Neutral Citation Number: [2014] EWHC 3043 (Ch) Case No: HC13B02029

IN THE HIGH COURT OF JUSTICE

CHANCERY DIVISION

Rolls Building, Royal Courts of Justice
7 Rolls Buildings, Fetter Lane
London, EC4A 1NL
Date: 26/09/2014

Before :

MR TIM KERR QC (sitting as a Deputy Judge of the High Court)

- -

Between :

CRESTSIGN LIMITED

Claimant

-and-

(1) NATIONAL WESTMINSTER BANK PLC

(2) THE ROYAL BANK OF SCOTLAND PLC

Defendants

RICHARD EDWARDS (Instructed by Slater & Gordon (UK) LLP, 50-52 Chancery Lane, London, WC2A 1HL) appeared on behalf of the Claimant

ANDREW MITCHELL QC and LAURA JOHN (Instructed by DLA Piper, 3 Noble Street, London, EC2V 7EE) appeared on behalf of the Defendants

Hearing dates: 21-24 July 2014, 28-29 July 2014

Approved Judgment

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

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Mr Tim Kerr QC:

Introduction

1. This is a negligence claim brought in respect of economic loss allegedly suffered by the claimant ("Crestsign") as a result of advice given or statements made by either or both of the defendants. The action was tried before me in London over six days in July 2014. The defendants ("NatWest" and "RBS"; together, "the bank(s)") are, and were at the material times, associated companies. The contractual arrangements giving rise to this claim were concluded between Crestsign and NatWest. It is agreed that nothing turns on any differences between the position of NatWest and RBS.

2. For Crestsign, I heard oral evidence from Mr Ian Parker and his wife Mrs Gillian Parker who are directors of Crestsign, which is their family company and principal source of income; from Mr Stefan Bransby-Zachary, an accountant and former director of Crestsign; and from Mrs Jackie Bowie, an expert adviser on the hedging of interest rate risks and on the suitability of financial products called derivatives, in which risk and liability are linked to fluctuations in interest rates.

3. For the banks, I heard oral evidence from Mr Stephen Flack, a relationship manager employed by NatWest; from Mr Nathan Gillard, who at the material time was employed by RBS as an interest rate risk manager responsible for introducing the banks' derivative products to customers, and arranging interest rate management transactions; and from Mr Nicholas Gibson, an expert with long experience in financial services regulation and compliance, who now provides consultancy services to businesses in relation to risk and compliance.

The Facts

4. Crestsign is a small private company incorporated in 1997 to invest in commercial property for letting to commercial tenants. It is owned and controlled by members of the Parker family and managed by Mr Parker. The directors are Mr Parker, Mrs Parker who is also the company secretary, and their son and daughter. The properties were purchased using interest only bank loans, secured on the properties. In 2007 Crestsign had three commercial properties, at Ingham (near Bury St Edmunds), Crewe

and Barwell (near Leicester). The properties were acquired with bank loans totalling around £3.3 million.

5. When Crestsign started its business, the regulatory regime governing bank lending was less developed than it now is. It is unnecessary to rehearse the detail of the regulatory history. In bare outline, from 18 June 2001 until 31 March 2013 the regulator was the Financial Services Authority ("FSA"). In 2013 it was renamed the Financial Conduct Authority ("FCA") (see section 1A and the former section 1 of the Financial Services and Markets Act 2000, as amended ("the 2000 Act")).

6. Under the 2000 Act, regulated activities can only be carried out by authorised persons (sections 19 and 22 of the 2000 Act). Regulated activities are those found in the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 (SI 2001/544), as amended ("the 2001 Order"). That includes (under article 14 of the 2001 Order) dealing in investments as principal and (by article 53) advising on investments. In the early 2000s, the relevant regulatory instrument was "COB", which stands for "Conduct of Business", the FSA's sourcebook for investment business.

7. Further development of the regulatory regime was promoted by the Markets in Financial Instruments Directive 2004/39/EC, of 21 April 2004, as subsequently amended ("MiFID"), which replaced and modified earlier European directives. MiFID was in part a response to the advent of financial products that were becoming more complex, making them more difficult for ordinary people to understand. These products included *derivatives*, so called because rights and obligations under them are *derived* from sources outside the contract itself, in particular fluctuating interest rates.

8. In or about 2005, Crestsign entered into a loan facility agreement with Northern Rock plc ("Northern Rock"). This replaced a previous borrowing facility with Anglo Irish Bank. The Northern Rock loan was an interest only facility of around £3.3 million, with an interest rate set at one per cent over LIBOR (the London Interbank Offered Rate). The following year, Crestsign sold one of its properties near Cambridge for about £1.5 million, leaving the three properties mentioned above, and thereby reducing its debt to Northern Rock.

9. In August 2007, Crestsign's loan facility with Northern Rock was sold to Lehman Commercial Mortgage Conduit Limited, which was part of the Lehman Brothers investment banking group. In September 2007, as is well known, there was a run on Northern Rock. Crestsign became interested in terminating its loan agreement with Northern Rock and refinancing its business elsewhere. This was not just because of concerns about Northern Rock's solvency, but also because Northern Rock wanted Crestsign to enter into an arrangement which included progressive repayment of capital debt as well as interest.

10. Mr Parker did not favour an arrangement involving capital repayment. He wanted Crestsign's loan facility to remain on an interest only basis. His expectation was that Crestsign would eventually repay its debts by selling its properties, using the surplus to provide income for him and Mrs Parker during their eventual retirement. Mr Parker was aged 54 in the latter part of 2007. I accept his evidence that he intended to run the business for about another 10 years, selling off the properties during the latter part of that period, thereby paying off Crestsign's debts and providing a comfortable retirement income.

11. Naturally, Mr Parker wanted to negotiate the best terms he could get on refinancing. Crestsign was paying annual interest at a level (linked to LIBOR) which was not far below 8 per cent towards the end of 2007, while the Bank of England's base rate, which had been climbing steadily, had reached 5.75 per cent in July 2007. He expressed his concern in correspondence with Northern Rock and began to look at alternative sources of finance. The base rate fell to 5.5 per cent from 6 December 2007.

12. At this time, the requirements of MiFID were being implemented in the United Kingdom through various instruments, only small parts of which were drawn to my attention. These included what from 1 November 2007 became the Conduct of Business Sourcebook ("COBS"), replacing (inter alia) COB. It is common ground that COBS was a source of regulatory obligations on the banks from 1 November 2007 and therefore at the time of the events in the first half of 2008, with which I am mainly concerned. My attention was drawn to certain COBS provisions.

13. It is also common ground that breach of an obligation under COBS is not actionable by Crestsign because it is a limited company carrying on a business (see section 138D of the 2000 Act as amended, and regulation 3(1)(b) of the Financial Services and Markets Act 2000 (Rights of Action) Regulations 2001 (SI 2001/2256)). The present claim is therefore brought only at common law. The regulatory backdrop is relevant only to the extent that it may, or it may not, assist the court in assessing whether the common law duties of care asserted by Crestsign arose and, if they did, whether they were breached.

14. The candidates to become Crestsign's replacement bankers included NatWest, where Mr and Mrs Parker were long standing personal customers. In the first part of 2008, Mr Parker engaged in correspondence and discussion with NatWest and one or more other institutions which included, at least, Clydesdale Bank and possibly Bank of Scotland (not to be confused with RBS). However, NatWest quickly became the front runner, helped by Mr Parker's prior acquaintance with two of its relationship managers, Mr Trevor Walker and Mr Stephen (Steve) Flack.

15. Mr and Mrs Parker lunched with these two NatWest bankers on 6 February 2008. Mr Parker explained that he was looking for a loan facility of around £3.3 million, which was the amount of the Northern Rock facility. As it happened, the Bank of England base rate fell the next day from 5.5 per cent to 5.25 per cent. Mr Parker followed up with further written information about Crestsign's properties, and confirmed the figure of "approximately £3.3 million" in an email of 25 February 2008 to Colin Bird of NatWest (in the absence on leave of Messrs Walker and Flack).

16. Mr Flack reported on the proposal to NatWest's credit committee on 14 March 2008. The documents record that he told the committee Crestsign wanted a £3 million facility rather than £3.3 million but, as he accepted, that was a mistake. He also told the committee that Crestsign was seeking a term of 15 years. However, he recommended a five year term. The committee supported the proposal for a five year loan, subject to a "contingent obligation" of £300,000, consideration of the proposal by the banks' Property Finance Group, and a possible requirement to enter into an "interest rate management" ("IRM") product to be considered by RBS's Global Banking and Markets ("GBM") division.

17. Mr Parker denied that he had told Mr Flack he wanted a term of 15 years. His evidence was that he told Mr Flack he wanted a term of 10 years, to coincide with his retirement plans. I prefer the evidence of Mr Parker on this point, which was convincing. He would have been likely to mention a proposed term in line with his strategy, which, as I have accepted, was to retire about 10 years later, in his mid-60s, rather than 15 years later.

18. Generally, while Mr Parker's recollection was imprecise on some points, he was willing to be corrected. Mr Flack's recall was also imprecise. He reported the loan facility figure inaccurately to his credit committee less than six weeks after being told it was £3.3 million. Much later, when witness statements were prepared, he (and Mr Gillard), wrongly recalled the Parkers as having two sons, rather than a son and a daughter. This is understandable and not intended as a criticism: for the banks' witnesses, this transaction was only one among many, while for the Parkers it was a single important milestone in the history of their family business.

19. I also accept Mr Parker's evidence that he was not necessarily bent on retaining all three of Crestsign's properties for the whole 10 years, and did not rule out selling one or more of them during that period, should a favourable opportunity present itself. The Cambridge site had been sold in 2006, and it would be natural for Mr Parker to leave open the possibility of a favourable sale if the right circumstances should arise. However, he had no specific plan to sell any of the properties and was prepared to retain all three for much or all of the 10 years or so up to intended retirement.

20. Mr Flack spoke to Mr Parker on 17 March 2008 and emailed him the next day, confirming that NatWest would support a £3 million loan subject to further information, which he asked for, concerning Crestsign's properties, historic occupancy levels and rent payments. He did not mention the possible requirement to enter into an IRM product, nor the concept of a £300,000 "contingent obligation", not being authorised to disclose those matters. Mr Parker provided the requested information the next day, shortly before leaving on holiday.

21. Mr Flack was satisfied with the information and advised his NatWest colleague, Mr Jon Parker, to proceed with a review by the Property Finance Group, headed by Mr Jim Mulligan. There was then a delay of nearly a month before Mr Mulligan

responded. Meanwhile at the end of March 2008, RBS published a forecast that the Bank of England base rate, then 5.25 per cent, would fall in stages to 4.75 per cent by the end of 2008 and would fall further to 4.5 per cent in early 2009 and thereafter would remain stable for the rest of 2009.

22. The first part of this prediction came true on 10 April 2008 when the Bank of England base rate fell from 5.25 per cent to 5 per cent. On 15 April, Mr Mulligan provided his assessment of Crestsign's loan application to Jon Parker, who forwarded it to Mr Flack two days later. Mr Mulligan was supportive of the application, favouring a five year loan with "a relatively fine margin, base related and maybe not hedged". Mr Flack was then instructed by Mr Bird to take the application back to the credit committee.

23. On 21 April 2008, Mr Flack obtained further information from Mr (Ian) Parker, not mentioning that the loan would be restricted to five years. Mr Parker, meanwhile, was still in touch with Clydesdale Bank, which on 1 May indicated willingness in principle to lend £3.2 million, but with capital repayments starting after a five year interest only period. Mr Parker was also in touch with Northern Rock, attempting to persuade it to waive or reduce a penalty of about £60,000 for early repayment of Crestsign's loan if the refinancing were completed by the end of May 2008.

24. On 7 May 2008, Northern Rock agreed to waive the penalty entirely if the refinancing were completed by the end of May, and to charge only one month's interest, i.e. about £20,000, if it were completed in June rather than May. Mr Parker informed Mr Flack by forwarding to him Northern Rock's email adding the ironic comment "no pressure". On 15 May, NatWest's credit committee approved the loan on the basis of a five year interest only term at 1.5 per cent over base rate, with a "contingent obligation" of £300,000, subject to "conditions of sanction" which included confirmed valuation figures for the three commercial properties, legal charges over them and "Interest Rate Management to be taken on via GBM".

25. Mr Parker was informed and then became busy arranging the three property valuations, against the tight deadline set by Northern Rock, which it subsequently (on 20 May) agreed to extend but only, on a final basis, until 6 June 2008. Meanwhile Mr Gillard of RBS's GBM division was brought in by Mr Flack to deal with Crestsign in

relation to the required IRM product. Mr Gillard and Mr Flack agreed to visit Mr Parker together to (in Mr Gillard's emailed phrase) "iron out a hedging strategy", i.e. negotiate and conclude a transaction to meet the requirement that Crestsign should have an IRM product.

26. Mr Parker and Mr Flack both gave evidence of a probable telephone conversation on 20 May 2008, of which no record survives. I find that it probably took place; that Mr Flack told Mr Parker about the conditions of sanction for the loan and that these included reference to hedging or interest rate management; but that Mr Flack did not go into detail, not being an expert in hedging products himself; that Mr Parker did not properly understand what the reference to hedging or interest rate management meant; that Mr Parker understood Mr Flack to be referring to a requirement that the loan be at a fixed rate, which he did not want; and that Mr Parker was concerned about this but not sufficiently to stop the discussions or seek any further explanation at that stage.

27. Mr Flack and Mr Gillard were aware of the deadline of 6 June 2008 set by Northern Rock. On 21 May Mr Gillard telephoned Mr Parker to introduce himself as the banks' specialist in interest rate protection and arrange the meeting. Mr Parker professed to be "particularly stupid" about "these hedging products" which, he said, "I don't really understand". Mr Gillard acknowledged that "unless you have had experience then you're not expected to" and said he would "lay out all of the options" at the forthcoming meeting.

28. The meeting was fixed for 27 May 2008 at Mr and Mrs Parker's home, but this had to be postponed to Wednesday 28 May 2008 at 4pm to enable Mr Parker to meet one of the valuers at the Barwell site on 27 May. On 23 May, Mr Parker told Mr Flack that the loan would need to be £3.45 million due to the property valuations and the banks' "loan to value" requirements. Mr Flack responded after consulting internally that this should not be a problem. The date and time of the meeting was not finally confirmed by Mr Parker until the evening of Monday 26 May.

29. The meeting was due to start at 4pm and appears to have been over by 4.55pm, when Mrs Parker telephoned Mr Parker in his car, a call he returned at 5.18pm. There are differences of recollection about what was said. Generally, I prefer the evidence of Mr and Mrs Parker to that of Mr Flack and Mr Gillard, where they differ. The

Parkers had good reason to recall this specific meeting, which was unique in the history of their business. To Mr Flack and Mr Gillard, it was one meeting among many in the course of their work. Mrs Parker, in particular, was a reliable witness but was only intermittently present.

30. No contemporary notes of the meeting have survived. Mr Flack's and Mr Gillard's witness statements both rehearse the course of the meeting on the basis of a reconstruction, i.e. what they say they believe "would have" been said, a phrase repeatedly used by both in their written statements attempting to reconstruct the meeting. Mr Flack's role was mainly passive. He understood Crestsign's business well but understood little about IRM products, which was the main topic on the agenda. He fairly accepted in his written statement that "[g]iven the passage of time, I cannot recall much about the meeting …".

31. Mr Gillard is a salesman to his bones as well as, then and now, an expert on IRM products. His performance at the meeting was, I am satisfied, polished, as it was when he gave evidence before me. I do not think it likely that either Mr Flack or Mr Parker listened with great attention to what Mr Gillard said about IRM products, of which Mr Parker understood next to nothing, and Mr Flack not a great deal more. I do not accept that Mr Flack has any sound basis for his written evidence that he is "quite confident that Mr Parker understood how these [IRM] products worked".

32. Mr Gillard's evidence before me was not always frank and was at times evasive. I felt he was delivering the message he wished the court to receive rather than providing accurate recall of events. Faced with difficult questions from Mr Edwards, he would buy time to think by giving long, discursive and unfocussed answers. On the other hand, he gave brief, concise and accurate answers to questions where it was obvious his answer would not be likely to undermine the banks' case. In my judgment, he calculated where the banks' advantage lay when deciding what kind of answer to give.

33. It is common ground that pleasantries were exchanged and that there was some initial conversation about the Parkers' family as well as their plans and aspirations for the business. It was natural for the Parkers to be asked about their son and daughter; both were directors of Crestsign at the time and had been identified by NatWest as possible

successors to the business. It is also common ground, and I accept, that Mr Parker made it plain he wanted a variable rate loan, not a fixed rate loan, that he believed Crestsign could weather changes in interest rates, and that he expected them to fall because the country was entering a recession.

34. I do not accept the evidence of Mr Gillard and Mr Flack that Mr Gillard made it plain at the start of the meeting that he was not able to give advice or recommend a particular product; nor that he explained clearly how different types of IRM products worked, by reference to a "series of graphs" he "would have drawn". Mr Flack refers only to one graph of a different kind. Nor do I accept that Mr Gillard provided a clear and detailed explanation of four separate IRM products, namely a "five year swap", a "vanilla cap" (in the jargon mixing culinary and sartorial metaphors), a "collar" and a "10 year forward swap". In particular, I do not accept that Mr Gillard explained the option of an interest rate cap and the high premium that would go with it.

35. I accept the evidence of the Parkers that Mr Gillard was arguing for the proposition that interest rates would rise and that he did not say this was contrary to RBS's published forecast. I also accept that Mr Gillard acknowledged, but did not necessarily accept, Mr Parker's jocular challenge to a bet about the future direction of interest rates which, Mr Parker said, would fall. Messrs Gillard and Flack did not dispute that the bet was offered by Mr Parker, and this is corroborated by a later email from Mr Parker, sent before any dispute had arisen, mentioning the figure of £50.

36. In oral evidence, Mr Gillard was unable satisfactorily to explain why he would have been offered a bet against a proposition if he was not advocating that proposition. I do not accept his evidence to the effect that he was playing devil's advocate and merely putting a possible scenario rather than stating a clear view that interest rates would rise. I am satisfied that he expressed the view that interest rates would rise and that he thereby expressed clear disagreement with Mr Parker's trenchant contrary view, provoking Mr Parker to offer the bet.

37. However I also accept that, contrary to Mr Parker's evidence, Mr Gillard did not confine himself to proposing a fixed rate loan at 7.5 per cent, and did touch on the nature of IRM products, giving some rudimentary outline of one or more of the products he later wrote about in documents he sent to Mr Parker, to which I am

coming. That was the whole purpose of his presence at the meeting. I accept that he mentioned, at least, a 10 year swap at the rate of 6 per cent, coupled with a five year loan. I am not persuaded on the balance of probabilities that he mentioned the possibility of a straightforward (or "vanilla") interest rate cap and the high premium that would attract.

38. I find that such explanations as Mr Gillard gave were not properly understood by Mr Parker, who was unfamiliar with the concepts underlying IRM products and failed to grasp them intellectually or appreciate their implications for Crestsign. I think that is why he does not recall Mr Gillard's explanations being given. Mr Gillard did not make Mr Parker understand the products he was describing, including two fundamental points which characterised the swap Crestsign later entered into: that it was a separate and independent contract from the underlying variable rate loan; and that its duration (10 years) was different from, and longer than, the five year loan.

39. I reject the written evidence of Mr Gillard that at the end of the meeting, Mr Parker "showed a good understanding of all the concepts which I had discussed". Indeed, I do not accept that Mr Gillard was concerned to ensure Mr Parker fully understood the nature of the IRM products on offer. He wanted Crestsign to understand them sufficiently to sign up to one of them, on terms satisfactory to the banks. He was not concerned to ensure that Crestsign understood the products sufficiently to enable it to judge whether they were objectively suitable, or which was the most suitable. His priority was to conclude the deal, benefit the banks financially and thereby enhance his position with his employer. His priority was not to benefit Crestsign.

40. I am satisfied that at the end of the meeting, Mr Parker did not understand that the loan was to be for only five years, while a separate IRM contract was to subsist for 10 years or up to 10 years. His failure to appreciate the separateness of the loan contract and the IRM contract prevented him from appreciating at the meeting on 28 May 2008 that the banks were guaranteeing a loan facility lasting five years, and that after that the term might not be renewed.

41. He was under the impression that the duration of the arrangement was to be 10 years, and that if Crestsign wished to terminate it earlier there would be some sort of penalty, which he regarded as likely to be similar to the cost (about £60,000 or three

months' interest payments) of extricating Crestsign early from its loan contract with Northern Rock. I find there was some mention at the meeting of exit costs or break costs, as they are called, but no attempt to explain or quantify what these were likely to be, beyond a vague explanation that it would depend on variables in the marketplace at the time of termination.

42. Mr Gillard drafted a note for Mr Flack to place before the credit committee, explaining that the client would not want a five year fixed rate swap at 6 per cent because that would mean Crestsign paying more for its funds than it was currently paying Northern Rock, so Mr Gillard was instead proposing a "10 year swap line", with a discounted variable rate in the first two years followed by a fixed rate swap for the remaining eight, at "circa 5.65%".

43. This, Mr Gillard explained, would earn the banks about £50,000 and would require a "credit line" or contingent liability of £640,000. A credit line is an internally used measure of a bank's exposure in a particular derivative transaction, and represents the maximum amount of credit the banks would be willing to extend to the borrower to cover the eventuality of default or payment of break costs.

44. The credit committee was not able to consider the matter that day, so Mr Flack encouraged Mr Gillard to "present structures" to Mr Parker straight away. Mr Gillard did so in an email the next day, 30 May 2008, which he described as a "play back" of his presentation at the meeting two days earlier. However, not all the points in the email and attachment had been fully aired at the meeting.

45. Mr Gillard proposed four alternative "trade ideas". The first two were "5 year ideas" based on "protecting £3.5m for the whole 5 years". They were, firstly, a five year fixed rate loan at 6 per cent or, secondly, an interest rate collar, with a cap at 6 per cent and a "floor" (minimum rate) of 5.25 per cent, with a premium of £4,200 each quarter. Mr Gillard accepted that he knew these two products would not be acceptable to Mr Parker. He expected Crestsign to enter into either the third or fourth of his proposed structures, which were "the 10 year ideas inclusive of a discount, … based on protecting a constant level of £3.5m for 10 years".

46. The third suggestion was a discounted variable rate loan, the discount being 0.15 per cent against base rate, in the first two years, followed by a fixed rate swap at 5.6 per

cent for the remaining eight years. The fourth suggestion was the same except that the discount in the first two years would be 0.4 per cent, the fixed rate in the remaining eight years would be 5.6 per cent, and the banks would have the right to cancel the trade at the start of the seventh year and every three months thereafter.

47. Mr Gillard went on to refer to the risk of "potentially paying interest on debt you do not have". This was a reference to the possibility that the five year loan might not be extended for a further five years, or that Crestsign might wish to repay the capital debt earlier than 10 years ahead. In either of those events, the swap contract would continue notwithstanding, unless the banks were to terminate it early, exercising its right to do so in the case of the fourth suggested structure.

48. Mr Gillard attached a paper ("the Risk Management Paper") explaining the four proposals in more detail. Mr Parker read the email and attached paper, but not with care, and did not fully understood Mr Gillard's proposals, apart from the first two which did not interest him. The Risk Management Paper included the heading "Important information", beneath which appeared a warning that "breakage costs" for early exit from the deal could be "substantial", and that "the Notes to this paper are important – please take time to read them". I accept Mr Parker's evidence that he never contemplated that "substantial" might refer to break costs well into six figures.

49. The four "structures" were then set out in more detail, with some graphics, followed by some "[b]enefits" and [c]onsiderations". It is not suggested by Crestsign that the descriptions of the structures were wrong or misleading. They were a fair summary of what each proposal would entail. They were followed by the "[n]otes", which included the following:

> 1. Any transaction terms agreed between us verbally are legally binding contract terms. Following execution of a trade you will be required to sign legal documentation (which may include a confirmation and Master Agreement) to confirm those terms.
>
> 2. Any hedging contract that you enter into with RBS is a separate legal contract from any borrowing it may relate to. In particular, they may be terminated independently of each other and early termination of one does not automatically terminate the other.
>
> 3. The cost to you of the overall hedging structure and any borrowing is the sum of the cost of the borrowing and the net cost to you of the hedging contract, whether this is a swap, cap, collar or any other hedging structure.

4. If you are hedging an interest rate exposure:

    - You will be exposed to interest rate risk if there is a mismatch between the start dates or end dates of the underlying debt and any interest rate protection. This mismatch may be caused by circumstances such as a deferred start to the agreed protection or alternatively by delay in drawing down the loan.

    - You will be exposed to interest rate risk if there is a difference between the value of the debt that is to be protected and the notional principal of your interest rate contract with us.

5. If you enter into an over-the-counter derivative transaction with us and decide to close out the transaction before its scheduled termination date, you may have to pay breakage costs. These will be calculated by reference to prevailing market conditions and include costs incurred by us in terminating any related financial instrument or trading position. Please note that such break costs may be substantial.

6. Where you enter into a derivative transaction with us for the purposes of hedging debt and you subsequently wish to repay the debt (whether through a refinancing or otherwise) or discharge all other obligations to us, you should be aware that it may be necessary for us to terminate the hedging transaction prior to its scheduled termination date and satisfy any liabilities that you have to us with respect to such transaction (including break costs) before we will release any security you have provided to us with respect to such liabilities.

7. You are acting on your own account and will make an independent evaluation of the transactions entered into and their associated risks, and you have the opportunity to seek independent financial advice if unclear about any aspect of the transaction or risks associated with it and you place, or will place, no reliance on us for advice or recommendations of any sort.

8. We would also draw your attention to our terms of business.

50. On the next and last page, a further note stated that the document:

> … is intended for your sole use on the basis that before entering into this, or any related transaction, you will ensure that you fully understand the potential risks and return of this, and/or any related transaction and determine it is appropriate for you given your objectives, experience, financial and operational resources, and other relevant circumstances. You should consult with such advisers as you deem necessary to assist you in making these determinations. [RBS] will not act and has not acted as your legal, tax, accounting or investment adviser or owe any fiduciary duties to you in connection with this, or any related transaction, and no reliance may be placed on RBS for advice or recommendations of any sort. RBS makes no representations or warranties with respect to the information, and disclaims all liability for any use you or your advisers make of the contents of this document.

51. I need not set out the rest of that note, which continues at some length with warnings about the risks that arise from such transactions alongside the benefits that can be realised, risks which can be substantial, need to be managed and can arise from adverse market movements and trading conditions. The remaining part of the note also mentioned that RBS personnel and affiliates may have interests in the products concerned or related products.

52. Mr Flack was made aware the same day, probably by a telephone call from Mr Parker, that Mr Parker favoured the fourth proposal. Mr Flack informed Jon Parker by email. The proposal was thereafter considered internally within NatWest and RBS, and approved in principle, subject to further clarification of the terms. Mr Parker forwarded the proposal to Mr Bransby-Zachary, then a director of Crestsign who occasionally advised on financial matters, being a qualified accountant.

53. In his covering email, Mr Parker said he favoured the fourth proposal because of the discount during the first two years, equivalent to £35,000 over two years. Mr Bransby-Zachary soon responded that he agreed the fourth proposal looked best, but queried what was meant by the reference to "paying interest on a debt you do not have". Mr Parker said he would ask Mr Gillard, saying he believed it could be a "penalty if I repay during the fixed period, ie by selling the Barwell site".

54. Mr Parker was busy collecting final information about the three properties during the following days, and was concerned to complete the refinancing deal by 6 June 2008, the extended deadline set by Northern Rock, after which it would no longer be prepared to waive its entitlement to a penalty payment for early repayment. With two days to go, on 4 June Mr Gillard sent RBS's written "Terms of Business for "Retail Clients", which included Crestsign, and the "Standalone Derivatives Terms".

55. These were the terms to which attention had been drawn in note 8 of the paper attached to Mr Gillard's email of 30 May. There is no dispute that these terms of business were drawn to Crestsign's attention under cover of a letter saying they "will apply to all our dealings". I am satisfied that Mr Parker understood this. He forwarded them to Mr Bransby-Zachary just before starting a meeting with his lawyers, asking Mr Bransby-Zacharty to look at them and call him. Mr Bransby-

Zachary did not manage to make any comment on them to Mr Parker before completion of the transaction two days later.

56. Clause 4.2 of the Terms of Business for Retail Clients stated that the services provided by RBS were “a non-advisory dealing service” in relation to various types of transaction including “contracts for differences”, compendiously referred to as “Investments”. Clause 4.3 stated (bold type in original):

> **We will not except where we have specifically agreed to do so, provide you with advice on the merits of a particular transaction or the composition of any account, or provide you with personal recommendations (as defined by the FSA) in relation to any transaction or account.** Accordingly, you should make your own assessment of any transaction that you are considering or of the composition of any account and should not rely on any opinion, research or analysis expressed or published by us or our affiliates as being a recommendation or advice in relation to that transaction or account.

57. Clause 6.3 stated that the dealing would be on a principal to principal basis and that RBS would therefore not owe any duty of “best execution” under applicable regulations. The duty of best execution is the obligation to “take all reasonable steps to obtain, when executing orders, the best possible result for … clients taking into account the execution factors” (COBS, at 11.2.1R).

58. Clause 6.5 stated that while any information provided was believed to be accurate and reliable, no representation or warranty to that effect was given. Schedule 1 (which, curiously, is not referred to in the body of the Terms of Business) contained a “Risk Warning” which I will not set out in full, but which included the words: “[y]ou should not deal in these products unless you understand their nature and the extent of your exposure to risk.”

59. The Standalone Derivatives Terms included under the heading “Representations and Warranties”, clause 3(g)-(m), which I will not set out but which are to the same effect. It is sufficient to note that they included the words (within paragraph (h)):

> it [the counterparty] has made its own independent decisions to enter into this the Transaction and as to whether the Transaction is appropriate or proper for it based on its own judgment and upon advice from such advisers as it has deemed necessary. It is not relying on any communication (written or oral) of the Bank 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 … .

60. None of those provisions was in the mind of Mr Parker when Mr Gillard telephoned him shortly after 10am on 4 June 2008. I heard a tape recording of the call (and some other calls) as well as seeing a transcript. Mr Parker was parking his car and about to start the meeting with his lawyers. He understood well enough that he would be getting a discount in the first two years which he valued at about £35,000, but had not fully grasped what was meant by the possibility of paying "interest on debt you do not have", in Mr Gillard's phrase. He asked Mr Gillard about this during their brief discussion, referring to this as "paying interest for money that you have paid back".

61. Mr Parker correctly suggested this meant that if, say, in the seventh year the whole loan were repaid, the fixed swap rate were 5.5 per cent but interest rates stood at 4.5 per cent, "then I have to pay the difference". Mr Gillard said "sure that's exactly what I meant". For that fleeting moment, Mr Parker did understand, at least dimly, the concept of having to pay interest on a notional debt the principal of which was no longer due. Mr Gillard, however, quickly moved to a slightly different topic, that of adjusting the notional principal debt (which he called "your profile") so that it would reduce "below what your actual debt will be".

62. This was an odd use of language given that the scenario under discussion was that the "actual debt" had been paid off. Mr Gillard then referred to "chipping a bit off your profile", by which he meant reducing, towards the end of the 10 year period, the notional debt on the basis of which liability under the swap transaction would be calculated. He spoke of Crestsign having what he called "a smaller profile out the back", meaning towards the end of the period of the swap. Mr Parker did not understand what Mr Gillard meant by a "profile" and asked him what that meant.

63. Mr Gillard explained that it meant "the total debt we are protecting", which would "reduce … so as you through years 6 to 10 we will have slightly less debt each year." Mr Parker said doubtfully "Oh I see" and "I see alright" but plainly he did not. He still had not grasped the significance of the point that while the period of the loan was to be five years, and would not necessarily be renewed, the period of the swap would be ten years. Since he did not envisage repaying the principal debt before the ten year

period, or most of it, had elapsed, he did not see the issue of paying interest on notional debt not actual debt as a problem, only dimly understood it during the telephone call, and quickly lost sight of it.

64. He then turned to the more familiar territory of trying to negotiate an increased discount at the start of the loan period, asking if he could be "cheeky" and ask for a discount during the first two years of 0.5 per cent rather than 0.4 per cent, under the fourth structure for which he had expressed his preference. Mr Gillard said he could but that the consequence would be to "push the rate up at the back of the trade", and offered to email over that evening "a couple of other ideas that … will give you the discount".

65. Mr Gillard sent his email that evening. It included a proposal for a revised "debt profile", reducing from £3.5 million during the first five years of the ten year period, reducing to £3.4 million in the sixth year, and then reducing by a further £100,000 each year to end at £3 million in the tenth and final year of the swap period. He also proposed two alternative models which he called structures 1 and 2, as the proposed terms of the 10 year swap transaction.

66. Structure 1 involved a discount of 0.45 per cent in the first two years, with a fixed swap rate of 5.65 per cent thereafter. Under that proposal, the bank would have the right to cancel the swap at the start of the seventh year and every three months thereafter. The reducing "debt profile" would be as set out above.

67. Structure 2 involved a discount of 0.6 per cent in the first two years, with a "stepped" swap rate of 5.65 per cent in the third and fourth years, rising to 5.75 per cent in the last six years (which he mistakenly called "Year 4 to 10", meaning "Year 5 to 10"). Under that proposal, the bank would have the right to cancel the swap at the start of the sixth year, and every three months thereafter. Again, the reducing "debt profile" would be as set out above.

68. Mr Gillard expected Mr Parker to prefer the "stepped" version in structure 2, because he judged that Mr Parker was more interested in the size of the discount at the start of the period than in the fixed swap rate in the latter part of the period or the length of time during which the bank would have the option to cancel the swap. He ended his email by stating what, I accept, he probably thought Mr Parker already understood,

but which Mr Parker (as he explained in evidence which I accept) did not properly understand until he read that email; namely, that:

> [a]s mentioned at our meeting these structures obviously involve a 10 year commitment and the bank only has a financing commitment for 5 years at this moment. … .

69. The next day, 5 June 2008, Mr Gillard notified Mr Flack of his revised calculation of the required credit line from £680,000 to £585,000. The same afternoon, Mr Gillard telephoned Mr Parker who, contrary to Mr Gillard's expectation, stated (as he had also set out in an email the same afternoon to Mr Flack) that he wanted to opt for "structure 1", of the two options set out in Mr Gillard's email. He then faxed to Mr Gillard, using Crestsign's letterhead, signed confirmation of agreement to RBS's terms of business. Mr Gillard emailed his manager, Ms Victoria Guerrier, with the surprising news that Mr Parker had preferred structure 1 over structure 2.

70. The transactions were then completed on 6 June 2008 by means of a tape recorded "trade call" followed by a written confirmation, and subsequent signature of a formal written contract letter dated 6 June 2008, signed by Mr Parker on behalf of Crestsign on 30 July 2008, confirming (subject to some errors that were later corrected and which are not relevant to this case) the terms of the swap transaction and incorporating again the clauses in the Standalone Derivatives Terms mentioned above. Mr Gillard estimated the total income for the banks at £70,000.

71. The terms of the swap were in accordance with structure 1, except that during the "trade call" Mr Gillard, citing market movements, stated that the bank's option to cancel the swap would subsist during the last four and a half years, rather than for the last four years, of the swap period. Mr Parker agreed to this. In the written confirmation sent to Mr Parker on 6 June 2008, the period of the bank's cancellation option is stated as starting after five and a half years, which correctly reflects what was agreed in the trade call. The notes in the acknowledgment contained wording to the same effect as the written terms of business.

72. After the transaction was completed, the economic turbulence of the times continued. The Lehman Brothers banking group filed for bankruptcy in the USA on 15 September 2008. The Bank of England's base rate fell from 5 per cent to 4.5 per cent

from 8 October 2008, in line with RBS's prediction six months earlier. The base rate fell again from 4.5 per cent to 3 per cent from 6 November 2008 and fell further to 2 per cent from 4 December 2008, dropping to 1.5 per cent from 8 January 2009, to 1 per cent from 5 February 2009 and to 0.5 per cent from 5 March 2009, where it remains to the present day. No one expected such steep or long lasting base rate cuts.

73. Crestsign benefitted from them substantially during the first two years of its refinanced loan with NatWest, which was unhedged and subject to a discount of 0.45 per cent. However, 6 June 2010 saw the second anniversary of the loan and swap transactions and, the next day, the start of the third year of the ten year period, at which point the swap transaction became substantially more expensive for Crestsign than anyone had foreseen, because it had to pay RBS the difference between the 0.5 per cent base rate and the 5.65 per cent fixed swap rate, amounting to 5.15 per cent on a "debt profile" of £3.5 million, on top of interest at 2 per cent (i.e. 1.5 per cent over base rate) on the underlying loan.

74. The following month, Mr Parker became very unhappy at an unexpected change of policy within NatWest, reluctantly communicated to him by Mr Flack, whereby the proceeds of sale on secured Crestsign properties were appropriated in full towards the discharge of existing debt arising from overdraft facilities and a bridging loan. Mr Parker started trying to think of ways to extricate Crestsign from its relationship with NatWest and RBS, and by November 2011 was in discussion with another bank, but was unable to secure refinancing because of the high break costs of the swap, which he had by then learned were estimated at a sum in the region of £600,000.

75. In June 2012 Mr Parker, on behalf of Crestsign, made a formal complaint to NatWest, asserting that "in essence the Swap agreement was mis-sold to me". Crestsign is attempting to obtain redress through the regulatory machinery, a process which is ongoing and with which I am not concerned in this case. The present claim was issued in May 2013.

76. The five year loan facility expired in June 2013 and has not been formally renewed. I was told that, as part of the regulatory process, there is a temporary agreement in place whereby the loan is being "rolled over" every three months, for the time being, and payments under the swap agreement have been suspended on a temporary basis,

without any admission of liability, until such time as a more permanent resolution of the regulatory issues ensues. I was told that the estimated break costs in respect of the swap, as at the time of the trial, are estimated as being in the four hundreds of thousands of pounds.

77. The parties called expert evidence as I have indicated; both experts' reports were dated 13 June 2014. Their joint statement was dated 27 June 2014. The banks called expert evidence reluctantly and under protest, without accepting that expert evidence on the issue of the normal pricing of swap transactions is relevant, given the contention that the pricing of this transaction was entirely a matter for the banks. Mr Gibson, the banks' expert, is not experienced in the pricing of derivatives. Mrs Bowie, the expert called by Crestsign, has experience of norms for swap transaction prices, and Crestsign contended that her evidence in that regard is relevant, at least, to the quantum of its claim, should it succeed on liability, and on the issue of the suitability of the swap.

78. Mrs Bowie opined that the swap entered into by Crestsign was unsuitable, not just with hindsight, and asserted that there was no attempt by the banks to assess its suitability for Crestsign. She thought it unsuitable because it hedged 100 per cent of the debt; it was inflexible for Crestsign (though not RBS) over the 10 year period; it hedged beyond the term of the loan, which might not be renewed or adequately refinanced; it placed nearly all the risk on Crestsign and little on RBS because of its cancellation option; it exposed Crestsign to adverse interest rate conditions for seven of the ten years; and it exposed Crestsign to very high break costs to exit the swap.

79. Mr Gibson was reluctant to commit himself to a view on the issue of suitability, even when pressed, reasoning that he did not have detailed knowledge of Crestsign's position in June 2008 and that since the terms of business ruled out any advisory relationship, suitability was to be determined by whether sufficient information was given to Crestsign to enable it to make up its own mind about the issue of suitability of the swap to meet the needs of its business at the time. He emphasised several times in his report that the facts as presented to him indicated that this was not a sale in which advice was given by the banks, while acknowledging that this was a factual issue for the court. I agree that this issue is not one for expert evidence.

The Issues: Reasoning and Conclusions

80. Crestsign, through Mr Edwards, relied on two pleaded duties of care. The first is "a common law duty, to use reasonable skill and care when giving advice and/or making recommendations to [Crestsign] to ensure that such advice and/or recommendations were suitable". The second is "a duty at common law to take reasonable care when providing information to [Crestsign] to ensure that such information was both accurate and fit for the purpose for which it was provided, namely to enable [Crestsign] to make a decision on an informed basis". Mr Edwards submitted that both duties were breached and that in addition Crestsign is entitled to damages under the Misrepresentation Act 1967 ("the 1967 Act").

81. The banks, through Mr Mitchell QC and Ms John, denied in their pleaded defence the existence of the first duty and, in relation to the second, accepted only (choosing not to rely on written terms of business which they said would exclude the second duty altogether) "a common law duty of care to give information to [Crestsign] which was not misleading". The banks asserted that there was no breach of any common law duty; that the proposition that this was an advised sale was precluded by the terms of business and other documents, as well as on the facts; that Crestsign was in any case estopped from asserting that this was an advised sale; and that there was no entitlement to damages either at common law or under the 1967 Act.

82. Mr Edwards contended that, in so far as the banks relied on contract terms or other documents to exclude any duty of care in giving advice and making recommendations, the terms or documents were exclusion clauses, purporting to exclude liability for negligence, and therefore by section 2(2) of the Unfair Contract Terms Act 1977 ("the 1977 Act") could not protect the banks unless they satisfied the requirement of reasonableness, which they did not. The banks countered that the terms and documents they relied on were not exclusion clauses so that the 1977 Act did not apply; or alternatively if it did, that the requirement of reasonableness was satisfied on the facts.

83. Both parties also made supplemental submissions on causation of loss and damage, and on the correct approach to measuring any loss and damage. Not surprisingly, these were in the main diametrically opposed, except that it was common ground that

if, contrary to the banks' case, they were under any liability to Crestsign for breach of a duty, the measure of damage should be such as to put Crestsign in the position it would have been in if the tort had not been committed.

(1) Did the banks owe a duty to use reasonable skill and care in giving advice and/or making recommendations about the suitability of the swap?

84. In order to found the duty of care for which Crestsign contends, it has to show that the banks in fact gave advice about the suitability of the swap, communicating with Mr Parker in such a way that the communications had, as Mr Edwards put it in language borrowed from the FSA, "the force of a recommendation" that the product was suitable; and that the interaction between the banks and Crestsign was such that it gave to a special relationship or, in the more modern parlance, an assumption of responsibility, so as to give rise to a duty to use reasonable skill and care in giving advice or making recommendations about the suitability of the swap.

85. To examine this issue, it is necessary to consider, firstly, the conversations and informal written communications by email between the parties - primarily, those between Mr Gillard and Mr Parker; secondly, the documents relied on by the banks as what Mr Mitchell called "basis clauses" (borrowing from Christopher Clarke J) negating the existence of the duty contended for (if it would otherwise arise) by precluding an advice-giving relationship; and thirdly, if necessary, whether Crestsign is estopped from relying on the existence of the duty it asserts.

86. Mr Edwards relied on the well known proposition that:

> if someone possessed of a special skill undertakes, quite irrespective of contract, to apply that skill for the assistance of another person who relies upon such skill, a duty of care will arise … Furthermore, if in a sphere in which a person is so placed that others could reasonably rely upon his judgment or his skill or upon his ability to make careful inquiry, a person takes it upon himself to give information or advice to, or allows his information or advice to be passed on to, another person, as he knows or should know, will place reliance upon it, then a duty of care will arise. (*Hedley Byrne v. Heller & Partners* [1964] AC 465 per Lord Morris at 502-3)

87. For Crestsign, Mr Edwards submitted that, while banks do not generally owe their customers any duty to advise on the merits of investments their customers may be proposing to make, if they choose to do so in the course of business then they owe a

duty to advise with reasonable skill and care, as established by Salmon J's decision *Woods v. Martins Bank* [1959] 1 QB 55, which was expressly approved in *Hedley Byrne* at 510, by Lord Hodson. An antecedent request for advice is not necessary (*Morgan v. Lloyds Bank plc* [1998] Lloyds Rep 73 per Knox J at 80).

88. Mr Edwards went on to point out that, while advice is an ordinary English word, it may take the form of a recommendation. In the context of activities regulated by COBS, the FSA's current guidance stated that "advice" extends to providing information "on a selected, rather than balanced, basis which would tend to influence the decision of the recipient" (Perimeter Guidance Manual ("PERG"), paragraph 8.28.4G, at (3)).

89. That proposition, said Mr Edwards, has effectively been endorsed in case law setting an objective test of whether an impartial observer would conclude that advice had been given: see *Zaki v. Credit Suisse (UK) Ltd.* [2011] 2 CLC 523, per Teare J at paragraphs 83-5; *Rubenstein v. HSBC Bank plc* [2011] CLC 459, per HHJ Havelock-Allan QC at paragraphs 81-5; [2013] 1 All ER (Comm) 915, per Rix LJ at paragraph 52.

90. Applying that learning to the facts here, Mr Edwards submitted that Crestsign was an unsophisticated retail client with no knowledge of complex derivative products; that the banks had created the need for advice by insisting on hedging as a condition of the loan; that Mr Gillard held himself out as an expert who could help, after being told Mr Parker regarded himself as "stupid" in relation to hedging products; that Mr Gillard's role was specifically to persuade Crestsign that one of RBS's hedging products was suitable and thereby win the business; that Mr Gillard provided selective information orally and in written follow up emails, including an apparent value judgment about which products were suitable; and that he must have or should have known that Crestsign would reasonably rely upon his judgment, having in practice no access to independent expert advice at the time.

91. Mr Mitchell QC, for the banks, started from the proposition that banks do not normally have advisory relationships with their customers, nor do they normally owe them fiduciary duties or a duty of care; the normal relation is that of debtor and creditor. He submitted that in the present case this was an ordinary commercial

principal to principal arms length commercial transaction, in which Mr Gillard laid out RBS's wares and provided information about them, leaving Crestsign free to select the product it wished to purchase having made its own assessment on the basis of whatever advice it wished to obtain.

92. The very nature of a swap transaction, submitted Mr Mitchell, is such that when one party is benefitting from the level of interest rates, the other is necessarily suffering disadvantage, and vice versa. There is thus an inherent tension between the parties' commercial interests, which makes it unsuitable for swap transactions to be the subject of advice giving. He submitted that even without having to rely on the terms of business and other surrounding documents warning that advice was not being given, no duty of care could arise from the written and oral communications between the parties in May and early June 2008.

93. Mr Mitchell pointed out that there is and remains no regulatory prohibition against selling swaps and other derivative products to retail customers on a non-advised basis; that the banks' insistence on a hedging product as a condition of the loan does not carry with it any implied obligation to advise on the suitability of the hedging product, and that if Crestsign had felt insufficiently expert or sophisticated to form a view about the product's suitability, its remedy was simply to take its business elsewhere.

94. The banks also placed heavy reliance on the documents they sent to Mr Parker, making it clear that the relationship was not that of adviser and advised party, that it was for Crestsign to make its own assessment of the suitability of the products on offer from RBS, and that even if Mr Gillard had "crossed the line" that separates provision of information from making a recommendation, the documents made it plain that the parties' relationship could not be treated as that of adviser and advised party, since they expressly stated the contrary.

95. The documents were, in chronological order, the Risk Management Paper, the Terms of Business for Retail Clients, the Standalone Derivatives Terms, the written confirmation of the contract (also called the post-transaction acknowledgment) and the terms of the written swap contract. The detailed language of some of those documents is set out in the banks' skeleton argument and in part quoted above, but it is unnecessary to recite it at length again, because Mr Edwards accepted in his

skeleton argument and oral submissions that the language used was on its face effective to exclude an advisory relationship. I have set out enough of it above to enable me to decide how it should be classified and interpreted, as discussed below.

96. Mr Edwards' answer to the banks' reliance on those documents was not that the language used was inapt to exclude an advisory relationship, but that the language used did not apply on the facts in the present case because the parties did the very thing the documents envisaged would not happen: they entered into an advisory relationship, which was inconsistent with the wording relied on by the banks. Mr Edwards argued that it would be rewriting history to treat the documents as excluding an advisory relationship which clearly came into existence from the conversations and emails between Mr Gillard and Mr Parker.

97. By the same reasoning, Mr Edwards submitted that no estoppel, contractual or otherwise, could arise from the terms of business and other documents relied on by the banks. He also pointed out that under the regulatory regime, no written agreement is required where a financial adviser is advising on investments, as distinct from advising on deposit taking, regulated mortgage contracts, insurance and other financial products where a written contract is required. He added that, if it were necessary to look at the banks' documents even though they parted company with reality, they included clause 4.3 of the Terms of Business for Retail Clients.

98. That provision, argued Mr Edwards, excluded the giving of advice on the merits of a particular transaction and the making of personal recommendations "except where we have specifically agreed to do so" – an agreement which, said Mr Edwards, must if necessary be inferred here from the course of dealing between Mr Parker and Mr Gillard. The purpose of clause 4.3, he submitted, is to prevent a client from complaining of the absence of a recommendation not made, not to absolve the bank from responsibility for any recommendation it has made.

99. Mr Mitchell, however, drew my attention to the lengthy discussion (in the context of the reasonableness requirement in section 3 of the 1967 Act) and review of authority in the judgment of Christopher Clarke J (as he then was) in *Raffeisen Zentralbank v. Royal Bank of Scotland plc* [2011] 1 Lloyds Rep 123, at paragraphs 271-315. Clarke J gave helpful examples of three different types of clauses (at paragraph 304), of

which the third is what the banks say happened here, namely "X agrees with Y that Y is not acting as an adviser or assuming any responsibility".

100. Clarke J went on to discuss "basis clauses", at paragraphs 313-5, expressing the view, taking account of the decision of Gloster J (as she then was) in *JP Morgan Chase Bank v. Spingwell Navigation Corporation* [2008] Lloyds Rep Plus 63 (subsequently upheld on appeal, [2010] 2 CLC 705, see per Aikens LJ at paragraphs 180-181) that "commercial parties of equal bargaining power", or "sophisticated commercial parties" should generally be free to accept terms which define the factual basis on which their dealings take place and what statements can or cannot be relied upon by the receiving party.

101. In similar vein, at paragraph 321 he referred to "the undesirability, generally speaking, of striking down terms freely agreed between large commercial parties who are usually to be regarded as the best judges of their own interest". At the other end of the spectrum, he gave the example (at paragraph 315) of a car dealer who says a car is perfect and then gets the buyer to agree that no representation has been made or can be relied on, describing this "as a retrospective attempt to alter the character and effect of what has gone before" and thus in substance an exclusion clause. As Clarke J put it at paragraph 314: "the key question… is whether the clause attempts to rewrite history or parts company with reality".

102. Mr Mitchell submitted that the documents in question contained basis clauses and not exclusion clauses and therefore fell outside the scope of the 1977 Act and were not subject to any reasonableness test. He relied on the same documents, and in particular the post-contract acknowledgment and subsequent formal written agreement embodying the swap, as creating an estoppel, or alternatively a contractual estoppel of the type discussed by Clarke J in *Raffeisen*, and in the judgment of Moore-Bick LJ in *Peekay v. Australia and New Zealand Banking Group Ltd* [2006] 2 Lloyds Rep 511, at paragraphs 56 and 57.

103. In the further alternative, Mr Mitchell submitted that if or to the extent that the language of the documents he relied on led to the conclusion that they were exclusion clauses, so that the 1977 Act did apply to them, the requirement of reasonableness was satisfied on the facts here just as it was found by David Steel J to be satisfied on

comparable facts in *Titan Steel Wheels Ltd v. Royal Bank of Scotland* [2010] 2 Lloyds Rep 92, at paragraphs 105-8.

104. In support, he submitted that the "aspiration of certainty" (in the words of Lewison J, as he then was, in *FoodCo UK LLP (t/a Muffin Break) v. Henry Boot Developments Ltd* [2010] EWHC 358 (Ch), at paragraph 177) is itself a facet of reasonableness; that this was an arms length commercial transaction between parties of equal bargaining power, without any "hard sell" or illegitimate pressure from the banks; and that Mr Parker was a shrewd businessman well able to look after Crestsign's commercial interests, choose between alternative suppliers of financial products, and take such legal, financial or other advice as he thought Crestsign needed.

105. Mr Edwards submitted that the banks could not succeed in showing the requirement of reasonableness in the 1977 Act was satisfied, because the clauses relied upon conflicted with the banks' obligations under the regulatory regime; the parties had a manifest inequality in their knowledge and understanding of the products and access to information and expertise in judging their suitability; and the customer had no practical means of obtaining the advice it needed.

106. I turn to my reasoning and conclusions on this first issue, in the light of those submissions and my findings of fact. I agree with Mr Edwards that advice is an ordinary English word. If I were to consider only the telephone conversations, the meeting of 28 May 2008 and the email exchanges between Mr Gillard and Mr Parker, without reference to the written notes in the Risk Management Paper and the documents setting out the banks' terms of business, I would readily conclude that Mr Gillard gave advice to Crestsign and not merely information.

107. I accept Mr Edwards' submission that Mr Gillard knew Mr Parker looked to him for expert assessment of the available products, Mr Parker having professed his ignorance of them in the first telephone conversation between them, and Mr Gillard having been brought in specifically in the role of an expert on those products, with the task of explaining them. I also accept that Mr Gillard's exposition of the banks' products steered Mr Parker in the direction of a fixed rate swap by not providing information about any products, such as a "vanilla cap", other than fixed rate swap products alongside two other products he knew were unacceptable to Mr Parker.

108. Specifically, in my judgment, Mr Gillard gave advice in the form of a recommendation to the effect that either or both of structures 3 and 4 in his email of 30 May 2008 were suitable for Crestsign's business. Structures 1 and 2 were not in substance being recommended by Mr Gillard because he knew they were not acceptable to Mr Parker and were only included as a way of setting the scene for presenting structures 3 and 4. I also find, by the same reasoning, that after the telephone conversation on 4 June 2008, Mr Gillard's email later that evening in substance recommended either of what had become structures 1 and 2, which were variants on what had been structures 3 and 4 in his previous written exposition.

109. I do not find that Mr Gillard expressly told Mr Parker that he, Mr Gillard, was giving advice, but I do not accept Mr Gillard's evidence that he expressly disavowed any advice giving role orally on 28 May 2008. I accept that he may not have appreciated that he was in substance giving advice in the meeting, the telephone conversations and his two emails, and that he probably believed when giving his evidence at the trial that he had not done so, but that does not alter my conclusion to the contrary, applying the objective approach referred to above.

110. Even without having regard to the documents to which I am coming in a moment, I observe that the giving of advice does not of itself necessarily mean that there is an assumption of responsibility and a duty of care in tort to give the advice carefully. A car dealer may recommend a car to a prospective buyer, saying for example "That is a very good car, I recommend it", but the law would not regard the dealer as, without more, assuming responsibility for giving careful advice or the buyer as entitled to damages on the basis of excessive fuel consumption or poor road holding.

111. In the present context, though, if I were to leave out of account the bank's documents which sought to exclude a duty of care, I would find that the relationship between Mr Gillard and Mr Parker was such as to satisfy the requirements set out in Lord Morris' speech in *Hedley Byrne* at 502-3, quoted above. The disparity in knowledge and expertise and the respective roles of the two men was such that it was reasonably to be expected that Mr Parker would rely on Mr Gillard's skill and judgment and, aside from the documents, it would be reasonable for him to do so. However, the banks went out of their way in the documents they provided to Mr Parker, to ensure that the duty I have found would arise, did not do so.

112. Those were the documents that were the subject of the debate between counsel on the distinction between basis clauses and exclusion clauses, already mentioned. The authorities are many but the principle is simple enough: you look at the words used to see whether, understood in their proper context from the perspective of an impartial and reasonable observer (i.e. the court), they prevent a representation from having been made, or whether, by contrast, they exclude liability for making it.

113. Where advice is given, the same principles apply. If a contract term provides that no advice is given, it must be construed and may be either a basis clause or an exclusion clause, depending on the wording and context. If advice is given outside the terms of a contract, a duty of care arises if the *Hedley Byrne* requirements are met, but "an assumption of responsibility may be negatived by an appropriate disclaimer" (*Henderson v. Merrett Syndicates Ltd* [1995] 2 AC 145, per Lord Goff at 181E).

114. In the present case, I find myself unable to resist the conclusion that the banks successfully disclaimed responsibility for any advice that Mr Gillard might give and (as I have found) did give. The Risk Management Paper and the two sets of terms of business were unequivocal; they defined the relationship as one in which advice was not being given. They were clearly drawn to Mr Parker's attention before the swap contract was concluded. He rightly understood (and hence sought comment from Mr Bransby-Zachary on the terms of business) that they were not empty words but were intended to have legal effect as part of any contract.

115. Although Crestsign was a retail client and not a large and sophisticated commercial party, it was not in a position akin to the buyer of a second hand car. I do not accept Mr Edwards' submission that it would be rewriting history or parting company with reality (in Clarke J's phrases in *Raffeisen*) to define the relationship as one in which advice is not given, even though I have found that, in substance, it was. The line that separates provision of information from giving advice may be a fine one, as where advice is conveyed by presenting information selectively. It is not always easy for a salesman such as Mr Gillard to know where one ends and the other begins. Reasonable people could disagree about whether the line is crossed in a particular case.

116. It is considerations such as these that lead parties in this type of arrangement legitimately to define their relationship and avoid disputes afterwards. No violence is done to history or reality by construing the documents as meaning what they say, even though the first document in time – the Risk Management Paper – postdated the meeting on 28 May 2008, and even though what Mr Gillard said at that meeting (and subsequently) in my judgment crossed the line and would have amounted to advice coupled with an assumption of responsibility, were it not for the disclaiming effect of the documents.

117. The end result is that by the time the swap contract was entered into, what Mr Gillard was saying in effect was: "although I recommend one of these products as suitable, the banks do not take responsibility for my recommendation; you cannot rely on it and must make up your own mind." I do not see anything unrealistic about that, nor does it mean the documents must be exemption clauses not basis clauses. As correctly submitted by Mr Mitchell, the disclaimers in the Risk Management Paper, the two sets of terms of business, the written acknowledgment of the transaction, and the formal written swap contract, are all basis clauses.

118. Nor am I able to accept Mr Edwards' argument that an agreement under clause 4.3 of the Terms of Business for Retail Clients can be inferred from the circumstances. Under that provision, the banks will not provide advice on the merits of a particular transaction "except where we have specifically agreed to do so". The effect of the passage in bold type at clause 4.3 is to require a displacement of the default position, which is that set out in clause 4.2, stating that the banks are providing "a non-advisory dealing service". For an agreement under clause 4.3 to arise, something more definite is required than what happened here, which was that Mr Gillard presented information in such a way as to amount to a recommendation.

119. By the same reasoning, I would accept the submission of Mr Mitchell, if it were necessary to do so, that Crestsign is contractually estopped from asserting the existence of the duty of care on which it now relies. The 1977 Act does not apply because the clauses in question are all basis clauses and not exclusion clauses. If I were wrong about that and the clauses were exclusion clauses, I would have to decide whether, applying the test of reasonableness under the 1977 Act, the test were satisfied. If that issue arose, I would take a different view on the facts here from the

view taken by David Steel J on the different facts in *Titan Steel Wheels*, and find that the requirement was not satisfied.

120. Although in the result it does not assist Crestsign, I would accept the submissions of Mr Edwards on this point. The market for derivative products was one in which the products themselves were complex and poorly understood by inexperienced purchasers, as Mrs Bowie explained. Understanding their nature can be counter-intuitive, as it was to Mr Parker. Mr Gillard did engage in "hard sell" - in this I disagree with Mr Mitchell's submission having heard the evidence. And importantly, expert advice was not readily available to Crestsign, unlike David Steel J's finding in *Titan Steel Wheels*. Mr Gillard's evidence that impartial expert advice on derivatives was readily available to Crestsign, was profoundly unconvincing.

121. In addition, I think the defects subsequently found by the FSA in its pilot findings in 2012, which were drawn to my attention, afflicted this particular transaction and would be of relevance to whether the requirement of reasonableness in the 1977 Act could be satisfied. The defects found were poor disclosure of exit costs, described here only as "substantial" without any detail; failure to ascertain the customer's understanding of risk; non-advised sales straying into advice; a mismatch between the duration of the hedge product and the underlying loan; and rewards and incentives being a driver of such practices.

122. For those reasons I conclude the first issue in favour of the banks and find that they owed Crestsign no duty to use reasonable skill and care in the giving of advice to Crestsign about the swap.

(2) If the banks did owe Crestsign a duty of care in relation to giving advice and/or making recommendations, were they in breach of the duty in advising on the suitability of the swap?

123. It follows that this second issue does not arise; but I propose to deal with this issue anyway, in case it is of help to the parties, given the possibility that the case might be taken further.

124. Crestsign's main submission was that the banks' advice was negligent because they should have recommended a simple ("vanilla") interest rate cap product, which would protect Crestsign against adverse future rises in interest rates, while allowing it to

benefit from the expected lowered rates and removing any impediment to refinancing arising from the high break cost of a swap. Mr Edwards submitted that the high premium associated with a cap product did not render it unsuitable. On the evidence, the premium would logically have exceeded £82,000, the premium payable for an interest rate "collar" product (i.e. with a "floor" as well as a "ceiling", to change the metaphor again).

125. Mr Edwards submitted that the swap was manifestly unsuitable, not just with hindsight, but at the time as well, essentially for the reasons set out in paragraph 12.3 of Mrs Bowie's report: because it hedged 100 per cent of the debt, was inflexible, hedged beyond the term of the loan which might not be renewed or adequately refinanced, placed nearly all the risk on Crestsign and little on RBS because of its cancellation option, exposed Crestsign to adverse interest rate conditions for seven of the ten years and exposed Crestsign to high break costs which (though Mr Parker did not know it) would dwarf the premium for a cap.

126. The banks submitted that the allegations of breach of a common law duty were thinly disguised allegations of breaches of duties owed under provisions of COBS, and produced a table showing a correlation between particular duties owed under COBS and particular breaches of duty alleged in Crestsign's particulars of claim. I did not find this point persuasive. I agree with the banks that the two sets of duties are not to be treated as co-terminous and that breach of a COBS duty is not necessarily common law negligence.

127. But it does not follow that breaches of COBS duties (not actionable as such at the suit of Crestsign) cannot also be negligent at common law. Nor is the content of the COBS duties wholly irrelevant in a common law claim brought by a person unable by statute to sue for breach of a COBS duty. The COBS duties are likely to be relevant to determining the standard of care required of a reasonably careful and skilled adviser, since a reasonably skilled and careful adviser would not fall short of the standard required to meet relevant regulatory requirements.

128. Crestsign has clearly pleaded (particulars of claim paragraph 38(1)) that the banks "did not investigate the known upfront cost of a cap", and that "the Swap was unsuitable" (paragraph 38(3)) and these contentions were repeated in Mr Edwards'

skeleton argument and in oral submissions. I have accepted the evidence of Mr Parker that an interest rate cap product was not discussed at the meeting on 28 May 2008 and I do not accept that his hostility to such a product made it legitimate not to include it among the four options presented after the meeting.

129. Mr Mitchell's main points in defence of the suitability of the swap were that opposition to it is driven by hindsight, while no one thought at the time interest rates would fall as low as they have; that it produces a fixed and known cost of borrowing, albeit at the price of not being able to benefit from interest rate falls; that Mr Parker's conversion to a cap product is late and opportunist, while at the time such a product would have been unsuitable – even to the point where it would have been negligent to recommend it – because of the high premium and improbability of the cap ever being needed.

130. If I were wrong in finding that the banks did not owe a duty of care to Crestsign in relation to the giving of advice and recommending suitable products, I would find a clear breach of the duty in recommending structures 3 and 4, and subsequently what became structures 1 and 2, as suitable products, for reasons similar to those advanced by Mrs Bowie. I did not find any effective answer to the criticisms in paragraph 12.3 of her report, either in Mr Mitchell's challenges to those criticisms in cross-examination, or in the evidence of Mr Gibson, who did not address the suitability of the swap head on.

131. I do not base that conclusion on any breach of a specific COBS duty, and do not find it necessary to engage in any detailed analysis of the duties owed by the banks under COBS. Indeed, I think that in May and June 2008 even a non-expert such as Mr Parker, if he had fully understood the effect of the swap (whichever variant of it), would have realised that it would be most unwise for Crestsign to enter into it.

132. It seems to me obvious that, viewed at the time and not with hindsight, any of those four variants carried with it the unacceptable risk of being *de facto* "locked in" to a 10 year transaction period with serious risk of very high quarterly payments resulting from low interest rates, coupled with the risk of inability to borrow money beyond the five year term of the loan, either from these banks because they might not be willing to renew the loan, or from an alternative provider because of the prohibitively high

break costs required to escape from the regime. Mr Mitchell's argument that it represented fixed and known borrowing costs does not answer these concerns.

133. Whether a cap, or some other form of hedging product acceptable to the banks, or no product at all, should have been recommended instead, seems to me a separate question of more relevance to causation and quantum (if they arise) than to breach of duty. I do not specifically find that it was negligent of Mr Gillard not to recommend a cap, though a balanced presentation of all options would have included an explanation of a cap with its advantages and disadvantages, and would have featured information enabling a comparison between the likely premium for a cap and the likely break costs of the swap should Crestsign wish to terminate it early.

134. I therefore would decide the issue of breach of the duty of care, in relation to the giving of advice, in favour of Crestsign, if I were wrong in finding that the banks did not owe that duty of care.

(3) What duty did the banks owe when giving information about the swap?

135. The banks accept, for the purpose of this case, that they were under a duty not to make any negligent misstatement, i.e., as pleaded, "a common law duty of care to give information to [Crestsign] which was not misleading". This is also sometimes referred to as a duty not to misstate. Crestsign contends for a wider duty, pleaded as "a duty at common law to take reasonable care when providing information to [Crestsign] to ensure that such information was both accurate *and fit for the purpose for which it was provided, namely to enable [Crestsign] to make a decision on an informed basis*" (my italics).

136. In oral submissions, Mr Edwards characterised this as a "mezzanine" duty, less onerous than the duty in relation to the giving of advice (considered above) but more onerous than the bare duty not to misstate which the banks accept. In his skeleton argument Mr Edwards submitted on the authority of *Cornish v. Midland Bank plc* [1985] 3 All ER 513, and *Bankers Trust International plc v. PT Dharmala Sakti Sejahtera* [1996] CLC 518, that:

> in cases involving information which falls short of advice, a bank which undertakes to explain the nature and effect of a transaction owes a duty to take reasonable care to do so as fully and properly as the circumstances demand.

137. In his oral submissions, Mr Edwards asserted that applying that approach to the facts here, Mr Gillard's duty was:

> … to give the customer sufficient information to enable the customer to make a properly informed choice between these unfamiliar and complex products. That … should mean all the products, not every product under the sun, but … at least all the vanilla products that he himself agreed are likely to be most appropriate for this client base: that is the collar, the swap and the cap, but especially the cap …. .

138. Responding to the banks' contention that such a duty was excluded by the decision in *Green and Rowley v. Royal Bank of Scotland plc* [2012] EWHC 3661 (QB) (Judge Waksman QC) and [2013] Bus LR 168 (on appeal, the Financial Conduct Authority intervening), Mr Edwards stated that Judge Waksman QC had expressed the duty too narrowly at paragraph 82 of his judgment, where he said, in the context of a discussion about the interaction of COB duties and common law duties, that:

> The duty to take care not to mis-state is much narrower than the advisory duty where one would expect that relevant professional standards would form part of the assessment as to whether it has been broken. …. . The *Hedley Byrne* duty does not include any duty to give information unless without it the statement is misleading. Equally the duty under Rule 5.4.3 [of COB] to take reasonable steps to ensure that the counterparty to a transaction understands the nature of its risks is well outside any notion of a duty not to misstate.

139. Mr Edwards submitted that the correctness of that comment was not in issue on appeal, where the narrow ground of the appeal was whether breaches of the statutory duties were "actionable as a breach of a concurrent common law duty" (per Tomlinson LJ, at paragraph 19, citing from the grounds of appeal). After analysing that question by reference to the seminal exposition of Lord Browne-Wilkinson in *X (Minors) v. Bedfordshire County Council* [1995] 2 AC 633, 730, Tomlinson LJ concluded that Lord Browne-Wilkinson's speech provided no support for a common law duty of care concurrent with duties owed under COB (which were not statutory duties in any case). He said:

> I reject the suggestion that the bank here owed to the claimants a common law duty of care which involved taking reasonable care to ensure that they understood the nature of the risks involved in entering into the swap transaction.

140. Earlier in his judgment, in the course of explaining the decision below, Tomlinson LJ expressed himself at paragraph 17 as agreeing with what Judge Waksman QC had said about the scope of the duty not to misstate. Mr Edwards said that this was *obiter* and not applicable in what he called an "explanation" case such as the present case and *Cornish v. Midland Bank plc*.

141. The banks, through Mr Mitchell, characterised Crestsign's formulation of the duty as "heretical". He submitted that Crestsign was trying to rerun the argument rejected in *Green and Rowley* that a common law duty in relation to provision of information could be fashioned from the content of applicable professional standards rules, as set out in COB and subsequently COBS. He asserted that the duty to provide information as advocated by Crestsign was likewise crafted from the content of applicable COBS rules and as such was the very duty rejected in *Green and Rowley*.

142. Mr Mitchell invited me to reject the notion of a "mezzanine" duty, whether it be described as a duty to educate, a duty to inform, a duty to put the claimant in a fully informed position, a duty to provide information, to make it fit for the purpose of making an informed decision or a duty to lift a claimant out of ignorance. He reminded me that if the court were to fashion a duty of care co-terminous with the regulatory regime, the statutory provisions limiting the class that can bring an action for breach of those duties would be circumvented.

143. I turn to my reasoning and conclusions on this issue. It seems to me that the answer to the question how wide the banks' duty was in this case, in respect of the provision of information, is dependent on the facts of this case, not on the facts of *Green and Rowley* or any other case, nor on the content of any duty imposed by applicable COBS rules. Mr Edwards is correct in his written submission that "a bank which undertakes to explain the nature and effect of a transaction owes a duty to take reasonable care to do so as fully and properly as the circumstances demand".

144. In *Cornish v. Midland Bank plc*, a bank manager took it on himself to explain the effect of a mortgage transaction to the plaintiff, and the bank was held liable because the manager negligently failed to explain to her that the security would extend to unlimited future borrowing by her husband. In *Bankers Trust*, sophisticated investors

in derivatives failed on the facts to establish any breach of a duty not to mislead them when negotiating the relevant contracts. In the part of his judgment dealing with the "legal position", Mance J (as he then was) commented (at 530B):

> The bank here was marketing to existing or prospective purchasers derivative products of its own devising which were both novel and complex. The analysis of the relationship is in the circumstances one of some delicacy.

145. So it is in this case. In *Bankers Trust*, the plaintiffs were asserting that "the duty … extends to *explaining fully and properly* … the operation, terms, meaning and effect of the proposed swaps and the risks and financial consequences of accepting them" (page 533C, italics in original). Mance J referred to *Cornish v. Midland Bank plc* and held at 533D-E:

> In short, a bank negotiating and contracting with another party owes in the first instance no duty to explain the nature or effect of the proposed arrangement to that other party. However, if the bank does give an explanation or tender advice, then it owes a duty to give that explanation or tender that advice fully, accurately and properly. How far that duty goes must once again depend on the precise nature of the circumstances and of the explanation or advice which is tendered.

146. It is that statement of the law which governs the position here. It is nothing to the point that applying it may produce a common law duty on the facts whose content may overlap with applicable COBS duties. Once again, I resist the fallacious reasoning that because common law duties and COBS duties are not co-terminous, and because Crestsign is excluded from the class of persons able to sue for breach of COBS duties, the banks can owe no common law duty which happens to overlap with a COBS duty.

147. In *Green and Rowley*, it does not appear to have been argued that a common law duty of care in relation to provision of information could arise independently of and irrespective of the then applicable COB rules. There is no indication that *Cornish v. Midland Bank plc* or the *Bankers Trust* case were cited to Judge Waksman QC or the Court of Appeal, or that (if they were) they formed any part of the reasoning of Judge Waksman QC or the Court of Appeal. The focus was on the claimants' attempt to fashion a common law duty that was co-terminous with the regulatory duties.

148. I am not saying, impertinently, that Judge Waksman QC and Tomlinson LJ (with whom Hallett and Richards LJJ agreed) were wrong to express themselves in the way they did. I am only observing that what they said was in the context of the facts and submissions before them, which were different; hence Tomlinson LJ's use of the word "here" in his conclusion rejecting the suggestion that "the bank *here* (my emphasis) owed to the claimants a duty of care which involved taking reasonable steps to ensure that they understood the nature of the risks involved in entering into the swaps transaction".

149. Anchoring myself in Mance J's statement of the law in *Bankers Trust* at 533D-E, what was the scope of the duty to provide information which arose on the facts in this case? The starting point is that the banks owed in the first instance no duty to explain the nature and effect of the proposed transactions to Crestsign. However, through Mr Gillard, they chose to do so. He visited Mr Parker for the express purpose of explaining some hedging products to Mr Parker, so as to "iron out a hedging strategy", in his phrase.

150. He needed to provide information about the products on offer in order to sell one of them to Crestsign. It is common ground that in doing so, he had a duty not to mislead Crestsign. In Mance J's language, he had a duty "to give that explanation or tender that advice fully, accurately and properly". But how far that duty goes must depend on "the precise nature of the circumstances and of the explanation or advice which is tendered". I remind myself that Mr Gillard needed Crestsign to be sufficiently aware of the nature and effect of the hedging products on offer to be willing to sign up to one of them, on terms acceptable to both parties.

151. I remind myself also that Mr Parker was intelligent and understood lending transactions generally but knew nothing about hedging products, a state of ignorance of which Mr Gillard was well aware; that Crestsign was a retail client of the banks without, as I have already noted, any realistic prospect of timely access to adequate expert advice; and that Mr Gillard and Mr Flack knew Crestsign was under time pressure because of the deadline set by Northern Rock for refinancing without a penalty payment.

152. After careful reflection, I do not accept Mr Edwards' submission that Mr Gillard came under a duty to explain the whole range of products that might be available and which could satisfy the condition of sanction requiring a hedging product, including an interest rate cap product. It seems to me that Mr Gillard's duty was to explain fully only those products which he wished to sell to Crestsign. Clearly, he did not wish Crestsign to purchase an interest rate cap product. He wanted Crestsign to enter into a swap transaction.

153. In my judgment, he came under a duty to explain fully and accurately the nature and effect of the products in respect of which he chose to volunteer an explanation, but I do not think he came under a duty to explain fully other products that Crestsign might have wanted to purchase but which he did not wish to sell, such as an interest rate cap product. An explanation of such other products, for the purpose of presenting a balanced picture, would be the territory of an advice-giving duty, which was excluded on the documents as I have already found. The absence of such an explanation was part of the selective presentation of information which led me to conclude that advice was given (but without any duty arising for the reasons given above).

154. The products in respect of which Mr Gillard volunteered an explanation were, as I have found, the four products alluded to in the Risk Management Paper (of which only the last two mattered) and the two variants in his subsequent email of 4 June 2008. In my judgment, he came under a duty to explain their effect accurately, without misleading, but I do not think his duty extended as far as a "duty to educate" in the sense of giving a comprehensive "tutorial" and satisfying himself that Mr Parker understood every aspect of each product, including a detailed account of the risks associated with each which, again, would stray into the territory of advice giving.

155. I therefore accept up to a point Mr Mitchell's proposition in his written argument that the banks were under no duty to ensure that Mr Parker correctly understood the information provided to him or its implications or consequences, or to ensure that he took an informed decision. But I would qualify Mr Mitchell's proposition by adding that the duty would extend to correcting any obvious misunderstandings communicated by Mr Parker and answering any reasonable questions he might ask

about those products in respect of which Mr Gillard had chosen to volunteer information.

(4) Did the banks breach their duty when giving information about the swap?

156. Crestsign's pleaded case on breach of the duty relating to provision of information is set out in 11 propositions in its particulars of claim. Some of these allege breaches of obligations which fall outside the scope of the duty as I have formulated it above. Thus, I do not accept that the duty required the banks to provide Crestsign with "a methodical and clear explanation of the mechanics of interest rate derivatives, the risks involved, how they are priced and the rationale for choosing one over another". Nor do I accept that the banks had a duty to take "adequate steps to ensure that [Crestsign] had an adequate understanding of the full range of circumstances in which exit costs might become payable".

157. Nor (as I have already said) do I accept that the banks were obliged to explain the attributes of a cap as a counterweight to those of swap transactions; nor that Mr Gillard's omission to mention a cap was a form of misleading by omission, since I have found that he was only obliged to explain the nature of those products he wished to sell to Crestsign; nor that the banks were obliged to disclose the existence or amount of Crestsign's credit line which, as Mrs Bowie and Mr Gibson agreed, is an internal measure not normally disclosed to a bank's customers.

158. The pleaded case also includes allegations that the banks did not do enough to acquaint Crestsign with the risks associated with possible non-renewal of the loan facility after five years and the magnitude of the break costs that would be incurred in the event that Crestsign either wished to, or found itself compelled to, refinance elsewhere after five years or during the second half of the 10 year period of the swap. It is also alleged that the banks explained inadequately the circumstances in which they would be likely to exercise their cancellation options during the second half of the 10 year period, and the risks and consequences.

159. After careful consideration, I have reached the conclusion that the banks did not act in breach of its duty relating to the provision of information about the products it offered Crestsign. I find that Mr Gillard's explanations of the four products alluded to in his email of 30 May 2008 and the Risk Management Paper (only the last two of which

mattered in practice), and his explanations in his email of 4 June 2008 of the two variants of structure 4, were not misleading and were adequate to comply with the banks' duty.

160. The email of 30 May and the Risk Management Paper set out the attributes of structures 1 to 4. The information provided about those strutures was not factually wrong. The Risk Management Paper gave more detail than the email to which it was attached. The information in the Risk Management Paper was a summary of the essential attributes of each of the four products it described. That summary was not misleading, either by the inclusion in it of any factually wrong statement or by omission or half-truth.

161. In particular, in the first email Mr Gillard drew attention to the issue of paying interest on "debt you do not have". He was asked about that by Mr Parker. His reply on the telephone was brief but not inaccurate or misleading. Mr Parker fleetingly understood the explanation although it did not stick in his mind. His attention was drawn to the mismatch between the duration of the loan facility, being only half that of the swap. This was expressly repeated in the email of 4 June 2008, which mentioned "a 10 year commitment and the bank only has a financing commitment for 5 years".

162. That email went on to propose three numbered alternatives if at the end of the five year period "you should choose or need to refinance elsewhere", with the comment that "we wouldn't expect this to be an issue but worth making you aware of the options up front". If Mr Parker had read those three numbered options carefully, he could have obtained a clearer understanding of the notion of paying interest on "debt you do not have", of the "separateness" of the two transactions and the implications of the mismatch in their respective durations. If he had wished to, he could have raised further queries on these points and the banks would have been duty bound to answer them accurately and without misleading. He did not raise any further queries.

163. As for the bank's periodic cancellation option during the second half of the 10 year period, its existence and effect was spelt out to Mr Parker in the email of 4 June 2008, without any misleading. I do not think it was incumbent on Mr Gillard to go further and warn Mr Parker that the option would probably be exercised should interest rates

rise to a point at which the swap would cease to be valuable to the banks. That was in my view too obvious to need stating expressly.

164. Nor was it incumbent on Mr Gillard to say more than he did about the point that if the banks were to exercise the cancellation option, Crestsign would no longer have any protection against high interest rates. That too was obvious. In any case, the description of structure 4 in the Risk Management Paper included the words: "[y]ou are unprotected in the first two years *and potentially in the last four years*" (my emphasis).

165. That leaves the question of break costs. I have considered anxiously whether it was adequate merely to describe them as "substantial" in the Risk Management Paper, without any further explanation of what "substantial" might mean in a variety of unpredictable scenarios. It is in this respect that the banks came closest to breaching the duty it owed in respect of the provision of information. But in the end I have reached the conclusion that the banks gave just enough information to avoid a breach.

166. The warning about break costs being "substantial" first appeared in the introductory remarks at the start of the Risk Management Paper, beneath the heading "Important Information". The warning was generic and preceded the descriptions of the four individual structures, though the reference to break costs (without repetition of the word "substantial") also appeared in the description of each product. The word "substantial" in the introductory section was preceded by an explanation that breakage costs "will be calculated by reference to prevailing market conditions and include costs incurred by us in terminating any related financial instrument or trading position".

167. That language might well have invited further enquiry. What was the formula for calculating break costs? How much might they be on various assumptions, from the lowest end to the highest end of the likely range? I have come to the conclusion that the provision of full and non-misleading information about the products on offer from the banks, did not extend to proffering that level of detail in the absence of such an enquiry being made of them. If Mr Parker had asked: "Are we talking about tens of thousands or hundreds or thousands?" Mr Gillard would have come under a duty to say that it could well be in the hundreds of thousands. But Mr Parker did not ask.

168. For those reasons, I have come to the conclusion that the banks did not act in breach of their duty in relation to provision of information to Crestsign about their products. For the sake of completeness, I would reach the same conclusion, and by the same reasoning, applying the tests ordained by the 1967 Act, section 3 of which (imposing a requirement of reasonableness in respect of any clause excluding liability) does not apply to the "basis clause" documents for the reasons given above.

169. I do not find any merit in Crestsign's argument that the banks misrepresented the nature of the swap by representing that the rates quoted in Mr Gillard's email of 4 June 2008 were market rates rather than the rates the banks were prepared to offer. I accept Mr Mitchell's point that the pricing of the swap was a matter for the banks to determine in accordance with their commercial judgment, and I do not think that Mr Gillard or Mr Flack ever represented expressly or impliedly that the rates quoted were in some way standard or other than commercially determined by the banks.

(5) Measure of damage; causation and quantum

170. For the reasons given above, Crestsign's claim does not succeed, and the question of loss and damage does not arise. Submissions on reliance, causation and quantum were made by both parties, however. I will mention them only briefly in case it assists the parties should this matter go further. If I were wrong in concluding that the banks are not liable in damages for negligence, I would have had to consider the measure of damage and the questions of causation and quantum.

171. I would accept Mr Edwards' proposition that the court's difficulty in speculating about what would have happened, does not absolve the court from the task of doing the best it can to award damages based on its assessment of the financial consequences of what would have happened, if the tort had not been committed.

172. If I had found that the banks had acted negligently, in any of the ways alleged by Crestsign, I would find that Mr Parker would on the balance of probabilities have steered clear of any swap product. I would not accept Mr Mitchell's submission that Mr Parker would necessarily have refused to purchase an interest rate cap product because of the high premium associated with that product.

173. If it had been part of the banks' duty to explain the interest rate cap product to him, and if the banks had explained its nature to him alongside that of a swap, and if the bank had made him aware that the break costs in the event of terminating a swap would be likely to dwarf the premium for a cap, Mr Parker would, in my judgment, have overcome his reluctance to pay that premium even though he considered that interest rates would fall for some time and that the protection of a cap would probably not be needed.

174. I take into account that when Mr Parker was asked by Mr Mitchell whether he could agree that, had he been told that a cap was going to cost possibly up to £100,000, he would not have been interested in that, he answered: "[w]ell without it being explained to me how am I supposed to determine that? What were the benefits to it? I did not know".

175. If I had had to assess the quantum of the claim for damages, the task would not have been easy since the swap is still in place and has not yet ended, and interest rates are currently such that the banks are unlikely to exercise their termination option. In order to assess damages, it would be necessary, as far as possible, to ascertain the parties' intention in relation to break costs should the swap terminate early, there being no live claim (though one was pleaded) for rescission of the swap. However, in the event the exercise does not need to be carried out, and I say no more about it.

(6) Conclusion

176. In sum, then, the banks did not provide misleading information. They did provide negligent advice but they successfully excluded any duty not to do so. They did not show themselves worthy of the trust Mr Parker placed in them, but unfortunately for Crestsign, the common law provides it with no remedy because the banks successfully disclaimed responsibility for the advice they gave on the suitability of the swap, which was negligent but not actionable.

177. This is the same result as in *Hedley Byrne v. Heller & Partners*, where the existence of the duty of care was established in a Pyrrhic victory of principle but a defeat on the facts. While the result may seem harsh to some, it is not the role of the common law and this court to act as a regulator. It follows that although I have considerable sympathy for Mr and Mrs Parker, I must dismiss Crestsign's claim. I conclude by

expressing my gratitude to counsel and their instructing solicitors for the helpful and constructive way in which the trial was managed and conducted, and for the high quality of the written and oral submissions.