Case No: A40MA156

Neutral Citation Number: [2015] EWHC 3430 (QB)

IN THE HIGH COURT OF JUSTICE
QUEENS BENCH DIVISION
MANCHESTER DISTRICT REGISTRY
MERCANTILE COURT

Date: 27 November 2015

Before :

HER HONOUR JUDGE MOULDER
(sitting as a Judge of the High Court)

THORNBRIDGE LIMITED

Claimant

- and -

BARCLAYS BANK PLC

Defendant

Richard Coleman QC and Steven McGarry (instructed by Aticus Law, Solicitors) for the Claimant
Andrew Mitchell QC and David Murray (instructed by Matthew Arnold and Baldwin, Solicitors) for the Defendant

Hearing dates: 2-6 November 2015

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

Her Honour Judge Moulder:

1. In this matter the claimant, Thornbridge Limited, seeks damages for losses which it alleges it suffered as a result of entering into an interest rate swap with Barclays Bank PLC in 2008. The claimant alleges that the defendant was negligent and/or in breach of contract and/or in breach of statutory duty in respect of information and advice given to the claimant in relation to the swap.

Background and Chronology

2. The claimant was a private limited company. The directors were James Harrison and his wife, Emma Harrison but James Harrison was principally responsible for its management. The claimant was a property investment business. In March 2008 the claimant sought a loan from the defendant to purchase a property known as "Queens House" in Sheffield. The property was at the time let to an entity known as Capita but there was only 12 months left on the lease and the intention was that the property would be let to A4E, a company specialising in the retraining of the unemployed with several government contracts which was founded by Emma Harrison who was both a director and owner.
3. Discussions took place with representatives of Barclays over the loan and the level of security that would be required including the cover that the rental income could provide. It was estimated that the annual rental value at £665,000 would provide 111% rental cover.
4. The loan agreement was entered into on 16 April 2008 (the "Loan"). The material terms of the Loan were that it was for an amount of £5,652,000, a term of 15 years and an interest rate calculated by reference to Barclays' base rate plus a margin of 1.5% payable quarterly (p205). The monthly instalments on the Loan were stated in the loan offer letter to be £50,069.75 comprising capital and interest payable in 180 monthly instalments from the drawdown date of the loan.
5. It was a condition of the loan stated in the offer letter that before the loan was drawn down the claimant "*shall either execute an interest rate hedge acceptable to the Bank which shall limit the aggregate interest cost of the Borrower in respect of at least 100 per cent of the Loan for a minimum period of 5 years or alternatively the interest rate is to be on a fixed basis for the first five years on the whole amount of the borrowing*."
6. It was anticipated that the lease with A4E would provide the income to service the loan.
7. The relationship manager for Barclays, Mr Marsh put Mr Harrison in touch with Barclays Capital, the investment banking division of Barclays to discuss interest rate hedging. Several discussions took place over the telephone between Mr Burgess of Barclays Capital and Mr Harrison notably on 9 May, 21 May and 29 May 2008. There were also email exchanges on 9 May and on 21 May. A presentation entitled "Interest Rate Risk Management Strategy" was sent by Mr Burgess to Mr Harrison with the email of 9 May. During these discussions Mr Burgess told Mr Harrison that if the claimant entered into a fixed rate interest rate swap at the rate of 5.68% (the then prevailing swap rate) it would be paying £51,388 per month irrespective of how rates moved.
8. Following these discussions on 30 May 2008 the claimant entered into a swap agreement with the defendant: the agreement was made orally over the telephone in a conversation between Mr Harrison and Mr Tuesley of Barclays Capital and

the parties then entered into a written swap confirmation dated 9 June 2008 which incorporated the 1992 ISDA master agreement.

9. The material terms were that the swap had an effective date of 30 May 2008 and a termination date of 30 May 2013. The initial notional amount was £5,652,000 (the same as the loan) which then reduced monthly as set out in the schedule attached to the swap agreement. Under the swap agreement Barclays paid to the claimant on 30th of each month an amount calculated by reference to the weighted average of the base rate for that month and the claimant paid to Barclays a fixed amount each month calculated at the rate of 5.65% per annum (a slight reduction from the rate of 5.68% discussed on the phone call). Both the fixed and floating payments were calculated by applying the relevant interest rate to the relevant (declining) notional amount set out in the swap schedule for the relevant period. (p379)
10. The payments under the loan and swap commenced in July 2008. Barclays' base rate reflects the Bank of England base rate. (It is common ground that Barclays base rate was aligned with the Bank of England base rate; the precise timing of changes to the Barclays base rate following a change to the Bank of England rate is unclear but of no relevance to the issues in this case). In 2008 there were a number of reductions in the Bank of England base rate. Even before the loan was drawn down, on 10 April 2008 there was a reduction from 5.25% to 5.00%. Further reductions followed:
    October to 4.5%,
    November to 3%
    December to 2%
    January 2009 to 1.5%
    February to 1%
    March to 0.5%
11. From July through to November, the monthly payments under the loan agreement continued to be paid by the claimant in the amount of £50,069.75 but the swap payments due from the claimant to Barclays increased as the net amount increased. In other words although the swap amount payable by the claimant was fixed, as the floating amount payable by Barclays reduced with the falling base rate, the difference between the fixed amount payable by the claimant and the floating rate payment payable by Barclays increased.
12. The amounts debited were as follows: –

Date	Loan	Swap	Total	Base rate
2 July	£50,069 .75	£3120 .22	£53,189.97	5
30 July	-	£3008 .52		
4 August	£50,069.75		£53,078.27	
29 August		£2997.02		
2 September	£50,069 .75		£53,066.77	
30September		£3184.49		
2 October	£50,069 .75		£53,254.24	
30 October		£4652.71		4.5 (wef 8.10)
3 November	£50,069 .75		£54,722.46	
30 November		£10,081.92		3%(wef 6.11)
2 December	£59,069.75		£50,938.45	

	(amended to £40,856.53)			
30 December		£16,767.38		2% (wef 4.12)
2 January	£40,856.53		£57,623.91	
30 January		£18,718.04		1.5% (wef 8.1)

13. I note that counsel for the claimant in his written submissions sought to provide monthly totals by combining the payment under the swap at the start of the month with the loan payment at the end of the month. Whilst I accept the submission that the combined loan and swap payments were more than the figure indicated by Mr Burgess on 29 May 2008, namely £51,388, in my view the correct approach to the monthly totals is to take the linked payments and these are the payments falling in the case of the swap at the very end of the month and for the loan at the start of the following month as these represent the linked amounts.
14. In January 2009 Mr Harrison complained to Barclays about the increase in the claimant's monthly payments. He was told that it was due to Barclays not making adjustments to the loan interest payments following the base rate falls and that as a result the excess of the monthly payments over the interest due had been allocated to principal repayments.
15. On 26 January 2009 Mr Harrison made a formal complaint to Mr Marsh: "*Having taken out a policy that was insisted on by the bank to protect my company and the bank's position I simply do not understand how this situation has been allowed to develop –the total cost of the mortgage now exceeds income expectations detailed in leases…*"
16. In response to the complaint Barclays then made adjustments to the account, by crediting to the claimant's current account an amount of principal of £23,575.69 effectively allowing the claimant to redraw that amount of the loan which had been repaid through the monthly overpayments and fixed the standing order payments to be made by the claimant at £51,292.85.
17. Between June and October 2009 the claimant requested a restructuring of the swap but was quoted an indicative breakage cost of £565,000 (p454). Given the size of the breakage costs, the claimant did not want to pay the breakage costs and the swap continued to maturity.

The claim

18. The claim in this case has been amended and restated over the months leading up to trial up to and including the application (largely rejected) to amend the pleaded case on the first day of the trial. The result is a lengthy pleading which is repetitive in parts and from which it is not easy to determine the precise case now alleged. Against that background it seems to me that the claim as set out in the Re-Re-Amended Particulars of Claim is in summary as follows: the claimant alleges breach of *Hedley Byrne* advisory and information duties in that the defendant failed to advise the purchase of a suitable product and/or failed to take reasonable care to ensure information was not misstated by actual misstatement, omission or partial omission.
19. There are three grounds on which the claimant alleges the defendant failed to ensure the derivative product was suitable: the warnings as to break costs in the presentation dated 9 May 2008 and the telephone call of 29 May 2008 were

inadequate; the defendant failed to advise as to the potential restrictions on the ability to refinance and the restrictions upon portability of lending.

20. Further the claimant alleges that the defendant had a duty to advise/provide information so that the claimant understood the financial consequences of the mismatch: that the combination of the loan and swap was wholly unsuitable in that in essence the swap profile remained fixed but the repayment profile of the loan varied dependent upon the relevant interest rate. This created overhedging. Further from February 2009 the swap payments were added to the balance of the loan and this had the effect that the loan balance was higher than it would otherwise have been and this resulted in higher interest costs.
21. The claimant also alleges that the written presentation failed to describe the advantages of the interest rate hedging products fairly, clearly and accurately.
22. The claimant contends that the bank owed it duties of materially the same scope in tort (negligence), in contract, and under the Financial Services and Markets Act 2000.

Issues for the court to determine

Factual issues

23. The factual issues for the court are as follows:
    (i) Did Barclays give advice in relation to the swap? Did the bank recommend an unsuitable product?
    (ii) did Barclays provide inadequate information in relation to the swap? In particular were the warnings as to break costs inadequate; (assuming a duty to provide the information) did the defendant fail to advise as to the potential restrictions on the ability to refinance and the restrictions upon portability of lending.
    (iii) did the bank fail to provide the claimant with the advice and information reasonably necessary to enable it to make an informed decision whether or not to enter into the swap.
    (iv) did the bank fail in the written presentation to describe the advantages and disadvantages of the interest rate hedging products fairly clearly and accurately?
    (v) if there was a breach of the common law and/or contractual and/or statutory duty, has the claimant established that it would have entered into a cap instead of the swap?

Legal issues

24. The legal issues for the court are as follows:

(i) If Barclays gave advice, did it assume an advisory relationship giving rise to a duty of care in that regard?

(ii) If the relationship was advisory is the claimant prevented from asserting such a relationship by the provisions of the terms in the swap confirmation?

(iii) If the relationship was not advisory, was there a duty to provide information which went over and above the duty not to give inaccurate or misleading information?

(iv) Did the terms of business applicable to the relationship between the claimant and the defendant give rise to an enforceable duty with regard to the alleged breaches? In particular did the words "subject to Applicable Regulations" have the effect of incorporating the relevant rules of the FSA into the contract between the claimant and Barclays.

(v) Is there a direct right of action for breaches of the Conduct of Business Rules under section 138D of FSMA? By that section, a contravention by an authorised

person of a rule made by the Financial Conduct Authority is actionable at the suit of a "private person" who suffers loss as a result.

Did Barclays give advice in relation to the swap? Did it assume an advisory relationship giving rise to a duty of care

Law

25. The basis for the claim for breach of a duty of care is *Hedley Byrne v Heller* [1964] AC 465 at 510 that a bank does not generally owe a duty of care to advise on the merits of transactions but if they undertake to do so they owe a duty to advise with reasonable skill and care.
26. It is common ground between the parties that the question whether advice has been provided is an objective one.
27. Mr Coleman QC for the claimant relies on *Rubenstein v HSBC [2011] EWHC 2304 (QB)* at 83:

    "*the key to the giving of advice is that the information is either accompanied by a comment or value judgement on the relevance of that information to the client's investment decision, or is itself the product of a process of selection involving a value judgement so that the information will tend to influence the decision of the recipient". [emphasis added]*

28. Counsel also referred to the Financial Conduct Authority's Perimeter Guidance Manual which states at paragraph 8.28.4 G (3):
    "*In the FCA's opinion… such information may take on the nature of advice if the circumstances in which it is provided give it the force of a recommendation. For example… (3) a person may provide information on a selected, rather than balanced, basis which would tend to influence the decision of the recipient."*
    Counsel submitted that this has been endorsed by Teare J in *Zaki v Credit Suisse (UK) Ltd [2011] All ER 41* at paragraphs 83 to 85. In that case Teare J had to decide whether the bank made a personal recommendation which in turn was defined as advice on investments.
    At paragraph 83 he said
    "... However, "advice on the merits" is to be distinguished from the mere giving of information…., what amounts to advice will also depend upon the context.…"
    At paragraph 84: "*advice requires an element of opinion on the part of the adviser…"*
29. Counsel also referred to the decision of Timothy Kerr QC in *Crestsign v Royal Bank of Scotland [2014] EWHC 3043 (Ch)* at 88 to 89 and at 108 that advice can take the form of a recommendation that a client enter into a particular contract.
30. For the defendant, Mr Mitchell QC, submits that the claimant must establish that Barclays assumed a legal responsibility for giving advice in relation to the swap so as to give rise to a duty of care at common law in relation to that advice. Counsel submits that it is not sufficient to establish that advice was in fact given and refers to the dictum of Hamblen J in *Standard Chartered Bank v Ceylon Petroleum Corporation [2011] EWHC 1785 (Comm*) at 508:
    "*there is a clear distinction between giving advice and assuming legal responsibility for that advice*".
31. Mr Mitchell also referred to the following extracts from the judgment of Gloster J in *JP Morgan Chase Bank v Springwell Navigation Corporation [2008] EW HC 1186 (Comm):*

[374] "<u>the fact that a person, in the capacity of a salesperson, gives investment advice, tells us nothing about what, if any, obligations were in fact owed… still less does it inform us to the extent of any such duties of care as were owed. In order to decide whether the advice given gave rise to obligations that went beyond the normal recommendations or "advice", given in the daily interactions between an institution's salesforce and a purchaser of its products, so as to import obligations of the type owed by a fully fledged investment advisor, one needs to look at all aspects of the objective evidence of the relationship between the parties</u>." [emphasis added]
[361]"it should be appreciated that the expressing of opinions and giving of advice is "part and parcel of everyday life of a salesman in emerging markets"
[449]"it follows that mere giving of advice, even specific investment advice, is not sufficient to establish a duty of care. This is the case even where the investment advice is relied upon by a customer: "the fact that… a salesman… was, in that capacity, giving such advice and making recommendations, and that the customer was taking the salesman's advice and recommendations into account… does not in my judgement predicate that a duty of care arises on the part of the salesmen. Reliance on its own, even if established, does not give rise to an advisory relationship, with consequential duties of care".

32. At paragraph 48 of her judgment, Gloster J referred to the three tests confirmed by the House of Lords in *Commissioners of Customs & Excise v Barclays Bank,* the three tests which had been used in deciding whether a defendant sued as causing pure economic loss to a claimant owed him a duty of care in tort:
1 the assumption of responsibility test, coupled with reliance;
2 the "threefold test" i.e. whether the loss was reasonably foreseeable, whether the relationship between the parties was of sufficient proximity and whether in all the circumstances it is fair just and reasonable to impose such a duty; and
3 the incremental test.
At paragraph 49: *"ultimately, the conclusion of their Lordships was that there was no single common denominator, with all of the tests operating at a high level of abstraction. However, what each test emphasised was the need to take into account all the relevant facts in the overall determination. As Lord Bingham said: "… It seems to me that the outcomes (or majority outcomes) of the leading cases cited above are in every or almost every instance sensible and just, irrespective of the test applied to achieve that outcome. This is not to disparage the value of and need for a test of liability in tortious negligence, which any law of tort must propound if it is not to become a morass of single instances. But it does in my opinion concentrate attention on the detailed circumstances of the particular case and the particular relationship between the parties in the context of their legal and factual situation as a whole. "*
At paragraph 51: *"However, as was pointed out in Williams v Natural Life Health Foods Limited, whatever the formulation of the test<u>, it requires an objective ascertainment of the relevant facts, the primary focus being on exchanges between the parties:</u>*
"the touchstone of liability is not the state of mind of the defendant. An objective test means that the primary focus must be on things said or done by the defendant or on his behalf in dealings with the plaintiff. Obviously the impact of what a defendant says or does must be judged in the light of the relevant contextual scene. <u>Subject to this qualification the primary focus must be on</u>

exchanges (in which term I include statements and conduct) which cross the line between the defendant and the plaintiff."" *[emphasis added]*

33. On the basis of these authorities it seems to me that one cannot divorce the issue of whether a duty was owed from the context of the exchanges between the parties and therefore I am bound to look in detail at the exchanges in order to determine both the factual question of whether Barclays gave advice and whether if it did give advice, it assumed an advisory relationship giving rise to a duty of care.

Claimant's Submissions

34. Mr Coleman submits that the Bank did provide advice and recommended the swap. He relies on the following points: –

– Mr Burgess worked in a department of Barclays Capital called "Corporate Risk Advisory";

-the words "Corporate Risk Advisor" appeared beneath his name on the relevant emails that he sent to Mr Harrison on 9 May 2008 and 21 May 2008; the presentation was headed "Corporate Risk Advisory" and Mr Burgess' business card had the words Corporate Risk Advisor" beneath his name;

– the gist of the telephone call on 9 May is evidenced by Mr Burgess' email dated 9 May 2008 and Mr Burgess was "steering" Mr Harrison towards choosing an interest-rate swap which was described as the product that would "keep things simple"; that Mr Burgess gave advice regarding current market conditions – he advised that businesses delaying hedging in the expectation of further interest rate cuts "*are not really going to see any advantage if the rate move does take place"*;

-the evidence of Mr Harrison at paragraph 35 and 43 of his witness statement is that he understood that Mr Burgess's role was "*the expert who would be advising me in relation to the condition of hedging*" as required by the bank. "*I was always under the impression I was receiving advice from Barclays both from Marsh and from Burgess. I was dealing with things I had never come across before and had no experience with whatsoever*";

- the presentation described three types of products: an interest-rate swap, an interest rate cap and an interest-rate collar, however it "subtly reinforced the message" that the simplest and therefore the best option was the interest rate swap;
- the letters of 14 and 20 May 2008 and the attached terms of business suggested that the defendant was giving advice

-the telephone calls of 21 and 29 May

Defendant's submissions

35. Barclays denies that it gave advice or in any way recommended the swap.
36. The Bank relies on its terms of business letter. Paragraph 3 of that letter stated: "*please treat this letter as written notice that we may, from time to time, provide you with advice for the purposes of clause 2.2 of our Terms*". Barclays says that the bank never advised or agreed to advise the claimant as contemplated by paragraph 3 of that letter.
37. Mr Mitchell submits that when one considers the totality of the communications between the parties in this case it is clear that there was no assumption of responsibility to provide advice in relation to the swap. In relation to the use of the terms "corporate risk adviser" and "Corporate Risk Advisory" on the Presentation, counsel relies on the dictum of Gloster J in *Springwell* and cited with approval by

Hamblen J in the Standard Chartered case (at 508): "*where phrases such as "trusted financial adviser" are used in internal documents, or even in correspondence between the parties, the court has to construe their meaning in the relevant context. Such words and phrases may be a mere "slogan" or "buzzword… intended to encourage relationship managers to maintain close relationships with their customers and to understand their business as a whole.*""

Discussion

38. Applying the authorities the question for the court on the evidence is whether the discussions looked at in the round and objectively amounted to advice or merely giving information? Did it involve a recommendation or an expression of opinion? Even if Mr Burgess gave advice did Barclays assume an advisory relationship in the sense identified by Hamblen J in *Standard Chartered Bank* and referred to above?

Credibility of witnesses

39. At this point I should express my views about the credibility of the witnesses of fact. The claimant relied on the evidence of Mr Harrison. The defendant relied on the evidence of Mr Rainford and Mr Marsh. Mr Burgess and Mr Tuesley were not called to give evidence. At the time the witness statements were prepared Mr Burgess no longer worked for Barclays. I am told that he has now re-joined Barclays but the defendant had not obtained a witness statement from Mr Burgess and did not anticipate having to call him, relying instead on the recorded telephone messages and email exchanges between the parties. Mr Rainford was based in London for Barclays Capital and responsible for the sales team in which Mr Burgess and Mr Tuesley worked although Mr Burgess worked in Manchester and his direct manager was Mr Atkinson. Mr Rainford was not party to any of the discussions between Mr Burgess and Mr Harrison. Mr Marsh was the relationship manager dealing with the overall relationship with the claimant and the loan side of the transaction.
40. In relation to Mr Harrison as a witness, I had the opportunity of observing him in the course of his cross examination as well as reading his witness statement. I also listened in my own time to the contemporaneous telephone recordings between him and Mr Burgess.
41. Listening to the tape-recorded conversations it struck me that Mr Burgess could not be said to be applying any pressure on Mr Harrison to purchase an interest-rate swap. His manner was very far from that of a “pushy” salesman. He was very understated in his approach.
42. Mr Harrison equally appeared comfortable in the exchanges, asking pertinent questions. Although Mr Harrison was asking questions he did not give the impression of a man who was unable to follow the conversation and on several occasions he stated expressly that he understood. Further it was obvious from his questions in relation to scenarios that he was following the conversation and understood the financial implications. He rejected offers of meetings.
43. In the witness box he appeared to answer frankly. There were two occasions on which it seemed to me he hesitated to give what seemed to be frank replies. The first is when he was asked about the correspondence that indicated that when delays occurred immediately before the loan was finalised, he threatened to take his business elsewhere. He appeared deliberately to misunderstand the question that was being asked and answered that he had no alternative bank to go to,

whereas the question was in fact directed to whether he had in fact threatened Barclays with going to an alternative bank if they failed to sort out the hold-up that was being caused in another part of the Barclays group. The second was when he was asked about his bank statements and was taken to an example (at p725) which showed an entry for 29 May 2009, a payment of £22,157.14 and a receipt on 1 June 2009 from Thornbridge of £51,292.85. It was put to him that the debit represented the swap payment which had been debited to his account and the debit on the statement had been underlined and initialled. It was put to him that Thornbridge knew that this was how the restructuring was being carried out, that is that the swap payments were being debited to the loan account. Mr Harrison seemed unable or possibly unwilling to identify the initials of the person who had checked the payment. He stated that it was not the initials of his bookkeeper and there was only one other person there could be, but seemed reluctant then to acknowledge the inference that it was in fact his own initials.

44. There were also instances where Mr Harrison had made assertions in his witness statement which were shown to be incorrect in cross-examination. In paragraph 51 of his statement Mr Harrison says "*my own experience of break costs derived from other loans which would see me pay an administrative charge for coming out of the product and which I determined would be more than a normal loan but not significant. Burgess did not explain or clarify anything more about the level of break costs or how the same may be calculated...*" It was put to him that Mr Burgess in fact told him that break costs could be expensive and gave an actual quantitative example; it is evident from the transcript of the call that this is correct and the passage in the witness statement did not accord with the version set out in the transcript.

45. I note that there were certain areas on which he was not cross examined as there was no evidence in his witness statement notably the significance to him of break costs in the context of a future refinancing.

46. Mr Rainford, I was told by counsel, has undergone major surgery and had been off work for five and a half weeks prior to the trial. Counsel made the point that he would find giving evidence tiring and the court was asked to make allowances for his ill health when he gave evidence. In the event he managed to give his evidence without any apparent ill effects from the surgery. However it did seem to me that he readily agreed with Mr Coleman's propositions when pressed and this may have been due to the fact that from a health perspective he was not as robust as he might otherwise have been. I therefore note the concessions that he made in the course of evidence upon which the claimant seeks to rely and whilst in no way doubting his integrity, I feel that he may have been less inclined to respond robustly to questions in cross examination and I take this into account in forming my overall conclusions. Further there were areas of his evidence in cross examination where in my view he was asked to comment on matters which strayed into the realm of expert opinion evidence and I approach his evidence bearing in mind that he was not there to give expert evidence but could only give evidence as to the usual practice and procedure within the investment bank and his team in particular. To the extent he expressed opinions which in my view went beyond his role as a witness of fact I disregard such evidence.

47. Mr Marsh has an ongoing banking relationship with Mr Harrison. Mr Harrison is a very wealthy individual with interests in a number of businesses and was the largest customer for Mr Marsh at the time. Barclays' internal credit application submitted in March 2008 noted that Mr Harrison ran a number of businesses

including Seals Packing & Gaskets Ltd and that the couple's net worth was estimated at the end of 2007 at £87,000,000. At times it appeared that Mr Marsh was troubled in giving answers which would either criticise the bank or criticise Mr Harrison whom he had known for some years. He was asked questions about the swap. Although he stressed on several occasions that he had nothing to do with swaps as these were handled by Barclays Capital and had very little experience of swaps, having done as he said hundreds of loans at that point but only a couple of swaps, nevertheless he strayed into responding to questions on the suitability of the swap to which on his own evidence as to his experience, in my view he was not qualified to respond. Mr Marsh works on the commercial banking side. He was not put forward as an expert witness and in cross examination where he was led on occasions to comment on matters relating to derivatives and interest rates these were areas which were beyond his area of knowledge and accordingly I place little or no weight on his answers to those areas.

<u>Telephone and email exchanges</u>

48. Applying the approach set out in the authorities referred to above, it is clear that the focus has to be firstly on the detailed exchanges between the claimant and the defendant. The key discussions were the telephone conversations between Mr Burgess of Barclays Capital and Mr Harrison on 9 May, 21 May and 29 May 2008 together with the email exchanges on 9 May and on 21 May and the presentation sent by Mr Burgess to Mr Harrison with the email of 9 May.
49. There is no transcript of the first conversation on 9 May. In his witness statement Mr Harrison says it was reasonably long. At paragraph 36 he states:
*"I had some difficulty in understanding his commentary and description but he <u>sought to encourage me to seriously consider taking an interest rate swap product.</u> The conversation was difficult to follow, as the concept was new to me and I didn't understand much of what was being discussed. I asked him to confirm his descriptions of the derivative products by email and he thereafter sent me an email dated 9th May 2008 in which <u>he specifically acknowledged that I wanted to keep things straightforward and suggested a fixed rate deal to "to keep things simple".</u>"[*emphasis added*]*
50. Mr Mitchell acknowledged that there was a conversation on 9 May which preceded the email but submitted that it was not pleaded that in that conversation Burgess "*sought to encourage me to seriously consider taking an interest rate swap product"*. Nevertheless it is evidence which in my view the claimant can rely upon in relation to its case.
51. However the weight to be given to this evidence of Mr Harrison in his witness statement has to be determined in the light of the email evidence.

<u>Email of 9 May</u>

52. In the email of 9 May 2008 from Mr Burgess to Mr Harrison, Mr Burgess wrote:
"I mentioned in our telephone conversation that there are a number of structures/deals that can be used for protecting the business against higher interest rates and I have attached a short presentation that outlines three structures that are used by the vast majority of our client base. <u>The decision regarding which type of structure to use may be based on a specific market view, if a certain budget rate is needed to be achieved or to keep things simple a fixed</u>

rate deal to know the interest cost of the debt each month irrespective of market movements."[emphasis added]

Please have a look at the presentation and the structures that I have outlined and afterwards give me a call if you want to talk through the paper and or to meet up to discuss further.

53. Mr Coleman submitted that this email was "steering" Mr Harrison towards an interest rate swap. He stressed the use of the words *"or to keep things simple a fixed rate deal"* and submitted that this language was recommending an interest rate swap.
54. I do not accept Mr Coleman's interpretation of the language. I note that this interpretation was put to Mr Rainford in cross-examination but Mr Rainford, although accepting that it was incomplete in not mentioning a cap or a collar emphasised that he did not have the context of the telephone conversation. It was not put to him that this amounted to advice or a recommendation.
55. I think the paragraph has to be read as a whole. It starts with Mr Burgess saying that *"there are a number of structures/deals that can be used for protecting the business against higher interest rates"* and in my view the second sentence "*The decision regarding which type of structure to use…"* is stating the options depending on the client's perspective. So Mr Burgess states that if you had a view on where rates were likely to go this would influence your choice –from which I infer you might want to fix a ceiling and a floor to your exposure to interest rates ie a collar but the level at which you fixed the floor and ceiling would depend on your market views; alternatively if you wanted to achieve a certain budget rate from which I infer you wanted to limit future rises beyond a certain level in which case it would be a cap and thirdly if you want to fix the interest cost of the debt each month irrespective of market movements which I infer is a reference to a swap which would do exactly that ie limit payments to the fixed rate in the swap irrespective of market movements. Therefore in my view Mr Burgess is setting out the options; he is not steering Mr Harrison towards a swap.
56. The email continues:

"I know that you want to keep things straight forward, but ahead of looking through the structures available, I think that it is worthwhile looking at the current market conditions. At the moment we expect a 0.25% cut in base lending from 5% to 4.75% in either June or July with the possibility of a similar cut to 4.50% in the second half of 2008. Following this we expect base to remain below 5.00% into 2009 before the world economy strengthens out of the current downturn meaning that rates could possibly move up again during 2009. This is important because should the Monetary Policy Committee move base downwards as already expected by the market then we should see very little movement in fixed rates because these moves have already been fully discounted in to the markets and so businesses that "hold – off" protecting the risk because they read in the media that we are due a rate cut in the next couple of months are not really going to see any advantage if the rate move does take place.

All the indicative pricing in the presentation are for the base cost of funds and the lending margin for the facility…will need to be added when considering the actual lending costs. I have quoted market prices for five, 10 and 15 years based on the loan facility structure and one decision for you to make would be the period that cover should be taken for and this would be dependent on whether you would expect early repayment of the loan….."[emphasis added]

The signature block on the email read *"John Burgess Corporate Risk Advisor"* and then gave his address and contact details.

57. Mr Rainford was asked about the middle paragraph of the email of 9 May set out above relating to what was likely to happen to rates and whether Mr Burgess was exceeding his role as a person who is not advising at this point. Mr Rainford disagreed and said he was giving the customer the Barclays' view on what might happen to rates. He said it was common practice to give views of the overall market.
58. In my view there is nothing in those paragraphs which suggests that Mr Burgess is recommending a particular type of hedge. Further the terms of this email as I read it tends to negate in my view the assertion in Mr Harrison's witness statement that in the phone call of 9 May Mr Burgess was encouraging Mr Harrison towards an interest rate swap. The terms of the email setting out the options suggests that Mr Burgess had not previously steered Mr Harrison towards a swap.
59. Mr Coleman QC referred to the sentence in the following paragraph "*that businesses that "hold off" protecting the risk ….are not really going to see any advantage if the rate move does take place.*" He submitted that this amounted to a recommendation to enter into a swap.
60. In my view that sentence has to be read in the context of the paragraph which is addressing market conditions rather than a particular hedging product. The paragraph starts "*I know that you want to keep things straight forward, but ahead of looking through the structures available I think that it is worthwhile looking at the current market conditions…*"
61. There is nothing in that paragraph which amounts to a recommendation as to a particular product and I agree with the evidence of Mr Rainford that Mr Burgess was not exceeding his role merely by giving a view on what might happen to rates.
62. In the penultimate paragraph Mr Burgess states:
    "*….I have quoted market prices for five, 10 and 15 years based on the loan facility structure and one decision for you to make would be the period that cover should be taken for and this would be dependent on whether you expect early repayment of the loan.*"
    In my view this final sentence is clear that Mr Burgess is providing the available options for Mr Harrison to consider and not advising on or recommending a particular product.
63. The evidence of Mr Rainford was that the Corporate Risk Management team were not intended to have an advisory function and the sales force who were required to be registered with the FSA knew that their role was to present the customer with a range of products potentially appropriate for the customer and for the customer to determine whether they wished to enter into any of the products. It was not their role to provide advice and they did not charge a fee for any service.
64. In cross examination Mr Rainford explained that the name "corporate risk advisory" was a name used by the investment bank and the relevant sales team was moved from the bank to the investment bank in 2004 and came under the umbrella of "corporate risk advisory". He agreed that it was potentially misleading to use it on emails, on the business card and presentation but said that "*the actual experience and the dialogue between the customer and the sales people was never an advisory relationship*".

The Presentation

65. Looking then at the presentation sent with the email of 9 May, this was a 7 page presentation entitled “Interest Rate Risk Management Strategy". The words "Corporate Risk Advisory" appear at the top on the right-hand side of the front page. The next page is entitled "Overview" and states:
"*You discussing a new facility with Barclays for which <u>hedging solutions can provide protection</u> against rising interest rates.*
<u>The ideas and indicative pricing that follow</u> have been based on the offer terms of the lending structure…
This paper outlines the following:
interest rate swap/fixed rate
interest rate cap
Interest rate collar,…" [emphasis added]
66. The pages that follow are headed "Known interest expense – interest rate swap", "Interest rate cap", "Interest rate collar", “Cancellation – scenario analysis" and a final page headed "disclaimer".
67. I reject the claimant’s submission that the presentation suggested that the simplest and therefore the best option was the interest rate swap. I do not accept that just because the interest rate swap was described before the alternative products this suggests any recommendation of the interest rate swap. There is no basis for such an inference. Further the title of the presentation was "Interest Rate Risk Management Strategy". The words "Corporate Risk Advisory" do appear at the top on the right-hand side of the front page but in my view are not of themselves enough to lead to an inference that this presentation was Barclays giving advice rather than Barclays setting out the options which were open to the claimant. The introductory words on the first page of the Presentation: “*The ideas and indicative pricing that follow”* are not in my view the language of recommendation or advice and I also reject the submission that there is an implicit recommendation of a swap. I think the presentation has to be read in the context of the telephone conversation and email and not viewed in isolation as a standalone document which it clearly on its face was not.

<u>Conversations of 21 May and 29 May</u>

68. On 21 May there was a further conversation between Mr Harrison and Mr Burgess. (p306) The essential extracts from that conversation are as follows:
Burgess:"*….we need to talk about the interest rate protection that I think needs to be in place before the loan is drawn*".
This is a reference to the fact that it was a condition of the loan that either the loan should be fixed rate or the claimant should have in place a hedging strategy.
Harrison:"*…because there is something that Andrew [Marsh of Barclays] has got written into [the deal] that says I’ve got to do something at some stage for the first five years, at least haven't I?"*
Burgess: *"yes, there are different ways to take out protection, it's whether we need something to [sort of,] two or three alternatives."*
Harrison: *"well I think that it's like we said before, <u>the one that is the simplest is the one I'll go for… and that's the first option in your email isn't it?"</u>*
Burgess: <u>"*Yep. I was going to suggest that anyway to be honest."*</u>
Harrison: *“Yeah . I think we should do that….”*
Burgess: *"..it will be a case of deciding whether you want to do it for 5 years or a longer period.. 5 year rates are higher than longer term, but it depends if you are looking at keeping the loan for a longer period.”*

Harrison: *"Erm well that's always debatable isn't it. I don't know the answer to that question. Which is the easiest way and the cheapest way, did you say five years or longer?"*
Burgess: *"Longer. Rates have gone up a fair bit because we don't expect base to come down as it did a few weeks ago. But in the longer term there is a possibility the rates could come down, so I'll just give you the rate actually just quickly to give you an idea. Five years is at 5.39. You've got to add your margin on top of this."*
Harrison: *"Yep"*
Burgess: *"10 years is at 5.31"*
Harrison: *"Yep"*
Burgess: *"15 years is 5.29"*
Harrison: *"Right"*
Burgess: *"So"*
Harrison: *"I think the way things are we would go for five years…"*[emphasis added]

69. Mr Coleman relies on the phrase: "*the one that is the simplest is the one I'll go for… and that's the first option in your email isn't it?"* and the response "*Yep. I was going to suggest that anyway to be honest"* as evidence of a recommendation being given by Mr Burgess.
70. This is clearly an expression of an opinion by Mr Burgess but does it amount to a recommendation in the sense of attracting the duty of care which would attach to an advisory relationship? Mr Coleman relies on the FCA handbook and the section dealing with "Advice or information". Para 8.28.1 states that in the FCA's view:
"*advice requires an element of opinion on the part of the adviser. In effect it is a recommendation as to a course of action*"
However I bear in mind the dicta of Gloster J in *Springwell* cited above that the giving of advice is not sufficient to establish a duty of care. The court has to decide whether the "advice" went beyond the "*normal recommendations ..given in the daily interacations between an institutions salesforce and a purchaser of its products"*. Mr Burgess is a salesman. His job is to sell derivatives and he makes his money by selling derivatives. He does not make money by providing advice in return for a fee. It is an integral part of the sales process in my view that he should have a dialogue with the customer and in the course of that dialogue may express opinions to the customer but those expressions of opinion have to be viewed in the context of the entire dealing. This expression of opinion is in my view the expression of a salesman selling his product not an adviser providing advice.
71. In my view this is not a conversation in which Mr Harrison is being advised as to what to do. It is clear from the exchange on rates in which Mr Harrison rejects the lower rates that a longer term would provide, that Mr Harrison understands the options that he is being offered and decides on the one which he feels is appropriate for him.
72. Mr Burgess then follows that up in an email dated the same day (p314) in which he says: "*in terms of market protection, rather than looking at cap and collar structures, I agree that the straightforward way is the best approach and so the main decision is for how long to fix your cost of borrowing."*
Again in my view this is nothing more than a salesman who sees an opportunity to sell a product. It is not an advisor giving advice.

73. There is a further conversation on 29 May 2008 (p343) between Mr Burgess and Mr Harrison which goes through the financial implications of a swap in some detail. In my view the key elements of this conversation are as follows:

Harrison: *"... I think I know where I am at now... But let's go through it again... So we are looking at this interest rate swap at the current deal as of today, which may change tomorrow is what…?"*

Burgess: "*as we speak, 5.68%"*

Harrison: "*and that's plus 1.5%?"*

Burgess "*yes... Jim, if you are not 100% about it, I can arrange a meeting tomorrow, if I need to, at your place."*

Harrison "*let's just go through it and see where we are at… So the interest rate I am going to be paying on this, if it happened now, I'd be paying interest at 7.18%?... What are the monthly repayments on that?"*

Burgess: "….t*hat would be £51,388…"*

Harrison: *"... If the bank rate changes, if it goes up, what happens?... If it goes to 5.5%*"

Burgess: *"you carry on paying £51,388… Irrespective of where base goes, if we agree the fixed-rate deal, you carry on paying £51,388…. Now, this is where the actual, the breakdown of the swap deal comes in, because it's separated from the loan. This is why it is sometimes better putting it down on paper. I'm trying to think of the best way to explain it over the phone."*

Harrison: *"Right. There's two things that can happen here, the interest rate either increases or decreases… So if the interest rate increases, what happens?"*

Burgess: "*Well, your loan – do it this way round – at the moment, the loan will always continue against base, or continue linked to base. If you separate out the two, you're going to have a base link loan with Andrew, at base of 5% plus your 1.5%... So at 6.5%, you're going to be paying £49,249 to Andrew, and you have a deal with me under the swap which is at 5.68%... So, this month, if base is at 5% under the deal, I will be taking a payment off you of £2,139 because that's the difference between the 7.18% and 6.5%"*

Harrison: "*so tell me that again… "*

Burgess: "*yeah, so that's 5% plus 1.5%. If you did absolutely nothing, no protection, then you'd have a bank loan off Andrew at 5% plus 1.5%"*

Harrison: *"... If nothing changed again, nothing changed for the next five years, I'd have to pay you an extra £2500, whatever it was, a month?"*

Burgess: *"yeah £2,139. If base goes down to 4.5%, then under Andrew's loan which will now be at 6%... You're going to be paying, let's see, £47,707, but you're going to have to pay me £3681 each month…. If base goes up to 7%, so Andrew's loan will be at 8.5%, with your margin on top…"*

Harrison "*if it went up half a percent, it would go for 5.5% plus 1.5%, yeah? 7%, yeah?"... So its 5.5% plus1.5%... So my original to him is still £47,707 stop no, no, no, hang about…"*

Burgess "*no, it's going to be more expensive. it's going to be £50,817… Then as base goes higher and higher, if base itself goes up to, say, 6%, then that's going to be 7.5%, all in…. You're going to pay Andrew £52,411, but I'm going to give you back £1023."*

Harrison *"... So, for five years, I now understand what my repayments are going to be, come what may, it's £51,388… But it's either that exactly, or I pay something and get some back, or give some away."*

Burgess *"....now, if in two months time you want to come out of the deal, then you'd have, you have this protection deal in place at 5.68%, with four years and 10 months left on it."... I would then look at the fixed rate for that period, in the March, at the time. If the rate had gone up to, say, 5.75%... Then I would give you 0.07% back for that full period... All I would do is look at the, basically, the profit I would actually want to buy out that deal, because if the fixed rate was 5.75% at the market, in two months time, then I'd rather walk away from the 5.68% fixed-rate deal with you."*
Harrison: "*Right, so you'd pay me to get out of it?... So, what happens if it goes the other way?... I pay you to get out of it?... And you can do that as a one-off payment?... Or do I have an option to pay it monthly?"*
Burgess: "*... we could either do a deal to come out of it straight away, and make a one-off payment, either you to me or me to you, or we could just keep on doing the comparison each month, and that, whether it's £1000 to me, £2000 to you, whichever amount it would be each month, comparing base to – the underlying base to the fixed rate that we agreed. We just keep doing that for each month for five years, or we cash settle on the day that you want to come out of the deal."*
Harrison: *"... So what he's insisting on is what amounts to an insurance policy, but instead of me paying what I thought I was going to be pay [sic] at £49,249, I'm actually paying £51,388... Every month?"*
Burgess: "*yes, because if interest rates go to 10%, he doesn't want you to be in a position where you have to pay him £75,000"*
Harrison: "*okay. I understand it."*

74. They then go on to discuss the break costs:
Burgess: *"... It can be expensive under a swap..."*
Harrison: *"... How do you mean it can be expensive*?"
Burgess: "*well, again, if the rates move aggressively, if you do a fixed rate at 5.68% and rates move down to say 5% or even 4%... Then it's going to be expensive to come out of, and to give you an example... If you think about it each month, it could be £1000 or £2000 either way.... Multiply that out over five years and if you decide to come out of that position all in one go, we could be looking at £70,000 – £100,000 quite easily on a 1% move... Last year, businesses were walking away with £100,000 on their deals, but this year they could be, they are looking at coming out of it and having to pay £100,000, because rates have... come down... So you do have the option to either keep paying the £2000, receiving £2000 or taking the hit or taking the gain. It would be a decision ongoing as and when."*
Harrison: *"... Well then, I understand it and I'm still gonna go for the five-year swap*"
Burgess: *"... If you're not 100%, I'm quite happy to get someone to come out and see you tomorrow. I'm not here tomorrow,...*
Harrison: "no I can sit here and I can say I understand it..."[emphasis added]
It seems to me that it is clear from the detailed nature of the discussion in the second conversation on 29 May, which I have cited at length above, that the relationship between the claimant and Barclays was not an advisory relationship. The language of Mr Harrison is clear-he asks detailed questions about what happens if rates move up or down and he forms his own view: *"... Well then, I understand it and I'm still gonna go for the five-year swap."*

Mr Burgess presses the point: "*... If you're not 100%, I'm quite happy to get someone to come out and see you tomorrow. I'm not here tomorrow,...*
Mr Harrison: "*no I can sit here and I can say I understand it...*"

75. In my view it is clear from this very detailed discussion on 29 May of the way in which the swap would work that Mr Harrison grasped the economics of the swap transaction and the effect that movements in base rate would have on the payments under the loan and the swap.
76. Mr Coleman accepts that Mr Harrison understood the basics of how the swap would work but submits that he was not experienced in derivatives and the relationship was an advisory one.
77. Having listened carefully to the telephone recordings Mr Burgess was clearly providing information to Mr Harrison as to how the swap would work but in my view he was not recommending or advising that Mr Harrison entered into the swap: he was explaining how the payment flows would work.

<u>Disclaimer</u>

78. I have already rejected the submission that the Presentation implicitly recommended an interest rate swap. Mr Coleman for the claimant sought to derive support for his submission that Barclays were providing advice and recommending the interest rate swap from the terms of the Disclaimer on the final page of the Presentation.
79. He refers to the sentence in the first paragraph of the Disclaimer:
"*Barclays Capital... may from time to time act as manager, co-manager or underwriter of a public offering or otherwise deal in, hold or act as market makers <u>or advisors</u>, brokers or commercial and/or investment bankers in relation to the securities or related derivatives which are the subject of this report.*" [emphasis added]
I do not think that any support can be derived for the claimant's argument from this paragraph. It does not state that Barclays is providing advice in relation to the derivatives which are the subject of the report. It merely states that it may do so and is in effect warning the reader that there may be a conflict of interest should Barclays act in these capacities.
80. He also refers to the sentence in the second paragraph "*Any securities <u>recommendations</u> made herein may not be suitable for all investors*" [emphasis added]
I reject the submission that this lends support to the claimant's case that Barclays were recommending the hedging instrument. Firstly the sentence relates to "securities" and an interest rate swap does not fall within the normal meaning of "securities". Further the sentence does not indicate that a recommendation is being made, merely that it may be made.
81. Finally on the Disclaimer, the claimant advances the argument that that the fourth paragraph is clearly inappropriate. It states:
"*This communication is being made available in the UK and Europe to persons who are investment professionals as that term is defined in article 19 of the Financial Services and Markets Act 2000 (Financial Promotion Order) 2001. It is directed at persons who have professional experience in matters relating to investments...*"
This sentence is clearly inappropriate in the context of this presentation as it is common ground that Thornbridge is not a professional investor but a retail investor. It does not however in my view lead to an inference that the entire

disclaimer should be disregarded. I accept the submission of counsel for the defendant that either the effect would be that the whole presentation was inappropriate or that the relevant paragraph has to be disregarded as irrelevant. Given that the presentation is clearly prepared specifically for Thornbridge as is evident from the specific terms set out under "Overview":

"You discussing a new facility with Barclays……amount GBP5,652,000, start date -31st May 2008…" it cannot be interpreted as a presentation which was designed for professional investors. It is clear that it was drafted only for Thornbridge. It seems to me that this paragraph has to be disregarded as irrelevant but is of no assistance to the issue of whether Barclays were providing advice.

82. Finally I note that the third paragraph of the "Disclaimer" at the end of the Presentation is consistent with a conclusion that Barclays were not providing advice-it states:

    "*Investors should seek their own advice as to the suitability of any investments described herein for their own financial or tax circumstances*."

83. This is a clear statement. It could, it seems to me, have been varied by the actual discussions which took place between the parties but in my view it is a factor which I am entitled to take into account in reaching a conclusion.

Letters of 14 May and 20 May 2008

84. Mr Coleman relies on the letters of 14 May and 20 May 2008 from Barclays to the claimant stating that it had classified the claimant as a retail client. Although these letters have different dates they appear to be identical. (page 282). In this letter Barclays informed the claimant that it was required to notify the claimant of its client categorisation pursuant to the FSA rules prior to providing any services to the claimant and that it had categorised the claimant as a "retail client". Barclays enclosed a copy of its terms of business and asked the claimant to return a signed copy. The claimant signed the second one. Mr Coleman QC for the claimant submits that the statement in paragraph 3 of the letters that *"[Barclays] may from time to time provide [the claimant] with advice for the purposes of clause 2.2 of our [terms of business]"* leads to an inference that Mr Harrison would have understood this to be an acknowledgement by the bank that it was advising and would continue to advise.
85. The letters of 14 May and 20 May 2008 classifying the claimant as a retail client do not in my view constitute any notification that Barclays were providing the claimant with advice in relation to this transaction.
86. Paragraph 3 of the letter of 20 May 2008 stated: "*please treat this letter as written notice that we may, from time to time, provide you with advice for the purposes of clause 2.2 of our Terms"*.

    Clause 2 of the "Terms of Business for Retail Clients" headed "Advice" provides:

    "*2.1 Non-advised services: Except as set out in clause 2.2 below, we will not provide any advice to you in relation to a Transaction.…*

    2.2 Advice: Notwithstanding clause 2.1 above, we may provide you with advice in relation to Transactions, where we have notified you in writing that we will do so. If we do give such advice, you confirm that the information that you have provided and provide from time to time to allow us to assess the suitability of the activities and services we are providing to you is accurate and complete."

    Counsel for the claimant submitted that the fact that this transaction was the only dealing which Barclays then had with Thornbridge, meant that this letter should

be interpreted as notifying the claimant that they were providing it with advice on this occasion.

The evidence of Mr Marsh was that he had not seen the letter even though the letterhead suggested that it came from his team and the signature was that of his assistant Julie Frankish. He assumed it was a standard letter. I accept his evidence that he had not prepared or seen the letter. It is clearly by its terms a standard letter which was not tailored to the claimant or the particular transaction. As such it seems to me that the correct interpretation of clause 3 of the covering letter is that it is a generic statement that Barclays may provide advice but clause 2 of the Terms of Business clearly state that Barclays will not provide advice except in those cases where Barclays notifies the customer that it will be giving advice. Giving these paragraphs their normal meaning I cannot see that the language in clause 3 of the covering letter that Barclays "*may from time to time provide you with advice*" amounts to a notification that they were advising Thornbridge in relation to this specific transaction.

<u>Reliance by the claimant</u>

87. Mr Harrison stated at paragraph 35 of his witness statement that he was "*always under the impression that Marsh was putting me in touch with Burgess, as the expert who would be advising me in relation to the condition of hedging as required by the defendant…."*
88. At paragraph 38: "*Hedging and derivatives were completely new to me, and it is not something I have ever come across or had any experience of previously. I placed considerable trust in the bank, whether it was Marsh, Burgess or anybody else that I spoke with…. I was always under the impression that the people I was dealing with were advising me either in my personal capacity or as director of the company, and recommending a product that was suitable…."*
89. Paragraph 39: "*At no time did I seek any separate advice from any third party or accountant in relation to the product or the financing, relying upon my own knowledge of business and the bank's recommendation as to the suitability of the borrowing."*
90. He viewed the product as an insurance policy (paras 49 and 58 of his witness statement).
91. In response to the assertion that Mr Harrison was relying on Barclays for advice Mr Mitchell submits the relationship between the claimant and Barclays was simply a commercial relationship and relies on the evidence that Mr Harrison was threatening to take his business elsewhere when there were problems immediately before the drawdown. An email from Mr Marsh sent on 19 May 2008 to other members of Barclays:

   "*Stephen*

   Your help please.

   We are financing a new commercial property for Jim and Emma Harrison via their development co namely Thornbridge

   TL is for £5.652 million against a purchase price of £6.650 million, with fees and derivative the deal is worth in excess of £100,000 VAPM year one.

   The deposit is being made from a third-party vendor taking a second charge over a property mortgaged to the Woolwich…

   The third-party lender requires Woolwich consent to do so, the lawyers have requested this on a number of occasions over the past four weeks, with no response.

The customer has tried to resolve direct with Premier with no success
<u>The customer has phoned this morning and registered a formal complaint, the upshot of which is that unless we can resolve by tomorrow the deal will go elsewhere.</u>
*Can you please help ASAP."[*emphasis added]

92. Mr Mitchell submits that this evidence suggests that in his actions in this regard Mr Harrison was tending to regard the bank as a supplier of banking services rather than as an adviser.
93. In my view there is no evidence to support Mr Harrison's assertion that Mr Marsh introduced Mr Burgess as an expert who would advise him. Mr Marsh's evidence in his witness statement at paragraph 26 and repeated by him in his oral evidence was:
"*At no stage would I have introduced Mr Burgess to Mr Harrison as someone who was able to provide advice."*
I have already referred to other evidence in Mr Harrison's witness statement which tends to suggest that the language used by him in the witness statement tended to support the claimant's case but did not withstand scrutiny and this affects the weight I am prepared to give to the statement at paragraph 35 of his witness statement (quoted above) that he was under the impression that Mr Marsh was putting him in touch with an expert who would advise him. Mr Marsh is an experienced commercial banker even if he was not familiar with swaps. He was well aware of the distinction between advisory and execution only and the regulatory framework which backs this. Accordingly I do not accept Mr Harrison's evidence on this point.
94. There was also no evidence as to what other advice was available to the claimant. Mr Marsh was asked in cross examination about the other advisers which Mr Harrison had used and whether they would have been authorised to provide advice but Mr Marsh unsurprisingly had no knowledge of their position. Counsel for the claimant sought to raise this issue in examination in chief of Mr Walsh, the claimant's expert witness from J C Rathbone Associates, but having heard the objection raised by the defendant, I ruled that the issue could not be raised with the expert in the absence of prior notice to the defendant so that Barclays could have had an opportunity to put evidence before the court. Without such evidence I am not prepared to exclude the possibility that Mr Harrison could have obtained evidence from his lawyers or accountants in relation to the swap should he have chosen to do so. Without evidence I do not accept the proposition of counsel that only a limited number of financial advisers could have provided advice on the swap and I doubt that to be the case. He was running a number of businesses and had the financial means to obtain advice, including it seems to me from firms of accountants and/or lawyers with experience in swaps, should he have chosen to do so.
95. As to Mr Harrison's lack of experience in hedging and derivatives, I do not accept that he failed to understand the product. His description of an interest rate swap as insurance is an appropriate description for someone who was looking to protect themselves against rises in interest rates. The fact that (unlike insurance) no premium is payable and no loss has to be proved are important features from a legal perspective but the use of the term "insurance" does not point to any lack of understanding on the part of Mr Harrison as to how a swap would work to protect him against interest rate rises. Notwithstanding his lack of academic qualifications at a higher level, Mr Harrison was a very successful business man who would

have been very familiar with the commercial context in which banks operate including the nature of the services they provide. In addition to the evidence, referred to above, concerning his approach when there was the delay in getting the loan finalised, I note that the internal credit application made in March 2008 refers to 5 companies run by Mr Harrison in addition to Thornbridge, all of which had banking facilities with Barclays. The company, Seals Packing and Gaskets, was in the process of being sold to a German company and the credit application refers to the negotiations and the fact that Mr Harrison had been offered £3.6m but "Jim has stated that he would like £4.5m but believes they will settle at c£4.00m plus buildings". Accordingly whilst accepting that Mr Harrison was a retail customer and not a professional investor and lacked experience of derivatives, I do not accept that the evidence of his background supports a conclusion that Mr Harrison would have thought that Barclays Capital were assuming an advisory relationship towards him or that he was entitled to rely on them as an advisor.

<u>Conclusion on advice/recommendation</u>

96. Having considered all the evidence on this issue, I conclude that Barclays did not recommend the swap and even if advice was given by Mr Burgess on the calls, Barclays had not assumed an advisory duty. I have set out my detailed reasoning above but my conclusion is based on an assessment of all the factors which I now draw together for completeness. The following should however be read in conjunction with my earlier remarks.
(i) The statements by Mr Burgess in the course of the telephone discussions on the likely movements in the interest rates were and would reasonably have been understood in my view by Mr Harrison to be at best, predictions or views rather than formal advice. Mr Burgess did express views as to the direction of interest rates, he did give explanations as to how an interest rate swap would fix the payments for the claimant and he appeared to endorse the suggestion of an interest rate swap. However even if this amounted to "advice" in my view it did not go beyond what Gloster J describes as the "*the daily interactions between an institution's salesforce and a purchaser of its products"*. It is clear following the principles laid down in *Springwell* that one needs to look at all aspects of the objective evidence of the relationship between the parties. In this regard I note the distinction drawn in that case between the investment adviser retained to advise a client and the advice or recommendations given by a salesperson as part of the selling process. I note that Barclays did not receive a fee in this case for any advice in relation to the swap. Mr Coleman submitted this was a neutral factor. In my view it is a relevant factor against finding an advisory relationship. It is common practice for bankers doing mergers and acquisitions to charge a fee for their involvement as advisers. This is a very different situation where the bank is selling a product and making its money through the profit earned on the transaction.
(ii) The fact that Mr Burgess' title was "Corporate Risk Adviser" and that this title appeared at the bottom of his emails cannot in my view be given any significant weight when weighed against the actual discussions which took place between Mr Burgess and Mr Harrison. It was a label which Mr Harrison acknowledged in cross examination that he did not rely on and looked at objectively this reinforces my conclusion that it was a label without significance in the circumstances. I also have regard to the evidence of Mr Rainford that the sales force was required to be registered with the FSA, Mr Burgess was very familiar with the distinction

between execution only and advised transactions and the sales force would have been very aware of the fact that they were not authorised to give advice to clients; their job as he explained, was not to recommend to the customer but to discuss solutions which are most appropriate to their needs. In my view this is a fundamental distinction in the way that bankers as individuals are regulated and authorised to do business. I note that Mr Rainford in cross-examination was asked whether he was claiming that Barclays sales people never strayed from non-advised sales into advised. He (fairly) replied that he could not answer for how each salesperson conducted their sale but only that the model is "definitely un-advised, non-advised, and that was very clear from compliance." For the reasons given above in relation to the detailed exchanges I do not think that Mr Burgess crossed the line into an advisory relationship.
The use of the title "Corporate Risk Adviser" in my view is not therefore of any significance in the circumstances of this case.
(iii) I have set out above the reasons why in my view neither the Presentation, the Disclaimer nor the letters of 14 and 20 May taken with the Terms of Business support an inference that Barclays were providing advice or assuming an advisory relationship.

If the relationship was advisory is the claimant prevented from asserting such a relationship by the terms of the contract?

97. I have found on the facts and the evidence before me that no recommendation or advice was given and that Barclays did not assume an advisory relationship resulting in a duty of care in that regard. If I am wrong on that, the defendant relies on the contractual documentation as giving rise to a contractual estoppel and I turn now to consider that documentation.
98. The swap confirmation contained the following provisions:
"*Each party represents to the other party that (absent a written agreement between the parties that expressly imposes affirmative obligations to the contrary):*
(a) ***Non-reliance****. It is acting for its own account, and it has made its own independent decisions to enter into the Transaction and as to whether the Transaction is appropriate or proper based upon its own judgement and upon advice from such advisers as it has deemed necessary. It is not relying on any communication (written or oral) of the other party as investment advice or as a recommendation to enter into the Transaction: it being understood that information and explanations related to the terms and conditions of the transaction shall not be considered investment advice or as a recommendation to enter into the Transaction. No communication (written or oral) received from the other party shall be deemed to be an assurance or guarantee as to the expected results of the Transaction.*
(b) ***Assessment and understanding.*** *It is capable of assessing the merits and understanding (on its own behalf or through independent professional advice), and understands and accepts, the terms, conditions and risks of the Transaction. It is also capable of assuming, and assumes, the risk of the Transaction.*
(c) ***Status of parties.*** *The other party is not acting as a fiduciary for or an adviser to it in respect of the Transaction.*
(d) ***Purpose.*** *It is entering into the Transaction for the purposes of hedging its assets or liabilities in connection with a line of business.*[emphasis added]

99. For the claimant Mr Coleman submits that these representations are not contractual warranties and therefore contractual estoppel does not apply. Further Mr Coleman submits that the clauses are not "basis clauses" but clauses which exclude liability and submits that the representations seek to rewrite history and part company with reality. The claimant relies on the authority of *Raffeisen Zentral Bank v Royal Bank of Scotland* [2011] 1 Lloyd's Rep 123 at 313 – 315 that to the extent the clause seeks to change the character of the parties' previous dealings, it will be treated as an exclusion clause. To the extent that the effect of such clauses is to exclude liability for negligence they are subject to the test of reasonableness in section 2(2) of the Unfair Contract Terms Act 1977.

100. Mr Coleman also submits that UCTA applies to any clause whose purported effect is to exclude a duty of care if, but for the clause, a duty of care would have been owed: *Smith v Bush* [1990] 1 AC 830 at 849,856-857 and 873.

101. Mr Coleman seeks to rely on the authority of *Peekay v ANZ Banking Group* [2006] 1 CLC 582 at 57 for the distinction which he seeks to draw between representations and warranties. I do not see that this reference supports his submission. Paragraph 57 of the judgment in that case reads:

"It is common to include in certain kinds of contracts an express acknowledgement by each of the parties that they have not been induced to enter the contract by any representations other than those contained in the contract itself. The effectiveness of a clause of that kind may be challenged on the grounds that the contract as a whole, including the clause in question, can be avoided if in fact one or other party was induced to enter into it by misrepresentation. However, I can see no reason in principle why it should not be possible for parties to an agreement to give up any right to assert that they were induced to enter into it by misrepresentation, provided that they make their intention clear, or why a clause that kind, if properly drafted, should not give rise to a contractual estoppel of the kind recognised in Colchester Borough Council v Smith…"

102. Counsel acknowledges that the decision in *Titan Steel Wheels v RBS* [2010] 2 Lloyd's Rep 92 at 87 is against his submission for such a distinction but submits it is wrongly decided.

103. In my view the authorities do not support such a distinction: this issue was addressed in *Springwell*. In that case Springwell claimed that, notwithstanding certain contractual representations and acknowledgements of fact such as that Springwell was a sophisticated investor and the transaction had been conducted on an execution only basis, that Springwell had not received any advice from Chase in relation to the relevant transactions and had not relied on any advice from Chase, Chase was in fact advising it on a regular basis. Gloster J held that Springwell could not set these facts up against the agreed facts which had formed the terms of its contract with Chase. Gloster J held that the basis of a contractual estoppel is a contractual representation, warranty or agreement forming the agreed and binding basis on which the parties will conduct their dealings (para 567). She accepted Chase's submissions that contractual estoppel is a separate species of estoppel from estoppel by representation, that it does not require detrimental reliance and it can arise from an agreement or representation about past facts (paragraph 556).

At paragraph 559 she said: *"the fact that some statements are expressed in the language of representation or acknowledgement cannot, in my view, make any difference to the analysis that the statements give rise to a contractual estoppel."*

It seems to me that further authority (if needed) that this distinction is without substance is to be found in the judgment of Aikens LJ in the Court of Appeal in *Springwell* at 170.

104. In relation to the submission that the representations seek to rewrite history and part company with reality, Mr Coleman relies in particular on paragraphs 313 – 315 of the judgement in *Raffeisen Zentral Bank*.

105. It seems to me that the passages on which the claimant seeks to rely have to be read as a whole and in my view the test is not whether the clause attempts to rewrite history or parts company with reality. The first step is to determine as a matter of construction whether the terms defined the basis upon which the parties were transacting business or whether they were clauses inserted as a means of evading liability. In that case Christopher Clarke J said at para 316:

"*I do not regard either the Confidentiality Agreement or the IM as in substance an attempt to exclude or restrict any liability to which RBS might be subject by reason of a misrepresentation made by it before the Syndication Agreement was made. On the contrary they contain, as it seems to me, the agreement of the parties as to the basis upon which the confidential information was to be given, namely that it was not to be regarded as a representation of fact on which RBS intended that RZB should rely or upon which it was entitled to rely; and that any statements made in, for instance, the IM were not to be regarded as complete.…*"

At 317: "*If parties such as these agree in unequivocal terms as to the ambit of what is being represented to them and the extent to which one party is entitled to rely on what it is being told by the other, I do not see why the court should not give effect to their agreement (as representing the true nature of their relationship) in deciding whether any actionable representation has been made.*"

106. In the recent decision in *Barclays Bank plc v Svizera Holdings BV* [2014] EWHC 1020 (Comm) Flaux J had to consider similar representations to those in this case, that the client had made its own independent decisions and the information and explanations provided were not to be considered investment advice or a recommendation to enter into the transaction. At paragraph 58 Flaux J said:

" It seems to me that the evidence referred to in the previous paragraph is fatal to any case of reliance on the alleged representations, but, even if it were not, the [representations] give rise to a contractual estoppel against any such reliance. It has long been recognised by the courts that with sufficiently clear words (which the words of [the representations] are) acknowledging that the relevant party has not relied upon any representation by the other party in entering the contract, the party may be contractually estopped from alleging that he relied upon a representation in entering the contract. See, for example, per Moore-Bick LJ in Peekay Intermark Ltd v Australia and New Zealand Banking Group Ltd…at 57..

"It is common to include in certain kinds of contracts an express acknowledgement by each of the parties that they have not been induced to enter the contract by any representations other than those contained in the contract itself. The effectiveness of a clause of that kind may be challenged on the grounds that the contract as a whole, including the clause in question, can be avoided if in fact one or other party was induced to enter into it by misrepresentation. However, I can see no reason in principle why it should not be possible for parties to an agreement to give up any right to assert that they were induced to enter into it by misrepresentation, provided that they make their intention clear, or why a

clause that kind, if properly drafted, should not give rise to a contractual estoppel of the kind recognised in Colchester Borough Council v Smith…"
[59]"That principle was followed and upheld by the Court of Appeal in JPMorgan Chase Bank v Springwell Navigation Corp… The same principle was recognised and applied by Hamblen J in Cassa di Risparmio della Repubblica di San Marino v Barclays Bank Ltd… at [505] in these terms:
"The authorities accordingly establish that… it is possible for parties to agree that one party has not made any pre-contract representations to the other about a particular matter, or that any such representations have not been relied on by the other party, even if they both know that such representations have in fact been made or relied on, and that such an agreement may give rise to a contractual estoppel."[emphasis added]

107. Flaux J then went on [60] to quote Hamblen J in *Cassa di Risparmio della Repubblica di San Marino* [525]:
"In the present case by clause 6 CRSM was contractually agreeing that it understood and accepted the risks of entering the transaction purchasing the Notes. In my judgement if the substance of the claim for misrepresentation is that representations were made which led it to misunderstand the risks of entering the transaction and purchasing the Notes then such a claim would be precluded. It is contractually estopped from asserting that it was induced to enter into the contract by a misunderstanding of the nature of the risks entering the transaction and purchasing the Notes. As in Peekay, the specific misunderstanding would be as to the specific matter which had it had been contractually agreed was fully understood."

108. Flaux J concludes [61] that:
" In view of the consistent judicial recognition that the effectiveness of provisions such as [the representations] to give rise to contractual estoppel, the suggestion by Mr White that in some way that provision should be struck down as unreasonable under ss 3 and 11 of the Unfair Contract Terms Act 1977 is hopeless…"

109. It seems to me that the authorities on this point are very clear. As a matter of construction the particular clauses in the Confirmation are in the nature of basis clauses and not exclusion clauses and this is supported by the approach taken in other cases where similar wording has been considered including the *Barclays Bank v Svizera Holdings* case referred to above. Mr Coleman referred me to the judgement of Aikens LJ in the Court of Appeal in *Springwell* at 181-182. In my view the sentences within those paragraphs however which were found to be subject to UCTA were those sections which did purport to exclude liability. It is not authority that basis clauses of the type being considered here are subject to UCTA.

110. The submissions advanced on the basis of *Smith v Bush* were considered in detail in *Titan Steel* where the judge observed that *"the decision may have been somewhat overtaken by later decisions in regard to the assumption of responsibility"*.

111. In my view recent authorities have been very clear that parties may agree the basis on which they are entering into a relationship. The effect of such a clause is that the party is contractually estopped from denying to the contrary. This is so even where for example parties agree that one party has not made any pre-contract representations about a particular matter and both parties knew that such representations have in fact been made (see Hamblen J in *Cassa di Risparmio*

della Repubblica di San Marino at 505 quoted above). Thus I reject the submission that the test is whether the clause "rewrites history". Nor does anything turn, in my view, on the fact that the confirmation was not received back for some months after the deal was entered into. It was signed by the claimant and returned to Barclays and this is the basis on which the parties agreed to enter into the relationship.

112. It follows from this that no question of reasonableness arises and as a matter of construction of the relevant provisions, even if I had concluded that recommendations or advice had been given, the claimant is contractually estopped from asserting that Barclays gave advice or a recommendation to enter into the swap transaction. The essence of the claim is that the claimant alleges that Barclays assumed an advisory relationship through its information and explanations. This is the specific matter which is addressed in paragraph (a) "non-reliance" in the confirmation and the claimant is therefore estopped from asserting this.

UCTA

113. If I am wrong on this and the relevant provisions should be regarded as a clause which seeks to exclude liability for negligence in that they prevent a duty of care being owed where otherwise it would do so, then the provisions would have to satisfy the requirement of reasonableness under the 1977 Act. I bear in mind the factors listed in schedule 2 of the Act in particular the strength of the bargaining positions of the parties and whether the customer knew or ought reasonably to have known of the existence and extent of the term (having regard, among other things, to any custom of the trade and any previous course of dealing between the parties).

114. The claimant submits that there was a marked inequality in the parties' bargaining power and knowledge and experience of swaps. Mr Coleman also submits that the market for derivative products was one in which the products were complex and poorly understood by inexperienced purchasers. Further that the bank knew or ought to have known that the representations were untrue; that expert advice was not readily available to Thornbridge; the terms of the representations were not negotiated and the bank did not bring them to Thornbridge's attention until well after the swap was transacted.

115. Mr Mitchell submits that this was a principal to principal transaction in which the parties had different economic and commercial interests and it was perfectly reasonable in such circumstances to specify that Barclays would not act as an adviser; there was no relevant inequality of bargaining power in that Thornbridge could have gone to other banks; the Harrisons were shrewd business people with considerable experience in dealing with banks; the terms of the confirmation were consistent with the disclaimer in the presentation; the claimant could have sought advice from other sources and the terms were widespread in the banking industry.

116. I do not accept that there was an inequality of bargaining position on the basis that there were a significant number of banks which at that time could have provided Thornbridge with an interest-rate swap and Mr Harrison demonstrated his sense of equal bargaining power with Barclays in threatening to go elsewhere for the loan (even though he says in practice he did not have a bank lined up to do so). Although the disclaimer is not of itself determinative of whether objectively an advisory duty had been assumed, nevertheless the statement in the third paragraph of the disclaimer "*investors should seek their own advice as to the*

suitability of any investments described herein for their own financial or tax circumstances." is in my view a clear statement which had it been a concern would or should have alerted the claimant to the issue. Although the claimant did not receive the Confirmation until after the trade was done, the issue of whether advice had been provided could nevertheless have been raised at that stage had it been a matter of concern. The claimant was not put under any pressure to deal with the documentation quickly and could have taken legal advice had he seen fit.

117. The fact that this is a standard provision in swap confirmations does tend to suggest that initially at least the claimant would have found a similar provision had it chosen to go to another bank. However the significance of its inclusion is to make it clear that the parties' relationship is arm's-length, "execution only" and to remove any grey area between them. I do not accept that because the product was unfamiliar to the claimant, Barclays were required to provide advice or that in providing information to Thornbridge they were required to take on an advisory relationship. A bank entering into a swap with a counterparty has its own economic interest and this in my view was apparent to Mr Harrison. It is clear from the telephone conversations that he perfectly understood the financial implications of the swap and whether the swap payments increased in favour of Barclays or the claimant was dependent on movements in interest rates. There is no basis on which their interests can be aligned. Were Barclays to have acted as an adviser they would in my view have to provide that advice through an entirely different and separate part of the bank given the opposing and therefore conflicting commercial interests of the parties. As I have already indicated there is no evidence that Mr Harrison could not have taken his own advice. Accordingly in my view there is no reason why in the circumstances of this case, the provision should be held to be unreasonable and therefore to fall foul of the 1977 Act.

If the relationship was not advisory, was there a duty to provide information which went over and above the duty not to give inaccurate or misleading information?

118. I have concluded that Barclays assumed no advisory relationship with the claimant and on the evidence did not recommend or advise on the merits of the interest rate swap. However the claimant submits, relying on the dictum of Mance J in *Bankers Trust International plc v PT Dharmala* [1996] CLC 518 at 533, that although a bank owes no duty to explain the nature or effect of the proposed arrangement, "*if the bank does give an explanation or tender advice, then it owes a duty to give that explanation or tender that advice fully, accurately and properly. How far that duty goes must once again depend on the precise nature of the circumstances and of the explanation or advice which is tendered."*

119. The claimant also referred to the judgment in *Crestsign* at 135 -155 where the Deputy Judge held that a bank that undertook to explain certain hedging products owed the duty described by Mance J above.

120. Mr Mitchell submits that the duty of care in respect of information supplied in "execution–only" deals is no more than to take reasonable care to ensure that the information provided is accurate and not misleading. Mr Mitchell refers to the decision of Tomlinson LJ in *Green v Royal Bank of Scotland[2013] EWCA Civ 1197* at 17. Mr Mitchell accepts that it is a question of fact in each case as to what positive information (if any) is required in such a situation.

121. Mr Mitchell also notes that in *Crestsign* the judge rejected the claimant's "duty to educate" and found that the information duty extended on the facts only

to the correction of obvious misunderstandings and the answering of reasonable questions.

122. The passage quoted above from the *Bankers Trust* case covers two situations: where the bank gives an explanation or tenders advice. The duty however on the facts of that case was held to be lacking. The focus of the conclusion of Mance J at 555 is on the role of Bankers Trust as an adviser rather than on any intermediate duty and he does not find any intermediate duty on the facts. He said:

"in the circumstances as I have found them, most of the basis for the suggested duty to explain fully and properly the questions of terms, meaning and effect of swap 1 is lacking. It is true that there was a disparity in expertise between BTCo the one hand and DSS on the other. Nevertheless Mr Thio and Mr Kong were experienced in financial matters and deliberately interested themselves in a transaction which, in my judgement, they must well have understood to be speculative. They did not ask and they were not entitled to expect BTCo to act as their advisers generally. Nor did BTCo and BT I make a particular statement giving rise to any particular advisory duty at the meeting or in their letter of 19 January 1994 or otherwise."

123. In reaching that conclusion Mance J considered the argument that BTI should have disclosed the current market value of derivatives which they were proposing to sell. Mance J concluded at 554:

"*between independent contracting parties and in the absence of any positive representations or undertakings to inform or advise, the nondisclosure of the swaps "mark to market" value in January 1994 does not ground any legal obligation."*[emphasis added]

124. In relation to the allegations that BTI represented that its products were safe and could be replaced at no cost, he concluded they are "*likewise points that could be significant in the context of an advisory relationship, or if they rendered inaccurate or unreasonable the actual forecast provided...."*[emphasis added]

125. Accordingly it seems to me that the principle which can be derived from that case is that a positive duty would exist only in the context of an advisory relationship or (absent any undertaking to inform) if it rendered inaccurate or unreasonable the information provided. It is not in my view authority for a wider or broader duty to provide information in the absence of an advisory relationship.

126. The Deputy Judge in the *Crestsign* case came to the conclusion that the banks had chosen to provide information and therefore owed the broader duty. He referred to the dictum of Mance J at 533 which I have cited above and from that concluded that although the banks owed no duty to explain the nature and effect of the proposed transactions to the customer, in that case they had chosen to do so and accordingly that the banks had a duty to explain fully those products which they wished to sell. At 153 he says:

"*in my judgement, he came under a duty to explain fully and accurately the nature and effect of the products in respect of which he chose to volunteer an explanation, but I do not think he came under a duty to explain fully other products that Crestsign might have wanted to purchase but which he did not wish to sell, such as an interest rate product."*

127. In arriving at that conclusion the Deputy Judge accepted (at 150) that the bank needed to provide information about the products on offer in order to sell one of them to Crestsign and in doing so the bank had a duty not to mislead but stated that the bank must provide the explanation fully and accurately so that the customer was sufficiently aware of the nature and effect of the hedging products

on offer to be willing to sign up to one of them. He concludes: "*it seems to me that Mr Gillard's duty was to explain fully only those products which he wished to sell to Crestsign."*

128. As I have stated it seems to me that the dictum of Mance J relied on by the Deputy Judge is not as extensive as it might appear taken in isolation. Each case must depend on its facts but to the extent that the Deputy Judge was making a point of more general application, it seems to me that the Deputy Judge would in effect have elevated the duty of a salesman to that of an adviser. As I have already indicated in relation to the issue of whether the Bank assumed an advisory relationship, the authority of *Springwell* reminds the court of the distinction between an adviser and a salesman and in my view the duty of a salesman is not to mislead but in the absence of an advisory relationship, a salesman has no obligation to explain fully the products which it is trying to sell.

129. In relation to the Court of Appeal decision in *Green*, the Deputy Judge in *Crestsign* distinguished the case on the basis that it did not appear to have been argued that a common law duty of care in relation to the provision of information could arise independently of the COB rules. He noted that the *Bankers Trust* case did not appear to have been cited or to form any part of the reasoning. He also stressed that the decision in *Green* was in the context of the facts and submissions before them.

130. In my view the dictum of Tomlinson LJ is relevant regardless of any argument as to whether a common law duty of care could exist independently of the COB rules. The significance in my view of the dictum of Tomlinson LJ at 17 is that he sets out the extent of the *Hedley Byrne* duty and in so doing addresses the issue in this case, namely whether the *Hedley Byrne* duty extends beyond a duty to take reasonable steps not to mislead. He states:

"the judge observed, rightly in my view, although I paraphrase his language, that the Hedley Byrne duty does not comprise a duty to give information unless without it a relevant statement made within the context of the assumption of responsibility is misleading. Thus in so far as COB 2.1.3R refers to a duty to take reasonable steps not to mislead, this is comprised within the common law duty, <u>but in so far as it refers to a duty to take reasonable steps to communicate clearly or fairly, this introduces notions going beyond the accuracy of what is said which is the touchstone of the Hedley Byrne duty</u>. <u>The duty</u> imposed by COB 5.4.3R <u>to take reasonable steps to ensure that the counterparty to a transaction understands its nature the judge regarded, again rightly in my view, as well outside any notion of a duty not to misstate, as he characterised the Hedley Byrne duty to be</u>…."

I do not therefore accept that the case can be distinguished either on the basis that it was not argued that a common law duty of care could exist independently or as limited to its own facts. It is a clear statement of the extent of the common law duty although I accept that it was obiter.

131. I note that in *Crestsign* the Deputy Judge noted on the facts that there was no "*realistic prospect of timely access to adequate expert advice"* and this was a relevant factor in reaching his conclusion. That is a matter which on the facts of this case I have dealt with above and in my view it cannot be said in this case that there was no such realistic prospect.

<u>Did the terms of business applicable to the relationship between the claimant and the defendant give rise to an enforceable duty with regard to the alleged breaches? In particular did the words "subject to Applicable Regulations"</u>

<u>have the effect of incorporating the relevant rules of the FSA into the contract between the claimant and Barclays?</u>

132. The claimant contends that the bank owed it duties of materially the same scope in contract, in tort (negligence) and under the Financial Services and Markets Act 2000.

133. In relation to the alleged duty in contract Clause 1.4 of the Bank's terms of business provides:

> *"this Agreement and all transactions are subject to Applicable Regulations. If there is any conflict between this Agreement and any Applicable Regulations the latter will prevail. Further, if there is any conflict between this Agreement and the terms of any Transaction, the latter will prevail."*

"Applicable Regulations" is defined in clause 12.1:

> *"Applicable Regulations" means each of the following, as in force from time to time:*
> *(a) FSA Rules or any other rules of a relevant regulatory authority;*
> *(b) the Rules of the relevant Market; and*
> *(c) all other applicable laws, rules and regulations."*

134. Counsel for the claimant relies on the authorities of *Brandeis Brokers Ltd v Black[2001] 2 All ER (Comm) 980* and *Nram v Jeffrey Patrick McAdam [2015] EWCA Civ 751* for the proposition that the words "subject to FSA Rules" have the effect of incorporating the relevant rules of the FSA into the contract between the claimant and Barclays. In relation to the conflicting authority of *MTR Bailey Trading Limited v Barclays Bank plc [2014] EWHC 2882,* a judgment of HHJ Keyser QC who held that the identical clause did not give contractual force to the applicable regulations, Counsel submits that this court is not bound by that decision which cannot be reconciled with *Brandeis* and ought not to be followed. I note that the claimant in *MTR Bailey Trading* has been granted permission to appeal in relation to that point, amongst others.

135. In the case of *Brandeis* Toulson J was concerned with contracts with metal traders which made reference to the rules of the Securities and Futures Authority. The contracts consisted of a letter from the applicant which enclosed a document entitled "terms of business letter". The terms of business letter provided that:
"These Terms apply to all our dealings with you and any arrangements entered into on the basis of these terms shall be legally binding.
These Terms and all other agreements and arrangements relating to the subject matter of these terms are subject to the SFA rules.
All transactions effected by us on your instructions will, in addition, be subject to any applicable Market rules. In the event of any conflict (i) between the SFA rules and any market rule or these Terms, the SFA rules shall prevail and (ii) between these Terms and any market rules, the market rules shall prevail"

Toulson J rejected the argument that the clause should be interpreted such that in the event of conflict the SFA rules should prevail over the printed terms of business but that it was not to impose any contractual obligation on Brandeis to observe the SFA rules. He thus rejected the submission that it was to provide Brandeis with a let out clause in circumstances where the terms of the contract would otherwise have required it to act in a manner which contravened the SFA rules. Toulson J accepted that the parties could not have intended to incorporate the SFA rules in their entirety because they contained matters which would have no bearing on the way in which Brandeis was to perform the services which it

contracted to perform. However he concluded that the words at the beginning of the terms that "*these Terms and all agreements and arrangements relating to the subject matter of these Terms are subject to the SFA rules*" should be understood as meaning that both parties would be bound by the SFA rules.

136. In my view the case of Brandeis can be distinguished. The wording in Brandeis is different even though the words "subject to" appear. The provision in this case reads

"this Agreement and all transactions are subject to Applicable Regulations. If there is any conflict between this Agreement and any Applicable Regulations the latter will prevail. Further, if there is any conflict between this Agreement and the terms of any Transaction, the latter will prevail."

In my view a contrary view is appropriate for two reasons: firstly the term "Applicable Regulations" refers not only to the FSA rules but also to "*all other applicable laws, rules and regulations*." Whilst it is possible (in line with *Brandeis*) to read the reference to the FSA rules as a reference to only those rules which are of relevance to the dealings between the parties, in my view no such interpretation can be made in relation to the much broader formulation of "*all other applicable laws rules and regulations*" as it would result in uncertainty in the contract to a degree which would be unworkable. There is no basis for an interpretation of the clause that the relevant FSA rules are part of the contract pursuant to that clause but not anything else unless one was effectively to strike out the second half of the clause. This in my view is to strain the interpretation unnecessarily since the alternative interpretation is one which gives meaning to the whole clause; namely that the clause has the effect of limiting any provision of the contract which would otherwise contravene applicable laws and regulations including the FSA rules. It is dealing with the possibility of conflict –it is not intending to introduce into the contract an open ended right for the other party to rely on other provisions of domestic law where no such right exists independently. This conclusion is consistent with the reasoning of HHJ Keyser in *Bailey*. The Court of Appeal decision in *Nram*, relied on by Mr Coleman, is in my view not of assistance. The reference at paragraph 21 of the judgment of Gloster LJ to the decision in *Brandeis* is in my view of no assistance: the decision of Gloster LJ on the point in issue turns on the fact that she found no express incorporation and she makes it clear that it is a question of construction of the relevant document.

137. In my view therefore for the reasons stated above there is no contractual right in existence for the claimant in respect of the Bank's obligations to comply with the FSA rules.

<u>Is there a direct right of action for breaches of the Conduct of Business Rules under section 138D of FSMA?</u>

138. The claimant submits that it can establish a direct right of action for breaches of the Conduct of Business Rules (the "COB rules") under section 138D of FSMA. By that section, a contravention by an authorised person of a rule made by the Financial Conduct Authority is actionable at the suit of a "private person" who suffers loss as a result.

139. "Private person" is defined in regulation 3 of the Financial Services and Markets Act 2000 (Rights of Action) Regulations 2001 and the relevant paragraph states:

"private person" means (a) any individual unless he suffers the loss in question in the course of carrying on any regulated activity…

(b) any person who is not an individual, unless he suffers the loss in question in the course of carrying on business of any kind;….."

140. Counsel for the claimant refers to the debate in the House of Lords concerning the legislative intention and states that the objective was to exclude litigation between market professionals. However he acknowledges that this argument was rejected by the courts in a number of cases most recently in *MTR Bailey Trading Limited v Barclays Bank plc* which relied on the decision in *Titan Steel v Royal Bank of Scotland*. I note that the decision in *MTR Bailey* is subject to appeal to the Court of Appeal on this point.

141. On the basis of the current law it seems to me there is no direct right of action for any alleged breach of the COB rules by way of direct action.

Findings of fact: breach of duty

142. Having considered the nature and scope of the duties owed by the claimant at common law, in contract and under statute, I turn then to consider the particular facts in this case. I have dealt with the issue of advice and the advisory relationship and set out my conclusions above. The claimant further submits that Barclays were in breach of duty in three respects: –
(i) providing inadequate information concerning break costs, ability to refinance and restrictions on portability.
(ii) failing to explain in the written presentation fairly clearly and properly the competing advantages and disadvantages of the hedging instruments
(iii) failing to provide information so that the claimant understood the unsuitability of the swap.

143. On the basis that I have concluded that there is no right of action for any alleged breach of the COB rules either under contract or by way of direct action I do not propose to consider the alleged breaches of COB rules in detail. However in broad terms there is considerable overlap between the alleged breaches of the COB rules and the conclusions reached on the three main heads of alleged breach of the common law duty set out below.

(i) Providing inadequate information concerning break costs, ability to refinance and restrictions on portability.

144. In his telephone conversation on 29 May Mr Burgess was clear that if the claimant was to break the swap it would be expensive and he explained how the break costs would be calculated. He said:
"... If you do a fixed rate at 5.68% and rates move down to say 5% or even 4%... fixed-rate, then it's going to be expensive to come out of, and to give you an example… If you think about each month, it could be £1000 or £2000 either way...multiply that out over five years, and if you decide to come out of that position all in one go, we could be looking at £70,000 -£100,000 quite easily on a 1% move".

145. Mr Coleman submits that the following statement of principle by Lord Reid in *Morris v West Hartlepool Steam Navigation Ltd* is of more general application:
"*it is the duty of an employer, in considering whether some precautions should be taken against a foreseeable risk, to weigh, on the one hand, the magnitude of the risk, the likelihood of an accident happening and the possible seriousness of the consequences if an accident does happen, and, on the other hand, the difficulty and expense and any other disadvantage of taking the precaution."*

146. Counsel for the claimant further submits that the Conduct of Business rules point to a requirement that the Bank would provide the claimant with such

information about break costs as would enable it properly to understand the risks of the transaction; to understand its advantages and disadvantages as compared with the other products presented in the written presentation; and to make a fully informed decision as to whether or not to enter into the swap. However given that I have found that there is no actionable right in relation to the COB rules, in my view this does not reflect the duty at common law as discussed above and this view is consistent with the decision in *Green v The Royal Bank of Scotland*.

147. Counsel referred to the Financial Conduct Authority's written submissions in *Green v The Royal Bank of Scotland* to the effect that to the extent there are potentially very substantial costs involved in the exercise of an exit or break terms, these should be disclosed to the customer in a way that is fair, clear and not misleading and which would enable the individual customer to understand the nature of the risks involved. Whilst the generic nature of the risk is a financial one, the true nature of the relevant risk cannot be understood without having regard to its potential magnitude.

148. Mr Coleman acknowledges that Mr Burgess did say that break costs could be "expensive", however the only illustrations given in the written presentation and during the telephone call on 29 May 2008 were for payments of £70,000-£100,000. In the expert witness report of Mr Walsh dated 21 July 2015 he gives a summary of indicative break costs. Based on this, Mr Coleman submits that the Bank would have been aware when the swap was entered into, that break costs of about £225,000 could have resulted in the event of a 1% fall in the market's expectations regarding future interest rates and the potential liability in the event of 2%, 3%, 4% and 5% falls might be as much as £440,000, £650,000, £870,000 and £1,090,000 respectively.

149. Mr Coleman submits that the Bank failed to provide full or proper illustrations of the break costs that might be payable in the event of a fall in interest rates. He submits that the information was easily available to the Bank and was of obvious importance to anyone in the claimant's position. He submits that the Bank valued its own potential exposure under the swap at £440,000.

150. Mr Coleman in his submissions refers to the paragraphs in the report dated 24 September 2015 of Mr Croft, the expert retained by the Defendant, that "*although in hindsight the fall in rates since 2008 has been very large indeed, the a priori statistical probability based on the recent history of sterling interest-rate movements of a shift in rates of more than 2% over a five-year period was small and in my view below a 3% probability."* (p937)
Counsel for the claimant sought to counter this view and submits that given the state of the financial markets and global economy in May 2008, the substantial falls could not have been prudently ruled out as a serious possibility and the risks were not so slight as to justify a reasonable and prudent banker from ignoring them. Further he submits that there were precedents for very low interest rates.

151. The defendant submits that no question of breach arises because the alleged "information" duty was not owed. Further Mr Mitchell submits that Barclays provided ample information to enable Mr Harrison to appreciate the level of potential break costs.

152. Mr Mitchell points out that the claimant's loan agreement required the claimant to enter into a hedging contract with a minimum of five years. He submitted that it is therefore critical that the claimant could not have broken the swap prior to its scheduled maturity unless the loan was repaid within the first five years thereby removing the need to have in place a swap. The defendant submits

that there is however no evidence that the claimant had any intention of repaying the loan within five years; on the contrary the A4E lease was for a minimum of 15 years with no breaks. Further there is no evidence that the claimant intended to refinance with another lender.

153. Mr Mitchell submits that Barclays could not have predicted with any certainty the breakage costs that Thornbridge might have incurred. The illustrations provided by Mr Burgess are not alleged to have been inaccurate. Barclays used its own proprietary models at the time rather than the Bloomberg models which have been used by the expert witnesses in preparing their reports in this case. If Mr Harrison had wanted details going beyond 1% he could and should have asked for more detail but given the probability of the rate dropping more than 2% was less than 1% Barclays cannot have been required to supply information to Thornbridge about so remote a possibility. An illustration based on a parallel shift (as the experts have done) does not reflect what would happen in practice. Mr Mitchell rejected the suggestion that the CEE limit reflected Barclays' own estimate of the break costs in the transaction.

154. Mr Mitchell also rejected the reference to the submissions made by the FCA in *Green*. He submitted that the position in those submissions is controversial, irrelevant and has never been judicially approved.

155. Dealing with the submissions, I have already stated that there was no duty at common law on the bank to provide full information but the bank was under a duty not to mislead when it provided examples of break costs.

156. At paragraph 77 of his witness statement, Mr Harrison stated:

"*My understanding of break costs was based on the alternative of just continuing to pay the extra few thousand pounds per month. Had I known or understood the actual level of potential break costs then I would have wanted to stay well away from the swap.*"

157. However in my view this statement does not fit with the surrounding circumstances. There was no evidence before me that the claimant might wish to refinance the 15 year loan within the five-year term of the swap agreement and accordingly the issue of break costs was very unlikely to arise. I do not accept the claimant's submission that it was open to the claimant to replace the swap with a cap during the five year period: in my view this could not have been done unilaterally given that a hedge was a condition of the loan and the swap obligations were secured on the property. I therefore accept the defendant's submission that on the facts of this case break costs would have been of little concern to the claimant.

158. Nevertheless the bank had a duty not to mislead and to the extent that Mr Burgess provided information on break costs, he had a duty not to mislead. I accept that as things turned out, the break costs could have been (and were as quoted in 2009 to the claimant) substantial (and the break cost figures calculated by Mr Walsh, the claimant's expert, are broadly accepted by Mr Croft); however I note that the particular figures relied on by counsel for the claimant and quoted above are for a termination of the swap agreement on the start date of the swap agreement. It is of course implausible that the swap would have been terminated on the start date of the agreement and thus amounts of that magnitude are inherently unlikely to have been incurred (p913). I accept however that the estimated break costs for a termination after one year remain substantial-a 1% fall shows indicative costs of c£190,000 and a 2% fall c£360,000. However it has to be borne in mind that the indicative costs produced by Mr Walsh are based on the

yield curve as at the trade date whereas the actual break costs will reflect the yield curve at the date a swap was broken and therefore the illustration provided can be no more than that.

159. Further and more significantly in my view, Mr Croft, at paragraph 12 of his report, notes that the table of break costs prepared by the claimant's expert, Mr Walsh, only illustrates downward shifts in interest rates. Mr Croft states that this "*is not realistic since, based on the conventional statistical approach used in the industry, the a priori probabilities of a move upwards would have been considered to be approximately equal to the probability of a move downwards. My experience of the mid-2008 period is that <u>there was a view among some market participants that the liquidity that was being injected into the financial markets as a response to the financial crisis would lead to inflationary pressures which would lead to higher interest rates. Some indication of this can be seen from the five-year swap rate, which increased from around 5% to 6% during the second quarter of 2008</u>, although it declined after the second quarter. <u>Increases in the swap rate would have led to break profits rather than losses.</u>*" [emphasis added]

160. Looking at Mr Croft's experience he has substantial experience in capital markets: in particular he worked for Citibank/Citicorp from 1983 to 1998, for ING Bank from 2000 to 2004 and American Express Bank from 2005 to 2008. His roles in those institutions included Director, Financial Markets Risk Management at American Express Bank and his roles at ING Bank included Global Head Market Risk and Financial Markets Risk. It seems to me therefore that Mr Croft is well placed to express both a market view and a financial statistical view and I accept his evidence.

161. Mr Coleman cross examined Mr Croft on the state of the financial markets and global economy in May 2008. Mr Croft accepted in cross-examination that as at May 2008 the financial markets were in a state of turmoil. He was asked whether in the light of that turmoil there was some prospect that some event or change or policy or government action might take place in the foreseeable future which would have a material effect on interest rates. He replied:
"*Certainly, and there were many different views, although I have to say I think there was a strong view amongst many participants in the market that interest rates would go up.*"

162. Mr Coleman referred to Mr Croft's report at paragraph 12 where he stated: *"My experience of the 2008 period is that there was a view amongst some market participants that the liquidity that was being injected into the financial markets as a response to the financial crisis would lead to inflationary pressures which would lead to higher interest rates."*

163. Mr Coleman put to Mr Croft that this was implicitly acknowledging that there were other market participants who thought interest rates would fall. Mr Croft accepted that there were two schools of thought.

164. He was asked about the statement in his report that the probability of movements of a shift in rates of more than 2% over a five-year period was small and in his view below a 3% probability. Mr Coleman asked whether the approach based on a priori statistical probability would not factor in the unique circumstances prevailing in the financial markets that is the turmoil in May 2008. Mr Croft accepted that this was not a robust analysis however he pointed out that whilst accepting that it was a period of unique turmoil and therefore the volatility was not going to be the same in the future as it has been in the immediate past, it did not tell you anything about the direction of rates

165. He was taken to the history of rate movements going back to the 1970s and in particular to rises in 1977 from 5% to 10% by June 1978 and in 1988 from 8.875% to 14.875% by October 1989 and 3.55 in July 2003. Mr Croft responded that they were quite different eras and they were both periods of uncertainty. He said: *"I would hate to try and tell you what the consensus view in the market was in 2008. Some people thought it was largely over at that stage."*

166. Mr Coleman also referred Mr Croft to the fact that the US base rate fell to about 1% in 2003 while Japan's base rate had not risen above 1% since 1995. Mr Croft observed however that he did not agree with Mr Coleman's comparison across countries and across eras. He agreed that you could not rule out the possibility of rates going down to half a percent in the foreseeable future but concluded: "*even amongst the people who thought interest rates would go lower, I very much doubt that there were any that thought it could go to one and then half a percent*."

167. He accepted that some would have thought that it might go below 3% but had no idea how many.

168. I accept the evidence of Mr Croft concerning the views held in the market at the relevant time including the view that there could be higher interest rates as a result of the liquidity injections and that the statistical probability of more than 2% movement over a five-year period was small. Notwithstanding the turmoil in the markets there was no evidence to support the contention that a reasonable person would have predicted falls of the scale that actually occurred and many thought that rates would rise. That the market view at the time was that rates would rise is in my view supported by the fact that, even within the limited period of the discussions on this transaction, swap rates rose slightly. In the call of 21 May Mr Burgess said "*the rates have gone up a fair bit, because we don't expect base to come down, as it did a few weeks ago*" although he acknowledged that "*in the longer term, there is a possibility the rates will come down*." At 21 May the five-year swap rate quoted was 5.39. By the time of the conversation on 29 May the rate quoted had gone up to 5.68. This (albeit slight) increase in rates indicates that the overall market perception at the time was that market rates would increase over the 5 year period.

169. Accordingly on the evidence in my view Barclays cannot be criticised for failing to give illustrations showing greater falls in interest rates. It is only with the benefit of hindsight that one can suggest that such low rates were reasonably to have been foreseen. Mr Croft rejected the comparison with earlier periods and across countries and I accept his view that such comparisons are inappropriate as they depend on the particular economic and political conditions prevailing at such times and in the relevant countries. Given this and the view that interest rates might rise, it cannot therefore be said to have been misleading for Mr Burgess not to give illustrations of the possible effects of more significant falls in interest rates.

170. In relation to the CEE limit it was common ground between the parties that Barclays had an internal limit but Mr Marsh was unable to say how it was calculated. In his original witness statement at paragraph 32 Mr Marsh sought to explain the CEE limit. He stated:

"before a hedge can be put in place the Bank's policy was that the Relationship Director needed to ensure that Credit was willing to allow the Bank to take on the risk of a hedge. The Bank accepted a degree of risk by entering into a hedging product with a customer as, if the customer becomes insolvent and defaults on its

hedge payments and at the same time interest rates have moved against the customer, the Bank may be left to bear the mark to market costs to terminate the hedge known as a breakage cost". When Mr Marsh came to give evidence he said before adopting his statement that he wanted to delete the words "*known as a breakage cost*". He was questioned in cross-examination on the reason for the deletion. He said he had read the statement overnight and decided of his own volition that it contained a mistake. It was put to him that this CEE limit relates to the mark to market cost that the bank would incur if the customer broke the swap. He replied:

"*I don't have a detailed understanding of what this CEE limit is, or indeed, more the point, how it is calculated. Because the bank had assumed a position, we were given a number by Barclays Capital and we had to communicate that internally. But it was an internal measure that still to this day I don't fully understand."*

He was pressed further by counsel but insisted that he was not sufficiently qualified to determine how that figure is arrived at or under what circumstances the position would crystallise.

Notwithstanding the late change to his witness statement which was challenged by Mr Coleman, I accept that Mr Marsh had no knowledge of how the CEE limit was arrived at and therefore he could not assist the court on this issue.

171. Mr Rainford in his evidence said that "CEE" stood for "credit equivalent exposure". He said that it was determined by putting it into a model which he described as "*a black box that determines an output based on historical market rates, future market rates, the transaction, the type of transaction, the length of the transaction, future volatility."*

172. He was asked whether he accepted that the CEE figure broadly corresponded to the break costs that the claimant would pay. Mr Rainford responded "*possibly in extremis*", that it was not a calculation of the estimated break costs at the point that it was done. He said that it was a limit which the bank uses to manage its own book as opposed to the customer. He said:

"*I'm not saying there's no connection because clearly in extremis you can have situations where the break cost, as we know, was actually higher than the CE limit but it's not meant to be a measure on day one or an estimate of the breakage costs."*

He was asked whether it provided any indication of the claimant's potential exposure to break costs albeit in extreme circumstances. Mr Rainford replied "*an indication, I think, in the sense that the size and duration of a transaction will partly determine how big a CE then it is."*

173. In the absence of further evidence I cannot reach a conclusion on the relevance of the CEE limit to the scale of the potential break costs. Without further explanation it cannot be inferred that the scale of break costs as at May 2008 was equivalent to the CEE limit such that the figures provided by Mr Burgess can be said to have been misleading.

174. In conclusion for the reasons stated above, I find on the evidence that there is therefore no basis for concluding that it was misleading for Barclays to give the examples of break costs which it provided on the call. In my view this is an allegation with the benefit of hindsight as illustrated by the following exchange that took place between Mr Burgess and Mr Harrison in January 2009 (P410):

JH: "*well I mean well it's true .. I mean this thing was put in place, the swap was put in place to protect Barclays if you like against and my business against interest rate rises which meant that the company wouldn't be able to afford the*

mortgage based on the rental income because the rental income is fixed and Andrew said well we need to put this in place in case interest rates rise in which case we covered off when in actual fact it's costing me an absolute bloody fortune."

JB: "*yeah because interest rates have gone down*."

JH "*I know, I know hindsight is a wonderful thing,… part of the deal was an insistence that it was done in case interest rates went the other way and it's going to cost me an absolute fortune."*

JB: "*I know, it's something that at the time there was quite a lot of concern about inflation which was the complete opposite to what actually was going on in the economy."*

175. This exchange, albeit at a time when rates had moved against the claimant but before litigation was contemplated, encapsulates the position. In my view in the circumstances of Barclays' knowledge at the time there was no requirement on Barclays to give examples of the effect of greater falls in interest rates.

176. In his closing submissions Mr Coleman submitted that the allegations as regards refinancing and transferring the loan were implications of the break costs problem. In cross examination, Mr Rainford was asked about the advantages and disadvantages of swaps compared with a cap. Mr Rainford was asked whether he would agree that one of the advantages of a cap is that a swap may give rise to problems with refinancing, particularly if interest rates go down, because the security is charged with the swap and one would have to pay break costs in order to refinance with another lender. Mr Rainford agreed that swaps were less flexible because of what Mr Coleman had outlined. Mr Coleman further put it to Mr Rainford that this is all information that a customer in the position of Thornbridge would need to understand in order to make an informed choice as between a swap and a cap. Mr Rainford replied:

"*certainly as part of the dialogue that would have been explored. I would expect it to have been explored."*

177. Since I have already concluded that the *Hedley Byrne* common law duty of care was limited to a duty not to misstate information and does not extend to a positive duty to provide information, there can be no justified complaint in relation to the absence of any discussion between Mr Burgess and Mr Harrison of the implications of break costs of the swap on refinancing or transferring the loan. Even if I were wrong on that, it seems to me that Mr Rainford was not being asked the question in the context in which Thornbridge was looking to fix its borrowing namely that it was a requirement of the loan that it had a hedging instrument in place for the first five years. On the basis that a hedge needed to be in place and there was no evidence to suggest that Mr Burgess was aware of any desire on the part of Thornbridge to refinance the loan during the initial five-year period, it seems to me that in the circumstances there would have been in any event, no requirement or obligation on Barclays to point out to Mr Harrison what would happen if he wanted to refinance and transfer the swap during the five-year term. There is no evidence that Mr Harrison had in mind to transfer the loan within the initial five-year period. It was a 15 year loan agreement supported by a long lease. It was not inconceivable that the claimant might choose to refinance the loan at some point in the future but this was not an issue which Mr Harrison raised and there was no duty on Barclays in the circumstances to identify this as a possible concern and address this point.

(ii) Failing to explain in the written presentation fairly clearly and properly the competing advantages and disadvantages of the hedging instruments

178. The claimant alleges that the Bank failed to explain in the written presentation fairly, clearly and properly the competing advantages and disadvantages of the hedging instruments in that it wrongly stated break costs were payable in relation to the cap; it used obscure words which suggested that a cap and collar would only be attractive if the customer was concerned about the difference between the interest rate under a cap and the interest rate under a swap and did not mention the ability to benefit from falling rates; it failed to mention that with a cap there were no issues as to refinancing and portability.

179. Mr Coleman submitted that Mr Rainford essentially admitted failing to explain in the written presentation fairly clearly and properly the competing advantages and disadvantages of the hedging instruments.

180. Mr Mitchell rejected the evidence of Mr Rainford as amounting to opinion evidence.

181. In my view the short point made by Mr Mitchell is a good one. Mr Rainford was not called as an expert witness. His views on whether the presentation therefore fairly set out the competing advantages and disadvantages of the hedging instruments amount to opinion evidence and of little weight. It is a question for the court to determine as a matter of construction and applying the relevant standard of care whether in the circumstances this presentation was misleading so as to amount to a breach of the *Hedley Byrne* duty of care. In any event it seems to me that Mr Coleman places undue reliance on the evidence of Mr Rainford. The relevant exchange was as follows:

C: *"a cap might be attractive to a customer for reasons that have no connection at all with the slight difference between the fixed rate and the base rate. Is that not right?*

R: *Yes. There could be lots of other reasons.*

C: *For example, the customer might prefer a cap because he can take advantage of the falling interest rates.*

R: *Yes*

C: *"..and the other advantages which we were talking about earlier. None of those other advantages that we were talking about earlier are mentioned as potential considerations on this page, are they?*

R: *"... I am saying yes, you are correct and my answer is yes, they are not but, again, I don't know what conversations happened in the buildup to John preparing this document for the customer."*

182. It seems to me that the evidence of Mr Rainford is that he accepts that these other factors identified by counsel are not mentioned but Mr Rainford points out, rightly in my view, that the presentation has to be read in the context of the surrounding discussions which Mr Burgess had with Mr Harrison.

183. Mr Coleman continued in cross-examination, putting it to Mr Rainford that the statements were incomplete and therefore not fair. Mr Rainford responded:

"*no, because this is just one part of the sales process and, again, you know, I'd find it would be very surprising if John hadn't had the conversation with the customer about the different products."*

C: *"we are dealing with the evidence we have got. Let us just assume that there was nothing else in the conversations and that this represents effectively a complete statement.*

R: *"If this was the only thing the salesperson had showed the customer and there was no other dialogue, then yes, it's incomplete and unfair…. As a document on its own with no context as to the end to end to sales process it would be unfair because it has clearly not gone through enough detail…"*

184. In my view the evidence of Mr Rainford was that this document viewed in isolation did not set out the advantages and disadvantages of an interest-rate cap. However it was being put to Mr Rainford that the document was incomplete and Mr Rainford was making an assumption that there was a duty on the bank to explain fully the advantages and disadvantages of the alternative products. In the light of my finding that in the circumstances of this case there is no such actionable duty either at common law or in contract or under statute, as alleged by the claimant, then the evidence is of little assistance. The scope of the duty in this case as I have found, is a *Hedley Byrne* duty in essence not to mislead or misstate; there was no duty to give full information about the competing advantages and disadvantages of the products. It was not an advisory relationship. Mr Harrison accepted in cross examination that the three products had been discussed on the telephone call on 9th May and then the email was sent attaching the presentation. The presentation has to be read not as a freestanding information guide on derivative products but a written document to supplement the telephone conversation that had gone before.

185. On that basis the Bank had a limited duty of care at common law and in my view the only misleading statement was the statement at the bottom of the page headed "Interest Rate Cap" that stated "*mark to market gains/losses will apply if the hedge is exited early."*

186. I will consider below the issue of causation and whether this particular statement was causative of the claimant's alleged loss.

(iii) Failing to provide adequate information so that the claimant understood the unsuitability of the swap

187. The claimant submits that Mr Burgess failed to provide adequate information so that the claimant understood the unsuitability of the swap and the swap was unsuitable because the payments under the swap and the loan were not constant; in other words the swap and the loan did not limit the claimant's contractual obligations to £51,000. The significance of the sum of £51,000 is that the bank wanted to ensure that the rent from the property (£55,416 per month) gave sufficient coverage to service the loan.

188. Mr Coleman submitted that the failure of the loan and the swap to interact such that a rise in the liability under the swap was not automatically offset is not consistent with the claimant's pleaded investment objective which was protecting cash flow and profit against adverse movements in rates. The objective could only be achieved through the restructuring which took place in 2009.

189. He further submitted that the claimant did not have a right to make a change in the monthly payments and that therefore the Bank could have required the claimant to make payments in the amount of £50,069.75 until the loan was repaid.

190. He relies on the evidence of the email of 22 January 2009:
"*The problem with swaps is always going to be that the cash flows can only be calculated based on the fixed rate or base rate when the deal is placed"*
and the email of 30 January 2009*:*
"it is never a perfect situation, but if we were to go back and total up the payments that Jim has made to date across both the swap and the loan, compare

them against the attached annuity stream at 7.15% and this will give us the overpayment on the position. The refund to Jim would effectively be a redrawing of the loan back to the correct notional amount as per the attached annuity stream."

191. Barclays say that the loan payments could have been adjusted under condition 3.3 of the Loan Agreement.

The relevant provisions of the Loan are as follows:-

Under the loan agreement dated 11 April 2008, it states under the heading "Repayment":

"*Repayment shall be made in 180 instalments of principal (together with interest) of £50,069 .75 payable monthly commencing one month after first drawdown with interest debited to loan account.…*

Where relevant, the instalment amounts specified above are subject to adjustment under condition 3."

The figure of £50,069 .75 comprises both principal and interest.

Under the heading "Interest" the loan agreement states:

"Interest shall be payable in accordance with condition 5. The bank's margin in respect of the Facility (the "Margin") shall be 1.500% per annum. Subject to the provisions of condition 5, interest shall be calculated: – Base Rate Basis: at a rate equal to the aggregate of the Margin and the Base Rate. Condition 5 contains provisions under which the basis on which interest is calculated may change from time to time during the term of the Facility – see condition 5.3 to 5.5.

Interest shall be debited to the account as specified above under the heading "Repayment", throughout the term of the Facility."

Condition 3.3 of the Terms and Conditions of the Loan states:

"if the Bank agrees that interest on the Loan is to be capitalised and debited to loan account, the amount of each repayment instalment specified or referred to in the Offer Letter under the heading "repayment" will be reviewed by the Bank annually and on each occasion that the basis on which interest on the loan is calculated changes in accordance with condition 5. The Bank will advise the Borrower of any variation to the repayment instalments and the Borrower shall thereafter be bound to repay the loan in such instalments."

192. Alternatively Mr Mitchell submitted that the loan instalments were not fixed: it was open to the bank to alter the instalments. He submitted that a contrary interpretation would mean that if interest rates had increased, the claimant was not required to pay the increased interest rate but only to pay the fixed instalments with the result that the loan would not be repaid within the 15 year term. Similarly he submitted that if the instalments were fixed and could not be changed then, if interest rates fell, principal would be paid off more quickly and the claimant, if it was obliged to make the 180 instalments expressly provided for in the Loan Agreement, would have overpaid Barclays.

193. As the claimant points out, condition 3.3 is only relevant where the Bank has agreed that interest on the loan is to be capitalised. I am not satisfied on the evidence before me that Barclays had agreed to capitalise the loan interest from the outset. I asked Mr Marsh how interest was calculated and he was unable to assist the court. I therefore proceed on the basis that interest was not being capitalised and the Bank was not able to adjust the payments under the loan under condition 3.3.

194. However I do not accept the contention that the instalments were fixed irrespective of movements in interest rates. Mr Coleman accepted that if interest rates fell with the result that the claimant paid off the principal of the loan more quickly, it was open to the claimant in those circumstances to reduce the number of instalments. He also accepted that the Bank was entitled to be repaid so it was open to the Bank to increase the instalments to ensure the amount was repaid at the prevailing rates. I see no basis on the face of the document for accepting an implied right on the part of the claimant to reduce the number of instalments to avoid overpayment of principal if rates had fallen and an obligation to increase the instalments if the rates increased, but no implied right or obligation to reduce the amount of the instalments if the rates fell.

195. I do accept that the fixed instalment amounts specified in the loan agreement did not take account of base rate movements and as a result the payments under the loan had the effect of paying off principal more quickly than anticipated.

196. In my view however, even if I am wrong on the implied terms of the loan, this does not mean that the swap was unsuitable. The issue of the aggregate payment exceeding £51,000 arose because the loan payments did not reduce when the base rate fell. When Mr Burgess was explaining the mechanics to Mr Harrison in his conversation on 29th May, he calculated the monthly payments under the loan and swap as £51,388 split as to £49,249 payable under the loan and £2,139 under the swap. He gave the example of base rates going down to 4.5% in which event he said the claimant would be paying £47,707 but under the swap the claimant would be paying £3,681. If the loan payments had reduced when the base rate reduced then this would have compensated the claimant for the increased payment under the swap.

197. That this is what should have happened to the loan is borne out by the evidence of the telephone conversation between Mr Harrison and Mr Burgess on 20 of January 2009 when Mr Burgess called Mr Harrison to discuss the payments that had been going through the accounts. (p407)

198. Mr Burgess initially says that it was the result of the interest rates changing so quickly and that there is a lag between the interest rate swap and the loan payments being adjusted. Later in the conversation he states :*"I think it's just it's just fallen out of line because … the interest rate moves had not been adjusted on the loan.*"

He then explains to Mr Harrison that the additional amounts that he has paid on the loan have been "knocked" off the capital.

The conversation continues: –

JB: *"right fine so it should be just a match off on the account because up until the end of September it would have been perfect because base was at 5… It's when base started falling drastically that the mismatch happened in the fourth quarter.*

JH*: "Well it seemed to me that I was paying £50,000 mortgage and about £3000 on the swap so I was paying out £53,000.*

JB: *"Yes and the swap started to charge you aggressively and the loan continued to charge you at the same pace.*

… nothing was adjusted on the loan which needs sorting out… It's quite straightforward I can see the figures on the swap it literally will be just the loan needs to be calculated against the base as it should have been".

199. I think the swap did what it was supposed to do: it limited the claimant's liability to rising interest rates so the amount of interest it would have to pay under the loan was protected through the swap. If interest rates had gone up, the

instalments under the loan could not have remained fixed and would have needed to increase to reflect the increased interest due and ensure the total payments were sufficient to cover both interest and principal and that the loan was repaid within the 15 year term; however the liability of the claimant to pay higher interest amounts under the loan would have been protected through increased payments received from Barclays under the swap. In the event interest rates fell but the principle remains valid: the swap did what it was supposed to do and paid the claimant an amount reflecting the amount of interest due under the loan at the then prevailing base rate. Had Barclays adjusted the loan instalments more quickly, then the overpayment of principal under the loan would not have occurred but this failure to adjust the loan instalments does not establish that the swap was unsuitable or that the information provided in relation to the swap was inadequate. When interest rates fell, the net amount payable by the claimant under the swap increased as the floating amount due to the claimant reduced. The increase in the claimant's payments under the swap was due to the increase in the differential between the floating amount receivable from Barclays and the fixed amount payable by the claimant. But in terms of overall cashflow as the amount receivable from Barclays under the swap fell with the change in the base rate, the amount of interest due under the loan fell. However as the loan instalment was not adjusted, the claimant did not see the benefit of the fall in rates reflected in the amount paid under the loan. So the total amount paid by the claimant was higher than anticipated. The claimant did not have any greater liability as a result of paying the fixed instalment under the loan as the excess over the amount of interest due was taken to repay capital.

200. In his email of 22nd January Mr Burgess stated (p416): "*it isn't a mis-sell because in placing the swap we have managed his interest costs for five years and now we need to agree with him how he wants to manage his cash flows after the unforeseen aggressive interest rate movements because it would be impossible to manage these flows until knowing retrospectively when base had moved. The problem with swaps is always going to be that the cash flows can only be calculated based on the fixed rate or base rate when the deal is placed.*

"… I believe that he already understands the position that in straightforward terms, as base falls lower, he is paying capital off the loan at a faster pace without the offset to the reset payments under the swap deal. This is not at a cost, but is a cash flow issue and the discussion needs to take place on how he wants this to happen going forward should the level of base change again.… I understand the issues that he currently faces because in January he will see a loan charge of £39,326 and a swap reset of approximately £19,000 and so a monthly gross cost of approx. £58,000. The question to Jim is whether he wants to eat into the capital now with a loan repayments set at £39,326 or should the loan repayment be reduced to offset the swap payment currently being charged in preparation for 2013 when the swap falls away when you can increase the loan repayments to ensure that the loan is repaid to nil at maturity? So in other words, Jim is looking at paying an extra £6000 for the next 4 1/2 years at a fixed rate and then if rates stay constant until maturity of the loan he will see a loan cost of £39,326 – does he want this to match income flows?

A change to the loan cash flows would need credit approval but with the swap already booked a restructure of the deal as an alternative could get more complicated as would be way off market or involve a break fee"

201. I think that this email from Mr Burgess correctly sets out what had happened. Mr Burgess did not incorrectly state the position to Mr Harrison in his telephone conversation in May 2008. The liability of the claimant under the swap and the loan was limited as he explained. However as the loan instalments were not adjusted this had the effect that the claimant was paying off more principal than had been intended.

202. The restructuring in 2009 was to allow the claimant to redraw the principal of the loan which had been paid as a result of the instalments being maintained at the same level and then to adjust the payments to fit the claimant's payment schedule going forward. The restructuring was not the result of any unsuitability in relation to the swap and does not demonstrate that the swap was unsuitable when entered into.

<u>If there was a breach of the common law and/or contractual and/or statutory duty, has the claimant established that it would have entered into a cap instead of the swap?</u>

203. Turning then to the issue of causation, there is the issue of causation in relation to the failure in the presentation to make it clear that break costs did not apply to the cap as well as the broader issue of causation which falls to be considered only if I am wrong on my conclusions on either the extent of the common law duty of care or the existence of a contractual or statutory right of action. There is an overlap in relation to the arguments advanced but I will deal with it separately as there is an additional argument which is relevant only to the presentation.

204. Mr Coleman submits that the claimant would have entered into a cap rather than a swap if properly advised and informed. Mr Coleman relies on the evidence of Mr Harrison at paragraph 55 – 59 of his witness statement and in particular at paragraph 57 and 58:
"having now been told how a cap works, that would certainly seem to me, to be the most straightforward of the options that would have been available to the Bank.…"
Paragraph 58: *"<u>if the cap been explained in greater detail, in comparison to the potential downside risks of the swap then I would have taken out the cap</u>. I had the funds readily available to pay the premium that was quoted for a cap, upfront if required, …. As far as I understood, under the swap I was paying an extra few thousand pounds per month for an insurance policy, and so if the swap and cap had been presented and sufficiently discussed, paying a premium for a cap would not have put me off."[*emphasis added]

205. Mr Coleman submits that the Bank did not challenge Mr Harrison's evidence that the claimant wanted the most straightforward product. He submitted that if the Bank had performed its obligations in relation to the written presentation and presented the advantages and disadvantages of the hedging products fairly clearly and accurately, the claimant would have been clear of the following advantages of a cap over a swap: the claimant would benefit from any falls in interest rates: there would be no liability to pay break costs under a cap; break costs under a swap could restrict the claimant's ability to refinance the loan, a problem that would not arise with a cap. As a result the claimant submits that if the presentation had fairly, clearly and accurately described the advantages and disadvantages of the products, Mr Harrison would have formed the view that the cap was the most straightforward product and would have chosen it.

206. Further Mr Coleman submits there was a strong financial case for a cap over a swap namely that if interest rates had remained the same or fallen over the life of the hedging product, a cap would have been cheaper. When base rate was at 5% at the commencement of the swap, the claimant was paying £3000 per month which would have been £180,000 over the life of the swap as compared with an upfront premium of £110,137 for the cap. That gap would widen as interest rates fell. Interest rates had to rise for the gap to narrow and a cap would have protected the claimant against rises above 6%.

207. Mr Mitchell submits that the claimant would not have bought a cap on the basis that the claimant had to enter into a hedging contract, the money markets

expected, and were pricing in, a rise in base rate over five years, the claimant had no particular view on how the base rate was likely to move, its concern was only to obtain protection against rises in the rate in order to ensure that it could continue to meet its loan repayments from its anticipated rental income. A swap enabled the claimant to fix its interest rate and gain protection from rate rises and no premium was required. A cap would also have provided protection from rate rises but on the claimant's case, only when the base rate was at 6%. A premium would be payable upfront of £110,137. Mr Mitchell therefore submits that it would only make sense for the claimant to buy a cap if, contrary to the prevailing view in the market, it was of the opinion that the base rate was likely to fall so far and for such a period of time that the claimant would recoup the premium by being able to pay loan interest at the prevailing base rate.

208. Mr Mitchell further submitted that Mr Harrison had only read the page of the presentation concerned with interest-rate swaps and as a result was not misled by any "obscure" wording for example on the page dealing with caps.

209. Following the conclusion of the oral submissions the parties have made (unrequested) written submissions to the court on causation including points on the pleadings. I do not see any merit in the points raised by the claimant on the pleadings. The claimant was given permission on the first day of the trial to amend its pleading to include paragraph 2.8(2) in essence an allegation that the defendant failed in the written presentation to describe the competing advantages and disadvantages of the hedging products fairly clearly and accurately and Mr Harrison was cross examined on the presentation in the light of that amended pleading.

210. Dealing first with the question of whether Mr Harrison read the presentation. Paragraph 37 of Mr Harrison's witness statement states:
"Burgess also attached a presentation document entitled "Interest Rate Risk Management Strategy" which was dated 9th May 2008. Page 2 of the presentation identified which products were being covered, the first of which was the "interest rate swap/fixed rate". <u>Having read this</u>, and in light of Burgess's email I considered that he was directing me towards the fixed rate/swap, which he'd already discussed as being the "simplest" way forward in the previous conversation…

211. Paragraph 46: *"From Burgess's initial email of 9th May 2008 onwards, I considered that he was advising me to take the swap. <u>On the back of this, I didn't even give any thought to the other products that may have been available,</u> not that I was really aware of any, and Burgess certainly didn't bring these to my attention or discuss them in any detail…"* [emphasis added]

212. Mr Coleman submits that the fact that Mr Harrison was not interested in the rest of the document does not mean that he did not read it.

213. Mr Mitchell relied on the words "*having read this*" in paragraph 37 of the witness statement as implying that Mr Harrison had only read page 2 of the presentation relating to swaps. Whilst I acknowledge that this is a possible interpretation it is far from clear and in my view the most likely interpretation is that he is referring to the presentation as a whole.

214. Looking carefully at the transcript of Mr Harrison's cross-examination it does not seem to me that Mr Harrison clearly said that he only read the page of the presentation concerned with interest-rate swaps, however it is clear that his evidence was that he paid no attention to the other products and therefore cannot be said to have been misled by any failings which might exist.

215. The relevant exchanges are as follows:

In answer to a question as to whether or not in the light of Mr Burgess' email Mr Harrison considered that Mr Burgess was directing him towards the swap he replied:

"*I didn't even give any thought to the other products that may have been available, not that I was really aware of any*"

and in answer to the question "*the email was directing you to a swap and that because of that, when you came to look at the presentation, although you read page 2, you considered that the direction from Mr Burgess was just to the swap and so you did not give… any thought to the other products. Have I got it right*?" Mr Harrison responded:

"I took his advice on which one of the recommendations that we should be looking at. So we were focused straightaway on that page 2."

Mr Mitchell put it to him: "*You read the page 2 but because of this steer, the direction, you just look at the swap page and you are not interested in the other products because of what Mr Burgess has said in the email that attaches the presentation. Is that correct?"*

Mr Harrison replied "*yes"*.

216. I do not think this can properly be taken as confirmation that Mr Harrison did not read the rest of the presentation but it is clear that he paid no attention to the other products. There is no evidence that he was misled into thinking that there were breakage costs in relation to the cap and that he would have entered into the cap had he not been misled into thinking that there were breakage costs. In my view there is no causative link on the evidence between any misrepresentation or omission in the presentation in relation to the information on the cap, including the statement suggesting break costs were payable in relation to the cap, and the decision to enter into the swap.

217. In relation to the other points raised, I have already referred to paragraph 77 of his witness statement in which Mr Harrison stated:

"*My understanding of break costs was based on the alternative of just continuing to pay the extra few thousand pounds per month. Had I known or understood the actual level of potential break costs then I would have wanted to stay well away from the swap."*

For the reasons stated above in my view this statement does not fit with the surrounding circumstances. There was no evidence before me that the claimant might wish to refinance the 15 year loan within the five-year term of the swap agreement and accordingly the issue of break costs was very unlikely to arise. There would be no liability to pay break costs under a cap but as I have already concluded for the reasons set out above, this potential liability was unlikely to have influenced Mr Harrison and there is no evidence that it did.

218. In relation to the submission that with a cap, the claimant could have benefited from falling interest rates, I have referred to the relevant extracts of the cross examination of Mr Croft above: Mr Croft did accept that there were two schools of thought but his primary view was: "*there were many different views, although I have to say I think there was a strong view amongst many participants in the market that interest rates would go up."*

I think that it is therefore distorting his evidence to place reliance on his acknowledgement that rates "might"fall. The predominant market view was that rates would rise-as indicated by the fact that the 5 year swap rate had gone up-and

therefore there was no certainty that the claimant would benefit from falls in interest rates.

219. Both a cap and a swap would have provided the claimant with protection from an increase in interest rates. If interest rates fell, under a swap the claimant would have fixed his liability so would have had to make a net payment to the Bank whereas with a cap no payment would have been due under the cap. However the evidence was that Mr Harrison had no personal view on the direction of rates and as I have found above, on the evidence the predominant market view was that rates would rise. A swap does not require a view on rates whereas with a cap this would only be taken out if you thought rates would rise, had a view on where to place the limit on how high rates would rise and were prepared to pay the premium. If you did not know what would happen to rates a swap gave you protection against the risk of a rise in interest rates without having to pay a premium. As stated above, the downside risk in the sense of the potential liability for break costs was in the circumstances of this case unlikely to have been a concern. Accordingly in the circumstances of this case it cannot be said in my view that a cap was the most straightforward product such that if it had been explained in greater detail the claimant would have entered into a cap.

Wider case on causation

220. The alternative submission made by Mr Mitchell that it would have been irrational for the claimant to have purchased a cap is of wider application to the issue of causation. Given my findings in relation to the scope of the duty at common law and the absence of a duty in this case in contract or under statute, it is not necessary for me to decide the point. However if I am wrong on the scope of the duty at common law or the absence of a duty in contract or under statute, and assuming a breach of any such duty, the issue of causation would be relevant.

221. Mr Coleman submits that the "new case on causation" was not clearly put to Mr Harrison in cross-examination. Mr Coleman's assertion is that had interest rates "remained the same or fallen over the life of the hedging product" a cap would have been cheaper.

222. Given the economic situation in May 2008 which is common ground, it is unlikely in my view that rates would have remained the same over the 5 year period of the swap. With hindsight it is clear that rates fell and to such a level that the claimant would have recouped its premium but as I have set out above on the evidence of Mr Croft and the statements of Mr Burgess on the call of 21 May, this was not the view in the market at the time, of the direction of rates over the term of the swap.

223. The key point on causation is, in my view, to be found in the cross examination of Mr Harrison:

"I'd entered into a process looking for protection against interest rate rises"

In other words, the claimant had to hedge its risk and protect itself against interest rate rises. It was accepted by Mr Coleman that Mr Harrison did not have a personal view on the direction of interest rates. Mr Harrison stated in his witness statement and in cross examination that he wanted to protect himself against the risk of increased rates. He was not looking to benefit from falls in interest rates. I therefore reject the submission of Mr Coleman made in closing that:

"Mr Harrison thinking rates might go up might also have wanted to have a bet both ways and the benefit of a cap if it went down."

Mr Harrison was not a trader speculating on rates. He was the director of a company that needed to hedge itself against the risk of rising rates. A swap is a

straightforward product in these circumstances. Mr Harrison's assertion that the cap is the most straightforward option is in my view an expression of opinion for which there is no basis other than with the benefit of hindsight. Mr Harrison says that:

"if the cap been explained in greater detail, in comparison to the potential downside risks of the swap then I would have taken out the cap".

He does not expressly state what those downside risks are but it would appear from his statement that he is referring to break costs and the cashflow problems that arose. The claimant was obliged to hedge for 5 years and therefore was not likely to have to incur break costs. It is therefore unlikely in my view that the absence of break costs on a cap, had he been made aware of the distinction, would have played any part in the decision in the circumstances. Further there was nothing inherent in the swap which meant that the cashflow objectives of the claimant could not be met through the swap. The cashflow issues which occurred were the result of the fixed instalments on the loan not being adjusted as the base rate fell.

Accordingly in May 2008, as discussed in more detail above, there was a market view that rates would rise and in those circumstances I am not satisfied that properly advised and informed, the claimant would have paid a premium and entered into a cap rather than a swap for which no premium was payable.

224. As far as the financial argument is concerned, I do not accept that the comparison between the swap payments and the cap premium should be made on the basis that rates would not have moved in five years. If rates had risen, the cap or the swap would have protected the claimant but the claimant would have been out of pocket in the sense it had paid the premium for a cap. In the event rates fell, but, for the reasons given in the evidence of Mr Croft, it was impossible for anyone to have predicted with any certainty or precision that rates would fall to a point where the premium on a cap would have been recouped or to have been able to predict the comparative cashflows of the swap such as to form a conclusion in May 2008 that a cap was a better option from a financial perspective.

225. For all these reasons the case on causation fails.

Conclusion

226. This is in my view a case based on hindsight and a loan agreement which did not operate as the parties intended. As I have found on the evidence before me, it is not a case of a claimant being advised to enter, or being misled into entering, into a swap which in the circumstances was unsuitable. For the reasons set out above on the evidence before me the claimant's claim fails.

Postscript:

Since sending out the judgment in draft to counsel in the usual way in accordance with the Practice Direction, I have received comments from counsel on both sides querying the use of the words "assumption of liability" in paragraph 38 and the word "swap" in paragraph 220 (now 219). I accept that the meaning was unclear in paragraph 38 and paragraph 220 did not convey what I intended to say. I have therefore amended both these paragraphs to clarify the intended meaning. I am grateful to counsel for raising these issues.