Neutral Citation Number [2018] EWHC 1027 (Ch)

Claim No: HC-2015-001062

IN THE HIGH COURT OF JUSTICE

BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
BUSINESS LIST (ChD)

7 Rolls Building
Fetter Lane
London
EC4A 1NL

16 May 2018

BEFORE:

MR. ANDREW HOCHHAUSER QC
(Sitting as a Deputy Judge of the Chancery Division)

BETWEEN:

(1) RAMESH JADAVJI PARMAR
(2) RAMA RAMESH PARMAR

Claimants

-and-

BARCLAYS BANK PLC

Defendant

Hearing dates: 14, 15, 16, 17, 20 November 2017

DAVID BERKLEY QC and MOHAMMED ALI AKRAM
(Instructed by Lexlaw Solicitors & Advocates, 4 Middle Temple Lane, Temple, London EC4Y 9A) appeared on behalf of the Claimants

ANDREW SUTCLIFFE QC
(Instructed by Dentons UKMEA LLP, 6th Floor, Station Road, Watford WD18 1AF) appeared on behalf of the Defendant

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.

ANDREW HOCHHAUSER QC

APPROVED JUDGMENT

Table of Contents

Introduction 4
The Nature of the Claims 4
The Losses Claimed 4
The Relevant Statutory Provisions and Regulatory Framework 5
The Relevant COBS Rules 5
The High Level Principles 13
The Perimeter Guidance Manual ('PERG') 14
The Issues 15
The Factual Witnesses 16
The Expert Evidence 20
The Relevant Factual Background 21
January 2007 – Mr. Lotz comes on the scene 26
The telephone conversations on 1 November 2007 28
The telephone conversation on 22 January 2009 31
Events following the telephone conversation on 22 January 2009 34
The Issues – three introductory points 46
Issue 1: Was this an advised or non-advised sale? 46
The Claimants' submissions on whether COBS 9 is engaged 47
The Bank's submissions as to whether COBS 9 is engaged 55
Discussion and conclusion on Issue 1 57
Issue 2: Do COBS Rule 2.1.2 or the provisions of the Unfair Contracts Terms Act 1977 prevent the Bank from relying upon the "basis clauses" in its contracts with the Claimants? 60
The Claimants' submissions 62
Discussion and conclusion on Issue 2 63
Has there been compliance with COBS 10? 63
The Claimants' submissions in relation to COBS 10 63
The Bank's submissions in relation to COBS 10 64
Discussion and conclusion on COBS 10 66
In the event that I had found that COBS 9 had been engaged, were the Swaps suitable? 67
The Claimants' Principal Areas of Complaint 67
Did the presentations provided to the Claimants fail to give a sufficient explanation of the potential magnitude of breakage costs involved in a Swap? 68

The Claimants' submissions 68
The Bank's submissions 68
Discussion and conclusion in relation to the adequacy of the explanation of the potential magnitude of breakage costs involved in a Swap. 70
Did the presentations provided to the Claimants and the discussions between Mr. Parmar and Mr. Lotz fail properly to identify prominently the true value of the Cap in comparison to the Swaps? 72
The Claimants' submissions 72
The Bank's submissions 73
Discussion and conclusion on whether the Bank failed properly to identify prominently the true value of the Cap in comparison to the Swaps. 73
Should the Bank should have disclosed the existence of its credit equivalent exposure ("CEE") limit in relation to the Swaps and its potential impact on the Claimants' ability to obtain further borrowing in future. 74
The Claimants' submissions 74
The Claimants' further submissions in the light of the PAG Decision 75
The Bank's Submissions 77
The Bank's further submissions in the light of the PAG Decision 81
Discussion and conclusion on whether the Bank should have disclosed the existence of its credit equivalent exposure ("CEE") limit in relation to the Swaps and its potential impact on the Claimants' ability to obtain further borrowing in future. 87
The Second Aspect of the impact of the complaint relating to the impact of the CEE limit – Discussion and conclusion 90
The conclusions on the Claimants' principal areas of complaint 92
Issue 3: Did the Bank comply with the client's best interests rule (COBS Rule 2.1.1) by acting fairly and professionally in accordance with the best interests of its clients? 93
The Claimants' submissions in relation to COBS Rule 2.1.1 93
The Bank's submissions in relation to COBS Rule 2.1.1 93
Discussion and conclusion in relation to COBS Rule 2.1.1 93
Issue 4 Did the Bank comply with each of COBS Rules 2.2.1, 4.2.1, 4.5.2, 4.5.2, 4.5.6 and 14.3.2? 94
Conclusion 95

Introduction

1. This case concerns claims brought by Mr. Ramesh Jadavji Parmar and his wife, Mrs Rama Ramesh Parmar against Barclays Bank Plc (**"the Bank"**) arising from their entry, on 29 April 2009, into interest rate hedging transactions, specifically two ten-year interest rate swaps (**"the Swaps"**), commencing on 1 May 2009, each at a fixed rate of 3.48% per annum based upon initial notional amounts of £482,962.87 and £863,528.42 respectively.

2. At trial the Claimants were represented by Mr. David Berkley QC and Mr. Mohammed Ali Akram. The Bank was represented by Mr. Andrew Sutcliffe QC. I am grateful to them for their helpful written and oral submissions. After the hearing, the Court of Appeal handed down its decision in **Property Alliance Group Limited v The Royal Bank of Scotland PLC** [2018] EWCA Civ 355 (**"the PAG Appeal Decision"**), which touched upon one of the issues I have to decide. I therefore invited Counsel to make further submissions on the effect of that decision, should they wish. They did so on 7 and 8 March 2018. By that stage the Claimants were represented by Mr. John Virgo, who was the author of the further submissions on their behalf.

The Nature of the Claims

3. When the Claimants' case was opened by Mr. Berkley, the primary claim advanced was a statutory claim under s.138D of the Financial Services and Markets Act 2000 ("**FSMA**") for damages for alleged breaches of the applicable Conduct of Business Sourcebook ("**COBS**") rules, contained in the FCA's Handbook (the "**FCA Handbook**"). There were, however, additional claims advanced for breaches of alleged common law and fiduciary duties. I queried with Mr. Berkley what additional benefit to the Claimants the further claims would add to the primary claim under s.138D of FSMA. After considering the matter further, after the short adjournment on the first day of the hearing, he indicated that he wanted to proceed on the primary claim alone. This judgment therefore considers only that aspect of the pleaded case. Suffice it to say at this stage, the Bank denies any breaches of the COBS rules, and contends that, even if there were, no recoverable loss has been sustained by the Claimants.

The Losses Claimed

4. Under their Schedule of Loss, the Claimants claim direct losses of £338,745.54, together

with interest. This is on the basis that they should have been sold two interest rate cap products, each for a term of 5 years at a rate of 4.5%, and accordingly, in making their claims, credit has been given for the cost of those interest rate cap products ("**Caps**")

5. There was also a claim for consequential loss in the sum of £530,270, together with interest. This was based upon an allegation that a subsequent refusal by the Bank to lend money towards the purchase of a property, 13, Aintree Road, Perivale, was the result of a concealed credit limit, imposed as a result of the Swaps. As a consequence, it was said, the envisaged purchase could not proceed and there was a loss of capital appreciation and rental income. At trial it became apparent from the evidence that the Bank's decision not to lend the money sought by the Claimants for the purchase of this property was for wholly unconnected reasons. In the light of this, in his closing submissions, Mr. Berkley abandoned the consequential loss claim. In my view he was clearly right to do so.

The Relevant Statutory Provisions and Regulatory Framework

6. Interest rate hedging products ("**IRHPs**"), such as the Swaps, are designated investment products and the sale and arrangement of such products are regulated under Part III of FSMA and the subordinate legislation thereunder.

7. The Bank is an authorised person, authorised by the FCA under FSMA to perform regulated activities. The regulated activities performed by the Bank include giving advice on financial products and arranging deals in financial products.

8. Section 138D(2) of FSMA provides that:

> "A contravention by an authorised person of a rule made by the Financial Conduct Authority is actionable at the suit of a private person who suffers loss as a result of the contravention, subject to the defences and other incidents applying to actions for breach of statutory duty."

9. It is common ground between the parties that, for the purposes of the subsection, the Claimants are "private persons", as defined in Regulation 3 of the Financial Services and Markets Act 2000 (Rights of Action) Regulations (*SI 2001/2256*). In addition the Claimants are classified as "Retail Clients" under COBS 3.4.1R, and therefore they are entitled to the maximum protection under the COBS Rules.

The Relevant COBS Rules

10. The COBS Rules upon which the Claimants relied were as follows:

"2.1.1R The client's best interests rule

(1) A firm must act honestly, fairly and professionally in accordance with the best interests of its client (the client's best interests rule).

2.1.2R Exclusion of liability

A firm must not, in any communication relating to designated investment business seek to:

(1) exclude or restrict; or

(2) rely on any exclusion or restriction of;

any duty or liability it may have to a client under the regulatory system.

2.1.3G

(1) In order to comply with the client's best interests rule, a firm should not, in any communication to a retail client relating to designated investment business:

   (a) seek to exclude or restrict; or

   (b) rely on any exclusion or restriction of;

   any duty or liability it may have to a client other than under the regulatory system, unless it is honest, fair and professional for it to do so.

(2) The general law, including the Unfair Terms Regulations (for contracts entered into before 1 October 2015) and the CRA, also limits the scope for a firm to exclude or restrict any duty or liability to a consumer.

2.2.1R Information disclosure before providing services

(1) A firm must provide appropriate information in a comprehensible form to a client about:

   (a) the firm and its services;

   (b) designated investments and proposed investment strategies; including appropriate guidance on and warnings of the risks associated with investments in those designated investments or in respect of particular investment strategies;

   (c) execution venues; and

   (d) costs and associated charges;

   so that the client is reasonably able to understand the nature and risks of the service and of the specific type of designated investment that is being offered and, consequently, to take investment decisions on an informed basis.

(2) That information may be provided in a standardised format.

4.2.1R The fair, clear and not misleading rule

(1) A firm must ensure that a communication or a financial promotion is fair, clear and not misleading.

4.2.2G

(1) The fair, clear and not misleading rule applies in a way that is appropriate and proportionate taking into account the means of communication, the information the communication is intended to convey and the nature of the client and of its business, if any. So a communication addressed to a professional client or an eligible counterparty may not need to include the same information, or be presented in the same way, as a communication addressed to a retail client.

(2) COBS 4.2.1R(2)(b) does not limit the application of the fair, clear and not misleading rule under COBS 4.2.1R(2)(a). So, for example, a communication in relation to designated investment business that is both a communication to a professional client and a financial promotion, will still be subject to the fair, clear and not misleading rule.

4.5. Communicating with retail clients

Application

(1) this section applies in relation to a firm in relation to:

(a) the provision of information in relation to its designated investment business…where such information …is addressed to or disseminated in such a way that it is likely to be received by a retail client.

4.5.2R General rule

A firm must ensure that information:

(1) includes the name of the firm;

(2) is accurate and always gives a fair and prominent indication of any relevant risks when referencing any potential benefits of relevant business or a relevant investment;

(3) is sufficient for, and presented in a way that is likely to be understood by, the average member of the group to whom it is directed, or by whom it is likely to be received;

(4) does not disguise, diminish or obscure important items, statements or warnings.

(5) uses a font size in the indication of relevant risks that is at least equal to the predominant font size used throughout the information provided, as well as a layout that ensures that such indication is prominent;

(6) is consistently presented in the same language throughout all forms of information and marketing materials that are provided to each client, unless the client has agreed to receive information in more than one language; and

(7) is up-to-date and relevant to the means of communication used.

4.5.5G

When communicating information, a firm should consider whether omission of any relevant fact will result in the information being insufficient, unclear, unfair or misleading. When considering whether a fact should be included in the communication or omitted from it, a firm should bear in the mind the guidance in COBS 4.2.2G to provide information which is appropriate and proportionate.

4.5.6R Comparative information

If information compares relevant business, relevant investments, or persons who carry on relevant business, a firm must ensure that the comparison is meaningful and presented in a fair and balanced way.

8.1.3R

(1) A firm must, in good time before a retail client is bound by any agreement relating to designated investment business or ancillary services or before the provision of those services, whichever is the earlier, provide that client with:

(a) the terms of any such agreement; and

(b) the information about the firm and its services relating to that agreement or to those services required by COBS 6.1.4R, including information on communications, conflicts of interest and authorised status.

(2) A firm must provide the agreement and information in a durable medium or, where the website conditions are satisfied, otherwise via a website.

(3) A firm may provide the agreement and the information immediately after the client is bound by any such agreement if:

(a) the firm was unable to comply with (1) because, at the request of the client, the agreement was concluded using a means of distance communication which prevented the firm from doing so; and

(b) if the rule on voice telephony communications (COBS 5.1.12 R) does not otherwise apply, the firm complies with that rule in relation to the retail client, as if he were a consumer.

(4)

(a) A firm must notify a client in good time about any material change to the information provided under this rule which is relevant to a service that the firm is providing to that client.

(b) A firm must provide the notification in a durable medium if the information to which it relates was given in a durable medium.

9.2.lR Assessing suitability: the obligations

(1) A firm must take reasonable steps to ensure that a personal recommendation, or a decision to trade, is suitable for its client.

(2) When making the personal recommendation or managing his investments, the firm must obtain the necessary information regarding the client's:

(a) knowledge and experience in the investment field relevant to the specific type of designated investment or service;

(b) financial situation; and

(c) investment objectives;

so as to enable the firm to make the recommendation, or take the decision, which is suitable for him.

9.2.2R

(1) A firm must obtain from the client such information as is necessary for the firm to understand the essential facts about him and have a reasonable basis for believing, giving due consideration to the nature and extent of the service provided, that the specific transaction to be recommended, or entered into in the course of managing:

(a) meets his investment objectives;

(b) is such that he is able financially to bear any related investment risks consistent with his investment objectives; and

(c) is such that he has the necessary experience and knowledge in order to understand the risks involved in the transaction or in the management of his portfolio.

(2) The information regarding the investment objectives of a client must include, where relevant, information on the length of time for which he wishes to hold the investment, his preferences regarding risk taking, his risk profile, and the purposes of the investment.

(3) The information regarding the financial situation of a client must include, where relevant, information on the source and extent of his regular income, his assets, including liquid assets, investments and real property, and his regular financial commitments.

9.2.6R Insufficient information

If a firm does not obtain the necessary information to assess suitability, it must not make a personal recommendation to the client or take a decision to trade for him.

10.2.1R

(1) When providing a service to which this chapter applies, a firm must ask the client to provide information regarding his knowledge and experience in the investment field relevant to the specific type of product or service offered or demanded so as to enable the firm to assess whether the service or product envisaged is appropriate for the client.

(2) When assessing appropriateness, a firm must determine whether the client has the necessary experience and knowledge in order to understand the risks involved in relation to the product or service offered or demanded.

10.2.2R

The information regarding a client's knowledge and experience in the investment field includes, to the extent appropriate to the nature of the client, the nature and extent of the service to be provided and the type of product or transaction envisaged, including their complexity and the risks involved, information on:

(1) the types of service, transaction and designated investment with which the client is familiar;

(2) the nature, volume, frequency of the client's transactions in designated investments and the period over which they have been carried out;

(3) the level of education, profession or relevant former profession of the client.

10.3.1R

(1) If a firm considers, on the basis of the information received to enable it to assess appropriateness, that the product or service is not appropriate to the client, the firm must warn the client.

(2) This warning may be provided in a standardised format.

11.2.1R Obligation to execute orders on terms most favourable to the client

A firm must take all reasonable steps to obtain, when executing orders, the best possible result for its clients taking into account the execution factors.

14.3.2R Providing a description of the nature and risks of designated investments

A firm must provide a client with a general description of the nature and risks of designated investments, taking into account, in particular, the client's categorisation as a retail client or a professional client. That description must:

(1) explain the nature of the specific type of designated investment concerned, as well as the risks particular to that specific type of designated investment, in sufficient detail to enable the client to take investment decisions on an informed basis; and

(2) include, where relevant to the specific type of designated investment concerned and the status and level of knowledge of the client, the following elements:

(a) the risks associated with that type of designated investment including an explanation of leverage and its effects and the risk of losing the entire investment;

(b) the volatility of the price of designated investments and any limitations on the available market for such investments;

(c) the fact that an investor might assume, as a result of transactions in such designated investments, financial commitments and other additional obligations, including contingent liabilities, additional to the cost of acquiring the designated investments; and

(d) any margin requirements or similar obligations, applicable to designated investments of that type.

14.3.8R Product information: form

The documents and information provided in accordance with the rules in this section must be in a durable medium or available on a website (where that does not constitute a durable medium) that meets the website conditions.

14.3.9R The timing rules

(1) The information to be provided in accordance with the rules in this section must be provided in good time before a firm carries on designated investment business with or for a retail client.

(2) A firm may provide that information immediately after it begins to carry on that business if:

(a) the firm was unable to comply with (1) because, at the request of the client, the agreement was concluded using a means of distance communication which prevented the firm from complying with that rule; and

(b) in any case where the rule on voice telephony communications (COBS 5.1.12R) does not otherwise apply, the firm complies with that rule as if the client was a consumer.

15.2.5R Disclosing a right to cancel or withdraw

(1) The firm must disclose to the consumer:

(a) in good time before or, if that is not possible, immediately after the consumer is bound by a contract that attracts a right to cancel or withdraw; and

(b) in a durable medium;

the existence of the right to cancel or withdraw, its duration and the conditions for exercising it including information on the amount which the consumer may be required to pay, the consequences of not exercising it and practical instructions for exercising it indicating the address to which the notification of cancellation or withdrawal should be sent.

(1A) If the firm offers to facilitate, directly or through a third party, the payment of adviser charges or consultancy charges, it must disclose to the consumer at the same time as it makes the disclosure in (1):

(a) whether any refund will include an adviser charge or consultancy charge; and

(b) that the consumer may be liable to pay any outstanding adviser charges or consultancy charges.

(2) This rule applies only where a consumer would not otherwise receive similar information under a rule in this sourcebook or in a key information document from the firm or another authorised person (such as under the distance marketing disclosure rules (COBS 5.1.1R to 5.1.4R), COBS 14 (Providing product information) or the PRIIPs Regulation)."

11. I should add that:

(1) originally reliance was placed by the Claimants on Rule 5.1.1 and COBS 5 Annex 1, which deals with distance marketing information. This was abandoned at the outset of the trial;

(2) after the conclusion of the evidence, the Claimants sought to re-amend their amended Particulars of Claim by adding further breaches of Rules 10.2.1R and reliance was placed for the first time on 4.5.6R, which deals with comparative information and provides:

"If information compares relevant business, relevant investments, or persons who carry on relevant business, a firm must ensure that… (a) the comparison is meaningful and presented in a fair and balanced way…"

The Bank consented to the re-amendment in relation to further alleged breaches of

Rule 10.2.1R, but opposed the introduction of any reliance on Rule 4.5.6R. For the reasons given in a separate judgment, I granted the Claimants' application to re-amend in its entirety, because it seemed to me that the factual basis for the reliance on the alleged breach of Rule 4.5.6R was merely another aspect of the detailed consideration of the facts in this case. I did not accept that the Bank would suffer any prejudice by its introduction. Insofar as Mr. Sutcliffe contended that he was put at a disadvantage because he had not had the chance properly to address this in his written closing submissions, I gave him the opportunity to do so, both orally in his closing and in further written submissions. In the event, no further written submissions were produced by him on this aspect.

The High Level Principles

12. Mr. Berkley also drew my attention to the FCA Principles, as at 29 April 2009, in particular:

> Principle 1 **Integrity** – A firm must conduct its business with integrity.
>
> Principle 6 **Customers' Interests** – A firm must pay due regard to the interests of its customers and treat them fairly.
>
> Principle 7 **Communications with clients** – A firm must pay due regard to the information needs of its clients and communicate information to them in a way which is clear, fair and not misleading.
>
> Principle 8 **Conflicts of Interest** – A firm must manage conflicts of interest fairly, both between itself and its customers and between a customer and another client.
>
> Principle **9 Customers' relationships of trust** – A firm must take reasonable care to ensure the suitability of its advice and discretionary decisions for any customer who is entitled to rely upon its judgment.

13. As Mr. Berkley pointed out, these Principles are not rules and do not themselves afford a right of action under section 138D, but they are relevant to the application and interpretation of the COBS rules. He relies upon the observations of Ouseley J in **R (British Bankers Association) v Financial Services Authority** [2011] EWHC 999 where he stated at [166] that:-

> *"It follows that there is no reason in principle why the specific obligations in the rules should not be subject to the wider role of the Principles. The specific obligations are not to be seen as exhausting the requirement to comply with high level Principles. The unhelpful concept of the specific rules "occupying the field" is inapt to express the true position. The Principles "occupy the field"; they stand over the specific*

rules. It is the general performing its role as the overarching requirement which cannot be displaced by compliance with specific rules if the overarching requirement is breached. Since the correct starting point is that the Principles govern the sales activities of the firms at all times, the real question is whether there is any reason to interpret a specific rule as excluding the general so that a breach of the Principles goes unredressed, even though a specific rule has been complied with."

The Perimeter Guidance Manual ('PERG')

14. Mr. Berkley also relies upon the following provisions of Chapter 8 of PERG:

    (1) PERG 8.28.1G, which provides that:

    > "In the FCA's view, advice requires an element of opinion on the part of the adviser. In effect, it is a recommendation as to a course of action. Information, on the other hand, involves statements of fact or figures."

    (2) PERG 8.28.2G, which states that

    > "(1) In general terms, simply giving information without making any comment or value judgment on its relevance to decisions which an investor may make is not advice."

    (3) PERG 8.28.3 states that information may often involve:

    > "(4) a comparison of the benefits and risks of one investment as compared to another."

    (4) PERG 8.28.4 states that:

    > "In the FCA's opinion, however, such information may take on the nature of advice if the circumstances in which it is provided give it the force of a recommendation. For example:
    >
    > ... (3) a person may provide information on a selected, rather than balanced, basis which would tend to influence the decision of the recipient."

15. He points to three first instance decisions where judges have been assisted by the guidance in PERG and have applied it when making factual determinations:

    (1) **Zaki v. Credit Suisse (UK) Ltd** [2011] 2 CLC 523, per Teare J at [83]-[84]. That decision was upheld on appeal [2013] EWCA Civ 14;

    (2) **Rubenstein v. HSBC Bank p***lc* [2011] CLC 459, per HHJ Havelock-Allan QC at [81]. That aspect of the decision not challenged on appeal [2012] EWCA Civ 1184; and

    (3) Mr. Timothy Kerr QC (as he then was sitting as a deputy judge of the High Court)

in **Crestsign v National Westminster Bank and another** [2014] EWHC 3043 (Ch) at [88]-[89].

I will take the relevant provisions of PERG cited above into account when determining whether there has been a breach of the COBS Rules.

The Issues

16. After hearing the evidence and the parties' submissions, which I describe below, the following principal issues arose for consideration:

    (1) Was this an advised or non-advised sale? Depending on the answer to this question, it is necessary to consider whether the Bank failed to comply with either COBS Rule 9 (in respect of an advised sale) or COBS Rule 10 (in respect of a non-advised sale).

    (2) Do COBS Rule 2.1.2 or the provisions of the Unfair Contracts Terms Act 1977 prevent the Bank from relying upon the "basis clauses" in its contracts with the Claimants?

    (3) Did the Bank comply with the client's best interests rule (COBS Rule 2.1.1) by acting fairly and professionally in accordance with the best interests of its clients?

    (4) Did the Bank comply with:

        (a) COBS Rule 2.2.1 (in the sense that it required information to be provided by it in a comprehensible form about the IRHPs offered, including appropriate guidance on and warnings of the risks associated those products to enable the Claimants to make a decision on an informed basis);

        (b) COBS Rule 4.2.1 (in the sense that its communications with the Claimants were required to be fair, clear and not misleading);

        (c) COBS Rule 4.5.2 (in relation to the obligation to give a fair and prominent indication of any relevant risks when referencing any potential benefits of the IRHPs offered);

        (d) COBS Rule 4.5.6 (in relation to the obligation to provide a meaningful comparison of the IRHPs offered and to present them in a fair and balanced way); and

(e) COBS Rule 14.3.2 (by providing the Claimants with an adequate description of the nature and risks of the Swaps and the advantages and disadvantages of the other IRHPs offered in a durable medium)?

In that context, it is necessary to consider the Claimants' particular allegations that:

(i) the presentations provided to the Claimants failed to give a sufficient explanation of the potential magnitude of breakage costs involved in a Swap;

(ii) the presentations provided to the Claimants and the discussions between Mr. Parmar and Mr. Lotz failed properly to identify prominently the true value of the Cap in comparison to the Swaps;

(iii) the Bank should have disclosed the existence of its credit equivalent exposure ("**CEE**") limit in relation to the Swaps and its potential impact on the Claimants' ability to obtain further borrowing in future.[1]

(5) Depending on the answers to the above issues, did any actionable breach of any COBS Rule by the Bank cause the Claimants to suffer loss?

The Factual Witnesses

17. **Mr. Parmar** – he was the only factual witness for the Claimants. He dealt with the Bank on behalf of himself and his wife, in relation in all the discussions relating to IRHPs, leading to the agreements made relating the Swaps. I found him to be an honest witness, doing his best to assist the Court, although he found giving evidence at times tiring and frustrating. One of the Defendants' witnesses, Mr. Chris Evans, who was the Claimants' Relationship Manager for the Bank from late 2008 until May 2012, described Mr. Parmar as "*a thoroughly honest and decent man*." That is an accurate description in my view. The events on which Mr. Parmar gave evidence, however, occurred many years ago, the most significant being between July 2006 and April 2009. It was clear that he has a real sense of grievance at the way that he feels he was treated by the Bank. In my view this has coloured his testimony to a considerable degree and, in my view, this has caused him at times substantially to exaggerate his lack of understanding at the time the products

[1] These allegations were helpfully summarised by Mr. Berkley in his oral closing submissions on Day 5/215/line 1-216/line 25.

were presented and discussed, when examined against the transcripts of the contemporaneous telephone calls and emails to which I will later refer and which are the more reliable record of events.

18. I also bear in mind the dicta of Leggatt J (as he then was) in **Gestmin SGPS S.A. v Credit Suisse Limited, Credit Suisse Securities (Europe) Limited** [2013] EWHC 3560 (Comm) concerning the reliability of oral evidence based on recollection of events occurring several years ago:

> *"Whilst everyone knows that memory is fallible, I do not believe that the legal system has sufficiently absorbed the lessons of a century of psychological research into the nature of memory and the unreliability of eyewitness testimony"* [15];
>
> *"Memory is especially unreliable when it comes to recalling past beliefs. Our memories of past beliefs are revised to make them more consistent with our present beliefs. Studies have also shown that memory is particularly vulnerable to interference and alteration when a person is presented with new information or suggestions about an event in circumstances where his or her memory of it is already weak due to the passage of time"* [18];
>
> *"Considerable interference with memory is also introduced in civil litigation by the procedure of preparing for trial…The effect of this process is to establish in the mind of the witness the matters recorded in his or her own statement and other written material, whether they be true or false, and to cause the witness's memory of events to be based increasingly on this material and later interpretations of it rather than on the original experience of the events"* [20];
>
> *In light of these considerations,* ***the best approach for a judge to adopt in the trial of a commercial case is, in my view, to place little if any reliance at all on witnesses' recollections of what was said in meetings and conversations, and to base factual findings on inferences drawn from the documentary evidence and known probable facts****… Above all, it is important to avoid the fallacy of supposing that, because a witness has confidence in his or her recollection and is honest, evidence based on that recollection provides any reliable guide to the truth"* [22] (Emphasis added).

19. I have adopted the approach indicated in paragraph 22 of the **Gestmin** decision in relation to all the witnesses of fact.

20. **The Banks' witnesses** – I heard evidence from two factual witnesses, Mr. Chris Evans, to whom I have referred in paragraph 17 above, and Mr. Peter John Starmer, who is a Director employed by the Bank in its Personal and Corporate Banking Divisions. Once again, I found both of them honest witnesses, who gave thoughtful evidence, making

concessions where it was appropriate to do so. Their evidence, however, was of limited assistance to resolving the issues in dispute, the problems being that:

(1) Mr. Evans was unable to give any material evidence in relation to the interest rate hedging products under consideration. He was not authorised to discuss such products because of their complexity and had to hand such matters over to someone from Barclays Capital ("**BarCap**") because only they were regulated and authorised to discuss such products with clients. He appeared to have little independent recollection of events, unsurprisingly, given the passage of time since they took place. The only material meeting which he may have attended was one which took place at Canary Wharf on 24 April 2009, since he is recorded in an email dated 23 April 2009 as intending to meet Mr. Parmar at the Bank's Canary Wharf offices at about 10.30 to 11am. He, however, has no recollection of being there and only a vague recollection of having a lunch with both Mr. Parmar and Mr. Lotz of Barclays Capital, with whom Mr. Parmar met on that day;

(2) Mr. Starmer had no dealings with the Claimants and no involvement with IRHPs whatsoever. His evidence was limited solely to his knowledge and experience of CEE from the perspective of being a Barclays Relationship Manager and Credit Officer.

21. **Former employees who were not called by the Bank** – there were two employees within BarCap who dealt with Mr. Parmar in relation to the IRHPs, Mr. Jonathan Mckeown, who was involved from 2006 until 2007, and Mr. Adrian Lotz, who was involved from January 2007 until the Swaps were concluded in May 2009. Neither was called by the Bank. The Claimants were particularly critical of the failure to call Mr. Lotz. I drew the parties' attention to the following principles summarised by Brooke LJ (at p. 340) in **Wisniewksi v Central Manchester Health Authority** [1998] PIQR P324, [1998] EWCA Civ 596 (which I applied in **Energy Renewals Ltd v Borg** [2014] IRLR [2014] EWHC 2166 (Ch) at [15]):

> *"(1) in certain circumstances a court may be entitled to draw adverse inferences from the absence or silence of a witness who might be expected to have material evidence to give on an issue in an action;*
>
> *(2) if a court is willing to draw such inferences, they may go to strengthen the evidence adduced on that issue by the other party or to weaken the evidence, if any, adduced by the party who might reasonably have been expected to call the witness;*

> *(3) there must, however, have been some evidence, however weak, adduced by the former on the matter in question before the court is entitled to draw the desired inference: in other words, there must be a case to answer on that issue;*
>
> *(4) if the reason for the witness's absence or silence satisfies the court, then no such adverse inference may be drawn. If, on the other hand, there is some credible explanation given, even if it is not wholly satisfactory, the potentially detrimental effect of his/her absence or silence may be reduced or nullified."*

22. I invited them to address me on those principles and whether or not I should draw an adverse inference in the light of the Bank's failure to call Mr. Lotz. It was submitted by Mr. Berkley on behalf of the Claimants that, "*applying the principles in Wisniewski in the absence of any explanation from the Bank, the obvious inference to draw is that Mr. Lotz's sale processes were indeed flawed and fell well below the standard expected of a compliant CF30.*" The Bank's explanation for not calling Mr. Lotz was that Mr. Lotz left the Bank in 2011 to return to South Africa, where it is believed he still lives and works. The Bank has had no contact with Mr. Lotz since then. Mr. Sutcliffe submitted that:

    (1) the Claimants made no allegation in the Particulars of Claim that went beyond the documentary evidence, and accordingly the attendance of Mr. Lotz was unnecessary;

    (2) unlike **Energy Renewals**, this was plainly not a case where the non-attendance of a witness is designed to secure a tactical advantage for the Bank;

    (3) Mr. Lotz's recollection was unlikely to be any more reliable than that of Mr. Parmar, for the reasons expressed by Leggatt J in **Gestmin**; and

    (4) the documentary record alone is sufficient to determine the few outstanding factual disputes between the parties.

23. I accept the Bank's submissions, although I note that no attempt appears to have been made to contact Mr. Lotz since proceedings were commenced on 6 March 2015. In my judgment, the present case is distinguishable from the position in **Energy Renewals** and the explanation given by the Bank satisfies me that it is not appropriate for an adverse inference to be drawn from the Bank's failure to call Mr. Lotz as a witness. I also bear in mind the observations of the Court of Appeal in the **PAG Appeal Decision** at [154] that "*No litigant is obliged to call witnesses to satisfy the curiosity or enthusiasm of his*

opponent... The fact that a party who might be expected to produce witnesses does not do so may sometimes speak volumes but it is a matter for the Judge to decide whether it does so in a particular case." In that case Asplin J (as she then was) was not prepared to do so, and nor am I in the present case.

24. **Expert evidence** – both sides called expert evidence. The Claimants' expert was Mr. Martin Berkeley, a Chartered Member of the Investment and Securities Institute, who has worked for a number of financial institutions, including Barclays Wealth and HSBC. He has an LLM in International Financial Regulation and has written a dissertation on financial advice and suitability, and teaches on the MBA Financial Markets course at Manchester Business School. He holds current FCA authorisation and has considerable personal experience of selling IRHPs, including Swaps, to retail and professional clients on an advised and non-advised basis. His evidence was that in his opinion the selling methods adopted by Mr. Lotz fell below the requisite standard, in breach of the COBS Rules, whether or not the sale was advisory or non-advisory.

25. The Bank's expert was Mr. David Croft. He has a BSc in Physics and a Postgraduate Diploma from London University, an MBA from the London Business School and a Diploma in International Management from the Ecole Hautes Etudes Commerciales in Paris. He has worked in a number of financial institutions, including Citibank for 15 years, latterly as Chairman of Citicorp International Securities Ltd, ING for 4 years as a senior banking advisor in the Institutional and Government Advisory Department and American Express Bank for three years in Treasury and Markets Risk Management. He does not, however, have the same direct experience of selling IRHPs as Mr. Berkeley. He is currently a director of GRBW Limited, a consultancy specialising in providing advice on banking and financial issues, and has acted as an expert witness in many banking cases. His evidence was that this was a non-advised sale, the Swaps were appropriate products, none of the Bank's presentations contained a recommendation and on that basis the Bank's sales processes were COBS compliant. In cross-examination, he indicated that if the sale were to be regarded as advisory and COBS 9 were engaged, the Bank would be in breach, because there was no personal recommendation made by Mr. Lotz for a particular product which he regarded as most suitable for the Claimants, as required by COB 9.2.[2]

---

[2] Day 4/213/line 14-214/line 16, Day 4/216/line 25-217/line 12.

26. I shall address the expert evidence in more detail later in this judgment, but at this point I would indicate that I found both experts did their best to assist the Court and were willing to make appropriate concessions.

The Relevant Factual Background

27. By the time Mr. Parmar was introduced to IRHPs in May 2006, he was a longstanding customer of the Bank. He first opened an account with them in 1970. He was an experienced businessman, but had received only a limited education. He had no prior experience of IRHPs. Mr. Parmar had a trusting and respectful relationship with his various relationship managers, and he had done business in the late 1980s when interest rates had soared to 15 percent. He accepted in cross-examination that he was someone who thought long and hard before making decisions, and he did so on this occasion. Indeed in the present case there were nearly 34 months between Mr. Parmar being introduced to IRHPs and the Claimants entering into the Swaps on 29 April 2009.

28. Prior to entering into the Swaps in April 2009, the Claimants had entered into the following facilities with the Bank:

    (1) by a facility letter dated 16 July 2003, the Claimants entered into a commercial mortgage facility for £432,000 over a term of 25 years to assist with the purchase of 18 Aintree Road, Perivale (the "**First Loan**"). Interest was charged initially at 1.75% above base but this rate was reduced shortly afterwards to 1.25% above base by letter of variation dated 28 August 2003. On 6 June 2006, the Bank wrote to the Claimants regarding this loan which was due for review on 18 July 2006.

    (2) by a further facility letter also dated 16 July 2003, the Claimants entered into a 15 year flexible business loan for £570,000 (the "**Second Loan**") in order to assist them with refinancing their commercial investment properties. The Second Loan was increased to £590,000 by a letter of variation dated 28 August 2003. Interest was fixed at 5.8% for the first 5 years, with the opportunity to fix for a further period. The Second Loan contained the following provision at clause 7.5: "*If you repay on a day before the end of a fixed rate interest period you will also pay us for any breakage costs and expenses that we incur as a result of you repaying all or part of the loan. These costs depend on the interest rates prevailing at the time you repay the loan and the actual interest rate being charged to this loan. They also take into account the unexpired period of the fixed rate term. The above breakage*

costs can be significant which is why it is important to select fixed interest rate periods that suit your business".

(3) by a facility letter dated 11 May 2004, the Claimants entered into a further flexible business loan for £180,000 for a term of 12 months (interest only) to assist with the purchase of the Malaysian business, subsequently amended by letters of variation dated 27 June 2005, 1 September 2005 and 27 July 2006. Interest was charged at 3% above base.

(4) by a facility letter dated 27 October 2005, the Claimants entered into a business loan for £200,000 to assist with the acquisition of a warehouse repayable by 30 November 2006 (subsequently amended by letters of variation dated 2 and 12 December 2005 and 27 July 2006).

(5) by a facility letter dated 10 November 2006, the Claimants entered into a commercial mortgage facility for £850,000 over a term of 25 years to assist with (a) the purchase of Stewkley House, 2, Wandsworth Road, Perivale and (b) repayment of the Second Loan (the "**Third Loan**"). Interest was charged on the Third Loan at 1.75% above base rate which at that time was 5%. Although the commercial premises at Stewkley House replaced those at 18, Aintree Road, which the Claimants sold for £1.01 million, it was agreed that the First Loan would remain in place, with the Claimants providing alternative security for it, namely charges over their commercial investment properties in Putney.

29. None of the above facilities required the Claimants to enter into an IRHP as a condition of accepting the facility. Moreover, all the sums available pursuant to the facilities had already been drawn down by the time the Claimants entered into the Swap Agreements.

30. In anticipation of the proposed new lending which resulted in the Third Loan, by an email dated 23 May 2006, the Claimants' then relationship manager, Gary Jones, contacted Jonathan Mckeown of BarCap, giving him Mr. Parmar's contact details and informing Mr. Mckeown that he had "*arranged £850,000 over 25 years on 1.75% margin due to complete on 1st December 2006. Already has £424,487 to 28/06/2028 at 1.25% margin. And is paying off £542,487 currently fixed at 5.8% with no breakage penalty*". Unlike Mr. Jones, Mr. Mckeown was authorised by the then named Financial Services Authority ("**FSA**") to perform "controlled functions", including what was then CF21 and now CF30, which is a customer-facing advisory function in relation to

products such as IRHPs. Mr. Jones asked Mr. Mckeown to contact Mr. Parmar, indicating that Mr. Parmar was "*looking to protect around £700,000 in total*". Mr. Parmar subsequently exchanged emails with Mr. Jones on 13 June 2006, stating that he needed to talk "*about the rate fixing*". It was Mr. Parmar's evidence that in 2006 he asked Mr. Jones for a fixed rate loan and he was told by both Mr. Jones, and by Mr. Mckeown in a meeting on 10 July 2006, that fixed rate loans were no longer being offered by the Bank[3]. It was Mr. Evans' oral evidence that this position never changed prior to the Claimants entering into the Swaps[4]. Mr. Parmar was therefore faced with the situation that if he wanted a fixed rate of interest, the only way to achieve it would be by entering into an IRHP.

31. The meeting on 10 July 2006 took place at Glove Club's offices at 18 Aintree Road. It was attended by Mr. Parmar, Mr. Jones and Mr. Mckeown. Mr. Jones's email to Mr. Mckeown dated 30 June 2006 confirmed the date and time of the meeting and informed Mr. McKeown that the Second Loan (i.e. the fixed rate loan) was being repaid in December through a new loan of £850,000 at 1.75% over base and that, in addition to this, the Claimants had the First Loan then standing at £427,489 at 1.25% over base. Its purpose was to enable Mr. McKeown to meet Mr. Parmar and to introduce him to the concept of interest rate hedging. I accept Mr. Berkley's submission that it was very likely that when Mr. Jones introduced Mr. Mckeown, he did so as an expert in IRHPs, who would explain those products to him. These are complicated products, in respect of which Mr. Jones was not authorised by the FSA to deal with customers. There is no evidence, however, that Mr. Jones indicated to Mr. Parmar that Mr. Mckeown would advise him as to which IHRP product to take. Prior to the meeting there is no evidence that any fact finding exercise in relation to the Claimants was carried out by Mr. Mckeown.

32. It is common ground that at that meeting Mr. McKeown took Mr. Parmar through the presentation he had prepared entitled "*Interest rate risk management solutions – Gloveclub*" (the "**July 2006 presentation**"). That presentation included information about the following IRHPs: a swap, a collar, an enhanced collar and a structured collar. It contained an explanation of each product as well as a summary of the advantages and disadvantages, including a warning at the foot of each page describing the product that

---

[3] Paragraph 23 of his witness statement dated 26 July 2017 (his "**Witness Statement**") and Day 3/140/line 10-142/line 7.

[4] Day 3/165/line 24- 166/line 21.

"*mark to market gains/losses will apply if the contract is exited early*". At page 13, it stated "***Cancellation** – cancelling the contract may result in either a breakage cost or a breakage profit.*" Mr. Berkley submitted that this amounted to poor risk disclosure. It made no mention of a Cap, another IRHP product, which, unlike those illustrated, was a product for which one had to pay a premium. Mr. Berkley relied upon this as indicative that the Bank was being selective in the products being shown to Mr. Parmar. At page 15 of the July 2006 Presentation, under the heading "*Barclays Capital Overview – Recognition of our Capabilities*", it referred to the awards the Bank had won, and stated: "*Barclays Capital is a global institution with an unrivalled depth of expertise in providing risk management and strategic FX hedging advice to the UK marketplace.*"

33. There are no notes of that meeting. In his Witness Statement, Mr. Parmar stated in relation to the July 2006 Presentation, "*I found the July 2006 Presentation very difficult to understand*" [20], and "*I did not understand the interest rate swap, which was complete gobbledegook to me.*" [23]

34. Following the meeting on 10 July 2006, by an email dated 12 July 2006, Mr. Mckeown sent Mr. Jones various compliance paperwork which needed to be completed "*so we can put the protection in place*". Mr. Mckeown stated "*I have assumed for FSA purposes, this is a private customer and the forms I have sent reflect this.*" This suggests that some information must have been obtained by him relating to the Claimants by this stage. This was chased up by Mr. Mckeown by an email dated 23 August 2006 to Mr. Jones, although the forms sent were never completed and thereafter nothing further appears to have happened until November 2006.

35. By two emails dated 1 November 2006, Mr. Mckeown sent the various compliance paperwork again to Mr. Jones, stating that he had telephoned Mr. Parmar and explaining that the forms needed to be completed. It appears from a subsequent email exchange between Mr. Mckeown and Mr. Jones on 7 November 2006 that Mr. Parmar and Mr. Mckeown had spoken and that Mr. Mckeown had agreed to send updated rates to Mr. Parmar and indicated that the compliance papers needed to be returned. Mr. Jones responded the following day, attaching the completed Advice of Compliance, classifying the Claimants as private customers and confirming that the customer agreement and risk warning notice had been completed on 10 October 2006. In the covering email Mr. Jones told Mr. McKeown to contact Mr. Chris Evans in future "*regarding this deal*".

Mr. McKeown was copied into Mr. Jones' email dated 8 November 2006 regarding the Claimants' loan repayment calculation. He subsequently received messages on 20 November saying "*Mr. Parmar wants to speak to you.*".

36. Meanwhile on 10 November 2006, the Claimants had entered into the facility letter for the Third Loan.

37. On 21 November 2006, and contrary to Mr. Parmar's suggestion that all contact in respect of hedging came from the Bank, Mr. Parmar sent Mr. Mckeown an email stating: "*I have not received the email from you yet. In case the email address was not accurately explained, this is it: rjparmar@gmail.com. I look forward to receiving the information for the forthcoming funding. The completion takes place next Thursday.*" The reference to completion was to the purchase of Stewkley House. Mr. McKeown responded by email the following day, stating: "*Sorry for the delay – I attach the updated rates. You will see that even though we have had two rate hikes this year, the rates for interest rate protection have not changed much at all. The only major change is the fact that you do not have to hedge for 21 years now to get decent rates – you can get just as good levels hedging for 15 years. Please give me a call if you have any questions.*" Attached to this email is a presentation entitled "*Interest rate risk management solutions 22 November 2006 Gloveclub*" (the "**November 2006 presentation**"). The November 2006 presentation was essentially the same as the July 2006 presentation, save that it included updated rates, slightly shorter terms and updated market commentary.

38. Completion of Stewkley House took place on 3 December 2006.

39. By emails dated 4 and 14 December 2006, Mr. Mckeown chased Chris Evans for a copy of "*the facility letter for Glove Club*". In January 2007 Mr. Steve Broom replaced Mr. Jones as the Claimants' relationship manager. By an email dated 2 January 2007 Steve Broom sent the facility letter for the Third Loan to Mr. Mckeown. By an email dated 4 January 2007 Mr. Mckeown thanked Mr. Broom for the facility letter, asking him to "*fill out 'nature of business' on the advice of compliance attached*", stating that "*Gary has put 'private custimers* (sic)*' which is not sufficient for our KYC*". That information was duly provided by Mr. Broom to Mr. Mckeown the same day, with the Advice of Compliance form amended to read in the 'Nature of Business' box: "*Business man, manufacturing and wholesaling of rubber products, and landlord*".

40. In an email dated 10 January 2007 to Mr. Broom (and following a call between them

earlier that day), Mr. Mckeown stated: "*Following on from our phone call earlier, the CEE on a 20 year swap for Ramesh's debt profile is £190k. If Ramesh wants to go ahead, you will need to agree this CEE limit with credit. Let me know if Ramesh has made a decision*". Mr. Broom responded the same day stating: "*Ramesh has not made his mind up what he wants to do yet, and has asked for some additional comparative quotes*". Mr. Broom asked for indicative rates for £850,000 and £500,000 for terms ranging from 5 to 20 years. These rates were provided by Mr. Mckeown the following day, the same day on which base rate increased from 5% to 5.25%. Mr. Parmar confirmed in evidence that he had asked for those additional comparative quotes[5] and that he had received them[6].

January 2007 – Mr. Lotz comes on the scene

41. It appears from subsequent emails that sometime in January 2007 Mr. Lotz replaced Mr. Mckeown as the sales person at BarCap responsible for dealing with Mr. Parmar. All documents disclosed by BarCap came from a folder marked 'Parmar' and included the facility letter for the Third Loan, Advice of Compliance and the July 2006 and November 2006 presentations. It appears likely that Mr. Lotz had access to these, because they were on a shared drive in which customer information was stored. In an email dated 6 March 2007 to his line manager's personal assistant, Mr. Lotz stated: "*Glove club – I spoke to the client some 2/3 months ago ... nothing since*". This suggests that Mr. Lotz introduced himself to Mr. Parmar as Mr. Mckeown's successor in January 2007.

42. Thereafter there was a gap of about nine months when nothing happened. This is hardly indicative that Mr. Lotz was putting pressure on Mr. Parmar to enter into the Swaps, as was suggested by the Claimants. The next contact was on 27 September 2007 when Mr. Parmar had his first communication, a telephone conversation, with Mr. Lotz. Mr. Lotz then emailed Mr. Parmar a presentation entitled "*Gloveclub – Interest Rate Protection Solutions*" (the "**September 2007 presentation**"). Mr. Lotz's covering email to Mr. Parmar stated: "*Hi Ramesh. It was good to speak to you earlier today. Attached please find the updated levels for our more popular solutions. I have included similar ideas to what we previously discussed. Please have a read of the presentation. I will give you another call next to discuss further*". This email therefore indicates that Mr. Lotz had at least two discussions with Mr. Parmar before he sent him the September 2007

[5] Day 2/57/lines 18-20.
[6] Day 2/60/lines 13-14.

presentation. There are no notes as to the contents of those discussions.

43. The September presentation stated under the heading '*Objectives*' "*To implement a solution that protects you against rising interest rates. Install at zero-premium*". It included information about four zero-premium products, namely, a Swap, a collar, an enhanced collar and a structured collar. It contained an explanation of each product as well as a summary of the advantages and disadvantages, including a warning on each page that "*mark to market gains/losses will apply if the contract is exited early*". It also contained a page comparing the products side-by-side, followed by a page on breakage and cancellation.

44. Mr. Berkley relied on the following points in relation to the September 2007 presentation:

    (1) The word "Solutions" in the title *Interest Rate Protection Solutions* (he drew to my attention that Mr. Parmar also referred to the document as "*the solutions*" in his email dated 1 November 2007 to Mr. Lotz).

    (2) The words *Corporate Risk* ***Advisory*** immediately beneath Mr. Lotz's name which he submits plainly influenced Mr. Parmar.

    (3) On page 2 –

        (a) The words "*Barclays can tailor a bespoke solution*";

        (b) Not having established the objective, as Mr. Parmar's own objective, there was a clear recommendation that a *zero-premium* product be installed rather than a premium product, which the Bank was able to offer. He submitted that this form of selection by the Bank from within its product range amounted to a personal recommendation.

        (c) "*The profile of your interest payments may be flexed providing a* ***bespoke*** *interest rate management solution.*"

    (4) The fact that a Cap, a premium product, was not shown demonstrates that the Bank was being selective in the products being shown to Mr. Parmar and was recommending the non-premium products, particularly when such products are being shown without a 'fact find' having taken place and with no adequate disclosure of breakage costs.

45. Thereafter nothing happened until 1 November 2007. That is an important date in this chronology. On that day BarCap sent an internal training email, entitled "*Remember, Remember the 1st of November*", to its staff, which indicated that in relation to Mr. Lotz's department, Corporate Risk Advisory, "*by virtue of the customer base we have agreed that we will be providing investment advice. We already have an established robust process which is MiFiD complaint.*" It then set out the process which had to be adhered to. Mr. Berkley relied upon this as an acknowledgment that Mr. Lotz's role was one of providing advice to clients, such as Mr. Parmar.

46. It was the day on which Mr. Broom sent Mr. Lotz an email stating: "*Ramesh is still keen to talk. Can you give him a call as soon as possible please*". Mr. Lotz responded stating "*Calling him now. He was meant to call me when he got back from conference*". The request for a conversation appears to have been initiated by Mr. Parmar who was impressed by the speed with which Mr. Lotz responded to Mr. Broom's email.

The telephone conversations on 1 November 2007

47. In the first conversation:

    (1) Mr. Lotz informed Mr. Parmar that the next move in interest rates was likely to be down, although "*nothing is effectively guaranteed*";

    (2) Mr. Lotz ascertained from Mr. Parmar (i) the approximate size of his debt and the period over which it was to be repaid[7] and (ii) the fact that he held investment property with long-term tenants who had been in there for many years;

    (3) Mr. Lotz explained to Mr. Parmar what he called two very basic core concepts, the first being to do a fixed rate which would mean he had known cash flows for the next 10 or 15 years but "*the big drawback is that if interest rates ... go down, you don't get the benefit*". The second concept was an interest rate collar.

48. After that initial conversation, Mr. Lotz forwarded the September 2007 presentation to Mr. Parmar and Mr. Parmar responded stating: "*thank you for sending me the solutions. Can I go through them and call you back after lunch please*?".

49. This was when Mr. Lotz first introduced the Cap to Mr. Parmar as a possible IRHP. It was not done face-to-face but during a telephone conversation – or rather a series of

[7] It would appear that Mr. Lotz obtained some financial information from Mr. Broom prior to the call as Mr. Parmar stated: "*Did he mention any figures to you*" and Mr. Lotz replied: "*He did yes I think it was 1.2 yes 1.2 million*".

conversations. The discussion was fragmented, falling into four sections, and was subject to a number of interruptions, including an international call which Mr. Parmar had to take. Helpfully there is a full transcript of all of those calls.

50. Mr. Parmar, not surprisingly, told me that he did not now have an independent recollection of those conversations. It is plain from those transcripts, that by reference to the September 2007 presentation (which Mr. Parmar confirmed he had reviewed), Mr. Lotz explained in some detail the operation of a Swap, a collar and a Cap. Mr. Lotz made it clear that the Cap was a product for which Mr. Parmar would have to pay a premium, which at that time for a Cap of 6.5% was roughly £35,000. It is clear from the content of the discussion between the two of them that Mr. Parmar understood how these products worked. He confirmed this in cross-examination in relation to a Swap and a Cap[8]. The upshot of the conversations was that Mr. Parmar indicated that he would play with the figures, put them onto a spreadsheet and see how it related to him with what he was doing at that time, following which they would speak again.

51. Mr. Parmar said that in fact he never prepared a spreadsheet and it was nearly a year before he had any further discussion with Mr. Lotz about IRHPs. Again this is hardly consistent with the allegation that there was pressure being exerted by the Bank on Mr. Parmar to enter into an IRHP.

52. In the meantime:

    (1) By a letter of variation dated 5 November 2007, the Bank agreed to make available a further advance of £100,000 under the First Loan and by a letter of variation dated 25 April 2008, the Bank agreed to make available a further advance of £30,000 under the Third Loan.

    (2) In early October 2008, Mr. Evans replaced Mr. Broom as the Claimants' relationship manager. By email dated 6 October 2008, Mr. Evans emailed Mr. Lotz for an update as to where he had got to with Mr. Parmar's hedging discussions. Mr. Lotz responded the same day stating "*RE glove club, I don't know what you mean. I don't think we have done any trades fo [sic] him yet?*".

53. On 13 October 2008 Mr. Evans and his relationship support manager Rachel Austin had their first meeting with Mr. Parmar at Stewkley House. At that time, the Claimants had

[8] Day 2/73/line 15-74 line 1 in relation to a swap, and Day 2/84 lines 10-17 in relation to a cap.

outstanding loans of £501,150 and £888,894, which were not due for repayment until 2028 and 2031 respectively. Mr. Evans' evidence (which was accepted by Mr. Parmar[9]) was that he had a specific recollection of Mr. Parmar being *"very conscious of what interest rates were doing at that time and he was concerned about the impact of a potential increase in interest rates on his ability to service the debt"*.

54. Two days later Mr. Evans sent Mr. Lotz an email stating as follows: *"Hi Adrian. Went out to see Glove Club on Monday. I think that you have a historic relationship with Ramesh Parmer (sic). We are currently sitting on around £1.4m of debt that is out long term. Can you give him a call please as he is warmed up and keen to discuss. Essentially, he owns a warehouse/office space that he uses but also sublets. He is setting up a new tenant on a long-term lease and my discussions were around the fact that he has a fixed income, and needs to fix his outgoings. Very nice guy. Ramesh Parmer (sic)...."*. Mr. Lotz responded to this email the same day stating: *"yes I have spoken to him on several times. I hope he is not a time waster but with a new lease maybe we can package it up"*. Thereafter nothing happened until January 2009.

55. On 8 January 2009, base rate was cut to 1.5%. A week later, by email dated 15 January 2009, Mr. Lotz sent Mr. Parmar a further presentation entitled *"Gloveclub – Corporate Interest Rate Risk Management"* (the "**January 2009 presentation**"). Mr. Lott apologised for the delay in getting the document to Mr. Parmar and promised to be in touch to discuss further.

56. The January 2009 presentation contained a page entitled *"Shock base-rate cuts significantly lowered expectations..."*. The page referred to base rate still being at 2% and to Barclay's Capital prediction that it would fall to 1%. The presentation included information about four products, namely, a Swap, a Cap, a collar and a structured collar, each with indicative pricing for 5, 10 and 15 year terms. The description of each product contained a bullet point summary as well as a list of the advantages and disadvantages. One of the disadvantages listed for each zero premium product was *"Possible mark-to-market loss (or gain) on exit"*. The presentation included a page comparing the zero premium products, which in the case of each product stated *"x Unable to participate in downward market rate movements"*. A further page entitled *"Cancellation may result in a breakage charge"* gave an indicative breakage cost of £29,000 based on a Swap with a

[9] Day 2/107/ lines 14-25.

notional amount of £1.4 million over a 15 year term being broken after 8 years after a 1% fall in rates. The second and third bullet points below the example stated as follows:

> *"Note this example assumes that the market rates at the time of cancellation for the future cash flows, were 1% higher or lower than the rate you have hedged at. The breakage **cost** would occur if **market rates were 1% LOWER** than your contracted rate."*
>
> If market rates were more than 1% lower than your contracted rate, the breakage cost could be higher than in this worked example".

57. The penultimate page of the January 2009 presentation was headed "*Execution, obligations and operation alongside the loan(s)*" and, amongst other warnings, contained a warning at paragraph 9 in the following terms: "*You are acting for your own account and, based on the information provided by Barclays Capital and taking into account the associated risks, you will make an independent evaluation of the transactions described.*" The final paragraph of this page drew attention to the Bank's terms of business.

58. Mr. Lotz's email exchange with Mr. Parmar dated 19 January 2009 shows that Mr. Lotz tried to call Mr. Parmar that day. Mr. Evans sent Mr. Lotz an email two days later on 21 January 2009 timed at 19:30 which stated: "*Need to pick up with you on a couple of hedges ... Also, Glove Club, Ramesh Parmer (sic) – I know he can seem a bit of a time waster but he has called me as he wishes to do something now*". Mr. Lotz responded by saying: "*I have been speaking to Ramesh and was going to call you to discuss... He does sound keen this time. Will call Ramesh tomorrow*".

The telephone conversation on 22 January 2009

59. Mr. Parmar and Mr. Lotz spoke at length on the telephone the following day, 22 January 2009. There is a transcript of that call. During that call, at Mr. Parmar's request, Mr. Lotz forwarded the September 2007 presentation for comparison purposes. There are several aspects of that conversation which are significant.

60. Mr. Parmar asked Mr. Lotz whether he thought interest rates would go down further to which Mr. Lotz replied "*current interest rates are 1.5% it is expected to go to 1% or lower and a lot of people are saying potentially zero*". Mr. Parmar asked Mr. Lotz whether he thought this will happen and Mr. Lotz replied: "*I used to say no two or three months ago but even speaking to our economists now there is a very real possibility..*".

61. Mr. Parmar asked Mr. Lotz whether his clients were "*now looking at him very seriously*" to which Mr. Lotz replied: "*yeah very seriously looking at it right now. I mean I probably*

got about five clients who I think will do something this month who I've been speaking to the two years ... And quite interestingly more than half of them are looking at caps". Mr. Lotz then referred Mr. Parmar to page 7 of the January 2009 presentation, describing the Cap as a premium product and continued "*The only reason why I started including these is because of the fact that if interest rates do go to 1% or lower okay it's irrelevant how low they go from here it's how long they're going to stay at the lower levels for*", to which Mr. Parmar responded: "*It may not stay too long because I think the reality will come into play and I think, I think like you say it's going to, a long-term interest rate will go up*".

62. During the course of the conversation, Mr. Parmar commented on the difference in the rates for a collar in the January 2009 and September 2007 presentations, which indicated that he had been considering them quite carefully. Because he had difficulty in opening the relevant file on his computer, Mr. Lotz resent the September 2007 presentation.

63. Mr. Parmar sought and received an explanation of the "premium" product – i.e. the cap. It was clear and detailed. Mr. Lotz referred to the 10 year Cap premium shown on page 7 of the January 2009 presentation, rounded up to £50,000. He and Mr. Parmar then discussed the potential benefits of adding the premium to the loan and Mr. Parmar did his own calculation of the amounts he would have to pay for a Cap with terms of 5, 10 and 15 years, if he was paying in the quarterly instalments indicated on page 7. Later Mr. Parmar referred to the graph on that page and indicated he understood its effect. In that context, Mr. Lotz explained that Mr. Parmar did not have to protect the entirety of his debt and continued: "*and also bear in mind if you had to pay it up front okay and whichever one and you paid it up front, if you came to me in a year's time, two years' time or five years' time and said I want to cancel this contract okay there can never be a breakage cost … There can't be. If you pay it up front for us and you want to break it at any time there can never be a breakage cost. Because if you think about it once you've paid us up front you've paid us all you will ever have to pay us in this contract ... We can only ever pay you. So if interest rates go low you don't pay anything to us ... If interest rates go high if they go to 6% then we've got to pay you because we've got to make up the difference between the 4 and 6. So you can see if the 5 year stage [sic] like a 10 or 15 one and in five year's time you come to me and go I want to terminate this because I've [sic] my loan has been repaid and go right we owe you*". Mr. Parmar's responses clearly indicated that he understood there would be no breakage costs to pay if a Cap contract

was cancelled at any stage prior to the end of its term.

64. They then proceeded to discuss the margins on the Claimants' loans and the fixed rate swap quotes at page 6 of the January 2009 presentation. Mr. Parmar stated: "*I also noticed that the 15 years works out quite favourably really there is not that much difference in the amount of the interest rate that you pay its only about know its only about two, three thousand pounds more*". This led Mr. Lotz into providing an explanation of potential breakage costs or breakage profit. He commented that "*So bearing in mind a 15 year compared to a 10 year one, a 15 year one your breakage profit or breakage costs are always bigger that a 10 year one because it's got more time remaining ... 15 years look great but if your intending you know if it' s a long long commitment for you then [inaudible]*" to which Mr. Parmar replied: "*Yeah okay what I've done is I've added the margins that I think, and the interest rate on the amount, and monthly costs and annual costs on interest, which looks pretty good to what I have been paying*". As Mr. Parmar confirmed in his oral evidence[10], he had worked out, by reference to the variable base rate plus margin cost he had been paying prior to the crash, whether his business could afford its outgoings at the fixed rate quoted in the January 2009 presentation.

65. Mr. Parmar then asked Mr. Lotz to explain the product on page 8 of the January 2009 presentation which he described as a "*zero premium interest rate collar and the rates are different from the other one aren't they?*". Mr. Lotz explained this product, whereupon Mr. Parmar said: "*Okay. I'm getting the hang of it*".

66. Mr. Lotz then explained the structured collar product at page 9 of the January 2009 presentation but concluded by saying that the product is "*probably not ideal in this kind of market this is meant, base rate is supposed to be about 3%... So it's probably not suitable in this market to be honest... So maybe we just ignore it*".

67. Mr. Parmar then referred to the breakage charge page in the January 2009 presentation. He said: "*I just wanted to hedge is for 15 years from now and we cancel eight years from now profit or loss in this example will be 29k*" to which Mr. Lotz replied: "*Yes if okay so obviously depends on where the market rates are at the time*". Mr. Parmar then said: "*Yeah if the interest rate then is 6% and we fixed it at 4% there would be would there be a [sic], the benefit would be that 2% would it?*" to which Mr. Lotz replied: "*Okay so say*

[10] Day 2/170/line 14-171/line 1.

in your example in 8 years time you do a 15 year trade and you pay a fixed rate of 4%. And in 8 years time you come to me and say I want to cancel if the 7 year rate is 7% okay then that is sorry you said 6% if the 7 year rate here is 6% that is 2% higher than the rate you're paying so it's a breakage profit... And it will be two times the 29 so will be £58,000". Mr. Lotz then explained broadly the calculation that would be done to arrive at the breakage figure.

68. The conversation ended with Mr. Parmar saying: "*Yeah okay all right I think I got the gist of it. I'm now going to read through and let me come back to you*".

Events following the telephone conversation on 22 January 2009

69. The Claimants signed the Bank's Retail Terms of Business on 9 February 2009. It was sent under cover of a letter dated 6 February 2009 entitled "*Classification as a Retail Client and Terms of Business – Response Required*" (the "**Classification Letter**"). Point 3 of the letter stated: "*Advice Please treat this letter as written notice that we may, from time to time, provide you with advice for the purposes of Clause 2.2 of our Terms.*"

70. The next activity in relation to IRHPs was on Friday 6 March 2009, when Mr. Parmar emailed Mr. Lotz. The terms of that email indicated that that they had already spoken that day (referring to Mr. Lotz's trip to the dentist) and intended to speak again on Monday 9 March 2009 "*on the way forward*". Mr. Lotz replied later that day, copied to Mr. Evans, stating:

> *"Attached please find the UPDATED pricing. These are the lowest rates I have shown you to date.*
>
> *As you are aware BOE cuts [sic] rates yesterday to 0.50%. It is widely accepted that there will be no further base rate cuts. The question now is when will the rates start to increase.*
>
> *All we need to trade is for you to sign and return to Chris the TERMS OF BUSINESS that was sent through before you went away.*
>
> *I am off from the PM on Friday 13/3 until April and would like to put this to bed before leave if possible.*
>
> *Lets talk on late Monday afternoon."*

71. At 16:53 on the same afternoon, Mr. Lotz sent an email to Mr. Evans stating: "*ok, he wants to do this. good news is that all he needs to do is signed [sic] the Terms of biz and then we are good to go. He has past [sic] KYC in the past (Assuming it i[sic] done in joint names?)*".

72. Attached to Mr. Lotz's email of 6 March 2009, was a document entitled "*Ramesh Jadavil Parmar & Rama Ramesh Parmar – PRE TRADE DOCUMENT*" (the "**March 2009 presentation**"). On the second page, it stated under *"Your Requirements", "Willingness to pay premium, or preference for zero premium.*" Mr. Parmar accepted in cross examination that at that stage he had not decided whether to pay a premium for a Cap or to go for a zero premium product[11].

73. On the third page, it stated:

> *"The Objectives are to identify the magnitude of the exposure and consider a broad range of potential solutions:"*
>
> – *Ramesh Jadavji Parmar & Rama Ramesh Parmar has [sic] borrowed c£1,400,000 over 15 years from Barclays.*
>
> – *There are a number of potential solutions to manage the market interest rate risk and associated rising financing costs.*
>
> – *Corporates typically focus on installing a solution at zero-premium cost."*

74. The March 2009 presentation then contained historic UK interest rate information and contained updated pricing for four products, namely a Swap, a Cap, a collar and a structured collar, on individual pages, each based on 5, 10 and 15 year terms. In all other respects, the descriptions of the products contained in the March 2009 presentation were the same as those given to the same products in the January 2009 presentation, as were the pages comparing the zero premium products and a section entitled "*Cancellation may result in a breakage charge...*", although the example contained a cancellation point of "*2.5 years from now*", as opposed to "*8.0 years from now*" used in the January 2009 presentation.

75. On the same day, Mr. Lotz emailed Mr. Evans, stating: "*Ok, he wants to do this.*", and chasing for the signed Terms of Business from the Claimants. On 9 March 2009, he replied to Mr. Lotz, stating that he would "*chase the paperwork*" and he asked: "*Can you let me know what limits I need form [sic] credit.*" On the same day, Mr. Evans emailed his assistant, asking him to "*call Ramesh at Glove club, he wants to trade, but we need the paperwork back form [sic] him*".

76. On 11 March 2009, Chris Evans emailed Paul Williams (acting then temporarily as his

[11] Day 3/4/lines 2-15.

boss) referring to his forthcoming meeting with Mr. Parmar, stating: "*I need to see him to seal the barcap deal*".

77. By an email sent on Friday 13 March 2009 to his colleagues in Barclays Capital, Mr. Lotz provided them with an update on his current caseload including the following entry in respect of the Claimants: "*Gloveclub/Ramesh Parmar. RD: Chris Evans. No paperwork back. No CEE. Client unsure what he wants. Been talking to him for 2yrs. Is keen this time thou!! Good lcuk [sic]*". As Mr. Sutcliffe correctly submitted, this email indicates that as at 13 March 2009, Mr. Parmar had not yet decided whether he wished to purchase a premium or zero premium product.

78. On 17 March 2009 Mr. Evans met with Mr. Parmar at Stewkley House. Mr. Evans' note of the meeting dated 18 March 2009 records: "*Needs identified: Clear Barcap need and client is in advanced stages of this, Adrian is fully engaged and is going to close the deal hopefully by the end of March*".

79. On 3 April 2009, an advice of compliance was signed by Mr. Evans, classifying the Claimants as retail customers and on the same day this form was sent by email to Mr. Lotz by Mr. Evans' assistant. Inside the box stating "*Nature of Business*" is written "*Owner occupied business and commercial landlord*".

80. Late on 7 April 2009, Mr. Evans spoke to Mr. Parmar and asked him to send over a breakdown of the tenants he currently had in place at his commercial properties. This is apparent from the email Mr. Evans sent to Mr. Parmar the next day repeating the request in writing. The concluding paragraph states: "*As I said, I am off from tomorrow through next week, so if you can get this over to me as soon as you can please. Adrian is available for you, so you can get your deal done*". As a result Mr. Parmar sent Mr. Evans "*the full schedule of the current rental income*" as an attachment to an email timed at 12.31 on 8 April 2009.

81. In cross-examination, Mr. Parmar said, having considered the March presentation carefully, he had decided that he did not want to purchase a Cap because he did not want to pay a premium[12]. Sometime after Mr. Lotz's return from holiday, probably 8 April 2009, after receiving Mr. Evans's email of that date, referred to at paragraph 80 above, Mr. Parmar spoke to Mr. Lotz and indicated that he wished to purchase a 15 year interest

[12] Day 3/27/line 25-28/line 5.

rate swap in respect of the entirety of the Claimants' outstanding loans.[13]. He could not recall why he had opted for a 15 year term.[14]

82. On the same day Mr. Evans submitted a credit application in relation to the Claimants for a 15 year fixed rate swap, seeking a CEE sanction of £290,000. The application has not been disclosed by the bank because it was overwritten on the Zeus system when a revised application for a reduced period was subsequently submitted on 20 April 2009. The original application was rejected by the Bank's credit team on 9 April 2009, the reason given being: "*proposed length of CEE at 15 years is unattractive. I would normally expect 5 years as average, maybe extending to 10 years max. Please clarify why you/Barcap consider the proposed term to be commercially acceptable to the bank*".

83. Thereafter and prior to 20 April 2009, Mr. Evans spoke to Mr. Lotz and informed him of credit section's rejection of Mr. Parmar's application for a 15 year term. Mr. Parmar accepted that he then had a further conversation with Mr. Lotz, when he was told about the rejection by credit of a 15 year term. In cross-examination, Mr. Parmar told me that he assumed the reason for the rejection was his age, but he did not inquire as to the reason[15]. Instead he opted for a 10 year term.

84. On 20 April 2009 (and having been made aware of the revised 10 year term) Mr. Evans submitted a revised application to credit which requested a 10 year CEE limit of £290,000 in relation to the proposed hedging "*at around 3.4%*". It stated:

> "*Client is finally going to hedge his loans after many years of deliberation... Rationale for the longer term is that the client is amortising his loans up to 22 years and wishes to have a clear understanding of his outgoings over this period. He has tenants in place for in excess of the barcap term and to take advantage of the stability of payments. We should note that the client has been in discussion with barcap for over 2 years and this is not a quick decision he is taking. He has no lump sum option over the 10 year period*[16] *so happy to hedge.*"

85. Mr. Parmar agreed in cross-examination that the reference in the revised application to him having "*no lump sum option over the 10 year period*" was a reference to the Claimants not being able to pay off all or a substantial part of their debt within the 10

[13] Day 3/28/lines 12-22.
[14] Day 3/35/line 18-36 line 13.
[15] Day 3/37/line 15-39/line 10.
[16] This was originally 15 years – see paragraph 83.

year term of the swap.[17]

86. On 24 April 2009, a meeting took place at BarCap's office in Canary Wharf, where Mr. Lotz was based, a meeting room having been booked at Mr. Lotz's request the previous day for three people for between 10.30-12.00. Unfortunately there are no notes of that meeting. It was certainly attended by Mr. Parmar and Mr. Lotz. Mr. Evans could not remember being there, nor could Mr. Parmar remember whether he was present or not. Mr. Parmar stated in cross-examination that: "*I can't remember exactly what happened there. It was just – just too much.*"[18] , although at paragraphs 52 and 53 of his Witness Statement, which he signed on 26 July 2017, he went into some detail as to what happened and when shown those paragraphs, he stood by their contents[19]. That stark difference in recollection caused me to doubt the accuracy of what was stated in those paragraphs of his Witness Statement.

87. It is clear that at that meeting, Mr. Lotz provided Mr. Parmar with a presentation dated April 2009, which he had earlier prepared entitled "*Ramesh & Rama Parmar Interest rate risk management*" (the "**April 2009 presentation**").

88. Although the first page of the April 2009 presentation was headed "*Background information*" and stated "*Following our meeting on 24 April 2009, I have summarised the points we covered below*" [Emphasis added], it is clear from contemporaneous emails that Mr. Lotz prepared the April 2009 presentation prior to the meeting, with the intention of going through it with Mr. Parmar at the meeting. Mr. Parmar then took it away with him after the meeting.

89. It is common ground that this was the first time that Mr. Parmar met Mr. Lotz in person. In his oral evidence, Mr. Parmar expressed the view that the meeting was no longer than 30 minutes and said he was unable to focus properly on the presentation because he had just flown in from Malaysia (although he was unable to confirm on what date). He also said that he found the Bank's offices imposing and overwhelming. Mr. Parmar, however, accepted that Mr. Lotz provided him with a copy of the April 2009 presentation at the meeting[20] and that Mr. Lotz took him through the presentation page by page[21].

---

17 Day 3/43/line 8-44/ line 19.

18 Day 3/46/2-3.

19 Day 3/49/line 10-50/line 12.

20 In advance of the meeting Mr. Lotz emailed the print room on the fourth floor to print out four copies by 10.15am in A5 format.

21 Paragraph 53 of his Witness Statement dated 26 July 2017 and Day 3/50/lines 13-21.

90. Beneath this introduction, there were the following bullet points, all but one of which Mr. Parmar accepted was correct[22]:

> "*Ramesh and Rama Parmar have c£1.35m Commercial term debt amortising over in c22 years*
>
> *The debt has arisen from the purchase of commercial property*
>
> *Ramesh is of the opinion that it is unlikely that he would wish to significantly overpay on the debt repayments as excess cash produced would likely to be reinvested in the business or invested in other investments*
>
> *The Bank has no mandatory hedging clause in the facility*
>
> *Ramesh has been carefully considering hedging and has been watching rates for at least the last 2 years*
>
> *Ramesh considers now a good time to considers [sic] hedging to obtain good long term affordable rate*
>
> *Ramesh is of the opinion that rates will move up in the future an [sic] that current base rate of 0.50% is artificially low*
>
> *Ramesh does not wish to pay a premium for a product*
>
> *All rates quotes [sic] are currently affordable for Ramesh and Rama Parmar*
>
> *Current STO are (in total) £10,248 and all rates quotes [sic] are at least similar to these*"

In relation to the statement, "*Ramesh is of the opinion that rates will move up in the future an [sic] that current base rate of 0.50% is artificially low*", Mr. Parmar's evidence on Day 3/61/line 17-62/line 6, was that this opinion was in fact mentioned by Mr. Lotz, but he accepted that it was his view as well.

91. Immediately beneath these points is a shaded box which reads: "*Barclays does not provide advice or recommendations on your selection of risk management products. As such, to the extent you require advice, you should consult an independent advisor. Barclays remains available to provide you with any further information or clarification in order to assist you with your decision*".

92. The April 2009 presentation provided information only in relation to a 10 year swap, with different monthly payments being identified on pages 7 and 8, explained by the slides on pages 6 and 8, which showed the loan reducing over 22 years and 15 years

---

[22] Day 3/58/line 3-62/line 15.

respectively. The characteristics of an interest rate swap were summarised on page 10. The 11th page was entitled "*Cancelling interest rate protection*" and provided indicative breakage cost figures of £54,149 and £77,605 as the cost of exiting the swap early, assuming a 1% downward parallel shift in the yield curve after 5 and 3 years respectively. The same page continued: "*In more unfavourable market scenarios, the breakage cost could be higher than in this example ... The breakage costs presented on this slide are purely indicative and should not be taken as a future commitment by Barclays Capital to cancel the transaction at these levels. Further scenarios can be provided on request*".

93. The 12th and 13th pages of the presentation contained the following statements:

> "**Independent evaluation** You are acting for your own account and, based on the information provided by Barclays Capital and taking into account the associated risks, you will make an independent evaluation of the transactions described. This does not prevent you seeking further independent financial advice where necessary...
>
> **Complexity** Derivatives are defined as COMPLEX instruments under MiFID. In addition to the economic parameters of the transaction, there may be legal, tax and regulatory consequences. Barclays is not your adviser and will not provide you with advice relating to the transaction. You must determine, on your own behalf through independent professional advice, the merits, terms, conditions and risks of the transaction…"

94. The 14th page of the presentation contained the following statement under the heading "***Disclaimer***" (the "**April 2009 Disclaimer**"):

> "This document has been prepared by Barclays Capital, the investment banking division of Barclays Bank PLC ("Barclays"), for information purposes only...
>
> Barclays is acting solely as principal and not as advisor or fiduciary. Unless otherwise agreed in writing with you: (i) Barclays does not provide, and has not provided, any investment advice or recommendation to you in relation to the transaction and/or any related securities described herein; (ii) You may not rely on any communication (written or oral) from Barclays as investment advice or as a recommendation to enter into any transaction; (iii) Barclays is under no obligation to, and shall not, determine the suitability for you of the transaction described herein; (iv) You must determine, on your own behalf or through independent professional advice, the merits, terms conditions and risks of the transaction described herein; and (v) You must also satisfy yourself that you are capable of assuming, and assume, the risks of any such transaction. Barclays accepts no liability whatsoever for any consequential losses arising from the use of this document or reliance on the information contained herein including, without limitation, the

reliance on any information, data or model set out herein, or use of this document in the preparation of financial books and records.

Barclays does not guarantee the accuracy or completeness of information which is contained in this document and which is stated to have been obtained from or is based upon trade and statistical services or other third party sources. Past performance, modelling or back-testing is no guide to future performance. No representation is made by the reasonableness of the assumptions made within or the accuracy or completeness of any modelling or back-testing. All opinions and estimates are given as of the date hereof and are subject to change and Barclays has no obligation to update its opinions or the information in this publication. The value of any investment may fluctuate as a result of market changes. The information in this document is not intended to predict actual results and no assurances are given with respect thereto."

95. Five days after the meeting in Canary Wharf, on 29 April 2009, Mr. Lotz received a telephone message to call Mr. Parmar. Later that day, Mr. Lotz and Mr. Parmar spoke on the telephone and the Claimants entered into the Swaps (the "**Trade Call**").

96. The Trade Call took place over two telephone conversations. In the course of the first telephone call, Mr. Parmar asked about the rate and stated that he had been waiting for the strike rate for a 10 year swap to drop back below 3.5% and noted that rates had been 3.1% one month before and that it was "*my silly fault for not booking it that time*". Mr. Lotz took Mr. Parmar through the main terms of the Swaps and Mr. Parmar confirmed his understanding and acceptance of those terms. In particular, they had the following exchange:

"Mr. Parmar: Adrian, I just wanted to touch base with you, in case you thought I'd forgotten about you.

Mr. Lotz: I had thought you'd forgotten about me Ramesh…."

After discussing the interest rates historically, Mr. Lotz then established that Mr. Parmar wanted an interest rate swap, which he described as "*for all intents and purposes a fixed rate*", on the full outstanding balance of his loans with the Bank for a 10 year period at the rate of 3.48%, plus the two lending margins of 1.25% and 1.75% on the two loans.

There was then the following discussion:

Mr. Lotz: Now we have spoken about the potential for breakage costs…

Mr. Parmar: Yeah.

Mr. Lotz: …and, you know, if you choose to break this contract you can do so at any stage.

Mr. Parmar: Yeah.

Mr. Lotz: If, the way we do it, or calculate it is, if, the equivalent fixed rate is...

Mr. Parmar: Yeah.

Mr. Lotz: above your, your, your rate of 3.48...

Mr. Parmar: Yeah.

Mr. Lotz: ...there'll be a breakage profit...

Mr. Parmar: Yeah.

Mr. Lotz: ...but below 3.48 there'll be a breakage cost and we have spoken about this...

Mr. Parmar: Yeah, yeah, yeah.

Mr. Lotz: ...before. So have you got any questions?

Mr. Parmar: Yeah. Just one question, you know this 1.54%[23]*, is that what, is that calculated on a prop rata basis, because the loans are different? One is twenty..."*

Mr. Lotz: Yeah, the 1.54% is, is calculated on a prop rata basis, but that's... just giving you a number so we can estimate...

Mr. Parmar: Okay.

Mr. Lotz: Your... two loans remain the same.

Mr. Parmar: Okay. Okay. That's fine. That's fine ...

Mr. Lotz: your... two loans stay as is ...

Mr. Parmar: Okay. Brilliant. That's ... good ..."

Mr. Parmar did not ask any further questions. The first telephone call ended in order to allow Mr. Lotz to check with the commercial bank that he had the up-to-date loan figures, in view of the Claimants' decision to hedge their entire debt.

97. Shortly afterwards, on the same day, there was the second telephone, when Mr. Lotz confirmed the rate of 3.48%, which would be the same for both loans, whereupon Mr. Parmar agreed to enter into the Swaps. Thereafter the following exchange took place:

"Mr. Parmar: Brilliant! Well done!

Mr. Lotz: OK

Mr. Parmar: You, you didn't think I was gonna do it, did you? [laughs]

---

[23] This was a figure mentioned at page 7 of the April 2009 presentation.

Mr. Lotz: 12 months ago, no. But ...

Mr. Parmar: Yeah, you know, I always get my facts right first.

Mr. Lotz: Yeah, that's absolutely [indistinct] ...

Mr. Parmar: You know, you take your time in thinking, once you've decided, you do it.

Mr. Lotz: Yeah, we do prefer people to, to rather take their time than sort of [talking over one another] rush into things.

Mr. Parmar: Yeah, yeah, mmm.

Mr. Lotz: So, no, I mean, we're happy to help out...

Mr. Parmar: Yeah, and there are a lot of questions, and like Chris says, you know, it's not a simple thing to make a decision on but now it's done, I'm pleased."

98. By an email dated 29 April 2009, Mr. Lotz provided Mr. Parmar with copies of the separate transaction details for the two Swaps (the "**First and Second Swap Transaction Details**") and asked Mr. Parmar to email back to confirm that the Claimants agreed with the terms of the transactions. The First and Second Swap Transaction Details contained a disclaimer in materially identical terms to the April 2009 Disclaimer. The First and Second Swap Transaction Details also provided as follows:

"KEY REASONS TO ENTER INTO A SWAP

- You are protected against rises in Base Rates above the swap rate of 3.48%
- You have known repayments

KEY RISK FACTORS

- Base rate may actually fall; you are unable to benefit from a fall in the Base rate
- If you pay off the debt such that the Protection amount is more than any remaining debt, you may no longer need this instrument in which case you will have three choices... i. Settle the difference in cash, which could be a substantial payment either from you to Barclays Capital or from Barclays Capital to you depending on market movements...
- Cancelling the contract may result in breakage cost or profit.

THESE BRIEF STATEMENTS ARE NOT EXCLUSIVE OR EXHAUSTIVE. ANY INVESTMENT INVOLVES SUBSTANTIAL RISK. INVESTORS MUST MAKE THEIR OWN RISK ASSESSMENT

AND CONSIDER APPLICABLE BUSINESS, FINANCIAL, INVESTMENT, HEDGING, TRADING, LEGAL, REGULATORY, TAX AND ACCOUNTING CONSIDERATIONS."

99. By email dated 29 April 2009, Mr. Parmar responded to Mr. Lotz's email, confirming the terms as set out in the First and Second Swap Transaction Details.

100. By email dated 6 May 2009, Mr. Lotz provided the Claimants with the two formal swap confirmations dated 30 April 2009 (the "**First and Second Swap Confirmations**"). On 20 May 2009 both the First and Second Swap Confirmations were signed by each of the Claimants and returned to the Bank. They contained the following express terms and representations (the "**First and Second Swap Confirmation Representations**"):

> "Each party represents to the other party that (absent a written agreement between the parties that expressly imposes affirmative obligations to the contrary): -
>
> (a) **Non-Reliance**. It is acting for its own account, and it has made its own independent decisions to enter into the Transaction as to whether the Transaction is appropriate or proper based upon its own judgement and upon advice from such advisers as it deemed necessary. It is not relying on any communication (written or oral) of the other party as investment advice or as a recommendation to enter into the Transaction; it being understood that information and explanations related to the terms and conditions of the Transaction shall not be considered investment advice or a recommendation to enter into the Transaction. No communication (written or oral) received from the other party shall be deemed to be an assurance or guarantee as to the expected results of the Transaction.
>
> (b) **Assessment and Understanding**. It is capable of assessing the merits of and understanding (on its own behalf or through independent professional advice), and understands and accepts, the terms, conditions and risks of the Transaction. It is also capable of assuming, and assumes, the risks of the Transaction.
>
> (c) **Status of Parties**. The other party is not acting as a fiduciary for or an advisor to it in respect of the Transaction.
>
> (d) **Purpose.** It is entering into the Transaction for the purposes of hedging its assets or liabilities or in connection with a line of business."

101. Following the Claimants' entry into the Swaps, Mr. Evans met with Mr. Parmar on 17 July 2009 to review his and the Company's facilities. Mr. Evans' notes of this meeting stated "*client has entered in to a hedge deal with [sic] is good news for him*". Mr. Evans' application to credit for the renewal of the Claimants' facilities dated 17 June 2010 stated: "*Client entered in to a 10 year interest rate swap in May 2009 on the property*

holding partnership based on a rate of around 3.2% this is working very well for the client".

102. In late 2010, Mr. Parmar approached Mr. Evans for some further lending to assist with a proposed property purchase by the Claimants. In his email to Mr. Parmar dated 10 November 2010, Mr. Evans explained that, given the short-term nature of the leases in place on Stewkley House, the proposal was not attractive to the Bank and nor did it meet the Bank's lending criteria. The Bank's decision at that time had nothing to do with the CEE limit which was in place for the Swaps.

103. Mr. Evans ceased to be the relationship manager for the Claimants and the Company in May 2012 following promotion to his current position.

104. In 2 October 2012, after the past business review into the sale of IRHPs (the "**Review**") had been announced by the FCA, the Claimants made a complaint about the Swaps.

105. By letter dated 24 July 2013, the Bank wrote to the Claimants stating that at the time of their purchase of their IRHPs they met the criteria of non-sophisticated retail classified customers according to the definition agreed with the FCA and that, as a result, the sales of their IRHPs had been assessed as eligible for the Review. The Bank invited the Claimants to opt into the Review and to attend a fact find interview with Eversheds. The letter confirmed that Eversheds' role did not involve making any decisions about whether a mis-sale had occurred or whether any redress was due to the Claimants.

106. The Claimants opted into the Review and a fact find call took place by telephone on 13 November 2013 at 10:00am (the "**Fact Find Call**"). A transcript of the Fact Find Call indicates that the Fact Find Call was attended by Mr. Parmar on behalf of the Claimants (with Mrs Parmar listening in), Ms Sarah Canavan from KPMG as the Independent Reviewer and Mr. Tony Thiaray and Mr. Gurpreet Birdi from Eversheds. During the course of the call, Mr. Parmar was asked to describe in some detail his experience of the sale of the Swaps.

107. Following the Fact Find Call, on 11 December 2013 the Bank sent a letter to the Claimants explaining that the fact find had been completed and the case had been passed to the Bank's Customer Review Team who would undertake the next stage of the Review.

108. By letter dated 30 January 2014, the Bank wrote to the Claimants to inform them of the

outcome of the Review (which had been overseen and considered by the Independent Reviewer). The letter stated that Mr. Lister, the Bank's customer review director of the Interest Rate Hedging Team, having considered all available documentation and materials relating to the sale of the Swaps, together with the information provided by the Claimants, and comparing what took place against the relevant regulatory standards agreed with the FCA for the purpose of the Review, had concluded that the Bank had met the necessary standards at the point of sale and therefore no redress was due. The letter confirmed that the outcome had been subjected to scrutiny by an internal quality assurance process and had been confirmed as appropriate by the Independent Reviewer.

109. These proceedings were then commenced on 6 March 2015. Paragraphs 60-72 of the original Particulars of Claim made a claim against the Bank in respect of the Review. That claim was abandoned by amendment on 9 October 2017, following the Court of Appeal's decision in **CGL Group Ltd v Royal Bank of Scotland** [2017] EWCA Civ 1073.

The Issues – three introductory points

110. With that somewhat lengthy description of the factual background, I now turn to each of the issues. Before doing so, however, I would make three introductory points:

111. First, when considering the answers to these issues, both Mr. Sutcliffe and Mr. Berkley accepted that I have to stand back and look at the evidence as a whole[24].

112. Secondly, Mr. Berkley indicated in his oral closing submissions that in relation to any claim for loss, he was confining himself to Mr. Lotz's conduct on behalf of the Bank from November 2007, when the COBS Rules were in force, leading up to the sale of the Swaps on 29 April 2009.[25]

113. Thirdly, the point has been made that this case is the first Swaps mis-selling case to come to a full trial, which concerns whether or not there has been compliance by a bank with the COBS Rules in relation to the information provided to a private person and a Retail Client. In my view each case will turn on its own facts and whatever findings are made here, may provide limited assistance in any subsequent case.

Issue 1: Was this an advised or non-advised sale?

---

[24] Day 5/44/lines 7-21, and 133/lines 18-23.

[25] Day 5/17/lines 24-18/12.

Depending on the answer to this question, the court will need to consider whether the Bank failed to comply with either COBS Rule 9 (in respect of an advised sale) or COBS Rule 10 (in respect of a non-advised sale).

114. Before setting out the parties' respective submissions as to whether or not this was an advised or non-advised sale and whether there has been compliance with COBS Rule 9 or COBS Rule 10, I would indicate that I accept the submission made by Mr. Sutcliffe, applying the principles in the cases of **Zaki v Credit Suisse UK Ltd** [2011] EWHC 2422 (Comm) at [102] and [2013] EWCA Civ 14 at [79]-[82] and **Basma Al Salaiman v Credit Suisse Securities (Europe) Limited, Plurami Capital LLP** [2013] EWHC 400 (Comm), which cited **Zaki,** that when considering COBS Rule 9, one is concerned with substance over form. As Cooke J noted at [19] in the **Basma** case:

> *"[T]aking reasonable steps to ensure that an investment is suitable for a client involves taking reasonable steps to ensure that the client understands the risk involved in the transaction and that the rules are concerned with substance over form. If an investment is in fact suitable for the client, then it does not ultimately matter if there have been failings in the process".*

115. I also, however, bear in mind, the point made by Rix LJ in the **Zaki** case at [79], where he stated:

> *"I accept, nevertheless, that a proven breach of the obligation of process will in the natural course of things lead a court to consider carefully, and if it need be sceptically, a firm's case that it had taken reasonable steps or that the lending was suitable, despite any lack of care in the process leading to the lending arrangements: see for instance,* ***Rubenstein v HSBC Bank plc*** *[2012] EWCA 1184, [2012] 2 CLC 747 at para [93]."*

The Claimants' submissions on whether COBS 9 is engaged

116. Mr. Berkeley on behalf of the Claimants submitted that this was an advised sale and COBS Rule 9 applied for the following reasons:

(1) He referred to the relevant guidance of PERG 8.28.1G, 8.28.2G, 8.28.3G and 8.28.4G, to which I have referred at paragraph 14 above. In particular, he relied upon PERG 8.28.4(3) which states:

> "In the FCA's opinion, however, such information may take on the nature of advice if the circumstances in which it is provided give it the force of a recommendation. For example:
>
> (3) a person may provide information on a selected, rather than balanced, basis which would tend to influence the decision of the recipient."

(2) By reference to the evidence of the Claimants' expert, he said that the question whether *information* has crossed the line and become *advice* is not always an easy matter to determine. He submitted that the answer to that question was one to be determined by the Court looking at the matter objectively.

(3) He submitted that looking at the evidence, the information provided by Mr. Lotz was selective, rather than balanced, and therefore tended to influence to Mr. Parmar to go for a Swap, rather than a Cap and therefore it took on the nature of the advice from Mr. Lotz.

(4) He invited me to have regard to the following circumstances which existed prior to Mr. Parmar's introduction to the Bank to IRHPs in July 2006:

  (a) Mr. Parmar was by then a longstanding customer of the Bank;

  (b) Mr. Parmar was an experienced business man but had received only a limited education;

  (c) Mr. Parmar had no prior experience of interest rate hedging products;

  (d) Mr. Parmar had a trusting "traditional" and respectful relationship with his relationship managers;

  (e) Mr. Parmar was definitely not shopping for hedging products (although I would interject to say that Mr. Parmar was certainly interested in fixing the interest rate on some or all of his loans with the Bank and he could only do so by means of an IRHP, because there were no fixed loans on offer);

  (f) Mr. Parmar had experienced the period in the late 1980s when interest rates had soared to 15 percent.

(5) Mr. Berkley relied upon Mr. Parmar's introduction by Gary Jones to Jonathan Mckeown of the Bank's Corporate Risk Management. He submitted it was very likely, when making the introduction, that Mr. Jones would have affirmed Mr. Mckeown as an expert or specialist who could advise Mr. Parmar. That would be the only way to explain why he was not assisting Mr. Parmar himself.

(6) There was no challenge to the evidence of Mr. Martin Berkeley, the Claimants' expert, at paragraph 4.65 of his report, that there were no independent experts operating at the relevant time, to whom Mr. Parmar might have had access. The

absence of independent advisers in relation to retail clients at that time was also accepted in oral closing argument by Mr. Sutcliffe[26].

(7) The relationship managers did not use the words hedging or swaps prior to the introduction of the BarCap team but rather used expressions such as '*protection*'. Mr. Parmar in his email to Mr. Jones on the 13 June 2006 used the term '*rate fixing*'.

(8) The fact finding exercise by both Mr. McKeown and Mr. Lotz was inadequate, in particular there was no evidence that they had carried out any form of fact finding exercise before recommending hedging products to Mr. Parmar.

(9) In relation to the July 2006 Presentation, he relied upon the following features:

(a) The very title of the presentation *Interest Rate Management* ***Solutions***.

(b) The contents page moved from *1. The current interest rate environment; 2. Interest rate protection strategies; to 3. Features and* ***benefits.***

(c) The macro-economic information and the rate forecasting affirmed the presenter was giving advice.

(d) The use of the word ***strategies*** and ***benefits*** and the offer to ***tailor the protection***, suggested that information was being provided to Mr. Parmar from an expert who was aware of Mr. Parmar's personal circumstances and needs/objectives and was providing him with a solution to an identified risk which would be of benefit to him.

(e) The fact that a Cap was not shown was very telling and demonstrated that as early as July 2006 the Bank was being selective in the products being shown to Mr. Parmar. This was particularly so in the pages relating to the Collars.

(f) Page 15 entitled "Barclays Capital Overview – Recognition of our Capabilities" used language such as "*Barclays Capital is a global institution with an unrivalled depth of expertise and providing risk management and strategic FX hedging advice to the UK market place*" and the words "*risk advisors*" in terms which would have suggested to Mr. Parmar that he was being given advice by a specialist.

[26] Day 5/128/line 11-129/line 7.

(g) The presentation did not mention breakage costs except to state (in respect of each of the proposed interest rate hedging products) that: "*Mark to market gains/losses will apply if the contract is exited early*" (pages 8-11) and that "*cancelling the contract may result in either a breakage cost or a breakage profit*" (page 13). This amounted to very poor risk disclosure. Given the absence of a Cap this was the provision of information on a selected, rather than balanced, basis which would tend to influence the decision of the recipient.

(10) He made the same points in relation to the November 2006 Presentation.

(11) The September 2007 presentation was provided to Mr. Parmar under cover of an email dated 27 September 2007 from Mr. Lotz, which referred to the products as "***our more popular solutions***". That email makes clear that there was a call. Mr. Lotz had spoken to Mr. Parmar on the 27 September 2007 but there is no transcript of the call or note of what was said. He relied upon the following features of the presentation :-

(a) The title *Interest Rate Protection **Solutions*** (Mr. Parmar also referred to the document as "*the solutions*" in his email dated 1 November to Mr. Lotz).

(b) The words *Corporate Risk **Advisory*** immediately beneath Mr. Lotz's name which plainly influenced Mr. Parmar.

(c) On page 2 –

(i) The heading was "*Barclays can tailor a bespoke solution*".

(ii) Not having established Mr. Parmar's own objective, there was a clear recommendation a *zero-premium* product be installed rather than a premium product, which the Bank was able to offer. This form of selection by the Bank from within its product range is a personal recommendation.

(iii) Reference was made to "*the profile of your interest payments may be flexed providing a **bespoke** interest rate management solution.*"

(12) Mr. Berkley relied upon the internal training email dated 1 November 2007, referred to at paragraph 45 above as an acknowledgment that Mr. Lotz's role was

one of providing advice to clients, such as Mr. Parmar.

(13) In relation to the conversations on 1 November 2007, reliance was placed on the fact that the Cap was first introduced in the course of these conversations rather than at a face to face meeting. Mr. Berkley emphasized the following aspects of the conversations, which he submitted, indicated that Mr. Lotz intended to influence Mr. Parmar's decision:

> *"AL: Ok that I can sell you that product on its own. Just the cap. So you'll never pay more than a certain amount and if interest rates go down you get the benefit*
>
> *RP: OK*
>
> *AL; But that is what we term a premium product. It's something you have got to pay for*
>
> *RP: OK*
>
> *AL: OK now as rough guideline and they're not very popular because of like I say it's something you've got to pay for and most people don't like paying for anything it's 6 and a half percent just to give you an indication. You're probably looking at about £35,000.*
>
> *RP: Wow*
>
> *AL: For 10 years so it's not cheap.*
>
> *RP: Ok that for what.*
>
> *AL: That's if I just at 6.5*
>
> *RP: Yes*
>
> *AL: Just that by itself. So I'll say to you give me £35,000*
>
> *RP: Yes*
>
> *AL: OK and I say to you you'll never pay more than 6 and a half percent in interest.*
>
> *RP: OK*
>
> *AL: If interest rates go down you benefit. As they don't come down if they go down to 4 percent*
>
> *RP: Oh you still benefit if it goes down*
>
> *AL: Yes if you pay the upfront premium*
>
> *RP: OK*
>
> *AL: So a lot of clients say well I'm not really interested in paying."*

When Mr. Lotz returns to discussing the collar he said:

> *"AL: OK now so if you don't want to pay anything upfront*
>
> *RP: Yes*
>
> *AL: we can* ***do something similar*** *where we have a cap*
>
> *RP: Yes*
>
> *AL: But because we've got to offer this for free*
>
> *RP: Yes*
>
> *AL: We've got to have something to offset it OK. So* ***we give you the cap at 6.5 for free*** *but now to offset that cost we also have you with a contract called floor...*
>
> *AL: So the two costs of those products offset each other*
>
> *RP: Yes*
>
> *AL: To make it* ***free***
>
> *RP: OK*
>
> *AL: Yes so that's why we* ***can offer these products for free*** *because we say you'll never pay more than a certain amount and we'll never pay less than a certain amount so sometimes the Bank might lose or win and sometimes you might.*
>
> *RP: OK and there's no fee for that*
>
> *AL: No fee nothing no admin no legal fee no absolutely free...*
>
> *So it's basically the reason why we do these is so people can have something just kind of sitting over their debt it's kind of like* ***to give you that feel good factor.****"* [Emphasis added]

(14) In relation to the January 2009 presentation, where the description of the Cap was provided in a durable medium as one of four IRHPs, Mr. Berkley relied upon the features of the presentation as amounting to advice being given:

(a) (On page 2) ***Barclays can tailor a bespoke solution to match your needs, views and circumstances.***

(b) *There are a number of potential* ***solutions*** *to manage the market interest rate risk and associated rising finance costs.*

(c) *Corporates typically focus on installing a solution at* ***zero-premium****.*

(d) *Any transaction is* ***bespoke to needs*** *and the* ***features and benefits are***

generic and clear.

(e) *The principles of the calculation are* ***the same as for traditional fixed rate loans***.

(f) (On page 6) [the Swap page] Poor articulation of the breakage costs risks by the use of the terminology ***Possible mark-to-market loss (or gain) on exit***.

(g) (On page 7) [the Cap page] Very low strike rates of 3.50% and 4.00% shown when 6.5% had been quoted on the telephone as £35,000.

(h) The principal advantage of the Cap – Inexplicably, the benefit *no breakage costs* (and no CEE) not shown.

(i) There was no explanation provided of the advantage *"No upfront cost of carry"* and this hid the *cost* element of the Swaps and Caps.

(j) (On pages 8 and 9) [the collar pages] There was emphasis on Zero premium and there was a poor articulation of the breakage costs risks.

(k) (On page 10) he said was an example of funnelling. The Cap has been lost. The endorsement in the legend below:

> *"Each of the above strategies protects your debt costs against interest rate hikes: implementing an interest rate risk management solution helps manage debt servicing risk. This allows you to concentrate on the general risks that may face your business in a rising rate environment."*

was a feature which was being linked to the non-premium products, but applied equally to the Cap. By placing it on page 10, he submitted that Mr. Lotz was seeking to influence Mr. Parmar's decision and appeared to recommend what he describes as the zero-premium solutions.

(15) In relation to the telephone conversation on 22 January 2009, Mr. Berkley referred to the following extracts:

> *"AL: With this one the maximum you will pay is 4%*
>
> *RP: Yes*
>
> *AL: But you've got to pay up front premiums for this.*
>
> *RP: Yes*

AL: Or you've got to pay a premium so the difference is if interest rates stay very low for extended periods of time

RP: Yeah

AL: ***The cap would work out better for you. Its almost like fire insurance.***

RP: Yeah

AL: ***You pay it, pay it and then one day you may or may not use it*** *but if you need it its really needed, you know interest rates go to 6%.*

Mr. Lotz referred to an upfront premium of £50,000

RP: Wow you mean that can be added to the loan

AL: We would have to speak to your relationship manager, Yeah I mean ***it is entirely possible I don't know.***

RP: That way it would not be very beneficial because you are exposing yourself with more outgoings upfront.

AL: ***Yea you are. To be honest the difference between I mean you either pay, you either borrow the money from them or you pay quarterly so it would work out roughly the same to be honest.*** *" [Emphasis added]*

He contended that Mr. Lotz emphasised the premium cost and did not make any reference to the carry cost of the Swap. He submits the use of the term *zero premium* is misleading in this context, because although technically the Swap and collar products are non-premium, they are not free and Mr. Lotz was wrong to describe them as such. Mr. Lotz did refer to the absence of breakage costs in relation to a Cap in the course of the conversation, but significantly this feature was not supplied in a durable medium and he did not appear to take Mr. Parmar to the worked example when he was talking about breakage costs, although he used quantification from the presentation in respect of the rates.

Mr. Lotz then contrasted the Cap with the collar at page 8 of the January Presentation and Mr. Berkley submitted he was explicit in his attempts to influence Mr. Parmar:-

"AL: Okay because you're protected and you get the benefit all the way down to zero but ***you pay the premium for that.*** *So some clients say to us well* ***I don't want to pay a premium I want something like that but I want it for free.*** *We go well we can't just insure something for free because it costs us to insure it so if I can say to you you never pay more than a certain amount but you'll also never pay less than a certain amount..."*

The discussion then turned to the structured collar and in the course of it, Mr. Lotz said:

*"AL: So it's probably **not suitable** in this market to be honest.*

RP: Okay

AL: So maybe we just ignore it."

Although in written submissions, Mr. Berkley suggested that the exclusion of the structured collar was indicative of advice being given, in his oral closing he accepted that his own expert did not accept this amounted to giving advice in relation to the remaining three IRHPs[27] (although interestingly the Bank's expert suggested otherwise, albeit somewhat tentatively[28]). Mr. Berkley's final position was "*what he is indicating is that a product which is available to sell by this bank to him is not suitable, the implication being that the others are.*"[29]

(16) Reliance was placed on the Classification Letter as being relevant to the issue of advice since it informed Mr. Parmar that written notice is being given "*that we may, from time to time, provide you with advice for the purposes of Clause 2.2 of our Terms.*" These were the Terms of Business for Retail Clients.

(17) In the covering email of 6 March 2009, in which Mr. Lotz sent the March 2009 presentation (which was in similar terms to the January 2009 presentation, save as to pricing), he described the Swap rates as the lowest he had ever shown to Mr. Parmar. Mr. Berkley submitted the implications of Mr. Lotz's statements were that it was an optimal time to enter into hedging, which he submitted once again pointed to giving advice, as opposed to mere information.

(18) In essence, he invited the Court to find that, by reason of the above, Mr. Parmar was steered away from Caps and towards collars and Swaps.

The Bank's submissions as to whether COBS 9 is engaged

117. Mr. Sutcliffe on behalf of the Bank submitted that this was a non-advised sale and COBS Rule 9 did not apply for the following reasons:

(1) He points to the FCA Handbook which defines a 'personal recommendation' as "*a*

---

27 Day 5/29/line 11-30/line 9.

28 Day 4/217/line 13-218/line 6.

29 Day 5/40/18-21.

recommendation that is advice on investments ... and is presented as suitable for the person to whom it is made, or is based on a consideration of the circumstances of that person". 'Advice on investments' (which include IRHPs as 'relevant investments') is defined in the FCA Handbook (so far as relevant) as "*advice on the merits of [the client] doing any of the following (whether as principal or agent): (i) buying, selling, subscribing for or underwriting a particular investment which is a security or relevant investment*".

(2) To constitute a personal recommendation. therefore, he submitted the recommendation must be made in respect of a particular investment (and not interest rate management generally). In this regard he relies upon **Thornbridge Ltd v Barclays Bank Plc** [2015] EWHC 3430 (QB) at [61-62].

(3) He too relied upon PERG 8.28 and 8.29 and submitted that on the facts no advice was given here. Information may include a comparison of benefits and the risks of one investment as compared to another.

(4) There is no evidence that Mr. Lotz made a personal recommendation in relation to the Swaps. Mr. Parmar did not say in evidence that he relied on any recommendation from Mr. Lotz. The evidence shows that Bank provided information to the Claimants in relation to what their expert accepted[30] were the three "basic types" of IRHPs, namely, Swaps, Caps and collars:

(a) The January 2009 and March 2009 presentations specifically included a Cap (as well as a Swap and a collar) as one of the possible IRHPs for Mr. Parmar to consider.

(b) The Cap was explained in detail by Mr. Lotz in the telephone call on 22 January 2009, when he started the conversation by informing Mr. Parmar that more than half of his clients at that time were looking at Caps.

(c) The neutral reference on the second slide of the March 2009 presentation under the heading "*Requirements*" to "*Willingness to pay premium, or preference for zero premium*" is a strong indication (accepted by Mr. Parmar in his oral evidence[31]) that at that stage he had not decided whether to purchase a Swap or a Cap. It also shows that Mr. Lotz was not making a

[30] Paragraph 4.67 of Mr. Berkeley's report.
[31] Day 3/4/lines 2-15.

recommendation one way or the other.

(d) Mr. Parmar did not suggest that the decision he took in April 2009 to purchase a Swap was based on a recommendation from Mr. Lotz. His evidence was clear that it was his decision, and his decision alone, both as to the amount of the Swap and its term. He had reached his own independent view that a fixed rate of less than 3.5% was affordable for the next 15 years, subsequently reduced to 10 years[32]. This was entirely consistent with the careful and cautious approach he had taken to the interest rate hedging discussions over the previous two or more years.

(e) Amongst the propositions listed on the first page of the April 2009 presentation, included the statement that "*Ramesh does not wish to pay a premium for a product*"[33]. This was entirely to be expected, given that he had testified on oath that it was his decision to purchase a Swap, not a Cap and he did not want to pay a premium for a product.

(5) Thus, far from accepting an IRHP that the Bank allegedly recommended, Mr. Parmar decided for himself the IRHP that he considered to be the most appropriate for the Claimants' wish to hedge their full interest exposure on the First and Third Loans. He chose an IRHP to last 10 years using a swap rather than a collar or a Cap (the Bank having described all three). He declined to pay a premium for a Cap and instead opted for the interest rate available at the date and time of the Trade Call, rather than waiting to see whether the market moved in the Claimants' favour.

(6) Further, as is apparent from the documents presented to and signed by the Claimants, the Bank repeatedly made it clear that it was not performing the role of advisor to them and that they should form their own judgments as to what was suitable for their purposes. This statement appeared in clear and simple terms at the foot of the first page of the April 2009 presentation below the bullet points where Mr. Lotz had set out his understanding of the Claimants' financial position and requirements and the April 2009 Disclaimer.

Discussion and conclusion on Issue 1

118. Authorities such as **Rubinstein v HSBC** [2011] EWHC 2304 (QB) per HHJ Havelock-

32 Day 3/27/line 25-30/line 1; Day 3/37/15-39/10.

33 Day 3/58/lines 3-8.

Allen QC, sitting as a Deputy Judge of the High Court, at [81], and Teare J in the **Zaki** case at [83]-[85], make it clear that there has to be '*a value judgment*'[**Rubenstein**], '*an element of opinion*' or '*some advice on the merits*'[**Zaki**] on the part of the Bank official to constitute advice being given. The test is an objective one looking at the evidence in the round. One has to ask the question 'Has there been advice or simply the giving of information?' (see **Rubenstein** at [83] and **Thornbridge** at [38]).

119. Upon considering the parties' respective submissions and reviewing the evidence of the presentations and the conversations as a whole, I have reached the conclusion that this was not an advised sale and COBS 9 was not engaged.

120. I do so for the following reasons:

(1) I do not accept that the matters relied upon by Mr. Berkley set out at paragraph 116(4) are indicative that either Mr. McKeown or Mr. Lotz was giving advice. In relation to the point about Mr. Parmar's relationship of trust with his relationship managers, it does not follow that when Mr. Lotz was dealing with Mr. Parmar on behalf of the Claimants, he was doing so as an adviser.

(2) The absence of an external independent adviser does not necessarily mean that Mr. Lotz was giving advice.

(3) The alleged deficiencies in the fact-finding exercise conducted by the Bank do not, in my judgment, go to the issue of whether advice was given or not. I shall address the allegation of whether there was an adequate fact-finding exercise when considering the other allegations of breach of other COBS Rules.

(4) The references at page 15 of the July 2006 Presentation to "*Barclays Capital's unrivalled depth of expertise and providing strategic FX to Corporate Risk to the UK Market Place*", and the words "*Corporate Risk Advisory*" beneath Mr. Lotz's name at the beginning of the September 2007 presentation by itself do not mean that Mr. Lotz was giving advice to Mr. Parmar in relation to the IRHPs being considered. That submission was rejected by HHJ Moulder (as she then was) in **Thornbridge** at [96(ii)], where the bank employee was described as a "Corporate Risk Adviser". She did so on the basis that the description could not be given any significant weight when weighed against the actual discussions that took place. One has to look at the entirety of the presentations and discussions to reach a proper

conclusion. Conducting that exercise here, I find that that no advice was given.

(5) I accept Mr. Sutcliffe's submission that, applying the approach taken in **Thornbridge Ltd v Barclays Bank Plc** [2015] EWHC 3430 (QB) at [61]-[62], to constitute a recommendation the recommendation must be made in respect of a particular product (and not interest rate management or indeed periods generally).

(6) The use of words such as '*bespoke*', '*our more popular solutions*', '*tailoring the protection*', and '*features and benefits*' does not, in my view, constitute giving advice. It is providing information as to a flexible range of possibilities available for a client to choose, which can be tailored to his or her own needs in terms of products offered, the nature of protection and the length of term. In themselves those words and descriptions do not amount to advice as to which of them to take.

(7) One has to look at all the presentations given to Mr. Parmar prior to the purchase of the Swaps, rather than hive them off and consider each individually. There is no doubt that Mr. Parmar was being given information as to the pros and cons of various IRHPs by a specialist in the field, authorized by the FCA so to do, but that in itself does not make him an advisor.

(8) Although the information about the Cap was not introduced until the conversations on 1 November 2007, that was followed up in detail in the subsequent January and March 2009 presentations and in another conversation on 22 January 2009. The content of the 1 November 2007 and 22 January 2009 conversations and the January and March 2009 presentations do not suggest to me that Mr. Lotz was steering Mr. Parmar to take a Swap rather than a Cap, nor did he give a recommendation that the Claimants should take a Swap. He was outlining the pros and cons of each, as well as the collar. In the 22 January 2009 conversation, Mr. Parmar received clear and detailed explanations about the premium and non-premium products, but was not advised which one he should take. There were no recommendations made, save that the Structured Collar was unsuitable for him and should not be pursued. That did not constitute a recommendation as to which of the other three IRHPs Mr. Parmar should take. In this regard I accept the evidence of the Claimants' expert, Mr. Berkeley.[34]

[34] Day 4/88/line 16- 90/line 1.

(9) I do not regard the language of the January or March 2009 presentations as selective and therefore unbalanced, although I accept in relation to cancellation charges upon breakage, the reference to "*the principles of calculation are the same for traditional fixed loans*" which appeared in both the January and March 2009 presentations was misleading as a comparison, but that relates to a separate issue to which I will revert.

(10) By the date of the March 2009 presentation, it was clear that Mr. Parmar had not made up his mind whether he wanted a premium or non-premium product. That was clear from the presentation itself, which did not promote one over the other.

(11) I do not regard the terms of the Classification Letter as taking matters any further on the issue whether, prior to entering into the Swaps, Mr. Lotz was acting as an advisor. As Mr. Sutcliffe correctly submits, it is clear from the evidence that Mr. Parmar did not suggest that the decision he took in April 2009 to purchase a Swap was based on a recommendation from Mr. Lotz. That decision was taken by him on the basis that he did not wish to pay a premium for a product. It was a decision which he had taken a considerable time to reach. I find that he did so after mature reflection and careful consideration of all the information provided to him. That raises the question whether that information was sufficient for him to make a decision on an informed basis, which I shall go on to consider.

121. I would make clear that in reaching my conclusion that COBS 9 was not engaged, there is one matter that I have not relied upon, namely the submission made by Mr. Sutcliffe at paragraph 117(6) above. There the Bank relies upon the non-reliance provisions contained in the documentation. The documentation includes not just the First and Second Swap Disclaimers but also the 14th page of April 2009 Presentation, containing the April 2009 Disclaimer. This raises the second issue.

Issue 2: Do COBS Rule 2.1.2 or the provisions of the Unfair Contracts Terms Act 1977 prevent the Bank from relying upon the "basis clauses" in its contracts with the Claimants?

122. I start here with the Bank's submissions. I was surprised to see this point raised as an issue in the closing submissions because on the first day of the hearing[35], when Mr. Berkley raised the effect of COBS 2.1.2R which prevents any attempt by a firm "*in*

[35] Day 1/76/4-19.

any communication relating to designated investment business seeking to (1) exclude or restrict; or (2) rely on any exclusion or restriction of; any duty or liability it may have to a client under the regulatory system.". I indicated that my understanding was that insofar as there was any attempt to do so, this was invalid. I expressly asked Mr. Sutcliffe whether there was any challenge to that. He said no.

123. The way in which he advanced his submissions in closing, (which he described on Day 5/129/lines 18-19 as "*very much a tail-end Charlie*") so as to rely on the disclaimers referred to in paragraph 116(e) above was as follows.

124. He pointed to the Claimants' contention that the provisions relied on by the Bank constitute exclusion clauses which fall foul of COBS Rule 2.1.2 and/or the Unfair Contract Terms Act 1977 ("**UCTA**") as not satisfying the requirement of reasonableness. He submitted that the arguments advanced by the Claimants in the present case have been considered by the court in the mis-selling cases already decided, in relation to similar or near identical clauses to those in the present case. These cases have repeatedly found these clauses to be 'basis clauses', which do not come within UCTA: see **Crestsign** at [112-119]; **Thornbridge** at [109,111] where HHJ Moulder further concluded that, even had she found the relevant clauses to be exclusion clauses within UCTA, she would have found them to be reasonable [113]-[117]; **Grant Estates Ltd v Royal Bank of Scotland** [2012] CSOH 133 at [18], [21], [22] and [29] and **Property Alliance Group Limited v The Royal Bank of Scotland PLC** [2016] EWHC 3342 (the "**PAG Decision**") per Asplin J (as she then was) at [229] & [231]. Her decision was recently upheld on appeal.

125. In summary, the Claimants' present argument in relation to these (or near identical) clauses has been considered, and subjected to extended scrutiny, by different judges in recent years. On every one of those occasions, the arguments now advanced by the Claimants have been rejected. On each occasion the clauses were found to define the non-advisory relationship between the parties, rather than being exclusion clauses, and not therefore subject to UCTA. There is no distinction to be drawn between the words used in COBS 2.1.2 and those used in section 3 of UCTA both talking terms of excluding or restricting liability which is not the effect of the non-reliance or 'basis' clauses relied on in the present case.

126. Furthermore, almost all of the cases that have gone on to consider the point, have

concluded that, even were the clause to be subject to UCTA, it would pass the reasonableness test. The same is true in the present case. The parties were commercial counter-parties, there was no condition of sanction that the Claimants should enter into an IRHP, the Claimants were not paying the Bank to act as their financial advisers, and the Bank repeatedly made it clear to them that it was not acting as their advisor. Mr. Parmar was fully able to appreciate the contractual nature of the parties' discussions and to understand the meaning and impact of the statements of no advice and non-reliance.

127. Accordingly, the Bank submitted that it was entitled to rely upon the clauses in question, which provide a yet further defence to the Claimants' allegations of breach of the COBS rules.

The Claimants' submissions

128. First, they submitted that COBS 2.1.2 is not equivalent to UCTA and therefore the authorities referred to and relied upon by the Bank in relation to UCTA do not assist here, because unlike UCTA, which provides in section 3 that it :

> "(1)...applies as between contracting parties where one of them deals... on the other's written standard terms of business.
>
> (2) As against that party, the other cannot by reference to any contract term – (a) when himself in breach of contract, exclude or restrict any liability of his in respect of the breach... except in so far as (in any of the cases mentioned above in this subsection) the contract term satisfies the requirement of reasonableness."

the terms of COBS 2.1.2R prevent the exclusion and the restriction of the duty, not merely liability.

129. The effect therefore is that, were Mr. Lotz, on the facts found, in reality acting as advisor, thus engaging COBS 9, the Disclaimer which sought to recast the basis on which the advisor was acting would fly in the fact of reality, and thus under COBS 2.1.2 would be an invalid attempt to prevent the duty which would otherwise have arisen.

130. They also relied upon the decision of Christopher Clarke J in **Raiffeisenzentralbank Osterreich v RBS** [2011] 1 Lloyd's Rep 123, where at [313]-[315], he held that where a clause seeks to rewrite history or parts company with reality, it should not be upheld. The example which was postulated there was that of a representation made to the man in the street that the car which was being sold to him was "perfect" only to be faced with a

seller seeking to avoid liability for a defective vehicle in reliance on a term in the sales agreement that no representations had been made or relied on. The judge commented that this would amount to an attempt retrospectively to alter the character and effect of what had gone before and in substance an attempt to exclude or restrict liability. He concluded that such clauses were subject to the provisions of UCTA and therefore susceptible to being struck down for being unreasonable. Thus assuming UCTA applied, on the facts it would be unreasonable.

131. The result is therefore that the disclaimer provisions are of no effect in the present case.

Discussion and conclusion on Issue 2

132. In my judgment, it is not necessary to have regard to UCTA to determine this issue, and the authorities in relation to that statute, relied upon by Mr. Sutcliffe, are of little assistance.

133. This matter is governed by COBS 2.1.2, and I accept Mr. Berkley's submission that its provisions go further than section 3 of UCTA, in that they prevent a party creating an artificial basis for the relationship, if the reality is different. Thus if a Bank employee is in fact giving advice, having a disclaimer or statement which in effect states that he is not to be regarded as an advisor, with the effect that COBS 9 does not apply, is void because it is a "*communication relating to designated investment business seeking to (1) exclude or restrict any duty... it may have to a client under the regulatory system.*"

134. Had I therefore found, looking at the evidence in the round, that Mr. Lotz had indeed given advice, the Bank would not have succeeded in its reliance on the First and Second Swap Disclaimers, the statement at the foot of the first page of the April 2009 presentation box or the 14th page of April 2009 Presentation, containing the April 2009 Disclaimer, to reach a contrary conclusion.

Has there been compliance with COBS 10?

135. I therefore turn to the remaining outstanding issue under Issue 1, namely has there been compliance with COBS Rule 10, on the basis that I have found this was a non-advised sale?

The Claimants' submissions in relation to COBS 10

136. On the basis that the Court has found that there was no personal recommendation then, the Claimants submitted that, on the facts earlier set out, the Bank was plainly in breach

of COBS 10.2 and has denied the Claimants the protection of COBS 10.3. There was no evidence that Mr. McKeown or Mr. Lotz had carried out an adequate fact-finding exercise in relation to the background, experience, knowledge, needs and objectives of the Claimants, so as to ensure the Claimants had the necessary understanding of the risks involved in relation to the IHRPs. They were therefore not in a position to assess whether the IRHPs were appropriate for the Claimants, nor was any warning provided as required by COBS 10.3.1R.

The Bank's submissions in relation to COBS 10

137. The Bank submitted that, even if the Court were to find that the Bank's *process* was deficient, the Bank nonetheless complied with COBS 10, in that the Swaps were self-evidently suitable for the Claimants. The focus in COBS 10.2.1R, in assessing appropriateness, is on determining whether the client has the necessary experience and knowledge in order to understand the risks involved in relation to the product. There is no requirement that this assessment be in writing.

138. It is clear from the summary of the evidence set out above that over a period of nearly three years Mr. Parmar had regular dealings with the two representatives of BarCap:

(1) Mr. Mckeown had a face-to-face meeting with Mr. Parmar in his office at 18 Aintree Road on 10 July 2006 and took him through the July 2006 presentation. This was in the presence of the relationship manager Mr. Jones.

(2) It can properly be inferred that Mr. Jones communicated to Mr. Mckeown the necessary information regarding the experience and financial background of the Claimants, the Company and the commercial property portfolio. Mr. Mckeown had copies of the Claimants' facility letters for both loans. These were stored on the Bank's electronic system and subsequently were used in presentations prepared by Mr. Lotz.

(3) It was Mr. Mckeown who insisted in early January 2007 that the advice of compliance form should be amended to read in the 'nature of business' box: "*business man, manufacturing and wholesaling of rubber products, and landlord*", thus indicating that he fully understood the nature of the Claimants' background and business.

(4) Mr. Lotz succeeded Mr. Mckeown as the BarCap representative in early 2007. He

had access to BarCap 'Parmar' file (as disclosed in these proceedings) from Mr. Mckeown. It can properly be inferred that he familiarised himself with the Claimants and their business. In the first of the five transcripts of their telephone conversation on 1 November 2007, Mr. Lotz ascertained from Mr. Parmar (i) the approximate size of his debt and the period over which it was to be repaid and (ii) the fact that he held investment property with long-term tenants who had been in there for many years. This was relevant information relating to the Claimants' experience and background which Mr. Lotz obtained nearly 18 months before the relevant transactions took place.

(5) It is clear from the content of the long telephone conversation between Mr. Lotz and Mr. Parmar on 22 January 2009 that Mr. Lotz gained a full understanding of Mr. Parmar's ability to understand the operation of the three basic products that he had included in the January 2009 presentation. In particular, it is clear from Mr. Parmar's questions and Mr. Lotz's answers that the conversation only moved on to consider each different product once Mr. Parmar had indicated he was happy to do so, having understood the explanations provided by Mr. Lotz. The exchanges between them in relation to the Cap, and the fact that no breakage costs were associated with such product, are very clear and Mr. Parmar accepted in his evidence that he understood what Mr. Lotz was telling him.

(6) Finally, the document which best demonstrates that the Swaps were both suitable and appropriate for the Claimants, and that Mr. Lotz had complied with the requirements of COBS 10, is the first page of the April 2009 presentation where Mr. Lotz's summary is both accurate and clear and was not disputed in any respect by Mr. Parmar. This was their first face-to-face meeting and it was right that, Mr. Parmar having decided on a particular product, Mr. Lotz should meet with him in order to take him through the presentation and ensure that he understood the nature of the contract he has decided to enter into. Mr. Parmar accepted that Mr. Lotz took him through the presentation page by page. The Court can properly infer from Mr. Parmar's undoubted cautious and careful approach to business, that if he had had any doubts or questions about the product he was purchasing, he would have raised them with Mr. Lotz at that meeting. No contract was entered into on 24 April 2009. Mr. Parmar was under no obligation to take part in the Trade Call on 29 April 2009 (which he appears to have instigated). He did so because he had by

that stage decided that a fixed rate of 3.48% for 10 years was affordable (and below his stated target rate of 3.5%), given his rental income and other outgoings.

Discussion and conclusion on COBS 10

139. In the relation to the complaint made by Mr. Berkley that there was no adequate fact-finding exercise conducted in relation to the Claimants, I accept that this exercise seems to have been done incrementally over the period of the discussions, rather than at the outset in July 2006, when little appears to have been done by Mr. Mckeown, prior to the meeting on 10 July 2007 with Mr. Parmar. Thereafter, however, considerable information was obtained: I refer to the chronology of events the matters referred to above at paragraphs 34 (July 2006), 39 (January 2007), 47 and footnote 7 (1 November telephone call[36]), 54 (15 October 2008). By the time of the January 2009 presentation Mr. Lotz clearly had sufficient facts in relation to the Claimants as to their factual background, financial circumstances and requirements. In the March 2009 presentation, the third page correctly described the Claimants' borrowing to date and in the April 2009 presentation there was an introductory section entitled "*Background Section*" set out an accurate summary of the Claimants' personal circumstances, financial position and objectives. This was considered in detail with Mr. Parmar at the meeting at Canary Wharf on 29 April 2009, and he took no issue with this summary.

140. Given the matters relied upon by Mr. Sutcliffe recited in paragraph 138, and those to which I refer in paragraph 139 above, I therefore do not accept that the Bank failed to conduct a sufficient fact finding exercise in relation to the Claimants. Whilst the information could have been obtained earlier, in the event nothing turned upon the failure to do so. In reaching my conclusion, I bear in mind the dicta of Cooke J in the **Basma** case, referred to in paragraph 113 above.

141. In my judgment, by January 2009 at the latest the Bank had sufficient information to form a view as to the appropriateness of the IRHPs being discussed with the Claimants through Mr. Parmar. In particular, prior to the trade bring done, in April 2009 Mr. Parmar was given by Mr. Lotz a written summary of the Claimants' personal circumstances, financial position and objectives. This was considered in detail with Mr. Parmar at the meeting at Canary Wharf on 29 April 2009, and he took no issue with it. I therefore find

[36] Also in the first of the calls that day, Mr. Parmar stated that he has spoken to Mr. Lotz so much about Glove Club and his products that Mr. Lotz has to tell him about his products.

there was no breach of COBS 10 by the Bank.

In the event that I had found that COBS 9 had been engaged, were the Swaps suitable?

142. Although it is not necessary for me to do so, given my primary finding, had I found that COBS 9 applied, I would have found that the Swaps were suitable for the Claimants. This is in accordance with the evidence of Mr. Croft at paragraph 7.9 of his report and Mr. Berkeley in his oral evidence at Day 4/93/line 17-94/line 13; Day 4/96/lines 10-22. As Mr. Berkeley accepted, there might be more than one product that is suitable for a client.

143. Given Mr. Parmar's stated desire to find a means to fix his interest rates, his decision not to pay a premium and his concerns that interest rates would not remain at their extremely low rates, the Swap product was a suitable one for him.

144. Before turning to the question of the third and fourth issues, and whether there has been compliance with the particular COBS Rules referred to therein, it is instructive to look at the particular complaints by the Claimants that have been made about the way in which the matter was handled by the Bank, because my findings on those will impact on the determination of those issues.

The Claimants' Principal Areas of Complaint

145. As indicated at paragraph 16(4)(e) above, in his oral closing submissions, Mr. Berkley helpfully summarized his clients' principal areas of complaint as being:

   (1) The presentations provided to the Claimants failed to give a sufficient explanation of the potential magnitude of breakage costs involved in a Swap;

   (2) The presentations provided to the Claimants and the discussions between Mr. Parmar and Mr. Lotz failed properly to identify prominently the true value of the Cap in comparison to the Swaps;

   (3) The Bank should have disclosed the existence of its CEE limit in relation to the Swaps and its potential impact on the Claimants' ability to obtain further borrowing in future.

146. I would add to those, two further complaints:

   (1) The information about the Cap was not introduced in a durable medium, but in a telephone call on 1 November 2007;

(2) The fact that the reference to "*the principles of calculation are the same for traditional fixed loans*" which appeared in both the January and March 2009 presentations was misleading as a comparison, which at paragraph 120(9) above I have found to be the case.

Did the presentations provided to the Claimants fail to give a sufficient explanation of the potential magnitude of breakage costs involved in a Swap?

The Claimants' submissions

147. Both the January 2009 presentation and the March 2009 presentation were seriously non-compliant. Mr. Berkley described the use of the expression *zero-premium* in relation to Swaps as being misleading, unfair and unclear to Mr. Parmar as it disguised the carry cost. He referred to the wording "*cancelling the contract may result in either a breakage cost or a breakage gain. The principles of the calculation are the same as for traditional* ***fixed rate loans***" as indefensible. Not only was it a patently misleading statement which was repeated over the two presentations, it did deceive Mr. Parmar, who stated at paragraph 42 of his Witness Statement that "*I believed that if the contract was cancelled early, there would be an early repayment fee of around 1%*". This would have been consistent with the terms of his 2003 fixed rate loan. What aggravates this was that Mr. Parmar was interested in and had not been offered a fixed rate loan (owing to the Bank's policy not to lend its retail business customers on such terms). To equate the Swap with such a product was plainly an inducement to increase Mr. Parmar's appetite for the Swap.

The Bank's submissions

148. The Bank submits that the critical documents and communications in the period preceding the Claimants' entry into the Swaps are:

(1) the January 2009 presentation;

(2) the telephone conversation on 22 January 2009;

(3) the March 2009 presentation;

(4) the April 2009 presentation; and

(5) the Trade Call.

149. All these documents and communications were fair, clear and not misleading. Moreover,

each of the January, March and April 2009 presentations provided an adequate description of the nature and risks of the Swaps in a durable medium. In this context, the principal risk was the payment of breakage costs on cancellation of the Swaps prior to the end of the term.

150. The Bank provided the Claimants with both qualitative and quantitative illustrations of potential breakage costs. The information included in those presentations was plainly sufficient to meet the Bank's obligations under COBS. The documentation made it clear that breakage costs would depend upon prevailing market conditions at the time of any termination. Mr. Parmar clearly understood that such costs could be substantial. This issue is, ultimately, a hindsight issue. No illustration could have been expected to encompass the unprecedented and prolonged depressed interest rate period that subsequently transpired, and consequently it is not reasonable to expect the Bank to have illustrated the magnitude of the breakage cost that subsequently would have been incurred if the Claimants had chosen to exit the Swaps early (which they have not).

151. It was neither practical nor necessary to give examples of different factual scenarios, let alone an example of the unprecedented situation which has existed between then and now. It was not practical because the number of potential scenarios was endless. Nor was it necessary because Mr. Parmar was capable of working the position out for himself at least in rough terms, simply by altering (i) the amount by which the interest rate decreased from the fixed rate and (ii) the time at which the Swaps were cancelled before the end of the 10 year period. Moreover, Mr. Parmar could have asked Mr. Lotz to provide further examples if he had been at all unclear on this point. As page 11 of the April 2009 presentation stated: "*In more unfavourable market scenarios, the breakage cost could be higher than in this example ... Further scenarios can be provided on request*".

152. The Claimants' expert agreed with the Bank's expert that the Bank did "much more" than the norm in providing numerical illustrations in all three of its 2009 illustrations[37]. The presentations need not be comprehensive. That was unachievable given the inherent limitations of a presentation, as recognised by the Claimants' expert[38].

153. Mr. Lotz's clear and more than adequate explanation of the way in which breakage costs

---

[37] Day 4/134/line 9-137/ line 8.

[38] Day 4/73 line 1-74/line 22.

worked in the telephone conversation on 22 January 2009 enabled Mr. Parmar to appreciate the effect of the variable rate being 2% or 3% lower than the fixed rate. He fully understood that this would have the effect of doubling or tripling the cancellation charge that could arise in the event of early termination of a fixed swap contract[39].

154. It is to be noted that the Claimants have never sought to exit the Swaps and so no liability for breakage costs has arisen.

Discussion and conclusion in relation to the adequacy of the explanation of the potential magnitude of breakage costs involved in a Swap.

155. I have already found at paragraph 120(9) above that the wording in the January and March 2009 presentations which stated "*cancelling the contract may result in either a breakage cost or a breakage gain. The principles of the calculation are the same as for traditional* ***fixed rate loans"*** was misleading. I accept Mr. Berkley's submission in this respect. The principles are wholly different, not least because (a) the amounts payable upon breaking a Swap are not calculable by reference to a fixed percentage and are infinitely variable, depending upon the movement in the market at any given time and (b) unlike a Swap, breaking a traditional fixed term loan will never result in a payment by the Bank to the client.

156. I consider Mr. Berkley's submission that the use of the expression *zero premium* in relation to Swaps as being misleading, unfair and unclear to Mr. Parmar, as it disguised the carry cost, is unrelated to the issue of whether there was a sufficient explanation of the potential magnitude of breakage costs involved in a Swap. It is, however, relevant to whether Mr. Lotz failed properly to identify prominently the true value of the Cap in comparison to the Swaps. I will consider it under that heading.

157. In my review of the transcripts of all the relevant telephone calls between Mr. Parmar and Mr. Lotz, I have, however, reached the conclusion that:

(1) The Bank provided the Claimants with both qualitative and quantitative illustrations of potential breakage costs. The documentation made it clear that breakage costs would depend upon prevailing market conditions at the time of any termination.

(2) Mr. Parmar properly understood the nature, effect and possible magnitude of the

[39] Day 3/25/line 4-28/line 22.

costs involved in breaking a Swap, before he entered into the agreements on 29 April 2009. He clearly understood that such costs could be substantial.

158. Not only would I include the telephone conversations, presentations and meeting in 2009, I would start with the content of the conversations on 1 November 2007, when the September 2007 presentation (which included the words in bold "***mark to market gains/losses will apply if the contract is exited early***" at the foot of five of the pages dealing with non-premium IRHPs, followed by a page relating to the breakage costs and cancellation) was considered. I refer to my findings in paragraph 50 above, that Mr. Parmar had an understanding of how the products worked at that comparatively early stage of the IRHPs being discussed. In relation to the telephone conversation of 22 January 2009, I refer to the extract of the conversation at paragraph 67 above, and his own calculations, which demonstrate his clear understanding of the variable nature of the breakage costs. In the light of that, I reject his written evidence at paragraph 42 of his Witness Statement that "*I believed that if the contract was cancelled early, there would be an early repayment fee of around 1%*". Indeed in cross-examination, he resiled from this, and accepted that his understanding was that market movements would affect the amount of the payment.[40]

159. On Day 3, in re-examination, at p. 130/line 15, Mr. Berkley referred Mr. Parmar to the transcript of 22 January 2009, after I had asked Mr. Parmar some questions about it. He put to Mr. Parmar that the transcript provided a very good indication of that moment in time as to "*what your state of knowledge was in relation to the mechanism of swaps and the risk in relation to the breakage of costs as disclosed by Mr. Lotz.*"[41] Mr. Parmar agreed. At page 132, he was then asked the following questions:

> *Q: So is the complaint not that you did not understand how the breakage costs would be calculated but that there was this hidden feature that that the CEE imposed a fetter on your credit.*
>
> *A: Yes.*
>
> *Q: and that affected your credit rating.*
>
> *A: Yes.*

---

[40] Day 3/26 line 13-27 line 24.

[41] Day 3/130/line 18-131/line 5.

Q: That is the complaint and not that it was information which would have enabled you better to understand how to calculate the cancellation charges.

A: Have I understood that correctly?

A: Yes, yes."

160. In the light of those answers, and the evidence referred to above, in my judgment there is nothing in this complaint. Given Mr. Parmar's admitted understanding of the nature, calculation and possible magnitude of breakage costs, the reference to the calculations being similar to traditional fixed rate loans did not cause him to be misled. I turn therefore to the second complaint.

Did the presentations provided to the Claimants and the discussions between Mr. Parmar and Mr. Lotz fail properly to identify prominently the true value of the Cap in comparison to the Swaps?

The Claimants' submissions

161. Mr. Lotz was required to ensure that all information provided to Mr. Parmar was accurate and in particular did not emphasise any potential benefits of the products without also giving a fair and prominent indication of any relevant risks. It should have been presented in a way that was likely to be understood by Mr. Parmar; and not disguise, diminish or obscure any important items, statements or warnings about the products.

162. In the 2009 presentations the use of the expression *zero-premium* in relation to Swaps was misleading unfair and unclear to Mr. Parmar as it disguised the carry costs. Mr. Berkley relied upon the evidence of Mr. Croft at Day 4/246/line 11-247/line 3, in particular:

> *"Q:... It may be called zero premium, but to someone such as Mr. Parmar, zero premium would suggest that he getting free [sic], wouldn't it? That's a fair way in which a retail customer would look at this, isn't it?*
>
> *A: I think it is open to that interpretation."*

163. In relation to a Cap, there was what Mr. Berkley described as the startling failure to include within its description, its most benevolent feature, namely the absence of breakage costs. This feature was only ever communicated by Mr. Lotz on the telephone. The absence of provision of the information in a durable medium is significant given the personality and business practices of Mr. Parmar.

The Bank's submissions

164. All the documents provided by the Bank and the communications by it were fair, clear and not misleading. Moreover, each of the January 2009, March 2009 and April 2009 presentations provided an adequate description of the nature and risks of the Swaps in a durable medium. In this context, the principal risk was the payment of breakage costs on cancellation of the Swaps prior to the end of the term. The distinction between a Swap and a Cap was properly explained to Mr. Parmar and in evidence he admitted that he clearly understood the difference.

Discussion and conclusion on whether the Bank failed properly to identify prominently the true value of the cap product in comparison to the Swaps.

165. As far as Mr. Parmar's failure to understand that there were no breakage costs associated with a Cap, his evidence in cross examination was to the contrary. On Day 2/177/lines 7-12, there was the following exchange in relation to the 1 November telephone calls:

> *"Q: Mr. Sutcliffe "So you understood, didn't you, Mr. Parmar, that there could never be a breakage cost if you decided to cancel the cap contract, and you discussed the matter in considerable [detail]?*
>
> *A: Yes."*

166. Thus, whilst that information should have been included in the written presentations, it was quite obvious to Mr. Parmar from his conversations with Mr. Lotz that, having paid a premium up front for a Cap, that was all that would have to be paid, even if one broke the cap. Indeed there seemed to me to be limited circumstances where one would want to break a Cap, having paid a premium for it.

167. In my judgment, calling the Swap (and indeed a collar or a structured collar product) a "*zero premium*" product is not a misnomer or unfair. It accurately reflected the fact that there is no upfront payment, unlike a Cap. Mr. Parmar knew that, in return for getting a fixed base rate of 3.48% (+ the margin 1.75% or 1.25%), there were substantial costs which could be incurred by him, if the market did not perform as predicted and he wished to exit early. In the January and March 2009 presentations, in the page outlining the advantages of a Cap, as opposed to a Swap was "*No upfront cost of carry (compared to a swap).*" Thus the distinction was clearly drawn to Mr. Parmar's attention in writing.

168. Whilst therefore there may be a proper cause for complaint that the written presentations did not cite that one of the advantages that there were no breakage costs associated with a Cap, from his discussions with Mr. Lotz, Mr. Parmar was well aware of this when he

decided to opt for a Swap.

Should the Bank have disclosed the existence of its CEE limit in relation to the Swaps and its potential impact on the Claimants' ability to obtain further borrowing in future?

The Claimants' submissions

169. It is common ground that at no stage did the Bank disclose the existence of the CEE to the Claimants, nor did it indicate that it would in any way impact upon the Claimants' future borrowing prospects. The Claimants rely on two aspects in support of the contention that the Bank was required to disclose the CEE. First, that it would assist their understanding of the breakage costs[42] and secondly that it would have revealed the potential impact on the Claimants' ability to obtain future borrowing from the Bank in future[43].

170. There was very little between the experts on the nature of CEE. At paragraph 8.5 of the Report of Mr. Croft, the Bank's expert, he said:

> *"CEE is not in my experience a credit facility per se in the same way that a loan approval would be since it is not an amount that a borrower could otherwise borrow from a bank if there was no IRHP contract. However banks refer to it as a credit facility and record it as such for the purposes of monitoring overall exposure to a customer..."*

171. In cross-examination Mr. Starmer agreed with that passage of Mr. Croft's evidence[44] and confirmed that the CEE would influence future lending decisions and that it could be a stress factor in specific circumstances such as if the value of the security provided by the assets were to fall. He also confirmed that businesses which were meeting their covenants and servicing their debt could still be vulnerable to movement into the Bank's Business Support Unit owing to the CEE marking.

172. To suggest that the CEE is irrelevant to the customer is plainly disingenuous. It is a consequence of selecting the Swap and is a relevant risk factor which ought to have been disclosed to Mr. Parmar. The disclosure of the CEE would have served two quite separate functions:-

    (1) It would have provided Mr. Parmar with the same information that the Bank used to assess the risk on a near worst case scenario. It would have been the most

---

[42] See paragraphs 44A-44C of the Re-amended Particulars of Claim ("**RPOC**").

[43] See paragraph 53 of the RPOC, which relied upon the refusal of the loan to purchase 13, Aintree Road, Perivale, which claim was subsequently abandoned.

[44] Day 4/180/lines 11-25.

efficient and meaningful way of expressing the risks associated with Swaps.

(2) It would have alerted Mr. Parmar to a very important feature of the Swaps namely the effect the same would have upon his relationship with the commercial banking division and his future borrowing requirements.

173. As to paragraph 171(1) above, the Court might well have formed the view of Mr. Parmar that he was risk averse and not likely to act recklessly if he had understood the potential risks associated with the Swap.

174. As to paragraph 171(2) above, Mr. Berkley submitted that the Court will have noted that Mr. Parmar was interested in investment in new ventures both in the UK and overseas. He did apply for further borrowings in 2010 and 2013. He would have been very interested in the CEE information.

175. The Bank appears to have had a policy of non-disclosure of CEE. This was confirmed by Mr. Starmer. It seems most unfair to a retail customer that by entering into a product designed to provide him with a fixed rate and deliver certainty he should assume a risk which is known and understood and quantified by the Bank as one party to the transaction and not by the customer.

The Claimants' further submissions in the light of the PAG Decision

176. The consideration of the CEE disclosure issue in the **PAG Appeal Decision** is not relevant to the Court's adjudication of the instant case and is apt to amount to a forensic distraction. In each of the reported cases which has considered the CEE disclosure issue, the claimant has been a corporate entity and as such the scope of any duty owed by the bank has been dependent on either establishing the existence of an advisory duty or showing that an actionable misrepresentation has been made as to the merits of structure of the swap. The corporate claimant has not been able to point to any positive duty to explain the product or any positive duty to warn as to its risks, arising under the COBS rules. Corporate claimants are not entitled to the investor protection offered by those Rules.

177. In particular, the COBS Rules impose positive duties to provide information and risk warnings which go far beyond any duties arising at common law. Reliance was placed upon the distinction drawn by Tomlinson LJ in **Green & Rowley v The Royal Bank of Scotland** [2013] EWCA Civ 1197 at [17], where he said:

> *"… Thus insofar as COB Rule 2.1.3 refers to a duty to take reasonable steps not to mislead, this is comprised within the common law duty, but insofar as it refers to a duty to take reasonable steps to communicate clearly or fairly, this introduces notions going beyond the accuracy of what is said which is the touchstone of the Hedley Byrne duty. The duty imposed by COB Rule 5.4.3 to take reasonable steps to ensure that the counterparty to a transaction understands its nature the judge regarded, again rightly in my view, as well outside any notion of a duty not to mis-state, as he characterised the Hedley Byrne duty to be. Accordingly, the judge did not regard the content of the Bank's common law duty in relation to the accuracy of its statements as in any relevant manner informed by the content of the COB Rules"*

178. The COBS Rules are an autonomous regime. This is clear from **O'Hare & O'Hare v Coutts & Co** [2016] EWHC 2224 per Kerr J at [204], where he said:

> *"I do not think the required extent of communication between financial adviser and client to ensure the client understands the advice and the risks attendant on a recommended investment, is governed by the Bolam test".*

179. In that context, the duty is akin to that explained in **Montgomery v Lanarkshire Health Board** [2015] AC 14. As Kerr J went on to explain at [208]:

> *"A duty to explain in terms not dissimilar to the Montgomery formulation is found in the COBS rules. I will not set them out here; see, in particular, rule 2.2.1(1) and 2.2.2(1)(b); rule 4.2.1(1); rule 9.2.1, 9.2.2, 9.2.3 and 9.2.6. I would find the content of those rules very difficult to square with the application of a conventional Bolam approach…"*

180. Reliance was also placed by Mr. Virgo on the judgment of Rix LJ in **Rubenstein v. HSBC Bank** [2013] PNLR 9, at [115]:

> *"… The statutory purpose of the COB regime pursuant to FSMA is to afford a measure of carefully balanced consumer protection to the 'private person'. That purpose is elucidated not only by the content of the COB rules themselves, but also by s.2 of FSMA, which speaks of 'the protection of consumers', i.e. 'securing the appropriate degree of protection for consumers' (s.2(2)(c) and s.5(1)) as among the regulatory objectives. The rules to be created by the regulatory authority are to be informed by a proper regard for 'the differing degrees of risk involved in different kinds of investment … the need that consumers may have for advice and accurate information … the general principle that consumers should take responsibility for their decisions' (see s.5(2)). … These basic principles and purposes are reflected in the imposition under the COB rules of onerous duties (albeit in a well conducted operation these should not be difficult to achieve and they are couched for the most part in terms of 'reasonable care') designed to ensure that the investment adviser understands his client and his client understands risk".*

181. Thus the **PAG Appeal Decision** is not of assistance when determining what information was required to be provided by the Bank to private persons/retails clients pursuant to the positive obligations imposed upon it under the COBS Rules.

182. Mr. Virgo then relied upon a number of additional materials, which seemed to go beyond addressing the **PAG Appeal Decision**. Relying on paragraphs 37 and 38 of the submissions of the FCA as intervenor in **Green & Rowley**, he submitted that COBS 2.2.1R required "scenario modelling", as to the worst case scenario in the event of default, if not disclosure of the CEE. The Bank's presentations in the present case showed a modest adverse financial risk which was far removed from the worst case scenario, and was therefore misleading. They did not go far enough in drawing attention the magnitude of the risks involved.

183. He referred to the grant of permission to appeal by Sir Colin Rimer in the **Crestsign** case where he said that "*there is also a real case for the argument that the judge was wrong to conclude as he did in paragraphs 165 to 167 that the respondents discharged the information duty that he found they owed in relation to what are referred to as "break costs". Again, I regard the points advanced in the supplementary argument, as helpfully explained by Mr. Coleman, as raising a real question as to whether or not the judge's decision on this part of the case was correct. Again ...I regard this ground of appeal as having a real prospect of success*". Mr. Virgo contended that this supported his submission that in order to comply with COBS 14.3.2 R, the Bank was required, as a matter of law, to provide information as to a "worst case" scenario. Information which merely warned that there might be a break cost and that the claimants could ask for more information did not go far enough.

184. Finally he referred to the Review Specification agreed between the banks and FCA, and referred to extracts from the June 2012 and January 2013 agreements, dealing with Sales Standards.

The Bank's Submissions

185. The bases on which the Claimants contended that the Bank was required to disclose the CEE were premised on a false understanding of both the nature of the CEE and how it is treated within the Bank.

186. The Claimants have described the CEE as constituting "*a calculation of the potential*

magnitude of breakage costs"[45] and a "*contingent liability*"[46] of the Claimants. Mr. Sutcliffe submitted this is a misdescription. The CEE is not a forecast of breakage costs under the Swaps. It is an internal risk management limit which enables Barclays to monitor its risk associated with products in respect of which its exposure depends upon future movement[47]. The CEE represents the Bank's estimated exposure in hypothetical near worst-case market conditions.[48] Conversely, the breakage costs under the Swaps represent the mark-to-market value of those contracts based on replacement contracts from the market at the actual prevailing rate at the time.[49] That was accepted by both parties' experts.[50]

187. On the Claimants' own expert evidence, there is no single means of calculating the CEE, and the breakage costs of a swap may not even comprise part of the CEE figure.[51] In the case of the Bank, the evidence of Mr. Starmer, to whom the Claimants' expert understandably deferred on matters of the Bank's treatment of CEE,[52] the CEE incorporated, *inter alia,* an additional "headroom" to give a worst-case position for the Bank for risk monitoring purposes.[53] It follows that it is wrong to equate the Bank's CEE with the Claimants' potential breakage costs, and the Claimants' assertion that the *"[t]he £290,000 was the Defendant's calculation of the potential magnitude of breakage costs of the swaps"*[54] was demonstrably false.

188. Neither is the CEE a "contingent liability" of the Claimants. First, it represents the *Bank's* exposure in a near worst-case scenario. As the Claimants' expert agreed,[55] it is not payable by the customer. Secondly, and in any event, the CEE is not a "contingent liability" at all. It is a contingent asset that appears on the asset side of the contingent balance of the Bank.[56] The point is borne out by the fact that the CEE is not capable of being covered by a fixed or floating charge over a customer's assets, because it is neither

45 See paragraph 40A RAPOC.
46 See paragraph 44 RAPOC.
47 Starmer §§9-16.
48 Starmer §12; [Day 4/113/lines 3-21] (Mr. Berkeley). [Day 4/272/ line 15/-274/line 14] (Mr. Croft).
49 Croft §8.2; Day 4/24/line 5-25/line 17 (Mr. Berkeley).
50 *ibid* and Day 4/113/line 3-21 (Mr. Berkeley); Croft §8.3.
51 Day 4/17/line 2-20/line 8 (Mr. Berkeley).
52 E.g. Day 4/122/lines 17-18; Day 4/123/lines 15-23; Day 4/123/lines 21-124/lines 7.
53 Day 4/176/line 13-177/line 11.
54 Paragraph 40A of the RPOC.
55 Day 4/123/lines 20-22; see also Starmer §8.
56 Day 4/273/lines 16-274/line 14 (Mr. Croft).

a present nor future liability.[57]

189. Accordingly, the CEE figure is altogether different from any breakage costs or contingent liability of the Claimants. Disclosure of the CEE would not have assisted the Claimants' understanding of the potential magnitude of breakage costs under the Swaps. At most, it might have facilitated their knowledge of the Bank's exposure, but this would have been irrelevant to the Claimants' decision to enter into the Swaps, and the Bank was not obliged to disclose it under COBS 4.2.1 or 14.3.2.

190. In relation to the contention that the CEE affected the Claimants' future borrowing prospects with the Bank, the CEE was not a "credit line" or "credit limit" *"utilised to protect itself against liability for the aforementioned breakage costs, thereby reducing the Claimants' credit-worthiness by £290,000"*[58]. The "credit line" or "credit limit" marks the extent of borrowing that has been granted by the Bank and is available for the customer to utilise. However, the Bank does not extend any credit to the customer under a swap, and the CEE is not treated as such by the Bank.[59] Mr. Berkeley's assertion to the contrary at paragraph 4.55 of his report was inconsistent with his oral evidence that CEE is not a lending limit, that it cannot be borrowed, and that it is not that "type" of credit.[60] The CEE does not affect the loan to value calculation under a customer's loan facility.[61]

191. In the case of the Claimants' own borrowing prospects, the clear evidence is that the risk that CEE would have affected the Claimants' borrowing was wholly illusory. The CEE was of no practical application at all.[62]

192. According to Mr. Starmer[63], in assessing the Bank's overall risk exposure from a customer's lending request, the benchmark generally adopted by credit was that the aggregate of the loan value and the CEE should not exceed 100% of the value of the Bank's property security. Mr. Starmer reaffirmed this in his oral evidence[64]. The CEE amounted to only 13% of the Claimants' property value, and the Claimants' overall exposure (loan plus CEE) was significantly less than 100% (c.74%). There was, in other

[57] Starmer §18.
[58] Paragraph 40A RAPOC/40A.
[59] Starmer §21; Day 4/191/line 5-192/line 13 (Mr. Starmer).
[60] Day 4/119/lines 21-120/line 18 (Mr. Berkeley).
[61] Starmer §18; Day 4/185/lines 1-9.
[62] Starmer §19.
[63] Starmer §19.
[64] Day 4/184/lines 13-17.

words, plenty of "headroom", as the Claimants' expert conceded.[65]

193. Further, this was not a "hard and fast rule". Credit officers were able to sanction greater overall percentage exposure, and other factors such as the customer's industry, its trading performance, its future business plans and its overall financial standing would also be relevant to any loan request.[66] The Claimants sought to rely on the CEE Excess Report dated 18 April 2012 of which they only became aware following disclosure in these proceedings. That Report showed a current limit set at £185,000, an excess of £40,000, and a "required limit" of £286,000 including the 20 per cent headroom recommended by BarCap. Despite that, according to the "comments", *"swop* [sic] *rates are down and this has pushed all limits up"*. As a result, the increased rate was sanctioned and the Claimants were never made aware of the Excess Report.

194. Mr. Sutcliffe relied heavily on the evidence that disclosure of the CEE was wholly inconsistent with banking practice at the time, both within BarCap and elsewhere. It was not the Bank's practice to notify the CEE limit to the customer. The CEE was for internal risk assessment only, and it was therefore irrelevant to the customer[67]. It was not the practice of other banks. Whilst the Claimants' expert [68] claimed that banks commonly explained the existence and purpose of the "*credit line*" as a quantification of risk to the client, that is undermined by his own experience relayed in oral evidence, during which he conceded that the CEE was only occasionally disclosed to clients, and only then if they were more sophisticated.[69] Despite the fact that the Review Presentation from RBS, introduced into evidence by the Claimants in the re-examination of the Claimants' expert, was said by him to exceed the disclosure standards expected in respect of a vanilla swap, it made no mention at all of CEE or its equivalents.[70]

195. It is further contradicted by **Crestsign**, in which the Deputy Judge accepted (at [157]) the agreed evidence of the experts in that case that the credit line put in place in relation to the derivative was *"an internal measure not normally disclosed to a bank's customers"*, and **the PAG decision**, in which Asplin J accepted (at [201]) that the credit line *"could not have been expected to have been revealed*". In that case, the credit line was referred

---

[65] Day 4/121/lines 4-6.
[66] Starmer §19.
[67] Starmer §14.
[68] Berkeley §4.58.
[69] Day 4/115/lines 7-12; Day 4/128/lines 9-23.
[70] Day 4/158/lines 24-159/line 7 (Mr. Berkeley).

to was "Credit Limit Utilisation" ("**CLU**"), but it is common ground that that there are no material differences between the CLU and the CEE.

The Bank's further submissions in the light of the PAG Appeal Decision

196. The **PAG Appeal Decision** handed down in March reiterates the position that, in banking practice, no disclosure was made of the CEE or its functional equivalents to a swap counterparty. That practice was relevant when considering the Bank's compliance with the COBS Rules. The **PAG Appeal Decision** further reinforces the fact that the CEE is not a forecast of breakage costs under the Swaps, as was accepted by both parties' experts at trial, or a contingent liability of the Claimants. It followed that the CEE would have been irrelevant to the Claimants' decision to enter into the Swaps, and the Bank was not obliged to disclose it under the COBS Rules.

197. Paragraph 79 of the **PAG Appeal Decision** stated: "*In a number of first instance decisions on swap transactions between a bank and its customer it was observed that it was not the normal practice to disclose the CLU or similar predictions and it was held that there was no breach of duty by the bank in failing to disclose them: **Bankers Trust, Crestsign, Thornbridge Ltd v Barclays Bank plc** [2015] EWHC 3430 (QB), **Marz Ltd v Royal Bank of Scotland plc** [2017] EWHC 3618 (Ch), **London Executive Aviation Ltd v The Royal Bank of Scotland plc** [2018] EWHC 74 (Ch). Although there is now greater disclosure by banks in relation to break costs than before, RBS still does not disclose the CLU*" The Court noted that no fewer than five first instance decisions on swap transactions between a bank and its customer had observed that "*it was not the normal practice to disclose the CLU or similar predictions and it was held that there was no breach of duty by the bank in failing to disclose them.*"

198. Insofar as the Claimants submitted that those decisions are irrelevant, first, because the claimants in those cases were "corporate entities" and, as such, were not subject to the same standards imposed by the COBS Rules and, second, because the scope of the requirements of a bank to comply with the COBS rules is not governed by *Bolam* principles but is instead determined by the principles set out in **Montgomery v Lanarkshire Health Board** [2015] AC 1430, both contentions were misguided.

199. First, the assertion by the Claimants that no direct cause of action under section 138D (previously section 150) of the FSMA arose in the previous reported cases considering CEE disclosure because the claimants were corporate entities was wrong because:

(1) Section 138D(2), and its predecessor, confers upon a *"private person"* a statutory cause of action for contravention of the FCA's rules. The meaning of *"private person"* is prescribed by regulation 3 of the Financial Services and Markets Act 2000 (Rights of Action) Regulations 2001/2256. By regulation 3(1)(b), any person who is not an individual, including corporate entities, is a *"private person"* unless they have suffered the alleged loss in question *"in the course of carrying on business of any kind"*.

(2) The claimants in the previous reported cases did not have a statutory cause of action, not because they were *"corporate claimants"*, but because they were companies *"carrying on business"*.

(3) An individual can be just as sophisticated as a corporate entity; and, indeed, the COBS Rules (and the '*investor protection*' afforded thereby) apply just as much to transactions with corporate customers as they do to transactions with individuals. Rather, the mischief of excluding non-natural persons carrying on business from section 138D (i.e. the statutory right of action for a breach of the COBS Rules) was *"the misuse by businesses of a right of civil action to raise strategic actions to obtain competitive advantage"*: per Lord Hodge in **Grant Estates Limited v RBS and others** [2012] CSOH 133 at paragraphs 51 to 53.

(4) The practical position of the Claimants in this case is in reality no different from the position of the claimants in other cases involving small businesses such as **Crestsign**. The Claimants ran Glove Club, which falls within the category of a small or medium size enterprise ("**SME**"), and the loans subject to the Swaps were taken out by the Claimants for the benefit of that business. It is only because those loans were taken out in the Claimants' own names, rather than in their company's name, that they have a cause of action as private persons under section 138D.

200. Second, whilst the claimants in the previous reported cases addressing CEE disclosure, including the PAG Appeal Decision, did not have a statutory cause of action under section 138D of FSMA, it is not in dispute that, in all those cases, as in this case, the banks' sales of Swap contracts were and remain subject to the COBS Rules. In that context, it is highly relevant that the Court of Appeal referred with approval in paragraph 79 of the **PAG Appeal Decision** to the first instance decisions in which it was observed that it was not normal practice to disclose the CLU or similar predictions and it was held

that there was no breach of duty by the bank in failing to disclose them. Importantly, the final sentence of paragraph 79 states: *"Although there is now greater disclosure by banks in relation to break costs than before, RBS still does not disclose the CLU".* In other words, it is still not the banks' practice to disclose their internal credit lines to customers, notwithstanding the scrutiny to which interest rate hedging contracts have been subjected over recent years.

201. Third, the Claimants sought to diminish the relevance of the banks' practices on disclosure of CEE on two bases, neither of which bears scrutiny:

    (1) The Claimants first referred to the distinction between the content of a firm's duties at common law and those under the COBS Rules. The Bank did not dispute that the duties assumed by firms on *Hedley Byrne* principles are not necessarily concurrent with those under the COBS Rules. But the Claimants' contention that that distinction provides any basis for the assertion that therefore the *"practice of a bank in disclosing or in not disclosing information….is not informative of the question: what information does a bank need to give a customer to meet its COB/COBS Rules duties?"* was entirely misplaced. The Claimants have advanced no cogent basis for such conclusion (which, on the contrary, merely begs the question) and there is none.

    (2) The Claimants' second point did not take matters much further. The Claimants appeared to contend that if the scope of the requirements of a bank to comply with those Rules is not determined by any **Bolam** duty of care, and instead, the duty is *"akin to"* that explained in **Montgomery**, then banking practice is entirely irrelevant to the Bank's compliance with the COBS Rules. But this was not correct. Even assuming that the Bank's duties under COBS Rules were *"not dissimilar to the Montgomery formulation"*, this does not advance the Claimants' case:

    (3) The duty as formulated by Lord Kerr and Lord Reid in **Montgomery** (in the medical context) was to *"take reasonable care to ensure that the patient is aware of any material risks…, and of any reasonable alternative…".* The test of "materiality" was formulated as being *"whether, in the circumstances of the particular case, a reasonable person in the patient's position would be likely to attach significance to the risk, or the doctor is or should be aware that the particular patient would be likely to attach significance to it"* (as cited in **O'Hare v**

Coutts, per Kerr J at paragraph 202).

(4) Thus, whilst **Montgomery** considered that the Bolam test ("*a practice accepted as proper by a responsible body of ... men skilled in that particular art*") did not provide the applicable test, it did not suggest that any such general practice was irrelevant when considering whether "*reasonable care*" had been taken to ensure the "*material risks*" had been understood.

(5) The scope of duty imposed by the COBS Rules is of course a matter of construction of those Rules. In considering the relevance of the **Montgomery** test in the banking context, Kerr J in **O'Hare v Coutts** considered that "*the expert evidence in the present case tends to indicate that there is little consensus in the financial services industry about how the treatment of risk appetite should be managed by an adviser*", but that "*As in the medical context, the extent of required communication with the client should not depend on the attitude of the individual adviser*" (at paragraph 206). It is antithetical to that latter observation to conscribe references to the approach taken by other advisors to complete irrelevance (as the Claimants seek to do); nor did Kerr J do so in his judgment.

(6) Moreover, the large number of decisions culminating in the **PAG Decision** (and referred to in paragraph 79 of the **PAG Appeal Decision**) make it clear that (a) all of the reported cases on CEE disclosure have proceeded on the basis that banking practice is relevant to the Court's determination of whether the Bank took "*reasonable care*" to ensure that the Claimants were aware of any material risks; and (b) the court's conclusion that the defendants did not breach any duty by failing to disclose CEE was evidently motivated by the fact that CEE is not ordinarily disclosed. In **O'Hare v Coutts**, Kerr J expressed the view that, so far as COBS information duties were concerned, "*breach of them will ordinarily also amount to a breach of [the common law duty to exercise reasonable skill and care].*" (paragraph 208); on which basis it is to be assumed that Kerr J would equally not have considered the decisions referred to in the **PAG Appeal Decision**, for the purposes of the issue of disclosure of the CLU, as irrelevant or, to use the Claimants' phrase, "a forensic distraction".

(7) The Claimants' assertion that banking practice is, as a result of **O'Hare v Coutts**, irrelevant under the **Montgomery** principles was thus incorrect, and was

misplaced. It is moreover tantamount to a (baseless) contention that either all of the previous reported cases applied the wrong test or, otherwise, in applying the right test, the Court took into account matters that were irrelevant. That is patently misconceived. In that regard, it is noteworthy that Mr. Rosen QC in **Marz Ltd v Bank of Scotland Plc** [2017] EWHC 3618 (Ch) at [306]-[308] cited with approval the Court's rejection in **Crestsign** of the claimant's claim that the credit line should have been disclosed, on the basis of the experts' evidence that the credit line was *"an internal measure not normally disclosed to a bank's customers",* before immediately considering (and rejecting) Marz's assertion that the Bank of Scotland had breached the duty expounded in **O'Hare v Coutts.**

(8) The Bank submitted the approach now advanced by the Claimants was inconsistent with the way they advanced their case at trial, during which they sought to argue[71] that it had been the practice of banks to disclose CEE or its equivalent in order to support their case that the Bank breached its duties under the COBS Rules.

202. Fourth, and in any event, the Bank's disclosure of the CEE (i) could not have assisted the Claimants to understand the material (or any) risks attributable to the Swaps, (ii) would have been irrelevant to their decision to enter into the Swaps and, accordingly, (iii) was not required under the COBS Rules:

(1) As explained in its Written Closing, the CEE is not a forecast of breakage costs under the Swaps. It is an internal risk management limit which enables Barclays to monitor its risk associated with products in respect of which its exposure depends upon future movements. Both parties' experts accepted that this is distinguishable from the breakage costs under the Swaps, which represent the mark to market value of those contracts based on replacement contracts from the market.

(2) Further, the Claimants' own expert evidence was that there was no single means of calculating the CEE, and the breakage costs of a swap (which represent the Swap counterparties' liability) may not even comprise part of the CEE figure[72].

(3) This was reinforced by the Court of Appeal in the **PAG Appeal Decision**. At paragraph 80, the Court observed that: "*The CLU is the product of the subjective view of RBS about many matters, including possible movements in interest rates in*

[71] See paragraph 4.58 of Mr. Berkeley's report and his cross-examination on Day 4/127/line 18-129/line 14.

[72] Day 4/17/line 2-20/line 8.

the future and the length of the outstanding term of the swaps at the time of the break, and involves a complex computer programme into which is fed a large number of different scenarios. It is an internal and subjective assessment by RBS of risk inherent in the swaps". (Underlining added)

(4) The Claimants' contention, at paragraph 11 of their Skeleton Note, that: "*any private person/retail client entering into a swap would naturally want to know what the "worst case" downside risk was*" is pure speculation, and moreover, pure speculation which was neither advanced nor argued during the course of trial, nor, therefore, was any evidence advanced to support it (or has been since). What was clear on the evidence (and whatever the Claimants might now speculate as to the desires of other private persons/retail clients), was that the First Claimant accepted[73] that, had he wanted to do so, he was perfectly capable of working out from the break cost examples provided to him by the Bank what the worst-case downside risk was. As such, even if (contrary to the above) it were right that the decisions in **Montgomery** and **O'Hare** render reference to the general practice of other practitioners irrelevant and illegitimate, it is clear that the Claimants did not attach sufficient significance to the risk to undertake that calculation for themselves, despite being able to do so.

203. In relation to the new materials relied upon by the Claimants, none of those documents provides any support for the Claimants' submission that the Bank was obliged by COBS to disclose the CEE to them.

204. The Claimants' appeal to the Financial Conduct Authority's submissions in **Green & Rowley** was misconceived. First, the Court in **Green & Rowley** did not hear oral argument on those submissions and at paragraph 31 declined to express any view about them, given that it was not necessary to do so for the disposal of the appeal. Their relevance is therefore difficult to discern. Second and in any event, the Financial Conduct Authority was emphatically clear that the extent of communications required was fact-specific. At paragraph 38 of its submissions, it stated that "*there may be cases in which only a broad explanation of the calculation of the likely costs will in fact suffice*" (and it is notable that the Claimants have not been able to point to a single Court judgment in which 'broad' explanations were held not to have sufficed, in contrast to the numerous

[73] See Day 2/186/ line 22-191 line 21.

decisions, culminating in the **PAG Appeal Decision**, to the contrary). The plain evidence was that Mr Parmar was a sophisticated businessman who was perfectly capable of calculating the downside risks of the Swaps from the information provided to him by the Bank.

205. The paragraphs cited from the agreements which formed part of the Review Specification refer to proper disclosure being provided of potential break-costs and the features and risks of non-cap products. The Bank provided ample disclosure of those matters and referred to paragraphs 88 to 90 of their written closing. Nowhere is it suggested in the Review Specification that, in order to comply with their duties under COBS, banks were obliged to disclose their internal credit line calculations, such as CEE or CLU.

206. The relevance of Sir Colin Rimer's reasons for granting leave to appeal in **Crestsign** to the point arising form the **PAG Appeal Decision** was not understood. It would appear to be concerned with break costs and was clearly fact-specific. The Claimants have not suggested how the tentative view there expressed, that the break-cost disclosure in that case might not have been sufficient to discharge the bank's informational duties, applied to this case.

Discussion and conclusion on whether the Bank should have disclosed the existence of its credit equivalent exposure ("CEE") limit in relation to the Swaps and its potential impact on the Claimants' ability to obtain further borrowing in future.

207. There are two distinct aspects of this complaint. The first is identified at paragraph 172(1) above, namely disclosure of the CEE limit would have provided Mr. Parmar with the same information that the Bank used to assess the risk on a 'near worst case' scenario. It would have been the most efficient and meaningful way of expressing the risks associated with Swaps. I turn to that first.

208. In my judgment, in order to comply with their obligations to the Claimants under the COBS Rules, it was not necessary for the Bank to disclose the existence of its CEE limit for the purpose of demonstrating the breakage costs

209. I reach that conclusion for the following reasons:

(1) I start with the re-examination of Mr. Parmar referred to at paragraph 159 above and my finding at paragraph 160. It is clear to me that Mr. Parmar well understood the calculation of the breakage charges, how they could grow depending on the

state of the market at any given time and that, if there was a dramatic turn in the market, whereby he wanted to break the Swap, it could be an expensive exercise. Mr. Parmar's complaint, properly understood, did not relate to a failure properly to understand the magnitude of the breakage charges related to a Swap. It was not necessary to disclose the CEE limit in order to achieve the necessary understanding on his part.

(2) As the Claimants' expert accepted in cross-examination, the breakage examples in the presentations necessarily will not be comprehensive. I find that the materials supplied to the Claimants in the presentations and the telephone discussions relating to breakage costs between Mr. Lotz and Mr. Parmar were adequate and did not require additional disclosure of the CEE limit.

(3) I accept the submissions of Mr. Sutcliffe that the CEE is not a "*contingent liability*" of the Claimants. It represents the *Bank's* exposure in a near worst-case scenario. As the Claimants' expert agreed,[74] it is not payable by the customer. It is an internal risk management limit which enables the Bank to monitor its risk associated with products in respect of which its exposure depends upon future movement[75]. The CEE represents the Bank's estimated exposure in a hypothetical near worst-case market conditions.[76] Conversely, the breakage costs under the Swaps represent the mark-to-market value of those contracts based on replacement contracts from the market at the actual prevailing rate at the time.[77] That was accepted by both parties' experts.[78] Further, the Claimants' own expert evidence was that there was no single means of calculating the CEE, and the breakage costs of a swap (which represent the Swap counterparties' liability) may not even comprise part of the CEE figure.[79]

(4) Looking at the expert evidence, it was not the practice of the Bank or the general practice of other banks to disclose their CEE limits as part of the sales process when informing clients about this risks associated with Swaps. In paragraph 4.58 of Mr. Berkeley's report, which put the matter at its highest, that paragraph began with the words "*Though practices vary...*". Under cross-examination, Mr. Berkeley

---

74 Day 4/123/lines 20-22; see also Starmer §8.
75 Starmer §§9-16.
76 Starmer §12; [Day 4/113/lines 3-21] (Mr. Berkeley). [Day 4/272/ line 15/-274/line 14] (Mr. Croft).
77 Croft §8.2; Day 4/24/line 5-25/line 17 (Mr. Berkeley).
78 *ibid* and Day 4/113/line 3-21 (Mr. Berkeley); Croft §8.3.
79 Day 4/17/line 2-20/line 8.

accepted that, as far as his own practice was concerned (and he had considerable experience), he conceded that the CEE was only occasionally disclosed to clients, and only then if they were more sophisticated.[80] Significantly the Review Presentation from RBS, introduced into evidence by the Claimants in the re-examination of the Claimants' expert, which the Claimants relied upon as a model of a presentation should contain, made no mention of the CEE.

(5) It is important to pay due regard to the reasoning behind the finding in the PAG Appeal Decision and the five first instance authorities cited at [79], which indicate that there is no obligation on a bank to disclose the CEE (or CLU as it was there referred to). In the **Crestsign** decision, Mr. Tim Kerr QC (as he then was) at [157] rejected the Claimants' submission that the credit line should have been disclosed, on the basis of the experts' evidence that the credit line was *"an internal measure not normally disclosed to a bank's customers"*. In **the PAG decision** Asplin J accepted (at [201]) that the credit line *"could not have been expected to have been revealed"*. That approach was upheld by the Court of Appeal, which at [80] described the CLU in the following terms: *"The CLU is the product of the subjective view of RBS about many matters, including possible movements in interest rates in the future and the length of the outstanding term of the swaps at the time of the break."* Thus, whilst I accept the Claimants' submission that these authorities were dealing with corporate entities carrying on business and were not specifically concerned with whether or not there had been compliance with the COBS Rules, which is an autonomous regime, the basis on which it was held in those cases that there was no obligation on a bank to disclose the CEE limit in those cases is instructive, when considering whether there is a requirement to disclose it under the COBS Rules. In my judgment, there was no such requirement. In order for the Bank to discharge its COBS obligation, it did not have to reveal the CEE limit but could do so by giving adequate examples, and discussing them with the client, as happened here.

(6) I am not greatly assisted by the new materials relied upon by Mr. Virgo because:

(a) Looking at paragraph 38 of the FCA submission as intervenor in the **Green & Rowley** case, it stated that *"There may be cases in which based upon the*

80 Day 4/115/lines 7-12; Day 4/128/lines 9-23.

information needs of the customer only an illustrative example/s will suffice. Equally there may be cases in which only a broad explanation of the calculation of the likely costs will in fact suffice". I do not read that as indicating that imposing a requirement on a Bank to disclose its CEE limit in order to be COBS compliant. In any event those submissions were not considered by the Court of Appeal in that case and there is no decided authority supportive of the Claimants' position.

(b) In the **Crestsign** case, permission to appeal was granted by Sir Colin Rimer on 10 March 2015, and as far as I can ascertain, it does not appear to have proceeded to a full appeal hearing. I accept Mr. Sutcliffe's submission that the permission is very much specific to the facts of that case.

(c) As Mr. Sutcliffe points out, nowhere is it suggested in the Review Specification that, in order to comply with their duties under COBS, banks were obliged to disclose their internal credit line calculations, such as CEE or CLU.

The Second Aspect of the impact of the complaint relating to the impact of the CEE limit – Discussion and conclusion

210. The second aspect of the complaint set out at paragraph 172(2) above relates to the impact of the CEE limit upon the Claimants' relationship with the commercial banking division and their future borrowing requirements. It is the Claimants' case that it was a very important feature of the Swaps, which was not revealed to him. Indeed in the passage quoted at paragraph 159 above, that is the essence of the complaint.

> *"Q: So is the complaint not that you did not understand how the breakage costs would be calculated* ***but that there was this hidden feature that that the CEE imposed a fetter on your credit –***
>
> ***A: Yes.***
>
> ***Q: And that affected your credit rating.***
>
> *A: Yes.*
>
> *Q: That is the complaint and not that it was information which would have enabled you better to understand how to calculate the cancellation charges.*
>
> *A: Yes"* [Emphasis added].

211. This aspect has caused me more concern. It would not be necessary for the Bank to

reveal the details of the CEE in order to inform the Claimants of the effect that it potentially could have on their future borrowing.

212. Whilst I accept Mr. Sutcliffe's submission set out at paragraph 190 above that the CEE was not a "credit line" or "credit limit" *"utilised to protect itself against liability for the aforementioned breakage costs, thereby reducing the Claimants' credit-worthiness by £290,000"*[81], the "credit line" or "credit limit" marks the extent of borrowing that has been granted by the Bank and is available for the customer to utilise. The Bank, however, does not extend any credit to the customer under a swap, and the CEE is not treated as such by the Bank. That, however, is not the end of the matter.

213. In his oral evidence, Mr. Starmer answered my questions as follows:

> *"Q: ... you say in paragraph 19* [of his witness statement] *that the practice adopted, it's the loan plus CEE limit that must not exceed 100 per cent of the value of the bank's property security.*
>
> *A: That's right.*
>
> *Q: So, it will affect a client's possibility of further borrowing but not quite the way of a loan to value assessment.*
>
> *A: Yeah. Potentially it could impact client's future borrowing.*
>
> *Q: Adversely*
>
> *A: Yeah*
>
> *Q: Adversely*
>
> *A: It could. It could. And in terms of the approach that was taken, I think it's important just to point out that the loan to value is obviously the borrower's borrowing capacity and, you know, therefore that generally speaking would allow perhaps max at around 70 per cent, so by allowing a bench mark up to 100 per cent we were taking a very measured view of the risk that pertained to that."*[Day 4/185/line 11-186/11]

And at Day 4/191/line 9-18

> *"A: ... [The CEE] is factored into the overall exposure for the client but it is not treated as a credit line.*
>
> *The Deputy Judge: "I have written... It may not be a credit line capable of being utilised by a customer but it is a factor taken into account when the bank determines whether to grant the customer further lending."*
>
> *A: That is absolutely correct, my Lord."*

---

81 Paragraph 40A RAPOC/40A.

214. Mr. Sutcliffe has submitted that in the case of these Claimants' borrowing prospects, the clear evidence is that the risk that CEE would have affected the Claimants' borrowing was wholly illusory. The CEE was of no practical application at all. In advancing this submission, he relied on the evidence of Mr. Starmer at paragraph 19 of his witness statement that "*In this case, I note that the Claimant's overall exposure (that is the loans plus the CEE limit), was significantly less than 100% of the value of the Bank's security (c.74%). As such in this instance the CEE limit itself would not have restricted the opportunity for further borrowing (being only 13% of the property value), provided that all other relevant criteria were satisfied.*"

215. On the facts there is some force in this submission. The evidence shows that the Swaps having been in place for over nine years of the ten year period, the CEE has had no impact whatsoever on the Claimants' ability to borrow further funds from the Bank. The only relevant plea was at paragraph 53 of the RPOC, which relied upon the refusal of the loan to purchase 13, Aintree Road, Perivale, which claim was subsequently abandoned, because the refusal was based on entirely different reasons. There is no evidence whatsoever of any potential borrowing which has been prevented because of the CEE limit.

216. On these facts, where the likelihood of the CEE having any impact on a client's ability further to borrow from the bank is minimal, in my judgment it was not incumbent on the Bank to provide that information to the Claimants prior to entering to the Swaps in order to be compliant with the COBS Rules. I would, add, however, that there may be other factual situations where the CEE limit could have a significant impact on future borrowing and then such disclosure would be necessary to comply with the obligations under the COBS Rules.

217. In the alternative, if I am wrong on this point, and the failure to disclose the potential impact on future borrowing by reason of the CEE limit, however unlikely, amounted to a breach of the COBS Rules, no loss has been suffered by the Claimants as a result.

The conclusions on the Claimants' principal areas of complaint

218. As a result of the above findings, the only aspects of the Claimants' principal areas of complaint which I find are well founded are:

    (1) In the January and March 2009 presentations, when dealing with cancellation charges upon breakage, the reference to "*the principles of calculation are the same*

for traditional fixed loans" was misleading as a comparison.

(2) The failure to include as part of the written presentations that there could never be a breakage cost if one decided to cancel a Cap contract.

219. I therefore turn to Issue 3. **Did the Bank comply with the client's best interests rule (COBS Rule 2.1.1) by acting fairly and professionally in accordance with the best interests of its clients?**

The Claimants' submissions in relation to COBS Rule 2.1.1

220. Mr Berkeley submitted in essence that the Bank has breached the client's best interest rule because it placed its own interests before those of the Claimants with the motive of making a significant profit upon transactions that exposed the Claimants to a risk which was not adequately disclosed and in circumstances where other less risky options were then realistically available and suitable for the customer's needs. An independent advisor would not have recommended the Swaps.

The Bank's submissions in relation to COBS Rule 2.1.1

221. The Bank acted fairly and professionally in accordance with the best interests of its clients at all times. There is no evidence to suggest that it did not do so.

Discussion and conclusion in relation to COBS Rule 2.1.1

222. I have already found that this was a non-advised sale. I have found no evidence that the Bank was seeking to place its own interests above the Claimants or to put him under any pressure to purchase any IRHP product or to go for a Swap as opposed to a Cap. After careful and lengthy reflection, Mr Parmar made an informed decision himself on behalf of the Claimants to enter into the Swaps, based upon written presentations provided by and oral discussions with Mr Lotz, which enabled him to have a proper understanding of the IRHPs on offer. I accept that the presentations were not perfect and contained the flaws I have identified in paragraph 217 above, but ultimately those flaws did not prevent Mr Parmar from properly understanding the IRHPs and the true value of the Cap in comparison to the Swaps. In my view, the Bank did not 'steer' Mr Parmar away from a Cap towards a Swap.

223. Mr Parmar made his decision on the basis that he thought that the base rate was

extremely low, and he anticipated that "*reality will come into play*"[82] and long-term interest rates were likely to rise. He saw the Swaps as a way of providing the Claimants with certainty for the next ten years, by means a fixed rate of interest, at a rate with which the Claimants could live. He appreciated that with a Swap he would not be able to benefit from interest rates remaining low, as he could have done with a Cap, but he did not to have to incur the costs of paying a premium. That was a risk he was willing to take.

224. In the event, interest rates did not rise as he envisaged and now in hindsight he regrets not having gone for a Cap. That, however, does not mean that the Bank failed to act fairly and professionally or that they preferred their interests over his. In his written closing, Mr Berkley referred to the sale of the Swaps to Mr Parmar as one that "*discloses predatory sales practices on the part of the Bank.*" I disagree.

225. In these circumstances, I find that the Bank was not in breach of COBS Rule 2.1.1.

Issue 4 Did the Bank comply with each of COBS Rules 2.2.1, 4.2.1, 4.5.2 and 4.5.2, 4.5.6 and 14.3.2?

226. I have set out the provisions of each of the these rules at paragraph 10 above and also the aspects to be considered in relation to them when identifying the issues at paragraph 16 above. I do not propose to reproduce those again here.

227. I have set out above the respective arguments of the parties in detail when considering what I have identified as the Claimants' principal complaints at paragraph 145 above and the two additional matters identified at paragraph 146 above in relation to the breaches of the COBS Rules.

228. In my judgment the flaw identified in paragraph 218(1), namely:

> "In the January and March 2009 presentations, when dealing with cancellation charges upon breakage, the reference to "*the principles of calculation are the same for traditional fixed loans*" was misleading as a comparison."

amounted to breaches of the COBS Rules 2.2.1 4.2.1. 4.5.2 and 14.3.2. However, for the reasons given at paragraph 160 above, I find that given Mr. Parmar's admitted understanding of the nature, calculation and possible magnitude of breakage costs, he was not in fact misled and no loss flows from these breaches.

229. The flaw identified in paragraph 218(2),

[82] His words during the telephone conversation with Mr Lotz on 22 January 2009.

> "The failure to include as part of the written presentations that there could never be a breakage cost if one decided to cancel a cap contract."

amounted to breaches of COBS Rule 4.5.6 and 14.3.2. However for the reasons stated at paragraphs 164-167 above, by the time he decided to opt for a Swap, from his discussions with Mr. Lotz, Mr Parmar was well aware that one of the advantages of a Cap was that there were no breakage costs associated it. No loss therefore flows from this breach.

Conclusion

230. It follows that, although the Claimants have established that there were breaches of certain of the COBS Rules, referred to above, no loss has been sustained by them as a result and this claim fails.

231. I would add this, were I to have accepted the Claimants' submission (which I have not), that, but for the Bank's breaches of the COBS Rules, they would never have entered into the Swaps, but instead would have gone for two interest rate Caps, I would not have accepted the contention that those Caps would have been for two 5 year periods.

232. It is clear, in my view from the evidence that Mr Parmar was looking for at least 10 years' protection, and the premium payable would have been that offered by the Bank on 29 April 2009 for two 10 year interest rate Caps with a strike rate of 4.25%. Any damages awarded would therefore have had to take into account the premiums payable for such products.

233. I invite the parties to agree the terms of draft Order, which will be considered when the hearing of consequential matters takes place.