Case No: 2MA40004

Neutral Citation Number: [2012] EWHC 3661 (QB)

IN THE HIGH COURT OF JUSTICE

MANCHESTER DISTRICT REGISTRY

MERCANTILE COURT

Date: 21 December 2012

B e f o r e :
HIS HONOUR JUDGE WAKSMAN QC
(sitting as a Judge of the High Court)

(1) JOHN GREEN
(2) PAUL ROWLEY

Claimants

and

THE ROYAL BANK OF SCOTLAND PLC

Defendant

John Virgo (instructed by Signey Law Limited, Solicitors) for the Claimants
Andrew Mitchell QC (instructed by SNR Denton UK LLP Solicitors) for the Defendant

Hearing dates: 3-6 December 2012

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.

INTRODUCTION

1. In this action the Claimants allege that in May 2005, the Defendant, the Royal Bank of Scotland ("the Bank") mis-sold to them an interest rate swap ("the Swap") as a form of hedge against their existing loan liabilities to the Bank. I am concerned with liability only, in the sense that while aspects of the damages claim are agreed, further submissions on the nature and extent of any relief will be required should I find against the Bank. At all material times the Claimants acted in partnership and I shall refer to them collectively as Green & Rowley.

2. The claim against the Bank is that it was in breach of its common-law duties of care (a) in a *Hedley Byrne* negligent mis-statement sense ("the Information Claim") and/or (b) because it gave negligent advice about the Swap ("the Advice Claim"). Originally there were claims for breach of statutory duty under s150 of the Financial Services and Markets Act 2000 alleging breaches of the (then) relevant Conduct of Business Rules ("the COB Rules"), but it is accepted that they are time-barred. Nonetheless Green & Rowley allege that some at least of the COB Rules are relevant to the negligence claims.

THE SWAP – ESSENTIAL FEATURES

3. There is no dispute over the mechanics of a swap and they should be explained at the outset. For the purpose of this explanation, it is assumed that as at the date of execution of the Swap on 25 May 2005, Green & Rowley had a pre-existing loan liability to the Bank of £1.5m repayable in 15 years on an interest only basis ("the Loan") at 1.5% above base rate. A swap is a separate instrument to the Loan and at the time of its making of the Swap, base rate was 4.75%. The basis of a swap is first a notional sum, often (but not always) equal to the principal amount of the loan in question. In this case, it was indeed £1.5m. Second, a swap has a term, again often but not always equal to the (remaining) term of the loan. In this case it was for the somewhat shorter period of 10 years. Third, a fixed rate is set and applied to the notional amount, in this case 4.83%. Following inception of the Swap quarterly payments are made on a net basis between the counterparty (here Green & Rowley) and the Bank as follows: where the actual base rate exceeds 4.83% the Bank will pay them by the amount of the difference. Where it is lower than 4.83% Green & Rowley will pay the Bank. This provides an effective hedge against any increases in base rate (putting to one side the slight difference between 4.75% and 4.83%) because while Green & Rowley will pay more interest under the Loan (because it is a variable rate) they are compensated for this increase by the money they get back from the Bank under the Swap. On the other hand however, if interest rates go down beneath the fixed swap rate they are worse off than they would have been without the Swap, because while their loan repayments go down they now have to pay a corresponding sum to the Bank under the Swap. Overall, therefore, and assuming that the percentage above base payable under the Loan, here 1.5% ("the Margin") remains the same, entering into the Swap is the same as converting the variable rate loan to a fixed rate loan with all the potential advantages and disadvantages that has, depending on the state of the market.

4. The base rate remained fairly flat until about June 2006 when it started to rise significantly. Between then and October 2008, when the banking and financial world was rocked by the well-known crisis, Green & Rowley did well out of the Swap. But afterwards, as interest rates fell to an all-time low by 5 March 2009 of 0.5% (described as "historic" by the FSA in its Update in Interest rate hedging products – "the Update") they fared very badly under the Swap. See the base rate chart at 4/688. Another useful graph which gives the references to significant events in the credit crunch from 2007 onwards is in a 2009 version of the Bank's brochure at 2/239.

THE BASIC HISTORY

Introduction

5. Mr Rowley is a hotelier and sometime property developer based in Lytham St Anne's. His family has banked with the Bank (or its predecessors) for many years at its local branch. In 1991 Mrs Kay Gill (then Ms Wainwright but I shall refer to her in this judgment as Mrs Gill) became the branch manager, in 1995 the Commercial Manager and then, in 2005, the Senior Commercial Manager looking after a specific portfolio of business customers including Mr Rowley. By May 2005 she knew him well both in a business sense and socially. Mr Green is a residential lettings agent. But in 2001 he joined forces in partnership with Mr Rowley to make the occasional property purchase.

The Central Beach Loan

6. In June 2004 Green & Rowley decided to buy and develop a property at 4 Central Beach and on 18 June they took out from the Bank a loan for the full purchase price of £480,000 on an interest-only basis at 1.5% above base, repayable on 30 June 2005, although it was always intended that it would be "rolled-over" into a further loan at that stage. In fact it was replaced by a similar loan but for an increased sum of £570,000 on 18 October 2004 and repayable on 30 September 2005. The amount due was reduced by a payment of £100,000 in mid-2005 so that thereafter the principal sum due was £470,000. On 18 January 2006 this was converted into a 15 year repayment loan but on 11 October 2006 it was converted into interest-only, but now repayable/to be reviewed in September 2007. On 1 November 2007 this was rolled-over until 30 September 2008 and then on 15 October 2008 it was rolled-over to 31 March 2009 but now with an increased margin of 1.85%. But on 16 January 2009 and after Green & Rowley complained about the margin rise at some point and the intervention with the Bank of Mrs Gill, the margin went back to 1.5%. By successive agreements in 2009 the debt was continually rolled over until it was due on 31 December 2009. Thereafter it has been rolled-over on the same terms but without any new written facility in place.

The Henry Street Loan

7. On 20 December 2004 the Bank lent a further £990,000 to Green & Rowley in order to purchase properties at Henry Street and Clifton Square. This was on a repayment basis over 15 years at 1.5% above base with the first year being a "holiday" in relation to the capital repayment element. This loan was secured by an "all monies" charge over the properties purchased as well as Central Beach and some other properties. On 18 January 2006 this loan was varied slightly and then on 11 October 2006 it was changed to an interest-only loan to be repaid/reviewed in September 2007. Thereafter it was rolled over at regular intervals, much as the Central Beach Loan was with the last formal repayment date being 31 December 2009.

Margin History

8. Green & Rowley had certain other loans as well but in respect of all their borrowings from the Bank the margin was always 1.5% apart from a brief period in late 2008 when it rose to 1.85% as noted above. There was a later attempt by the Bank to raise the margin to 4% but following complaints by Green & Rowley this was not done (see below).

Swap History

9. As noted above, the Swap was incepted on 25 May 2005 following a meeting which took place on 19 May 2005 ("the Meeting") between Mr Green, Mr Rowley Mrs Gill and Mrs Karen Holdsworth who at the time was an Area Manager specialising in the arrangement of interest rate management products like the Swap. It is common ground that information was provided

to Green & Rowley at this meeting about the Swap and other interest rate protection products known as "caps" and "collars". It is also common ground that prior to the meeting there had been some contact between Mrs Gill and at least Mr Rowley following her approach to him inviting him (at least) to consider taking one of these products. By the end of the Meeting, Green & Rowley were disposed towards taking the Swap although they did not commit themselves then.

10. After Mr Rowley verbally agreed to take the Swap on 25 May 2005 he was faxed a letter bearing the same date ("the Terms Letter") which purported to (and did according to Mrs Holdsworth) enclose the Bank's terms of business for such instruments. The letter was signed and returned by Mr Rowley. Shortly afterwards the trade was undertaken. On 26 May 2005 Green & Rowley signed a further faxed document called a "post-trade acknowledgment" ("the Customer PTA"). This set out the core terms of the Swap and stated that the transaction excluded Bank lending margin. Finally Green & Rowley signed the full written contract for the Swap dated 25 May 2005 ("the Swap Contract").

11. Clause 7 of the Swap Contract deals with early termination. It sets out a formula according to which, upon termination, Green & Rowley would either pay or be paid a sum of money. In very broad terms if at the time of termination the Bank was "in the money" under the Swap (because interest was below the strike rate) so that it would have wished to keep it open and earn further monies assuming favourable market conditions, Green & Rowley would be paying a cost (referred to in this case as "the Break Cost"). On the other hand if the Bank was out of the money on the Swap (because interest was above the strike rate), there would be monies payable to Green & Rowley. The calculation formula took into account prevailing market conditions. Either Green & Rowley or the Bank could terminate the Swap voluntarily but the termination formula would then apply.

12. I have noted above that Green & Rowley were net payees under the Swap until October 2008 and in this period they in fact took out two other swaps in respect of other lending with a further swap taken by Mr Rowley in respect of the Lindum, the family hotel.

The Start of the Dispute

13. In early 2009 Green & Rowley wished to restructure their partnership with Mr Green taking most of the properties and with them, most of the debt. This meant revising the Swap. See the first six sentences of paragraph 26 of Mr Rowley's witness statement ("WS"). When they enquired as to the cost of terminating the Swap early they were shocked to learn that it was as much as £138,650. Mrs Gill was surprised as well. Of course that cost is at least in part a reflection of the very significant drop in base rate from the fixed rate of the Swap, whereby it was very much "in the money" from the Bank's point of view, with 6 years still to run. In addition, they were struggling somewhat with servicing the loans and the Swap. In Autumn 2009 on review of the loans the Bank stated that it wished to charge a margin of 4%. Obviously in the original 15 year loans, the margin was fixed but when they started to be reviewed annually, technically there would have to be agreement on the new terms each time and so it was open to the Bank to propose a new margin.

14. Then in November 2009 there were two informal meetings between Green & Rowley and Mrs Gill who was sympathetic to their predicament. Unbeknown to her, they were recorded.

15. On 15 August 2011, Green & Rowley made a formal complaint to the Financial Ombudsman Service. By then, on 25 May 2011 a claim form had been issued (for limitation purposes) followed some time later by the Particulars of Claim. By the end of 2011 the Defence and

Reply had been served but at a hearing on 16 March 2012 it was clear that the claim needed to be significantly recast and the upshot was an Amended Particulars of Claim on 15 June 2012 which completely replaced the original, an Amended Defence on 6 July and an Amended Reply on 19 July. The main witness statements were served in late September or early October 2012 that is over 7 years since the principal events in question.

THE CLAIMS NOW MADE

16. As refined both before and during the trial, these may now be expressed as follows.

The Information Claims

17. This alleges that the Bank was guilty of negligent mis-statement at the Meeting and/or before it, in the following ways:

Break Costs

(1) Green & Rowley were told by Mrs Holdsworth and/or Mrs Gill that the costs of breaking the Swap were "modest" or "affordable" when they were not as the Bank knew or should have known. Alternatively if (as the Bank contends) it told them simply that if broken there could be a cost or a benefit depending on market conditions, it was a breach of the Bank's duty not to inform them further;

The Swap as Separate

(2) Green & Rowley were told that the Swap was separate from the loans but in truth there were two particular links: (a) the fact that any liability of Green & Rowley under the Swap was caught and secured by the "all monies" clause in the charge and (b) Green & Rowley could become liable to have the Swap terminated (and thus potentially pay the Break Costs) because of a default not under that agreement but under the loans due to the Swap's "cross-default clause"; this too amounted to a breach of duty;

Fixed Margin

(3) Green & Rowley were told that the Swap fixed not only the base rate but also the margin or alternatively were otherwise told that because of the new transaction the margin would be fixed for all time, when none of this was so;

Portability

(4) They were told that the Swap could be moved to a different lender along with the loans, if refinancing was done, when in practice this was not so or not likely to be so;

The Advice Claim

18. Here Green & Rowley allege that prior to and at the Meeting Mrs Gill and/or Mrs Holdsworth told them that the Swap was a good idea and that they should enter it, adding that the Bank would look favourably upon them in connection with further borrowing if they did. The Bank admits the last of these but denies that any advice properly so called and to which attached a duty of care, was given.

19. If given, Green & Rowley contend that there was a breach of duty because the Swap was not suitable for them since their clear requirement was for an instrument which would fix both the interest rate and margin when in fact the Swap merely fixed the former. The Bank denies any such breach.

Causation and relief sought

20. Generally, Green & Rowley contend that but for the Bank's breaches of duty they would never have entered the Swap and so claim the difference in cost to them of having it and not having it together with the cost of now breaking it. However, if they were to succeed on the Margin point alone they say their damages would be limited to the difference between what they would pay on the basis of a 1.5% margin and under any different and higher margin. Thus far, apart from very briefly in late 2008 no higher margin has in fact been imposed but if it were, between now and 2015 when the Swap ends, they would seek an indemnity for the difference. It necessarily follows that if they succeeded only on the principal argument under the Advice Claim (see paragraphs 18-19 above) their loss would be framed in the same way.

The Evidence

21. This is a highly fact-sensitive case because for the most part it turns on what was said or not said at the Meeting or in the period shortly before, over 7 years before witness statements were filed, themselves a few months before the trial. Even the first (informal) complaints were not made until 2009 some four years after the event. Green & Rowley have no notes or any other documents evidencing what was said at the time to them by Mrs Gill and Mrs Holdsworth. For their part Mrs Gill has no notes but Mrs Holdsworth does: manuscript diagrams and figures used for illustrative purposes at the Meeting and more importantly a typed note made no later than July 2005 from the manuscript note she took at the Meeting setting out what was said, or at least part of what was said ("the Note"). That is therefore an important piece of contemporaneous evidence. There is no reason to suppose that Mrs Holdsworth did not transcribe accurately from her original written notes and indeed this was not suggested to her. There were of course other documents made contemporaneously but they were the suite of documents signed by Green & Rowley together with some internal notes of the terms of the Swap which are not in doubt.

22. I heard from both Mr Rowley and Mr Green. The state of Mr Green's written evidence was somewhat unsatisfactory in that he did not produce a full WS but dealt only with certain matters while otherwise expressing agreement with Mr Rowley's WS. In fact it became clear in the course of his evidence that in some respects he purported to have a greater recall of matters than Mr Rowley and also differed in some respects from his evidence as set out in his WS. As will appear below their evidence was not always consistent with each other on significant matters or internally, nor was it always plausible. While I think that both were doing their best to help the Court, their evidence has been hampered by the lengthy lapse of time since the events in question and the absence of any documents to help them, and the fact that they have probably by now persuaded themselves that the Bank is to blame on a variety of fronts so that they have become convinced that something was said when it may not have been. They are, unfortunately, in the position that many banking customers found themselves in the wake of the catastrophic failures of the banking system in 2008 and beyond.

23. For the Bank I heard from Mrs Holdsworth and Mrs Gill. Mrs Holdsworth was an impressive witness. She struck me as honest, careful and reliable with a clear understanding of how she structured her meetings where instruments such as the Swap were explained to customers such as Green & Rowley. And she has the benefit of her note. Mrs Gill is in a difficult position. She is a senior employee of the Bank but also was friendly with Mr Rowley and then Mr Green also. That friendship soured when she discovered that they had covertly recorded her conversations with them in November 2009. She was also shocked at the events of 2008 and their impact on customers like them. She was equally shocked when the Bank sought to increase the margin to 4% in 2009 which she never imagined would happen. She was a patently honest witness though not always as reliable as Mrs Holdsworth. Her evidence was sometimes

inconsistent or unclear although on the other hand she often made concessions, sometimes almost too many when it seemed to me that she became somewhat suggestible. Where she really could not recall something, she said so. I am sure that she was doing her best to assist.

24. Although I shall examine the evidence on each issue in detail below, for the reasons given above, where there was a true conflict of evidence as to what was said at the time, I generally prefer the evidence of the Bank to that of Green & Rowley.

25. I should add that there is also a WS from an accountant, Andrew Seed, for Green & Rowley dealing with some aspects of loss. The mathematics of that statement are agreed and otherwise it is not necessary for me to refer to it at this stage.

THE FACTS

Introduction

26. It is appropriate to make the relevant findings of fact first before considering the various claims.

Before the Meeting

27. Mr Rowley said that there were various conversations with Mrs Gill before the Meeting, one of which was at an earlier meeting. Although paragraph 3 of the Amended Particulars of Claim stated that this meeting involved Mr Green as well, this was not maintained in Mr Rowley's WS. For his part Mr Green said that there might well have been an early meeting involving him as well but accepted that generally his understanding of what Mrs Gill had been saying came from Mr Rowley.

28. It is common ground that the conversations were initiated by Mrs Gill. She had been concerned about Green & Rowley's ability to service the two loans referred to above for some time because she thought that interest rates might rise and thought that they should consider an interest rate protection product. She was not a specialist in such products - Mrs Holdsworth was - and thought that they should meet her to consider this further. She saw it as being in the interests of both parties that Green & Rowley should fix their base rate commitment in some way. She told Mr Rowley about the protection that could be given so as to fix base rates. She accepts that she would have told Mr Rowley that the Bank would look favourably on further borrowing if they took such a product although both Mr Rowley and Mr Green accepted that this was not said as any kind of condition or requirement for further borrowing and indeed Mr Rowley agreed that the Bank had previously said that it would contemplate further borrowing. She also accepted that she said that it was a good idea for them to learn about such a product and to take one. Mr Rowley for his part accepted that while Mrs Gill made some kind of recommendation at this early stage it was all preliminary to a meeting where they would learn from Mrs Holdsworth about the features of such products, how they worked and their benefits. Any recommendation was at best provisional therefore. The key thing would be the Meeting itself. Mr Green similarly wanted to hear what Mrs Gill said about such products directly (at the Meeting) and was interested to hear what the specialist said. He added that at the time both of them expected both loans to be in effect for 15 years ie long term and indeed were interested in further borrowings in order to acquire further properties. At this time, of course the property market was buoyant.

The Meeting of 19 May 2005

Background

29. Some background points need to be made first. Between 2002 and 2005 Mrs Holdsworth sold at least 50 interest rate derivatives for terms of between 3 and 15 years. The Bank's policy at the time was that customers with borrowings of over £500,000 (such as Green & Rowley) would be introduced by their manager to a specialist such as Mrs Holdsworth. The sale of a swap product would generate income for the relevant department – Global Banking and Markets ("GBM") – and the sale would also be recognised in the relevant commercial lending department which had made the introduction. If particular targets were met, managers such as Mrs Gill would receive incentives in the form of shopping vouchers. Mrs Holdsworth would also be paid a discretionary bonus reflecting the performance of her unit overall. Typically this would be in the sum of around £30,000 though in one particular year it was £60,000. It is hard to relate this to her basic earnings since they were not explored in evidence. In general terms she said, unsurprisingly, that she would try to maximise profits for the Bank if she could. But having heard both Mrs Holdsworth and Mrs Gill give evidence I should make it clear that I reject any suggestion (not in fact at the forefront of Mr Virgo's arguments) that because of such matters they deliberately "spun" the benefits of the products, or misled Green & Rowley about them or put pressure on them. Both Mr Rowley and Mr Green at various stages in their WS's suggested that they had been pressurised but in evidence they were less firm about that and in truth I do not believe that they were.

30. Mrs Holdsworth received no formal training in the workings of products like swaps, for example in the form of manuals or dedicated courses, but she did shadow a work colleague in this area for six months where they would meet with customers about 3 or 4 times a week. Once this had been completed, she was approved to sell the products but was then shadowed in turn by someone else for at least two months to make sure she was doing the right thing. So by 2005, she had considerable experience of selling products. She said that she had her own way of structuring meetings with customers which she was very clear about and I am sure that she was. Some of those standard features were as follows. She would say that she was not there to give advice about the products. Her training enabled her to appreciate the difference between giving information and advice, which she observed. She would inform customers about break costs by saying that if the swap was terminated early there could be a cost or a benefit to the customer depending on market conditions at the time. But she would not say much more and in that sense reflected what was said in the booklet (see below). If a customer asked her how much the costs could be she would say that she did not know. If they wanted an illustration of costs she would have to give an example to her technical associates who would then come back with a figure. But it was rare for her to seek illustrative figures and indeed customers did not usually ask for costs figures. That is not implausible. Many customers hedging long term loans may not foresee any real likelihood that the swap would be broken. And at the end of the meeting she would give to the customer a booklet describing the products' features. She would leave it until then because she did not want the customer to be distracted while she was going through the options. If she was asked about the scale of any break costs she would not say that such costs were nothing to worry about because she would not know. As for Mrs Gill, she would very much leave it to a specialist like Mrs Holdsworth to explain the products. As for the margin charged by the Bank at that time she could not conceive of it rising or more correctly, the Bank seeking to increase it where it was entitled to do so, for example when providing the terms for the rescheduling of an existing loan on review, or for a new loan.

Mrs Holdsworth's Note

31. The typed version of the Note said as follows:

"Paul Rowley and John Green

Co - Paul Rowley, Director
John Green, Director
Bank - Karen Holdsworth (RM)
Meeting May 2005 at the Lindum Hotel, St Anne's
Meeting arranged by KW to discuss interest rate hedging. PR and JG have a property portfolio and borrowing is in the region of £1.5m to be repaid over 15 years. KH discussed Caps, Collars and Swaps and left the Interest Rate booklet to provide confirmation. Explained that as the IRD was separate to the borrowing that we could look at protecting a proportion of the debt and for a shorter period of time to suit their requirements. Breakage costs covered and they both agreed that the debt likely increase rather than decrease.
They both had a view that rates would come down in the short term and then rise so were very keen to hedge at current market rates. PR had a preference to do some on Cap and some on the Collar but JG felt that achieving a fixed rate for 10 years less than 5.00% was a better deal as they didn't have to pay an upfront premium cost.
PR and JG definitely going to hedge they would get in touch when had decided on how much and for how long.
(Post-meeting)
PR rang KH 25 May and advised that they wanted to go with a swap rate for 10 years on £1.5m bullet amount. KH advised the rate was 4.85%.
PR spoke with JG and came back and asked KH if we could reduce the rate KH advised rate would now be 4.83% - PR confirmed he wanted to put the deal in place.
Interest Rate Swap in place 25 May £1.5m bullet for 10 years at 4.83%.
Transaction suitable as they didn't really want to pay a premium and they were looking for a fixed rate for 10 years less than 5.00%."

General Matters

32. Mrs Holdsworth's manuscript notes from which this note was made were destroyed afterwards. I have no reason to doubt that, nor that this was an accurate transcription of what the original notes said. Mrs Holdsworth also denied that she had altered the note subsequently when at the end of 2005 she transferred the note from her laptop to her work computer. There was no reason then why she should have done and I accept her evidence here which in any event is supported by the identity between the versions on each computer.

33. Mrs Holdsworth said that the Note accurately represented what she said at the Meeting and there is no reason to doubt that (I put to one side for the moment <u>other</u> things which she is alleged to have said.) The reference to Green & Rowley's views on interest rates is I think a little incomplete. Mr Rowley said that he did think it was a reasonable view that interest rates were likely to go down and then up but that this view had come from Mrs Gill initially. That would make sense given her concerns over interest rates and it was the Bank's view at the time. But not much turns on this point.

34. It is now common ground that a description of the total borrowing of £1.5m being for 15 years was fair in the circumstances because at the time the Central Beach Loan was expected to be rescheduled, either once or successively but so that the borrowing remained in place long term. Equally it is common ground that a swap period of 10 years would make sense, and would have come from Green & Rowley, because their view at the time, in a buoyant market was that in ten years they would sell or refinance the properties so that there would be no need to lock themselves into a swap for 15 years. Equally they agreed that they would have indicated that their debt was likely to increase rather than decrease essentially because of the desire to acquire more properties.

35. While Mr Rowley could not really recall, it must have been the case that Mrs Holdsworth did indeed go through the differing cap, collar and swap products because they all offered base rate protection in different ways and it was her standard practice. Her (retained) manuscript notes showing diagrams and sample figures and rates for swaps, caps and collars show this to be so. See 2/152-157. The cap was, as the name suggests, a product which effectively limited the maximum amount of interest which the borrower would pay while allowing him to take full advantage of a drop in interest rates as applied to his loan. The collar offered the same upward

protection and a certain amount of downward leeway but only to a particular point. If interest rates fell below that point the borrower had to pay out and this meant that in effect he no longer could take advantage of lower interest rates. In the examples given by Mrs Holdsworth there was a premium for this product also but less than the cap since it gave less overall protection.

36. Up until then the most popular product she sold was the swap with caps and collars amounting to around 30% of sales. One reason might have been because there was no upfront premium for the swap whereas there were for caps and collars.

37. By the end of the meeting at least according to Mr Green, they were almost sure they would take one of the products. I have already said that I do not believe they were pressurised in any way. Nor do I believe that either of them was confused in particular about the swap or how it worked despite an occasional suggestion in their evidence to the contrary. They are both intelligent and experienced businessmen albeit not previously versed in swaps but this particular swap was very straightforward and they would have had no difficulty in understanding it, or if they did they would have asked. At one stage in his evidence Mr Rowley articulated the complaint that while he understood how the Swap worked and that if interest rates fell below the fixed swap rate, Green & Rowley at that point would have been better off if there was no Swap, just paying a low rate of interest on the loans, he was not told quite how much they would be paying under the Swap. He said he should have been warned about that. However this is no part of their claim, nor could it be, as it is simply a feature of the Swap being in this sense a fixed rate product.

38. There was some dispute about the length of the Meeting. Green & Rowley suggest only around 30 minutes at best whereas Mrs Holdsworth says that it would normally be up to 1.5 hours and that her electronic diary entry showing a marking for 30 minutes was not indicative of how long it was expected to take but rather the set period for a reminder. She said that on any view it would not be less then 45 mins. I am prepared to proceed on the basis that it took at least 45 minutes. In reality not much turns on this.

Separate Transaction

39. The Swap was described as separate to the loans in the sense referred to at the beginning of the Note. See paragraph 31 above.

Breakage Costs

40. This is the first major factual dispute. Both Mr Rowley and Mr Green allege that at the meeting Mrs Holdsworth told them not merely that if they broke the Swap early there could either be a cost or a benefit (as Mrs Holdsworth alleges) but also volunteered that the costs would be "affordable" or "minimal" or adjectives of that kind. She denies this. Mrs Gill has no recollection of saying anything of that kind either, which in truth was the province of Mrs Holdsworth anyway. Neither Mrs Holdsworth nor Mrs Gill had any direct experience before then of the early termination of a swap with break costs being paid and so neither knew what costs would be involved. The only sure way would be to put an example to the traders. Mr Virgo says that it is inherently more likely that this assurance was given since if not, a customer would ask. Mr Green says that if he had received the booklet at the end of the meeting (which he denies) and had not been told they were modest he would have asked about it. On the other hand Mrs Holdsworth's evidence was that in fact few customers ever asked more about the break costs and that is perhaps understandable because they may well not anticipate breaking a swap – and that is particularly true here where Green & Rowley were confident that they would need the swap for ten years. And indeed, the immediate cause of seeking the cost of breaking the Swap years later, in 2009 was their desire then to restructure the partnership such that Mr

Green would take most of the assets and most of the debt which meant doing something with the Swap. That was not on their horizon in 2005. The fact that Mrs Gill and Mrs Holdsworth did not realise how much the break costs could be in the post-2008 low interest rate era does not mean that they would have positively said they would be modest. To say that, especially given Mrs Holdsworth's experience with selling the product and her standard procedure would have been reckless and I do not regard Mrs Holdsworth as the kind of person who would do so. I have already referred above to her positive qualities as a witness. Nor do I consider that this was a "hard sell" such as would make her disposed to say whatever she thought might persuade them to buy even if she could not be sure it was true. I accept that both Mr Rowley and Mr Green were fairly emphatic about this allegation but their memories are not infallible. For example Mr Green was fairly sure that the Bank's subsequent margin raise of 1.85% was a mistake and that he did not gain this understanding from the various facility letters he signed – but that cannot be right. See paragraph 65 below. Equally Mr Rowley could not recall being shown examples of the cap and collar but he obviously was. In my judgment Green & Rowley are wrong about this. I have no doubt that when break costs figures were put to them years later it came as a surprise but I think that they have by now persuaded themselves that – along with its other failings - the Bank misled them here when in fact it did not do so.

41. I am fortified in this conclusion by the fact that when they sought break cost figures for the first time in January/February 2009 (and see the internal Bank emails reflecting this at 2/224-232), they made no complaint that this was contrary to an assurance that they would be low. Equally by the time Mrs Gill was reporting internally to the Bank in October about the matters raised by Green & Rowley the complaint they were making concerned the Margin issue and not break costs. Even more significantly they did not raise such costs by way of complaint in their meetings with Mrs Gill in October and November 2009. See paragraphs 71 -77 below. In answer to that Mr Rowley said in evidence that this complaint only came later when they had looked at all the circumstances of the Swap sale and uncovered a "can of worms" but that does not make sense here. No investigation was needed for Green & Rowley to have recalled at an early stage once they ascertained the Break Costs, that they had been told they would be minimal. Mr Green said that they did not complain about being misled over break costs in 2009 because they felt that if they did, the Bank would foreclose. But if that was right (and it was not put to the Bank's witnesses) it would apply to the margin question about which they did complain. So I do not see this as a plausible explanation for not complaining of break costs then.

Fixing the Margin

42. It is common ground that the Swap cannot itself fix the margin applied to any given loan as opposed to the (variable) base rate. Where there is a long term loan such as the Henry Street Loan payable at (here) 1.5% above base, the margin is fixed in any event – as a matter of contract between the parties. The scope for movement comes (as it did here) only if the loan is rescheduled so that in effect a new loan agreement has to be made. In that event it would be open to the Bank to propose a different margin as a matter of negotiation or – in an extreme case – insist on the new margin otherwise no new loan would be given. The latter is what the Bank in effect did when raising the margin to 1.85% briefly at the end of 2008 and when proposing a new margin of 4% in 2009 though ultimately it drew back. Margins were therefore not within Mrs Holdsworth's province because the products she was dealing with did not and could not legislate for that. However, as Mrs Gill made very clear, as at May 2005 the margin applied by the Bank had consistently been 1.5% for as long as she could recall and she could not imagine that it would change in respect of any new loan agreements. That view made sense at the time not only because it was correct, historically, but also because if the Bank set a higher margin, it could well lose business to other banks who kept it at 1.5%.

43. The essential factual dispute, as it became clear in the course of evidence, was this: Green & Rowley allege that they were told that by entering into the Swap they would be effectively fixing not only the base rate payable (which was true) but also the margin (which was not). In particular, Mr Rowley said that Mrs Gill stated both before and at the Meeting that the Swap would fix both base rate and margin. Mr Green said that Mrs Gill stated this at the meeting and Mrs Holdsworth sat there and did not correct her. Indeed he said that he sought clarification to be 100% sure that the Swap would fix both base rate and margin for 10 years and she said it did.

44. On the other hand Mrs Gill accepts that at the Meeting or on some other occasion she was asked what the position was about the Margin. She accepts that she would have told them that she did not expect it to increase in the future and so they would have understood that it would not rise – unsurprisingly because that was her clear view at the time. Which is why she was shocked when an increase was proposed in late 2008 and thereafter. She readily accepted in evidence that Green & Rowley would have come away from the Meeting thinking that their position now was that both the margin and the base rate position were now fixed. But equally she insisted that she never said that the Swap affected anything other than base rate. This version of events was put to Mr Green and Mr Rowley but they denied it.

45. In my judgment, Mrs Gill's evidence is clearly correct on this point. First, if Mrs Gill had even suggested that the Swap itself fixed the margin the person entrusted with its sale, Mrs Holdsworth, would have been bound to intervene and correct this fundamentally mistaken view of it. The notion that in this event Mrs Holdsworth would simply have sat there is wholly implausible. Second, Mrs Gill's account is inherently likely. Mrs Holdsworth dealt with the Swap and Mrs Gill would deal with any questions concerning the existing loan agreements. Indeed as far as the Henry Street Loan was concerned at that time the margin was already fixed as a matter of contract. I have considered whether Mrs Gill in her evidence here was trying to be too clever, knowingly distancing herself from anything to do with the attributes of the Swap, but that simply does not square with the tenor of her evidence and indeed the way she answered questions on the point which came across as totally honest, including her sympathy for the position Green & Rowley now found themselves in and her view that the Bank should have accommodated them more, a view she expressed when dealing with the proposed margin increases in 2008 and 2009. From Green & Rowley's point of view to find that the particular allegation made is incorrect is not to say they made it up. Even on Mrs Gill's account their view of the position as a whole would have been that their interest liabilities as a whole were now or would be fixed. What has happened is that they have conflated what Mrs Gill told them at some stage about margins staying the same and what they were told about the Swap itself. That may appear to be a subtle difference but it is an important one, as will be seen later.

Portability

46. Mrs Holdsworth accepts that at the Meeting she would have told Green & Rowley that the Swap was "portable" in other words it could be taken on by a different bank if for example the underlying loan was moved, provided that such bank took derivatives in principle.

Giving of advice

47. Whether advice was given to which there attached a duty of care is a mixed question of law and fact. As to the facts, Mrs Holdsworth said that while she explained the products she did not give advice about them for example advising that the Swap was a product which Green & Rowley should take or which was suitable for them. Mr Rowley's evidence on this was not very clear. At first he said that Mrs Gill agreed with Mrs Holdsworth that entering the Swap was "the right thing to do" but then said that he could not recall Mrs Holdsworth saying it was

the right thing or recommending it. Then he said that Mrs Gill nodded and expressed that it was the right thing. Mr Green said that they were advised by both of them to take it, that both were pushing and promoting it although he then said that the one who advised it "verbally" was Mrs Gill. Mrs Holdsworth on the other hand said at the outset that she was not there to advise, consistent with her general practice. Mrs Gill said that to say she advised did not "sit comfortably" with her and did not think she used the word "advice" though could not rule it out. Nor did she recall Mrs Holdsworth giving advice; she would have said that Mrs Holdsworth was there to explain the different products as the specialist. When the issue of the Swap arose with Green & Rowley initially in January 2009, Mrs Gill was clearly of the view that she had not advised them. See her email of 16 January referred to in paragraph 69 below.

48. Mr Virgo contends that for the purpose of considering whether advice was given it is enough if the product in question was recommended. See in this regard paragraphs 80 – 81 of the decision of Judge Havelock-Allan QC in *Rubenstein v HSBC Bank Plc* [2011] EWHC 2304 (supra). I agree but I am not satisfied that any recommendation or advice for the Swap was given at the Meeting. The fact that the relative advantages and disadvantages between the Swap, cap and collar were discussed by reference to their features does not mean that the Swap was recommended. Nor does the fact that Mrs Gill herself felt that they should take it because she felt it was in the interests of them and the Bank. Whatever she had said before the meeting, my very clear impression of her evidence and that of Mrs Holdsworth about the meeting itself is that the person in charge of speaking about the products on offer was Mrs Holdsworth not Mrs Gill. Equally the fact that (of course) she would prefer to make a sale rather than not, does not mean that she gave advice or a recommendation about it.

49. The last sentence of Mrs Holdsworth's typed note refers to the transaction being "suitable". See paragraph 31 above. And in the Bank PTA of 25 May 2005 there is a reference to the confirmation of trade suitability. But as Mrs Holdsworth explained what this meant was that the Swap met their requirements – in other words as an interest rate protection product this particular one was suitable because it had no premium and gave them the desired fixed rate for the period concerned at under 5%. This does not mean that advice had to have been given at the meeting.

50. In reaching this conclusion I have taken into account what was said by Mrs Gill in her notes of October 2009 and by the parties at the November meetings, considered in paragraphs 71 - 77 below.

The Brochure

51. Green & Rowley say that they did not receive a copy of the Brochure (booklet) at the end of the Meeting. It would have been in their files if they had. But there is no reason to suppose that Mrs Holdsworth would not have followed her usual practice of providing it. Indeed she described in her evidence how she would physically hand it over saying that this was a confirmation "of our discussions today" showing the three different products and explaining their features and benefits, as a reference for them, and drawing their attention to the terms at the back. I can see no reason why she should not have followed her usual practice here. In the years which followed the trade, it is quite possible that it was no longer retained by Green & Rowley and that they have forgotten this. Accordingly I find that they were given the Brochure.

52. In that part of the Brochure dealing with swaps it stated the following among other things:

> "**Can be reversed at a future date.** An interest rate swap can be unwound at the prevailing market rates to reflect changes either to the hedging strategy or underlying borrowing structure. Although this might

result in either a cost or a benefit, a customer can nevertheless switch from floating rate to fixed rate debt and back again depending on its views on interest rate movements.

Potential Breakage Costs
Additional costs may be incurred in the event that the customer wishes to come out of this arrangement. This could be the case where for example the underlying borrowing is repaid early or rescheduled. We will be pleased to provide examples of potential costs."

53. The Notes at the back of the Brochure included the following:

> "1. The transaction terms that are finally agreed between us verbally are legally binding contract terms. Following execution of the trade you will be required to sign legal documentation to confirm those terms…
>
> 9. [1] You are acting for your own account, and will make an independent evaluation of the transactions described and their associated risks and seek independent financial advice if unclear about any aspect of the transaction or risks associated with it [2] and you place no reliance on us for advice or recommendations of any sort."

54. Green & Rowley would have seen these parts of the Brochure had they read it.

Eventual terms

55. It is common ground that on 24 May Mr Rowley was informed by Mrs Gill that the 5 year swap rates might come down the following day (information given to her by Mrs Holdsworth) and Mr Rowley said that they definitely wanted to sort something out and it had to be done before he went on holiday on 31 May. Green & Rowley were offered an initial fixed rate for the Swap of 4.85% but the Bank then agreed to reduce it slightly to 4.83%. This was in place by early on the morning of 25 May. As noted above, there then followed the sending to Mr Rowley by fax the Terms Letter.

The Terms Letter

56. The whole purpose of the Terms Letter was to have a record of the customer's positive assent to the Bank's terms of business in relation to a particular trade, before that trade was incepted. Thus the action to be taken under the letter is to read carefully and review the enclosed terms, and the customer is reminded that by signing the letter they would be agreeing to be bound by those terms and declared that they had read and understood the warning in Schedule 1 to the terms. These declarations are immediately above the signature space. See 2/167. The factual issue here is whether the Terms were enclosed with the letter which was itself sent by fax. Mr Rowley, who received the letter (bearing Mrs Holdsworth's signature) by fax, says not. If not, he signed his agreement to the terms without knowing what they were. Mr Rowley agrees and said that while he appreciated the consequences of signing the letter he was careless and did so in the absence of any terms. He claims that he can recall many years later that he did not receive them. Mrs Holdsworth on the other hand said that she did send them. She was not allowed to close a deal without them being sent. Here the letter and terms were faxed because Mr Rowley wanted the trade done quickly and was going off on holiday. The terms were contained in a booklet which would normally accompany the letter in the post. But the terms were also available in A4 sheets in pdf format (which is the version at 2/168-179) so they could be easily faxed. And the Bank's file contains such pdf sheets, which suggests that they were taken off the system for faxing, there being no other reason to do this since they were readily available in booklet form. In the light of all of that I find that the terms were indeed sent. In the time that passed since 2005, Mr Rowley may well have mislaid and forgotten about them.

57. Paragraph 3.2 of the Terms stated that the Bank will provide the customer with dealing services on an execution-only basis in respect of the products sold. Paragraph 3.3 states that the Bank

will not provide the customer with advice on the merits of a particular transaction. These Terms are generic and do not set out particular terms applicable to the Swap.

58. On any view the Swap itself was incepted shortly after the Bank received back the signed Terms Letter.

The Customer PTA

59. Although post-contractual (just) this document, signed by Green & Rowley on 26 May is of some evidential significance. Its purpose is to obtain their signed confirmation of the economic terms of the trade as set out in the table contained in the PTA. This gives the period and dates of the Swap along with the notional amount and rate. Underneath it are the words:

> "The above transaction excludes Bank lending margin."

60. This puts it beyond doubt that the Swap is not concerned with (and therefore could not be fixing) the Margin. Mr Green accepted that he read that particular passage, that it reflected his understanding of matters and that he would not have signed this document unless he agreed with it. But he said this sentence did not concern him because he had been told that the rate including the margin had been fixed. I do not wholly follow this because this written passage runs completely counter to the notion that the Swap fixed the Margin. Mr Rowley gave evidence to similar effect.

61. Paragraph 9 of the Notes to the Customer PTA states that the customer is acting for their own account and will seek independent financial advice if unclear about any aspect of the transaction or associated risks and places no reliance on the Bank for advice or recommendations of any sort.

The Swap Contract

62. This was sent to Green & Rowley by fax for signature on 26 May. It contained the detailed terms of the Swap including the cross-default clause at clause 4 (f). Clause 8 is headed "Representations and Warranties". By the sub-clauses the Counterparty was deemed to warrant and represent to the Bank on the trade date that:

> "(e) In entering into this Agreement it is not relying upon the Bank in relation to any advice or forecast or estimate of future trends in relation to interest rates or otherwise..
>
> (g) It is capable of assessing the merits of and understanding ..and understands and accepts the terms conditions and risks of this Agreement"..

63. Clause 11 provided that the Agreement could not be transferred without the prior written consent of the other party.

64. Mr Rowley said that he signed the Contract after "glancing through it".

The change of margin to 1.85%

65. In October 2008 Green & Rowley signed a number of written agreements which increased the margin to 1.85% including in respect of the loans at issue here. Mr Rowley accepted that he signed these agreements without complaint on the basis that it was a small change. Mr Green says that he signed the agreements without reading them simply because they were presented to them by Mrs Gill who said it was time to review them. The 1.85% was just "buried" in the agreements. That in fact is not so if one looks at them. The interest rate is very clearly stated. Mr Green said that he only discovered the increased rate when he saw that the December interest payment had gone up slightly and he enquired why. Indeed his evidence is that he thinks the Bank had mistakenly increased the rate. He says that his recollection of this is "totally different" from Mr Rowley's. Mrs Gill's recollection is that when she presented these

agreements to Green & Rowley for signature she specifically explained the margin increase which she felt bad about. When the documents were put to Mr Green in cross-examination he made no comment as to whether he was still saying that the Bank was mistaken but maintained that he had no idea of a rate increase then because he did not read them because he trusted Mrs Gill. I have to say that I found this part of his evidence completely implausible and I am sure that matters transpired as Mrs Gill said.

66. But what is common ground is that at some point before January 2009 Green & Rowley complained about the margin and it was reduced back to 1.5%.

Interest Rates

67. Between October 2008 and March 2009 base rate dropped steadily from 5% down to 0.5% and accordingly Green & Rowley became net payers under the Swap in significant amounts.

Seeking break costs in early 2009

68. I have dealt with this in paragraph 13 above. The context is well illustrated by Mrs Gill's email to Mr Dudley of 16 January 2009:

> "They have lost quite a few tenants and are really struggling to cover the interest,…the additional burden of the swaps is really killing them right now…..They feel I have badly advised them and really want to come out of all the swaps. I tried to tell them I didn't advise them that it was their decision, but they are having none of it and I feel absolutely gutted for them. I really do."

The 2009 version of the Brochure

69. This included a revised explanation of Breakage Costs which concluded thus:

> "Additional cost/value may occur for the company in the event that the customer wishes to come out of this arrangement. Any cost/value will be based on prevailing market conditions such as interest rates and market expectations of future interest rate changes. The cost/value could be substantial."

Proposed margin increase to 4%

70. When this was proposed in around October 2009 Green & Rowley did object and in the end the Bank did not seek to incorporate it. The last formal agreements ran until 31 December 2009.

Mrs Gill's documents of 14 and 15 October 2009

71. By now Mrs Gill had to apply internally to extend the loan facilities given to Green & Rowley. As a precursor to this she wrote a long email to David Dudley at GBM essentially in relation to the various swaps taken out by them and by Mr Rowley separately. It records that she met with them on 12 October. The issue which had by then arose was that she had intimated that to continue the loans beyond their expiry on 30 September the margin had to be increased (this would have been the proposed 4% margin ie an increase of 2.5%). She recited that because of this they felt that they had been mis-sold the Swap because they thought when taking it out that it fixed not only the base rate but Margin too and had been told that the Swap achieved this. She then says:

> "To be fair to them, I had been lending to these customers for many years at a margin of 1.5% and I had never in my experience had to negotiate this margin over the 1.5% and at that stage - could not envisage ever having to do so. But of course 12m or so ago - the world and the Banks changed and this is what they can not accept.
>
> I think they honestly thought the swap rate + 1.5% margin was the maximum they would ever have to pay until the swaps expired. I can not remember them ever asking me if the 1.5% would ever increase but if they had done - I would have said that I could not imagine it increasing, which was absolutely how I

> felt at the time. At the time..we were in competition with other lenders ..and if anything we were under pressure to reduce the margin and not increase it – so I do have much sympathy with them.
>
> I can see absolutely, that from an FM point of view - you will see the customer's argument is not with the swap rate or your bit of The Bank - but with my bit of the Bank trying to increase the margin. However, the customers are saying that had they known my margin was ever at risk of being increased they would never have signed up for the swaps. This is perhaps an issue I should have discussed with them before they agreed to swap - but above – I had no idea of ever knowing I would ever be put in a position of having to re-price my margin."

72. Mrs Gill then went on to suggest that the Bank might avoid possible litigation if it kept the margin at 1.5% - which in the event, it did.

73. The formal document seeking sanction for the continuation of the loans came from Mrs Gill the next day, 15 October 2009. She repeats her "reputational issues" with increasing the margin. She recounts that Green & Rowley were not complaining of mis-selling in respect of those swaps which related to repayment loans – because under term facilities the margin was fixed in any event. But their concern was that they thought that the same arrangement applied to interest only loans (which in fact were more susceptible to being granted on a short term basis only – as paragraphs 6 and 7 above show) and felt that this was not adequately explained to them at the time. She ended by saying that:

> "I feel very strongly that The Bank have made an enormous amount of money out of these people over the years. I feel they have not had good advice from us regarding the hedging and feel strongly that we need to keep our margins at 1.5% with no renewal fees. If we do not do this - there is, I feel a strong reputational risk to the Bank and one we can easily protect."

74. It is not actually clear to what the lack of good advice refers unless it was a failure to say that the margin was possibly at risk in the future. In evidence Mrs Gill could not really say what this was about.

The November 2009 Recorded Meetings

75. By November Green & Rowley had been told that their accounts were going to be moved to Manchester from the local branch in Lytham which meant losing Mrs Gill as their manager. They had two meetings with her, on 25 and 30 November (at Mr Rowley's home and at the Lindum Hotel) to discuss the way forward because by then, as noted above, they were under significant financial pressure bearing in mind their payments under the Swap and some downturn in rental income. They knew also that the Bank wished to increase the margin. This was not a formal bank meeting and indeed Mrs Gill was there essentially as a friend. That is clear from some unguarded remarks about certain other individuals at the Bank, which other bank and manager she would recommend if she moved and what the Bank's negotiating position would be in the event that they complained – and how they might complain most effectively. I have no doubt that Green & Rowley secretly recorded these meetings because they thought that what Mrs Gill might say might be useful to them afterwards in some way. I do not accept Mr Rowley's explanation that he wanted a recording so that he could listen carefully afterwards to make sure he understood what Mrs Gill was saying rather than having to ask her which would be embarrassing. They must have known that if they had asked her she would have refused her consent. One therefore needs to treat what was said at the meeting with a little circumspection because she was not attending in any formal way on behalf of the Bank and was trying to be accommodating to them – she was, after all, sympathetic to their general situation and wanted to bring about a resolution to the potential dispute with the bank if she could.

76. But what does stand out from the transcripts (much of which are concerned with other things like potential property sale) is that the essential complaint concerned the Margin. At p300E the point being made was that while the Swap was for 10 years margin could not in fact be guaranteed for 10 years if and to the extent that any of the borrowing was rescheduled because that was the point at which the Bank could seek to increase the margin. Mrs Gill (in line with her earlier notes) said that if she had been asked if the Bank would ever change its 1.5% margin she would have said no because it never had but now the world has changed. At some points what Green & Rowley seem to be saying is that they did not understand that the Bank could be in a position to seek a different margin because the loan facilities were (or became) short-term ones where they had to be renegotiated. That is a little difficult to follow because as at May 2005 the Central Beach Loan was such a facility – but Green & Rowley expected it to continue on the same terms. At one point Mrs Gill suggests how Green & Rowley might put their case to the Bank:

> "If I were you I would just find out what this guy can do, what his experience is and if he is going to do it on a no-win, no fee basis, because once they start, you know, if they start being difficult with you. The only thing is if you go in there and say well you know, I'm going to... I'm thinking of suing the bank, they'll, they'll just treat you badly because they don't want the bank to be sued, but if you go in there and be nice, and say we're going to work with you but we do feel we have actually been mis-sold these swaps for these reasons, erm it, they could well, it depends on the person, take your point of view on that, I am pretty sure, you know, to me it's quite black and white you were mis-sold it."

77. Again it is quite hard to understand Mrs Gill's reference to a mis-sale and once more, in evidence she could not really help. The only possible explanation might have been that it should have been spelled out that there was a theoretical risk that the margin could change in relation to any short-term facilities as opposed to the long term Henry Street Loan extant at the time of the Meeting. I consider the import of all of this below but I do not think it actually bears upon who said what at the Meeting about margin save that Mrs Gill in her evidence now accepts that at some point she was asked directly about whether the margin would change.

Attempts to move the loans and the Swap

78. In December 2009, February 2010 and again in late 2011 or early 2012 Green & Rowley approached other lenders with a view to transferring the loans to them. In each case they would not take them while the Swap (and thus Green & Rowley's commitment thereunder) was in place. As a consequence the loans have remained with the Bank.

THE COB RULES

79. It is common ground that at the time of the Swap the Bank actions in arranging it or advising upon it (which is contentious here) were governed by the then current COB Rules and Guidance. The relevant ones are as follows:

(1) **COB 2.1 - Clear, fair and not misleading communication**
Rule 2.1.3: When a firm communicates information to a customer, the firm must take reasonable steps to communicate in a way which is clear, fair and not misleading.

(2) **COB 2.5 – Exclusion of liability**
Rule 2.5.3: A firm must not, in any written or oral communication in connection with designated investment business, seek to exclude or restrict, or to rely on any exclusion or restriction of any duty or liability it may have to a customer .."

(3) **COB 5.2 – Know your customer**
Guidance 5.2.3
When a firm provides limited advice on investments to a private customer, the firm should not treat any resulting transaction as an execution-only one.

Rule 5.2.5

Before a firm gives a personal recommendation concerning a designated investment to a private customer, or acts as an investment manager for a private customer, it must take reasonable steps to ensure that it is in possession of sufficient personal and financial information about that customer relevant to the services that the firm has agreed to provide.

(4) **Requirement for suitability generally**
COB Rule 5.3.5
(1) A firm must take reasonable steps to ensure that, if in the course of designated investment business:
(a) it makes any personal recommendation to a private customer to:
(i) buy, sell, subscribe for… a designated investment
the advice on investments or transaction is suitable for the client.

(5) **Requirement for risk warnings**
COB Rule 5.4.3
A firm must not:
(1) make a personal recommendation of a transaction; or …
(3) arrange (bring about) or execute a deal in a ..derivative to or for a private customer unless it has taken reasonable steps to ensure that the private customer understands the nature of the risks involved.

80. In addition the then current FSA Glossary defined an "execution only" transaction as:

> "a transaction executed by a firm upon the specific instructions of a client where the firm does not give advice on investments relating to the merits of the transaction".

THE INFORMATION CLAIM: THE LAW

81. All aspects of this claim are founded on the common law duty to take reasonable care when making statements, which may be relied upon by the other party, that they are accurate. In this context Mr Virgo for Green & Rowley argues that assuming negligence and loss, a statement may be actionable if it amounts to a half-truth and is thus misleading. I have been referred to extracts from *Chitty* (in the context of misrepresentation claims) at 6-020, *Halsbury* (in the context of misrepresentation and fraud) at paragraph 749 and *Clerk and Lindsell* (in the context of deceit) at 18-07. The latter passages seem to be relevant notwithstanding the context of fraud because what is at issue is when a statement which is true in part is properly to be regarded as a mis-statement. It is clear from these passages that (a) the context in which the statement is made and understood is, as ever, important and (b) a statement true on its face will only be regarded as a mis-statement by reason of its failure to point out other matters comparatively rarely, and where it can clearly be seen that there was an implied mis-statement, or to put it another way, the statement made was obviously one-sided. To take one example, to say that there is an exclusion clause in respect of damage to beads and sequins when in truth the exclusion covered all liability was an actionable half-truth. See *Curtis v Chemical Cleaning* [1951] 1 KB 805. Usually the half-truth will be a deliberate attempt to lure the other party into believing he has been given appropriate disclosure but this need not always be the case.

82. A second point is that Mr Virgo contends that while there is no direct claim here for breach of any of the COB provisions under s150 of the 2000 Act the common-law duty of care under *Hedley Byrne* included the contents of Rules 2.1.3 and 5.4.3. For that proposition he relies on the decision of HHJ Jack QC (as he then was) in *Loosemore v Financial Concepts* [2001] LLR 235, followed by HHJ Havelock Allan QC in *Rubenstein* (supra). Both of these were cases where the bank's representative gave advice and the question was whether their undoubted duty of care in respect of that advice included some of the advisory provisions within the FIMBRA rules (the precursors to the COB Rules). At p241 of *Loosemore*, Judge Jack held that the skill and care to be expected of the representatives would ordinarily include compliance with such rules. In paragraph 87 of his judgment in *Rubenstein* Judge Havelock-Allan agreed and noted that it was not suggested that the representative was not negligent if he broke the COB Rules. So if the relevant relationship was an advisory one, it embraced the relevant COB requirements.

I follow that, but those cases do not support the proposition advanced here in the information as opposed to the advisory context. 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. In particular, as to Rule 2.1.3, insofar as it refers to a duty not to mislead, this is present in the common-law duty in any event but the duties to take reasonable steps to communicate clearly or fairly are or may be wider and concern matters other than the accuracy of what is said. To the extent that lack of clarity or unfairness in the statement rendered it a half-truth in the sense referred to above, it will be actionable in any event. 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 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 mis-state. Accordingly I reject the suggestion that either of these COB rules are encompassed within the *Hedley Byrne* duty and thus the Information Claim operates within relatively narrow confines.

THE INFORMATION CLAIM: ANALYSIS

Breakage Costs

83. In the light of my findings at paragraphs 40 - 41 above I reject the suggestion that there was any mis-statement about Breakage costs on the basis that it had been said (incorrectly) that they were modest or such-like. Nor do I consider that the language used by Mrs Holdsworth amounted to a half-truth.

84. In this context Mr Virgo referred me to *Lakeside Inns v Yorkshire Bank Plc* 26 January 2005. There the bank was found to have mis-represented the facility it was providing by describing it as a "cap and collar" when in fact it was not, because there was in truth no minimum rate. See paragraph 33 of the judgment of HHJ Maddocks. I do not see how that unsurprising decision, on those facts, assists me here.

85. Had COB Rules 2.1.3 and/or 5.4.3 been relevant to the duty not to mis-state (contrary to my conclusion at paragraph 82 above) I would still have found no breach. As to Rule 2.1.3, the explanation given by Mrs Holdsworth was not misleading nor unclear. Nor was it unfair. The fact that there could be a cost was given and illustrations were offered in the Brochure which I have found was given to Green & Rowley. And as to Rule 5.4.3, the explanation in my view satisfied the requirement that reasonable steps be taken to explain the nature of the risks involved in the Swap. Indeed the essential risk was the obvious one which Green & Rowley understood, namely that if interest rates fell, they would do worse, overall by having the Swap, than by not having it because they would be paying less without it. It was right to say something about the ancillary matter of Break Costs but what was said was sufficient. On the facts as I have found them to be, it was open to Green & Rowley to have asked either at or after the Meeting for detail of the costs but they did not do so.

86. The fact that in the changed world after 2008, the 2009 Brochure made a reference to a potential "substantial" cost/value if the Swap was broken does not mean that what was said before was inadequate by reference to COB. Mr Virgo suggested that the spectre of substantial break costs could arise not merely in the situation which occurred after 2008 but simply whenever there was a sharp and sustained dip in interest rates, perhaps after a significant and sustained rise which might then make the customer consider getting out of the Swap. Perhaps but one has to bear in mind what the initial Swap rate is – the question is not some dip after rates have risen significantly but a significant dip beneath the fixed swap rate. Here it remains the case that the drop in interest rates which followed 2008 and has remained was extremely unusual.

87. Mr Virgo also relies upon the fact that Mrs Holdsworth said in evidence that had she appreciated at the time of the Meeting that break costs could be £200-300,000 on a £1m swap she would need to tell this to a customer as a disadvantage. But that is with hindsight and in the knowledge of the substantial break costs arising in a swap such as this because of the very significant drop in interest rates below the fixed swap rate. As at 2005 that was very much a theoretical risk and not one which needed to be positively stated, especially bearing in mind that at the time they were sure that they would keep the loans for at least 10 years and probably increase them so the prospect of breaking the Swap would have been remote.

88. I would only add this: had Green & Rowley been informed simply that the break costs/benefits could be substantial back in May 2005 it is in my view a matter of complete speculation as to what they would have done and I certainly could not be satisfied that they would not have proceeded. Had they been told that the cost could be substantial one would then have to postulate what would have happened next - it is far from clear that they would have stopped there and then without seeking further information and it is not at all clear what they would have been told back in 2005. One needs, again, to remember the context, being that the prospect of them seeking to break within the 10 years would have been remote.

The Swap as Separate to the Loan

89. The claim here is that while the Swap was described in the Meeting as separate to the loan it was not because of (a) the fact that liabilities thereunder were secured under the "all monies" clause of the charge originally provided to support the Henry Street Loan and (b) the cross-default clause. This claim did not start life as a primary point raised by Green & Rowley. It came about because in paragraph 7.2 of the Amended Particulars of Claim the complaint was made that a disadvantage of the Swap was that the liabilities thereunder would remain even if the loan was repaid earlier than 2015. In paragraph 17.2 of the Amended Defence that feature was admitted but the riposte was that Green & Rowley in effect knew this because they had been told that the Swap was a separate contract. This then led to the allegation in paragraph 10.1 of the Amended Reply that any statement that the Swap was separate was misleading because of points (a) and (b) above. This is something of a non-sequitur because the reason for invoking Mrs Holdsworth's reference to "separate" was simply to explain that Green & Rowley knew that these were two separate contracts each with a life of their own - the Swap did not end automatically just because the loans might. Indeed this reflects the context in which Mrs Holdsworth made the reference to the Swap as separate. It was to explain that therefore, Green & Rowley did not <u>need</u> to take out a swap for the entire length of the loans or in respect of the entire amount borrowed. That was its flexibility resulting from the fact that it was a separate instrument. See the first paragraph of the Note (set out at paragraph 31 above). That was obviously understood by them since in the end they took it for 10 years only.

90. There was originally a separate point taken about the cross-default clause in paragraph 7.4 of the Amended Particulars of Claim and the defence was that absence of reference to this was not a breach of Rule 2.1.3.

91. But now these points have been put forward as relevant only to a claim for mis-statement in connection with the description of the Swap as separate.

92. In fact neither Mr Rowley nor Mr Green complain about the security or cross-default clause in their witness statements at all nor did they give any evidence in chief about this. It could be said that, technically, there is <u>some</u> evidence, constituted by their signing the statement of truth for the Amended Particulars of Claim and the Amended Reply, but this is wholly inadequate to compensate for the absence of evidence where it should appear.

93. It is common ground that at the Meeting neither the security position nor the cross-default clause were mentioned. In my view that fact, first, did not render the statement that the Swap was separate, false. It was indeed a separate instrument and the entirely different context in which this was said was the fact that it was flexible as to amount and length. Nor did the failure to mention security and the cross-clause render was what said, a half-truth.

94. And even if COB Rules 2.1.3 or 5.4.3 applied, there was nothing unfair in not mentioning these points when explaining the Swap. Nor was it necessary to do so to explain the risks of the Swap. In particular, Green & Rowley knew or should be taken to know that the charge contained an all-monies clause. And if they did, they would have appreciated that any liability to the Bank under the Swap would be caught by that clause. Secondly, while the cross-default clause was a term of the Swap, I cannot see that any COB duty of fair explanation would extend to fairly standard form terms like this. If it were otherwise it is hard to see why the Bank should not be obliged to go through a number of the other terms in detail as well.

95. Mr Virgo suggests that the security position meant that any continuing cover thereunder for the Swap liabilities would be a fetter on Green & Rowley's ability to deal with the assets secured, if for example they wished to repay or refinance the loans early because (perhaps) the Bank would not release the security since the Swap was still in place. But as to that, first there is no evidence of any of this from Mr Green or Mr Rowley. Secondly the whole context of the Swap was that a conservative period of 10 years was taken on the basis that the loans might be redeemed or refinanced then. So it was not in anyone's contemplation that the loans might be repaid any earlier.

96. It is correct that Mrs Holdsworth agreed in evidence that a customer should be told that if a swap goes wrong his liabilities are secured but there is in fact no evidence that Green & Rowley did not appreciate the security position anyway. Mrs Holdsworth did not accept that the cross-default clause should have been explained.

97. For all those reasons I can see no breach of any *Hedley Byrne* duty here. But even if there was, the paucity of the evidence from Green & Rowley on the point means, inevitably, that causation has not been established. In other words it cannot be said on the balance of probabilities that had they been told of these points they would have declined to proceed.

Fixing the Margin

98. It follows from my findings in paragraphs 42 - 45 above that it was not stated to Green & Rowley that the Swap fixed the margin. Accordingly any claim for negligent mis-statement could only be by reference to what Mrs Gill said and in particular that she could not imagine margin rising over the course of the loans giving them to understand that it would not rise.

99. It is first necessary to consider what sort of statement this was. It could not be a statement of existing fact. It could be a statement as to the intentions of the Bank. As to that, if it was to the effect that the Bank had no intention in the foreseeable future of putting its margin up as far as these customers were concerned whenever it would have been entitled to do so (for example on a rescheduling of the Central Beach Loan) it is impossible to say that this was false on the grounds that the Bank in fact did have such an intention – and there is no evidence put forward to suggest this anyway.

100. The only other way to consider this statement is to see it as some kind of expression of opinion as to what might happen with the Bank's margins in the future. If there was on this basis a

prediction that they would not change and then they did, the prediction has turned out to be false but this could only be actionable if there was no reasonable basis for making that statement. There is no expert or other specific evidence adduced by Green & Rowley on this point and the most that Mr Virgo could say was that it was bound to have been negligent because it failed to take account of the fact that in a volatile market the Bank might indeed seek to raise it. The only evidence is from Mrs Gill who was quite adamant that at the time, any rise in margin was indeed inconceivable. See paragraph 42 above. Indeed it was not even put to Mrs Gill in cross-examination that she had been negligent in this respect. Had it been put, it is plain from her very firm evidence that she would have denied it.

101. The only other way of looking at what Mrs Gill said is to see it (at best) as some kind of collateral promise or a representation that at no point during the life of the Swap would the Bank seek to increase the margin. That forms no part of this case, unsurprisingly because the margin in the event has not been increased save briefly at the end of 2008 and then only by 35 points. Nor has the Bank intimated that it will do so hereafter. But if it does then that is the time when arguments based on an estoppel arising from any collateral promise or a representation may arise, not now.

102. All of the above is on the basis, as I have found, that Rules 2.1.3 and 5.4.3 have no application. But if they did, it would not make any difference. As Mr Virgo effectively accepted in closing on this particular allegation the essential allegation is "straight" negligent mis-statement. That must be right – if there was no falsity or no negligence in what Mrs Gill said about margin in the future it is very hard to see that what she said was unclear or unfair or was a failure to explain the nature of the risks of the Swap.

103. Had it been a different case where the COB rules might have been shown to be broken if applied to the statement in question, it would be necessary to examine whether they could be applied not to statements about the Swap, (being the investment concerned) but existing loan commitments. On that point Mr Virgo drew my attention to the case of *Martin v Britannia Life* [2000] Lloyds Rep. PN 142. Here a question arose as to the scope of the Defendant's representatives advisory duty and the application of the then rules to it, in respect not of his advice about the investment in question (an endowment policy) but in relation to the wisdom or otherwise of remortgaging his property using that policy as security. At paragraph 5.2.5 Parker J said this:

> "In my judgment it is neither appropriate in the context of the 1986 Act, nor for that matter would it be realistic, to seek to limit the concept of "investment advice" by reference to the extent to which the advice relates to the "merits" (i.e. to the advantages or disadvantages) of a particular "investment" as defined; and if that be accepted, it seems to me that it must follow that the concept of "investment advice" will comprehend all financial advice given to a prospective client with a view to or in connection with the purchase, sale or surrender of an "investment", including advice as to any associated or ancillary transaction notwithstanding that such transaction may not fall within the definition of "investment business" the purposes of the 1986 Act."

104. I follow that but this case is quite different since there was no other proposed transaction on the table at the Meeting than the Swap. Otherwise it is not necessary for me to explore the point further since it does not arise here, given that the Rules do not really add anything. And it should be remembered that Mr Mitchell did not suggest that the negligent mis-statement allegation should fail *in limine* because Mrs Gill could have owed no relevant duty of care not to mis-state, or that there was no reliance. Rather the defence was that either there was no actionable mis-statement or there was no negligence. On those points he has succeeded and so this allegation must fail.

Portability

105. This issue arises because in the event Green & Rowley were unable to move their loans while the Swap was in place and implicit in that is that the proposed new lender was not interested in taking it on. See paragraph 46 above. Green & Rowley allege first that to say that the Swap was portable was a negligent mis-statement for two reasons: first, strictly speaking the Bank's consent was required – see clause 11 of the Swap Contract. Second because it would not always follow that a new bank would take on the Swap – or refinance if it remained in place – as in fact happened here.

106. I do not accept that there was any such mis-statement. In evidence Mr Rowley said that he understood the position to be that any transfer to another bank would require that bank's consent. Subject to that the Swap was in principle portable. On that basis there can have been no mis-statement in relation to the position of the other bank. Indeed it is difficult to see what other understanding could be. Mrs Holdsworth could not possibly be saying that in all events the other bank would be obliged to take the Swap. The point about portability in principle was that the Swap was not an agreement that inevitably had to remain with the Bank come what may and even if the loans were moved. And as for the requirement for consent to any move by the Bank, again that did not stop the Swap being portable in principle. And while in theory the Bank could refuse even where the loans were being moved elsewhere, it is extremely difficult to see why it should do so. Mrs Holdsworth said in evidence that while she knew that the Bank had to agree she could not see why it should not and was sure that it would. On that basis I regard the prospect of it refusing to be so remote as not to be a material consideration. So there was no mis-statement, even by a half-truth, here. Or put another way, it was not negligent of the Bank to say that the Swap was portable without adverting to the need for the Bank to agree. This point has not been put to the test. If Green & Rowley were to find a lender ready to take the loan and the Swap and the Bank now refused it may very well be that in the light of what was said the Meeting it would find itself estopped from refusing consent, as Mr Mitchell made clear. But all of that, if it ever arises, is for another day.

107. Nor do I consider that if Rules 2.1.3 or 5.4.3 applied this would make any difference. Mrs Holdsworth accepted that she did not say that if there was in the future substantial fluctuations in interest rates which then went down (so that the customer was "out of the money" under the Swap) there was a serious risk that a new lender would not take the Swap. She denied that in fairness she should have told this to Green & Rowley at the Meeting but then said that on reflection it was something she should have identified. But in my judgment that statement is one made very much with hindsight. Upon reflection of what happened in 2008 (and earlier Mrs Holdsworth described the situation since then as unprecedented) many things might have been done differently. But this does not mean that Mrs Holdsworth's reference to portability was unfair at the time. Nor in my view does it come close to failure to take reasonable steps to explain the nature of the risks involved with a swap. Mr Rowley said that he understood in any event that a new lender's consent would be necessary. So the argument would have to be that the Bank should have said something to the effect that a lender might not take on the Swap in a situation like that which happened. Or more simply that it cannot predict all the circumstances where the new lender might or might not take on the Swap. I do not see that the Bank had any duty to say either of these things and even if it had, I do not accept on the balance of probabilities that it would have made any difference. Indeed, in his WS Mr Rowley does not even make a clear statement that it would. At the end of his paragraph 15 dealing with his unsuccessful attempts to move the loans he says that he would not have entered the arrangement if he had any idea of its impact in terms of higher interest rates as against prevailing rates or termination or break costs. None of that is to do with statements about portability.

Conclusions on the Information Claim

108. For all the above reasons, the Information Claim fails.

THE ADVICE CLAIM: THE LAW

109. It is accepted by the Bank that if the Bank did indeed advise Green & Rowley to take the Swap or otherwise recommended it to them, and that a duty of care in that regard arose (both of which are denied) then when considering any breach of that duty regard should be had to Rules 5.3.5 and 5.4.3 cited in paragraph 79 above. But it was submitted by Mr Mitchell that the real question was whether any such of duty of care had been assumed here at all. In this regard, I was urged not merely to consider the nature and effect of what was said before and at the Meeting, but also provisions in a number of documents which the Bank claimed (but Green & Rowley denied) negatived the existence of any such duty of care or reliance on the part of Green & Rowley. That analysis would then involve the related question as to whether any such provisions would fall foul of Rule 2.5.3. In fact, for the reasons given below, it is not necessary for me to embark on that particular exercise to any great extent.

THE ADVICE CLAIM: ANALYSIS

Introduction

110. Green & Rowley allege that overall and in particular because (on their evidence) they were positively recommended the Swap at the Meeting, the Bank's advisory duty came into play.

111. As to breach of any such duty originally a key element of this claim was that the Swap was not suitable for Green & Rowley because of a supposed "mismatch" between it and the underlying loans by reference to the length of the Swap and the fact that some or all of the loans might be repaid before 10 years. But in the light of their evidence (loans expected to increase not decrease over time and be in place for at least 10 years) this allegation became untenable and was abandoned.

112. That left two points. The first, only faintly pursued by Mr Virgo in closing, was that there was a breach of Rule 5.2.5 because the Bank had failed to "take reasonable steps to ensure that it is in possession of sufficient personal and financial information about" Green & Rowley before recommending the Swap. The particular information concerned was said to be their attitude to risk. And because the risks had not been pointed out, or properly pointed out, no reasonable steps had been taken.

113. The second point, upon which Mr Virgo concentrated, was that the Swap was unsuitable because (a) Green & Rowley made it clear that they wanted to come away with a product that would fix their position both with regard to base rates and margin and yet (b) it did not and could not do so because it dealt only with base rates.

114. In response the Bank say there was no actionable duty of care and even if there was, there was no breach. I agree with both of those contentions for the reasons given below.

An actionable advisory duty?

115. In my judgment, no such duty arose as a result of anything said by Mrs Holdsworth or Mrs Gill at the meeting because no advice was then given. See my findings at paragraphs 47 - 49 above. As to what Mrs Gill said before, when there was undoubtedly an element of recommendation this was in an important sense provisional because the main thing was to get Green & Rowley to consider the products with a specialist at the Meeting. In those circumstances I cannot see

how the Bank objectively assumed an advisory duty of care before the Meeting which somehow endured through it even though no advice or recommendation was given at that stage. Accordingly, in my judgment no such duty arose and that is an end of the Advice Claim. I have reached that conclusion without recourse to the various documents and provisions prayed in aid by Mr Mitchell.

116. But I should add that the provisions contained in the first part of Clause 9 of the Notes to the brochure and clause 3.3 of the Terms (cited in paragraphs 53 and 57 above) both of which preceded the making of the Swap emphasise the non-advisory nature of what took place at the Meeting. That such provisions can be invoked to negate or delineate the ambit of any duty of care was confirmed by the Court of Session in *Grant Estates v RBS Plc* [2012] CSOH 133, a case which involved the same Terms as this case, among other things.

117. There was an interesting further debate before me as to the extent to which the Bank could place reliance on such clauses (including the second part of Clause 9 of the Brochure Notes), and further clauses in the Customer PTA and Swap Contract including terms stating non-reliance on any advice that was given, by the customer so as to give rise to a contractual estoppel and the effect of COB Rule 2.5.3. But in the light of my findings above and below it is neither necessary nor proportionate for me to determine that matter. The limited pre-contractual provisions referred to in paragraph 116 above are in my view untouched by this debate.

Breach of any such duty?

118. However, lest I be wrong in concluding that there was no advisory duty of care, I consider the question of breach.

119. There is clearly no breach of Rule 5.2.5. While this Rule was mentioned in Mr Virgo's Written Opening it was not there clear how its breach was being put. Nor was it suggested to either Mrs Holdsworth or Mrs Gill that the Bank failed properly to obtain the relevant information from Green & Rowley and in particular their attitude to risk (insofar as this is encompassed within the words "personal and financial information"). And insofar as the failure is said to be self-evident because the risks were not explained (which makes the claim under this rule a somewhat contorted one) I have already found that there was no breach of Rule 5.4.3 in the relevant respects (if applicable) in my analysis of the Information Claim.

120. I thus turn to the real point made in respect of breach and there is a short answer to this. In the light of the facts as I have found them to be, Green & Rowley understood full well that the Swap itself did not fix margin and they were not told otherwise. They did want an assurance about what would happen with margins which was Mrs Gill's department and she gave them one. If they therefore have any complaint about margin it is in the context of that assurance. That is the complaint considered at paragraphs 98 to 104 above which I have rejected. If what Mrs Gill said about margin in the future was not negligent, it cannot be said that there was a failure to take reasonable steps to ensure that any advice or recommendation to enter the Swap, or the Swap itself, were unsuitable by reference to Green & Rowley's desire to maintain margin.

121. And as for the objective of base rate fixing, the Swap was entirely suitable for Green & Rowley and it is not suggested otherwise. In the event, because of the credit crunch, the ensuing parlous position of RBS and the taking of the wholly unforeseeable step of increasing margin significantly, it transpired that the protection given by the Swap was not complete, a situation which was exacerbated by the concomitant financial burden on Green & Rowley of having to

pay large sums under the Swap at a time when their own income stream was affected as well. But none of that means that the Swap was an unsuitable product back in May 2005.

122. Accordingly there is in any event no breach even if there were the requisite advisory duty.

THE FSA UPDATE

123. By way of postscript I should mention the Update issued in 2012. The FSA's review into the sale of interest rate hedging products to SME's by certain banks including RBS found "serious failings" in such sales and the banks have agreed to review certain classes of those sales. While the Update has been provided to the Court in the bundle of authorities it cannot be of any assistance to me in determining the particular facts and claims arising in the case before me and Mr Virgo did not seriously suggest that it should. While at one stage in opening he suggested that the Bank might have had further disclosure to make by reference to this case and the FSA (which the Bank denies) no application was made and I need say nothing further on the point.

CONCLUSION

124. For all the reasons stated above, this claim must fail in its entirety.

125. I am most grateful to Counsel for their comprehensive and helpful oral and written submissions.