Neutral Citation Number: [2018] EWHC 3492 (Comm)

Claim No: CL-2015-000685

IN THE HIGH COURT OF JUSTICE
THE BUSINESS AND PROPERTY COURTS OF ENGLAND & WALES
COMMERCIAL COURT (QBD)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17/12/2018

Before :

MR JUSTICE ROBIN KNOWLES CBE

- -

Between :

HMG INVESTMENT HOLDINGS LIMITED **Claimants**

- and –

NATIONAL WESTMINSTER BANK PLC **Defendant**

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Richard Edwards QC and Liisa Lahti (instructed by **Teacher Stern LLP**) for the **Claimants**
Andrew Ayres QC and Niamh Cleary (instructed by **Dentons UK and Middle East LLP**) for the **Defendant**

Hearing dates: 21, 25-28 June, 2-4, 10-12 July 2018

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Judgment Approved

Mr Justice Robin Knowles:

Introduction

1. The Claimant ("HMG") is a group holding company, formerly known as The Hollins Murray Group Limited. The group operates through wholly owned subsidiaries in the business of property development and property investment. From August 1993 until March 2014 the Defendant ("the Bank") provided HMG with banking facilities.

2. On 24 March 2005 the Bank provided a facility to HMG, to include the refinancing of prior loans.

3. As at April 2008 the facilities provided by the Bank to HMG were hedged by three interest rate hedging instruments ("the Original Hedging Instruments"). HMG was in discussions to increase its borrowing from another bank and from the Bank. HMG closed out the Original Hedging Instruments and entered into a new hedging instrument with the Bank ("the Geared Collar").

4. In due course HMG was to allege that in the course of these developments representations were made by the Bank about the protection offered by the Geared Collar and the risk to HMG under the Geared Collar. Those representations were false, HMG alleged, and it was misled by them and suffered losses. In these outlined circumstances it brought this claim against the Bank. As appears below the allegations have since narrowed. This is the judgment on the trial of the claim.

The eventual compass of the case

5. Before and in the course of the trial the representations alleged and relied on by HMG narrowed. What has been termed the "Decreased Risk Representation" has been left at the heart of the case. This is said to have been a misrepresentation and to have caused HMG to enter into the Geared Collar.

6. For the avoidance of doubt, what were termed "Protection Representations" in HMG's statement of case were either removed, or not pursued, or became unsustainable in light of HMG's own evidence at trial. Any case in negligence beyond that dealt with in this judgment was not ultimately pursued. HMG's written closing submissions helpfully confined themselves to what did remain.

7. HMG and its legal team deserve some credit for their readiness to work to focus the case on the issues that were at the heart of what they criticised the Bank for. In the result the case largely turns on a true understanding of one particular aspect of a telephone conversation of 10 years ago, though fortunately recorded at the time.

The Original Hedging Instruments

8. These comprised (as summarised by the parties):

(a) An Interest Rate Cap for a notional sum of £7 million terminating on 5 May 2009 at a cap rate of 6.5%, executed on 5 May 2004.

(b) An Interest Rate Collar for a notional sum of £1 million terminating on 17 August 2008 at a cap rate of 5.5% and a floor rate of 4.46%, executed on 17 August 2005.

(c) An Interest Rate Collar (or Value Collar) for a notional sum of £25 million with a Cap and Floor rate of 6.5% and 3.95% (subject to knock-in rates varying from 4.5% to 5.25% in the event the reference rate set below the Floor rate) terminating on 19 January 2012, executed on 24 April 2006.

The Geared Collar

9. The Geared Collar was proposed and described by Mr Tony Bescoby ("Mr Bescoby") of the Bank to Mr Ian Thomas ("Mr Thomas"), HMG's Finance Director and Company Secretary, in an email of 3 April 2008.

10. Mr Bescoby, the sales person within the Bank's Global Banking and Markets Group, introduced what he described as a "suggested restructure" in these terms:

> "… whilst [HMG's current hedging] does provide a certain amount of protection the recent sharp rises in 3 month LIBOR are causing a significant increase in HMG's interest cost. Therefore I thought it would be useful to have a look at a re-structure which blends the break costs of the existing hedges (thus avoiding any cash outlay) and provides significantly improved protection which will reduce the company's immediate interest costs …"

11. Mr Bescoby continued:

> "Suggested re-structure … HMG breaks all the existing hedges and blends the break costs into the following new collar structure … Start date – 19/04/08 … Maturity – 19/01/12 … Notional amount - £35 m bullet … HMG purchase 5.60% CAP … HMG sell 4.15% FLOOR … If 3 month LIBOR fixes below 4.15% HMG interest cost increase by difference between actual fixing and 4.15% … However, this capped at 5.60% … On maturity RBS has the right to extend the collar on exactly the same terms for a further 4 years on £35m bullet notional … So the company improve the protection level by 90 basis points (current 6.50%) and although the floor level is increased slightly if 3 month LIBOR does fix below the floor it will have to fall below 3.55% this year and 3.05% until 2012 to match the fixed rate potentially payable on the existing collar (4.75% and 5.25%)."

12. The email stated that the break costs of the Original Hedging Instruments would be £300,000.

Before a telephone conversation on 4 April 2008

13. On HMG's case "the sequence of *relevant* [original emphasis] events leading to the entry into the Geared Collar begins in March 2008". At this point HMG approached the Bank with a view to borrowing a further £10 million to purchase Burton Place Shopping Centre in Burton-on-Trent.

14. At the time HMG had a £40 million facility with the Bank (of which £2 million remained undrawn), and a £9 million facility with N.M. Rothschild. The latter was in the process of being transferred at Rothschild's instigation to Lloyds TSB.

15. The terms of the £40 million facility were set out in a Facility Agreement dated March 2005. This provided at clause 10.21 that HMG would "at all times during the term of the Loan hedge not less than 2/3 of the amount drawn down under the facility with the interest rate hedging instrument being acceptable to the Bank and [HMG]."

16. In the course of discussions about the possible new lending, Mr Skinner (the relationship manager at the Bank for HMG) wrote to Mr Thomas on 2 April referring to the possibility of a new hedge and noting that if interest were capped at 5.5% this would make a "noticeable difference" to HMG's interest cover. Mr Thomas' response the following morning was to say that "If Tony can come up with a revised hedge that improves our position and interest the cap [sic] we would obviously be interested".

17. That afternoon Mr Bescoby called Mr Thomas on the telephone and Mr Thomas re-iterated that if the existing hedging could be reviewed so as to "improve our hedging and reduce our top end exposure … we're interested obviously".

18. Mr Bescoby explained that he "might be able to do something to bring the cap slightly down to a more feasible level". In order to do this, Mr Bescoby said that he "might just have to tinker around with the floor levels", and "maybe also" look at giving the Bank the right to extend the trade after a certain period. Mr Thomas invited Mr Bescoby to "do some figures and fax them over" to Mr Thomas so that he could circulate them.

19. Shortly afterwards Mr Bescoby sent the 3 April email summarising the Geared Collar. Mr Thomas forwarded the email to Mr Andrew Murray (HMG's Chief Executive, now sadly deceased), Mr Nick Casson (who would later succeed Mr Murray as CEO) and Mr Paul Mitchell ("Mr Mitchell", a non-executive director of HMG, although also a director of corporate finance of another company, a Chartered Accountant by qualification and later the chairman of HMG).

20. Mr Thomas then replied to Mr Bescoby: "I have circulated and will let you know if we are interested", adding "I assume we can revamp the hedging even if we don't proceed with Burton". Mr Bescoby confirmed that this was the case.

21. Mr Mitchell's response to Mr Thomas, having read Mr Bescoby's proposal, was to say that it looked "very interesting" and to invite Mr Thomas to call him to discuss it the following day.

22. Early the next morning Mr Thomas wrote to Mr Bescoby by email to ask what effect it would have on the figures if the notional amount of the hedging was increased to £40 million or £50 million rather than £35 million as Mr Bescoby had proposed. Mr Bescoby replied by email shortly afterwards with indicative levels.

23. In reply to this email, Mr Thomas wrote to Mr Bescoby: "Mr Mitchell, our chairman [sic], has just asked why there is a break cost of £300k for our present collar. Is it possible to let me know in a way I would understand!!". Mr Bescoby replied breaking down the cost into its constituent parts. Mr Mitchell accepted that he must have received the reply.

24. Importantly the breakdown of the break cost showed a figure of £230,000 as a cost to HMG for "Structured FLOOR being bought back by HMG". This was (as Mr Bescoby was to explain to Mr Mitchell in their telephone conversation on 4 April in which the Decreased Risk Representation is said to have been made) a reference to the presence in the Interest Rate Collar of knock-in rates varying from 4.5% to 5.25% in the event the reference rate set below the Floor rate.

25. Mr Thomas called Mr Bescoby, saying that Mr Mitchell "still can't understand … why there is a cost" and suggesting that Mr Bescoby should call Mr Mitchell to explain it to him direct. Mr Bescoby agreed to do so.

The telephone conversation on 4 April 2008

26. As framed in closing by Mr Richard Edwards QC and Ms Liisa Lahti for HMG, HMG's case is that it was induced to enter into the Geared Collar by the Bank's representation "that the Geared Collar would expose HMG to less risk than the Original Hedging Instruments". This representation is said to have been made in the telephone conversation at 14.06 on 4 April 2008 between Mr Mitchell and Mr Bescoby. It is alleged to have been false. The case is robustly challenged by Mr Andrew Ayres QC and Ms Niamh Cleary for the Bank.

27. I have listened to a recording of the telephone conversation, studied a transcript of it, and heard Mr Bescoby and Mr Mitchell give evidence about it.

28. In deriving the meaning of the words used in the telephone conversation I was invited by HMG to focus on an objective interpretation of the words according to the impact they might be expected to have on a reasonable representee in the position and with the known characteristics of the actual representee. This invitation was founded on <u>Raiffeisen Zentralbank v RBS plc</u> [2011] 1 Lloyd's Rep 123 at [81] and [86] (per Christopher Clarke J as he then was) and other authorities. It was not materially challenged by the Bank, and I accept it.

29. A great deal of evidence was directed to the relative level of understanding of derivative financial products as between the Bank and HMG, and as between Mr Bescoby and Mr Mitchell. It is sufficient for me to summarise my conclusions in

this respect, and these are unlikely to be surprising. The Bank had the greater understanding, and Mr Bescoby in particular within the Bank. HMG (including Mr Mitchell) was not without some understanding and experience of derivative financial products, but not nearly to the same order as the Bank. Mr Edwards QC accepted that HMG understood the basics of interest rate hedging, and that puts things fairly in my judgment.

30. More generally, I add that HMG also had the advantage of experienced and capable business leadership, and that included Mr Mitchell and Mr Thomas.

31. The purpose of the call was to discuss break costs.

32. The conversation lasted 10 minutes. Mr Mitchell told Mr Bescoby that the break costs Mr Bescoby had quoted for the existing hedges seemed "very high to me". He said that this "sort of indicates that there is in the probability curve … a likelihood of it [LIBOR] going into that range" (ie below the 3.95% floor of the Value Collar).

33. He expressed his concern that "if that's the case … aren't we being a bit foolish to move our threshold upwards to 4.15 or 4.05 per cent … in those circumstances. … You know my, my concern is, are we increasing our risk rather than decreasing it?".

34. Mr Bescoby replied: "Well I think potentially you're actually decreasing it, and I'll tell you the reason why." When Mr Bescoby had finished, Mr Mitchell said that he was "getting the point", summarising it by saying that under the new structure, "even with the higher thresholds … it's a lower impact". Mr Bescoby followed with "It's a lower impact, absolutely."

35. What Mr Bescoby had conveyed was that whilst the risk of breaching the floor was increased, the impact of breaching the floor was less. Even then he used the word "potentially" as well, and in context this conveyed that it would depend on the exact circumstances.

36. The statement that "it's a lower impact" had a basis. It referenced the fact that the increase in rates under the Geared Collar if the floor was breached was more gradual than under the Original Hedging Instruments.

37. Indeed the email of 3 April from the Bank outlining the Geared Collar had made the point:

> "… although the floor level is increased slightly if 3 month LIBOR does fix below the floor it will have to fall below 3.55% this year and 3.05% until 2012 to match the fixed rate potentially payable on the existing collar (4.75% and 5.25%)."

The reference to 4.75% and 5.25% "on the existing collar" was to the knock-in rates that were a feature of the Value Collar under the Original Hedging Instruments.

38. Indeed in the telephone conversation on 4 April 2008 Mr Bescoby explained:

> "… The probabilities are exactly the same of those two floors of going below 3.95, but if we go below 3.95 there's a payoff that you pay, you need to pay the bank which is much higher than, than the normal, standard floor. Because what you've got is a situation at the moment is if the market fixes at or below 3.95 then the interest costs that HMG pays for this, from now to the end of January 2009 is 4.75, and then for 2009 to 2012 is 5.25%"

39. Mr Bescoby and Mr Mitchell returned to the same point a little later in the conversation:

> "Mr Bescoby: … so what we were saying is this. This, collar structure says that if – it's not a normal collar structure. What it says is if the three month LIBOR fixes at or below 3.95 then HMG will pay a higher fixed rate for that period.
>
> Mr Mitchell: Yeah.
>
> Mr Bescoby: So out until January 2009 that higher fixed rate will be 4.75. From January ----
>
> Mr Mitchell: That's the existing one?
>
> Mr Bescoby: Yeah, yeah, this is the existing one I'm talking about.
>
> Mr Mitchell: Yeah.
>
> Mr Bescoby: And then from 2009 to 2012 the, the higher fixed rate will actually be 5.25 percent.
>
> Mr Mitchell: Uh huh, I've got you.
>
> Mr Bescoby: So what we're saying is that the probability of it going below 3.95 isn't necessarily high. Obviously we have to build into the fact that there is a probability. But what it is saying is that if we do go below that 3.95 then ----
>
> Mr Mitchell: Those are big numbers.
>
> Mr Bescoby: Those are big – yeah, there, there's a big number ----
>
> Mr Mitchell: I've got it.
>
> Mr Bescoby: -- ie HMG will not pay 3.95.
>
> Mr Mitchell: Now I'm getting the point.

> Mr Bescoby: Right.
>
> Mr Mitchell: Because now, even with the higher thresholds ----
>
> Mr Bescoby: Yeah.
>
> Mr Mitchell: -- it's a lower impact.
>
> Mr Bescoby: It's a lower impact, absolutely.
>
> Mr Mitchell: I've got you. Tony, I've got you."

40. I mentioned above that Mr Bescoby explained to Mr Mitchell in the telephone conversation on 4 April the relationship with break costs. He did so in these terms, immediately preceding the passage quoted at paragraph 38 above:

> "The … structured floor which you've got [ie under the Original Hedging Instruments] has the biggest value [ie value to the Bank], and that's £230,000, …"

"The Decreased Risk Representation"

41. Mr Edwards QC submitted that the key question was: "What do the words "Well I think potentially you're actually decreasing it" mean?". These words, unquestionably used by Mr Bescoby in the telephone conversation, appear in their place in the sequence of events at paragraph 34 above.

42. HMG's case is that on their plain and ordinary meaning the words mean that the structure proposed by the Bank - the Geared Collar - would expose HMG to less risk than the Original Hedging Instruments. (Mr Edwards QC makes clear that HMG has "never argued" that it understood from what was discussed that the Geared Collar would "always be more beneficial" than the Original Hedging Instruments.)

43. In my judgment, and with all respect for the high quality of argument presented on behalf of HMG, that case does not reflect the true compass of the conversation and fails to take account of what followed in the conversation.

44. As shown by paragraphs 32 to 40 above, the conversation continued in a way that conveyed clearly that what Mr Bescoby was saying was that the particular risk of breaching the floor was increased but the impact of breaching the floor was less.

45. In Mr Bescoby's initial response to Mr Mitchell's use of the word "risk", given in Mr Bescoby's words "I think potentially you're actually decreasing it", Mr Bescoby

was not referring to some "overall" comparison of risk of the Geared Collar as compared with the Original Hedging Instruments. Nor was he referring to risk "in the sense of probability of loss on the downside of the transaction in the event that interest rates fall" (to use the description of one "sense" of risk given in Mr Edwards' written closing submissions). The explanation he went on to give made that clear, and to make what he was referring to clear.

46. Similarly, Mr Bescoby was not referring to the implications of other particular aspects of the Geared Collar, for example the 4 year extension option. Again examination of the explanation he went on to give makes that clear.

47. Mr Edwards QC drew particular attention to three features:

    a. The first was the fact that Mr Mitchell used the word "risk". Mr Edwards QC argued that Mr Mitchell was expressly asking about risk rather than the rates payable pursuant to the new proposed structure. It is however necessary to go further. Taken as part of the conversation as a whole the question, and the answer, each convey that the word was a reference to the risk of breaching the floor, which appeared higher if the cost indicated "a likelihood of it going into that range" and the floor ("threshold" in Mr Mitchell's terminology) was set higher (and that was Mr Mitchell's point). But more importantly still, the conversation continued and clarity of meaning was provided as described above.

    b. The second was the fact that Mr Bescoby had already set out the details of the proposed new collar structure in an email which Mr Mitchell had seen. Therefore, argued Mr Edwards QC, Mr Mitchell already had that information and would not have been asking for it. This point does not take Mr Edwards QC very far. The conversation was prompted by HMG's concern over breakage costs. These would be absorbed within the change from Original Hedging Instruments to the Geared Collar. HMG obviously appreciated that would involve the Bank receiving benefit elsewhere in the Geared Collar structure to reflect the absorbed costs.

    c. The third feature highlighted by Mr Edwards QC took the form of a suggestion that the statements made or information provided by Mr Bescoby about the details of the revised structure were "clearly being provided by way of an explanation as to how it could be the case that risk was decreasing despite the floor being increased (an increase in the floor alone would increase [HMG's] risk)". This is apparent, says Mr Edwards QC, from the fact that Mr Bescoby expressly stated "Well I think potentially you're actually decreasing it, and I'll tell you the reason why" before making those statements. For my part, I do not think this feature advances HMG's case; it is consistent with the answer to that case.

48. Mr Edwards QC argued that the interpretation of the words used contended for by HMG was supported by the context. I cannot agree; context, and especially the

words in the context of the conversation as a whole and the reason for it, tend against HMG's interpretation.

49. Mr Edwards QC argued that HMG's interpretation was supported by both Mr Mitchell's evidence and Mr Bescoby's evidence. I do not accept this, even where it is relevant in an enquiry that is focused on an objective interpretation of the words according to the impact they might be expected to have on a reasonable person (see above). Both were doing their best with a conversation that is 10 years old. Neither in my view had an original recollection of words used. The recollection of both was, in my assessment of their evidence, reconstructed (and understandably reconstructed) with the benefit of the tape and the transcript.

50. Mr Mitchell's evidence, highlighted by Mr Edwards QC, that "quite clearly I had just said my concern is we are increasing our risk, and I hear somebody say, in the context of their sentence, you are decreasing it" does not add to the wording on the tape and in the transcript, and requires the same analysis to reach a correct understanding as does the tape and transcript.

51. A passage in Mr Bescoby's evidence at trial that was particularly highlighted by Mr Edwards QC is in these terms:

> "Q. He [Mr Mitchell] is worried that HMG might be about to step into a new transaction where the downside risk is actually greater?
>
> A. Yes, that's correct.
>
> Q. He's talking about that, in terms of comparing the two he is looking at pricing of what you might call the downside of the transaction as a matter of objective fact?
>
> A. Yes."

52. To this I would respectfully say again, that the conversation said to contain the Decreased Risk Representation must be understood as a whole. Listening to his evidence, I did not understand Mr Bescoby by these answers in cross examination to be accepting that Mr Mitchell was looking at this point in the conversation for some "overall" comparison of risk of the Geared Collar as compared with the Original Hedging Instruments. References to measurements including the extent to which HMG was exposed on the downside of the transaction, or to CLU or to Mark to Market (or increased break cost of the new structure that was the Geared Collar), subject to some exploration at trial, would not have been relevant for that reason.

53. Similarly with the fact that the Geared Collar required an increase in the Bank's credit line for HMG. That signal in relation to risk was also not relevant to the narrow content of the conversation, although if it was then HMG was aware of it. Mr Bescoby told Mr Mitchell in the telephone conversation that the Bank needed "to make sure we've got sufficient credit to cover the, the, credit on this". He was to refer to the same subject in a later conversation with Mr Thomas.

54. In any event Mr Bescoby did not give any overall "comparison". Even when he said, next, "I think potentially you're actually decreasing it" he said "I'll tell you the reason why". The explanation he went on to give made clear that he was not giving some "overall" comparison of risk of the Geared Collar as compared with the Original Hedging Instruments. By the time the conversation was complete Mr Mitchell had been told that what Mr Bescoby was talking about was reduced (or decreased) impact. He had also in fact been told that something was increased, not decreased.

55. A more generalised reference to the "overall" effect of the Geared Collar did come later in the conversation. Mr Mitchell was to say to Mr Bescoby: "You think it's a pretty good swap, swap for us to do, don't you?" Mr Bescoby began to embark on an explanation of what the Geared Collar did. Each gentleman participated, with Mr Mitchell offering his view of what was likely to help and which way interest rates would move and when. And then Mr Mitchell had to go to another meeting. So that later part of the conversation was in some senses incomplete. But importantly for present purposes that part of the conversation is not alleged by HMG to give rise to the Decreased Risk Representation. Even had that been the allegation it would have had no merit, as an examination of the conversation as a whole makes clear.

After the telephone conversation

56. Following the conversation Mr Mitchell told Mr Thomas that he was satisfied with the explanation Mr Bescoby had provided. Mr Thomas called Mr Bescoby to thank him for speaking to Mr Mitchell, telling him that Mr Mitchell had "understood it eventually".

57. This passage followed, which is in line with the conclusions reached above, from the 4 April telephone conversation between Mr Bescoby and Mr Mitchell, about the allegation that there was a Decreased Risk Representation:

> "Mr Bescoby: I think it's one of those things where it just – and I think he has hit the nail bang on the head, that there is a slightly bigger risk that we'll go through the floor but the greater –
>
> Mr Thomas: Mmm hmm.
>
> Mr Bescoby: -- sorry, but there's less of an impact ----
>
> Mr Thomas: Yeah, I (inaudible – over speaking).
>
> Mr Bescoby: -- if you see what I mean.
>
> Mr Thomas: Yeah. We're all ready to go ahead. Do you need a fax confirmation or will a verbal one do?"

58. Mr Bescoby explained to Mr Thomas that he had not yet got credit approval, so they agreed to speak again later in the afternoon. Mr Bescoby called Mr Thomas back to execute the transaction just before 3pm. The formal confirmation followed on 14 April 2008.

HMG's case in negligence

59. HMG has a case in negligence that Mr Edwards QC explained would engage if the claim in misrepresentation failed because it was found that Mr Bescoby had in making the alleged Decreased Risk Representation expressed an opinion without any express or implied representation of fact.

60. The question then would be whether in expressing an opinion the Bank assumed a duty to take reasonable care. In the event I need not answer that question because the Decreased Risk Representation as alleged was not made, and also because Mr Bescoby's statement was not negligent.

61. In arguing that it was negligent Mr Edwards QC made clear that HMG relied on essentially the same matters as those relied on in relation to the misrepresentation claim. Mr Edwards QC's argument had three stages, in summary. First that Mr Bescoby knew that by closing out the Value Collar of the Original Hedging Instruments in order to step into the Geared Collar, HMG would be selling options with a substantially greater value to the Bank than the options it was buying back. Second, it was necessary and inevitable that the options must increase in value to the Bank in order to pay for the reduction in the cap rate and to provide the Bank with the revenue it wanted out of the transaction without charging a premium. Third, had Mr Bescoby been acting carefully he would have been bound to say that the risk to which HMG was exposed would increase if it entered into the Geared Collar.

62. The first and second stage do not take into consideration the effect of the extension as a further source of value to the Bank, but that is a detail. The central answer to HMG's argument is that Mr Bescoby was not asked to deal with, and was not dealing with, what HMG here describes as "the risk to which HMG was exposed would increase if it entered into the Geared Collar". And what he did deal with he dealt with without negligence.

63. I appreciate that to make that answer good involves repetition of what has gone before, and so I will be brief. Mr Mitchell had expressed concern that said that "there is in the probability curve … a likelihood of [LIBOR] going" below the 3.95% floor of the Value Collar. He raised the question "if that's the case … aren't we being a bit foolish to move our threshold upwards to 4.15 or 4.05 per cent" because that would be reached even earlier. In relation to the risk that Mr Mitchell was asking about, Mr Bescoby replied: "Well I think potentially you're actually decreasing it, and I'll tell you the reason why." Mr Mitchell himself was as a result able to summarise the reason by saying that under the new structure, "even with the

higher thresholds … it's a lower impact". Mr Bescoby followed with "It's a lower impact, absolutely." It is clear what was being discussed. There is nothing negligent in that discussion.

"Still false?"

64. HMG further argued that "even if Mr Bescoby's statement only referred to the risk arising from the change in the floor structure, it was still false". This argument was based on evidence set out in these terms by the derivative and risk management expert witness called by HMG, Mr Hanif Virji.

65. Mr Virji said this:

> "… My Lord, the new floor structure does not decrease the risk, nor is the risk the same. The risk has increased, and it has increased for a number of reasons. The first reason it has increased is that the cap rate was reduced, and in order to pay for that reduction in the cap rate, the risk – so the lowering of risk should interest rates rise – the risk must necessarily increase should interest rates fall. One can't just reduce or increase risk without there being – without a risk changing elsewhere, unless premium was being paid.
>
> There was no premium paid in this case, so a decrease in risk should interest rates rise must be compensated for by an increase in risk should interest rates fall.
>
> In addition to that, the bank took out a revenue of £240,000 –odd. That means in order to pay for that revenue, the risk must also increase. Given that it can't increase should interest rates rise, because they have reduced the cap rate, that £240,000 worth of risk must also increase should interest rates fall.
>
> Now the effect – where the risk arises from should interest rates fall comes from a number of factors. The first factor are the various puts that HMG have sold to the bank, or effectively sold to the bank within the structure. The second factor is the swaption, the bank's option to extend the extendable geared collar.
>
> Everything taken together implies that the risk has increased, and it cannot be otherwise.
>
> Excluding the extension option, and using the valuations that we have, the risk has still increased even after adjusting for the increase in the notional value of the original hedging instruments and the extendable hedging product.

> So in every analysis that I have done, it demonstrates that the risk has increased and it cannot be otherwise….”

66. I do not consider that this evidence means that what Mr Bescoby said was false. Properly understood Mr Bescoby was not saying “the new floor structure decreased the risk”. He was saying that the possibility of going through the floor was increased, but the impact was lessened.

The adequacy of the Bank’s case

67. HMG dwelt on suggestions that the Bank’s case at trial was not its case as set out in its statement of case. HMG added that this affected the credibility of the Bank’s defence and of the evidence of Mr Bescoby.

68. I do not consider there to be anything in this. The key question on HMG’s own case is one of interpretation. The interpretation that has prevailed was well within the compass of the Bank’s statement of case which denied the interpretation advanced by HMG. The presence of other interpretations too, in a statement of case or in argument at trial, is unsurprising in a case of this nature. But perhaps most importantly, is the point that the interpretation of HMG fails in my judgment.

69. I reject completely the suggestion that Mr Bescoby’s credibility was impaired. Like the other witnesses of fact in the case, on both sides, he was trying to do his best in his evidence at trial and I am grateful to him and to the other witnesses, again on both sides, for the assistance given to the Court.

Conclusions

70. There was no Decreased Risk Representation as alleged by HMG. What was in fact said was not confined to the sentence relied on by HMG and was not, on its true interpretation, false. It is not necessary for me to enter into questions of loss because they do not arise.

71. This is an unfortunate case. The outcome in law is in my view clear. But on any commercial view this was an unsatisfactory transaction. The attention to detail on both sides in Spring 2008 was not great, given what they were doing. HMG - a business that was good at what it did - expected more of the Bank than it got. I did not detect from any of the Bank’s witnesses a sense that they believed this was a transaction from which they could ultimately take any professional pride.

72. However, the decision for me is whether the case succeeds or fails in law. I am quite clear it fails. I must dismiss the claim.