Neutral Citation Number: [2016] EWHC 1236 (QB)

**IN THE HIGH COURT OF JUSTICE**
**QUEEN'S BENCH DIVISION**
**MANCHESTER DISTRICT REGISTRY**
**MERCANTILE COURT**

**Case No: A90MA058 and B40MA085**

Manchester Civil Justice Centre
Manchester M60 9DJ

Date: 08/06/2016

**Before:**
**HIS HONOUR JUDGE PELLING QC**
**SITTING AS A JUDGE OF THE HIGH COURT**

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**Between :**

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|---|---|
| **(1) STEPHEN FREDERICK FINCH**<br>**(2) OMNIA-CHEM LIMITED** | **Bank Claim Claimants** |
| **- and -**<br>**LLOYDS TSB BANK PLC** | **Bank Claim Defendant** |
| **-and-** | |
| **PROMONTORIA HOLDING 87 BV** | **Guarantee Claim Claimant** |
| **-and-**<br>**(1) STEPHEN FREDERICK FINCH**<br>**(2) PAUL KENNETH ABBOTT**<br>**(3) ANDREW RUNNACLES CHADWICK**<br>**(4) DAVID JOHN SCHOFIELD**<br>**(5) SCOTT GRAEME CAIRNS** | **Guarantee Claim Defendants** |

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**Mr Richard Slade QC and Mr Andrew Thomas** (instructed by **Berg LLP**) for the **Bank Claim Claimants**
**Mr Ian Wilson** (instructed by **TLT LLP**) for the **Bank Claim Defendant**
**Mr Michael Watkins** (instructed by **Quinn Emanuel Urquhart & Sullivan UK LLP**) for the **Guarantee Claim Claimant**
**Mr Richard Slade QC and Mr Andrew Thomas** (instructed by **Berg LLP**) for the **Guarantee Claim Defendants**
**The Third Guarantee Claim Defendant** did not appear and was not represented

Hearing dates: 26-29 April; 3-4 and 6 May 2016

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**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.

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HIS HONOUR JUDGE PELLING QC SITTING AS A JUDGE OF THE HIGH COURT

**HH Judge Pelling QC:**

## Introduction

1. This is the trial of two claims. In the first claim ("the Bank Claim"), the Bank Claim Claimants sue the Bank Claim Defendant ("the Bank") as the assignees of a cause of action formerly vested in Bredbury Hall Limited ("BHL"). Until it went into administration in March 2014, BHL traded as Bredbury Hall Hotel and Country Club ("the Hotel"). The First Bank Claim Claimant, Mr Stephen Finch ("SF"), was the registered holder of 46% of the shares in BHL and is and was the registered holder of a majority of the shares in the Second Bank Claim Claimant, Omnia-Chem Limited ("OCL"). In the second claim ("the Guarantee Claim"), the Guarantee Claim Claimant, Promontoria Holding BV ("PHBV"), sues the Guarantee Claim Defendants (each of whom was a fellow investor with SF in BHL) as the assignee of guarantees granted originally to the Bank by the Guarantee Claim Defendants.

*The Bank Claim in Overview*

2. The Bank Claim arises out of a loan agreement between the Bank and BHL dated 31 January 2008 ("the Loan Agreement") under which the Bank agreed to make a fixed interest rate loan of up to £11.6 million to BHL for a term of 10 years to enable it to purchase the issued shares in the company that then owned the Hotel and its business. In essence the Bank Claim Claimants allege that the Bank owed BHL a duty to advise it as to the existence within the Loan Agreement of any onerous terms prior to BHL entering into it and that in breach of that duty the Bank failed to advise or warn BHL as to the effect of clause 6.10(b) of the Loan Agreement. In addition, the Bank Claim Claimants allege that the Bank negligently misrepresented to BHL that the Loan Agreement had been "*tailored*" to its needs and they also allege that the Bank breached a collateral agreement made prior to signature of the Loan Agreement to the effect that the Bank would lend additional funds in the future if required to meet deferred consideration payments due to the vendor of the shares in the company that owned the Hotel and its business. In addition, the Bank Claim Claimants alleged fraud against the Bank and one of its officials. I return to that issue further below.

3. Clause 6.10(b) of the Loan Agreement imposed on BHL an obligation to make good any break costs incurred by the Bank as a result of the early repayment of the loan. The Bank Claim Claimants allege that it was only after the agreement had been entered into that the Bank informed BHL's directors that such costs would include costs incurred by the Bank as a result of it having to break a Swap agreement entered into by the Bank as a hedge against the risk posed by lending at a fixed rate funds borrowed at variable rates and that the break costs were then likely to exceed £1.5 million. They allege that in consequence BHL could not re-finance its borrowing requirements without paying and therefore also borrowing the break costs and that in consequence BHL was unable to re-finance at a lower interest rate. It is the Bank Claim Claimant's case that the Bank should have advised, but in breach of contract or duty failed to advise, BHL of the effect of Clause 6.10 before the Loan Agreement was signed by the parties. The Bank Claim Claimants' pleaded case is that had BHL been advised as the Bank Claim Claimants maintain it should have been it would not have entered into the Loan Agreement but would have obtained a facility from one of the other institutions to which BHL had been introduced by Ford Campbell LLP at a

floating rate of interest of between 1.4% and 1.5% above base rate without any provision similar to that imposed by clause 6.10(b) of the Loan Agreement. The Bank Claim Claimants maintain that it was BHL's inability to refinance at a lower interest rate that was the main cause of BHL's demise. Ultimately, BHL was placed in administration because of a demand for repayment of its overdraft which it could not meet.

*The Fraud Allegation against the Bank and Mr David Bowen*

4. By a late amendment made by consent on 22 February 2016, the Bank Claim Claimants alleged that the Bank fraudulently misrepresented to BHL (at a time when it was thought that the loan to BHL would be at a variable rather than a fixed rate) that it required a minimum amount of £10.8 million of the loan to be hedged against interest rate fluctuation. It was alleged that the representation was made by Mr David Bowen, who at the time material to these proceedings was employed by the Bank as a Relationship Director and was the official who led negotiations for the Bank with BHL. The Bank Claim Claimants alleged that the representation was false and made fraudulently both by the Bank and Mr Bowen personally – see paragraph 29B of the amended Particulars of Claim – even though Mr Bowen was not made a party to the Bank Claim. The only basis of the allegation of fraud was an inference that, it was alleged, should be drawn from an alleged inconsistency between what Mr Bowen had required from BHL (100% hedging) and the Bank's credit committee's requirement for a minimum of 50% hedging as reflected in an internal memo from another employee of the Bank on behalf of the credit committee, addressed to Mr Bowen.

5. By its amended Defence the Bank asserted that its commercial requirements and the minimum conditions imposed by its credit committee were different and that Mr Bowen as the relationship manager managing the relationship with BHL was authorised to require more hedging than the minimum requirement imposed by its credit committee. A witness statement was served signed by Mr Bowen in which at paragraph 47 he said in relation to the allegation of fraud made against him that "... *I was in any event authorised to determine the terms of the deal subject to the minimum requirement ...*".

6. In the course of Mr Slade's opening submissions, I questioned whether this material could properly be the subject of a fraud allegation but the allegation was maintained – see T1/31/2 to 32/20.

7. When the time came for Mr Bowen to be cross examined on this issue, Mr Bowen was asked to confirm and he confirmed what he said in his witness statement, namely that he had authority to go above the minimum figure specified by the Credit Committee – see T5/63/4-10. He was asked whether his authority was supported by any internal guidelines and he said that he could not be certain because it was a long time ago and he no longer worked for the Bank – see T5/64/15-25. Mr Bowen left the Bank's employment in 2014 after being employed by it for in excess of 30 years and is currently employed as the Branch Manager for another commercial bank. At this stage the allegation of dishonesty made against Mr Bowen had not been put to him. Mr Slade then sought instructions and having done so said this:

> "MR SLADE: I think it is appropriate at this juncture, my Lord, that I mention that in the light of Mr Bowen's answers we are not going to pursue the allegation that in the email of 9 January he said things that he knew to be untrue. I just want to make that clear.
>
> JUDGE PELLING: Does that mean the fraud allegation is withdrawn?
>
> MR SLADE: The fraud/misrepresentation allegation is withdrawn, yes.
>
> JUDGE PELLING: We will say no more about that now, I note what you say."

At the end of Mr Bowen's evidence, the following exchange took place:

> "JUDGE PELLING: I have no questions.
>
> Mr Slade, I wondered whether, in the light of the withdrawal of the allegation of fraud you made, there is anything else you would want to say in the presence of this witness in case he will not be here for the rest of the trial?
>
> MR SLADE: All I would say, my Lord, is that we have withdrawn it unreservedly, we made it, but we can see in the light of Mr Bowen's witness evidence that he gave before your Lordship that we cannot maintain that he deliberately misled us in any way in the 9 January email. We unreservedly withdraw the allegation that he deliberately misled us in that email.
>
> JUDGE PELLING: Very well.
>
> You will understand that an allegation of dishonesty was made against you by the claimants.
>
> **A. Yes, my Lord.**
>
> JUDGE PELLING: That they have withdrawn it, and it is as if it was never made.
>
> **A. Thank you, my Lord.**
>
> JUDGE PELLING: Thank you. "

8. I leave to one side the question whether the fraud allegation ought to have been made on the material relied on. Given the contents of the A,mended Defence and Mr Bowen's witness statement however, it might have been thought appropriate for the allegation to have been withdrawn before the case was opened or as it was being opened, since oral evidence on this issue could realistically add nothing to what had been set out by Mr Bowen in his statement and it was not suggested in cross examination that what he had said in his statement concerning this issue was wrong or

untrue or that there was any basis for thinking what he said in his statement was either wrong or untrue.

9. I accept that once it had been decided to withdraw the allegation in the course of Mr Bowen's cross examination it was appropriate to do so in the terms that were adopted by Mr Slade since anything more would have disrupted, or might have blunted the effect of, the cross examination on other matters that followed.

10. I regret however that the opportunity to apologise to Mr Bowen for the making of the allegation was not taken when his evidence had been completed. It is I think obvious that significant reputational damage could be inflicted on a career bank official by an unfounded allegation of fraud. That is all the more the case when he is not a party to the proceedings and thus has no opportunity to defend himself other than as a witness called by his former employers.

11. In those circumstances, I consider it right that the nature of the allegation and that it was withdrawn should be recorded on the face of this judgment as a vindication of Mr Bowen's position. It is equally important that the Bank should have the comfort of that vindication since fraud was alleged against it as well and such an allegation could lead to regulatory difficulty for, as well as reputational damage to, the Bank.

*The Guarantee Claim in Overview*

12. The Guarantee claim is in respect of sums said to have become due under the guarantees entered into by the Guarantee Defendants which secured part of the loan that was the subject of the Loan Agreement. In December 2013 the Bank assigned the guarantees to PHBV. Those claims are defended on grounds that arise out of the same facts and matters as form the basis of the Bank Claim.

*The Trial*

13. The trial took place between 26-29 April; 3-4 and 6 May 2016. I heard oral evidence on behalf of the Bank Claim Claimants and Guarantee Claim Defendants from SF, Mr Cairns ("SC"), Mr Abbott ("PA"), Mr Schofield ("DS") and SF's son Mr Ross Finch ("RF"). I heard oral evidence on behalf of the Bank and PHBV from Mr David Bowen ("DB") and Mr Andrew Horner ("AH"). At the time relevant to the claims DB was employed by the Bank as one of its Relationship Directors in its NW Region Large Corporate Division. As I have said already, DB left his employment by the Bank in 2014 and since then has been employed as a branch manager by another commercial bank. AH was employed by the Bank at the time relevant to the claims as a Business Development Director. He continues to be employed by the Bank as an SME Area Director.

**The Facts**

14. The events with which the claims are concerned arose out of a desire on the part of SF and senior staff at the hotel to acquire the trade and assets of the Hotel by acquiring the entire issued share capital of its then ultimate owner First House Leisure Group Limited, using a business mechanism referred to in the documentations relevant to the dispute as a BIMBO – that is a Buy In and Management Buy Out. BHL was incorporated on 31 July 2007 as the corporate vehicle that was to acquire the shares in First House Leisure Group Limited.

15. The investors (being each of the Guarantee Claim Defendants) were advised throughout by Ford Campbell LLP ("FC"), a firm of chartered accountants since dissolved who also operated as corporate and strategic finance advisors, and by Lewis Hymanson Small ("LHS"), a Manchester based firm of solicitors. The main individual at FC that acted for the Investors was Ms Charlotte Ashton. The principal solicitor involved was Mr Colin Mellor.

16. A principal function that FC had to perform was to act as finance brokers to the investors for the purpose of soliciting offers to lend funds sufficient to enable them to acquire the trade and assets of the Hotel. The retainer letter issued by FC set out the scope of the work that it would perform. It included advice on the purchase price and funding structures, making "*... introductions to potential sources of finance and assist with presentations to them ...*", and to "*... assist in negotiations with potential funders to obtain the most appropriate terms ...*". One of LHS's principal roles was to negotiate the terms of the Loan Agreement with Mace & Jones, the solicitors who acted for the Bank in relation to the negotiation of the Loan Agreement.

17. FC prepared a written business plan ("business plan"). It was provided to the Bank and other potential funders by FC "*... for the sole purpose of assisting them to decide whether to provide funds to ...*" BHL. It added that FC "*... is the sole point of contact for all potential providers of funds and under no circumstances should the funders directly contact ...*" BHL. The business plan described the funding requirement as being £14.75 million of which £12.2 million was to be borrowed with £1.05 million being funded by the investors and £1.5 million being deferred consideration.

18. It is common ground that FC introduced the investors to the Bank and that Mr Bowen or Mr Horner was, or both were, present at each of the meetings that took place

between those representing the Bank and the investors down to the date when the Loan Agreement was executed. The fees payable to FC consisted of a non contingent fee of £15,000 and a contingent fee of "*...2% of funds raised contingent on the successful completion of the transaction ...*". This last mentioned fee was £232,000 based on the sums borrowed from the Bank under the Loan Agreement, was never re-negotiated and was paid – see SF's evidence at T1/60/5-7.

19. The Bank Claim Claimants maintain that an increasingly close relationship developed between the investors on the one side and Messrs Bowen and Horner on the other that manifested itself in the attendance of one or other or sometimes both at meetings that took place at the offices of FC attended by representatives of FC and some or all of the investors at which the progress of the venture was discussed. There is no dispute that Messrs Bowen and Horner attended these meetings, often at short notice, or that what was discussed consisted of more than simply how much the Bank was prepared to lend and on what terms. The Bank Claim Claimants maintain that this course of conduct was consistent with what the Bank said itself subsequently in internal marketing and training material namely that the role of the Bank was not simply as a source of finance but was as it described itself subsequently namely a "*trusted advisor*" to the investors and BHL. I accept because it was not seriously disputed that in the course of meetings between Mr Bowen and Mr Horner with the investors at the offices of FC, Mr Bowen sought to make the Bank stand out for the purpose of winning the lending business that was the subject of the business plan. He no doubt emphasised that the Bank would get BHL the best possible deal, that BHL would get the best possible funding from the Bank and highlighted that the Bank's team could provide advice, cooperation and expertise. I accept as accurate the summary set out by Mr Slade QC on behalf of the Bank Claim Claimants in paragraphs 55 – 56 of his written closing submissions. None of this material was challenged by the Bank in cross examination. Its point (which I turn to in detail below) is that this material must be viewed strictly in context and that its effect can only be assessed adopting that approach.

20. The relevance of the terms on which FC were retained, the fee payable and that those terms were never varied suggests that the role played by FC did not alter to any material extent during the period when what sum the Bank was prepared to lend and on what terms was being negotiated. That the central role of FC did not alter to any material extent at any material time is also borne out by the correspondence to which I refer in detail below. The key point is however that the terms on which the Bank was prepared to lend were discussed throughout in communications (usually email) from Mr Bowen and FC down to the point when solicitors were instructed and thereafter between the solicitors retained by the investors and BHL on the one hand and the Bank's solicitors on the other. Any communications received by FC relating to this issue were passed on to the investors (usually SF) and discussed between FC and the investors.

21. This should not be of any surprise. The Bank's position and interest were in fundamental conflict with those of the investors and BHL. It was in the interest of the Bank to lend on the best terms including the best margin and with the best security and risk control it could negotiate whereas the interest of the investors and BHL was in borrowing as much as it could persuade a lender to advance on the cheapest terms it could obtain.

22. The business plan described SF as at that stage having "*25 years experience with multi-national companies rising to the level of Vice President ...*" and having "*... experience of starting up, developing and priming businesses for eventual sale*". DS was described as having been the managing director of a family retail and manufacturing business from 1975 to 1999. PA was described as having extensive experience of property development and the Third Guarantee Claim Defendant, Mr Chadwick ("AC") was described as having extensive experience in the property business, having established an estate agency 34 years previously that had expanded to four separate offices throughout Greater Manchester. I am entirely satisfied that collectively the investors were experienced, shrewd, and successful business men. I am satisfied therefore that they were fully aware of the fundamental conflict of interest between the Bank on the one hand and the investors on the other and that remained notwithstanding the good relations that existed at a personal level between the investors on the one hand and Messrs Bowen and Horner on the other.

23. The next development of significance came on 30 October 2007. On that date the Bank issued an indicative offer that was subject to a number of conditions including credit approval, documentation and completion by the Bank of its due diligence. The offer was for loans over two different terms, one of which was for 16.5 years. I need say no more about that because it is not suggested that was taken any further. The indicative offer that mattered was of a loan of £12.2 million for a term of 10 years at a rate of 1.45% over the Bank's Base Rate, repayable on an interest only basis for the first 12 months with repayment of interest and principal sufficient to reduce the Loan To Value ratio of the loan to the market value of the Hotel and its business from 75% (assuming a market value of at least £16.5 million) to 50% by the 10th anniversary of the loan, with the balance of the loan then outstanding being refinanced at that stage. This indicative offer assumed therefore that the sum offered represented no more than 75% of the market value of the Hotel and its business at inception. This reflected the Bank's internal controls. The Bank was not prepared to lend more than 75% market value of the Hotel and its business at any stage. It was this difficulty that led to the sum eventually lent being split into a sum of £10.85 million, representing 70% market value of the Hotel and its business, which was secured against the Hotel and its business, and the balance of £750,000, which was secured by personal guarantees.

24. There was a specific provision within the indicative offer for what is called "*Prepayment/Cancellation*". "*Prepayment*" meant early repayment of some or all of the sum the Bank was indicatively offering to lend. The term sheet provided that early repayment was "*... permitted without penalty (apart from any interest hedge breakage costs) after the first 12 months*".

25. The indicative offer was sent to FC by the Bank and was forwarded by Ms Ashton of FC to the investors by email dated 31st October 2007. In relation to early repayment she said at Paragraph (4) of her covering email that "*After the initial 12-month period no exit or early repayment fees (other than any break costs associated with interest rate hedging) are imposed.*".

26. Under cover of the same email, Ms Ashton sent to the investors a spread sheet illustrating the other indicative offers that had been received from other lenders approached by FC down to 31 October 2007. Of those, two were in excess of £2 million short of the funding requirement as redefined after formal valuation of the

Hotel and its business referred to below, a third was for a period of 20 years with a funding shortfall and the fourth left a temporary funding shortfall of in excess of £1.8 million and was at a higher rate than that sought by the Bank. Only the indicative offer from the Bank left no funding shortfall.

27. Following this, negotiations continued with the Bank. By 27 November 2007, a valuation of the Hotel and its business had been obtained by the Bank from CBRE. It advised a market valuation of £15 million. This was £1.5 million less than the market valuation on which the indicative offer referred to above had been based so that a loan of £12.2 million could no longer be justified. In an internal email between Mr Bowen to Mr Domerecki, Mr Bowen recorded that a loan of £10.85 million (the maximum that could be justified on the market value contained in the valuation obtained by the Bank) "*... is not going to be sufficient to land this deal. We need to hit £11.6M ...*". The email continued:

> "Andrew [Horner] had a very open and honest conversation with the advisor late last night at which she stated that if we could get to £11.7M then they can make up the rest ... Andrew pointed out that £11.7M would not work being in excess of 75% MV. At this stage going back with less than £11.6M would mean that the other 4 banks who are pitching would be re-engaged. ... "

The "*advisor*" referred to was Ms Ashton. This email is a significant one in relation to the Banking Claim Claimants' assertion that there was a close relationship between the investors, BHL and the Bank in which the Bank by Mr Bowen and Mr Horner had assumed an advisor role and that the role of FC had reduced. This email shows very clearly that as at the date of this email (4 December 2007) (a) the negotiations concerning what sum the Bank was prepared to lend and on what terms were being carried on by the Bank with FC; (b) no form of agreement had been reached between the Bank and BHL and (c) if a loan of at least £11.6M could not be offered then negotiations with the other banks would be re-activated.

28. Later that day (4 December 2007), Mr Horner offered BHL a term loan of £10.85 million secured on the Hotel and its business with further lending of £750,000 secured by personal guarantees giving a figure of £11.6 million in all. The offer was contained in an email addressed to Ms Ashton of FC. It was not copied to any of the investors by Mr Horner. It was forwarded to them by Ms Ashton the following day. Mr Horner said of the offer of £750,000 on top of the term loan of £10.85 million that was to be supported by personal guarantees that:

> "As this is a reflection of the value of the asset not the quality of the management team we will be happy to discharge the guarantee as soon as the loan to value ratio decreases below 70% of market value – regardless of whatever the closed value is at this point."

The reference to "*closed value*" is a reference to the value of the Hotel as a property rather than as a trading business.

29. On 20 December a meeting took place at the offices of FC attended by Mr Horner, AC, Ms Ashton of FC, Mr Mellor at LHS (the investors' solicitors), and Messrs Clinch and Philips from Mace & Jones, the Bank's solicitors. At that meeting the final indicative terms offered by the Bank were produced. There were no material changes from those described above. The indicative term sheet confirmed that there would be no early repayment fee "*... other than treasury break costs if applicable*" and that the maximum LTV was 75% "*... reducing to 70% by 3 years after drawdown.*" It also included a provision to the effect that a minimum of £10.85M was to be hedged for the term of the loan on a reducing basis. It contained no mention of the availability of other facilities in order to meet deferred consideration commitments. There is no good reason why it would not have done if such an agreement had been reached. It is entirely clear from the internal communications within the Bank that it was not prepared to lend more than was being offered and that every sum over £10.85 million had to be secured by personal guarantee. The obvious reason why FC and LHS were at the meeting is because BHL and the investors were being represented by them in relation to the negotiation of the loan just as the Bank was being represented in relation to the legal aspects of the loan by Mace & Jones.

30. A first draft loan agreement was produced on 4 January 2008. This agreement was produced by the Bank's solicitors Mace & Jones and was sent to Mr Mellor at LHS and Ms Ashton at FC. It included at clause 6.10 a provision to the effect that BHL would "*... compensate the Bank on a full indemnity basis for all losses, damages, costs, charges and expenses (including without limitation the cost of closing out related funding contracts or refunding costs) incurred by the Bank by reason of all or any part of the Loan being prepaid.*". It contemplated that BHL would enter into a Hedging Agreement that was designed to protect against interest rate fluctuations. This draft was followed by Draft 2 dated 8 January 2008. It did not contain any changes material to this dispute.

31. Between 8 and 28 January 2008, the structure of the loan was altered from a variable interest rate loan to a fixed rate loan. When and how this was negotiated is unclear but the stimulus for this change appears to have been an email from Mr Bowen to Ms Ashton on 9 January 2008, in which various hedging methods were identified of which one was to fix the rate for the whole amount to be borrowed. This email is significant not merely for its subject matter but because it shows that even at this stage negotiations concerning the commercial terms of the proposed loan were being carried out by the Bank with FC acting on behalf of BHL and the investors.

32. The fixed rate methodology had either been agreed between the investors by the start of a meeting on 11 January 2008 or it was agreed at that meeting. It does not matter which. In any event on 14 January 2008, Mr Bowen emailed the Bank's solicitor responsible for negotiating the loan agreement informing him that hedging had been agreed by lending the whole sum of £11.6 million at a fixed rate.

33. The effect of the fixed rate arrangement commercially was that BHL hedged its risk of rates increasing by fixing the rate for the whole term of the loan. As will be apparent even at this stage and in relation to this single point the interest of the Bank on one side and the Investors and BHL on the other were opposed. The Bank's interest lay in fixing the fixed rate at a high rate. The interests of BHL lay in fixing it at a low rate. In any event, what the fixed rate arrangement did not do was protect the

Bank from compression of its margin caused by increases in variable rates applicable to funds it borrowed to make or maintain the fixed rate loan.

34. Following further exchanges between Mace & Jones and the Bank that do not matter, on 28 January 2008, under cover of an email of that date, Mace & Jones sent a further draft loan agreement to Mr Mellor at LHS and Ms Ashton at FC. This version of the agreement contained a definition of the fixed rate that was to apply. It also contained the clauses that referred to hedging that should have been but had not been removed as a result of the agreement becoming a fixed rate agreement. It is not suggested that the inclusion of these provisions (and the failure to remove them from the signed version) was anything other than drafting error.

35. The 28 January 2008 draft is the first draft that contained clause 6.10 in the form that it appeared in the executed version of the Loan Agreement. In so far as is relevant for present purposes clause 6 provided:

> "6.1 The Borrower shall repay the Loan in 108 monthly repayments …
>
> 6.2 The Borrower may not prepay all or any part of the Loan except as expressly permitted by this Agreement
>
> …
>
> 6.5 The Borrower may at any time after giving at least 5 business days notice to the Bank make early repayment of all the Loan together with interest accrued to the date of payment and any amount that may be payable pursuant to clause 6.10 …
>
> …
>
> 6.10 If the Borrower … for any reason … repays … the Loan or any part … other than in accordance with clause 6.1 above, the Borrower shall, in addition to any fee that may be specified in this Agreement, pay to the Bank immediately on demand any cost or loss to the Bank which in the Bank's reasonable opinion results from such action. Such cost or loss will include, but will not be limited to:
>
> (a) any loss or expense sustained or incurred by the Bank in repaying or redeploying deposits acquired by the Bank at a fixed rate of interest in order to make or maintain the Loan; and
>
> (b) any loss or expense sustained or incurred by the Bank in respect of any agreement it has entered into to compensate for the potential cost to the Bank on-lending at a fixed rate of interest deposits acquired by the Bank at a variable rate

> of interesting order to make or maintain the Loan, including any loss or expense sustained or incurred by the Bank:
>
> (i) in fulfilling or terminating any obligation it may have under any such agreement; and
>
> (ii) in entering into and fulfilling any obligation it may have under any other agreement it may enter into to offset the cost of continuing such first agreement."

The Loan Agreement was signed on 31 January 2008. The terms of the Agreement as signed did not differ materially from the terms set out in Draft 3.

36. Clause 6.10 was described by Mr Slade in his opening submissions as a "*concealed time bomb*" because it exposed BHL to breakage costs of "*... an unascertainable and potentially huge kind under the Bank's own hedging arrangements, the details of which were not ... notified to ...*" BHL. It is common ground that at no stage in the negotiations did the investors' advisors FC or LHS raise any issues or concerns about the scope or effect of clause 6.10 or its predecessor provisions. This is so notwithstanding they were representing the interests of the investors and BHL in relation to their negotiations with the Bank and its solicitors. The Bank Claim Claimants maintain that the fact and level of exposure became apparent only in the course of a meeting in July 2009, when Mr Bowen informed SF that BHL could not re-finance because the effect of clause 6.10(b) meant that BHL would have to pay about £1 million if it was to repay the loan early.

37. As I have explained already, BHL's borrowing requirement was for £11.6 million. The Bank was willing to lend that additional amount only if the investors offered personal guarantees. Originally, it was intended that each investor would give a personal guarantee and that the exposure on the guarantee would be secured as to £450,000 by way of legal mortgage against the home owned by SF and his wife – see the definitions of "*Finch Mortgage*" and "*Personal Guarantee*" in clause 1.2 of the Loan Agreement. In fact, the first guarantee ("the First Guarantee") was entered into by SF alone but was limited to £450,000 rather than £750,000. It was signed on 18 March 2008. This left the Bank unsecured as to £300,000. This was cured in the end by the execution by the investors of a second Guarantee ("the Second Guarantee") that was limited in scope to £300,000. The second Guarantee was executed on 10 July 2008.

38. In relation to each of the Guarantees the parties received legal advice concerning its terms and their effect. In relation to the First Guarantee SF received advice from Mr Scott, a solicitor at Parkinson Wright LLP. SF accepted that he had been fully advised in relation to the terms of the Guarantee. That such advice should be taken is apparent on the face of both Guarantees. Not merely does each Guarantee have a box at the head of the signature page which contained the following statement:

> **"IMPORTANT NOTICE**

> YOU SHOULD CONSULT A SOLICITOR BEFORE SIGNING THIS DOCUMENT. BY SIGNING THIS GUARANTEE YOU MAY BECOME LIABLE INSTEAD OF OR AS WELL AS THE BANK'S CUSTOMER. THIS GUARANTEE WILL BE LIMITED TO THE AMOUNT (IF ANY) SPECIFIED IN CLAUSE 2.1. IF NO AMOUNT IS SPECIFIED THIS GUARANTEE WILL BE UNLIMITED"

but SF's signature of the First Guarantee was witnessed by Mr Scott (his solicitor), who affirmed by his signature that SF had executed the First Guarantee:

> "In my presence and after the contents had been explained to him …"

Mr Scott prepared an attendance note of the meeting at which he advised SF in relation to the First Guarantee. Materially, the Attendance Note records Mr Scott as having given SF "*... comprehensive advice with regard to the guarantee which he then signed*".

39. By clause 26 of the First Guarantee, it was agreed by and between the parties that:

> "**26. No reliance by me/us on the Bank**
>
> 26.1 (a) I/we acknowledge to and agree with the Bank that in entering into this Guarantee:
>
> (i) I/we have not relied on any oral or written statement, representation, advice, opinion or information made or given to me/us in good faith by the Bank … and the Bank shall have no liability to me/us if I/we have not done so
>
> (ii) …
>
> (iii) There are no arrangements, collateral or relating to this Guarantee, which have not been recorded in writing and signed by me/us and on behalf of the Bank
>
> (iv) I/we have made, without reliance on the Bank, my/our own independent investigation of the customer and its affairs and financial condition and of any other relevant person and assessment of the creditworthiness of the Customer or any other relevant person and the Bank shall have no liability to me/us if in fact I/we have no done so.
>
> …
>
> (d) I/we agree with the Bank for itself and as trustee for its officials, employees and agents that neither the Bank nor its officials, employees and agents shall have any liability to me/us in respect of

> any act or omission by the Bank, its officials, employees and agents done or made in good faith."

The Second Guarantee was substantively in exactly the same form as the First Guarantee. As with the First Guarantee, the Second Guarantee had a box at the head of the signatures page containing a statement in similar terms to that set out in the box at the head of the signature page of the First Guarantee. Each of the Guarantee Claim Defendants were advised in relation to the Second Guarantee by Mr Mellor of LHS, who witnessed the signatures of each of the guarantors, in each case affirming by his signature that they had executed the Second Guarantee:

> "In my presence and after the contents had been explained to him …"

40. By January 2009, BHL required further funding and BHL entered into discussions with the Bank for that purpose – see the letter of 19 January 2009 from SF on behalf of BHL to Mr Bowen. In that letter SF stated that without further assistance from the Bank, "*... 2009 would become a very difficult year for us*". In consequence, BHL was seeking "*... a suitable overdraft facility which would allow us to settle the two outstanding deferred amounts and to progress– hopefully – to a much more stable and predictable marketplace in 2010.*" It is noteworthy that it was not suggested in this letter or for that matter is any subsequent contemporaneous written communication between the Bank and BHL or its investors that the Bank had committed itself to lend further sums in order to fund the payment of the deferred consideration. Had there been such an agreement, or if the understanding of the investors generally or SF in particular was that there was such an agreement or understanding, it is difficult to see why that agreement or understanding would not be asserted in this correspondence or subsequent correspondence concerning the same topic.

41. As part of these discussions, the directors obtained a "desk top" valuation report from CBRE dated April 2009 which valued the Hotel at £16,750,000. CBRE had valued the market value of the Hotel and its business at £15 million for the Bank as part of the Bank's due diligence carried out prior to it entering into the Loan Agreement. The April 2009 valuation was not addressed to the Bank however.

42. It is the Guarantor Claim Defendants' case that the Bank had agreed that the Guarantees would be discharged as and when the LTV of the sums loaned to the value of the Hotel dropped below 70% or became estopped from enforcing the Guarantee once that event had occurred. In support of this submission, they rely on the terms of Mr Horner's 4 December 2007 correspondence referred to above.

43. The contemporaneous documentation shows the focus of the discussions between the Bank, BHL and the investors in the period between January and November 2009 was on the provision of additional facilities in the form of an overdraft facility. It was not suggested in correspondence at least by or on behalf of the investors that the Guarantees should be discharged. Mr Bowen said in the course of his evidence that he would not have considered such a suggestion as long as BHL was seeking to borrow further funds.

44. Ultimately by a letter dated 10 November 2009, the Bank offered the directors of BHL and overdraft facility initially of £500,000 but dropping to £250,000 from and after 1 January 2010. It was a condition of the facility that the amounts owing under it would be secured by the security listed in the Security Schedule set out at the end of the letter. The securities listed included both Guarantees. BHL accepted the offer of facilities in writing by the counter-signature of the 10 November 2009 letter by SF and DS. They each counter-signed the letter on 14 January 2010. It is not suggested that SF and DS were not acting for all the guarantors in signing the letter or that only SF and DS are bound by it.

45. There is no dispute that the debt secured by the Guarantees exceed the maximum sums secured by them. Although it was alleged in the Defence by the Guarantee Claim Defendants that there were changes to BHL's obligations as primary debtor that had the effect of discharging the Guarantees, those defences were not pursued at trial – see T1/42/7-9. A pleaded assertion to the effect that it was agreed that the First Guarantee would be discharged if the Second Guarantee was entered into was abandoned as well – see T1/41/21-42/5. The defence asserted in relation to the Guarantees was limited to an assertion that the Guarantee Claim Defendants were induced to enter into the Guarantees by reason of the breaches of duty and misrepresentations alleged by the Bank Claim Claimants against the Bank and that affords the Guarantee Claim Defendants a defence to the Guarantee Claim – see T1/42/17-25. In addition, it is alleged that the Bank wrongfully repudiated the Guarantees by failing to discharge them in 2009 when (it is alleged) the LTV of the Loan to the market value of the Hotel and its business dropped below 70% or that PHBV is estopped from enforcing the Guarantees by reason of that event in light of the statement made on behalf of the Bank that the Guarantees would be released once the LTV of the Loan to the market value of the Hotel and its business dropped below 70%.

## The Bank Claim

*The Issues*

46. The issues that remain to be decided at this trial are the following:

    i) Did the Bank owe BHL an advisory obligation either in contract or tortiously? I refer to this issue below as the "Advisory Duty Issue";

    ii) If the Bank did owe BHL such a duty, did the Bank breach that duty by failing to explain to BHL the potential magnitude of the losses that might come within its scope? I refer to this issue below as the "Breach Issue";

    iii) In putting forward the proposed terms, did the Bank thereby impliedly represent that what was offered had been tailored to meet the needs of BHL and/or the investors and if such was the case was that representation false and made negligently? I refer to these issues below as the "Misrepresentation Issues";

    iv) Did the Bank enter into a collateral or other agreement with BHL at or before the date when the Loan Agreement was entered into by which the Bank was obliged to advance further funding to enable BHL to meet deferred payments

due in respect of its acquisition of the shares in First House Leisure Group Limited? I refer to this issue below as the "Additional Loan Issue";

v) Had BHL been aware of the potential magnitude of the losses that might come within the scope of clause 6.10, would it have entered into the Loan Agreement or would it have entered into a floating rate loan with a capped rate product covering a maximum of 50% of the sum loaned? I refer to this issue below as the "Causation Issue".

*The Advisory Duty Issue*

Although the claimants refer in their written closing submissions to the existence of "*advisory obligations*" that description avoids a critical question that arises at the outset concerning the source of the duty. The obligation can arise only either contractually or in tort.

47. *The Contractual Duty Case*

The only pleaded allegation that refers to a contractual duty is that contained in Paragraph 21 of the Amended Particulars of Claim. In that paragraph it is alleged that the Bank "*... had a contractual duty of care ... arising by implication under section 13 of the Supply of Goods and Services Act 1982, or by necessity, that the Bank would act with reasonable care and skill in the advice that it provided ...*" to BHL. The reference to "*the Claimant*" is an error since both claimants are assignees of a cause of action that had vested in BHL, which was in any event the borrower under the Loan Agreement. This is not an allegation that the Bank was under a duty to provide advice. It is an allegation that it would exercise reasonable care and skill in and about the advice that it gave.

48. It is not alleged that the Bank gave advice that was wrong (save in relation to the misrepresentation claim). The allegation is that the Bank should have but failed to advise BHL concerning the scope and effect of clause 6.10 of the Loan Agreement. On that basis s.13 is not engaged even if the existence of a relevant contract had been alleged and proved.

49. S.13 of the 1982 Act provides:

> "In a relevant contract for the supply of a service where the supplier is acting in the course of a business, there is an implied term that the supplier will carry out the service with reasonable care and skill."

S.13 has effect therefore only to imply a term by operation of law into a "*... relevant contract for the supply of a service...*". What constitutes such a contract is defined by s.12 of the 1982 Act as being:

> "... a contract under which a person ("the supplier") agrees to carry out a service ..."

If reliance is to be placed on s.13 in the context of this case, it follows that it is necessary for the claimants to plead and prove a contract under which the Defendant

has agreed to provide a service that included the provision of advice. It has not done so. To the extent that the Bank Claim Claimants seek to rely on s.13 of the 1982 Act, their claim fails at that point.

50. If and to the extent that the Bank Claim Claimants allege the existence of a term to be implied applying common law principles by including in Paragraph 21 of the Amended Particulars of Claim the phrase "*or by necessity*" that too misses the point. The only implied term alleged is an implied term requiring that "*... the Bank would act with reasonable care and skill in the advice that it provided...*". Thus even if a contract into which such a term could be implied had been pleaded and proved, it could not be alleged that the alleged implied term had been breached because it is not alleged that negligent advice has been given but rather that advice should have been but has not been given. In any event, no attempt has been made to plead a contract which imposes a duty on the Bank to provide advice. It is noticeably not alleged that it was an implied term of the Loan Agreement that the Bank would provide such advice, and it is difficult to see how such an assertion could be arguable on any conventional understanding of the basis on which terms are to be implied into contracts.

51. If and to the extent that the Bank Claim Claimants allege that a contract to advise arose out of the inter relationship between Messrs Bowen and Horner on the one hand and the investors on the other in the period down to the execution of the Loan Agreement on 31 January 2008, then I reject that suggestion as unarguable. Aside from the question whether any such agreement has been pleaded, no offer, acceptance or legally sufficient consideration to support the obligation has been identified. As I have explained the commercial interests of the Bank on the one hand and BHL and its investors on the other were diametrically opposed. Further all the contemporaneous documentation that I have been taken to in the course of the trial (the material parts of which I have summarised above) shows that in relation to the negotiation of both the commercial and the legal terms of the Loan Agreement the Bank negotiated with the professional advisors to BHL and the investors. Whilst I fully accept that the investors on the one side and Messrs Horner and Bowen on the other got to know each other increasingly well in the Autumn of 2007, it was a relationship based on self-interest – the investors wanted to borrow what was needed to enable BHL to purchase the Hotel and its business; and the Bank had an appetite for lending for that purpose – but in my judgment each of the parties well knew and in any event it was obvious that the interest of each were opposed and divergent in the way I have described. That is why FC were retained and continued to be retained throughout, why all material communications concerning the commercial terms of the loan were required to be and were directed by the Bank to FC and why BHL on the one hand and the Bank on the other retained solicitors to negotiate the terms of what became the Loan Agreement.

52. *The Tortious Duty Case*

I start with a summary of the applicable legal principles. In summary:

i) In general a bank is not under a legal obligation to provide advice but if it gives advice then it must do so using reasonable care and skill – see Woods v. Martins Bank Limited [1958] 1 QB 55 *per* Salmon J at 71: "*I find that it was and is within the scope of the defendant bank's business to advise on all*

*financial matters and that, as they did advise him, they owed a duty to the plaintiff to advise him with reasonable care and skill in each of the transactions to which I have referred.*"; Bankers Trust International Plc v. PT Dharmala Sakti Sejahtera (No.2) [1996] CLC 518 *per* Mance J as he then was at 533: "*... a bank negotiating and contracting with another party owes in the first instance no duty to explain the nature or effect of the proposed arrangement to that other party. However, 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.*"; National Commercial Bank (Jamaica) Limited v. Hew [2003] UKPC 51 per Lord Millett at [22]; and Paget, Law of Banking, 14th Ed., Para 29.7

ii) Whether a duty of care in tort is owed in any particular case will depend upon the application of one or more of the usual three tests – that is the assumption of responsibility coupled with reliance test, the three-fold-test (reasonable foreseeability of loss, sufficient proximity between the parties and whether it is in all the circumstances fair just and reasonable to impose a duty) and the incremental test – having regard to the exchanges which cross the line between, and the dealings of, the parties considered in their context – see JP Morgan Chase Bank v. Springwell Navigation Corp [2008] EWHC 1186 (Comm) *per* Gloster J as she then was at [48]-[52] and Standard Chartered Bank v. Ceylon Petroleum Corporation [2011] EWHC 1785 (Comm); and

iii) In approaching the question using the methodology referred to in (ii) above, there is a distinction to be drawn between the provision of advice in the context of a commercial relationship and assuming responsibility for that advice – see JP Morgan Chase Bank v. Springwell Navigation Corp (ante) at [374].

53. Before turning to the facts it is relevant to note at the outset that (aside from the misrepresentation claim to which I refer below) this claim is not advanced on the basis that advice has been sought or given much less that advice has been given that was negligently wrong. Rather it is advanced on the basis that it is alleged that the Bank was under a duty to give voluntary advice that was or might be contrary to its commercial best interest. This would be to go further than any of the authorities cited to me have gone and would negative the general principle identified in (i) above. Whilst I cannot say that there are no circumstances in which such a duty could arise applying the tests summarised in (ii) above, I consider that they would have to be exceptional and markedly different from the conventional relationship of banker and customer.

54. Further, in my judgment the circumstances would have to be exceptional before it could safely be concluded that a bank that is pitching for the business of a potential customer came under a duty to give advice in relation to the product that it was offering. That is likely to be all the more the case where, as here, to the knowledge of the bank, the potential customer was represented by a broker who had procured the interest of the bank in pitching for the customer's business, where the bank concerned was required by the broker to communicate only via the broker in relation to the product that it was offering, where all meetings attended by the potential borrower and the bank were at the offices and in the presence of the broker's representatives,

where all communications concerning the terms of the loan were required to be and were directed by the Bank to FC as advisor to BHL and the investors and where the potential borrower is represented by solicitors throughout in relation to the negotiation of the documentation necessary to carry that bank's offer of facilities into effect.

55. The proposition for which the Bank Claim Claimants contend is in effect that the Bank should have given disinterested advice to BHL and the investors in relation to the product the Bank was offering, even though such advice had not been sought, BHL and the investors had professional advisors and the giving of such advice might be contrary to the Bank's commercial best interests.

56. The Bank was introduced to BHL and the investors by their broker and advisor FC, all the technical proposals concerning the bank's offer were transmitted to FC in accordance with the directions contained in the business plan that all communications were to be directed to FC, and not the potential borrower, all meetings between the representatives of the Bank and BHL were at the offices, and in the presence of representatives, of FC and once agreement had been reached on the commercial terms both the Bank and BHL were represented by solicitors who negotiated the terms of the Loan Agreement at arms length. In my judgment this is the context in which the various communications passing between the parties on which the Bank Claim Claimants rely must be judged when considering whether they give rise to a wide ranging duty to give advice concerning what the bank was offering even when such advice was not requested and when its terms might be contrary to the Bank's best interests.

57. In my judgment another relevant contextual factor is that identified in the case law summarised above – in general the bank is not under a duty to give advice. The relationship is generally a banker and customer relationship not an advisor and client relationship. The other contextual consideration is that the alleged duty arose not after the relationship of banker and customer had come into existence but before it came into existence, and in the context of negotiations concerning the terms on which it might come into existence.

58. In the end the only basis on which the Bank Claim Claimants sought to advance this claim was on the basis that the closeness of the relationship between the investors on the one hand and the Bank represented by Mr Bowen and Mr Horner on the other was such as to create a duty on the Bank to give the voluntary advice which the Bank Claim Claimants maintain BHL and the investors should have been given. In my judgment this proposition is an impossible one once the context in which the relationship between Messrs Bowen and Horner on the one hand and the investors on the other arose and developed is understood. The fact is that in relation to the negotiation of the Loan Agreement, the interests of BHL and the investors was represented by FC and LHS and the Bank's interests were represented by Messrs Bowen and Horner and by the Bank's solicitors. The use of the phrase "*trusted advisor*" was simply a phrase adopted by the Bank and its employees as part of a marketing strategy to make the Bank appear different from its competitors. It had no other significance. In my judgment on the facts of this case, there was no duty on the Bank to advise BHL and the investors concerning the implications of clause 6.10. That was a clause on which FC and LHS should have advised BHL and the investors. If either FC or LHS were unclear as to the implications arising from the clause they

could and should have asked. It is not suggested that either did. If there was any breach of contract or duty that occurred in relation to the failure to advise it was not by the Bank.

59. In light of these conclusions, the breach issue does not arise.

*The Misrepresentation Issues*

60. The Bank Claim Claimants' pleaded case on misrepresentation is that in the course of a meeting in September or October 2007, Mr Bowen represented that the Bank would tailor a product to the needs of the investors and BHL and that the alleged representation continued down to the date when the Loan Agreement was signed and thus there was an implied representation that the Loan Agreement had been tailored to meet the needs of the investors and BHL. It is alleged that these representations were false and made negligently – see paragraph 29 of the amended Particulars of Claim. It is alleged that the representation was false and made negligently by reference to the grounds set out in paragraph 27 (a) of the amended Particulars of Claim. In summary two allegations are made – first that the loan was unsuitable for BHL by reason of the costs of early exit and secondly because (it is alleged) SF informed Mr Bowen at the outset that BHL would want to repay early by reason of the ages of SF and DS. This last question involves resolving a contested issue of fact, because Mr Bowen disputes that he was ever told that either SGF or DS would wish to exit from the investment within the life of the loan.

61. SF and DS both gave evidence in accordance with their witness statements that they were looking to exit from the investment after about 5 years. It was submitted on behalf of the Bank Claim Claimants that SF was not challenged on this issue. SF's witness statement says that he had made the position clear in the course of a meeting that took place in December 2007 attended by DS and Mr Bowen. I accept that this was not challenged by cross examination of SF although it was the subject of extensive cross examination of DS. His evidence was that he had discussed with FC a wish for the business to be sold on within 5 years (T3/198), that he did not however recall FC being asked to perform a feasibility study concerning whether this was viable (T3/199) and that if there was to be an exit in 5 years that would increase dramatically the sum outstanding under the loan at the exit date compared with the position at the end of the 10 year term – see T3/204-5. DS also accepted that he did not inform BHL's solicitors LHS of the plan by SF and DS to exit after five years – see T3/206/4-6.

62. DS accepted in the course of his cross examination that the Bank would expect the guarantees to remain in place for the duration of the loan and thus that the Bank would be concerned by the suggestion that SF and DS would want to exit earlier than the end of the term of the loan – see T3/211. This point needs to be viewed with some care. At the time when the indicative offer was made it was anticipated that the LTV would reduce to 70% by the third year. However the point is a good one in the sense that the Bank would expect the Guarantees to remain in place until the LTV had dropped below 70%.

63. When DS was cross examined about the difference between what he had suggested earlier in his evidence (that the plan was to sell the business within five years) and his

alternative suggestion that just he and SF would exit, his answers were unconvincing in my judgment. When he was pressed to say which of these plans he alleged was explained to Mr Bowen, his reply was "*we would have been flexible*" which was not an answer to the question asked. He then said he could not remember specifically what he said to the Bank and then that the extent of the conversation was that he was 65 at the time "*... and I would like to be thinking I would be out of there by 70*" – see T3/212-3. His evidence then was that the loan would have carried on if he and SF exited early (T3/214/8). In my judgment these answers were unsatisfactory, contradictory and, in part at least, evasive. In those circumstances, it is necessary that I test what SF and DS say against the contemporaneous documentation and objectively ascertainable events. In doing so I remind myself that I am not concerned with what may have been said by and between the investors or by them but with what is alleged to have been communicated by them to the Bank.

64. First I need to mention the evidence given by Mr Bowen and Mr Horner on this issue. In doing so, I record my conclusion that each gave honest evidence to the best of their recollection given the time that had passed since the events with which I am concerned. I conclude also that each was a competent middle ranking bank official with substantial experience of commercial lending. Each was familiar with the internal procedures of the Bank and in my judgment neither had any reason to seek to engineer a loan to BHL otherwise than in accordance with those internal constraints. Mr Horner's evidence on the issue I am now considering is that if it had been suggested that the majority shareholders wished to exit within five years that would have been the end of the loan. He explained (entirely convincingly in my judgment) that the loan was to interest only for the first year which meant that capital would be repaid only over the next four years which in turn meant that the Bank would be exposed to "*... a massive refinance risk ...*" Mr Bowen too said that the deal would not have proceeded if the loan was to be over a five year period because it would then have posed "*... too big a risk ...*".

65. Turning now to the contemporaneous documentation, there is no reference anywhere within the business plan to either a plan to sell the business within five years or at all. None of the indicative loan offers made by other lenders were made on the basis of a loan for a term of five years. The initial indicative offer by the Bank was of a loan for a period of either 16 ½ years or 10 years and thereafter the revised indicative offer and all the versions of the draft Loan Agreement were all for 10 year terms. The Guarantees were for unlimited periods of time. Even if (as the Guarantee Defendants maintain) the Guarantees were to be cancelled as and when the LTV between the loan and the market value of the Hotel and business dropped below 70% that does not lead to the conclusion that the guarantees are consistent with SF and DS's case concerning exit since when such a drop would occur was unpredictable. It is inconceivable that SF and DS would have failed to inform FC of the position if this was anything approaching a settled requirement. There is no mention of this requirement within any of the email communications between FC and the Bank. If exit by the majority shareholders within five years was a fixed requirement then FC would have been bound to mention it essentially for the reasons identified by Mr Horner and Mr Bowen in their evidence – it had and would obviously have a material impact on whether to lend and if so on what terms, and in particular whether to lend the top up sum of £750,000 secured by personal guarantees. Each of SF and DS would have been bound to mention the point to the solicitors advising them in relation to the Guarantees. Had

they done so, the solicitors would have been bound to advise them to attempt to include a exit provision within the Guarantees. Similarly I think the issue would have been discussed with LHS since it would or might impact on the terms of the Loan Agreement.

66. In my judgment the deficiencies in the oral evidence of DS, the substance of the evidence of Mr Horner and Mr Bowen and the absence of any mention of a five year exit strategy within any of the contemporaneous documentation including in particular that mentioned above lead me to reject the evidence of SF and DS (as is alleged in paragraph 27(a)(ii) of the amended Particulars of Claim) that the Bank had been informed "*... at the outset that* [BHL] *planned to repay the loan facility in less than its full term in view of the ages of two key players* [DS] *and* [SF]". If that was their plan, it was not one that was communicated to the Bank. If it was a plan they had communicated to FC, it is not one that FC passed on to any of the lenders approached including the Bank.

67. Had the Bank been informed as alleged then there might have been a tenable basis for contending that there had been a misrepresentation as alleged but without it I do not see how the allegation of misrepresentation can hope to succeed. The representation is said to have been made at the outset of the relationship. It was therefore an expression of intention not of fact. The expression "*tailored*" can mean only that the loan offered would be the best that the Bank was prepared to offer taking account of the requirements that had been notified to the Bank by or on behalf of the investors and BHL. Had the Bank been aware of an intention to "*... repay the loan facility in less than its full term ...*" then no doubt it could have been suggested that what was offered had not been "*tailored*" to meet that requirement because it precluded repayment other than on the terms set out ultimately in the Loan Agreement. However even if that was so, that does not lead to the conclusion that the representation was false or made negligently at the time that it was made. The obligation to "*tailor*" could only be a promise to offer facilities that took account of the needs of the borrower to the extent that the Bank in its commercial judgment was prepared to do so. It could not possibly be construed as requiring the Bank to offer anything at all if it chose not to do so or to offer facilities on terms that subordinated its commercial interest to those of BHL and the investors. Thus even if I am wrong to conclude that the investors did not inform the bank of an intention to repay early, I do not see that this leads to the conclusion either that what the Bank represented was actionable or that what they represented was false or made negligently.

68. The reality is that the Bank did "*tailor*" its offer to meet the requirements of the investors and BHL in so far as those were made known to the Bank and subject to the qualification that it was not obliged to subordinate its interests to those of the investors and BHL in the offer that it made. Thus the Bank offered the sum required even though that was in excess of its internal LTV parameters by lending an additional £750,000 secured by personal guarantees. It offered a repayment schedule that included interest only repayments in the first year. It set out various alternatives for hedging interest rate fluctuations and acceded to the choice of the investors for a fixed rate loan.

*The Additional Loan Issue*

69. The Bank Claim Claimants' pleaded case is that Mr Bowen promised in November 2007 – December 2007 to assist BHL to fund the final deferred consideration payment due under the agreement by which BHL acquired the shares in FHLG. The evidence in support of that claim comes from SF who at paragraph 41 of his witness statement says that Mr Bowen or Mr Horner had said that "*... they would provide a funding solution for the subsequent tranche ...*". When this alleged agreement was made was not something that SF could assist with. He said it was after 5 December (T3/18/5) and after 4 January 2008 (T3/18/11). When he was asked if it was agreed before 28 January, he answered "*In a formal written form?*" which was not an answer to the question not least because it had never been the Bank Claim Claimants' case that the offer of additional funding had been in writing. When pressed further SF agreed that it was sometime between 4 and 31 January (T3/19/18-20). A little later, it was suggested to him that there was never a point at which it was agreed the Bank would fund the deferred consideration to which SF agreed (T3/28/11). In the end this was retreated from and SF said that in January "*... it was repeatedly said to us that the bank were there to advise and assist, to support us throughout the process of acquisition and in the long term thereafter.*" He maintained that it was this that constituted the binding promise – see T3/29/22.

70. In my judgment this part of the Bank Claim Claimants' case fails for the following reasons. First the terms in which SF describes Mr Bowen as having expressed himself is not consistent with the Bank by Mr Bowen having entered into a binding commitment to provide additional funding.

71. Secondly, it is inherently improbable that a bank official as experienced as Mr Bowen would commit himself to further lending of an indefinite sum on unspecified terms at an unfixed time in the future at a time when the capacity of BHL to sustain further borrowing could not be known or judged. The whole manner in which the negotiations between the Bank and the investors were then being conducted could not have left the investors in any doubt that whether to lend and on what terms was a judgment that could be made only at the time and by reference to the circumstances that prevailed when further facilities were requested.

72. Thirdly, given the difficulty that had been experienced by the Bank in lending even the sum lent under the Loan Agreement, it is all the more inherently unlikely that the Bank would enter into the sort of future commitment that the Bank Claim Claimants allege it entered into. It is also inherently unlikely that the Bank would have been willing to contemplate discharging the Guarantee and the Finch Mortgage when the LTV of the sum loaned to the market value of the Hotel and its business dropped below 70% if further lending was in contemplation at that stage.

73. Fourthly, it is inconceivable that (a) FC would not have known of this additional commitment if it had been offered, particularly since all offers or variations to the loan proposal were transmitted to FC by the Bank and all discussions took place at meetings at which FC were represented, (b) FC would not have referred to it in one of the many emails that passed between it and the Bank if it had been made and understood to be a formal offer, (c) FC or the investors would not have instructed LHS of the offer if it had been made or considered a binding commitment and (d) LHS would have failed to record the obligation either in the Loan Agreement itself or in a side agreement or side letter if the offer had been notified to them. This last point

is all the more the case given that clause 15.5 of the Loan Agreement (and each of the drafts of the Loan Agreement) provided that the documentation constituting the Loan Agreement "*... supersede(s) all prior agreements, arrangements or correspondence between the Bank and the Borrower in relation to the loan*".

74. Fifthly, the conduct of SF in requesting an overdraft in the 2009 correspondence referred to earlier is inconsistent with him believing that the Bank was committed to further lending. SF's explanation was that he was being polite – see T3/ 45/12-16 – but that is not an answer to this point and in any event does not explain why the point that there was an obligation to provide further facilities was not made subsequently.

75. For these reasons I conclude that the Bank did not enter into a contractually binding commitment to offer further finance to fund deferred consideration payment due from BHL to FHLG. This element of the Bank Claim Claimants' case fails.

*The Causation Issue*

76. In light of the conclusions I have so far reached this issue strictly does not arise. However, I set out in summary my conclusions in relation to it for completeness.

77. I am prepared to accept that when BHL and its directors were informed about the implications for early repayment of clause 6.10 they were shocked. However, I am not able to find on the evidence available that if informed of the risk posed by clause 6.10 before entering into the Loan Agreement BHL would have entered into a floating rate loan with at most a 50% hedge and a strike rate of 5.75%. My reasons for reaching that conclusion are as follows.

78. First, I accept the submission made on behalf of the Bank that this element of the Bank Claim Claimants' case must fail if they are unable to demonstrate the availability of the alternative product they rely on. This begs the question of what alternative product the Bank Claim Claimants are entitled to assert would have been available. In my judgment the Bank is correct in its submission that the Bank Claim Claimants are entitled to assert only that BHL would have obtained a purely floating rate product. This follows from Answer 36 in the Further Information dated 24 March 2015 where the alternative product is defined as being one with interest rates of "*... approximately 1.4% to 1.5% above base rate*". This is in effect repeated in answer 2(b) within the Further Information dated 13 April 2015. The only point where the allegation concerning a 50% cap is pleaded is in Paragraph 36A(a) of the amended Particulars of Claim. However, that relates exclusively to the loss alleged to have been caused by "*Representation C*", which is the now abandoned allegation of fraudulent misrepresentation. That this is so is apparent from the opening 1½ lines of Paragraph 36A. In those circumstances, the Bank Claim Claimants are not entitled to assert that but for the alleged breach of contract and duty, BHL would have borrowed on a floating rate basis " *... with at most a 50% hedge and a strike rate of 5.75%...*". The Bank says, and I have no reason to suppose this is not correct, that it has made decisions about which witnesses to call based on the case pleaded against it.

79. Secondly, there is no expert evidence available that establishes that there would have been any alternative floating rate loan available that was not subject to the requirement for the 100% hedging that was the Bank's position in the negotiations.

The Bank Claim Claimants had applied to adduce such evidence but permission had been refused. There was no appeal from that decision.

80. Thirdly, the only evidence relied on by the Bank Claim Claimants is the schedule of other indicative offers produced by FC on 31 October 2007. As I have explained already, none of those indicative offers were on terms that were better than those being offered by the Bank and each of them left a funding shortfall. These offers were made at a time when on the basis of what is contained in the business plan, BHL and the investors were looking to borrow £12.2 million. That from RBS/Natwest was for a loan £11.5 million over 20 years which given the rejection of the Bank's proposal to lend over 16 ½ years was unlikely to be acceptable particularly as there would still have been a funding shortfall of in excess of £450,000. The indicative offers from the Co-Op and HSBC were £9.8 million and £8.74 million respectively and without details of either the term or the applicable rate. The Bank of Ireland was for £10 million and was at a rate of 1.7% above base rate. Thus each offer was of a loan sum that was substantially below the sum that ostensibly the investors were seeking to borrow, and below or significantly below even the £11.6 million that was their reduced borrowing requirement. There is no evidence from any of these institutions that enables me to conclude what if any conclusions they would have sought to impose concerning hedging.

81. All these offers were made before formal valuation of the Hotel and its business. As SF accepted in cross examination, all the offers would require revision after the valuation of the market value of the business was received at £15 million as opposed to the projected £16.5 million – see T2/44/18 – 45/2. The reaction from RBS's Mr Schofield was that the investors would have to materially increase their equity stake – see the email of 29 November from him to Ms Ashton. This is one of the three lenders then still being considered – see T2/45/17-22. Aside from the Bank the only other one was Co-Op. As I have said already, Co-Op's indicative offer had been for a sum that was well below what was required. As SF accepted, there was no discussion with any other lenders other than RBS and the Bank following receipt of the valuation and the contact with RBS ended with the email dated 29 November.

82. None of this material establishes that there was a lender prepared to lend what was required. It establishes that RBS was prepared to lend at a floating rate but there is simply no evidence at all as to its attitude to hedging because the discussions had not reached that stage – something SF accepted in the course of his cross examination at T2/28/1-23. However given that RBS was considering a loan over 20 years, I would have thought it at least as likely that it would want to hedge at the expense of BHL.

83. In the result, the Bank Claim is dismissed.

## The Guarantee Claim

84. In light of the conclusions that I have so far reached, there is only one defence to the Guarantee Claim that can be maintained namely that based on the representation by the Bank that it would be happy to discharge the Guarantees as soon as the ratio between the sums lent and the market value of the Hotel and its business ("LTV") dropped below 70%. That a representation to this effect was made was not in the end disputed. It is difficult to see how it could have been given the terms of the email of 4

December referred to above. Notwithstanding the making of the representation, I conclude that this does not give the Guarantee Claim Defendants a defence to the claims under the Guarantees. My reasons for reaching that conclusion are as follows.

85. The defence pleaded on the basis of this statement is that it created either an express or implied term of the Guarantees or a collateral contract to the effect that the Bank "*... would cancel the ... Guarantee upon the LTV becoming less than 70%*" or an estoppel that precludes the Bank or its assignee from enforcing the Guarantees in accordance with their terms as soon as the LTV fell below 70%. Although the Guarantee Claim Defendants rely on the email from Mr Horner referred to above, it is noteworthy that this is not the pleaded basis of this part of the claim. However, that point has not been taken by PHBV and thus I proceed on the basis that the Guarantee Claim Defendants are entitled to rely on it notwithstanding that it has not been expressly pleaded.

86. I leave until the end of this judgment the issues that arise in relation to the various acknowledgements contained in the Guarantees. In my judgment on the evidence that is available it has not been demonstrated that the LTV ever fell below 70%, or that the Bank concluded or ought reasonably to have concluded that it had, or that the Bank should have acted unilaterally by discharging the Guarantees after the April 2009 CBRE Report was sent to it. My reasons for reaching those conclusions are as follows.

87. The April 2009 CBRE Report was commissioned by BHL for the purpose of supporting its request for further facilities from the Bank. There is no mention within it either of instructions to the effect that the representation had been made or that the report was being prepared for the purpose of demonstrating that the LTV had fallen below 70%. As far as I can see BHL's borrowings are not referred to anywhere within the report. Although SF suggests that one of the reasons why the Report was commissioned was to demonstrate that LTV had dropped below 70%, he abandoned that suggestion in cross examination – see T3/163/1-12. He also accepted that he did not say to the Bank either by reference to the April 2009 Report or otherwise that the Guarantees had ceased to apply or should be discharged – see T3/163/22-25. SF continued to suggest that he had drawn to the attention of Mr Bowen that the LTV had dropped below 70% and thus by implication that the Guarantees ought to be discharged.

88. Mr Bowen denied there was such a discussion. I accept that evidence for the following reasons. First, for the reasons I give below, the April 2009 Report is not one that refers to much less addresses the LTV issue and further is not a report the Bank could reasonably be expected to act upon for the purpose of deciding whether the LTV had dropped below 70%. Secondly, the discussion with the Bank at the time the report was provided to it was about the provision of additional facilities. It is inherently improbable that SF would be asking the Bank for additional facilities whilst at the same time seeking, whether expressly or by implication, release of part of the Bank's security. Thirdly, if the Guarantors were really requesting release and had done so initially orally and by implication, they would have been bound to follow up with a formal written request for release in the event that the oral implied request had not succeeded. There is no documentation of any sort which suggests that such a request was made. Finally, if there had been a request for release of the Guarantees

then that would have appeared in the Bank's internal documentation and would have informed the request actually being made by BHL for additional facilities. In particular such a request would have been bound to feature in the July 2009 internal note that I refer to below. There is no such reference. Rather, under the heading "*Security*" the note says "*No change in existing security, existing security is ....(iii) £450K supported PG from SF ...(iv) £300K PG ...*".

89. Assuming that the Bank was under an obligation to consider discharge of its own volition upon receipt of the 2009 Report, and even though it had not been requested to consider such a release, it is necessary to identify what borrowing is being referred to by the representation relied on in order to decide whether the Bank acted in breach of the express or implied terms or collateral contract or unconscionably by not discharging the Guarantees. The difficulty is that the representation relied on was made at a time when the only lending in contemplation was that which was the subject of the Loan Agreement. Following completion of that agreement, there were two events of significance. First, there had been additional overdraft facilities extended to BHL. Secondly there had been a repayment to BHL of capital repayments made by it in accordance with the Loan Agreement from the first anniversary of the loan. This begs the question therefore as to what lending was relevant for the purposes of the LTV representation. If the answer is only the lending the subject of the Loan Agreement then that involves ignoring the post completion events. It also ignores the fact that the Guarantees were all monies guarantees. Given this last point, and commercial reality, it is unlikely that it was intended that the LTV question should be tested (if it arose in the future) other than by reference to the total of the sums secured by the Guarantees at the time when the question had to be tested. If that is the correct approach then even if the April 2009 Report is taken at face value the LTV did not reduce below 70% as is demonstrated by Appendix A to PHBV's closing submissions.

90. In any event, the April 2009 Report is not one that the Bank could reasonably have been expected to act upon by discharging the Guarantees for the following reasons.

91. First, the April 2009 report was not addressed to the Bank, and it was not prepared for the purposes of considering whether the Guarantees could be released. It was prepared as I have said on the instructions of BHL and was deployed in support of its request to the Bank for additional facilities. CBRE had prepared the valuation report on which the Bank's original lending had been based. It is likely that had the Bank been requested to release the Guarantees it would have had to consult another panel valuer given that CBRE had chosen to provide the April 2009 valuation to BHL.

92. The Report itself is based on an EBITDA of 31% which the report records as being "*... higher than achieved between May 2008 and January 2009 which was about 22%*". It is only by adopting this figure (and ignoring the total amount outstanding under the overdraft facility as at the date of the report [£229,118.35]) that the April 2009 market value figure (and thus the assertion that the LTV had dropped below 70%) can be justified. There is no explanation as to the quantum of increase beyond a belief that one off costs were high and an assumption that promotional costs, consultancy fees and accountancy fees "*... will be slightly lower*" without explaining how much lower or why these assumptions were justified or how whatever detailed assumptions had been made led to the conclusion that the EBITDA figure adopted

was the correct one to adopt in the circumstances. That the conclusion concerning costs being "... *slightly lower ...*" did not lead to the conclusion that the EBITDA figure should be increased by 9% was accepted by SF in cross examination – see T3/154/14 - 19. As SF also accepted, it was impossible to test the assumptions made – see T3/155/3-7. Thus it was impossible for the Bank to test them in April 2009. The report records that staff costs were higher in 2008 than projected but it is not explained how much higher or why those costs would not continue at the higher rate. There is an expressed belief that "... *trade will continue to improve ...*" but again by how much and how that impacts on the figures adopted is not explained.

93. Various comparables are referred to in the report but how they impact on the valuation has not been explained. It is said that the valuation has been arrived at relying on market evidence but that evidence has not been identified, much less what adjustments have been made.

94. In the end the valuation appears to have proceeded on the basis of an EBITDA that exceeded current figures by 9% which had not been explained other than in very general terms. The increase in projected EBITDA is a substantial one in what was a hostile trading environment resulting from the then state of the economy, which is described in the April 2009 Report as having had a "... *negative impact on the hotel trade ...*".

95. Both Mr Bowen and Mr Horner said that the report is not one that the Bank would have acted on for security evaluation purposes. I accept that evidence having regard to the limitations of the report that I have referred to above and also because the Report had not been commissioned by the Bank and the valuer had asked that the report should not be shown to the Bank – see SF's oral evidence at T3/149-150 and 152, where he confirmed that he had not told CBRE that he had sent the April 2009 Report to the Bank and that the valuation had not been prepared for the purpose of assessing the Bank's security. As SF put it at T3.153/2-6, it had been prepared and presented to the Bank "... *in order to provide information that the bank required to secure the additional facility*". My conclusion that the Bank would not have acted on the April 2009 Report is consistent with the Bank's internal documentation – see its internal note dated 13 July 2009, where it is recorded that "*clarity and confirmation needed round recent valuation ... the EBITDA used ... appears forecast led when compared to actual run rate ...*".

96. Contractually the defence is advanced on the basis of an alleged repudiatory breach by the Bank of the express or implied terms or the collateral contract alleged to arise from the representation relied on. Even if all of this is wrong and the effect of providing the Bank with a copy of the April 2009 Report was in principle to trigger an obligation on the part of the Bank to discharge the Guarantees even in the absence of a request to do so, the Guarantees were affirmed by the actions of the Guarantors.

97. All the relevant facts were known to the Guarantee Claim Defendants by July 2009 at the latest. By then they had received the April 2009 Report and, on their case, knew that on the basis of the April 2009 Report showed that the LTV had dropped below 70%. This is only so assuming only the original loan alone is considered and the overdrafts ignored as I have explained already but that is not material for present purposes. Notwithstanding this state of knowledge, each of the Guarantee Claim

Defendants signed documents that confirmed that the Guarantees remained in full force and effect or such documents were signed on their behalf

98. The first such document is the letter signed by SF and DS dated 10 November 2009 by which they accepted an offer of an overdraft facility expressly secured by the Guarantees. SF accepted in the course of his oral evidence that he signed this document at a time when he knew the LTV had dropped below 70% - see T3/173/7-17. The effect of this was to affirm the Guarantees. SC signed a similar document in similar terms dated 6 October 2011. DS signed the document referred to above, and additional ones dated 20 April 2012, 21 February 2013 and 28 October 2013, by each of which he accepted overdraft facilities on behalf of BHL that were secured by the Guarantees. His only explanation was that he did not read the document. It has not been suggested that any of the signatories were not authorised to sign the documents by the Guarantee Claim Defendants.

99. For these reasons, even assuming that there was an express or implied term of the Guarantees or a collateral contract to the effect alleged I am not satisfied that breach has been demonstrated. If I am wrong about that, the Guarantees were affirmed by the conduct referred to above. In any event there was no attempt to accept the alleged repudiation prior to formal demand being made under the Guarantees.

100. I have left to the end the effect of the acknowledgements contained in the Guarantees. As I have explained, the defence proceeds on the basis of the promise taking effect as an express or implied term of the Guarantees or as a collateral contract the consideration of which was the signing of the Guarantees or on the basis of an estoppel.

101. Each of the Guarantees contained an acknowledgement by the Guarantors that there were no arrangements, collateral or relating to the Guarantees, which have not been recorded in writing and signed by them and on behalf of the Bank. The effect of this provision is to preclude the Guarantee Claim Defendants from relying on any contractual arrangements not contained in a document signed by both parties. Had the Guarantee Claim Defendants wished to rely on what Mr Horner had said, they could and should have insisted on what he had said being recorded either in the guarantee or in a side letter signed by the Bank and the Guarantors. The word "*arrangement*" is more than wide enough to encompass either a collateral agreement or an express or implied term of the Guarantee not set out in the Guarantees themselves. In my judgment Mr Horner's written promise is one that falls within the scope of this acknowledgement. The only written arrangement that was excluded from its scope was one signed by both the guarantors and the Bank. The communication from Mr Horner preceded the Guarantees and so could not be said to be any form of waiver of any of its provisions. Each of the Guarantors were fully advised concerning the terms and effect of the Guarantees. Had they thought that what had been promised was intended to have contractual effect then as I have said they would have told their solicitors and their solicitors would have insisted in the qualification being recorded in a side letter.

102. The Guarantee Claim Defendants rely in the alternative on an estoppel based on the contents of Mr Horner's email – see paragraph 43 of SF's defence. However, in order to make good such an assertion, they must demonstrate that they have relied on the

promise concerned. In my judgment this is an impossible submission in light of the acknowledgement within each Guarantee that the Guarantors have not relied on any oral or written statement, representation, advice, opinion or information made or given to me/us in good faith by the Bank, not least because what is relied on is pleaded as having been a representation and in any event is "*information*". Even if this is wrong however, it does not take matters any further in light of the factual conclusions I have reached set out above.

## Conclusion

103. The Bank Claimants' claim is dismissed. The Guarantee Claim succeeds.