an "honest (non-reckless) belief" as to what CB was entitled to charge by way of break costs. Even if his understanding was wrong (which I do not accept) this gets nowhere near establishing the requisite state of mind. It fails to grapple at all with the inherent likelihood of someone in Mr Thorburn's position relying on specialists within the bank, including traders, interest rate risk managers and lawyers, to do their job, such that he would naturally become aware of issues only when others brought them to his attention.

<u>Mr Golding</u>

83. Mr Golding's evidence was that he was aware of the CNHs, and that he knew they were used in the calculation of break costs payable by customers to CB. He was not, however, aware how CB actually charged break costs (i.e. what else

went into the calculation as between CB and its customer). As Head of Markets at NAB, there is no reason why he would have been aware of such matters. In this role, he said that approximately 10-20% of his time would have been devoted to Treasury Solutions matters. Of this, FRTBLs formed only one element. He travelled extensively for work. He said that he often received several hundred, maybe a thousand, pieces of electronic information everyday, such that he could not possibly read everything, and was reliant on those who were closer to the detail to raise issues with him. I found this evidence to be inherently plausible.

84. In his witness statement, having seen the email from Claire Shields of 2 June 2005 (see above at [9]), Mr Golding said that he did not recall the email, and did not remember reading the terms and conditions of the TBLs, "though I may have read them at some point". In the email Ms Shields quoted just one part of clause 8.2. Apart from being sent that email, there is no evidence that Mr Golding had any other involvement with the FOS complaint from around that time. He does not appear on any other emails connected with it. When asked to speculate, he said he thought that Ms Shields was expressing a concern that the CNH with NAB may not be at arm's length. He acknowledged that may have been her view, but his view was that she was mistaken. As I have noted above, whatever concerns Ms Shields may have had in this respect appear to have been overcome by the time Mr Pickard met with the FOS, since the final version of the slide presentation for the meeting unambiguously identified NAB as the counterparty to the CNHs.

85. In his oral evidence, Mr Golding repeated that he had no recollection of reading the Standard Conditions, and that given his role within NAB he was not party to what CB's customers' terms and conditions were. His focus was the swap between the two banks.

86. Aside from Ms Shield's email, there is no evidence that CB's contractual entitlement to charge break costs was ever raised with Mr Golding. It was not in fact put to him that he had read clause 8.2 and understood it to preclude charging break costs on the CNH Loss Basis. What was put to him (and which he denied) was that he must have been "told by someone", by the time of the PCB meeting in March 2013, that the CNH was not a proper basis for charging break costs to customers under their contracts with CB. As I have noted in the body of the judgment, had anyone within the Banks concluded that CB was not entitled to charge break costs on this basis and told the four executives, it is remarkable that there is no record of any such discussion or communication.

87. The claimants dispute Mr Golding's professed lack of involvement in the detail, contending that it is repeatedly undermined by the contemporaneous documents. Of the instances relied on in the Appendix 1 documents, Mr Golding is only implicated in five of them, and in most of these his involvement was peripheral at best.

88. I have already noted his minimal involvement in relation to the FOS inquiry in 2004-2005. In relation to Mr Campbell's response to the Secretary of State for Scotland in 2013, Mr Golding was simply asked to provide the name of someone who could help, which he did. In relation to the instance involving the

Nomura analyst, his involvement consisted of passing on to Mr McLintock the task of reviewing the complaint from the disgruntled customer. In relation to the meeting with Mr Betts MP, Mr Golding was sent a copy for information. As I have noted above, these last two in any event related to the commercial lending book, after the Morph Transaction, to which the CNHs and the CNH Loss Basis did not apply.

89. The level of his involvement in these events is consistent with the fact that he had an oversight position, and that he was reliant on others to undertake the detail. David McGill, who took over from Mr Pickard as the overall head of Treasury Solutions in 2012, endorsed that view of Mr Golding's role.

90. The claimants particularly rely on Mr Golding's involvement in relation to the PCB. In particular, they refer to email communications (disclosed only after Mr Golding had finished his evidence) in the run up to the PCB meeting in March 2013 which considered the draft letter to the FSA. On 18 February 2013, Mr Golding was one of 18 recipients of an email from Mr Campbell attaching a copy of the draft, in which Mr Campbell said that the purpose of circulating it was to ask for any "fatal flaw" amendments. The following day another recipient of that email, Jon Burgess, responded to Mr Campbell (copying in Mr Golding) saying "I have a question with Richard about break costs following which I will send my views". On 22 February, he then emailed Mr Campbell (again copying in Mr Golding), saying he thought they should have a "robust agreed statement on how break costs are calculated which Richard's team are looking at". On 25 February, Mr Burgess sent Mr Golding, for information, a copy of "Actions and Key Points of Note" from that morning's meeting of the IRHP Decisioning Forum. The document included reference to "pressure testing comments around how we calculate break costs which Richard Golding's team are now looking at." A final draft of the letter was circulated (including to Mr Golding) on 27 February. On the same day, a meeting was scheduled for 28 February between Mike Bligh, Mr Pickard and Mr Golding to "agree wording on methodology applying to TBL break costs", following which Mr Pickard emailed Mr Bligh and Mr Golding to say he had updated the letter and break cost explanation.

91. Mr Golding said that he did not remember the PCB meeting. After disclosure of the additional documents referred to above, he wrote, in a further witness statement, that he had no recollection of these email exchanges or any of the meetings referred to in them. The claimants did not take up the offer of cross-examining Mr Golding on this further statement. I do not doubt that he has no recollection of these events. While the documents evidence Mr Golding being kept informed of what was going on, in large part they do not evidence any direct involvement by him, as opposed to referring to things being done by "Richard's team". To the extent that he was involved in discussions about break costs, given his role within NAB and the absence of any reason for him to be involved in the contractual arrangements between CB and its customers, I do not think that those discussions would have dealt with CB's contractual entitlement to charge break costs.

92. In any event, as already noted with Mr Thorburn, the explanation given in the draft letter reviewed by the PCB meeting was one which suggested that break

costs were charged (on the claimants' case) in a way which was not permitted by clause 8.2. The suggestion that Mr Golding was party to a decision to conceal the CNH Loss Basis because *that* was not permitted by clause 8.2 therefore makes no logical sense.

93. I am satisfied that Mr Golding was not deceitful, whether deliberately or recklessly.

Mr Storey

94. Mr Storey joined CB as UK Treasurer in November 2010, a post he held for the remainder of the period relevant to these proceedings. Prior to that he had worked at NAB as Regional Treasurer for the UK and USA. In his role as UK Treasurer at CB he had responsibility for the management of capital, funding, liquidity and interest rate risk for CB. His responsibilities did not include credit risk. Nor did they include Treasury Solutions, which fell under NAB's responsibility.

95. His evidence was that he became aware on or soon after joining CB of the arrangement, by then well-established, of a CNH being booked for each FRTBL, which matched the terms of that FRTBL. I accept this, as it is consistent with my findings in the body of this judgment as to the position in fact. He knew that no interest rate risk was run on CB's balance sheet, and the effect and purpose of the CNHs was to transfer that risk to NAB. He was not aware of the details of how the CNHs were booked but assumed that this was booked on both sides on NAB's derivative systems, as CB did not have its own derivative booking system until after the demerger from NAB in 2016.

96. Mr Storey was directly involved in only two instances specifically relied on by the claimants, where explanations were provided to third parties.

97. In their closing written submissions, the claimants focused principally on just one of them: the FSA's review of interest rate hedging products, and the draft letter reviewed by the PCB in March 2013.

98. The claimants complain that Mr Storey gave monothematic evidence – that he did not recall the details of events concerning the PCB, the draft letter or the standard break costs explanation. They contend that it is implausible that he would not remember "the very important letter/script". I find it unsurprising that he did not remember details of these events, which occurred a decade before his witness statement.

99. They also characterise as implausible his answer as to why he now thinks the letter to the FSA did not mention the CNHs – namely that the letter was not about break costs but about the interest rate hedging product review. I did not find his answers implausible. That was indeed what the letter was about, as I have explained in detail elsewhere in this Appendix. His evidence that he did not recall break costs (that is, the entitlement to charge them) being a major part of the review into interest rate products is also borne out by the remainder of the contemporaneous evidence.

100. The claimants contend that Mr Storey did not need to say he had no recollection of these events "if there was a simple answer to why the CNH was never mentioned – that he believed that break costs were in fact chargeable on a lost income basis, so that the existence of the CNH did not matter." I do not understand this criticism. If, as I accept, he did not recall the PCB meeting, then it was honest evidence to say so. It was his evidence that he understood break costs to have been based on the payment due to NAB on termination of the CNH. The fact that he also understood (as I have accepted in the body of this judgment) that CB would have been entitled to charge break costs in the same amount even if there had been no CNH does not mean that there is anything suspicious in him *not* referring to that to justify the lack of mention of CNHs in the letter to the FSA. The limited purpose of the letter – to explain why FRTBLs were excluded from the Banks' review of interest rate hedging products – was justification in itself.

101. The second instance in which Mr Storey was involved, was when he was asked to speak to Mr Thorburn about hedging and TBL break costs in advance of Mr Thorburn's evidence to the Treasury Committee in 2014. Mr Storey had no recollection of what they discussed, but Mr Thorburn said, in his witness statement, that Mr Storey confirmed to him there were no embedded hedges in the FRTBLs, that in the normal course NAB did not hedge the individual FRTBLs, but did so on a portfolio basis. Mr Thorburn also said: "we did not discuss how interest rate risk was transferred from the Bank to NAB. In particular, we did not discuss the corresponding hedging arrangements between the Bank and NAB."

102. I have already found that Mr Thorburn was aware that CB transferred interest rate risk to NAB, but was not concerned in the details of it, and was unaware of the CNHs or their role in determining break costs. I have addressed above (in dealing with Mr Thorburn) why he would not have been focused on the way in which break costs were calculated in preparing for the Treasury Committee. I do not find it suspicious, therefore, that Mr Storey – although he knew about the CNHs and their role in calculating break costs – did not discuss this with Mr Thorburn at this time.

103. I certainly do not think that it is possible to infer, from the fact that the CNHs were not mentioned on either of the occasions on which Mr Storey was involved, that Mr Storey knew that (or was reckless as to whether) break costs could not be charged on the CNH Loss Basis.

104. The nearest that the claimants came to showing that Mr Storey might even have considered the Standard Conditions was when they established that his evidence (in his witness statement), that he would never had reason to consider the Standard Conditions, was incorrect. Mr Storey had been sent, on 24 July 2012, a copy of an email sent to the FSA which attached, among nine other things, the Standard Conditions. He said that he had not referred to this because he had forgotten being sent them at the time. I find that inherently plausible. As with Mr Thorburn (see above) he was forwarded this by Mr Webber as a copy of what had been sent to the FSA. He was not asked to review it or respond. He accepted in cross-examination that he is likely to have seen these documents, although I find it unlikely that he would have read the Standard Conditions in

detail. He was not a lawyer, and no issue in relation to the Standard Conditions had been identified as something he should consider. It was not put to him that he had concluded on reviewing the Standard Conditions that the CNH Loss Basis was not a proper basis for charging break costs, or that anyone had advised him of this.

105. I found Mr Storey to be a credible witness, who understandably had a limited recollection of events a long time ago. I find no basis to conclude he was deceitful, either deliberately or recklessly.

<u>Mr Pickard</u>

106. Mr Pickard, who was head of Treasury Solutions from 2004 to 2012, was unfortunately unable to defend himself. In their closing written submissions the claimants describe the case that he did not believe the CNH to be a proper basis for charging break costs as "unanswerable". I have reached the opposite conclusion: I find that none of the matters relied on by the claimants as against Mr Pickard overcome the problems inherent in the case in deceit, as referred to in the main body of this judgment.

107. Mr Pickard *did* have cause to consider the contractual basis on which CB charged break costs, albeit this was in 2005-2006 and related to terms that were in place prior to the Standard Conditions. The contemporaneous documents (set out above in relation to the FOS complaint) demonstrate, in my view, that he believed that CB <u>was</u> entitled to charge break costs on the CNH Loss Basis. Why else did he explain to the FOS that break costs were calculated in this way? When the question was raised by the FOS that the loss suffered might be a future loss and therefore not covered by a clause which referred to loss which "we have suffered", his response was to explain (in the email to Claire Shields of 8 March 2006) why it was <u>not</u> a future loss. In any event, even had he thought that the reference to loss "we have suffered" was problematic, that phrase does not appear in the Standard Conditions.

108. The claimants' case depends, therefore, on Mr Pickard having undergone a change of heart after that time. There is no evidence that he had cause to reconsider the legality of the CNH Loss Basis, or took any advice on it, or that he had any such change of heart. Nor is there evidence of the steps he would have to have taken to keep others within the Banks from revealing the true position as to how break costs were calculated.

109. The documents relating to Mr Pickard's involvement in the FOS complaint also indicate that his belief reflected the Banks' overarching case at trial: that CB's loss on early repayment of a FRTBL was in fact calculated by reference to the CNH Loss Basis, but that this was because this reflected the economic loss suffered at the point of early repayment of the FRTBL, measured by the difference between the NPV of the fixed and floating interest cashflows over the remainder of the period of the loan. That was the also the view taken by his successor as head of Treasury Solutions, Mr McGill, who was not accused of dishonesty in this, or any, respect.

110. I have noted the relatively limited extent to which Mr Pickard was involved in the instances relied on by the claimants in the Appendix 1 documents above. To the extent that he was involved, or aware of the explanations being given to third parties about break costs, I am not persuaded that this gets close to establishing that he knew that (or was reckless as to whether) the CNH Loss Basis was an improper basis to charge break costs. There are – as I have pointed out in the main body of this judgment – a number of possible explanations for the fact that the CNHs were not referred to on the various instances relied on by the claimants where he was involved.