Case No: 3NE30118 and D30NE028

Neutral Citation Number: [2019] EWHC 3744 (Ch)

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN NEWCASTLE
BUSINESS LIST (ChD)

Before:
HH Judge Kramer sitting as a judge of the High Court

The Moot Hall, Castle Garth,
Newcastle upon Tyne, NE1 1RQ

Date: 28/06/2019

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Between:

NORHAM HOLDINGS GROUP LIMITED **Claimant**

and

LLOYDS BANK PLC **Defendant**
(FORMERLY LLOYDS TSB BANK PLC)

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Mr Hugh Sims QC and Mr May Jagasia (instructed by Sinton LLP) for the Claimant

Mr Richard Handyside QC and Mr Giles Wheeler (instructed by DLA Piper UK LLP) for the Defendant

Hearing date: 8-9 April 2019

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Judgment

JUDGMENT

Judge Kramer

1. This is the trial of two preliminary issues in an interest swaps mis-selling claim. The Claimant is represented by Mr Sims QC and Mr Jagasia and the Defendant by Mr Handyside QC and Mr Wheeler.

2. The issues have been formulated in question form as follows:

    a. By Norham accepting the Option B Redress Offer made by the Bank and the parties entering into a compromise agreement on the terms pleaded in [7.5] – [7.5.4] of the PoC, have the claims made by Norham for losses allegedly suffered as a result of the swap (not including the LIBOR or BSU misconduct claims) merged in the compromise and created a contractual entitlement to consequential losses?

    b. Alternatively, is the Bank estopped from disputing that the swap was mis-sold, in the sense that the same was sold in breach of an actionable duty owed by the Bank to Norham, leaving the Court to determine the amount of consequential losses sustained by Norham?

3. In order to understand how these questions are in issue it is necessary to look at the factual background to the claim. The evidence in this case took the form of witness statement from Stephen Bilclough, for the claimant, and the documents in the bundle. Mr Bilclough was not cross examined on the basis that there was no challenge to the passages in his statement relevant to the two issues and there is no dispute as to the authenticity of the documents. My account of the background facts is taken from this evidence and can be taken as being my findings of fact.

Background

4. The claimant is a property holding and investment company. At the material times, and for many years prior thereto, it was a customer of the bank.

5. On 29th January 2008 Norham entered into loan agreements with the bank for the provision of two loans. The first was for £2 million and was to be repaid one year after drawdown. The second was a loan for £5.5 million, to be repaid by a lump sum of £1 million two years after drawdown and the remainder by 96 instalments. The second loan was subject to a condition subsequent requiring Norham to provide evidence that ii had entered into hedging transactions equal to no less than 75% of the loan from time to time outstanding for a minimum period of 10 years after date of borrowing.

6. On 29th February 2008 Norham and the bank entered into a contract for interest rate hedging. Under the terms of the contract:

    a. The tenor was for 10 years from 29th February 2008;

    b. The starting notional amount was £5.5 million reducing to £4.5 million on 26th February 2010 and £4 million on 28th February 2011. And thereafter circa £2.6 million by February 2018.

    c. The bank had the option to terminate the swap 3 years after it was entered into, and monthly thereafter;

    d. The fixed rate to which Norham was subject was 4.5% to 28th February 2011 and 5.115% thereafter; and

    e. The floating rate was based on LIBOR.

    The trade was confirmed by documents signed by the parties in March 2008.

7. Shortly after the Swap transaction interest rates fell sharply. As the rate fell well below the fixed rate, Norham has to pay substantial sums to the bank under the Swap. In consequence, Norham experienced a shortage of cash flow which, it says, caused huge damage to its business.

8. On 29th June 2012 the bank entered into an agreement with the Financial Services Authority (now the Financial Conduct Authority, 'FCA') to review the sales of its swaps transactions; the agreement recorded that the authority had found evidence of poor practices in the bank's sale of interest rate hedging products-identical agreements were made with other banks. Under the terms of the agreement the bank undertook to

carry out a review of its sales to certain customers and if a breach of regulatory requirements had occurred determining what, if any, redress would be fair and reasonable in the circumstances. The onus was on the bank, having reviewed its files and sought information from the customer, if appropriate, to determine that there had been compliance, there was no onus on the customer to prove that there had not.

9. The regulatory requirements against which the sales were to be assessed were set out in the agreement and defined as *"the principles, rules and guidance contained in the FSA's Handbook"* Thus, redress was available for mis-selling which did not necessarily found a common law cause of action and could extend, as in this case, to a customer who was not an 'private customer' and for that reason unable to maintain a claim for breach of the regulatory requirements under s. 138D of the Financial Markets and Services Act 2000 and regulation 4 of the Financial Services and Markets Act 2000 (Rights of Action) Regulations 2001. Redress was also available in sums greater than the value limits placed on redress through the Financial Services Ombudsman and to businesses which did not meet the Ombudsman's definition of a microenterprise; an entity with fewer than 10 employees and a turnover or balance sheet that did not exceed 2 million euros.

10. In March 2013 the Financial Services Authority published a report with its findings on some pilot reviews and setting out an approach as to the principles of redress which had been agreed with the banks, including the defendant. If the review of a sale concluded that had the sale complied with regulatory requirements the customer would not have purchased the swap, the appropriate redress would be for the customer to exit the swap at no charge and a refund of all payments and any break costs previously paid; break costs are a charge for exiting the swap prematurely. If it was reasonable to conclude that had there been compliance with regulatory requirements, the customer would have purchased a different Swap, redress would be the alternative Swap and any difference in payments between the actual and alternative Swap, including the difference in any break costs paid. Lastly, if it was reasonable to conclude that the customer would have bought the same Swap had there been compliance with regulatory requirements, no redress would be awarded. The report recognised that some customers may have suffered consequential losses, such as overdraft charges and additional borrowing costs. The report provided that in order to recover for such loss it had to be

caused by the breach of regulatory requirements and reasonable foreseeable at the time of the breach.

11. By December 2013 the FCA was concerned that the anticipated time scales to complete reviews would not be met. It agreed with the banks that the latter would split the payments for initial redress and consequential loss. The banks would offer customers 8% simple interest on their initial redress payment, termed basic redress, to compensate them for the opportunity cost of being deprived of their money, e.g. lost interest or profits. It was hoped that this would be a straightforward alternative to putting together a consequential loss claim, but it did not prevent such claims.

12. Norham was informed of the review by the bank on 11th July 2012. It's original request for a review was refused but after much exchange of correspondence the bank wrote to Norham on 13th September 2013 to say that the Swap sale qualified for review.

13. On 27th January 2014 the bank wrote to Norham indicating that there was insufficient evidence on file to demonstrate compliance with the regulatory requirements considered under the review and as a result some redress was due to the company. Enclosed with the letter was a 'Basic Redress Determination Statement' which explained how the basic redress had been assessed. The bank concluded that in this case redress should take the form of replacing the Swap with one which it considered Norham would have entered into but for the breach of regulatory requirements. Taking into account payments made, suspended payments and payments which would have been made on the redress swap, a payment of £283,355.96 was due to the company as basic redress, inclusive of 8% interest.

14. The bank gave Norham three options, A, B and C.

    Option A read:

    "OPTION A (Full and Final Settlement)

    Only consider Option A if you do not wish to make or continue a claim for Consequential Loss

    Option A-If you do not wish to make or continue a claim for Consequential Loss, you are able to accept the Basic Redress Determination (with Compensatory Interest) in

full and final settlement of all claims or complaints you have or may have arising out of or in connection with the sale of your Trade falling under the scope of the Review (including claims or complaints which may not have been addressed in the Review, such as those based on fraud or involving allegations of dishonesty or the part of the Bank in connection with the sale).

…Please be aware that if you accept Option A, you cannot later make any claim for Consequential Loss (whether under the Review or by any other means).”

Option B read:

“OPTION B (Split Settlement)

Consider Option B if you wish to make or continue a claim for Consequential Loss

Option B- If you wish to make or continue a claim for Consequential Loss, you are able to accept the Basic Redress Determination as a separate settlement from any redress which may be due in respect of you claim for Consequential Loss.

Full details are included in the accompanying letter, which explains how to formally accept the Basic Redress Determination whilst still being able to make or continue a claim for Consequential Loss. If you select Option B, the amount of Basic Redress due to you (including any Compensatory Interest) will be paid to you, whilst we continue to progress your Consequential Loss claim separately….

If you wish to proceed with this option, please sign the Option B Settlement Acceptance Form in the accompanying letter and return it to you Case Handler.”

Option C read:

“OPTION C (Combined Settlement)

If you do not select Option A or Option B you case will progress through to Option C

Option C- If you do not accept Option A or Option B, or if you do not respond at this stage in the Review process, your case will progress to Option C, meaning your Basic

Redress and any redress for Consequential Loss will be available only for acceptance and settlement together. This is known as Combined Settlement.

15. The form referred to under Option B is entitled "ACCEPTANCE OF BASIC REDRESS DETERMINATION-OPTION B: SPLIT SETTLEMENT" This is a, if not the, key document in relation to the first preliminary issue and must be set out in full. It reads*:*

"If you wish to accept and settle the Basic Redress but continue to make a claim for Consequential Loss, please sign and return the form in the pre-paid envelope provided.

Importantly, if you accept the Basic Redress Determination, the settlement between us will be a full and final one, except in respect of any claims for Consequential Loss. By accepting this Basic Redress Determination, you will not be able to bring any further claim or complaint against the Bank in relation to the sale of the Trade (except in respect of claims for Consequential Loss) whether in the courts or by any other means (including by making a complaint to the Financial Ombudsman Service).

1. *I/We confirm that I/we have understood the enclosed redress statement dated 27 January 2014 form Lloyds Banking Group (the "Bank") relating to the Bank's review of sales of interest rate hedging products.*

2. *I/We would like the Bank to proceed with providing the redress to me/us on the basis described in the Basic Redress Determination set out above in respect of the Trade, Trade Reference 2258281LS.*

3. *I/We request the sum of £283,355.96 be paid in accordance with my/our written Settlement Instructions which are provided on the attached Settlement Instruction Form.*

4. *I/We understand and agree that the Basic Redress Determination is in full and final settlement of all and any actual or potential claims or complaints (whether present or future and whether known or unknown and whether arising from or affected by any change in the law or any change of circumstances of any sort) I/we have or may have against the Bank, its related companies, current and former employees, servants and agents arising out of or in connection with, whether directly or*

indirectly, the sale of the Trade falling under the scope of the Review (including claims or complaints which may not have been addressed in the Review, such as those based on fraud or involving allegations of dishonesty on the part of the Bank in connection with the sale), except any claims for consequential loss (the "Settled Claims"). I/We release the Bank from the Settled Claims and agree not to commence any court proceedings or any other claims or complaints (including but not limited to complaints to the Financial Ombudsman) against the Bank, its related companies, current and former employees, servants and agents in connection with the Settled Claims.

5. *I/We understand and agree that i/we shall only be entitled to receive further amounts by way of compensation (whether awarded under the Review, by a court or by the Financial Services Ombudsman Service) in respect of any successful claim for loss of profit, loss of opportunity or the cost of borrowing to the extent that the amount of those losses exceeds a sum equivalent to the Compensatory Interest applied to the Basic Redress."*

(my numbering for ease of reference)

16. On 23rd April 2014, Mr Stephen Bilclough, Norham's chairman signed the Acceptance form and it was sent to the bank the following day. The bank confirmed that the Swap was terminated on 1st May 2014 and that the basic redress had been settled on 2nd May 2014.

17. Norham submitted a claim for consequential loss in the review on 27th June 2014. This was initially refused but on 19th October 2016 the bank informed the company of its final determination to award redress in the sum of £46,546.50 inclusive of interest in its 'Final Consequential Loss Determination Letter. This was accompanied by an explanation as to what Norham could do to accept or reject the redress. It informed Norham that if it did not wish to accept it should inform the Case Handler giving reasons for the refusal and went on to say: *"This does not affect your legal and statutory rights, which you are free to pursue should you wish to."*

18. Norham rejected the redress offer on 4th November 2016. It sent a letter of claim to the bank on 2nd December 2016 alleging various misrepresentations concerning hedging and the merits of the particular swap, negligent advice and a negligent absence of advice about the Swaps, a negligent failure to comply with regulatory requirements, fraudulent misrepresentations about LIBOR rates, a breach of contractual and tortious duties to use reasonable skill and care in its assessment of consequential loss under the review, such duties said to arise from the compromise agreement, and breaches of contractual duties arising from the actions of its Business Support Unit's dealings with Norham when it found itself in financial difficulty and, finally, an unlawful means conspiracy.

19. The claim was issued on 26th May 2017; a protective claim form had been issued on 16th December 2013 and was consolidated with the later claim. The original Particulars of Claim repeated the allegations in the letter of claim. By an amended Particulars of Claim, dated 13th September 2017, the allegation that the Defendant was in breach of contractual and tortious duties in its conduct of the review was dropped and replaced by the allegation which gives rise to the preliminary issues.

20. In paragraph 7 of the Amended Particulars of Claim Norham alleges that the effect of the agreement to compromise the basic redress award, was to give it a contractual entitlement to consequential loss, subject to proof of causation, based on the counterfactual which was used to quantify the basic redress. That is what it calls its "*primary swaps case".* The other allegations are on relied upon if the 'primary' case fails.

21. The second preliminary issue arises from paragraphs 32 (c) and 37A of the Amended Reply in which Norham alleges that the bank is estopped from disputing that the swaps were mis-sold and that the only matter for the court to determine is the amount of consequential loss sustained (paragraph 32(c)) . In paragraph 37A it is asserted that there is an estoppel by convention and/or representation to this effect. At the hearing, Mr Sims restricted his argument to that supporting the existence of an estoppel by convention and that founded on representation was not developed.

<u>The Claimant's contentions</u>

<u>The construction point</u>

22. At risk of oversimplifying the argument advanced by Mr Sims on the first issue, his central argument is that the settlement agreement compromised all Norham's causes of action against the bank. Because an action for consequential loss can only succeed if Norham have a cause of action which, if proved, could result in an award of such loss and the agreement expressly preserves the right to consequential loss, the agreement, properly construed, must provide for the recovery of such losses under the terms of the agreement, all pre-settlement causes of action having been compromised. The basis upon which the losses are to be assessed must be the same as was adopted in quantifying the basic redress as Norham, no longer having any pre-settlement causes of action, can only look to the method of assessment adopted in the Review, which, says Mr Sims, must amount to a contractual entitlement to consequential loss assessed in accordance with the counterfactual used to quantify Basic Redress.

23. Mr Sims seeks to persuade me to his view on the basis that such a construction accords with the wording, factual background and business purpose of the agreement and to this end he referred me to an oft cited passage in the judgment of Lord Neuberger PSC, in **Arnold v Britton [2015] UKSC 36,** where he said at [15]:

> *"When interpreting a written contract, the court is concerned to identify the intention of the parties by reference to "what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean", to quote Lord Hoffmann in Chartbrook Ltd v Persimmon Homes Ltd…And it does so by focusing on the meaning of the relevant words…in their documentary, factual and commercial context. That meaning has to be assessed in the light of (i) the natural and ordinary meaning of the clause, (ii) any other relevant provisions of the [contract], (iii) the overall purpose of the clause and the [contract], (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of any party's intentions…"*
>
> Mr Sims says that the construction of the contract is a unitary exercise and referred me to a passage in **Arnold** where Lord Hodge said, at [77]:

"This unitary exercise involves an iterative process by which each of the rival meanings is checked against the provisions of the contract and its commercial consequences are investigated…But there must be a basis in the words used and the factual matrix for identifying a rival meaning. The role of the construct, the reasonable person, is to ascertain objectively, and with the benefit of the relevant background knowledge, the meaning of the words which the parties used. The construct is not there to re-write the parties' agreement…"

24. He points to the fact that the contract was one of compromise and that fact is important in its construction. I was taken to various extracts from Foskett on Compromise (8th Edition) and **Jameson v Central Generating Electricity Board [1998 1 AC 455** to demonstrate the primacy which the courts give to compromise and a resulting disinclination to permit a party to seek to unpick what was agreed. Mr Sims places reliance on the fact that the settlement agreement is expressed to be in full and final settlement of all claims and complaints, whether present, future known or unknown.

25. As to the background facts, Mr Sims argues that the carve-out for consequential loss can only refer to a claim based on the counterfactual in accordance with the review because in the literature from the FCA and the bank, which preceded the agreement, it was made clear that consequential loss was to be determined as part of the review process (bank's letter of 29th January 2013), and consequential loss was described by the bank as *"losses over and above any redress that is determined to be due and which may have been caused by non-compliance with regulatory requirements during the original sales process"* (Guidance for Providing Information, provided with the banks letter to the claimant of 13th September 2013); the FCA website in 2013 described consequential loss in similar terms. Further, the bank informed Norham, before it agreed to accept the compromise, that in the light of the determination of Basic Redress due it now had the opportunity to make or continue a claim for consequential loss (bank's letter to Norham of 27 January 2014), and that Norham would have to demonstrate that the consequential loss was caused by the reasons for the Basic Redress due (Consequential Loss Claim Summary dated 27 January 2019). Furthermore, the summary makes it clear that consequential loss relating to loss of profit/use of the money will be set-off against compensatory interest applied to the Basic Redress.

26. Mr Sims says that 'consequential loss' where referred to in the agreement must refer to such losses arising from regulatory failings, as found on the review, it would be perverse if the carve out had the effect of requiring that the claimant establish a cause of action to recover for consequential loss. Such an outcome would be inconsistent with the redress scheme, particularly where there is an element of consequential loss built into the Basic Redress, hence the set-off. He relies upon the final paragraph of the agreement which provides that Norham would only be "*entitled"* to certain items of consequential loss if they exceeded the compensatory interest paid on the Basic Redress as indicating that the agreement provides a contractual entitlement to such consequential loss; this is relevant both to the factual background and as a comparison as to how consequential loss has been dealt with in another part of the contract.

27. Looking at the broader picture, by reference to the Pilot Findings, Mr Sims points to the fact that it was agreed between the FCA and the banks that for customers who suffered additional loss over and above the normal, the banks would use an established legal approach which involved determining whether the loss was caused by the breach and whether it was reasonably foreseeable at the time of the breach, thereby adopting the approach to loss in claims for breach of statutory duty, and the review would be conducted by assessing whether there had been regulatory compliance first and move to consider if redress was due and in what form after a failure in compliance had been established. (March 2013 Pilot Findings). He argues that this is an indication that the commercial purpose of the review was intended to be a speedy and low cost way for a customer to achieve redress and achieve finality as between the bank and its customer in relation to swaps mis-selling complaints which would be thwarted if, notwithstanding an acceptance of regulatory failings, the bank could require the customer to prove causes of action before a court to justify an award of consequential loss, which, in any event, would be quantified in the same way as provided for under the review.

28. In the event that there is an ambiguity as to the proper construction of the agreement, the claimant argues it should be construed contra proferentem, Norham being the proferens, on the basis that he who yields the pen must take the consequences of such ambiguity. Mr Sims argues that as the agreement was drafted by the bank and was not open to negotiation any ambiguity must be resolved in favour of the claimant's construction. He referred me to extracts from Lewison on the Interpretation of Contracts (6th Edition) at [7-08] onwards. I

take from the test and the references to the cases in that chapter that whilst "*where there is doubt in the meaning of a contract, the words will be construed against the person who puts them forward"*[7-08], the rule only comes in to play where there is doubt or ambiguity. The court should, nevertheless strive to construe the contract using the established canons of construction and only resort to the rule as a last resort. Thus, it will only arise where the court is unable on the material before it to reach a sure conclusion on construction.

Estoppel

29. It is argued that an estoppel by convention may be relied upon if I conclude that the effect of the settlement agreement is other than as suggested by the claimant. Mr Sims, at paragraph 59 of his skeleton argument, asserts that the effect of the estoppel is to prevent the bank from disputing that the Swap was mis-sold, leaving the court to determine Norham's consequential loss. The estoppel arises because it was assumed by the parties that the offer and compromise agreement amounted to acceptance on the part of the Bank that the Swap was mis-sold and, had there been regulatory compliance, it would have been sold the Redress Swap. This assumption was shared by the parties or acquiesced in by the bank. In reliance on the assumption Norham participated in the review process and entered into the compromise agreement thereby giving up its chance to argue for a more favourable redress outcome in relation to Basic Redress.

The Defendant's contentions

The construction point

30. Again, without wishing to over simplify the Defendant's case, Mr Handyside argues that it is clear from the face of the agreement that it preserves the claimant's causes of action which are capable of leading to an award of consequential loss. He points to the fact that under the agreement Norham were bound not to bring any claims in connection with the Settled Claims, but a claim for consequential loss was expressly excluded from such claims. Furthermore, if the claimant's construction was correct, the word 'claims' where it appears in the fourth paragraph of the agreement would have different meanings when applied to the settled claims, where it would incorporate a reference to pre- settlement causes of action, and where applied to the consequential loss claims, where it would not incorporate such a reference but to a contractual right to such loss arising from the agreement.

31. Looking at the wider context, Mr Handyside draws attention to the fact that the agreement between the FCA and the bank and the review process thereunder conferred no contractual or other rights upon Norham which were enforceable against the bank through the courts. If the agreement was intended to confer upon Norham a contractual right to consequential loss based on the same counterfactual as for Basic Redress it would have said so. Reference to consequential loss in literature connected with the Review is irrelevant as it is directed to the context of the Review alone, which is a discrete process providing redress for customers even where, in law, there would be no redress avialable. It would make no commercial sense if the bank, by operating the review, was disempowered from defending itself from customers' claims in the event that they chose not to accept the redress on offer. In such circumstances, the customer has a remedy, it can bring a claim in reliance upon conventional causes of action. This would not lead to re-arguing the case for essential elements of such claims will not have been argued, or determined, in the Review. All that is established by a Review finding in the customer's favour is that, without the protection of disclosure between the parties, the bank has been unable to find evidence of compliance with the standards of conduct expected by the FCA which, in the case of Norham, would not be actionable before a court in any event.

Estoppel

32. As to the constituents of estoppel by convention, Mr Handyside referred me to **The Indian Endurance [1998] AC 878** where, at 913E, Lord Steyn said such an estoppel may arise:

"*where parties to a transaction act on an assumed state of facts or law, the assumption being either shared by them both or made by one and acquiesced in by the other. The effect of an estoppel by convention is to preclude a party from denying the assumed fact or law if it would be unjust to allow him to go back on the assumption*"

33. He identified the five requirements for establishing and estoppel by convention as set out in **Bindley v Heath Investments Ltd v Bass[2017] Ch 389.** These were stated to be:

> *"(i) It is not enough that the common assumption upon which the estoppel is based is merely understood by the parties in the same way. It must be expressly shared between them.*

(ii) The expression of the common assumption by the party alleged to be estopped must be such that he may properly be said to have assumed some element of responsibility for it, in the sense of conveying to the other party an understanding that he expected the other party to rely upon it.

(iii) The person alleging the estoppel must in fact have relied upon the common assumption, to a sufficient extent, rather than merely upon his own independent view of the matter.

(iv) That reliance must have occurred in connection with some subsequent mutual dealing between the parties.

(v) Some detriment must thereby have been suffered by the person alleging the estoppel, or benefit thereby have been conferred upon the person alleged to be estopped, sufficient to make it unjust or unconscionable for the latter to assert the true legal (or factual) position." [91]

There must be a demonstration of *"conduct "crossing the line" and unambiguously giving rise to a clear assumption of fact or law on the faith of which both parties unequivocally proceed"* [88] of the judgment. *"The question whether the parties manifested assent to the assumption by something said or some conduct which clearly crossed the line is largely a question of fact."* [93].

34. Mr Handyside says that as soon as one looks at the issues raised by Norham's non- primary swaps case the estoppel case cannot succeed. Norham is trying to rely on findings in the Review to prevent the bank from disputing liability for various causes of action based on breaches of legal duties which were not the subject of the Review. He asks, rhetorically, where is the common assumption that there was a breach of legal duty capable of giving rise to a cause of action or misrepresentation? There is none.

35. The assertion that the bank is estopped from disputing that the Swap was mis-sold does not assist Norham. All that mis-selling means, in the context of the review, is no more than that there was a failure in regulatory compliance, which is not sufficient to found a cause of action against the bank. The highest at which Norham could put its case of estoppel is that the Basic Redress Determination settlement proceeded on the basis that on the evidence then available to the bank it could not establish that there had been compliance with the regulations. That falls far short of a common assumption that the bank could not defend

itself or that Norham would be able to recover consequential loss from a court without establishing a cause of action upon which an award of such loss must be based.

36. Mr Handyside argues that there was no detrimental reliance. The only effect of the agreement was to draw a line under the claim for Basic Redress. The evidence of Mr Billclough does not go so far as to say that Norham would not have settled the Basic Redress claim if it realised it would have to prove the cause(s) of action upon which a consequential loss claim could be pursued.

37. Whilst Mr Sims did not develop a claim based on estoppel by representation in his skeleton or at the hearing, Mr Handyside had prepared his response to such an allegation. He pointed out that no specific representation was identified, which should usually prove fatal to an allegation of such an estoppel. He makes the general point that what was said by the bank in the Basic Redress Determination Statement was based on the standards applicable to the Review and did not indicate that it was more widely applicable. It explained the outcome of the Review and did not contain an unequivocal representation as to the bank's position in future litigation. Norham's reliance on references in its own correspondence to 'mis-selling' is irrelevant as it cannot constitute a representation by the bank, and even so 'mis-selling' has its own meaning in the context of the Review.

38. In his submissions in reply, Mr Sims sought to rely upon an exchange between the bank's redress specialist, Mr Bilclough and the claimant's solicitor on 24th February 2014 in which the specialist said that if option B was accepted "you will not be able to pursue the bank in relation to the sale of the trade, whether by the courts or any other means, including the Financial Ombudsman". Mr Handyside felt it necessary to point out that this was said in the flow of conversation and was contradicted by the information provided with the Basic Redress Determination Statement. Mr Sims, however, did not put this forward as a representation upon which an estoppel could be founded. He would have had difficulty as Mr Billclough does not even refer to this part of the conversation in his statement or that Norham relied on these words. He suggested that these words were an indication that Norham's pre- settlement causes of action merged in the compromise agreement.

The Law

39. The correct approach to the construction of a contract is set out in the extracts from **Arnold**, set out above, and are not controversial. The relevant law as to the estoppel by convention

is to be found in the extracts from **The Indian Endurance** and **Bindley**, above, and is, again, uncontroversial. The legal nature of the review and the effect of a compromise agreement has been considered in two recent cases in the Court of Appeal, **CGL Group Ltd v Royal Bank of Scotland plc [2018] 1 WLR 2137** and **Elite Property Holdings Ltd v Barclays Bank plc [2019] Bus LR 129**, the latter an application for permission to appeal which is cited with the permission of the Court of Appeal.

40. **CGL** dealt with three cases between customers and the banks from whom then had purchased interest rate hedging products. In each case the customer was dissatisfied with outcome of the FCA Review. They brought proceedings against their banks alleging mis-selling of the hedging products. Subsequently, they sought to amend their claims to allege negligence in the course of the review. In each case the original claim was struck out and the application for permission to appeal refused. An appeal against such refusal was dismissed by the Court of Appeal on the grounds that the bank owed no duty of care to its customer in relation to the conduct of the review. In rejecting an argument that a common law right of action should exist because whilst private persons could bring a claim for breach of regulatory duties under, what is now, section 138D of the Financial Services and Markets Act 2000, non-private persons could not, the court said:

"More broadly, I consider that the overall regulatory regime is a clear pointer against the imposition of a duty of care, and suggests that to recognise a common law duty of care in the present case would circumvent the intention of Parliament. The FCA has a wide range of powers as regulator, including to make or require a section 404 scheme or restitution under section 384 . It was the deliberate intention of Parliament that only the FCA was to have the power to require the banks to comply with these schemes, and that no individual customer could enforce them or sue for breach. Accordingly, the effect of the regime is that a non-private customer cannot sue in relation to a complaint or a complaint handling issue. Nor can a non-private customer complain about a redress determination if a bank proactively sets up a redress scheme. If a bank fails to comply with the terms of the Review agreement, it is the responsibility of the FCA to bring enforcement proceedings." See per Beatson LJ at [87].

41. In **Elite Property Holdings Ltd** this last extract was relied upon by the Court of Appeal in rejecting an argument that a not entirely dissimilar compromise agreement to that in the present case, settling the basic redress award claim, gave rise to a contract under which,

amongst other matters, the bank was contractually bound to carry out a detailed assessment of consequential loss and pay fair and reasonable redress if the claims were well founded. Beatson LJ's reasoning for rejecting the existence of a duty of care was considered *" to militate strongly against there being a contract of the kind alleged by the appellants"* see per Flaux LJ at [64]-[65]. Furthermore, at [19] of **Elite** Flaux LJ explained the effect of the redress agreement in this way:

"By signing the Revised Redress Offer Acceptance Form, the directors of the company agreed that the acceptance of the Revised Redress Offer was subject to certain terms, including that it was in full and final settlement of all claims and causes of action other than in respect of consequential losses and that "no further redress (if any) will be payable until the Bank's detailed assessment of the Company's claim for consequential losses as set out in your Consequential Loss Questionnaire ("CLQ") are completed"."

42. The above extract from the judgment of the Court of Appeal runs counter to Norham's case on the construction issue. Mr Sims argues that it does not assist as Flaux LJ was not faced with the argument which is now raised as to the merger of causes of action into the compromise agreement and did not explain how he came to his view as to the effect agreeing to the Revised Redress Offer. Additionally, the wording of the acceptance form was different, thus it is not even persuasive authority as to how the terms of compromise in this case should be construed.

The construction point

Discussion

43. A good starting point is to look at the words used in the agreement dated 23 April 2014. The full text is set out at paragraph 15, above. Paragraph 4 of the agreement provides that Norham agreed to the Basic Redress Determination *" in full and final settlement of all and any actual or potential claims or complaints…(including claims…such as those based on fraud…) except any claims for consequential loss ("the Settled Claims"). I/We release the Bank from the Settled Claims…"* The immediate impression given by those words is as explained by Flaux LJ in **Elite** (paragraph 40 above). Thus, for example, a claim for consequential loss based on fraud has not been compromised for otherwise the word "except" following the bracket in which fraud is referred to would be deprived of meaning. If Norham's argument is correct, namely that the settlement compromised all causes of

action, the word 'claims', other than where it appears just before 'for consequential loss' would mean causes of action, but before these words would mean something else, presumably, on Norham's case, an assertion of foreseeable loss caused by the regulatory breach. That would be surprising result but one justified, says Mr Sims, by the literature which accompanied the acceptance document, a consideration of paragraph 5 of the agreement, the broader context and the law's fondness for compromise.

44. This last point carries the issue of construction no further. Mr Handyside referred me to **Jameson v CEGB [2000] 1 AC 455** where, at 480C, Lord Clyde said *"Whether an accord does or does not have the effect of achieving a discharge depends on the terms of the agreement."* The fact that the law seeks to uphold settlements is not a guide as to what the parties have settled. In any event, the words of settlement and the preamble to the agreement make it clear that the claim for consequential loss is excluded.

45. Mr Sims placed substantial reliance on the literature which accompanied the acceptance document and documents in the public domain. He argued that the expression 'claims for consequential loss' must be a reference to the head of loss, and not the cause of action on which it is founded because the description of the way in which the Review operates is that first there has to be a finding of regulatory breach, this is followed by a determination of Basic Redress and if option B is chosen, a consideration of consequential loss follows. There is, however, no need to refer to all the documents to which he took me.

46. The key document upon which he sought to rely was the Consequential Loss Claim Summary. He places particular reliance on that part of the document headed "When does a claim for Consequential Loss apply?" where it is stated *"In line with the terms agreed with the Financial Conduct Authority, for each case where Basic Redress is due we will consider claims for Consequential Loss…You will need to be able to demonstrate that the Consequential Loss was caused by the reasons for Basic Redress being due…"* Mr Sims argues that this document governs what is meant by 'claims for consequential loss' in paragraph 4 of the compromise, it is a loss caused by the same reasons for which Basic Redress is due. Mr Handyside's response to this argument, with which I agree, is that the documents to which Mr Sims refers explain what must be proved to recover consequential loss as part of the Review. This is supported by the purpose of the Consequential Loss Claim Summary which is stated to be *"to provide a summary of any claims for Consequential Loss you may have made at this stage in the Review process…"* and goes on

"sets out details of any claim you have already made and additional information and/or documentation we may require from you before we can determine whether redress is due to you for Consequential Loss." It has nothing to do with such claims as may be made outside the Review. I would add that if the compromise intended that the only claim outside the "Settled Claims" was a claim within the Review, it could have been expected to say so. Instead, there is a recognition in the agreement that a claim for loss outside of the Review, both in the preamble and paragraph 5, both of which contemplate a claim for such loss, would be in the courts.

47. What of Mr Sims's argument concerning paragraph 5 of the compromise agreement. He says that the use of the word 'entitled' is an indication that the agreement creates a contractual obligation to recover such loss on the basis of the Basic Redress counterfactual. It is impossible to read paragraph 5 in this way. It is clear from the wording that its sole effect is to require Norham to set-off the compensatory interest on the Basic Award against the heads of loss identified, which, in any event, do not comprise all potential heads of consequential loss, as is made clear in the Final Redress Determination Letter of 27 April 2014.

48. Finally, I consider the broader context in which the Acceptance of Basic Redress Determination dated 23 April 2014 was set. Much of this is set out in paragraphs 8 to 11, above. As was noted in **CGL**, *"The FCA entered into the Review agreement with the banks in its role as regulator and as an alternative to enforcement proceeding"*, per Beatson LJ at [86]. As is apparent from **CGL** and **Elite**, the agreement with the banks did not give the customers any contractual rights or give rise to any duty of care in their favour in respect of the review.

49. In January 2013 the FCA and banks had agreed that consequential loss was to be determined as part of the review. At that stage both the Basic Redress and compensation for consequential loss were to be offered to the customer at the same time. In the face of such an offer, the customer could accept the redress and compensation on offer and if they did not accept, they could litigate in relation to such causes of action which they considered they possessed. In December 2013, however, the FCA and banks agreed to the split settlements in order to speed up the paying of basic redress. Hence options A,B and C.

50. Option A was designed to provide a swift outcome to the review and avoid the expense and complication to the customer of constructing a consequential loss claim in simple cases. Option C, which is the default position for a customer who did not select an option or selected Option A or B but did not accept the Basic Redress, mirrored the pre-split redress position; basic and consequential loss redress were offered as a package and could be accepted or rejected as such. What is common to both Options is that the customer could either accept what was on offer or, ultimately, reject and sue, but in order to succeed in the courts would need to establish a cause of action to support their claim for damage.

51. Under Option B the customer can accept or reject the Basic Redress, and if they reject they default to Option C. Alternatively, the customer can accept the Basic Redress and ask for consequential loss to be considered thereafter. It is to be remembered that Option B, was introduced to enable customers to receive their Basic Redress more swiftly, as was Option A. The commercial purpose behind the change was not to alter the underlying scheme of the Review. It would be illogical and contrary to the commercial purpose if a customer who opts for C or defaults to that option can refuse the package on offer, and has all their causes of action preserved, but an Option B customer who accepts the Basic Redress must give up their rights to bring a claim for consequential loss before the courts save on the basis of the counterfactual used in the Review. The introduction of Option B was supposed to benefit the customer, not, by a side wind, put them in the dilemma where they have to weigh the benefits of prompt payment against the penalty of having to give up potentially highly valuable rights. Neither can it have been the object of Option B to fix the bank with liability to the customer in the event that a redress offer, either basic or for consequential loss was refused. The determination which resulted in the offer did not involve the bank in admitting facts which, in this case, were sufficient on their own to found a cause of action, still less was there any finding in the Review that they gave rise to a cause of action.

52. It is clear from the statement of Mr Bilclough that he was aware of much of the background to the Review process set out above. In particular, he was aware from the documents which he exhibits to the statement that :

    a. The FSA(later FCA) had found evidence of mis-selling of swaps and made an agreement with the Banks under which customers were to obtain redress in cases where that had been mis-selling to put the customer in the position they would have been had there been no regulatory failings.

b. The Reviews set up under the agreement would be directed at determining whether there had been regulatory failings; there was no mention of an investigation into whether there was evidence which could establish that Norham had a cause of action against the bank.

c. Compensation would be available in the form of both Basic Redress and consequential loss.

d. The FCA had agreed with the banks that split payments would be made available for initial (basic) redress and consequential loss in order to speed up the process of paying redress to customers. Thus, the purpose of the Option B procedure was to confer a benefit on the customer.

e. The Review process was designed to be simple, avoid the need to employ professional advisors and save cost.

f. The information from the bank and FCA concerning redress related to the conduct of the Review and did not purport to advise or inform Norham as to their rights in a civil claim arising from the sale of the swaps or how they could be enforced.

g. The Review process did not preclude the bringing of a civil claim. Indeed, Norham brought protective proceedings which were stayed whilst they awaited the outcome of the Review.

h. The bank determined that in the case of Norham the information on their files did not show that there had been regulatory compliance and on that basis Basic Redress was offered.

The objective observer, armed with these facts could not reasonably have come to the conclusion that when the compromise agreed referred to' Settled Claims' it meant settled causes of action, but when it referred to 'claims for consequential' loss it meant foreseeable loss caused by the breach of regulations(s) for which Basic Redress had been agreed.

53. Lastly, on construction point, I return to **Elite Property Holdings Ltd** which Mr Sims treated as of no relevance. Mr Handyside says that whether entirely on point or not the extract from the judgement given my Flaux LJ is a good indication as to how a senior court would interpret a similar agreement.

54. The facts of **Elite** were that the appellant companies entered into various interest rate hedging products with the defendant bank. These trades were the subject of a Review under the agreement between the Bank and the FCA. Redress offers were made in June 2014 offering, under consequential loss, 8% interest on refunded amounts. Under the Review operated by Barclays, the customer had 3 options. Option 1 provided for the acceptance of the redress in full and final settlement of all claims. Option 2 allowed the customer to accept the redress offer, including interest, and submit a claim for consequential loss. Option 3 was to not accept the offer of redress and submit a claim for consequential loss. Where this option was selected, no redress, whether basic or for consequential loss, was to be paid until the bank had completed the assessment of consequential loss. The appellants chose Option 3.

55. By September 2014 the appellants found they were in financial difficulties and they asked for the Basic Redress amounts to be paid. In consequence, the bank, which was sympathetic to the request, issued a Revised Redress Offer which amounted to the Basic Redress but without the payment of interest. The offer came with an acceptance form which the appellants signed and read as follows:

> *"You acknowledge and agree that your acceptance of this Revised Redress Offer is in full and final settlement of all Claims including for costs, expenses or damages (excluding for consequential loss (as defined in the Bank's 'Customer Guide on Consequential Losses') and any court costs awarded in relation to any action to pursue damages for consequential loss), in any way connected to the sale of your IRHPs, however such claims arise."*

It was the effect of that wording which was explained by Flaux LJ at [19], set out at paragraph 40, above.

56. In December 2014 the bank announced the outcome of the review. It was not satisfied that the appellants had suffered any consequential loss and rejected that claim. It offered to pay the 8% interest on the basic redress. The appellants were not content with the offer and issued proceedings claiming mis-selling on the grounds that the bank was negligent, guilty of negligent misstatement and misrepresentation, breaches of a duty of care in the Review process and conspiracy. In response to an application to strike out, the appellants sought permission to amend to allege that the Revised Redress Agreement contained express terms under which the Bank was required to carry out a detailed assessment of the claim for consequential loss and if the same were well founded in law and fact, pay fair and reasonable redress to the Appellants. They also alleged implied terms which included an obligation on the bank to carry out the assessment in accordance with the terms agreed with the FCA.

57. The bank resisted the application to amend. It argued that the Revised Redress Agreement did not contain any of the terms alleged as the review of consequential loss was undertaken in pursuance of its obligations to the FCA, not any contract with the appellants. There was no consideration for the alleged contract to carry out the review and produce the outcome alleged. It argued that such an outcome was consistent with a number of cases in which judges had rejected claims that the bank was under a contractual obligation to the customer to conduct a Review as a result of the acceptance of its offer of Review; See **Suremime Limited v Barclays Bank [2015] EWHC 2277 (QB), Marshall v Barclays Bank [2015] EWHC 2000 (QB) and Marsden v Barclays Bank [2016] EWHC 1601 (QB)**. In each of these cases it was held that the bank was bound to carry out the Review under the agreement with the FCA and there was no consideration moving from the customer. As far as they were concerned it was a gratuitous arrangement under which they took the benefit. There was no difference when the Revised Review Offer was accepted. The only contract was the compromise and there was no more contract to conduct a Review of consequential loss than there had been before acceptance.

58. In accepting these arguments Flaux LJ said, at [59]-[60]:

"In my judgment, the appellants' claim that the bank came under a contractual obligation to them in relation to the conduct of the review when they accepted the Revised Redress Offer is unsustainable. There was plainly no such contract in June

2014 for all the reasons given by the judges who decided the earlier cases to which Mr Goodall QC referred, which I consider were correctly decided on this issue. The bank was always going to conduct the review anyway pursuant to its obligation to the FCA under the FCA Agreement which expressly excluded any rights of third parties such as the appellants and there was no consideration for any alleged contract at that time."

The position did not change in September or November 2014. The timing point made by Mr Goodall QC highlights that the bank was only conducting the review pursuant to its obligation to the FCA. The suggestion that the bank suddenly came under an additional contractual obligation to the appellants mid-way through the review process makes no sense. The only contract made upon the acceptance of the Revised Redress Offer was, as Mr Goodall QC submitted, the contract of settlement or compromise, under which the bank assumed no additional obligation in relation to its conduct of the review."

59. The compromise agreement in **Elite**, though not identically worded contained the same material features, namely a settlement of all claims but excepting claims for consequential loss. The agreement arose under the same FCA Review procedure under which the bank was obliged to identify regulatory failure and, where identified, determine Basic Redress and consequential loss by reference to a counterfactual which would put the customer in the position they would have been had the failure not occurred. Whilst Norham's construction point was not raised in **Elite**, the fact that the Court of Appeal rejected the proposition that the agreement to compromise basic redress was capable of creating a contractual obligation to determine consequential loss and to do so in a particular way, fatally undermines Norham's argument on the construction point. At the very least, it would produce an outcome which was entirely at odds with the gratuitous nature of the Review, which is a powerful factor in declining to construe the agreement in the manner asserted by Norham. Indeed, seen through the prism of **Elite,** any purported contractual cause of action requiring the bank to assess consequential loss in accordance with the counterfactual it employed to assess Basic Redress and to provide fair and reasonable compensation would merely replicate the bank's existing obligations to the FCA and could not exist as a contract due to want of consideration.

Conclusion on the construction issue

60. In asking the question as to what a reasonable person, having all the background knowledge which would have been available to the parties, would have understood them to be using the language in the contract to mean, the natural and obvious meaning of the words, which points to the 'Settled Claims' in the compromise agreement being all claims and causes of action other than in respect of consequential loss, is consistent with the operation of the FCA Review scheme and commercial sense for the reasons set out above. It has the virtue of treating the word 'claims' as having the same meaning where it is used in paragraph 4 of the agreement. It is also consistent with the fact that the agreement is headed "Acceptance of Basic Determination" in a process under which the bank will proceed to consider consequential loss under its obligations to the FCA whether the Basic Determination is accepted or not.

61. In contrast, Norham's construction does not accord with the ordinary and natural meaning of the operative term and would cut across the regulatory regime. It would also have the effect that a procedure which was intended to confer a benefit on the claimant, the early payment of Basic Redress, would prevent it from pursuing causes of action for consequential loss in which damages can be awarded on a more favourable basis than in the Review, for example damages for fraud or negligent misstatement where only causation, but not foreseeability, must be proved. Further, if the objective intention of the agreement had been to create contractual rights to a consequential loss determination part way through the review process one would expect to see express words to that effect.

62. As to the first issue, namely :

    By Norham accepting the Option B Redress Offer made by the Bank and the parties entering into a compromise agreement on the terms pleaded in [7.5] – [7.5.4] of the PoC, have the claims made by Norham for losses allegedly suffered as a result of the swap (not including the LIBOR or BSU misconduct claims) merged in the compromise and created a contractual entitlement to consequential losses?

The answer is no.

The Estoppel Issue

Discussion

63. Norham's assertion that the bank is estopped from disputing the Swap was mis-sold leaving the Court to determine the amount of consequential losses it sustained on the basis of the counterfactual upon which Basic Redress was assessed gets it nowhere.

64. The mis-selling accepted in the Review consists of a failure to comply with the regulatory requirements identified in the FCA agreement. It does not have a contractual claim to losses due to breach of the requirements, thus, even if it would be unconscionable for the bank to deny that it mis-sold the Swaps, in the sense admitted, a claim based on such breaches would be bound to fail. In the event, the common assumption arising out of the Review is not as clear cut as suggested by Norham because although the Basic Redress decision identifies an absence of regulatory compliance, it does so in the context of the Review which puts the burden on the bank to prove compliance and it makes it clear that the admission is made on the basis of an absence of information on file. The only unequivocal common assumption that can arise from these facts is that on limited information the bank cannot prove that it complied with the relevant regulations.

65. In order to succeed in a claim against the bank Norham will have to prove the existence of a cause, or causes, of action which are capable of leading to an award of consequential loss. There is no factual basis for a finding that there was a common assumption that the bank would not defend such an action or deploy any particular defence to defeat these claims.

66. At the outset of the hearing I indicated that I could not see how the estoppel could operate if the claimant failed on the first issue. In the light of my observations I continue to be of that view.

67. There was no argument based on an estoppel by representation. No representation was identified aside from that in the discussion between Mr Bilclough and the independent expert, and in relation to that there was no evidence of reliance.

Conclusion

68. As the regards the second issue, namely:

Is the Bank estopped from disputing that the swap was mis-sold, in the sense that the same was sold in breach of an actionable duty owed by the Bank to Norham, leaving the Court to determine the amount of consequential losses sustained by Norham?

The answer is no.