



Neutral Citation Number: [2022] EWHC 726 (Comm)

Case No: CL-2016-000037

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 29/03/2022

Before :

MR JUSTICE JACOBS

Between :

- (1) **CJ AND LK PERKS PARTNERSHIP**
- (2) **CLAYTON JOHN PERKS**
- (3) **LEANNE KAY PERKS**

Claimants

- and -

NATWEST MARKETS PLC
(formerly The Royal Bank of Scotland Plc)

Defendant

Duncan Macpherson (instructed on a direct access basis) for the **Claimants**
Paul Sinclair QC and Laurie Brock (instructed by **TLT LLP**) for the **Defendant**

Hearing dates: 17th-18th, 22nd November, 14th-16th December 2021, 17th-18th January 2022

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

This judgment was handed down by the judge remotely for circulation to parties' representatives by email.

The date of hand- down is deemed to be 29th March 2022

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A: The parties, the background and the claims

A1: The parties

The Claimants

1. The Claimants bring proceedings in relation to a number of aspects of their dealings with the Royal Bank of Scotland PLC (“RBS” or “the Bank”), now called Natwest Markets PLC, between 2007 and 2011.
2. The first Claimant is a husband & wife partnership (“the Partnership”) in whose name a number of contracts with RBS were concluded. Its partners are the second Claimant (“Dr Perks”) and his wife Mrs Leanne Perks, the third Claimant (“Mrs Perks”). One issue in the case is whether, as RBS contends, the Partnership had a separate legal existence from its two partners, because it was a Scottish partnership.
3. Dr Clayton Perks is a chiropractor. Chiropractors use their hands in order to deal with problems with muscles, bones and joints. In the United Kingdom, chiropractic is regarded as a form of complementary or alternative medicine, and it is not widely available on the NHS. Its registered practitioners, such as Dr Perks, have undergone training, but are not medically qualified physicians. They are, however, entitled to use the title “Dr”, and I shall use that title in this judgment. Mrs Perks is a homemaker.
4. Dr & Mrs Perks were originally from Australia. In 1997, they started buying property in Glasgow, from which Dr Perks ran chiropractic clinics. In 2004, Dr & Mrs Perks established a company, Glasgow Chiropractic Limited (“GCL”), to operate clinics in Scotland from premises which, by the time of the events with which I am concerned, were rented mostly from the Partnership. In 2007, Dr & Mrs Perks established Newcastle Chiropractic Limited (“NCL”) to operate clinics initially in Newcastle from premises rented from third parties. I shall refer to GCL and NCL as the “Companies”.
5. Legally and contractually, the Companies and the Partnership (whether Scottish or not) were different. The function of the Partnership was essentially to own property, which Dr Perks hoped would prove to be a good investment and provide a nest-egg on eventual retirement. By contrast, the Companies were the operating chiropractic businesses. There was, however, a close connection between them. In particular, the income of the Partnership, which was required in order to service loans made for the purpose of acquiring properties, was derived from rents paid by GCL. To some extent, therefore, it could be said that there was an overall business, and it is therefore convenient to refer, as did the parties in various contexts, to the “Perks business” as encompassing all aspects of the commercial dealings of the Partnership and the Companies.
6. A number of other individuals played some role in the relevant events. The most important individual was Ian Fordyce, an in-house accountant to GCL, NCL and the Partnership. He was closely involved in the discussions which led to the Partnership entering into swap contracts in 2007 and 2009. Other individuals were: Matthew Small, the Managing Director of GCL until 4 December 2009, and Hooman Zahedi, a former chiropractor and former shareholder in GCL. Mrs Perks played no significant part in the business or in the events giving rise to the litigation.

7. Dr Perks was the only witness who gave evidence for the Claimants. It will be apparent from my description of events below that Mr Fordyce would have been a potentially important witness. It was, however, accepted by RBS that there was a reasonable explanation as to why he had not been called and I was not invited to draw any adverse inference from the fact that he was not called.

RBS

8. RBS became principal bankers to the Partnership and the Companies in around 1999. It funded the purchase of properties with 100% debt and gave the two Companies substantial overdrafts with which they established new clinics and occasionally purchased existing clinics. The business grew quickly so that by 2006 there were 16 clinics around Glasgow. During that time, Dr Perks' principal contact at RBS was Ms Jane McGuigan, who acted as his "Relationship Manager".
9. Ms McGuigan was one of a large number of RBS individuals who became involved, one way or another, in the banking relationship with the Perks business. She worked as the "Relationship Manager" from 2006 to late 2008 within "Commercial Banking". This was the business banking division of RBS. She was based in Glasgow and the Commercial Banking unit where she worked was called "Glasgow Commercial". This unit had a number of relationship managers for clients, who were referred to as "connections". The Relationship Manager or "RM" is the first point of call for a client within Commercial Banking. In due course, Ms McGuigan was succeeded as RM by Mr Robert Clark from late 2008 to November 2009, at which point the relationship was effectively transferred to the Global Restructuring Group or "GRG".
10. There were a number of other units within RBS, apart from Commercial Banking, which had a significant involvement in the events giving rise to the litigation, principally: (i) Credit Risk Management; (ii) "Commercial Risk Solutions", later known as "Global Banking and Markets"; (iii) GRG; and (iv) Portfolio Management Unit.
11. Credit Risk Management was the Credit division of the Bank, of which UKCB Credit Scotland formed part. I shall refer to this division simply as "Credit". The approval or "sanction" of Credit was required for the additional borrowings relevant to the present litigation. The individuals within Credit involved from time to time included Katherine Jenkins, Christine Jones and Eric Livingstone.
12. Commercial Risk Solutions (later Global Banking and Markets and sometimes known as "Treasury Solutions") was the investment banking division of RBS, responsible for the sale of an Interest Rate Hedging Product ("IRHP"). Three individuals from that division played a part in the relevant events:
 - i) In 2007, Angela Fullerton sold the first swap to the Partnership. Ms Fullerton subsequently married and became Angela McPartlin;
 - ii) Kevan Munro, a Director of the RBS Commercial Risk Solutions Division, corresponded by e-mail and telephone with Dr Perks and Mr Fordyce in 2009, in the lead up to the second swap;

- iii) David Tweedie, a colleague of Mr Munro, who executed the second swap. His involvement was briefer and less significant than that of Ms Fullerton and Mr Munro.
- 13. Global Restructuring Group or GRG was, as its name suggests, a unit which dealt with businesses which had encountered problems and where restructuring was a possibility. Business Restructuring Group or BRG was a division within GRG. The relationship management of the Perks business was transferred into GRG in late 2009, where it was initially dealt with by Mr David McCall under the supervision of Mr Neil Graham who was the head of BRG Scotland. Mr McCall's role was to act as the RM for the Companies and the Partnership on the transfer of their management relationship to GRG/ BRG in November 2009. He remained the RM until 2011 when he was succeeded by Euan Campbell.
- 14. Portfolio Management was a unit at RBS which, amongst other things, carried out desktop property valuations. Such valuations were relevant because the Partnership's principal assets comprised the properties which it had acquired. Mr Alisdair Hillis worked for that unit.
- 15. At trial, RBS called only two employees who had been involved in the events giving rise to the litigation: Mr McCall and Mr Graham from BRG/ GRG. Their involvement had started in early November 2009. I did not therefore hear from the principal individuals (Ms McGuigan and Ms Fullerton) who were involved in the events leading to the first (2007) swap, nor from the individuals (principally Kevan Munro) involved in the discussions leading to the second (2009) swap. As described below, the Claimants invited the court to draw adverse inferences from their absence.

A2: The three claims

- 16. The Claimants' claims concern: (i) alleged mis-selling of the 2007 swap; (ii) alleged mis-selling of the 2009 swap; (iii) an alleged conspiracy concerning the conduct of GRG following the transfer of the management of the Perks business to GRG in 2009. This section introduces the background to those claims.

The first (November 2007) swap

- 17. In the course of 2006-2007, discussions took place between Dr Perks and Ms McGuigan relating to the continuation and expansion of the facilities which RBS had granted. RBS was at this time looking to consolidate its existing mortgages on various properties into a single repayment loan to the Partnership of around £2m. The discussions reached a successful fruition in November 2007. It is common ground, and clear from the contemporaneous documents, that a new loan agreement was concluded between RBS and the Partnership at that time. Unfortunately, a copy of the contractual document has not survived, and neither side was able to produce it in the course of disclosure in these proceedings. There is, however, no dispute that, in November 2007, the Partnership drew down on the new loan.
- 18. In the course of the discussions between the parties in 2007, RBS had indicated that it would be necessary, as a condition of the loan, for the Partnership to enter into an IRHP. There were various types of IRHP which were potentially available at that time, including an interest rate swap agreement. A swap of the type concluded in the present

case has been described by Tomlinson LJ in *Green v RBS* [2013] EWCA Civ 1197 para [11] as a “very straightforward transaction”. This was one of the earliest swaps “mis-selling” cases, and I have been referred to many such subsequent cases. In essence, and as described by Tomlinson LJ, an interest rate swap has the effect of fixing the liability of a customer to pay interest to a bank under a variable rate loan. A swap is a mechanism for providing an effective hedge against an increase in interest rates. Such an increase would, absent the swap, have an adverse financial effect on the customer, who would have to pay the higher rates of interest. The swap neutralises that impact. If interest rates rise, the customer would pay more under its variable rate loan, but would recoup the enhanced payment from the bank under the swap. The corollary was that if rates fell (as in fact they did) the customer would be worse off than if the swap had not been entered. That is because whilst the customer would pay less interest under the variable rate loan, it would have to disgorge that saving to the bank under the swap.

19. On 29 November 2007, the Partnership entered a 5-year interest rate swap at 5.60% (excluding lending margin) in respect of a sum starting at just over £2m and reducing in accordance with the loan (“the 2007 swap”). RBS’s lending margin was 2.15% so the combined effect of the loan and the swap was to fix the Partnership’s payments for 5 years at 7.75%. The effect of the swap was to provide protection to the Partnership against upwards movements in interest rates. Any upwards movement would result in the Partnership having to pay a higher rate under the 2007 loan, which was concluded on the basis of a “floating” (and therefore variable) interest rate. However, those payments would be compensated for by payments which the Partnership would receive under the swap. Equally, the effect of the swap was to deny the Partnership the practical benefit of any downward movement in interest rates. Any such movement would result in a reduction of payments being made under the 2007 loan, but a corresponding increase in the payments required under the swap.
20. As matters transpired, interest rates fell and therefore the Partnership was in a less advantageous position than it would have been if its only commitment had been to pay a floating rate under the loan. There was a small reduction in interest rates – the relevant rate at that time being the Bank of England base rate – from 5.75% to 5.5%, approximately a week after the swap had been concluded. However, the most significant reduction in rates occurred following the global financial crisis of 2008, with the Bank of England base rate reaching 0.5% in March 2009.
21. The effect was illustrated by a table produced by the Bank, at the request of the Claimants, shortly before the start of the trial. This showed that there were relatively small payments under the swap in its first 10 months or so, when base rate was at around 5%. However, from March 2009 onwards the net amounts to be paid under the swap were approximately £ 8,000 or £ 9,000 per month, or around £ 100,000 per year. Had the swap not been concluded, so that the Partnership’s only relevant obligation was to pay interest under the variable loan, this cash outflow would have been saved, with the Partnership enjoying the benefit of the substantial fall in interest rates that had occurred.
22. The 2007 Swap is the first transaction which gives rise to claims by the Claimants in these proceedings. The substance of those claims is that RBS sold the 2007 swap as the result of a negligent misrepresentation about its belief as to interest rate movements, as the result of a negligent failure to explain the risks of the 2007 swap, as the result of

negligent advice as to the suitability of the swap, and in breach of a number of Code of Business (“COB”) and after 1 November 2007 Code of Business Sourcebook (“COBS”) rules issued by the Financial Conduct Authority in respect of which the Claimants (or at least Dr and Mrs Perks) allege a right of action under Financial Services and Markets Act 2000 (“FSMA”) section 138D.

The second (July 2009) swap

23. The second transaction which gives rise to claims is a swap that was concluded in July 2009 (“the 2009 swap”). There was a substantial history of dealings between the parties, in the latter part of 2008 and 2009, which led to this swap, which formed part of a restructuring of the debt of the Partnership and the two Companies. This is addressed in more detail in Section D below. The position, in broad summary, was that during that time period Dr Perks was looking to borrow further monies from RBS, but RBS had concerns as to the financial position of the Perks business.
24. From October 2008, RBS was looking to achieve a number of objectives, including repayment of the overdrafts of the Companies, to move the borrowing of the Partnership to a rate based on LIBOR (rather than base rate), to increase its lending margin, and to re-hedge the loan. At around that time, RBS itself had experienced very well-known difficulties as a result of the global financial crisis. After a lengthy internal discussion, RBS emailed Dr Perks on 30 March 2009 with its proposals to restructure the existing debt (“the 2009 restructuring”), which included: the Partnership property debt would be converted to LIBOR + 2%; the Partnership would take out a new swap with costs for breaking the 2007 swap being “blended in” with the new swap; GCL’s existing £567,000 loan would be converted to LIBOR + 3% with a 6 month capital holiday; and its £400,000 overdraft would be transferred to an Enterprise Finance Guarantee (“EFG”) loan (75% of which is guaranteed by the UK government) also with a 6 month capital holiday.
25. On 9 June 2009, Kevan Munro, the Director of Commercial Risk Solutions at RBS, emailed Dr Perks giving him the option of staying with the 2007 swap or taking out a new swap at a slightly lower rate. In fact, although this option of staying with the existing swap was offered, the Bank would not ultimately have agreed to it: it wanted a new swap using LIBOR rather than base rate. In due course, on 9 July 2009, David Tweedie of RBS agreed a new 5-year interest rate swap with Ian Fordyce, in-house accountant to the Group, at a rate of 5.40%.
26. The 2009 swap gives rise to a further series of claims. The Claimants contend that RBS forced the partnership to enter the 2009 swap as part of the 2009 restructuring as a result of a failure to explain the key risks of the swap, as the result of negligent advice as to suitability, and in breach of a number of COBS rules in respect of which the Claimants (or at least Dr and Mrs Perks) alleged a right of action under FSMA section 138D.

The transfer to GRG and the conspiracy claim

27. The third set of claims arises out of events which began in late 2009. On 1 November 2009, RBS transferred the management of the Perks business to GRG. This resulted in the business engaging, at the Bank’s request or insistence, the services of a Ms Aileen Pringle as a consultant. Ms Pringle was the third witness called by the Bank at trial. This transfer to GRG in turn resulted in a further restructuring of the business ultimately

concluded in mid-2011. The features of that restructuring were, in summary, that: the 2009 Swap was broken, the breakage fee was added to the Partnership's indebtedness, the Bank allowed more time for repayment in the hope that the business could recover, and the Bank received certain benefits in the form of an equity stake in the Companies and a separate Property Participation Agreement ("PPA").

28. The substance of the conspiracy claim, at least as originally pleaded, was that RBS destroyed the Perks business as a result of the transfer to, and via the practices of, GRG. The Claimants contended that individuals at GRG then worked with Ms Pringle against the interests of the business until the two companies could no longer trade. They entered administration in February 2013. The Claimants' pleaded case advanced wide-ranging claims in conspiracy against RBS, involving a large number of individuals within different units.
29. The Claimants' written opening, however, addressed the conspiracy claim relatively briefly, indicating that the claim would be addressed further in closing after the court had seen the oral evidence. It suggested, however, that there would be a narrowing of the case advanced so as to focus on the period when Ms Pringle was working as a consultant and her work in that regard. The cross-examination of the Bank's witnesses, and the Claimants' written closing, confirmed that the case had indeed substantially narrowed. The case in substance was that RBS was seeking to extract the largest possible value from the Claimants by exploiting the breach by Ms Pringle of her duties of loyalty to the Perks business.

The relationship between the various claims

30. In their written and oral closing submissions, the Claimants devoted the substantial majority of their submissions to the claim in respect of the 2007 swap. It seems to me that reflected the importance of the Claimants succeeding on their claim in respect of the first swap. This is because it is possible, at least in theory, to see that the claim in relation to the first swap, if well-founded, could give rise to a claim for substantial loss. This would be on the basis that the first swap had the effect of saddling the Partnership with a significant financial burden at a time of falling interest rates. It was therefore not able to enjoy the benefits of falling interest rates that it would otherwise have enjoyed. Had it enjoyed those benefits, its cash flow would have been improved and it would have prospered in a way in which it was unable to do as a result of the 2007 Swap.
31. If that claim were to fail, however, then it is not easy to see how the other two claims (the 2009 swap and conspiracy) could be said to lead to the same or similar consequences.
32. The case in relation to the 2009 swap was, in substance, that the Partnership was forced to conclude this swap as a consequence of the 2007 swap. Had it not done so, then the 2007 swap (which was a 5-year swap) would have continued until November 2012 with the same adverse financial consequences, in terms of the Partnership needing to make substantial payments under the swap, during that time. Indeed, in the Claimants' written opening, it was submitted that the claims were related because: had the Partnership not entered the 2007 swap, it "would not have been in a position where RBS could have forced it to enter the 2009 restructuring including the 2009 swap". This indicated that the real and underlying (alleged) cause of the Claimants' losses was the 2007 swap, rather than the 2009 swap.

33. The Claimants' written closing asserted that the result of entering into the 2009 swap was that the Partnership suffered "some loss"; in particular the difference between the sums that would have been payable for breaking the 2007 swap and the higher sum payable for breaking the 2009 swap. However, a claim in respect of that head of loss would be relatively limited, and much more confined than the potential claim for loss, comprising the destruction of the Perks business, alleged to flow from the 2007 swap.
34. In relation to the conspiracy case, the Claimants' closing submissions identified loss relating to more favourable terms that Ms Pringle might, if she had performed in accordance with her fiduciary obligations, have negotiated with the Bank as part of the 2011 restructuring arrangements. However, this is a much more limited loss than a claim for the destruction of the Perks business. This reflected the fact that Dr Perks' evidence at trial was that the business was insolvent at the time of the transfer to GRG. The underlying cause of that insolvency was, as Dr Perks perceived it, the 2007 swap.

A3: The proceedings and the trial

35. Dr Perks first intimated claims of mis-selling of the 2007 swap in 2009, in the course of the discussions which led to the 2009 swap. No proceedings were, however, commenced at that time, or indeed for many years after.
36. The first swap was entered into on 29 November 2007, and therefore its six-year anniversary was 29 November 2013. On 1 November 2013, as this date approached, the Partnership entered into a standstill agreement with the Bank. The Bank accepts that this temporarily stopped time running. On 24 November 2015, Dr Perks sent a letter to Mr John Robinson, giving notice of termination of the standstill agreement with effect from 22 December 2015. There is a dispute as to whether this letter was effective to terminate the standstill agreement. RBS says that it was, and that therefore proceedings should have been commenced by 19 January 2016. The Claimants say that it was not. The significance of the point is that proceedings were not commenced until 21 January 2016, and RBS says that this was two days late and that there is a limitation defence as far as concerns the claims in respect of 2007 swap.
37. It is not necessary to describe the interlocutory stages of the proceedings, save to note that in September 2020, at the case management conference, it was ordered that the trial was "in respect of liability only". There was no dispute that this did encompass issues of inducement and related issues of causation; in particular whether any alleged misrepresentation, or any breach, caused Dr Perks to do anything which he would not otherwise have done. RBS's case is that even if RBS had acted differently, and even if any relevant wrongdoing on its part were to be established, Dr Perks would still have entered into both swaps. It was common ground that quantification of loss, if liability in respect of the claim is established, is for subsequent determination.
38. RBS's opening and closing submissions put forward a quantified counterclaim, comprising the sums outstanding in respect of the loan to the Partnership, as restructured in 2011. The Claimants' submissions did not address the counterclaim at all. In my view, the quantification of RBS's counterclaim is a matter which does not form part of the liability trial. One principal objective of the claim, however, is to negate the counterclaim. If the claim fails, then there does not seem to be any dispute that RBS will succeed as a matter of liability in relation to the counterclaim. The precise

quantification of the counterclaim is, however, a matter for later determination although it will be open to RBS to seek an interim payment pursuant to CPR Part 25.

39. Opening oral submissions began on 17 November 2021. The first day of the trial, and much of the second day, were spent on applications by the Claimants for additional disclosure and to make wide-ranging amendments to their pleading. I refused the former, and permitted far more limited amendments than had been sought. Dr Perks' evidence began towards the end of Day 2 and continued on Day 3. Owing to illness of counsel, it was not possible to complete his evidence in November and the trial resumed on 14 December when Dr Perks' evidence was concluded. Mr McCall, Mr Graham and Ms Pringle then gave evidence for 2 days. Following conclusion of the evidence, the parties served written closing arguments, and closing oral submissions were made on 17 and 18 January 2022. I indicated at the conclusion of the hearing that I did not wish to receive any post-hearing submissions, unless specifically requested by me or unless an application was made. Dr Perks sought to make a further submission, but I declined to receive it, indicating that I intended to decide the case on the basis of the evidence and submissions made at the hearing.
40. In this judgment, I have sometimes corrected typographical or other errors in quoted e-mails or correspondence, or have expanded abbreviations, for ease of understanding.

B: The witnesses

B1: Dr Perks

41. Dr Perks is a critical witness for the Claimants, and the central aspects of the Claimants' claim depend upon the court's assessment of his reliability as a witness. In particular, the Claimants advance a case that there was an oral misrepresentation at a meeting on 9 October 2007, when Dr Perks was told (in the context of discussions about entering into a swap) by Ms Fullerton that interest rates would rise or at least that they were highly likely to do so. His evidence is that this induced the Partnership to conclude the 2007 swap in circumstances where, if no such representation had been made, the Partnership would not have done so.
42. RBS submitted that Dr Perks was a very unsatisfactory witness whose evidence betrayed a multitude of shortcomings. In particular, they submitted that his primary motivation in cross-examination was not to try to give honest answers to the questions posed, but instead to make speeches, seek to argue the case and/or to give unnecessarily discursive and irrelevant answers to straightforward questions. They drew attention to certain statements made in correspondence, and in his evidence at trial, which were false or implausible. They said that his evidence should not be accepted, save where it was adverse to his own position or supported by contemporaneous documentation.
43. Mr Macpherson on behalf of Dr Perks submitted that the court should accept his evidence. Dr Perks was giving evidence to the best of his ability and recollection, and the court should make appropriate allowance for the fact that the events in issue happened many years ago. Dr Perks may not have fully appreciated his role as a witness at the start of his evidence, but his tendency to give lengthy answers and to make speeches reduced very considerably after the court had explained the function of a witness. There was no reason to conclude that Dr Perks gave untruthful evidence on any aspect of the case. The court should also bear in mind that no witnesses from RBS

had been called, in relation to the events leading to the first and second swaps, to give a different account to Dr Perks.

44. Having listened to Dr Perks for over 2 days, I accept Mr Sinclair QC's submission that Dr Perks had become obsessed with blaming the Bank for the collapse of his business, and obsessed with the minutiae of the litigation. I agree that this meant that it was difficult for him to give evidence comprising his best recollection of the relevant events, rather than evidence which he considered would be convenient or helpful to the case.
45. This is illustrated by Dr Perks' evidence in relation to the formation of a partnership with his wife. As mentioned above, by the time of the trial, an issue had arisen as to whether or not there was a partnership which had a separate legal existence, because it was a Scottish partnership. I accept that this is not a question to which Dr Perks is likely to have given any significant thought in the past. However, he was keen at the outset in his evidence to distance himself from the suggestion that, to his knowledge, there was any partnership at all. When shown a loan agreement made in 2005 with "The Firm of C&L Perks, of 3-41 Saint Vincent Place, Glasgow, G1 2DH", he suggested that it may have been the Bank which "created the partnership and started calling us a firm", and that he "just didn't pick up on it". I accept that Dr Perks did not appreciate, as he said, that there was the potential for the Partnership to be a separate entity. It is, however, most improbable in my view that it was the Bank that in some way created the partnership; or that (as Dr Perks said later in his evidence) it was the Bank which "started calling us a partnership".
46. I also cannot accept that Dr Perks did not appreciate or "pick up on" the fact that documents were being signed in the name of the Partnership. There were numerous such documents in the hearing bundles, including the documents relating to the two swaps in issue. Contrary to his initial evidence, he must have appreciated that there was a change between the earlier loan documentation which simply named Dr and Mrs Perks, and the later documentation which consistently referred to the Firm. Indeed, later in his evidence (Day 3/ page 37 and Day 5/ page 210) Dr Perks accepted that he did understand that there was a partnership between himself and his wife, and that he was signing loan documentation on behalf of that partnership.
47. In other respects, Dr Perks' evidence as to what happened many years ago was in my view clearly mistaken. This is unsurprising, and I am willing to accept that Dr Perks' mistaken evidence is in some cases no more than the usual situation of a witness trying to recall events, and persuading himself that certain things happened when they did not. This is illustrated by Dr Perks' evidence as to a meeting with Ms McGuigan and Ms Fullerton which is alleged to have taken place in October or November 2006, and in which both women are alleged to have told him in unison that interest rates were going to increase. This alleged meeting was referred to in Dr Perks' witness statement, and he was cross-examined about it by reference to the contemporaneous documents.
48. These documents, which are described in sequence in Section C below, show clearly in my view that there was no meeting between Dr Perks and Mr Fordyce, and Ms McGuigan and Ms Fullerton, in October or November 2006. The documentation does not refer to any such meeting. Rather, what happened was that on Wednesday 8 November 2006, Ms Fullerton sent a brochure to Mr Fordyce (but not Dr Perks) relating to the most commonly used interest rate hedging products. This was sent "following on from our discussion earlier". This was (as Dr Perks accepted) a conversation with Mr

Fordyce by telephone, to which Dr Perks was not a party. Dr Perks' evidence was that he did not look at the brochure at the time, but that it was shown to him at "the meeting the next week". However, it is clear that there was no such meeting the next week, or indeed at that time at all. Ms Fullerton's e-mail sent on 8 November states that she was going on holiday from Friday (10 November) for 2 weeks. Those plans did not change: Ms Fullerton's email to Ms McGuigan on 10 November said that she would speak to her when "I get back from my hols". It is also clear that there was no meeting the following week. It is equally plain that there was no meeting which took place between 8 and 10 November 2006. Instead, what happened is simply – as Mr Fordyce said in his e-mail sent on the morning of 10 November – that he discussed the brochure "with the Directors and we are going to stay with the present arrangement at the moment". The "Directors" was a reference to Dr Perks, with whom Mr Fordyce had had a discussion.

49. Witnesses are of course often mistaken about factual matters which happened many years ago. Such mistakes may frequently, and do in the present case, cause the judge to doubt the accuracy and reliability of the recollection of the witness on disputed matters, and to prefer the objective documentary record. In the present case, however, my doubts are reinforced by Dr Perks' intransigent refusal to recognise, in cross-examination, that his evidence as to this alleged meeting was not consistent with the documentary record. Furthermore, in his evidence on Day 3 he repeatedly referred to a further e-mail, beyond those contained in the existing trial bundles, which he said would "absolutely categorically prove" that the meeting took place. When the missing e-mail was identified and added to the bundles, it provided no such proof of any meeting. It was simply the e-mail from Mr Fordyce referring to his discussion with the directors, and advising Ms Fullerton that the decision was to stay with the present arrangement at the moment.
50. The suggestion that Dr Perks had an e-mail which would "absolutely categorically prove" the existence of the meeting illustrates that, as I saw it, much of Dr Perks' evidence was somewhere on a spectrum ranging between unjustified optimism, wishful thinking, an inability to recognise reality, bluster, and deliberate exaggeration. Various aspects of the evidence illustrate this.
51. Early in his cross-examination, Dr Perks accepted that an e-mail which he sent to Mr Euan Campbell (the RM at GRG who had taken over from David McCall) in April 2012 involved him "bigging himself up". In contrast to what he said in that e-mail, Dr Perks could not remember being employed by Axa Insurance as a business consultant, and he said that he had not given business advice to accountants or put together a deal for retirement villages worth over US\$ 100 million.
52. In an e-mail of 23 November 2009, Dr Perks put forward various "solutions" to Mr Hillis and Mr McCall. He said that his proposal worked smoothly for both parties.

"It also takes pressure off the Hedged Loan facility as:

1. We can show clearly that it was misrepresented to us when we were forced to sign up to it. Both Ian and I were present and Ian takes detailed notes of all meetings. (I doubt the RBS can even find who attended this meeting".

53. In an e-mail to the same people on 25 November 2009, Dr Perks continued the same theme, namely that there were documents which showed that there had been a misrepresentation:

“Ian and I are going over and over the documents in fine detail and we are convinced that the hedged loan was clearly misrepresented twice”.

54. On 26 November, he e-mailed Mr McCall (now copying Mr Graham). The e-mail referred to Mr Fordyce taking “great notes” in the following passage which responded to a statement from Mr McCall that he would not try to force Dr Perks to accept help and advice:

“That’s rubbish. You and Alisdair Hillis attempted to bulldoze me into it. I have Ian as my witness and he takes great notes. Just like when you forced me into the hedge loan “Sign here...it is just to protect you from any rise in interest rates and they are highly likely in the near future.””

55. All of these statements sought to give the impression that Dr Perks had notes, made at the time by Mr Fordyce, which demonstrated that there had been a misrepresentation when the first swap was concluded. The true position is that Dr Perks had no such notes. None have been disclosed on disclosure. Had such notes existed, Dr Perks would have ensured that they were preserved in order to assist in a mis-selling argument that he was starting to develop in 2009.

56. In December 2012, Dr Perks took steps to lease practices without the Bank’s consent. The Bank first learned of this because Ms Toni Bennett – who had taken over by that time from Mr Fordyce – passed various e-mails sent by Dr Perks to the Bank shortly before Christmas. She recognised that what Dr Perks was doing was improper, and considered that the Bank needed to be informed. The Bank’s solicitors became involved, and they wrote to Dr Perks on 20 December 2012 making it clear that the Bank’s consent as a secured creditor was required before any practices funded by and secured to the Bank could be leased or sold. Further correspondence followed in January, including a letter from Harper MacLeod LLP on behalf of Dr Perks in which it was asserted that there had been a misunderstanding, and that Dr Perks recognised the need for the Bank’s consent, certainly if there were to be sub-leases of premises. Dr Perks therefore backed off from what he was planning to do.

57. Dr Perks’ conduct at that time, in taking these steps, certainly seems to me to have been improper, as it seemed to Ms Bennett and the other staff members who blew the whistle on it. However, I recognise that Dr Perks was under enormous pressure and strain at that time, and this conduct would not, taken on its own, lead me to form an adverse view of Dr Perks as a witness. However, the conduct does not stand on its own. Dr Perks’ evidence about it was, in my view, not frank. He described what had happened as simply “an idea”. He said that he was thinking out loud to his staff, thinking on his feet. He accepted that he could not have leased the practices without the Bank’s

permission, and: “Of course I would have got the Bank’s permission. This is just a preliminary draft idea that I have come up with while I am going back to Australia to get my family to pack up”.

58. The documentary evidence shows, however, that the steps taken by Dr Perks, without the Bank’s permission, went well beyond being a draft idea that he had come up with at the airport, or was simply him thinking out loud. Ms Bennett’s e-mail to Mr Campbell (GRG) dated 19 December 2012 stated that Dr Perks had actually received £ 10,000 in cash from one chiropractor (Mr. James O’Malley), prior to Dr Perks travelling to Australia. Dr Perks in his evidence did not dispute that he had received this money before leaving for Australia. The existence of what Dr Perks understood to be a done deal is also clear from the correspondence. Mr O’Malley had told Ms Bennett that he was “paying Clayton in instalments for the Cramlington practice and has all the money in place”. Dr Perks e-mail of 15 December 2012 said that Mr O’Malley was taking over “Cramlington from this Monday”. He also said that this was the “same deal” as a deal with Mr Jonny O’Malley, who had started two weeks ago. The same e-mail instructed Ms Bennett and other staff to draw up contracts. His e-mail of 20 December 2012 said: “We’ve done a great deal so go with it”. Dr Perks’ evidence was therefore not consistent with the contemporaneous documentary evidence. It was at best wishful thinking, misrecollection and bluster, and at worst (as the Bank submitted) an obvious lie. On any view, it was wholly unreliable, and adds significantly to my overall conclusion that Dr Perks was not a reliable witness.
59. Dr Perks’ inability to recognise reality, and his obsession with blaming the Bank for any difficulties, was illustrated by his evidence concerning a cash-flow crisis suffered by the Perks business in late 2008. This crisis, which is described in Section D below, was precipitated by the refusal of Lombard (another unit within RBS) to refinance certain x-ray machines. Dr Perks had proceeded on the basis that Lombard would do so, and that this would release cash. Lombard declined to do so, because of various concerns which were clearly expressed in internal notes written at the time. Correspondence and meeting notes in November 2008 showed that the business was unable to meet its debts as they fell due. The documents record, for example, that: Mr Fordyce was paying certain bills by cheque rather than BACS, in order to gain time; a debt owed to a builder had increased by £ 4,000 because of non-payment; PAYE monies owed to HMRC had to be the subject of an agreement to defer payment; and early in 2009, Dr Perks was forced to borrow money from his family. Dr Perks in his evidence was, however, reluctant to accept that there was any problem at all. It was put to him that the need to resort to payment by cheque showed that he was in a pretty dire financial situation. He refused to accept this: “not even slightly” was his unconvincing response. RBS characterised this answer as “nonsensical”, and I agree. The same can be said of his later answer, when it was put to him that the business was not in a good financial shape: “Terrific, left alone I would have solved it blindfold”. It was in my view obvious that the business was not in terrific shape in late 2008 or early 2009.
60. One theme in Dr Perks’ responses to cross-examination on the 2008 cash-flow crisis was to blame the problems on the 2007 swap, and the amount of money that it was costing. He said that if the swap had not been there, “I would have been a hundred grand a year better off”. However, the table of swap payments provided by the Bank, at the request of Dr Perks, shows that the swap had not cost anything like that sum of money in the period up to November 2008. In the first 5 months of the swap, the highest

monthly payment was £ 605, and for the next 6 months (May to October 2008) the monthly amount was in the region of £ 1,000 or thereabouts. Even in November 2008, the payment was only £ 2,316.65. The much steeper payments, of around £ 7 - 8,000 per month, only started in February 2009. It also needs to be remembered that the increased swap payments were matched by reduced payments required under the variable loan. I therefore do not accept that the cash-flow crisis in late 2008 was caused by the swap. Rather, as the analysis of Lombard indicated, the cash-flow difficulties were the result of other matters: in particular, problems with the performance of the business and the weakening of the balance sheet through the payment of dividends. Lombard considered that what was required was further capital to be injected by the directors, and for there to be a reduction of their dividends, and preferably both.

61. The other theme in Dr Perks' evidence, indeed a fairly constant theme in his evidence, was that he was not being left alone by RBS. I queried with him why this was so, in circumstances where (in late 2008) he was still running the business and taking all relevant decisions. (This period was a year before the transfer to GRG and the involvement of Ms Pringle). In response to my questions, it became clear that Dr Perks' concept of "freedom over the business" reflected his belief that he had a right to expect the Bank to give him as much money, including by way of overdraft, as he wanted or that the Bank had given him previously, notwithstanding any change in economic circumstances. RBS submitted, and I agree, that his evidence as a whole was infected by this belief – which in my view was divorced from reality – and also anger that the Bank had changed its approach or was critiquing the financial position of the Perks business when the Bank was itself in financial difficulty. This caused, as RBS submitted, Dr Perks' evidence to comprise, at times, little more than irrelevant invective.
62. The previous point is also illustrated by the evidence of Ms Pringle as to a meeting which occurred in April 2012. It was attended by Dr Perks, Ms Pringle and Ms Bennett. (No-one from the Bank was present). The purpose of the meeting was to discuss financial projections which the Bank needed. However, Dr Perks opened a letter from the Bank about a breach of undertaking by him in relation to his remuneration level. Dr Perks reacted very angrily to the letter, and to Ms Pringle personally, when she explained what it was about. Dr Perks stood beside a white board, literally jumping up and down shouting "I want, I want" and writing his list of demands of the Bank. Ms Pringle told him that he was naïve and delusional if he thought he would achieve his objectives by behaving in such a manner.
63. I have hitherto focused on particular aspects of the detail of Dr Perks' evidence. I also agree that the manner in which Dr Perks gave his evidence was unsatisfactory and not such as to inspire confidence in his reliability as a witness. He did indeed seek to make speeches, to argue the case, and gave unnecessarily discursive and irrelevant answers to straightforward questions. There were very many occasions on which I had to remind him of the proper function of a witness.
64. I take fully into account that Dr Perks has been living with his complaints against RBS for very many years (he said 15 years), that he had not previously given evidence. I also recognise that his approach in the witness box would inevitably have been affected by the fact that he considered that this was his opportunity to tell his story and to explain why, as he no doubt genuinely perceived it, the demise of his business was entirely the fault of wrongdoing on the part of RBS. Dr Perks clearly believed in the wide-ranging

conspiracy case that had been pleaded – but which in the event was advanced by Mr Macpherson on a much narrower basis: see Section E below. These matters incline me towards taking the charitable view (contrary to RBS’s submission) that Dr Perks had generally persuaded himself as to the truth of the evidence. He was not therefore a witness who, generally speaking, sought to give evidence which he knew to be untrue. However, these matters do not enhance Dr Perks’ reliability as a witness. Indeed, they add to the overall picture of a witness whose evidence needs to be approached with caution.

65. Accordingly, for these reasons I agree that Dr Perks’ evidence should not be accepted save where it is adverse to his own position or supported by contemporaneous documentation.

B2: RBS witnesses

66. RBS called Mr McCall, Mr Graham and Ms Pringle. Their evidence addressed the conspiracy claim. Each of them was an impressive witness. Mr McCall and Mr Graham had reached positions of some seniority within the Bank, and it was easy to see why. Ms Pringle had a wide-ranging career, and it was again easy to see why she had been held in high regard by RBS. Each of them in my view sought to assist the court by giving honest and (usually) brief and clear answers to questions which they were asked. I address their evidence in more detail in Section E below.

B3: Witnesses not called by the Claimants

67. Mr Fordyce was, at the material times, an important person within the Perks business organisation. He was not a decision-maker, as recognised by Mr McCall in an e-mail describing him as a “number-cruncher”. Dr Perks’ evidence was, in summary, that Mr Fordyce was: very impressive; very detailed and careful; a person whom Dr Perks trusted generally, and specifically to have discussions on various matters with the Bank; a person who would have understood interest rate collars and swaps. The hearing bundles contained numerous e-mails, as well as financial documents, prepared by Mr Fordyce, as well as transcripts of calls in which he participated. They bear out the evidence of Dr Perks as to the quality and attention to detail of Mr Fordyce.
68. Dr Perks explained in his evidence the reason why Mr Fordyce was not called as a witness, and RBS did not suggest that any adverse inference should be drawn from his absence. The absence of Mr Fordyce means, however, that there is no corroboration for evidence on important matters given by Dr Perks who is, for reasons given above, not a reliable witness. Furthermore, I conclude from the evidence as to the careful and detailed approach of Mr Fordyce to his work, as well as his general ability and qualities, that he had a good understanding of the two swap transactions which were concluded by the Partnership. I was not, for example, referred to any particular document which suggested that he was not competent, or had misunderstood a matter relating to the swaps. Since he worked closely with Dr Perks, I also conclude that he would have sought to explain material matters to Dr Perks in order to enable the latter to take relevant decisions.
69. The important 9 October 2007 meeting was also attended by Mr Small. He was not called as a witness, but again RBS did not submit that an adverse inference should be drawn.

70. The upshot is that the evidence as to a relevant representation at the October 2007 meeting depends – in the absence of any contemporaneous documentary evidence – entirely upon the oral evidence of Dr Perks as to what was said. In view of my conclusion as to the unreliability of Dr Perks, the absence of corroboration from other witnesses for Dr Perks evidence has, potentially at least, a significant impact on the resolution of this issue.

B4: Witnesses not called by RBS

71. The three witnesses called by RBS were able to give first-hand evidence concerning the transfer of the relationship management of the Perks business to GRG in late 2009 and subsequent developments. None of them had any involvement in the events leading to the 2007 swap or the 2009 swap. Mr Graham, and to some extent Mr McCall, were asked questions about swaps, and a large number of other matters of which they had no personal knowledge. They did their best to answer the questions, but neither of them had any expertise in that area or knowledge of the relevant events.

72. In their opening submissions, the Claimants submitted that adverse inferences should be drawn in respect of the Bank's failure to call two witnesses involved in the 2009 swap: Ms McGuigan and Ms Fullerton (as well as Mr Munro who was only involved in 2009). At that time, the Claimants' case was that both women had attended the meeting on 9 October 2007 when the alleged misrepresentation was made. The Claimants submitted that both women could have given evidence as to what was said at the 9 October 2007 meeting, and that the court should infer that RBS had chosen not to call either witness because it wished to avoid the court hearing the evidence that they might have given. In particular, they wished to avoid evidence being given that, as the Claimants submitted:

“(a) One or both told Dr Perks, Mr Fordyce, and Mr Small that interest rates were going up and that the Group needed protection from that by ‘fixing’ the rate;

(b) They knew that Dr Perks (as the key driver of the Group) would rely on this representation when deciding whether to enter an IRHP; and

(c) One or both knew before 29.11.07 that RBS believed that interest rates were going to fall and stay low for some time”.

73. Subsequently, Dr Perks accepted that Ms McGuigan had not attended that meeting. Accordingly, the Claimants contended that an appropriate adverse inference should be drawn because of the failure to call Ms Fullerton.

74. The Supreme Court has recently addressed the question of adverse inference in *Royal Mail Group Ltd v Efobi* [2021] UKSC 33. The Court said at paragraph [41]:

“The question whether an adverse inference may be drawn from the absence of a witness is sometimes treated as a matter governed by legal criteria, for which the decision of the Court of Appeal in *Wisniewski v Central Manchester Health Authority* [1998] PIQR P324 is often cited as authority. Without intending

to disparage the sensible statements made in that case, I think there is a risk of making overly legal and technical what really is or ought to be just a matter of ordinary rationality. So far as possible, tribunals should be free to draw, or to decline to draw, inferences from the facts of the case before them using their common sense without the need to consult law books when doing so. Whether any positive significance should be attached to the fact that a person has not given evidence depends entirely on the context and particular circumstances. Relevant considerations will naturally include such matters as whether the witness was available to give evidence, what relevant evidence it is reasonable to expect that the witness would have been able to give, what other relevant evidence there was bearing on the point(s) on which the witness could potentially have given relevant evidence, and the significance of those points in the context of the case as a whole. All these matters are inter-related and how these and any other relevant considerations should be assessed cannot be encapsulated in a set of legal rules.”

75. In his 5th witness statement served following submission of the Claimants’ skeleton for trial, Mr Samuel Parr (the solicitor with day to day conduct of the case on behalf of the Bank) explained why witness statements had not been served from Ms Fullerton, as well as Jane McGuigan and Kevan Munro. The explanation was as follows.

Jane McGuigan left the Bank in 2009. The Bank’s previous solicitors (Dentons) contacted Ms McGuigan in 2018, seeking her assistance with the case. She responded that she wanted to obtain legal advice from a relative and thereafter did not revert to the Bank. The Bank took the view that she was unlikely to cooperate with the procedure in those circumstances.

Angela McPartlin (nee Fullerton) left the Bank in 2014, two years before these proceedings were commenced and some seven years before the exchange of witness evidence. I am informed by David Anderson, Legal Counsel to the Bank, that the Bank was aware of personal information concerning Ms McPartlin relating to a tragedy in her personal life which meant that the Bank took the view that given: (i) her lack of recent involvement with the Bank; (ii) the fact that the relevant events in which she was involved took place in 2007; (iii) the existence of contemporaneous documents and call records (including full transcripts); and (iv) on compassionate grounds, the Bank would not ask her to become involved in the case.

Kevan Munro remains employed by the Bank. Mr Munro has previously given evidence for the Bank in the *Grant Estates* case. Mr Munro was contacted to see if he was willing to be a witness but expressed a preference not to give evidence again given that he said that this previous experience had taken its toll on him. The Bank took the view that given the existence of call

records (including the full transcript of a lengthy call on 12 June 2009) and emails documenting all of the relevant communications in which Mr Munro was involved, they would not ask him to be a witness in the case.

76. I do not consider that it is appropriate to draw any adverse inference from the Bank having not called Ms Fullerton, or indeed Ms McGuigan and Mr Munro. As far as Ms Fullerton is concerned, the combination of the reasons given by Mr Parr provides a good explanation as to why she was not called. I bear in mind in particular that the present proceedings were commenced many years after the relevant events in 2007 with which Ms Fullerton was concerned. Proceedings were not started until January 2016. By that time, not only had Ms Fullerton left the Bank, but it would be most improbable that she would have a recollection, independent of the documents, as to what she had said at a meeting held nearly 10 years earlier. The meeting was relatively short, and there is no reason to think that it would have been particularly memorable. In addition, as discussed in more detail in Section C below, Ms Fullerton had – albeit some months after the meeting - prepared a note of the meeting, and this provides evidence as to her genuine recollection of the meeting at that time. It is fanciful to think that she might have a better or more reliable recollection if asked to describe the meeting in evidence some 14 years later. Although the note was prepared late, it was not prepared in the context of litigation or the threat of litigation. Furthermore, the nature of the personal tragedy has been explained to me, and there is no dispute that it occurred. I do not consider it necessary to provide details in this judgment.
77. I also see no reason to draw an adverse inference in relation to Ms McGuigan or Mr Munro. In both cases, there were sensible and appropriate reasons why these witnesses were not called, as explained by Mr Parr. The most significant points in my view are as follows.
78. Ms McGuigan did not attend the October 2007 meeting. I have already rejected the suggestion that she attended a relevant meeting in November 2006, and specifically the suggestion that she and Ms Fullerton said in unison that interest rates would rise. Her general dealings with Dr Perks are amply demonstrated by the contemporaneous documentation, including a significant e-mail record and entries on the Bank's computer system called the Relationship Management Platform or "RMP".
79. As far as Mr Munro is concerned: he was involved in the lead-up to the 2009 swap. There is no case that a specific false representation was made by Mr Munro at any meeting, or during any phone conversation. Furthermore, the important phone conversation involving Mr Munro was transcribed, and therefore the court has a full record of what was said. It is difficult to see how Mr Munro could materially add to the transcript, or the documentary record more generally.
80. It also seems to me that – certainly in the case of Ms Fullerton and the October 2007 meeting, which I will address in more detail below – the Claimants are seeking to rely upon the drawing of an adverse inference in order to bolster a weak case which is largely dependent upon the evidence of an unreliable witness (Dr Perks). I do not consider that it is appropriate to draw an adverse inference in these circumstances, irrespective of the matters relied upon by Mr Parr.

C: The 2007 swap

81. The Claimants advance three separate claims in relation to the 2007 swap: (i) misrepresentation; (ii) failure to explain the risks of the 2007 swap; and (iii) failure to advise properly in relation to the 2007 swap. Before describing the arguments in more detail, I will set out my findings of fact concerning the relevant events which led to the conclusion of the 2007 swap.

C1: The facts leading to the conclusion of the 2007 swap

The early period (prior to the 2007 Loan)

82. The period 2005-2006 was a period of rapid expansion for the Perks business. Entries on the Bank's RMP system in late 2006 record that the business grew in 18 months from a 6-unit operation catering for 1,000 patients per week to a 17-unit operation servicing 3,000 patients per week. The plan at that stage seems to have been to grow the practice to 20 units and then stop. This was seen as the optimum level that the business model – which involved staffing the business with chiropractors coming from abroad – could support. The comments on the RMP system recorded that to a large extent it was the access to a highly qualified foreign workforce (mainly from Australia), who wanted to work in the UK for a short while, which made the model work, and which competitors found almost impossible to replicate.
83. The RMP documents in late 2006 identify various strengths and weaknesses of the business as part of a “SWOT” (Strengths, Weaknesses, Opportunities, Threats) analysis. The strengths included: a strong management team; that Dr Perks had a “clear vision and was completely focused on what it will take to deliver”; that a gap in the finance function, previously regarded as a major weakness of the business, had now been properly addressed with the recruitment of Mr Fordyce; that there was a unique business model which it was difficult for competitors to copy; the existence of a growing market; access to a highly skilled workforce; and that the business was “infinitely and visibly more professional than any of their competitors”. The weakness was that there was a danger of overtrading and looking to expand too quickly. The RMP documents give an overall impression that the relationship team, in particular Ms McGuigan, thought highly of Dr Perks and his business. However, Mr Todd, who worked in the Bank's Credit unit, expressed the view in September 2006 that there was a need for a period of consolidation and debt reduction.
84. The correspondence shows that during 2006 and 2007, Dr Perks repeatedly expressed a desire for further significant expansion, involving 20 or even 50 additional clinics. The expansion ideas included the purchase of existing clinics and opening new clinics. RBS accepted that the then relationship manager, Jane McGuigan, expressed a willingness in principle to look at ways in which the Bank could support that expansion. She introduced Dr Perks to Scott McClurg from the Bank's Highly Leveraged Transactions team.

The £800,000 Loan

85. In October 2006, the Bank advanced a new loan of £800,000 to GCL over five years, at Base Rate plus 2.35%. That loan incorporated GCL's existing overdraft of £ 500,000. On 19 October 2006, Ms McGuigan e-mailed her colleague Angela Fullerton in

Treasury Solutions. She told her that Ian Fordyce, the then in-house accountant for the business, was interested in hedging options. She asked Ms Fullerton to give him a call, saying that it might not come to anything but was worth investigating. She passed on his telephone number.

86. The Re-Amended Particulars of Claim (“RAPOC”) alleged that Ms McGuigan raised with Dr Perks the potential benefits to the Partnership of interest rate hedging, telling him that “interest rates were going to rise” and recommending “that the firm should fix interest on the whole of its borrowings”. Dr Perks’ witness statement did not, as I read it, support that allegation. In any event, the 19 October 2006 e-mail indicates that the initial conversation about hedging products had taken place with Mr Fordyce, not Dr Perks. There is nothing in that e-mail which suggests that Ms McGuigan had given Mr Fordyce a positive prediction as to a rise in interest rates, or a positive recommendation that an IRHP should be taken out so as to fix interest on the whole of its borrowings. In so far as Dr Perks suggested the contrary, I do not accept that evidence.
87. On Wednesday 8 November 2006, Ms Fullerton e-mailed Mr Fordyce. The e-mail was not sent to Dr Perks. There had clearly been a discussion on the telephone between Ms Fullerton and Mr Fordyce. The e-mail attached a “brochure outlining some of the most commonly used interest rate hedging products”. There had obviously been no meeting at that stage between Ms Fullerton and Mr Fordyce (let alone Dr Perks): the e-mail does not refer to any meeting, and if a meeting had taken place then it would have been easy to hand over the brochure rather than sending it subsequently by e-mail. The e-mail continued:
- “The purpose here is not to attempt to provide potential solutions to specific interest rate management issues, but instead explain the building blocks of many of the interest rate management solutions used by businesses today.
- As mentioned I am off on holiday from Friday for 2 weeks, however should you have any questions, please do not hesitate to contact one of my colleagues on 0131 525 2044 or Jane McGuigan who would then arrange for someone to touch base with you in my absence.”
88. Ms Fullerton’s e-mail was expressed in neutral terms: she said (reflecting the wording of the brochure itself) that she was not attempting to “provide potential solutions to specific interest rate management issues”. There was nothing in the nature of advice to Mr Fordyce to enter into an IRHP, or a recommendation to do so. There was no prediction as to the future direction of interest rates. There was also no suggestion that a meeting was to take place with Mr Fordyce, or Dr Perks, to discuss the issue further. Since Ms Fullerton’s e-mail was sent at 13:41 on 8 November, and Ms Fullerton was leaving on holiday after Friday of that week, there would have been very little time for a meeting to take place before she went away. It is extremely improbable that either the Bank or Mr Fordyce would have regarded the issue as requiring an urgent meeting.
89. The e-mail correspondence (which I have to some extent described in Section B above, when considering Dr Perks as a witness) then shows what happened. On the morning of Friday 10 October 2006, Mr Fordyce thanked Ms Fullerton for the information, and said that he had discussed this “with the Directors and we are going to stay with the present arrangement at the moment”. He said that they would “monitor the situation on

an ongoing basis and we will get back in touch should we wish to change in the future”. He thanked Ms Fullerton, and wished her a good holiday.

90. Dr Perks’ evidence was that the discussion “with the Directors” had taken place following a meeting with Ms Fullerton and Ms McGuigan, and at which they had both said in unison that interest rates were going to rise. Mr Fordyce’s “thank you but no thank you” email was sent after that meeting. I reject that evidence. There is nothing in the documents which suggests that any meeting took place at all. The brochure was sent to Mr Fordyce, and it is probable that he read it and discussed it with Dr Perks. There was, however, no interest in an IRHP at that stage.
91. The brochure sent in October 2006 (“the 2006 brochure”) contained 8 pages of text (in addition to some photographs and contact details). It explained that its purpose was to “explain the building blocks of many of the interest rate management solutions used by businesses today”. It then provided an explanation of three IRHPs: a Base Rate cap, a Base Rate collar and a Base Rate swap, including that they were each independent from any underlying loan. It explained:
- i) as regards a Base Rate cap, that it “sets a ceiling on a borrower’s interest rate costs” (in return for the payment of an up-front premium) and that “unlike some other hedging products, the purchase of a cap does not “lock in” the borrower to a fixed rate, and so if interest rates decline the benefits of cheaper funding are received.”
 - ii) as regards a Base Rate collar, that (among other things):
 - a) it was a “combination of an interest rate cap (maximum interest rate) and an interest rate floor (minimum interest rate)”;
 - b) (under the heading “potential breakage costs”) additional costs might be incurred in the event that the customer wanted to come out of the arrangement, and that the Bank would be “pleased to provide examples of potential costs.”
 - iii) as regards a Base Rate swap, that (among other things):
 - a) it “provided a means of converting floating rate debt to fixed rate debt and vice versa” (the manner in which it did this was illustrated by an example and a diagram);
 - b) no up-front fee would be payable for such an IRHP;
 - c) it could be “unwound at the prevailing market rates to reflect changes either to the hedging strategy or the underlying borrowing structure”, albeit that this might result in either a cost or a benefit. The same explanation regarding potential breakage costs as had been provided in relation to a Base Rate collar then followed, including that the Bank would be pleased to provide examples of potential costs.
92. The final page of text contained 11 paragraphs of “Notes” which were described as being important. These “Notes” and materially similar versions thereof (“the Notes”)

were provided to the Perks business on various subsequent occasions. The Notes included the following:

1. The transaction terms that are finally agreed between us verbally are legal binding contract terms. Following execution of the trade you will be required to sign legal documentation to confirm these terms.

4. The interest rate contract that you may enter into with RBS is a separate legal contract from the borrowing that it is protecting. In particular, they may be terminated independently of each other and early termination of one does not automatically terminate the other.

8. If interest rate derivative contracts are closed before their maturity, breakage costs or benefits may be payable. The value of any break cost or benefit is the replacement cost of the contract and depends on factors on closeout that include the time left to maturity and current market conditions such as current and expected future interest rates. This is illustrated below.

There will be a breakage cost to you if the interest rates prevailing on closeout are lower than the fixed rate of the swap (that you are paying) or below the floor rate of the collar. There will be a benefit to you if prevailing interest rates are higher than the fixed rate of the swap (that you are paying) or above the cap rate of the collar.

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

...

This document is intended for your sole use on the basis that before entering into this, and/or any related transaction, you will ensure that you fully understand the potential risks and return of this, and/or any related transaction and determine it is appropriate for you given your objectives, experience, financial and operational resources, and other relevant circumstances. You should consult with such advisors as you deem necessary to assist you in making these determinations. The [Bank] will not act as your advisor or owe any fiduciary duties to you in connection with this, and/or any related transaction and no reliance may be placed on [the Bank] for advice or recommendations of any sort.

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include providing banking, credit and other financial services to any company or issuer of securities or financial instruments referred to herein.”

93. Although I have not heard from Mr Fordyce, I consider it probable that he would have understood the information contained in the brochure, which was expressed in straightforward terms. Dr Perks’ evidence was that he read the brochure. It is probable that he did so, probably briefly and sufficiently to have a short conversation with Mr Fordyce about it. The decision at that stage was not to enter into an IRHP.
94. I think that the likely reason why the decision was made not to enter into an IRHP at this stage, when compared to what later happened in November 2007, is that the Bank was not at this stage requiring their facility to be hedged. There was therefore, at least at that stage from the perspective of Dr Perks and Mr Fordyce, no perceived need for the Perks business to enter into an IRHP. There is nothing to suggest that Dr Perks was emphatically opposed to such products in principle: Mr Fordyce’s e-mail dated 10 November indicated that they would continue to monitor the situation.

The 2007 Loan

95. In September 2007, Dr Perks sought a new Base Rate loan for the Partnership of £1,030,000 to acquire four new properties. It was this request which prompted Ms McGuigan and Mr McClurg to consider consolidating the Partnership’s various extant loans into a single loan.
96. The Bank’s internal consideration of the proposal evolved over a period of time. However, it culminated in an e-mail from Ms McGuigan dated 24 September 2007, in which she reported:

“Hi Clayton. Just off the phone to Matt [Small] to confirm that we have the green light to provide 100% funding on one loan over a 15 year term subject to suitable hedging being in place and a suitable debt servicing/dividend covenant.

Still to fine tune the details and I’ll confirm officially in writing ASAP”.
97. It is clear from this e-mail that the Bank was requiring, as a condition of the new loan, a suitable IRHP to be in place. It was also clear from Dr Perks’ evidence that, at the time, he understood that this was the case. Indeed, paragraph 75 of the RAPOC (consistent with Dr Perks’ witness statement) pleaded that in the course of his discussions with Ms McGuigan between 4 September and 9 October 2007, the latter “explained that RBS required the Partnership to enter into hedging arrangements acceptable to the bank as a condition of consolidating the firm’s existing borrowing and RBS advancing further loans”.
98. It was, however, submitted on behalf of Dr Perks in Mr Macpherson’s closing argument that the Bank’s internal documents showed that an IRHP was not considered by the Bank, or at least certain individuals within the Bank, to be a pre-condition for the new loan. The submission was relevant to arguments concerning causation: in particular, Dr Perks’ submission that if he had firmly pushed back on the Bank’s requirement for an IRHP to be in place, the Bank would not have pressed the point.

99. In my view, this submission was not supported by the evidence, in particular the entries on the RMP. The original proposal was made by Ms McGuigan, on 4 September 2007. This requested “deferral of various facilities as outlined”, coupled with a request for additional support in the name of the Partnership, for £ 1,035,000 to support the acquisition of a further 4 units in Scotland. These would then be rented to GCL. The proposed loan would have a maximum period of 15 years, although anything above 70% LTV (loan to value) would be repayable over three years. I note in passing that this document is one of a number which indicates that the Bank understood the difference between the “Firm of CJ & LK Perks”, and GCL: it did not, contrary to the Claimants’ argument, simply treat everything as being a loan to an amorphous “group” or “Group”, the latter being the term used by the Claimants in their submissions.
100. The proposal was analysed by Mr Todd in Credit, and he recorded his views on 10 September 2007. He did not find the proposal acceptable, essentially because the “proposed LTV is too high” when seen in the light of the overall exposure of the Bank. He wanted to see “some cash brought to the table”. He did not consider that at this stage he had sufficient information to base a judgement, although he identified a number of likely conditions. These included “standard securities”, but not at that stage an IRHP. In a memo which Ms McGuigan produced in May 2008, describing the events relating to the transaction, she said that Credit were “very cautious/ reluctant to fund continued expansion”. This was borne out by Mr Todd’s entry.
101. There was then a resubmission by Mr McClurg on 20 September 2007, following further discussion within the Bank’s management. The resubmission was a revised proposal which involved the consolidation of all existing partnership property loans into one loan of £ 2,424,000. This would be amortised over 17 years. The rationale for the change from the initial proposal was set out in three bullet points. The third bullet stated:
- “Refinancing all the loans gives us an opportunity to revisit the terms of the facilities and it is proposed that we increase the margin to 2.15% across all the debt, make the deal conditional on an appropriate hedging strategy covering 100% of the debt for at least 5 years, and introducing a covenant on GCL that quarterly testing is done and a minimum of 1.1x debt service is generated from cash flow after dividends, tax, etc.”
102. Mr McClurg’s paper identified a number of positive aspects of the proposal. These did not include the IHRP. The negatives were 100% funding, the aggressive growth strategy, and the overseas resident owners. He recommended supporting the proposal. He identified a significant risk that the customer would seek funding for the entire property portfolio from another provider. If that happened, it was conceivable that the client would obtain a funding package based on 80% LTV “at a lower margin than we are proposing”. It would result in the Bank “being left with the cashflow lend only on the trading business”. It was submitted on behalf of Dr Perks that this showed that the Bank was keen to retain Dr Perks’ business. I agree that this was certainly Mr McClurg’s view at that time.
103. Mr Todd considered the revised proposal, noting his response on 24 September 2007. He thought that the latest management information made satisfactory reading, and he also thought that the combined businesses should be able to service the commitment. However, he was not keen at that stage on the proposal to consolidate the loans into a

single loan with a repayment period of 17 years. He pointed out that the existing loans were on a 10-year pay-down, and his preference was for that to remain. He was, however, prepared to support Ms McGuigan's original proposal made on 4 September; i.e. for the new loan of £ 1,035,000.

104. The RMP documents show that there was then an updated submission on 24 September. This sought confirmation for a consolidated facility of £ 2,424,000 over "15 years to the Firm at 2.15% over base". This was subject to satisfactory valuations for the 4 new properties, an "appropriate hedging strategy", and an inclusion of a covenant relating to GCL's cash flow. Accordingly, the proposed term of the loan had now reduced. On 25 September 2007, Mr Todd recorded that this was "recommended". It appears from the e-mail sent by Ms McGuigan on 24 September that Mr Todd may have given the green light to the proposal on the day before he made his entry (25 September) in the RMP.
105. There is nothing in the above exchanges which indicates that Mr Todd, or anyone else at the Bank, took a view as to the requirement for hedging which was different from that of Mr McClurg. If there was to be a consolidated loan, with an increase in the amount borrowed by the Partnership, with repayment over either a 17- or (in the event) 15-year term, then Mr McClurg took the view that hedging was required. Indeed, this was part of the stated rationale for the transaction. Mr Todd was not initially attracted by the proposal at all. However, he later agreed to it on the basis proposed; i.e. with the hedging requirement. This is confirmed by Mr Todd's entry onto RMP on 8 October 2007. This recapped the position, namely that there was a loan of £ 2.424 million agreed over a 15-year period, and that this was subject to: "Appropriate hedging strategy". He went on to say: "Hedging noted/ leave to you to take forward". In fact the loan was reduced to £ 2,259,000 as one of the four new properties was not ultimately acquired.
106. As previously noted, no copy of a facility agreement, whether signed or unsigned, relating to the 2007 Loan is available. However, the contemporaneous documents show that there is no doubt that the loan existed, and that it was sanctioned on the basis that it would be hedged. The first drawdown under the 2007 Loan occurred on 8 November 2007. This was prior to the IHRP being concluded. Ms McGuigan had to seek the approval of Credit for this to happen: her request stated that "Angela Fullerton is arranging heading [a typo for "hedging"] for the new loan, although this will not be in place until the week commencing 12 November 2007".

24 September – 9 October 2007

107. Following Ms McGuigan's email of 24 September 2007 informing Dr Perks (and Mr Small) that the 15-year loan would be subject to "suitable hedging being in place", there is nothing to suggest that Dr Perks was unhappy with this condition, or was reluctant to take the loan on that basis. On the contrary, his response later that evening was: "Great news Jane. Thanks for the update". This is, in my view, important background to the meeting which took place just over two weeks later. There was nothing prior to the meeting which would have indicated to the Bank that Dr Perks was someone who needed persuading that he should put a hedge in place. There was therefore no need for the Bank's representatives to prepare for the meeting by identifying arguments in favour of Dr Perks taking out a hedge. Equally, Dr Perks did not in my view enter the meeting on the basis that he needed persuasion. Had that been the position, I would have expected to see some indication to that effect in the contemporaneous documents.

I would also very much doubt that the statements alleged by Dr Perks to have been made by the Bank at the meeting would have been such as to persuade someone who was opposed to entering into a swap, or reluctant to do so, to change his mind.

108. On 1 October, Ms McGuigan asked Ms Fullerton to speak to her the next day in relation to setting up an appointment to discuss hedging for GCL/C&L Perks. In a note that she prepared some months later, Ms Fullerton (by now McPartlin) answered the question: “Who requested the meeting and why?”. She wrote, accurately in my view: “Jane McGuigan requested the meeting to discuss hedging for increased debt of £ 2,424k”. The meeting would provide an opportunity for a discussion to take place as to the different types of product that were available: the 2006 brochure had identified three basic products.
109. On 3 October 2007, Dr Perks referred to a discussion with Ms McGuigan about the “way that we borrow funds”. The e-mail subject header was: “Overdraught/RBoS/Lombard”. The text of the e-mail asked as follows:

“We need a list as to precisely where we need to get our funds as we probably haven’t followed a strict criteria in the past. ie. We often pay for fixtures and fittings and equipment from the overdraught account! This is good in that it makes us run a tight ship, however it means that we always fill the overdraught and therefore have an ongoing cash flow problem.

For example if we put in new carpet or new paint work or a new couch we may just write a cheque from £5000 from the over draught account.

When we add lots of little things together it soon uses up all the over draught space!

Summary:

Precisely what roles do the

1. overdraught
2. RBoS
3. Lombard

have in terms of where we borrow?

If we can clarify precisely what to do then it should sort out the overdraught use and keep plenty of space on it.”

110. Mr Macpherson placed much reliance on this e-mail, with its misspelling of “overdraft”, as indicating that Dr Perks was naïve and unsophisticated. I am not persuaded that the misspelling leads to that conclusion: it is not the only misspelling by Dr Perks in the documents, and this only shows that Dr Perks was not good at spelling. However, he was clearly an intelligent man, with very big ideas. He was interested in a successful sale of the business in due course: an e-mail from Dr Perks in February 2007 indicated that he was hoping to grow the business so that it would produce profits of £

2 million plus, which would give an estimated valuation of £ 20 million. He had the assistance of Mr Fordyce on financial matters. He did not have prior experience of a swap transaction, but I consider that he understood the basic features of the hedging products which were described in the 2006 brochure. The e-mail of 3 October 2007 asks relevant questions as to the interrelationship between different forms of borrowing which were in existence and under discussion, and as to which in Dr Perks' mind there was a lack of clarity. I do not draw the conclusion from that e-mail that he was naïve and unsophisticated.

111. Ms McGuigan's response was informative. She explained that, generally speaking, an overdraft should be used for working capital purposes and general day to day expenditure. Term loans from RBS could be used for capital expenditure or property purchases. Whilst they could also cover asset/ equipment purchases, that was Lombard's speciality.

The 9 October 2007 meeting

112. The Claimants' pleaded case was that a meeting took place at RBS's premises at Kirkstane House between 9 and 10 am. It was attended by Ms Fullerton and Ms McGuigan on behalf of RBS, and Dr Perks and Mr Fordyce for the Partnership. The pleading accepted that Ms Fullerton at the meeting advised on the advantages of hedging arrangements, but otherwise no admissions were made as to the accuracy of the note prepared by Ms Fullerton and described in more detail below. The critical representation relied upon by the Claimants was made when Dr Perks asked the question: "what happens if interest rates go down?" It was alleged that the response from all those attending the meeting on behalf of RBS, in unison, was that "interest rates are going to rise, not fall".
113. This account was supported by Dr Perks in his witness statement. He described Ms Fullerton and Ms McGuigan stating clearly and in unison that interest rates were going to go up and that the Group need protection from that by 'fixing the rate'. Ms Fullerton told him that without that protection, "we would suffer significantly if base rate rose". Dr Perks was not worried about missing out on any drops in interest rates if they fixed the rate. He was just glad to have been warned about the coming increase in rates by people who were focused on protecting the business and helping it succeed.
114. At the start of his evidence in chief, however, Dr Perks said that the "unison statement" was from 2006, rather than 2007. In cross-examination, he accepted (or at least appeared to accept) that the meeting was attended by Ms Fullerton and Mr McClurg, and also that his memory was possibly faulty as to who attended the meeting.
115. There is relatively little contemporaneous documentary evidence concerning what was said at the meeting. The relevant documentation comprises, first, a one-page document, partly typed and partly handwritten. The document is likely to have been prepared by Ms Fullerton. The typed part at the top of the page sets out some background details (for example the amount of the proposed loan, and its purpose), which were prepared ahead of the meeting. This part also refers to a "Condition – hedge full amount for minimum of 5-years". It also contains some indicative rates. The typed part has a few handwritten amendments or notations.

116. The bottom half is handwritten, and it is probable that these were notes made at the meeting itself by Ms Fullerton. They list “Scott McClurg” and “Ian”, indicating that those individuals (Ian being Ian Fordyce) attended the meeting. It was accepted by the Claimants that Mr Fordyce had indeed attended the meeting. As indicated above, Dr Perks appeared to accept in cross-examination that Scott McClurg had indeed attended.
117. I consider, based on the documentary evidence, that the meeting was attended on the Claimants’ side by Dr Perks and Mr Fordyce, and probably Mr Small as well. (Ms Fullerton’s note of the meeting, prepared some months later, indicated that Mr Small had attended). On the Bank’s side, it was attended by Ms Fullerton and Mr McClurg. It was not attended by Ms McGuigan.
118. The handwritten section of Ms Fullerton’s note continues with information likely to have been provided by Dr Perks at the meeting, for example: “Looking to grow the value of the company from £ 4 million. Shift profit out of Glasgow Chiropractic Ltd to service debt for CJ and LK Perks”. It identified a profit target of £ 5,000 per week. The note concluded with Ms Fullerton noting: “Send collar price and swap”, and some rates then being set out. Ms Fullerton also noted down e-mail addresses and the telephone number of Mr Fordyce.
119. There is nothing in the note which suggests that Ms Fullerton intended to make, or did make, statements as to the future direction of interest rates. Nor is there anything which indicates any reluctance on the part of Dr Perks or Mr Fordyce to commit to a hedge, this being stated to be a “condition” of the loan.
120. Some 10 days after the meeting, on 19 October 2007, Ms Fullerton e-mailed Mr Fordyce referring back to the meeting the previous week. Consistent with the handwritten note, she said that she was sending “indicative prices for your preferred collar and a swap over 5-years based on the attached profile”. A collar transaction would require a premium, as well as identification of the two aspects of the collar, the “cap” and “floor” level. These were set out in a table in the e-mail, together with the applicable premium (either £ 28,176 or £ 23,122, depending upon the level of the floor). She said that she was also attaching a paper outlining both options in more detail. She concluded by saying that Mr Fordyce should not hesitate to contact her with any questions. Failing that, she would call next week to ensure safe receipt of the e-mail.
121. Both the e-mail and the handwritten note therefore indicate that the Claimants, most likely through Mr Fordyce, had indicated at the meeting their preference for an interest rate collar. This is a more complex product than the straightforward swap that was in fact concluded. In order to express that preference, Mr Fordyce must have had a reasonable understanding of the different types of product available. Such an understanding could have been derived from his general experience in financial matters, aided by the 2006 brochure and explanations given at the meeting itself, as well as any research that he had carried out.
122. In that connection, there had been an exchange with Ms McGuigan in early September 2007, prior to the time when the “green light” was given for the new loan. Ms McGuigan had e-mailed Dr Perks, Mr Fordyce and Mr Small in relation to suitable structures for the proposed additional borrowing. In her email of 4 September 2007, she had said that she would also “strongly recommend that you look at interest rate hedging with borrowing set to increase to c £ 2.4 million”. Mr Small’s response was to ask her

to provide some further information on interest rate hedging “so we can investigate this thoroughly”. Ms McGuigan’s response was to offer to set up a meeting with Angela Fullerton in order to discuss hedging options, and in due course this is what she did. I think that it is probable that, prior to meeting Ms Fullerton to discuss hedging, Mr Fordyce would have well prepared for the meeting by seeking to understand the topic that was to be discussed. He was sufficiently well prepared to express a preference at the meeting for a “collar” transaction.

123. Approximately 9 months after the meeting, Ms Fullerton prepared a typed note of the meeting. In view of the dispute which has developed, it is to be regretted that she did not do so earlier. The Claimants make the point that a note prepared many months after a meeting is not a very satisfactory basis for reaching a conclusion as to what was said. Whilst there is some force in that submission, it is important to note that at the time that it was prepared (in July 2008) there was no dispute which had developed between the parties. There is no reason to think that Ms Fullerton was preparing the note in order to bolster the Bank’s position in some way. It is likely that there is a prosaic explanation for the late preparation of the note. Ms Fullerton should have prepared a note of the meeting much earlier, no doubt in order to comply with the Bank’s procedures, but she had failed to get round to doing so. When she made her note, she had available the file and the one-page document that I have previously described. She would have also been familiar with the way that she would usually conduct meetings of the kind that had taken place. In these circumstances, there is no reason to think that the note represented anything other than Ms Fullerton’s best recollection, albeit some 9 months after the meeting, of what was said.
124. The note, which was on 2 pages, recorded that the meeting had taken place at Kirkstane House. The attendees on each side were identified at the conclusion of the note: Dr Perks, Mr Small, Mr Fordyce, Ms Fullerton (who by July 2008 had become Ms McPartlin) and Mr McClurg. The main body of the note described matters as follows:

“Who requested the meeting and why?”

Jane McGuigan requested the meeting to discuss hedging for increased debt of £2,424k.

Topic discussed

The Bank has agreed to restructure 8 existing loans into 1 to include an additional £1,035k to purchase 4 properties where the trading company, Glasgow Chiropractic Ltd trade from (GCL currently trades from 20 locations around the UK). Current property in the portfolios is valued at c£3.2m and they are keen to grow this to £4m. The new loan of £2,424k will be repayable over 15-yrs @ base + 2.15%.

AF explained the advantages of the stand-alone status of the hedging options and a swap, cap and collar were outlined along with the advantages and disadvantages. The potential for breakage costs if broken early was also explained as well as the mechanics of how a breakage cost would be arrived at.

FSA registration and the retail terms of business were explained and an IRD brochure was provided. AF recommended they seek independent advice prior to proceeding. A general discussion on market conditions followed.

Client stated requirements and views?

Interested in viewing rates for both collars and swaps with worst case rates of 6.25 & 6.50% excluding lending margin over 5-years.

How did the customer express their requirements?

Verbally to AF during the meeting.

How did the customer confirm their understanding of using these solutions?

Through direct questioning all clients confirmed their understanding of potential solutions and break cost calculations.

Further actions and timescale

AF to forward retail docs and indic levels as above.”

Correspondence and discussions following the meeting

125. Following the meeting, as described above, Ms Fullerton’s e-mail of 19 October 2007 attached a 4-page document (“the 2007 Hedging Paper”). The covering e-mail said that the paper outlined both options “in more detail”. The Claimants submitted that this meant that the discussion at the meeting had been less detailed, and therefore inadequate. I do not accept this conclusion. The reference to “in more detail” can just as easily be read as referring to the fact that the covering e-mail was relatively brief in terms of outlining the possible transactions. It is likely that the meeting itself did not cover everything that was set out in the 2007 Hedging Paper, which included some detailed notes and almost a page of text thereafter. However, it does not follow that the explanation at the meeting was inadequate.
126. The first page of the 2007 Hedging Paper described an Interest Rate Collar. It does so in clear terms, which are not difficult to understand. It identified a number of advantages: protection from rising base rate above the cap strike rate; limited ability to benefit from falling base rate; allows maximum borrowing costs to be quantified; reduced or no up front premium payable. The listed disadvantages were: unable to take full benefit from falling rates; may involve a cash cost (or benefit) if cancelled prior to maturity; is “independent of the loan and requires separate documentation. A credit line is required for the floor sold”.
127. The second page described an interest rate swap, again in clear terms which are not difficult to understand:

“Interest Rate Swap

- A swap can be used by a borrower to convert floating rate loans to fixed (and vice versa) without disturbing the underlying borrowing. It is a common, well established, hedging technique used by a broad spectrum of borrowers and investors.
- swaps achieve the same end as using a fixed rate loan. However, there are two key advantages:
 - If you entered into an interest rate swap and decide to close out the swap before maturity (for example if the loan is repaid more quickly than anticipated) you may have to pay breakage costs or you may receive a breakage payment from the Bank, dependant on subsequent swap market movements – fixed rate loan providers generally only have a cost.
 - Fixed rate loans do not usually provide the ability to have a forward start and often do not price complex amortisation correctly.
- The main disadvantage of the swap is the inability to benefit from favourable movements in interest rates. In addition if the transaction is terminated prior to maturity a close out cost (or benefit) may arise.

Advantages

- Protects against increase in interest rates
- Simple to transact
- No up front premium to enter into the swap
- Documented using standardised ISDA documentation

Disadvantages

- No benefit from falls in rates
- There may be a cost (benefit) if the hedge is terminated before its final maturity date. A cost will be incurred if prevailing swap rates are lower at the time of termination than the fixed rate in the swap. Conversely, if prevailing swap rates are higher than the fixed rate, the termination would result in a breakage benefit to you. The size of the breakage cost or benefit will therefore depend on the Yield curve prevailing at the time of termination.
- It is independent of the loan and requires separate documentation.”

128. The third page contained notes which were somewhat, but not significantly, different to the notes included within the 2006 brochure. They included:

“The following notes are important

1. Any transaction terms agreed between us verbally are legally binding contract terms. Following execution of a trade you will be required to sign legal documentation (which may include a confirmation and Master Agreement) to confirm those terms.

2. Any hedging contract that you enter into with RBS is a separate legal contract from any borrowing it may relate to. In particular, they may be terminated independently of each other and early termination of one does not automatically terminate the other.

3. The cost to you of the overall hedging structure and any borrowing is the sum of the cost of the borrowing and the net cost to you of the hedging contract, whether this is a swap, cap, collar or any other hedging structure. This is illustrated below.

You may have an interest rate swap under which you receive base rate or LIBOR and pay a fixed rate. This is being used to protect interest rate risk on a loan on which you are paying base rate or LIBOR plus margin.

Your resulting position under the swap and loan will be

Interest Rate swap	Pay	Fixed
	Receive	(Base rate/LIBOR)
Loan	Pay	Base rate / LIBOR + Margin
Effective Pay	Fixed + Margin	

4. If you are hedging an interest rate exposure:

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

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

5. If derivative contracts are closed before their maturity, breakage costs or benefits may be payable. The value of any break cost or benefit is the replacement cost of the contract and depends on factors on closeout that

include the time left to maturity and current market conditions such as current and expected future interest rates.

6. You acknowledge that your obligations (whether present, future, actual or contingent) under any transaction shall (unless otherwise agreed) be secured by all present and future security which The Royal Bank of Scotland plc or National Westminster Bank Plc, as the case may be, may hold from time to time for all your liabilities to the Bank of whatsoever nature and for the avoidance of doubt nothing herein stated is intended to vary any such security.

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

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

The material has been prepared by The Royal Bank of Scotland plc ("RBS") is indicative and is subject to change without notice. It is intended for the sole use of the recipient (the "recipient") on the basis that before entering into this, or any related transaction, the Recipient will ensure that it fully understands the potential risks and return of the proposed transaction, and any related and/ or similar transaction and determine whether the transaction is appropriate for the Recipient given its objectives, experience, financial and operational resources, and other relevant circumstances. The Recipient should consult with such advisers as it deems necessary to assist in making these determinations.

Nothing in this document should be construed as legal, tax, accounting or investment advice or as an offer by RBS to purchase from or sell to the Recipient, or to underwrite securities of the Recipient, or to extend any credit or like facilities to the Recipient, or to conduct any such activity on behalf of the Recipient. RBS will not act as the Recipient's adviser or owe any fiduciary duties to the Recipient in connection with this, or any related transaction and no reliance may be placed on RBS for advice or recommendations of any sort. RBS makes no representations or warranties with respect to this material, and disclaims all liability for any use the Recipient or its advisers make of the contents of the material.

...

In general, all OTC Derivatives involve risks which include (inter-alia) the risk of adverse or unanticipated market, financial or political developments, risks relating to the counterpart, liquidity risk and other risks of a complex character. In the event that such risks arise, substantial costs and/or losses may be incurred and operational risks may arise in the event that appropriate internal systems and controls are

not in place to manage such risks. Therefore the Recipient should ensure that, before entering into any OTC derivative transaction, the potential risks and return thereof is fully understood and the Recipient should also determine whether the OTC transaction is appropriate for the Recipient given its objectives, experience, financial and operational resources, and other relevant circumstances.

RBS and its affiliates, connected companies, employees or clients may have an interest in financial instruments of the type described in this material or in related financial instruments. Such interest may include dealing, trading, holding, acting as market-makers in such instruments and may include providing banking, credit and other financial services to any company or issuer of securities or financial instruments referred to herein.”

129. On 9 November 2007, at 10.46 am, Ms Fullerton and Mr Fordyce spoke on the telephone. This call and subsequent calls were recorded, so that transcripts were available at trial. During this call, Mr Fordyce confirmed that the first drawdown under the 2007 Loan had taken place. Ms Fullerton explained to Mr Fordyce that she needed Dr Perks and his wife to sign certain documentation. This documentation was the Bank’s Terms of Business. Ms Fullerton asked whether Mr Fordyce had had any further thoughts about hedging, adding that she appreciated “if Clayton has been out of the country that’s probably been quite a difficult discussion to have had”. Mr Fordyce responded that he thought that they were “probably looking ... What’s the current fixed rate at the moment?”. Mr Fordyce was therefore asking about rates for an interest rate swap, rather than the collar which had been indicated as the preference at the meeting. Ms Fullerton said that the rate had come down quite a bit since she had last sent it to him. She asked whether Mr Fordyce would like her to send an update rate, and Mr Fordyce said that would be helpful.
130. Later on the same day (at 12.12), Ms Fullerton sent Dr Perks an email (copied to Mr Fordyce) which attached a letter to the Partnership at its Glasgow address, and also the Bank’s Terms of Business for a “Retail” client (“the 2007 Terms of Business”). Ms Fullerton explained that the documentation would need to be signed before they could proceed. She also (as per her conversation with Mr Fordyce earlier that day) provided Mr Fordyce with an updated indicative 5-year swap level: 5.82%, excluding lending margin.
131. The 2007 Terms of Business included the following terms:

“4.2 We will provide you with a non-advisory dealing service in relation to shares, debentures, government and public securities, warrants, certificates representing certain securities, units, options, futures, contracts for difference and rights or interests in investments (together “**Investments**” and individually “**Investment**”) together with related research, strategy and valuation facilities. Transactions in certain Investments may be subject to separate or supplementary terms. The provision of safe custody facilities is not included in these Terms and is subject to separate terms.

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

4.4 The content of any opinion, research or analysis expressed or published by us or our affiliates is based on information that we believe to be reliable but we do not represent that it is accurate or complete. Any research which we distribute is produced in accordance with our Research Conflicts Policy which can be viewed by our research clients on our website at www.rbsmarkets.com or any successor medium as designated by us. You agreed not to pass our research on to any third party without prior written approval.

6.5 Any information we provide to you relating to transactions is believed, to the best of our knowledge and belief at the time it is given, to be accurate and reliable, but no further representation is made or warranty given or liability accepted, as to its completeness or accuracy. Such information does not constitute an assurance or a guarantee as to the expected outcome of any such transaction. You should also be aware that the market conditions and pricing may change between the time we provide you with information and the time you approach us with a view to entering into a trade.

13. Confirmations

After we have executed a transaction, we shall confirm the details thereof to you (which confirmation may be in electronic format or made available on a website, in which case such electronic format shall have the same effect as if served on you in written hard copy). The content of our confirmations will, in the absence of manifest error, be deemed conclusive and binding on you unless you object in writing within five business days of despatch.

15.1 If you approach us to close out a trade which has been entered into between us, we are under no obligation to do this. Where we agree to do this, we will calculate the close out value of the trade based on prevailing market conditions and may include associated costs arising from the close out in this figure. The close out value may be due from you to us or from us to you depending on the trade and may be substantial.

21.1 Nothing in these Terms will exclude or restrict any liability that we owe you under FSA Rules.”

132. On 26 November 2007, Dr Perks and his wife signed the attached letter as partners in, and on behalf of, the Partnership, thereby confirming the Partnership's agreement to the 2007 Terms of Business.
133. In the meantime, on 14 November 2007 (at 10.54), Ms Fullerton had called Mr Fordyce, saying that she was "just checking up on our discussions from last week". On this call Mr Fordyce informed Ms Fullerton that:
- "I think we are just going to go for the fixed rate... For the 5 years, seeing as it's come down a bit since, erm, last time we had the meeting... Cos I think it's something, it is going to work out about a hundred quid extra a month or something like that on average... On what we're paying just now..."
134. There was nothing in this call, or in the previous call, which could be described as hard selling by Ms Fullerton, or indeed any selling at all. Nor was there anything in the nature of advice. When Mr Fordyce said that he thought that they were just going for the fixed rate, Ms Fullerton's response was: "Right, OK. I thought, I thought you might do".
135. On 28 November 2007, Ms Fullerton called Mr Fordyce again on the telephone. Mr Fordyce confirmed that Dr Perks and his wife had signed the letter sent on 9 November 2007. She asked Mr Fordyce about hedging: had they "reached any sort of conclusion on what they are looking to do Ian or are you still talking to them about that?" Mr Fordyce responded: "fixed rate", and he confirmed it was "just the fixed rate" at "5.82 or whatever it was". Ms Fullerton said that this was "no problem".
136. Ms Fullerton reiterated that she would need to have received the signed letter before she could proceed, and she and Mr Fordyce discussed arrangements for formalising the deal. Mr Fordyce asked what needed to be done in order to formalise it. Ms Fullerton said that she needed "to agree over a recorded telephone line basically. What I have to do, is I have to get a live price for him ... and quote that over the phone ... and he has to just agree to it basically. It is really that simple now to be honest". Mr Fordyce confirmed that Dr Perks was "happy with that, he is happy with, he knows all about the 5.82". Ms Fullerton said that the price might change, and she was hoping it would move in their (the Claimants') favour.

29 November 2007

137. On 29 November 2007, five telephone calls took place relating to the swap. These were principally between Ms Fullerton and Mr Fordyce, but the fourth call was between Ms Fullerton and Dr Perks.
138. On the first call, which began at 15.06, Ms Fullerton informed Mr Fordyce that she had not yet received the signed letter. Mr Fordyce confirmed that the letter had been sent out by first class post the previous day, but it was agreed that Mr Fordyce would fax a signed copy, which he then did.
139. On the second call, which began at 15.57, Ms Fullerton confirmed that she had received the fax. She explained that, if the trade was going to be done that day, it would probably need to be done by 4.30pm (i.e. within approximately the next half an hour) and gave

Mr Fordyce an updated swap rate of 5.61%. Mr Fordyce's comment on the lower rate was: "Wow right cool".

140. On the third call, which began at 16.00, Mr Fordyce told Ms Fullerton that Dr Perks was "good to go if you phone him on that number right now". She explained that Dr Perks would need to sign a confirmation "pretty much right away". It was agreed that Mr Fullerton would email that document to him, copying in Mr Fordyce. Dr Perks would be able to print it off when he was down in Newcastle on the following day. Ms Fullerton asked whether she needed to go over the mechanics of the swap "or anything again with Clayton or are you quite comfortable with how it works". Mr Fordyce suggested that she could always phone him back once she had been over things with Dr Perks. She offered to go over things with Mr Fordyce, but he had other things to do.
141. The fourth call was between Ms Fullerton and Dr Perks. It commenced at 16.01. Ms Fullerton confirmed with Dr Perks that he was happy to proceed with the interest rate swap she had discussed with Mr Fordyce, which she explained would mean that he was "swapping out the average base rate for a fixed rate of 5.60, obviously your lending margin is over and above that as we have discussed previously". She provided the following further explanation of the profile (duration and notional) of the interest rate swap:

"...essentially what we are doing is we're hedging the first 5 years of your loan profile...so the starting amount as it is today is £2,068,638.08 and the expiry date would be the 8th of November 2012, because your loan was actually drawn down on the 8 November... and the end amount would be £1,630,257.21".
142. Ms Fullerton later said that "essentially what you would have then is a fixed rate of 5.60 plus your lending margin". Dr Perks said: "That's great", and he confirmed that the 2007 swap could be booked. Ms Fullerton explained that Dr Perks would need to sign and return a "confirmation" for the transaction, which she would email to him.
143. On the fifth call, which was again between Ms Fullerton and Mr Fordyce and which commenced at 16.19, Ms Fullerton confirmed to Mr Fordyce that the 2007 swap had been executed at 5.60% and they discussed the mechanics thereof, which Mr Fordyce confirmed that he understood.
144. At 16.44, Ms Fullerton sent Dr Perks an email which attached "a copy of your deal agreed this afternoon". The attachment, described as the "Post-transaction acknowledgment" summarised the terms of the 2007 swap and included: (i) a table showing the "structure" (or profile) of the 2007 swap, and in particular how its notional amount would reduce over its five year term; and (ii) Notes which were materially the same as those provided as part of the 2006 brochure.
145. The Partnership was later sent a "Confirmation" for the 2007 swap dated 14 January 2008 which was signed by Dr Perks for the Partnership. The Confirmation set out the terms of the 2007 swap, including the notional schedule over five years.
146. There is nothing in this sequence of events which involved Ms Fullerton giving any advice to the Claimants to enter into the 2007 swap. To the contrary, as RBS submitted, on two of the calls referred to above (on 9 November 2007 and 28 November 2007),

Ms Fullerton asked Mr Fordyce an entirely open question as to what they were thinking, and had decided, about hedging. Mr Fordyce responded that they were primarily looking at, and had decided upon, a “fixed rate” (i.e. an interest rate swap).

C2: Misrepresentation

The Claimants’ argument

147. This claim arises from statements alleged to have been made in the meeting held on 9 October 2007. The Claimants’ pleaded case was the attendees were (on the Claimants’ side) Dr Perks, Mr Fordyce and Matthew Small, and (on the RBS side) Ms McGuigan and Ms Fullerton. The relevant statement, alleged to be a misrepresentation, was that interest rates were going to rise. A representation, that Dr Perks was told that hedging against interest rate risks would be “in the best interests of the Partnership” was pleaded. But Mr Macpherson said, in the course of closing arguments, that this part of the case was not pursued.
148. The focus of the case was therefore on the statement that interest rates were going to rise. This statement included an implied statement that RBS had reasonable grounds on which it based this opinion. RBS was under a duty of care not to misstate facts to the Claimants. The statement made was a misrepresentation, because RBS in fact believed that a fall in base rate was imminent, and that the rate would remain below the then existing rate (5.75 % at the time of the meeting) for some time. The representation made was a continuing representation which was not corrected or updated prior to the conclusion of the 2007 swap contract. The Claimants contended that if RBS had told them that they believed that interest rates would fall, then the Partnership would not have entered the 2007 swap but would instead have obtained funding elsewhere, or taken other steps such as not entering the 2007 loan.
149. The legal basis for the claim is the common law tort of negligent misrepresentation – a “standard” *Hedley Byrne v Heller* [1964] AC 465 misrepresentation claim – alternatively a claim under the Misrepresentation Act 1967. The principal difference between the two claims is that the latter requires RBS to show that it had reasonable grounds to believe, and did believe, up to the time of the contract that the facts represented were true.
150. The claim gives rise to a number of evidential issues, in particular as to what was said at the October 2007 meeting (it being common ground that a meeting did take place on that day), whether RBS believed that interest rates were going to fall, and whether there was reliance by Dr Perks on the statements allegedly made.

The argument of RBS

151. In response to this claim, RBS contended – as a defence to each of the ways in which the claim under the 2007 swap was put, including misrepresentation – that the claims were time-barred, albeit only by two days. The timing was such that, taking into account the standstill agreement which the parties concluded in 2013, the claim form should have been issued by 19 January. In fact, it was not issued until 21 January 2016, two days later.

152. As far as the substance of the claim in misrepresentation is concerned, RBS submitted that the court should find that neither Ms Fullerton nor Ms McGuigan made an unqualified statement as to the direction of interest rates during the October 2007 meeting. If any such representation was made, RBS submitted that the evidence did not establish that, in the lead up to and as at the date of the first swap, RBS held the belief or opinion which made this representation false.
153. RBS submitted that for a variety of other reasons, the Claimants' case as regards the future direction of interest rates was doomed to fail. The appropriate counterfactual was what the claimant would have done if the relevant misrepresentation had not been made; i.e. what Dr Perks would have said if RBS had said nothing. RBS submitted that the Partnership would not in those circumstances have acted any differently.

Discussion

Did RBS make a representation as to the direction of interest rates?

154. A critical initial question is whether the Claimants have proved, on the balance of probabilities, that the representation relied upon was in fact made. The only evidence in that regard comes from Dr Perks. There is no contemporaneous documentary support for the making of the statement. The Claimants say that I should accept his evidence, particularly bearing in mind that Ms Fullerton was not called as witness. RBS says that Dr Perks was not a reliable witness, and that the making of the statement is not supported by any objective evidence or the inherent probabilities.
155. In approaching the evidence on this disputed factual issue, I apply the well-known guidance of Robert Goff LJ in *Armagas Ltd v Mundogas S.A. (The Ocean Frost)*, [1985] 1 Lloyd's Rep. 1, 57:

"Speaking from my own experience, I have found it essential in cases of fraud, when considering the credibility of witnesses, always to test their veracity by reference to the objective facts proved independently of their testimony, in particular by reference to the documents in the case, and also to pay particular regard to their motives and to the overall probabilities. It is frequently very difficult to tell whether a witness is telling the truth or not; and where there is a conflict of evidence such as there was in the present case, reference to the objective facts and documents, to the witnesses' motives, and to the overall probabilities, can be of very great assistance to a Judge in ascertaining the truth."

156. Robert Goff LJ's judgment was described as the "classic statement" in *Simetra Global Assets Ltd. v Ikon Finance Ltd.* [2019] EWCA Civ 1413, where Males LJ said at [48]:

"In this regard I would say something about the importance of contemporary documents as a means of getting at the truth, not only of what was going on, but also as to the motivation and state of mind of those concerned. That applies to documents passing between the parties, but with even greater force to a party's internal documents including emails and instant messaging. Those tend to be the documents where a witness's guard is down and their true thoughts are plain to see. Indeed, it has become a commonplace of judgments in commercial cases where

there is often extensive disclosure to emphasise the importance of the contemporary documents. Although this cannot be regarded as a rule of law, those documents are generally regarded as far more reliable than the oral evidence of witnesses, still less their demeanour while giving evidence.”

157. It was common ground that there was nothing in the contemporaneous documents which supported the making of the statement. The trial documents contained e-mail and other correspondence passing between the parties, as well as internal documentation. It also included transcripts of the calls that took place, not long after the meeting, with Ms Fullerton. There is also a contemporaneous note, described above, containing Ms Fullerton’s pre-meeting typed notes, together with handwritten notes.
158. There is nothing in any of these materials which provides any support for the representation. Indeed, if anything they point the other way.
159. For example, the 2007 Hedging Paper was prepared by Ms Fullerton after the meeting, and sent to Mr Fordyce on 19 October. To a large extent, this was no doubt based upon standard documentation, rather than being a bespoke paper produced for the Claimants. However, the fact that Ms Fullerton prepared and sent it, and that it included clear reference to the fact that a disadvantage of the swap was that there was “no benefit from falls in rates”, suggests that it is unlikely that Ms Fullerton had previously made a firm statement that interest rates were going to rise.
160. The transcript of the 9 November 2007 call between Ms Fullerton and Mr Fordyce is also significant in this regard. This was the first verbal discussion between them subsequent to the October 2007 meeting. The transcript shows that Ms Fullerton asked a neutral question relating to the hedging: had they (i.e. Mr Fordyce and Dr Perks) “had any further thoughts on it”. She was not pushing to sell a product, and there was no reference to rising interest rates. Mr Fordyce does not ask her to confirm views allegedly previously expressed at the meeting, as to the direction of interest rates in the future. In fact, he asked what the “current fixed rate at the moment” was. He was told that it had come down “quite a bit ... since I probably last sent it to you”. In a subsequent conversation in the series that took place on 29 November, Mr Fordyce was told that the rate had fallen from 5.82% to 5.61%, and he was happy: “Wow right cool”. Given that Mr Fordyce was financially astute, he is likely to have appreciated that falling swap rates reflected a market perception that the risk of future interest rate rises was also falling. As the Claimants explained in opening: the market interest rate predictions (the forward yield curve) were changing to show that Base Rate would fall or (at least) would not rise. If positive statements had been made at the meeting as to interest rates rising, Mr Fordyce would likely have asked whether this was contradicted by the falling swap rates.
161. I also consider, contrary to the Claimants’ submission and for the reasons that follow, that some weight can be attached to the meeting note that Ms Fullerton prepared approximately 9 months later. The likely reason that she wrote this note was, as the Claimants’ submitted, because it was required by the Bank’s internal procedures, as shown by the fact that the (bold) headings in the note followed the format of a template disclosed by RBS on disclosure. Ms Fullerton should clearly have prepared this note

much earlier, and there was force in the Claimants' submission that there was nothing about the meeting which rendered it particularly memorable for Ms Fullerton. Much had happened in the intervening 9 months, including that Ms Fullerton had married. However, there is nothing to indicate that Ms Fullerton's note of the meeting did not represent her best recollection at the time, as to what had happened. I do not accept that it was prepared as a "defensive move". At that time, Ms Fullerton was not seeking to defend any allegation. She appears simply to have been behind with her paperwork.

162. In preparing her note, she would no doubt have used the note that she had prepared for and made at the meeting itself: the figures in the first paragraph under "Topic discussed" are taken from that note. This would have enabled her to refresh her memory as to what had been discussed. It is probable that she would also have relied upon her usual approach to meetings of the kind that had taken place: for example, to explain the advantages and disadvantages of each IRHP under consideration, to make a recommendation that the client seeks independent advice, and for a general discussion on market conditions to take place. A reason why (as the Claimants suggest) the meeting would not have been particularly memorable for Ms Fullerton, is that there was nothing unusual about the meeting which she would have conducted as she usually would.
163. Dr Perks was cross-examined about the meeting note. This was with a view to testing his recollection of the meeting, and to seeing the extent to which he positively disagreed with the meeting note as a record of what was said. Unsurprisingly, at this distance of time, Dr Perks had very little recollection of the details of the meeting as recorded in the note. He agreed that he could not remember the meeting well enough to be able to say whether the statement made, concerning an explanation of the advantages and disadvantages of the various IRHPs, was true or false. He could not remember whether the potential breakage costs, as well as the mechanics of how a breakage cost would be arrived at, was explained, or whether that statement was true or false. He agreed that it was possible that, as the note records, "FSA registration and the retail terms of business were explained and an IRD brochure was provided". (I understand IRD to refer to Interest Rate Derivatives). He could not remember whether Ms Fullerton had recommended that they seek independent advice. He could not remember Mr Fordyce asking for rates on collars and swaps, although he made the point that the only person who might have asked would have been Mr Fordyce; since he was the only person on their team who would have even known what they meant. It was clear from that line of cross-examination that Dr Perks had virtually no recollection of the discussion at the meeting, and that he could not dispute the material parts of the note.
164. Accordingly, I consider that the note, albeit prepared many months later, is likely to be a broadly accurate summary of the discussion that took place. I am reinforced in that conclusion by consideration of the documents during the 2006/2007 period which concern Ms Fullerton. I have not had the benefit of seeing her (in 2021) in the witness box. However, I can see how she dealt with matters in various ways in 2007. Generally speaking, the correspondence and transcripts give the impression of a person who was professional and who was seeking to deal with matters carefully and properly, including by providing relevant information to Mr Fordyce and Dr Perks. Neither the correspondence nor transcripts reveal a person who was selling a product hard. Although there are a fair number of transcripts, the Claimants did not identify any statements made which are alleged to have been inaccurate. Whilst her failure to make

a prompt note of the meeting can properly be criticised, the fact remains that she did make a note, albeit late.

165. There is nothing in the typed note which indicates that a statement as to future rises in interest rates was made. It does indicate that there was a discussion about market conditions, but that cannot be equated with the positive statement for which Dr Perks contends. As RBS submitted, it is a significant leap from that recorded statement to a finding that Ms Fullerton made the kind of unqualified statement as to the future direction of interest rates that it is alleged.
166. I have so far considered the documentation surrounding and relating to the meeting. It is also important to consider the inherent probabilities. RBS submitted that it would be very surprising for either Ms Fullerton or Ms McGuigan to have made an unqualified statement as alleged, given that the future path of interest rates is inherently unpredictable. I thought that there was considerable force in this submission. Ms McGuigan was not an interest rate specialist in any sense, and in any event she did not attend the 2007 meeting. Ms Fullerton worked within the Bank's Treasury Solutions unit, and she clearly would have had some expertise in this area. Given the inherent uncertainty of future market movements in relation to interest rates, it is inherently improbable that Ms Fullerton would have made a categorical statement of the kind alleged. She would no doubt have been familiar with the content of the Notes which were included within the 2007 Hedging Paper that she sent. These included reference to: the "variety of significant risks" associated with over-the-counter derivatives, and that in general all such derivatives involve risks which "include (inter alia) the risk of adverse or unanticipated market, financial or political developments ... and other risks of a complex character". There is also nothing in the documents emanating from Ms Fullerton, or the transcripts of the calls with her, which is indicative of ill-considered or inaccurate statements on her part. Furthermore, it is inherently probable that, as reflected in the note, Ms Fullerton would have spent some time at the meeting explaining both the advantages and disadvantages of the IRHPs being considered. She had no reason to hide the disadvantages: they had been identified in the 2006 brochure and were further identified in the paper that she sent after the meeting. In addition, the note provides evidence that Ms Fullerton recommended that the client took independent advice; a point reflected in the "notes" to the 2007 Hedging Paper ("you have the opportunity to seek independent financial advice ...").
167. The inherent improbability of the statement alleged is reinforced by the fact that there appears to be no good reason why Ms Fullerton would have made the statement. The Bank had already made it clear that it required an IRHP as a condition of the proposed loan. There had been no indication that the Claimants were unwilling to conclude such a transaction or were even hesitant about doing so. Ms Fullerton therefore would not have approached the meeting on the basis that she was going to have to persuade Dr Perks to do something that he was reluctant to do. A principal reason for the meeting was not for Ms Fullerton to sell the idea of an IRHP to Dr Perks, but rather for an explanation to be given about the different types of product which were available, and their advantages and disadvantages.
168. Against this background of the documentary evidence and the inherent probabilities, I do not attach any weight to Dr Perks' evidence. I have already indicated that he was, in my view, an unreliable witness, for the reasons given. It is apparent from the line of cross-examination already discussed that he had little recollection of the meeting.

169. It is in my view a significant point that there was a material change in his case as to the key participants in the meeting on the Bank's side. The Claimants' pleaded case was that Ms Fullerton and Ms McGuigan had attended for the Bank, and that both of them said in unison that interest rates were going to rise, not fall. In the Claimants' written opening, a footnote indicated that the pleading in this respect contained a factual error; and that Dr Perks' recollection of a chorus from RBS in unison came from an earlier meeting "in which RBS sought to sell the Group an IRHP in late 2006". At that stage, the Claimants' case was, still, that Ms McGuigan had attended the meeting. However, Dr Perks' evidence that Ms McGuigan had attended this meeting was inaccurate: the attendees were Ms Fullerton and Scott McClurg. In cross-examination, Dr Perks accepted that his memory was "possibly" faulty in respect of who attended the meeting, and he later accepted that Ms McGuigan had not attended the meeting. He said, however that it confirmed his earlier view that "they sang in unison, so there must have been a 2006 meeting then". However, as previously discussed, the evidence indicates that there was no meeting in 2006 attended by Ms Fullerton, and certainly none attended by Ms Fullerton and Ms McGuigan. There was, therefore, never an opportunity for these two women to sing about interest rates in unison. This never happened.
170. I do not consider that Dr Perks is deliberately lying when he gives evidence as to the statements made, initially in unison in 2006, and later by Ms Fullerton alone, as to interest rates rising. He is a witness who, like many witnesses whose evidence is inaccurate and not supported by the documents, has persuaded himself that something happened even though it did not. He has then rigidly adhered to that view, persuading himself (for example) that the e-mail relating to the 2006 meeting proved his case, when in fact it did no such thing.
171. Mr Macpherson relied upon various statements made by Dr Perks in 2009, and in particular in a recorded and transcribed call with Mr Munro when Dr Perks said that the "advice" received in 2007 had been that interest rates would rise. (The detail of this call is set out in Section D below, in the context of the 2009 swap). I have discussed some of these statements in Section B above. In my view, they are not of significant evidential weight, when considered in the light of the evidence as a whole. They were statements made by a witness whom I regard as unreliable. They were made even longer after the event than the time when Ms Fullerton's typed note was prepared. By the time that they were made, Dr Perks was already unhappy about how the 2007 swap had turned out, in the light of the drop in interest rates particularly in and after November 2008. It may be that, by late 2009, Dr Perks had already persuaded himself that he had been misled as to the future direction of interest rates. But that does not mean that he was in fact misled.
172. Accordingly, my conclusion is that I cannot, on the balance of probabilities, make a finding that the representation relied upon, as to the direction of interest rates, was made by Ms Fullerton in 2007 (or indeed at any other time). Accordingly, the Claimants' misrepresentation case falls at the first hurdle.
173. In these circumstances, it is not necessary to consider the parties' arguments addressed to issues concerning the nature of the representation and how it was understood by Dr Perks, falsity, the effect of RBS's terms and conditions and related issues. I will, however, consider the issue of causation, since this provides an additional reason for my rejection of the Claimants' misrepresentation case.

Causation

174. By the time of closing arguments, it was common ground that the relevant causation question (or “counterfactual” as the parties described it) was to ask: what would the claimant have done if the relevant misrepresentation had not been made: *SK Shipping Europe Plc v CMTC* [2020] EWHC 3448 (Comm), affirmed [2022] EWCA Civ 231 para [61]. The question is not: what would the claimant have done if told the true position?
175. Dr Perks was somewhat reluctant to engage with cross-examination on this topic, since it involved him trying to answer hypothetical questions in a scenario which, as far as he was concerned, did not happen. It was put to him that if Ms Fullerton had said nothing about interest rates at all, he would still have entered into the swap because it was a condition of the loan. His answer was: “possibly, possibly”. When he was asked the question again, he said: “Maybe, maybe. How can you tell, how can you tell?”
176. I consider on the balance of probabilities, and indeed without any hesitation, that Dr Perks would have entered into the swap if the relevant misrepresentation had not been made. He was told that it was a condition of the loan. When this was first communicated to him, on 24 September 2007, in connection with the news that the green light had been given for the loan he did not raise any objection (“Great news Jane”). There is no indication in the documents at any unhappiness with the Bank’s requirement. The position was that Dr Perks wanted to expand the business and wanted the loan which RBS was proposing in order to enable him to do so. That was the prize, and he was happy to enter a swap if that is what the Bank wanted. Mr Fordyce also seems to have been very happy with the arrangement, no doubt because the swap may have allayed any concerns on his part arising from the size of the Partnership’s borrowing and its potential exposure to any increased rates. In a note prepared by Jane McGuigan in 2008, she recorded that: “In house accountant delighted that now only one loan and risks mitigated re hedging”. Dr Perks agreed that Mr Fordyce was indeed delighted with the hedging.
177. Accordingly, the misrepresentation case fails.

C3: Failure to explain the risks of the 2007 swap – the common law claim

178. There are two legal bases on which this claim was made, with a significant overlap between them. The essence of the claim was a failure to explain the risks of the proposed swap, with liability arising (i) at common law and (ii) pursuant to section 138D of the Financial Services and Markets Act 2000 and breaches of the COBS rules. I deal in this section with the common law claim.

The parties’ arguments

179. The common law claim relied upon the principles considered in the judgment of the Court of Appeal in *Property Alliance Group Ltd v RBoS* [2018] EWCA Civ 355 (“PAG”) in particular at paras [37] – [86]. In that case, the court considered the statement of principle of Mance J in *Bankers Trust International plc v PT Dhamala Sakti Sejahtera* [1996] CLC 518, namely that: “if a bank does give an explanation or tender advice then it owes a duty to give that explanation or tender that advice fully, accurately and properly”. The Claimants said that PAG showed that circumstances may

arise in which a bank assumes a responsibility to give a full, accurate and proper explanation. This depends on the responsibility assumed in the particular factual context. In the present case, the Claimants submitted that Ms Fullerton decided to give an explanation of the advantages and disadvantages of the proposed swap, but that this explanation omitted important disadvantages and risks as summarised below.

180. In *PAG*, the claim failed. That claim included some allegations similar to those advanced by the Claimants in the present case. But the Claimants contended that the factual context in which its claim arose was different and stronger than that of *PAG*. Here, RBS had asked Dr Perks to attend a presentation, whose purpose was to explain the advantages and disadvantages of various IRHPs in order that (as the Claimants submitted in opening) “he could make an informed choice which to enter as a condition of the new 2007 Property loan”. RBS knew that Dr Perks was naïve about basic finance and would rely on what he was told in the meeting. It also knew that Dr Perks had requested and Ms McGuigan had offered financial advice in the past. The meeting was then followed up by the paper that Ms Fullerton sent, and which was intended to provide a more detailed outline of a collar and interest rate swap, and their advantages and disadvantages. Prior to the meeting, the Claimants had not been provided with that document, nor with the terms and conditions on which RBS relied. In the circumstances of the present case, the Claimants contended that RBS assumed responsibility for what was said in the meeting and in particular for listing the advantages and disadvantages of an interest rate swap fully, accurately and properly. The Bank in the circumstances assumed that responsibility towards its client.
181. The Claimants contended that there were four respects in which there was a failure to explain risks to Dr Perks in a manner that he could understand or at all.
182. (1) *Substantial break costs*. First, there was a failure to explain the risk that the breakage costs of an interest rate swap would become very substantial if the Bank of England base rate were to fall significantly and/or remain at a low level. This was what ultimately occurred: Base Rate dropped to 0.5% on 5 March 2009 and the break cost for the Partnership’s approximately £2m swap on 9 July 2009 was £191,623. The Claimants submitted that it was not good enough simply to explain the mechanics of how a break cost was calculated. With the naivety of these clients, worked examples were required.
183. (2) *Impact of a “Contingent Obligation” on future lending decisions*. Secondly, there was a failure to explain the risk that, by entering an interest rate swap, there could be a negative impact on future lending decisions of RBS to the Partnership or the wider “Group”. This was because RBS would immediately add to its records of the Partnership’s credit exposure a substantial sum called a “Contingent Obligation” or “Cont Obl”. In the present case, Ms McGuigan added a “Cont Obl” of £114,000 in November 2007.
184. The size of this “Contingent Obligation” was based on the “CLU” or “Credit Limit Utilisation” which had been provided by Ms Robinson (in the Global Banking and Markets or Treasury Solutions unit) to her colleague Ms Fullerton. On 16 November 2007, she told Ms Fullerton that the CLU was £ 114,000. This figure was then passed to Ms McGuigan in an e-mail which told her: “we need a cont ob of £ 114k to cover a 5-yr swap based on full loan amount”. Subsequently, in April 2009, Mr Kraftt (also in Treasury Solutions) told Mr Anderson (whose title was “Relationship Director,

Commercial Banking, Glasgow”) that the CLU was £ 254,581, and therefore exceeded the previous figure by £ 140,581. He asked for a “sufficient limit to be recorded”.

185. The Claimants submitted that the “Cont Obl” was indeed a contingent liability of the customer. Even if it did not meet the exact legal test for a contingent liability, a “Cont Obl” could have a negative effect on a future lending decision by RBS. They referred to the decision of Bacon J in *Fine Care Homes Ltd v National Westminster Bank PLC* [2020] EWHC 3233 (Ch), where (see [135]) the experts had agreed that the CLU could be material to a bank’s decision on how much to lend to a borrower, and the larger a CLU the less a customer could potentially borrow. The Claimants submitted that this would be of particular concern in the present case, given that the Partnership purchased properties with 100% loans and GCL purchased clinics with a £400,000 overdraft. There was therefore substantial leverage already on the assets of the Partnership. The size of the contingent obligation, which eventually reached (so the Claimants submitted) £ 320,000, was significant: approximately 15% of a total debt of around £ 2 million. The potential negative effect on future lending decisions should have been explained.
186. (3) *Restrictions on property sales.* Thirdly, there was a failure to explain that by entering an interest rate swap, the Partnership or GCL could be restricted from selling properties that it owned. This was for essentially the same reasons as the impact of the Contingent Obligation. The Partnership’s liabilities under the 2007 swap were secured by all the property owned by the Group. A Contingent Obligation could (depending on the state of the Group and the market) negatively affect whether RBS would allow the Partnership or GCL to sell property.
187. In closing submissions, the Claimants explained that the restriction on the sale of properties arose from two features of the 2007 swap. First, the break costs and the contingent obligation were both secured against all the properties owned by the Partnership and (if different) Dr & Mrs Perks personally. Secondly, the 2007 swap was a stand-alone contract. The combination meant that the 2007 swap could “trap the Partnership in the 2007 Loan” because (a) the Partnership could not sell the Properties to repay the 2007 Loan without breaking the 2007 swap, because the properties were also security for the break costs or the contingent obligation; but that (b) the Partnership could not afford to pay the cost of breaking the 2007 swap, especially as interest rates fell. The restriction on the ability to sell was an aspect of the first of the four risks which were not explained, namely the potential for the break cost to be substantial if interest rates fell or stayed low.
188. In oral closing submissions, Mr Macpherson drew attention to paragraph 16 of Schedule 1 to the Terms and Conditions signed by Dr and Mrs Perks on behalf of the Partnership in November 2007. Schedule 1 had the sub-heading: Risk Warning. Paragraph 16 was as follows:

“16 Break Costs

If you enter into an over-the-counter derivative transaction (such as an interest rate swap or a fixed rate deposit) with us and decide to close out the transaction before its scheduled termination date, you may have to pay breakage costs. These will be calculated by reference to prevailing market conditions and include any costs incurred by us in terminating

any financial instrument or trading position. Please note that such break costs may be substantial.

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

He submitted that the warning in clause 16 should also have been included as a warning in the 2007 Hedging Paper, or in the meeting, as one of the disadvantages of the swap.

189. (4) *Fees charged by RBS*. The fourth matter which was not explained was not in the nature of a risk, and indeed did not form part of the Claimants’ written opening. The Claimants contended that the Bank charged a fee of 40 basis points (0.4%) on the 2007 swap, and this resulted in a payment of £ 32,000 from the trade. The Claimants contrasted this with the 2007 Hedging Paper, which said that there was: “No up front premium to enter into the swap”. This statement in the Paper was therefore a “half-truth”, and there was therefore a failure to describe the swap fully accurately and properly. In respect of the COBS claim, described in more detail below, there was a failure to comply with COBS 16, Annex 1, paragraph 13: this required the transaction documentation to contain a “total sum of the commissions and expenses charged”.
190. In response to this case, the Bank made four principal submissions.
191. First, no common law duty arose at all, because nothing was said that was misleading, and there were no exceptional circumstances which justified the imposition of a duty to volunteer information. The Bank adopted and relied upon the analysis of the Court of Appeal in *PAG*.
192. Secondly, none of the alleged breaches of duty was pleaded, and each of them needed to be. Had they been pleaded, the Bank would have wished to adduce evidence directed towards them.
193. Thirdly, there was in any event, on the facts, no breach.
194. Fourthly, the claim fails as a matter of causation. Even if all of these matters had been explained to Dr Perks, he would still have entered into the 2007 swap.

Discussion: the pleading argument

195. I consider that, in relation to the common law claim, the case advanced at trial should have been pleaded, but was not. CPR 16PD.8 requires particulars of claim to include “details of any misrepresentation”. Mr Macpherson accepted that the first three risks relied upon (substantial break costs, contingent obligation and impact on property sales) had not been pleaded, although he submitted that the fourth matter (RBS’s fee) had been pleaded in paragraph 108 (b) of the Re-Amended Particulars of Claim (RAPOC).

He said, however, that paragraph 95 of the RAPOC pleaded in wide terms, albeit without particulars, that in “breach of duties owed to the Partnership Ms. Fullerton failed to explain the risks associated with the products recommended to the Partnership”. RBS could have asked for particulars of that case, but did not do so.

196. In my view, paragraph 95 of the RAPOC was not an unparticularised plea of failure to explain the risks. Rather, the case that was to be advanced was then set out, admittedly in a rather discursive fashion, in the following paragraphs. It culminated in the plea in paragraph 108 of the matters of which the Partnership needed to be informed. These were, first, “current market expectations of interest rate movements”, because RBS knew that the market expectation was of a continuous downward trend in interest rates. This aspect of the pleaded case has not (as Mr Sinclair pointed out) been pursued. Secondly, in paragraph 108 (b), the Claimants pleaded that the Partnership needed to be informed:

“that regardless of the “fix”, in order to understand the supposed benefit the Partnership required, additionally, to know of RBS’s lending margin to understand the rate to which interest rates would be required to rise before netting payments would be in the Partnership’s favour. This was never revealed by RBS”.

197. Paragraph 108 (b) is a puzzling plea, since the Claimants knew both the rates payable under the 2007 swap, and under the 2007 consolidated loan to the Partnership (which was at a margin over Bank of England base rate). It has nothing to do with what could be described as the “turn” which the Bank made because the swap rate payable by the Partnership was marginally above the rate which the Bank paid when hedging that position in the market. Indeed, at the time of this pleading, the pleader apparently did not know about the “turn”, and was therefore not referring to it: Mr Macpherson said that it was a point that only came out in disclosure.
198. The upshot is that none of the matters now relied upon were pleaded within paragraphs 95 – 108. In particular, there was no reference to the size of break costs, the contingent obligation, or the impact upon property sales. This lacuna was no doubt the reason why, shortly before trial, the Claimants sought to amend their Particulars of Claim with substantial additional particulars under paragraph 95, as well as additional particulars (shorter but similar) in paragraph 113 which concerned the FSMA/ COBS claim discussed below. In the event, Mr Macpherson did not pursue the amendments to paragraph 95 (or 113), whilst indicating that he would in due course contend that matters covered by the proposed amendment could be argued at trial; for example because they were encompassed by the broad existing plea in paragraph 95.
199. I disagree with the argument that these points can be argued at trial without having been pleaded. I consider that the matters now relied upon should have been pleaded, whether pursuant to CPR 16PD.8 or otherwise, in order to give the Bank fair notice of the points which were to be advanced. It is clear from cases such as *PAG*, *Parmar v Barclays Bank PLC* [2018] EWHC 1027 and *Fine Care Homes*, that parties can and do plead a case identical or very similar to the first three points now advanced. Where such a case is pleaded, the Bank (or Barclays in the case of *Parmar*) has called factual and in particular expert evidence in order to address points such as the nature and effect of the CLU, or market practice as to the disclosure of the risks relied upon. The absence of a pleading meant that RBS did not have a fair opportunity to prepare for the case which

the Claimants now seek to advance. I therefore consider that these points are not open to the Claimants.

200. Nevertheless, I have endeavoured to deal with the merits of the arguments below, at least to the extent possible on the existing evidence, whilst bearing in mind that the failure to plead the point has the consequence that the evidential picture is incomplete.

Duty of care

201. The nature of the duties owed by the Bank, in the present context, is to be derived from the decision of the Court of Appeal in the *PAG* case. In *PAG*, the claimant had concluded various swap transactions and relied upon arguments which were similar if not identical to the first two matters relied upon by the Claimants here. The claimant alleged that there had been a failure to disclose the Bank's internal estimate of the potential cost of breaking the swaps during their lifetime on a "worst case" basis (the estimate being the Bank's CLU figure), and a failure to provide worked break cost scenarios. It was alleged that this presented an inaccurate and incomplete explanation of each proposed swap. It was argued that liability for negligent misstatement arose under the classic statement of principle in *Hedley Byrne*. Alternatively, and as a subsidiary line of argument, it was alleged that the failure to disclose the information was a breach of a duty at common law to take reasonable care when providing information to ensure that such information is both accurate and fit for the purpose for which it was provided to enable the recipient to make a decision on an informed basis. (See paragraphs [41] – [43] of *PAG*).

202. In paragraph [64], the Court of Appeal discussed the *Hedley Byrne* duty. There may be factual circumstances, arising out of the "position of the defendant in relation to the claimant, combined with the defendant's conduct or omissions", that give rise to an assumption of responsibility and the imposition of a tortious duty.

"At its most basic, this is a duty not carelessly to make a misstatement. What amounts to a misstatement in this context will depend upon the factual circumstances of the relationship and identification of the matter for which the defendant has assumed responsibility. It is, therefore an elastic duty that is factually sensitive. The duty is premised on the voluntary proffering of representations by the defendant, which may require further elucidation or the correction of misleading impressions on the claimant".

203. In paragraph [65], the Court of Appeal said that there might be exceptional cases where a defendant assumed a responsibility to speak. This had been characterised in some cases as a more general advisory duty.

204. In paragraph [66], the court discusses the statement of Mance J in *Bankers Trust* concerning the duty, where a bank does give an explanation or tender advice, to do so fully accurately and properly. The court emphasised, however, that: "how far that duty goes must once again depend on the precise nature of the circumstances and of the explanation or advice which is tendered". The court drew attention to the facts of *Bankers Trust*, where there had been a positive statement that the proposed swap would improve the risk exposure of the customer. In paragraph [67], the court emphasised that

concentration should be “on the responsibility assumed in the particular factual context as regards the particular transaction or relationship in issue”.

205. When dealing with the particular circumstances in that case, the court attached importance to a number of matters. It was not alleged that the documentation provided by the bank contained inaccurate information, or that there were errors in what had been expressly and positively stated by the bank [71]. The documentation provided had made clear that breaking the swaps would have adverse financial consequences, that the size of those consequences would depend upon interest rates at the time the swaps were broken, and that the precise calculation would depend upon a comparison of interest rates [72]. The methodology for calculating break costs was explained in a presentation document [73]. There was therefore no error in the way that RBS explained the terms of the swaps, including the circumstances in which break costs might be incurred and how they would be calculated [75]. There was no basis for holding that there was any assumption of responsibility for disclosure by RBS of the CLU or any similar indication of the possible size of future break costs [78]. In a number of first instance cases, it had been held that it was not the normal practice to disclose the CLU or similar predictions, and there was no breach of duty by the bank in failing to disclose them [79]. The CLU is the product of the subjective view of RBS about many matters, involving a complex computer programme [80]. Any worked break cost scenarios would similarly be based on a subjective opinion as to what might happen to interest rates [81]. It was not necessary to provide illustrations as to how the break cost methodology worked, since the methodology was clearly stated in the material given to the claimant in *PAG* which could have worked out examples for themselves [81]. Moreover, under the relevant documentation, *PAG* had represented that it understood and accepted the risks of the transaction and was capable of assuming those risks [82].
206. Accordingly, the Court of Appeal concluded that there was no breach of the *Hedley Byrne* duty [71], and no wider duty existed.

The four matters relied upon by the Claimants

207. The first two matters relied upon by the Claimants (size of break costs and the contingent obligation) are materially identical to the allegations of breach of duty (both *Hedley Byrne* and the wider duty) which were advanced in *PAG*. I do not consider that there is any reason why the outcome of the present case, on those issues, should be any different to the outcome in *PAG*. There is in my view no material factual difference between the two cases which would justify a different result. It seems to me that all, or at least nearly all, of the facts which led the Court of Appeal to reject *PAG*'s case are equally applicable in the present case.
208. As far as the size of break costs are concerned, the Claimants in the present case had received, in 2006, a brochure which explained the potential for break costs, and had offered to provide examples of potential costs. At that time, the discussions on a swap were not taken any further. Ms Fullerton's typed note of the October 2007 meeting records that the potential for breakage costs if broken early was explained “as well as the mechanics of how a breakage cost would be arrived at”. Dr Perks could not recall what was said on this topic, but I see no reason to doubt the accuracy of the note in that regard. The 2007 Hedging Paper produced after the meeting again identified the disadvantage of the potential break costs, explaining that the size would depend upon the yield curve prevailing at the time of termination. Note 5 to that paper explained

again that breakage costs may be payable, and that the value of any break costs would depend on factors at closeout that included the time left to maturity and current market conditions such as current and expected future interest rates. Schedule 1 to the Terms of Business, sent by Ms Fullerton to Dr Perks and Mr Fordyce on 9 November 2007, contained risk warnings. Clause 16 dealt specifically with break costs, as described above. It included the statement that “such break costs may be substantial”.

209. In these circumstances, I do not consider that there was any misstatement in the information provided by the Bank in relation to break costs, nor any tortious duty which required more detail as to the size of possible break costs to be provided. Having been told about break costs in a number of documents, and at the meeting itself, it must have been apparent that this was a substantial potential disadvantage. If the Claimants felt that they needed further information as to break cost scenarios, they could either have asked the Bank to provide such scenarios (as it had previously offered to do), or they could have discussed the issue with an independent adviser – the Bank having recommended that they seek independent advice prior to proceeding.
210. The principal factual difference relied upon by the Claimants is their alleged lack of sophistication. Mr Sinclair rightly accepted that the claimant in *PAG* was more sophisticated than the Claimants in the present case. But the sophistication of the *PAG* claimant was not a principal reason why the Court of Appeal reached its conclusion on duty and breach in that case. Furthermore, Dr Perks was in my view capable of understanding financial matters including the consequences of the swap as explained to him. His evidence at trial was that he did understand the potential disadvantage of the swap in the context of a downward movement in interest rates. He was, after all, running a business with a substantial turnover, and was looking to build it up so that it could be sold at a very substantial price (the figure of £ 20 million was referred to). He had employed a finance man, in Mr Fordyce, who was competent and detail-orientated, and who approached his work properly and with diligence. Dr Perks worked closely with him and, as the Bank submitted, was happy to delegate matters to him.
211. I reach the same conclusion in relation to the CLU or the contingent obligation. In *PAG*, the Court of Appeal referred to a number of cases which had held that there was no obligation to disclose the CLU. The *PAG* case reached the same conclusion. The issue was subsequently considered in some detail in both *Parmar* and *Fine Care Homes*.
212. In *Parmar*, the issue was whether Barclays Bank should have disclosed the existence of the CEE limit (the equivalent of the CLU in the present case) and its potential impact on the Claimants’ ability to obtain further borrowing. It is apparent from the summary of the parties’ submissions at paragraphs [169] – [206] that a considerable amount of evidence, including expert evidence, was adduced in relation to this point. The Deputy Judge, Mr Andrew Hochhauser QC, analysed the legal position, and the evidence, in paragraphs [207] – [217] of his judgment. In *Parmar*, the claimants were in a position to rely upon the COBS rules which are potentially more favourable to a claimant than a claim at common law, because there is no need to establish a relevant duty of care. Nevertheless, the judge held that it was not necessary for the bank to disclose the existence of its CEE limit for the purpose of demonstrating the breakage costs. The judge held that the CEE was not a “contingent liability” of the claimants:

“It represents the Bank's exposure in a near worst-case scenario. As the Claimants' expert agreed, it is not payable by the customer. It is an

internal risk management limit which enables the Bank to monitor its risk associated with products in respect of which its exposure depends upon future movement. The CEE represents the Banks estimated exposure in a hypothetical near worst-case market conditions. Conversely, the breakage costs under the swaps represent the mark-to-market value of those contracts based on replacement contracts from the market at the actual prevailing rate at the time. That was accepted by both parties' experts. Further, the Claimants' own expert evidence was that there was no single means of calculating the CEE, and the breakage costs of a swap (which represent the swap counterparties' liability) may not even comprise part of the CEE figure.”

213. The deputy judge said [209 (v)] that it was important to pay due regard to the reasoning behind the findings in *PAG* and other cases as to why there was no obligation on a bank to disclose the CEE (or the CLU as it was there referred to). The basis on which the argument had been rejected was instructive in considering whether there was a requirement to disclose it under the COBS rules.
214. The deputy judge addressed in paragraph [201], and the following paragraphs, an argument, similar to that advanced by the Claimants here, that disclosure was required because of the potential impact of the CEE on future borrowing. On the facts of that case, the judge accepted that there was no such obligation. He identified the fact that there was “no evidence whatsoever of any potential borrowing” which had been prevented because of the CEE limit. He said, however, that there may be other factual situations where the CEE limit could have a significant impact on future borrowing, and then such disclosure “would be necessary to comply with the obligations under the COBS Rules”.
215. In *Fine Care*, the focus of the claimants' argument was the impact on future borrowing. At paragraphs [126] – [127], the court referred to the expert evidence as to the nature of the CLU:

“[126] The CLU, as the experts agreed, is a bank's internal and subjective estimate of the near worst-case risk to the bank, at any given time, of default by the customer under the IRHP. Each bank's precise method of assessment of the CLU will differ; what is common is that the CLU will change over time depending on the passage of time (all else being equal, the CLU will reduce as the remaining time under the contract reduces) and movements in the market (such as the levels of interest rates, the yield curve and volatility of the market). At RBS the CLU was calculated on the basis of a 95% confidence level.

[127] Since the CLU is the bank's estimate of the risk of default to the bank, the experts agreed that the CLU is not a contingent liability of the customer. The customer's liability under an IHRP at any given point in time is rather the sum (if any) that the customer would have to pay to terminate the IRHP earlier, i.e. the break cost, which is calculated on the basis of the replacement cost of the contract in the market, referred to as the mark-to-market value. That is different from the CLU, but like the CLU the break cost varies over time depending on market conditions.”

216. The judge then addressed the facts in detail, including evidence from the claimants' expert that when markets were benign, the CLU was not a material issue. The judge concluded, on the facts, that it was not inevitable that the collar in that case would impede the claimants' further borrowing prospects.
217. It will be apparent from these authorities that where a claimant has pleaded and advanced a case based upon the CLU and its effect, whether at common law or (as in *Parmar*) COBS, the claim has been dismissed. Furthermore, where the issue has been pleaded, factual and expert evidence has been generally been adduced by the defendant bank in order to address the issues raised. In the present case, by contrast, the issue was never pleaded. The Bank had no proper opportunity to address the case. I did permit some questions to be asked of Mr Graham in cross-examination on the question of the CLU; because at that stage I had not made any final decision as to whether or not the CLU argument could permissibly be advanced, although I indicated that I had provisionally concluded that it could not. Whilst Mr Graham had some knowledge of the CLU and its impact, I considered that the questions which he was asked, and his fair attempts to answer them "on the hoof" as it were, only served to emphasise the unfairness that would result if the Bank were required to deal with this line of argument in circumstances where the point had not been pleaded, and where it had not had a proper opportunity to advance its case.
218. For example, Mr Graham was asked whether the "contingent obligation was regarded similarly to other credit lines, in the sense that it required a credit agreement". He said that he did not deal with the mechanics and did not know. He indicated that the contingent obligation might be taken into account in overall lending decisions "at the margin", but he could not say that he had seen that make a "material difference in my experience". Theoretically, it was something that would be looked at, but it was "peripheral", at least as far as GRG was concerned. He later described the CLU as really being a non-issue, since the customer should be paying what he has agreed to pay under the swap agreement. It was in his experience a "second order" issue rather than a "prime order" issue. It seems to me that if these and similar issues were to be properly explored, the Bank should have been given notice of them, so that it could either call appropriate factual evidence (I doubt that Mr Graham would have been an obvious candidate) or expert evidence.
219. In these circumstances, it suffices to say that there is no reason for me to reach a different decision to that reached in the series of cases where the point had been properly pleaded. Indeed, if the point failed in cases where it had been raised fairly and squarely, it would be bizarre for me to conclude that it succeeded in a case where this had not happened. But in any event, I consider that the point should have been pleaded, and that it is not permissible for the case to be advanced based upon it.
220. This means that it is not necessary to consider the Claimants' argument that the present case can be distinguished from prior cases, because RBS's internal documents refer to a "Cont Obl" or "Contingent Obligation", rather than the CLU. However, I considered that argument to be unconvincing. The RBS internal documents referred to by the Claimants show that the CLU figure was used as the "Cont Obl" figure. There is no difference in substance between them. In *PAG*, the Court of Appeal referred to "the CLU or similar predictions."

221. Insofar as the term “Cont Obl” suggests that the Partnership in fact had a contingent obligation, the term is a misnomer. A “contingent obligation” is an obligation, agreed to by a party, which arises when a particular contingency occurs. In the present case, there is no evidence that the “Cont Obl” (which is ultimately an estimate of the near worst-case risk to the Bank at a given time) creates any such obligation. Mr Macpherson submitted that an analogy was to be drawn with a car rental agreement, where the rental company will require a credit card deposit to cover the risk that the car will be damaged or not returned. The deposit will then use up some of the credit limit otherwise available. He described the Cont Obl as blocking “an amount of credit that the customer might otherwise be permitted to use”.
222. I do not accept that this is an appropriate analogy. In the case of the car rental example, the customer has an agreement with the credit card provider as to how much credit is available, and has then decided to utilise part of that credit on the rental transaction. The decision is made in order to provide security for a future obligation which is created by the rental contract: the obligation to return the car in the same good order and condition as upon delivery to the customer. In the present case, the amount of credit that the customer (such as the Partnership) can use is contained in documentation put in place when a loan or other facility is agreed. There is no evidence that the CLU or Cont Obl is referred to in such agreements, or that they create an obligation on the part of the customer to pay the amount of the CLU or the Cont Obl. In that regard, I see no reason to doubt Mr Hochauer QC’s conclusion in *Parmar* at [209 (3)] that the CEE (the equivalent of the CLU or Cont Obl) is not a contingent liability of the customer.
223. Nor is there any evidence that it has any impact on the customer’s ability to borrow under terms that have been agreed. The parties’ respective obligations are contained in their agreement, and the customer’s entitlement is to the monies which the Bank has agreed to advance. The customer has no entitlement to, or permission to use, other monies. Any such entitlement can only arise if a further agreement is made. The evidence of Mr Graham, and the decisions in *Parmar* and *Fine Care*, suggest that the CLU or Cont Obl may, at least in theory, be a factor that plays some part in the Bank’s decision as to whether to enter into a further agreement, and if so on what terms. However, this does not mean that it represents the equivalent of a blocked deposit, or the part utilisation of a credit limit.
224. Nor do I accept that the analogy is valid because the “Cont Obl” will form part of a Loan-to-Value (“LTV”) calculation. The documentation containing the agreement for the 2007 consolidated loan was not available. However, I was not shown any other loan relevant documentation which records an obligation by the Partnership to maintain a specific LTV ratio as a condition of the loan, still less any provision which calculates the LTV by reference to the “Cont Obl”. Accordingly, there is no evidence that the Cont Obl has, or can have, the effect of putting the Partnership in breach of its loan agreement with the Bank.
225. The third aspect of the Claimants’ case concerned the alleged failure to explain that the swap may have the effect of restricting the sale of properties. However, I reject the argument in any event. Note 6 in the 2007 Hedging Paper stated in express terms that the obligations under the swap were secured by all present and future security held by the Bank. Paragraph 16 (under the heading “Break Costs”) in Schedule 1 to the Terms of Business – which was sent, and signed, prior to the conclusion of the 2007 swap – made it clear that any liabilities, including break costs, might need to be satisfied

“before we will release any security you have provided to us with respect to such liabilities”. Note 10 to the post transaction acknowledgment, sent on 29 November 2007, repeated the terms of Note 6 in the 2007 Hedging Paper.

226. The documentation therefore indicates that, at least in theory, future sales of properties held as security might be affected by the liabilities created by the swap, and that this was explained to the Partnership including Dr Perks. There can therefore be no complaint that the relevant risk was not identified, in circumstances where it was set out in a number of documents.
227. In addition, there was no evidence that any sales were in fact impeded by those liabilities. Mr Graham’s evidence was that there had never been a discussion along the lines of Dr Perks wanting to sell a property or properties, and the Bank blocking that proposal. He indicated that if Dr Perks had wanted to sell, then the existence of the swap would not necessarily have prevented such a sale: there were ways in which this could have been done if there was a “feasible plan”. However, the issue never arose. This was because, at it seemed to me, the potential difficulty in selling properties after late 2008 was the result of an unfavourable market in the wake of the global financial crisis.
228. The final aspect of this case concerns the Claimants’ allegation that the Bank told a “half-truth”, that no fee was being charged. I do not consider that this argument has any substance. The 2007 Hedging Paper states, as one of the advantages, that there is no “up front premium to enter into the swap”. This was in contrast to an interest rate collar, where there was a possibility of a premium, but that this could be reduced or eliminated by a structure involving a “floor”. It is also in contrast to a cap which, as the 2006 brochure had explained (and as would no doubt have been explained at the October 2007 meeting) involved the payment of a premium.
229. These statements as to the absence of an up-front premium are in my view accurate, and are not falsified by the “turn” that RBS made because the rate agreed for the swap with the Partnership was marginally higher than the rate paid on the back-to-back transaction which RBS concluded in the market. The notes within the 2007 Hedging Paper made it clear that RBS “may have an interest in financial instruments of the type described in this material or in related financial instruments” and also that this interest may include “dealing, trading, holding, acting as market-makers in such instruments”. The existence of an “interest” of RBS in financial instruments of types such as the swap indicates that RBS might be making some money from the transaction.
230. Accordingly, the Claimants have failed to establish a common law liability in respect of their case based on “failure to explain”.

Inducement

231. Mr Sinclair submitted that even if there had been a failure to explain any relevant risks, this had no consequence. Even if additional risks, such as the CLU and its alleged impact, had been explained, the Partnership would still have entered the swap because they wanted the loan.
232. I accept this submission. It is clear that Dr Perks did indeed want the loan. He was warned of significant risks which were associated with the swap. These included the

inability to benefit from falls in interest rates, and the risk of break costs (depending upon the market at the time) in the event of an early termination. He was advised to seek independent advice, but did not consider it necessary to do so. He was provided with the “Risk Warning”, as Schedule 1 to the Terms of Business. This includes, as discussed above, an express warning in relation to one of the matters (the impact on possible sales of security provided to the Bank) of which the Claimants now complain, as well as a further warning concerning break costs.

233. If Dr Perks, in conjunction with Mr Fordyce, was prepared to enter into a transaction notwithstanding the risks which were explained to him, it is in my view an obvious conclusion that he would not have been deterred from doing so if other risks, allegedly not explained to him, had been explained. In reaching that conclusion, I bear in mind that Dr Perks’ attitude, as apparent both from the correspondence at the time and his evidence, was one of cheerful and relentless optimism as to the likely success of his business. His attitude was that there was no problem that did not have an easy solution. If, for example, there had been an explanation of CLU or contingent obligation, and that it might have an impact on future lending, Dr Perks would have regarded this as highly theoretical. If a problem arose, they would deal with it at the time; but since the business would succeed, there would be no problem. This also explains why Dr Perks would not have been concerned, at the time, about the risk warning concerning the security which the Bank held. If he had paid any attention to it, then he would have regarded it as theoretical. His immediate aim and desire was to obtain the loan, and he was happy to conclude the swap, with its risks, if that was what the Bank wanted. Furthermore, the evidence indicates that Mr Fordyce, who was clearly a more cautious individual than Dr Perks, was keen to have the swap as a hedge against the risk of possible interest rate rises on the substantial loan that would be in place.
234. Some further support for this conclusion is provided by the nature of complaints made by Dr Perks in 2009. In a conversation with Mr Munro in June 2009, in the context of the second swap, Dr Perks complained, in relation to the 2007 swap, that “it was not our choice, got forced to do it, and we had to do it and then you know, six to twelve months later we’re stuck with this interest rate we didn’t want ...”. Similarly, in an email to Mr McCall and others in November 2009, he said that he could show clearly that “it was misrepresented to us when we were forced to sign up to it”. I do not accept that it is accurate to say that Dr Perks was “forced” into the 2007 swap, at least in so far as this expression might suggest some improper compulsion. However, I do consider that the position was that Dr Perks knew that if he wanted the loan, then he would need to enter the swap. Dr Perks had no qualms about doing so, and thought that it was an acceptable part of an overall package which was in the interests of the Partnership. His mindset would have been no different if, as he now contends should have happened, additional risks had been explained to him.

C4: Failure to explain the risks of the 2007 swap – the COBS claim

The Claimants’ case

235. In addition to the claim at common law, the Claimants advance a claim under section 138D FSMA. This provides that a contravention by an authorised person of a rule made by the FCA is actionable at the suit of a private person who suffers loss as a result of the contravention.

236. The Claimants contend that they, and the Partnership (which has no separate legal personality) are private persons within the meaning of section 138D. They allege that there were various breaches of rules made by the FCA, such rules originally being contained in COBS and its material identical predecessor known as “COB”.
237. The principal rules relied upon were COBS 2.1.1 2.2.1, 4.5.2, 14.3.2 together with Prin 2.1.1 (6) & (7). These provide as follows:

“2.1.1(R)

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

2.2.1(R)

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

(a) ...

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

(c) ...; and

(d) ...;

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

4.5.2 (R)

A firm must ensure that information:

(1) ...;

(2) is accurate and in particular does not emphasise any potential benefits of relevant business or a relevant investment without also giving a fair and prominent indication of any relevant risks;

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

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

14.3.2(R)

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

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

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

(a) the risks associated with that type of designated investment
..."”

238. Principles 2.1.1(6) & (7) provide:

“(6) Customers' interests A firm must pay due regard to the interests of its customers and treat them fairly.

(7) Communications with clients A firm must pay due regard to the information needs of its clients, and communicate information to them in a way which is clear, fair and not misleading”

239. There was no dispute that the specific COBS rules must be interpreted in line with these principles, and also in accordance with the understanding that, as stated by Newey LJ in *Adams v Options UK Personal Pensions LLP* [2021] EWCA Civ 474 at 115(i):

“A key aim of FSMA is consumer protection. It proceeds on the basis that, while consumers can to an extent be expected to bear responsibility for their own decisions, there is a need for regulation, among other things to safeguard consumers from their own folly.”

240. The Claimants submitted that the effect of these rules was that RBS was required, amongst other things, to: provide appropriate information in a comprehensible form to Dr Perks about interest rate swaps so that he was reasonably able to understand the nature and risks of interest rate swaps; include in that information appropriate guidance and warnings; ensure that the information given was accurate and gave a fair and prominent indication of any relevant risks; ensure that the information was sufficient for and presented in a way likely to be understood by the average chiropractor; and ensure that the information did not disguise, diminish or obscure important warnings.

241. The factual basis of the claim is that there was a failure by Ms Fullerton to explain the risk of the 2007 swap properly at the meeting on 9 October 2007, when she met with Dr Perks, Mr Fordyce and Mr Small. The hour allowed for the meeting was inadequate for Ms Fullerton to explain the risks of the 2007 swap. In their closing submissions, the Claimants said that the COBS claim overlapped factually with the common law claim.

The specific failures relied upon were therefore the four matters which I have already described concerning: (i) the possible substantial nature of break costs; (ii) the CLU or Cont Obl; (iii) the risk that properties could not be sold; and (iv) the turn (or fee as the Claimants described it) which RBS made (or, as the Claimants would say, charged) when the 2007 swap was concluded.

The Bank's arguments

242. RBS advanced essentially the same arguments as were advanced in the context of the common law claim. The case now advanced was not pleaded, and was not open to the Claimants. The case failed in any event as a matter of causation, since Dr Perks would have acted no differently even if given further information as to the risks. In any event, the relevant risks were indeed sufficiently explained at the meeting. RBS place reliance on documents provided by RBS at the time, and upon the note of the meeting which was prepared some time after the meeting had taken place, but which records that various matters were communicated including the advantages and disadvantages of a swap, cap and a collar (all different types of IRHP), the potential for breakage costs, the mechanics of how a breakage cost would be calculated, and a recommendation that the Partnership seek independent advice before proceeding. RBS submitted that it had repeatedly informed Dr Perks and his colleagues about the possibility, for example, that breakage costs would be payable in the event of an early cancellation, and also about how such costs would be calculated.
243. In addition, however, RBS raised a threshold point as to the potential availability of section 138D in the present case. Mr Sinclair made it clear that he was not saying that COBS was inapplicable to the conduct of RBS, but rather that there was no sustainable cause of action for breach of any COBS rule based upon section 138D of FSMA. RBS submitted that this claim based on COBS in relation to failure to advise as to risks – and indeed to all of the claims based on COBS – was not sustainable, because the relevant claimant (the Partnership) was not a “private person”. This was because the Partnership was a Scottish partnership, which was carrying on “business of any kind”, and a Scottish partnership has legal personality separate from its partners.

Discussion

The threshold “Scottish Partnership” point

244. A Scottish partnership is different from an English partnership. An English partnership has no separate legal personality. Section 4(2) of the Partnership Act 1890 provides, however:

“[i]n Scotland a firm is a legal person distinct from the partners of whom it is composed”.

245. This well-established, indeed statutory, difference between Scottish and English partnerships has been the subject of detailed discussion in the case law: see for example *JH Rayner Ltd v DTI* [1990] 2 AC 418, a case concerning the demise of the International Tin Council. The significance of the difference in the present context is that, subject to Mr Macpherson’s argument that the Partnership was not carrying on business of any kind, if the Partnership was Scottish and therefore had separate legal personality, it would not be a “private person”.

246. Mr Macpherson submitted that it was not open to RBS, on the current pleadings, to rely upon a case that the Partnership was Scottish. He also submitted that if Scots law were to be relied upon, it needed to be specifically pleaded and proved by expert evidence. I disagree. Paragraph 23 of RBS's defence pleads clearly that the swaps were entered into by the Partnership, and that it was denied that the Partnership was a "private person" within the meaning of FSMA s 138D(2). As for the alleged need for evidence as to Scots law: the Partnership Act 1890 is a statute which applies in England as much as Scotland, and I must apply the terms of section 4 (2). If an applicable Act of Parliament has provided for the characteristics of a Scottish partnership, then I must apply that statute in accordance with its terms. Furthermore, in *KV (Sri Lanka) v SSHD* [2018] EWCA Civ 2483, the Court of Appeal said that judges do not generally need expert assistance to interpret an enactment of another English-speaking country whose law forms part of the common law. That must apply with even greater force to a statute such as the Partnership Act 1890. The separate legal existence of a Scottish partnership is so clear from the statute, and so well-established in the case law, that there is no reason why expert evidence on the issue should be required.
247. The important question, therefore, is whether the "Firm of CJ and LK Perks", as referred to in various documents, was indeed a Scottish partnership carrying on business of any kind.
248. The business of the Partnership was to own properties and to receive rental income from the Scottish operating company, GCL. I have no doubt that this constituted "business of any kind" within the meaning of paragraph 3 of the Financial Services and Markets Act 2000 (Rights of Action) Regulations 2001 which defines a "private person" for the purposes of section 138D of FSMA 2000:
- "a. The meaning of the term "private person" for the purposes of the above section is set out in which provides that it means:
- i. any individual, unless he suffers the loss in question in the course of carrying on –
1. any regulated activity; or
2. any activity which would be a regulated activity apart from any exclusion made by article 72 of the Regulated Activities Order (overseas persons); and
- b. any person who is not an individual, unless he suffers the loss in question in the course of carrying on business of any kind..."
249. The words "in the course of carrying on business of any kind" have a wide meaning: see *Titan Steel Wheels Ltd v RBS* [2010] EWHC 211 paras [69] – [70] (Comm), as followed or applied in (for example) *Bailey v Barclays Bank* [2014] EWHC 2882 (QB) at [42] - [44] and *Thornbridge v Barclays Bank Plc* [2015] EWHC 3430 (QB) at [140] – [141]. They are certainly wide enough to encompass the nature of the activities which the Partnership was carrying on.

250. That conclusion is supported by the decision of Lord Hodge in *Grant Estates Ltd v RBS and others* [2012] CSOH 133 (Outer House, Court of Session) at paragraph [60]. Lord Hodge was there considering the case of a property-owning special purpose vehicle or SPV. He concluded that even if (which he did not consider was so) the wording of the 2001 Regulations captured only transactions which were an integral part of a business, the test was met: the SPV was carrying on business and had entered into hedging as an essential part of that business. I see no reason why it could be said that the SPV was carrying on business in that case, but the Partnership was not doing so in the present case.
251. The Claimants relied upon various authorities, in the field of revenue law, in support of the proposition that “the ownership of property, the receipt of rents and the occasional sale of a property for profit” fell outside the wording of the 2001 Regulations. I agree with RBS that the revenue authorities relied upon by the Claimants are beside the point. They pre-date the 2001 Regulations, and they considered a completely different question – namely whether selling property is a “trade” under income tax rules. In *Grant Estates*, Lord Hodge rightly cautioned against reasoning by analogy with different statutory provisions in the present context: see [54]-[57].
252. The question remains, however, whether the Partnership is nevertheless to be regarded as a “Scottish” partnership. The factual position is that the business of the Partnership was carried on exclusively in Scotland: the only properties owned were those in Scotland. Scotland was also the location of the Partnership’s head office: Mr Fordyce worked from there, and so (at least for much of the time) did Dr Perks. The contractual documents gave the Glasgow address as that of the Partnership. It can fairly be said that the Partnership was carrying on business in Scotland, and indeed only in Scotland.
253. However, I was not persuaded that this would lead to the conclusion that the partnership was a Scottish partnership. Counsel’s detailed researches found no clear authority on the principles of English law which determine how the “nationality” of a partnership is to be determined. Mr Sinclair referred me to a passage in *Blackett-Ord*: “*Partnership Law*, 6th Ed. (2020) and specifically the last sentence (underlined below) of para 1.10, where the authors state:

“The question whether a foreign entity is a corporation, and any other question as to its constitution, must be decided according to the relevant foreign law, which is the law where the entity was created. So a Delaware Limited Partnership is likely to be recognised as a limited partnership by the English courts, as will a UAE ‘mudarabah’ agreement which is similar to a limited partnership’. Where a partnership is situated depends upon where its business is carried on or principally carried on.”

In support of the final sentence, the authors rely on *Laidlay’s Trustees v Lord Advocate* (1890) LR 15 App. Cas. 468 and CPR Part 7 PD 5A.1(2).

254. I did not think that *Laidlay* was of any assistance in relation to the present issue. The question in that case was where, for probate purposes, the share or interest of the deceased in a partnership was situated. That question depended, as *Blackett-Ord* says, upon where the partnership was being carried on. This is not the question with which I am concerned. Nor do the rules in CPR Part 7A, paragraphs 5A and 5B, assist: they are

directed towards the circumstances where proceedings can be brought in the name of a partnership.

255. I thought that, in the absence of contrary authority, Mr Macpherson made a good point when he submitted that one should look at the present question from first principles. A partnership is a contract between the parties, and the law of the partnership is that with the closest relationship with the contract. It seemed to me that the question of whether the Partnership was to be regarded as a Scottish partnership depended ultimately on whether there was sufficient evidence that this is what, objectively, the partners intended to create. There is no reason in principle, as Mr Macpherson submitted, why partners should not create (for example) an English or Australian partnership whose business is to be carried on in Scotland.
256. The evidence as to what Dr and Mrs Perks intended to create was scant and virtually non-existent. There was no partnership deed or other documentation which would provide any assistance in answering that question. The Partnership appears to have come into existence by around April 2005, when they first started buying property in the name of the Partnership: April 2005 was the date of the first loan in the trial bundles which refers to the “Firm of C&L Perks, of 3-41 Saint Vincent Place, Glasgow G1 2DH”. At that time, the evidence of Dr Perks was that they were both living in Australia. Dr and Mrs Perks never actually lived in Scotland until 2008. They had moved back to Australia from Belfast in June 2000, and both remained living in Australia, with Dr Perks travelling back to the UK regularly to (as he described it) oversee the “management of the Partnership business”. In 2008, he moved to Manchester and then to Glasgow, where his family joined him.
257. There is nothing in this evidence which suggests, either subjectively or objectively, that Dr and Mrs Perks intended to create a Scottish partnership. Indeed, it was clear from Dr Perks’ evidence, which in this regard I accept, that he had given no real thought to the question of the nature of the Partnership, and it was only much later, in the context of the litigation, that he became aware of the issue of whether it was Scottish and therefore a separate legal entity. The Partnership came into existence at a time when the partners were both based in Australia, albeit with Dr Perks travelling to Scotland on a regular basis. Against this background, I do not consider that it is possible to conclude that the partners had any intention to create a Scottish partnership. There is no more reason to characterise it as Scottish than Australian, which is the nationality of the partners and the place where they had their permanent residence at the time.
258. Accordingly, I do not accept that the Partnership was a Scottish partnership. In reaching this conclusion I have not disregarded three documents referred to in RBS’s closing which suggested that the Partnership was Scottish. These were a security review by DLA Piper, a response to an enquiry about the Data Protection Act, and a statement on the first page of the Property Participation Agreement. These documents were all created long after the Partnership was formed. No doubt the authors of those documents considered that the Partnership was Scottish. But the question is whether they were right to do so. I do not think that there was a sufficient basis for reaching that conclusion.
259. Accordingly, I accept the Claimants’ case that section 138D and COBS is potentially applicable to claims made by the Partnership. This is because it has not been shown to

have a legal existence separate from Dr and Mrs Perks, who were themselves “private individuals”.

The factual case

260. Given the potential availability of a claim under section 138D in conjunction with the relevant COBS rules set out above, the Claimants can circumvent the difficulties in establishing a relevant duty of care at common law. However, there remain two difficulties in the Claimant’s case, discussed in Section C3 above, that cannot in my view be overcome.
261. First, the Claimants’ case, as to the risks which were not explained, but which should have been explained under COBS, comprises the four unpleaded matters already described. It is no more appropriate to permit the Claimants to advance that case in the context of COBS than it is in the context of the common law claim.
262. Secondly, and in any event, my conclusion on inducement, that a further explanation of risks would have made no difference to the Claimants, who would still have concluded the 2007 swap, is equally applicable to the COBS claim. Any claim under section 138D would therefore fail on causation.
263. In these circumstances, I do not consider it appropriate or sensible to express any views as to what the outcome of this case might have been, in relation to the claim under COBS, if the issue had been pleaded and RBS had been given a fair opportunity to meet the case.
264. Accordingly, this aspect of the Claimants’ case also fails.

C5: The claim for failure to advise properly in respect of the 2007 swap

The parties’ arguments

265. The Claimants advanced a claim, both at common law and pursuant to section 138D FSMA 2000 and COBS 2.1.1 and 9. They contended that there had been a failure to advise properly in respect of the 2007 swap. In his opening submissions, Mr Macpherson said that the claim did not add substantially to their claim for negligent misstatement and failure to explain the risks. He dealt with the claim very briefly in his written and oral closing submissions.
266. COBS 9 identifies various procedures which are applicable if a firm makes a personal recommendation. The following provisions of COBS 9 were pleaded by the Claimants:

“9.2.1(R)

- (1) A firm must take reasonable steps to ensure that a personal recommendation, or a decision to trade, is suitable for its client.
- (2) When making the personal recommendation or managing his investments, the firm must obtain the necessary information regarding the client’s:

- (a) knowledge and experience in the investment field relevant to the specific type of designated investment or service;
- (b) financial situation; and
- (c) investment objectives; so as to enable the firm to make the recommendation, or take the decision, which is suitable for him.

9.2.2(R)

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

- (a) meets his investment objectives;
- (b) is such that he is able financially to bear any related investment risks consistent with his investment objectives; and
- (c) is such that he has the necessary experience and knowledge in order to understand the risks involved in the transaction....

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

9.2.6(R)

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

- 267. The Claimants contended that the 2007 swap was sold in breach of COBS 2.1.1 and 9, because the product was unsuitable for the Partnership.
- 268. In addition to COBS 9, the Claimants also relied upon the common law requiring an adviser to take reasonable care. The breach comprised RBS’s failure to obtain or evaluate information regarding Dr Perks’ understanding of IRHPs, and its negligent conclusion that they had sufficient understanding thereof; the failure properly to explain the risks associated with the 2007 swap; the failure to ensure that the 2007 swap met the investments objectives of the business; and the misrepresentation that the 2007 swap was necessary to protect against a rise in interest rates when it believed that rates would drop.
- 269. The Bank addressed these issues, in particular the common law claim, at much greater length. They submitted in summary as follows. First, nothing that the Bank said could be characterised as advice. Secondly, the Bank did not assume a legal responsibility for giving advice so as to give rise to a duty of care at common law. Thirdly, any advisory duty was precluded by the terms of dealing between the parties. Fourth, if the

Bank was under an advisory duty, then it satisfied that duty. Fifth, even if the Bank failed to satisfy the advisory duty, the Claimants would have entered into the hedge anyway.

270. In relation to COBS 9, the Bank submitted that this was not an “advised” transaction, and it was therefore not one which fell within COBS 9. In order to come within COBS 9, the Bank would have had to advise or make a recommendation of a particular product. That was not something that was done. In 2007, the Partnership was given a choice of different products and they eventually chose one, not because it was recommended by the Bank. Mr Sinclair said that he would have to accept that if COBS 9 was applicable, the Bank had not jumped through all the procedural hoops. But that was because the Bank did not regard it as an advised transaction.

Discussion: the common law claim

Legal principles

271. There are two comparatively recent authorities which discuss the approach to claims of negligent advice having been given by banks to customers in connection with IRHPs: *London Executive Aviation Ltd v RBS* (“*LEA*”) [2018] EWHC 74 (Ch) at [159]-[172] (Rose J); and *Fine Care Homes* at [102] – [106], where Bacon J applied the approach in *LEA* with the benefit of the subsequent judgment of the Court of Appeal in *PAG*. In *Fine Care*, Bacon J described the “ultimate question” at paragraph [107] of her judgment:

“The ultimate question is whether the particular facts of the transaction, taken as a whole and viewed objectively, show that the bank assumed a responsibility to advise the customer as to the suitability of the transaction. In this regard I bear in mind the observations [of the Court of Appeal] in *PAG* that in the ordinary case the bank will owe no duty to explain the nature and effect of the proposed transaction to its customer, but that in “some exceptional cases” such a duty might arise.”

272. The judgment of Rose J in *LEA*, applied in *Fine Care*, draws together a significant body of authority on this issue, and identifies five principles which emerge from the cases.
273. First, the question of whether the Bank “not only sold the products to a customer but also advised the customer to buy its products to an extent that engages a legal responsibility on the part of the defendant bank to ensure that such advice was not negligent” is fact sensitive and is to be determined by an examination of the circumstances of the case and the particular relationship between the parties: see [160].
274. Second (at [160]) in many cases the claimant:
- “...faces the hurdle that the binding contractual terms explicitly state that the relationship between them is not an advisory one; that the customer acknowledges that the bank is not advising him and that he has not relied on any advice or recommendation given by the bank. This may prove fatal to the claimant’s case.”

275. Third, the Courts have taken a pragmatic and sensible approach to analysing the dealings between a bank's representative and a customer, and recognised "the dangers of dissecting phone calls and email correspondence to extract advice or opinions or personal recommendations from a relationship which the parties have not expressly characterised as a relationship of advisor and client." (See [162] – [163]). This approach is expressed or reflected in the distinction which the courts have drawn in many cases between what is said by an advisor and what is said by a salesman. The courts also recognise that the expression of opinions (and even the giving of advice) is "part and parcel of the everyday life of a salesman in emerging markets" and/or "an integral part of the sales process".
276. Fourth, the factual question of whether "advice" was given by the bank's representative and the legal question of whether the bank assumed responsibility for that advice are separate, albeit they are closely linked: see [164] – [165]. It is therefore possible for the court to conclude that a bank's representative crossed the line into giving "advice" on occasions, but nevertheless to conclude that such "advice" as was given was "not of a kind to attract a duty of care on the part of the bank". Rose J returned to this point at [205]:

"The Bank contends that *LEA*'s analysis of the case misses out an important step. One cannot jump straight from a finding that advice, properly so called, was given to a conclusion that the Bank incurs liability if that advice was negligently given. I agree with [Counsel for the Bank's] submission that it is not enough for *LEA* simply to show that something said by Mr Brindley could be regarded as advice or a recommendation; it must also show that there is a relationship of proximity between the parties giving rise to a duty of care on the part of the Bank. As Hamblen J said in *Standard Chartered v Ceylon Petroleum* [2011] EWHC 1785 (Comm) at paragraph 508 (citing what Gloster J has said in [*JP Morgan Chase Bank v Springwell Navigation Corp* [2008] EWHC 1186 (Comm)]), the mere giving of advice, even specific investment advice, is not sufficient to establish a duty of care. This is the case even where the investment advice is relied upon by a customer."

277. Fifth, the courts are "cautious about importing concepts from the regulatory rules and guidance into the discussion of the scope of the common law duty of care and the circumstances in which it arises". There is therefore a need to keep the causes of action of: (i) breach of statutory duty; and (ii) breach of an alleged common law duty of care, separate. (see [166]-[172]).
278. When considering the facts of the case, Rose J referred (at [174]-[175]) to a submission by counsel for *LEA* that, in determining whether the bank had given "advice", the court should "take a holistic approach" and that the "general thrust" of the written presentation prepared by the bank's salesperson and his discussions with *LEA* was "plainly calculated to convince *LEA* of the merits of the hedging products and to recommend that the company enter into them": Rose J rejected that approach [175]:

"In my judgment, although background and context are important in construing the actual words said to constitute advice, they cannot be a substitute for being able to identify actual words of advice. It must be possible for the claimant to point to some written or oral statement which

the claimant can prove the defendant made and that he can show that he read or heard and which properly construed amounts to advice, applying the test described in the case law. The holistic approach adopted by *LEA* makes the test for liability too subjective and dependent on the impression that a mass of material was said to create in the mind of the claimant. It makes the claim almost impossible for a defendant to contest.”

279. In considering the distinct question whether, even if “advice” was given by the Bank, such advice was “of a kind to attract a duty of care on the part of the bank”, Rose J examined various factors which have also been considered in other cases in the same context (see [206]-[217]). These included: (i) the sophistication or otherwise of the claimant; (ii) the presence or absence of a written advisory agreement; (iii) the availability of advice from other sources; (iv) the indicia of an advisory relationship; and (v) the contractual documentation and agreed basis of dealing.
280. In *Fine Care Homes Ltd v Natwest Markets Plc* [2020] EWHC 3233 (Ch), Bacon J endorsed these principles. She also held (at [111]) that in order for the bank to have assumed a responsibility of the kind above, it must (as a minimum) have made a recommendation “in respect of a particular product and not IRHPs generally”. In so holding, she applied the approach taken, in the context of an argument as to the applicability of COBS 9, by Andrew Hochhauser QC in *Parmar* at [120(5)].
281. Mr Macpherson, unsurprisingly, did not dispute that the above principles were indeed applicable to the present case.

Application to the facts

282. I accept RBS’s submission that, applying the principles from *LEA*, the answer to the ultimate question posed by Bacon J in *Fine Care* is very clearly no, for the reasons which RBS gave.
283. First, there are no recorded written or (in the available call recordings, which have been transcribed) oral examples of advisory language being used by Ms Fullerton, who was the relevant derivatives sales-person involved in the 2007 swap.
284. Secondly, and to the contrary, the available documentary evidence indicates that Ms Fullerton told Dr Perks and Mr Fordyce, at the October 2007 meeting, that she recommended that they seek independent advice prior to proceeding. The clear implication of this statement, which I accept was made, was that Ms Fullerton was saying that it was not her role to advise them.
285. Third, even if some advice had been given by Ms Fullerton, there is nothing which is sufficient to establish that the Bank assumed a responsibility to advise the Partnership in connection with the 2007 swap. The Claimants submitted that the relationship between RBS and the Group was beyond that of banker and customer; that Dr Perks had relied upon RBS for business advice from around 2004; and that this is an exceptional case in which the Bank assumed a responsibility to advise as to the suitability of IRHPs. This submission drew upon the dealings between Dr Perks and the Bank’s lending or relationship management teams, in particular Jane McGuigan and Scott McClurg. However, the discussions and dealings relating to the 2007 swap took

place with Ms Fullerton. The case that the Bank assumed a responsibility to advise the Partnership about IRHPs, or the particular swap that was concluded, is not advanced by referring to general exchanges, in the preceding time period, when a business and the Bank were considering ways in which funds might be advanced. If the advice allegation is to get off the ground, there needs to be something which relates to advice on hedging and, indeed (in accordance with the above authorities) a specific interest rate hedging product.

286. I have already described the dealings with Ms Fullerton in Section C1 above. She was not trying to advise. When she sought an update from Mr Fordyce on 9 November 2007, she expressed herself in neutral terms, asking open questions as to what decision, if any, had been reached.
287. Fourth, as far as the documentary evidence is concerned, there is only a single example of anyone from the Bank using even arguably “advisory” language in relation to hedging. That single example is an email from Ms McGuigan dated 4 September 2007. In this email, having informed the Perks business that she was waiting on indicative approval for new funding for the Partnership, Ms McGuigan stated that she would “strongly recommend that you look at interest rate hedging with borrowing set to increase to c£2.4 million”. The only thing that Ms McGuigan recommended was that the Partnership should consider interest rate hedging, given the size of their borrowing. The email does not contain a recommendation that the Partnership should in fact hedge. Mr Small then said that he wanted some further information in order to take matters forward: “so we can investigate this thoroughly”. This led in due course to the October 2007 meeting. I agree with RBS that this single email falls a long way short of establishing that the Bank gave “advice” to the Partnership as regards the 2007 swap, much less assumed legal responsibility for that advice.
288. Fifth, I accept RBS’s case that analysis of the relevant factors highlighted by *LEA* and other cases, as being relevant to the distinct question whether any “advice” given by the Bank with respect to the swaps was such as to attract a duty of care on its part, leads to the conclusion that it did not.
289. *The sophistication or otherwise of the Perks business.* I consider that Dr Perks, and certainly Mr Fordyce, were sufficiently intelligent to understand the nature of the swap that they concluded, and the risks that were explained by the Bank. Mr Fordyce clearly understood how the 2007 swap would operate, and would have taken the necessary time in order to do so.
290. *The absence of a written advisory agreement.* This has been consistently noted as a relevant factor pointing away from the imposition of an advisory duty of care in cases such as this: see for example *LEA* at [212], *Springwell* at [434]-[440], and *Titan Steel* at [94(i)]. The Claimants did not pay for any advice in relation to hedging. By contrast, Dr Perks or his business had paid for advice in connection with a mentoring scheme that the Bank had offered.
291. *The availability of advice from other sources.* Dr Perks could turn to Mr Fordyce for advice. There is no reason to think that further independent advice was unavailable to Dr Perks. In *LEA*, Rose J concluded at [215] that, even if independent advice on hedging had not been available to *LEA*, in the absence of any evidence in the contemporaneous documents of “hard selling tactics brought to bear by [the Bank’s representatives]

which an independent adviser might have been able to counteract” this was to be regarded as a neutral factor. There was no hard selling in this case.

292. *The indicia of an advisory relationship.* The question discussed in the authorities under this heading has been whether advice was ever expressly sought and/or given, and, if so, to what extent. It was noted in each of *Springwell* (at [442]), *Titan Steel* at [94(ii) and (iii)] and *LEA* (at [216]) that the fact that the claimants in those cases had never actually asked the relevant salespeople for advice as to what they should do was a significant pointer against an advisory duty of care having been assumed by the bank.
293. *The contractual documentation and agreed basis of dealing.* RBS submitted that in cases such as *LEA* (see [233]-[234]), the claim based on an alleged advisory duty of care failed without the court even needing to consider the effect of the contractual documentation and the agreed basis of dealing. I agree that, even without reference to the contractual documents, the Claimants in the present case do not come close to establishing the existence of an advisory relationship.
294. The contractual documents reinforce that conclusion. It was not in dispute that these documents, as well as the non-contractual documents such as the 2006 brochure and the 2007 Hedging Paper, make it clear that the Bank was providing an execution-only service and was not acting as advisor to the Partnership. The contractual documents also contained the Partnership’s agreement that it had made its own decision to enter into the swaps and had not relied on any advice from the Bank when doing so.
295. Accordingly, the claim based on breach of a common law duty to advise fails.
296. Since the claim fails irrespective of the effect of the contractual documents, it is not necessary to consider in detail the parties’ arguments in relation to the validity of the terms relied upon. It suffices to say that there is no reason for reaching a different conclusion, as to the validity of terms relating to the nature of the relationship, to that reached by Bacon J in *Fine Care Homes* paragraphs [118] – [124].

Discussion: the COBS 9 claim

297. I can deal with this briefly, because this claim is no better than the common law claim. In short, on the basis of the facts which I have already described, this was not an advised transaction where the Bank made any recommendation at all, let alone a recommendation in respect of a particular product. COBS 9 was not, therefore, engaged.
298. In any event, the claim in relation to COBS 9 (and indeed any claim based upon the common law duty) would fail on causation grounds. The Partnership would still have entered into the swap, because they wanted the loan, even if the Bank had (as Mr Sinclair put it) gone through the COBS 9 hoops.

C6: Limitation

299. Accordingly, the Claimants have failed to establish the Bank’s liability in relation to each of the three ways in which the Claimants advance a case on the 2007 swap. In view of this conclusion on liability, it is not necessary to decide whether, as RBS contended, any claim in respect of the 2007 swap was time-barred. I will, however,

express my conclusions on that issue as briefly as possible. The nature of the parties' arguments will be apparent from the discussion section below.

The factual background

300. On 29 November 2007, as described in Section C1 above, there was the series of telephone conversations between Ms Fullerton and Mr Fordyce and Dr Perks. On the third call, Mr Fordyce confirmed that Dr Perks was ready to proceed. Dr Perks said the same thing in the fourth call, and he confirmed that the trade could be booked. Ms Fullerton gave Dr Perks the current pricing. She said that she would also need to send him a confirmation that she needed him to sign and return, if possible with his wife signing as well. Towards the end of the conversation, Ms Fullerton said:

“Well I’ll go ahead and I’ll get that all booked in for you. As far as you are concerned just now that is that deal all done anyway, and I will just get something out as a confirmation for you as soon as possible”.

Dr Perks’ response was:

“Lovely, very good”.

301. Almost immediately afterwards, Ms Fullerton then sent an e-mail at 16:44 on 29 November 2007. The e-mail said: “Please find attached a copy of your deal agreed this afternoon”. Dr Perks was asked to check the contents of the document and to sign and fax back the front page. He was told that the official confirmation would follow shortly, and that he would be required to sign and return it as well. The attachment to the e-mail was the 4-page post-transaction acknowledgment. As described in Section C1 above, this set out the basic terms and structure of the swap, together with 11 paragraphs of “Notes”. The acknowledgment also stated that a legal confirmation “detailing the entire terms of our agreement relating to the transactions” would be despatched, and that Dr Perks was requested to sign and return it.

302. The further (17 page) “legal confirmation” was sent in a letter dated 14 January 2009. This confirmation contained detailed terms of the transaction. The opening paragraph of the letter explained that:

“The purpose of this document (this “Agreement”) is to set forth the terms and conditions of the transaction (the “Transaction”) entered into between the Royal Bank of Scotland plc (“Bank”) and yourselves (“Counterparty”) on the Trade Date specified below”.

The Trade Date “specified below” was 29 November 2007.

303. The confirmation was in due course signed by Dr Perks.

304. Against this background, and contrary to one of the Claimants’ arguments on limitation, I have no doubt that a concluded agreement in respect of the 2007 swap was made on 29 November 2007. The later documentation did no more than confirm the full terms of that agreement. I return to this point below. If therefore, the 6-year limitation period ran from the date when the swap was concluded, the Claimants would need to commence proceedings by 28 November 2013.

305. On 1 November 2013, as this date approached, the Partnership entered into a “standstill” agreement with RBS. RBS accepted that this agreement temporarily stopped time running. This agreement contained the following terms:

“3. STANDSTILL PERIOD

3.2 The Standstill Period begins on the date of this Agreement and continues until the earlier of the following dates:

- a) 28 days after delivery of a notice under Clause 4
- b) The “Long-Stop Date”, being 4pm on 9 July 2016 or such other date as the Parties may agree in writing.

4. ENDING THE STANDSTILL PERIOD BY NOTICE

4. A Party may end the Standstill Period by written notice to each other Party.

7. NOTICE AND ADDRESSES FOR SERVICE

7.1 Any notice given under this Agreement must be in writing and either delivered by hand or sent by registered post to the Address for Service, and quoting the reference, given in Clause 7.2.

7.2 The Address for Service for each Party is:

Party	Address for Service	Reference
Perks	LEXLAW Solicitors 4 Middle Temple Lane London EC4Y 9AA	P563
RBS	RBS Legal – Markets The Royal Bank of Scotland Plc 135 Bishopsgate London EC2M 3UR	Head of Risk Solutions

7.3 A Party may change its Address for Service by giving each other Party written notice of the new address and reference”

306. On 16 November 2015, Mr John Robinson of RBS e-mailed to Dr Perks a letter “issued to the firm and partners today”. Mr Robinson’s e-mail described his position as “Corporate Director, Business Restructuring Group” in Edinburgh. RBS said that he was the individual at RBS who had responsibility for the Partnership’s borrowing

relationship with the Bank at that time. This is borne out by the nature of the letter that he sent, and by other correspondence sent at around this time. The letter indicated that unless satisfactory proposals were received by 20 November 2015, the Bank would be left with no alternative but to refer the matter to “our Recoveries department for the purposes of recovering all amounts you owe to the Bank and enforcing any security that the Bank may hold”.

307. On 24 November 2015, Dr Perks sent an e-mail to Mr Robinson by way of response. The email enclosed “two attachments including a letter and a brief claim form”. The letter said that the 2007 and 2009 swaps had been mis-sold, and enclosed a Claim Form which had been settled by counsel for issue in the Commercial Court in London. Dr Perks said that once issued, he expected to formally serve the Claim Form in the new year. He summarised the claim, referred to the standstill agreement, and then gave notice in the following terms:
- “Given the existence of the standstill agreement, I hereby give notice by this letter, that that agreement is terminated with effect from 22nd December 2015 (being 28 days from the date of this letter). However, subject to agreements on the points on disclosure discussed below, I am happy to extend the time for your Defence to the date of the longstop, namely 1st July 2016”.
308. The letter concluded by seeking the Bank’s agreement to a number of steps, including that no steps were to be taken by the Bank in Scotland under either the guarantees or the loans, until the main action had been decided. Dr Perks also proposed a mediation in the first three weeks of January 2016, on a convenient date before the Claim Form was formally served.
309. Although the letter was clearly intended to terminate the standstill agreement with effect from 22 December 2015, it was not sent in accordance with the terms of Clause 7. It was not sent to the Head of Risk Solutions, and it was not delivered by hand or sent by registered post to the relevant address for service in London. Nor did it quote the reference in clause 7.2.
310. However, Mr Robinson promptly (on 26 November) forwarded Dr Perks’ letter and attachments to a number of colleagues, including Sarah Smith whose title was “Corporate Director, Special Situations and Litigation” within the Bank’s Restructuring division. In his covering e-mail, marked with “high” importance, Mr Robinson described the claim being made in the Commercial Court. He also referred to the standstill agreement and the “intimation of termination”. On 30 November 2015, Ms Smith responded, copying in a further individual at the Bank, Dave Dudley, who appears to have had some responsibility for IRHP issues.
311. Dr Perks was not aware of this internal correspondence at the time. There was, however, no suggestion from either party that there had not been a valid termination of the standstill, because an ineffective notice had been given. Indeed, Dr Perks in due course issued (on 21 January 2016) a Claim Form. He was entitled to do so at that time (which was well before the contractual long-stop date) if, as his letter had indicated, notice of termination of the standstill had indeed been given.

312. If Dr Perks' e-mail and covering letter sent on 24 November 2015 was effective to terminate the standstill with effect from 22 December 2015, and if the limitation period was 6 years from 29 November (the date of the 2007 swap), it was not disputed that the Claim Form needed to be issued by 19 January 2016. This is because, as at 1 November 2013, when the Standstill Agreement was agreed, there remained 28 days (from 1 November to 29 November) for the issue of the Claim Form. 28 days from 22 December 2015 would expire on 19 January 2016. The Claim Form was not, however, issued until 21 January 2016, two days later.

Discussion

313. On behalf of Dr Perks, Mr Macpherson advanced a number of reasons why the Claim Form was timely.
314. Mr Macpherson relied upon the fact that notice of termination was not given in accordance with the terms of clause 7 of the Standstill Agreement. It is true that it was not so given, but it does not follow that it was ineffective to terminate the Standstill Agreement. The 24 November 2015 letter expressed in the clearest terms that there was a decision to end the "Standstill Period". The question is whether the contractual requirements for notice are to be regarded as "an indispensable condition compliance without which the termination cannot be effective": see the review of the authorities by Akenhead J in *Obrascon Huarte Lain SA v Gibraltar* [2014] EWHC 1028 (TCC) paragraphs [364] – [374]. As Dyson LJ said in *Rennie v Westbury Homes (Holdings) Ltd* [2007] EWCA Civ 1401, paras [15] – [16], some clauses may contain express language that "the notice shall only be valid if". Where such express language does not appear, it is a question of construction as to whether "it is an indispensable condition of validity that the notice satisfies the requirements of the clause". That question itself needs to be considered by reference to commercial common-sense.
315. In the present case, there is no express language which has the effect of making service in accordance with the method identified in clause 7 an indispensable condition. I see no reason to reach the conclusion that it was. In *Obrascon*, Akenhead J held that a notice of termination actually served on a person "at a sufficiently senior level" would be sufficient service to be effective. A broadly similar approach was taken by the Inner House in the Scottish case, *HOE International Ltd. Andersen* [2017] CSIH 9, paragraphs [17] and [32] – [35]. I consider that the same approach should be taken in the present case. The notice here was served on a person at a sufficiently senior level: Mr John Robinson was the person who was then responsible for the relationship with Dr Perks, and he had recently sent or caused to be sent the letter dated 16 November 2015. Dr Perks clearly regarded Mr Robinson as a person with sufficient authority to receive the detailed response, and claim, that he sent back, including the notice to terminate the standstill. In addition, both parties clearly treated the notice as effective: Dr Perks issued the Claim Form (without waiting for the long-stop date), and RBS took no point that he had acted prematurely in doing so.
316. However, Mr Macpherson had another more powerful argument available. RBS's limitation defence depended upon the proposition that the Partnership suffered a loss at the moment that it concluded the 2007 swap by entering into that contract. He challenged why this should be so, and submitted that loss was only suffered once interest rates moved down and the swaps began to operate to the Partnership's prejudice. He submitted that it was only on 6 December 2007, 7 days after the

Partnership entered the 2007 swap, that rates started to go down. It was only at that stage that the Partnership's financial position was measurably worse than if it had not entered into the swap. In his oral reply, Mr Macpherson referred to the statement of account produced by the Bank: this showed a small credit to the Partnership on 10 December 2007, and then (reflecting the drop in interest rates) a small debit on 8 January 2008. For the purposes of his argument, however, the addition of the 7-day period, prior to the adverse interest rate movement, would be sufficient.

317. The Bank submitted that the Partnership was worse off in an identifiable way from the point when it entered the 2007 swap. At that moment, it lost the opportunity to pay, as its overall interest cost, a lower floating rate of interest from the outset of the 2007 swap. The Bank also relied upon the fact that the Bank applied a margin over the market rate when executing the 2007 swap, thereby deriving a modest income which it booked at £ 32,000. As a result, the "mark-to-market" value of the 2007 swap was negative for the Partnership on the day the 2007 swap was entered into.
318. The parties referred to a large number of authorities, including: *Law Society v Sephton* [2006] UKHL 22; *Pegasus Management Holdings SCA v Ernst & Young* [2010] EWCA Civ 181; *Nykredit Mortgage Bank PLC v Edward Erdman Group Ltd* [1997] 1 WLR 627; *Shore v Sedgwick Financial Services Ltd* [2008] EWCA Civ 863; *British Telecommunications Plc v Luck* [2014] EWHC 290 (QB); *Maharaj v Johnson* [2015] UKPC 28, in particular Lord Wilson at [19]; *Elliott v Hattens Solicitors* [2021] EWCA Civ 720. The Bank placed significant and heavy reliance on the decision in *Shore*, where – in the context of a decision by an investor to switch from one pension to another more risky product – the Court of Appeal considered that loss had been suffered at the time of the switch.
319. Despite the abundance of cases dealing with limitation and swaps in recent years, there is no direct authority as to when the limitation period begins to run in the case of a swap transaction. In order to resolve the principal argument between the parties, it is in my view sensible to start by identifying the nature of the 2007 swap transaction. The swap had a notional starting value of £ 2,068,638.08, which amortised over the life of the first swap. The reference rate of the swap was UK Base Rate, and the payments made by the Partnership and the Bank respectively under the 2007 swap, each month, were determined by the average level of Base Rate over the previous month ("the Average Base Rate"). The Partnership was entitled to receive interest on the notional value of the swap, from month to month, from the Bank at the Average Base Rate. The Partnership was required to pay interest on the same notional value of the swap, from month to month, at a fixed rate of 5.60%. These obligations were then netted off, and a single payment was to be made by one or other party each month – unless Average Base Rate was exactly 5.60%, in which case no payment would be made at all.
320. This meant that if Average Base Rate was above 5.60% (say 6%), then the Bank would pay the Partnership a sum representing interest on the notional value at the difference between 5.60% and Average Base Rate (i.e. 0.4% in the example). In that situation, the swap would be beneficial to the Partnership, because payment was being made to the Partnership, and this would off-set the additional sums payable at a variable rate under the Partnership's loan. This scenario would produce no measurable disadvantage to the Partnership. On the contrary, the payment made to the Partnership would in this situation be advantageous, for the reasons explained.

321. If, on the other hand, Average Base Rate was below 5.6% (say 5%), then the Partnership paid the Bank a sum representing interest on the notional value at the difference between 5.60% and Average Base Rate (so 0.6% in the example). The result in this scenario is disadvantageous. The fall in base rates, which in fact occurred, meant that the Partnership became liable to make payments under the 2007 swap, and these payments were progressively higher as interest rates fell further. Whilst it is true, as the Bank pointed out, that the Partnership's overall interest cost across both the 2007 swap and the 2007 loan did not change, the second scenario (where interest rates fell) meant that the swap produced a measurable disadvantage to the Partnership; because the effect of having to make payments under the swap was to negate the advantage which would otherwise have flowed from the fall in interest rates.
322. Against this background of a contract which might or might not give rise to a liability on the part of the Partnership to make payments to the Bank under the swap, I consider that it is not appropriate to say that the Partnership suffers a loss at the time when the contract is concluded. Rather, it seems to me that since this was a transaction with benefits and burdens, the loss occurs when an adverse balance is struck, to use the expression of Brennan J in *Wardley Australia Ltd v State of Western Australia* [1992] 175 CLR 514, 536:
- “A plaintiff may suffer economic loss or damage in a number of ways: by payment of money, by transfer of property, by diminution in the value of an asset or by the incurring of a liability. Whether loss or damage is actually suffered when any of these events occurs depends on the value of the benefit, if any, acquired by the plaintiff by paying the money, transferring the property, having the value of the asset diminished or incurring the liability. If the plaintiff acquires no benefit, the loss or damage is suffered when the event occurs. At that time, the plaintiff's net worth is reduced. And that is so even if the quantification of that loss or damage is not then ascertainable. But if a benefit is acquired by the plaintiff, it may not be possible to ascertain whether loss or damage has been suffered at the time when the burden is borne — that is, at the time of the payment, the transfer, the diminution in value of the asset or the incurring of the liability. A transaction in which there are benefits and burdens results in loss or damage only if an adverse balance is struck.”
323. Brennan J's judgment was quoted with approval in the leading judgment of Lord Hoffmann in *Law Society v Sephton* at [2006] 2 AC 543.
324. I also agree with Mr Macpherson that it is appropriate to categorise the case advanced by the Claimants as a “no transaction” case. In my view, this is so whether one is considering the claim for misrepresentation, failure to explain the risks, or failure to advise. In each case, Dr Perks' complaint is that he would not have entered into the 2007 swap if the misrepresentation had not been made, or if the key risks had been explained, or if he had been properly advised. (I have rejected those complaints for the reasons already given, but the limitation issue only arises if one of these claims had been well-founded).
325. In those circumstances, I agree that it is appropriate to apply the approach of Lord Wilson, giving the lead judgment of the Privy Council in *Maharaj v Johnson* at

paragraph [19], recently approved by the Court of Appeal in *Elliott v Hattens Solicitors* at paragraph [12]:

“[T]he central concept behind the ‘no transaction’ and the ‘flawed transaction’ cases is different. For in the latter the claimant does enter into a ‘flawed transaction’ in circumstances in which, in the absence of the defendant’s breach of duty, he would have entered into an analogous, but flawless, transaction. In the former, however, the claimant also enters into a transaction but in circumstances in which, in the absence of the defendant’s breach of duty, he would have entered into ‘no transaction’ at all. The difference in concept dictates a difference in the inquiry as to whether, and if so when, the claimant suffered actual or measurable damage. In the ‘flawed transaction’ case the inquiry is whether the value to the claimant of the flawed transaction was measurably less than what would have been the value to him of the flawless transaction. In the ‘no transaction’ case the inquiry is whether, and if so at what point, the transaction into which the claimant entered caused his financial position to be measurably worse than if he had not entered into it: see *Nykredit Mortgage Bank Plc v Edward Erdman Group Ltd (No.2)* [1997] 1 W.L.R. [1627], at p.1631 (Lord Nicholls). The *Nykredit* case was a classic example of a ‘no transaction’ case in that the claimants, who had lent money on the security of a property which the defendant valuers had negligently overvalued for them, would have declined to make the loan if the valuation had not been deficient.”

326. Here, it does not seem to me that the Partnership was measurably worse off than if it had not entered into the 2007 swap until, at the earliest, the moment when interest rates dropped in December 2007. I say at the earliest, because I consider that there is much to be said for the view that it was measurably worse off when the first payment became due, resulting from that fall, in January 2008. However, either date is sufficient to defeat the Bank’s limitation argument.
327. I did not consider that the decision in *Shore v Sedgwick Financial Services Ltd* dictated a different result. The relevant transaction in that case was very different to the swap transaction in issue in the present proceedings. In that case, the claimant moved from one pension arrangement to another. However, as Dyson LJ said at paragraph [32], the new pension scheme into which the claimant transferred his pension was not one which created any contingent liability, or indeed any liability. The position is in my view different in relation to the present swap transaction, which does create a potential liability. It is a liability which may or may not materialise. If it does not materialise, because interest rates do not move at all, or because they increase (thereby benefitting the Partnership) then there would be no adverse balance struck and no measurable loss.
328. Nor do I accept the Bank’s argument based upon the “mark-to-market” value of the swap which was alleged to be negative on the day when it was entered into. There was in fact no evidence before me as to how, if at all, the swap was marked to market at the time that it was entered, although that is a point covered in some of the prior case-law. However, even if this did happen, it did not result in a measurable loss to Dr Perks. There is no evidence that he even knew about it. It would essentially have been a book entry on the part of the Bank. There was no demand made of the Partnership at that time for payment of this amount, and the book entry would not of itself create an

obligation on the part of the Partnership to pay anything. If interest rates had moved higher, the entry would no doubt have changed, reflecting the fact that the swap would be “in the money” as far as the Partnership was concerned.

329. Mr Macpherson also argued that loss did not occur until 14 January 2008, when the confirmation document was signed. This was because it was only at that stage that the Partnership was unable to withdraw from the swap: prior to that time, it could withdraw from the 2007 swap without cost. I have already briefly addressed this argument, which in my view is clearly wrong. A binding contract was concluded in the call that took place on 29 November 2007, and the subsequent documentation confirmed the full terms of that agreement. Dr Perks was not free to walk away from the deal concluded on the phone on 29 November 2007. The main terms of the swap were explained to Dr Perks in the course of the phone call, and there was agreement to those terms. Both parties intended to be bound at that stage, even though it was envisaged that there would be later more formal documentation. That documentation was in due course sent and was then (certainly in the case of the confirmation sent on 14 January 2008) signed by Dr Perks. Accordingly if (contrary to my view) the Partnership did suffer loss at the time when the 2007 swap was concluded, this argument would not assist the Claimants to defeat limitation.
330. Accordingly, had the claim in respect of the 2007 swap otherwise succeeded, it would not have been defeated on limitation grounds.

D: The 2009 swap

D1: Introduction to the issues and the parties’ arguments

331. On 9 July 2009, the Partnership entered into the second, 2009, swap. The starting notional value was £ 2,194,000 which was in line with the initial amount of a loan which the Bank was preparing to advance to the Partnership, following negotiations for a restructuring described in more detail below. The reference rate of the 2009 swap was sterling LIBOR. The fixed rate of interest payable by the Partnership under the 2009 swap was 5.40%, and therefore slightly lower than the rate payable under the 2007 swap. The term of the 2009 swap was 5 years, starting from 14 July 2009.
332. The 2009 swap replaced the 2007 swap. This required the 2007 swap to be terminated early or “broken”. The break costs that would normally have been payable were, however, blended into the rate of interest payable under the 2009 swap, so that there was no requirement for an immediate payment by the Partnership.
333. The discussions which led to the second swap involved Mr Fordyce and Dr Perks for the Partnership. Ms Fullerton/ McPartlin was not involved for the Bank. The principal individual who dealt with Mr Fordyce and Dr Perks was Kevan Munro. Mr David Tweedie was also involved at a later stage.

The Claimants’ arguments

334. The claims in respect of the 2009 swap were more limited than those advanced in relation to the 2007 swap. There was no allegation of a positive misrepresentation. Instead, the Claimants alleged that there had been a failure to explain key risks, and a failure to advise. Both claims were advanced at common law and under COBS.

335. The failure to explain the key risks was based upon the communications which took place in June 2009, initially by e-mail and then by way of a lengthy (and transcribed) conference call. In the e-mail exchange on 9 and 10 June 2009, Mr Munro had put forward two options: the first option was for the Partnership to enter into a new swap by way of replacement of the 2007 swap, and the second option was for the Partnership simply to leave the existing 2007 swap in place. The Claimants contended that, by giving some explanations about the options, Mr Munro assumed responsibility to explain the benefits of and risks of the first option. There was a failure on his part to explain two very significant disadvantages of that option.
336. First, there was a very substantial break cost in respect of the 2007 swap. The Claimants were told that there would be no extra fees or costs to pay. But in fact the pricing of (namely the rate payable under) the 2009 swap incorporated break costs of £ 191,623 as well as a “fee” of £ 22,000. Secondly, and more importantly, there was no explanation of the fact that there was a potential increase in liability to the Bank because the term of the 2007 swap was due to expire in 2012, but the 2009 swap would last until 2014. Accordingly, the term was in practice increased from 3 years to 5 years. The financial naivety of the Claimants required the Bank to provide a spreadsheet of the 2007 swap, but this was never provided despite a request from Mr Fordyce.
337. The Claimants contended that there were no reasonable grounds for the Partnership to change from a swap based on Base Rate to a swap based on LIBOR: it was not necessary to do so simply because the underlying loan to the Partnership was moving to LIBOR. Nor was it reasonable to blend the break costs into a new interest rate swap: the only sensible option was to add the break costs to the Partnership borrowing. They contended that if Mr Munro had explained properly the break costs and the extra payments that the Partnership would have to pay, there is no doubt that Dr Perks would have refused to enter the 2009 swap. That swap was “damaging and pointless”, and resulted in a loss arising from the unnecessary extra burden that the 2009 swap added to the finances of the Perks business. If Dr Perks had actually understood the level of extra liability that the Bank was asking the Partnership to bear, he was a man with sufficient strength of personality to take strong issue with the Bank about being forced into what was fundamentally an unsuitable swap for the Partnership.
338. The claim based on failure to advise was based on the proposition that Mr Munro did in fact, albeit subtly, advise Mr Fordyce and Dr Perks to enter into the 2009 swap. He provided information which was aimed at influencing, and did influence, Dr Perks to enter into that swap. In particular, he advised him as to how most customers would approach the decision which Dr Perks had to make, and made other positive remarks about the first option. Although Mr Munro had said that he could not advise, in fact he did just that. If properly advised, and in particular if the break costs and extra payments had been explained, Dr Perks would not have entered into the 2009 swap.

The Bank’s arguments

339. The Bank’s arguments were broadly similar to those advanced in relation to the “failure to explain” and “failure to advise” claims concerning the 2007 swap, except that no pleading (or limitation) points arose.
340. In his oral submissions, Mr Sinclair emphasised that the Bank had been careful to offer a choice, rather than offering only one product. The choice was between doing nothing

and remaining with the 2007 swap, or entering into a new swap. The Bank had been careful not to make a recommendation or offer advice.

341. In relation to the two specific complaints concerning matters which were allegedly not explained: the Bank submitted that both matters were explained, as shown by the e-mail exchange and transcript of the 12 June 2009 call.
342. The Bank also submitted that there was no sustainable case of causation. Dr Perks' evidence was that he was forced into the 2009 swap: it was not a question of his being given advice to do so, and following that advice. He also said that he made a choice between the first and second options. On either basis, it was clear that the Partnership did not enter into the 2009 swap as a result of any mis-selling.

D2: The facts (including the background) relating to the 2009 swap

343. The background to the 2009 swap was the making of further funding requests by Dr Perks and a degree of dissatisfaction on the part of the Bank as to the performance of the Perks business and aspects of the way in which it was being run.
344. In the period between December 2007 and October 2008, a number of further funding requests from Dr Perks were approved but this was against a backdrop of increasing concern from Credit.
345. In December 2007, a further loan of £740,000 for GCL was approved but Paul Todd (in Credit) stated that it had reached the limit of its support and expressed concern at money being taken out of the business by Dr Perks. Mr Todd's disquiet was also apparent when, in July 2008, Dr Perks sought £40,000 to pay a tax bill. Dr Perks' request for funding was contained in an e-mail dated 21 July 2008 which contained an optimistic account of the progress of the business. (A number of emails in the same vein were sent by Dr Perks at around that time). Mr Todd said that bearing in mind the level of remuneration that the Perks took from the business, he would have thought that they would have made provision for any income tax payments that would fall due.
346. On 1 October 2008, not long after he had sent optimistic emails regarding the business and potential further expansion, Dr Perks asked for a loan of £70,000 to fund refurbishment costs for a clinic which had suffered from dry rot and associated severely reduced trading. Whilst the Bank agreed to provide this funding, Mr Todd considered it disquieting that the business did not have reserves available to meet this cost. He went along with the request but said that he saw the Bank's support as "full"; in other words, that it had reached its limit.
347. In or around November 2008, the business suffered a cashflow crisis, which prompted: (i) serious (and evidently heated) discussions between Dr Perks and the Bank; (ii) protracted internal discussion within the Bank; and, ultimately (iii) a decision by Credit to transfer the connection to "CRM" (also or previously known as "SRM", or Specialised Relationship Management).
348. The reasons for the crisis, the content of the discussions and the multiple problems that the Perks business was facing by this stage are evidenced by the Bank's internal documents, including a "Problem Analysis" by Katherine Jenkins (a Credit Manager) dated 20 January 2009. In summary:

- a) As well as the funding from the main Bank, the business utilised asset finance from Lombard. However, in November 2008, Lombard (Robert Martin) declined a request from the business to re-finance some x-ray machines, on the basis that: (i) the request looked like a “short-term plug for cashflow”; (ii) even the directors considered that the business was underperforming; (iii) the Companies were “technically insolvent”; and (iv) the level of dividends and other remuneration for the directors (and particularly Dr Perks) was excessive and a major problem. Mr Martin concluded that the business was in need of equity funding and that Lombard would not consider further exposure until the Companies were making and retaining profits and cash.
 - b) Lombard’s decision evidently came as a shock to Dr Perks and caused a serious problem, because the business had already spent £140,000 in anticipation of the request being approved. Dr Perks had simply assumed that it would be approved.
 - c) Dr Perks did, at least initially, refuse or at least struggle to understand or accept the Bank’s position and level of concern. However, it is clear that there was indeed a real problem, as shown by the fact that in late 2008 and early 2009: (i) the business had to seek a deferral of an HMRC PAYE payment; (ii) it had to consider a bridging loan of £150,000; (iii) it had to seek a significant increase to its overdraft facility and exceeded that increased limit for a significant period of time; (iv) it had to request a period of interest-only repayment on both the 2007 Loan and GCL’s £740,000 loan; and (iv) Dr Perks was even forced to obtain a loan from his brothers.
 - d) Credit were particularly exasperated at the fact that the other core reason for the poor financial position of the business was that Dr Perks had taken more than £300,000 out of the business, using a director’s loan account to circumvent the dividend restriction covenants to which GCL’s borrowing was subject. He had spent that money on a property in Australia, and – because that property was heavily mortgaged – was not in a position to repay his director’s loan, or indeed inject any cash into the business himself.
 - e) The relationship management team appears to have tried to persuade Credit to take a more lenient approach or to dissuade Credit from transferring the connection to CRM, but Credit gave this short shrift.
349. The report prepared by Ms Jenkins: (i) highlighted eleven “ACMU Triggers” and six categories of “Key Risk”; and (ii) proposed a period of consolidation and the reduction of debt through clinic sales, concluding that: “unless the debt can be reduced to a manageable level, the connection may benefit from GRG involvement”. This strategy was endorsed by one of her colleagues in Credit who observed as follows in relation to Ms Jenkins’ report:

“Unfortunately the danger in funding a strategy of rapid growth on the back of debt alone is demonstrated here. Factor in difficult trading conditions and a pretty generous remuneration package and the end result is all too plain — the business is unable to meet the calls against it and viability is in doubt. Debt to be reduced to manageable levels and

in the absence of a cash injection a programme of disposal needs to be progressed.”

350. It seemed to me that the points made by Ms Jenkins and her colleague were soundly based.

The 2009 Restructure

351. Over the first quarter of 2009, there were protracted discussions – both between Dr Perks and the Bank and internally within the Bank – about a restructuring of the Partnership’s and the Companies’ borrowing. Part of the context for those discussions was the general drive within the Bank to move customers’ facilities from Base Rate to LIBOR where this was possible: an internal e-mail dated 31 October 2008 stated that current rates of Base Rate related lending were below the market cost of funds.
352. However, the Bank submitted that the context also included at least two matters which meant that some form of restructuring of the Partnership’s and the Companies’ borrowing was in any event essential. First, the Perks business was carrying a substantial overdraft and was repeatedly exceeding the limit thereof, with no sign of that ending. Secondly, the business was not able, at that time, to make capital repayments on either the 2007 Loan or the £740,000 GCL Loan from cashflow and consequently – as Dr Perks repeatedly made clear in e-mails sent in early 2009 – required a period of interest-only borrowing. That submission was borne out by the contemporaneous correspondence.
353. The discussions and arrangements for the restructure involved a number of different relationship teams within the Bank. The proposed restructure involved, in summary: (i) 6 month capital repayment holidays across most of the Partnership’s and the Companies’ borrowing (with possible further holidays depending on business performance and/or improvements); (ii) a new 15 year LIBOR-referenced loan for the Partnership (to be hedged by a replacement LIBOR-referenced swap); and (iii) a new 5 year LIBOR-referenced loan and also a new Enterprise Finance Guarantee (i.e. government-backed) loan for GCL (the “EFG Loan”).
354. The final paper presented to Credit in early March 2009 included the following comment:

“We are essentially where we are at present, +ve steps have been taken by the customer however there is an enthusiasm that sometimes verges on being blinkered. It would seem sensible from the Banks perspective to support as outlined and give the customer a final chance to deliver at this point. ”

The comment that there was an “enthusiasm that sometimes verges on being blinkered” is a very fair, if understated, assessment of Dr Perks, who was relentlessly optimistic but blind to the very real difficulties that his business faced.

355. These real difficulties caused Christine Jones of Credit to respond initially by taking the view that she could not justify the Bank increasing support to “these businesses when they are loss-making and insolvent”. The response of the relationship management team acknowledged that “GCL is insolvent and that the business cannot

service its debt”. Those comments as to the state of the business seem to me to have been amply justified.

356. In due course, however, the Bank decided that it was willing to offer a restructuring proposal. The news that the restructure had been agreed by Credit was described as a “positive solution for all concerned” by Mr Fordyce, in an e-mail dated 27 March 2009. He said that he “greatly appreciated” the help provided by Robert Clark at the Bank.
357. The details of the final restructure were set out in an e-mail to Mr Fordyce from Robert Clark on 30 March 2009. This included details as to associated fees, the requirement for a new LIBOR hedge and for additional guarantees.

“As discussed at our meeting on Thursday of last week and as requested by Clayton I note below details of the Bank’s proposals to restructure the borrowing in name of both Glasgow Chiropractic Ltd and Firm of CJ and LK Perks:-

Firm of CJ and LK Perks

1. Existing property loan to be converted to a LIBOR related loan with a new hedging agreement put in place and whilst the margin will be 2% with the new hedging agreement this will mean you are paying an interest rate of around the same level as at present with the Base Rate loan. This will avoid the breakage costs having to be paid up front as they will be blended in with the new LIBOR hedge. A fee of £22k will be chargeable and will be added to the loan together with the balance of the overdraft on account number 00242050 which should give us a new loan of circa £2,194,000 (any excess above this figure will need to be borne out of cashflow). A 6 month Capital Repayment holiday will be put in place to be reviewed towards the end of the 6 month period in light of the performance of the Ltd Company which is expected to improve significantly following the measures implemented by the Directors. The loan will initially be set up with a 5 year term with a repayment profile of 15 years. (Emphasis supplied)

2. The two existing loans will be allowed to run their normal course with loan account number 00288980 (£16k) finishing in August and loan account number 00291841 (£70k) being reviewed in October following expiry of 12 month interest only period. Existing interest rates to apply to these facilities.

Glasgow Chiropractic Ltd

1. Existing loan £567k on account number 00277997 to be converted to a LIBOR related facility with a margin of 3% above LIBOR. A fee of £5,700 will be chargeable and will be added to the loan bringing the loan amount up to £573k. A 6 month Capital Repayment holiday will be put in place for this loan also and will be reviewed along with the Firm property loan as detailed above.

2. Ayr property loan account number 00267061 to continue meantime and be repaid upon conclusion of the sale of the property and clinic to Dr Zahedi for circa £200k. Existing interest rate to continue to apply to this loan.

3. A new Group overdraft facility of £200k to be put in place between Glasgow Chiropractic Ltd and Newcastle Chiropractic Ltd, reducing to £50k when sale proceeds of Ayr received and (2) above repaid. A £2k fee is chargeable for this facility and will be debited the Glasgow Chiropractic Ltd business account. An interest rate of Base + 3.75% will be charged on this facility.

4. Existing overdraft utilisation of £400k to be transferred to a new Enterprise Finance Guarantee scheme loan with a fee of £4k chargeable and added to loan amount creating loan facility of £404k. As with (1) above a 6 month Capital Repayment holiday will be provided with this facility and will be reviewed as detailed above in Firm property loan text. Interest rate of Base + 4.6% to apply to this facility. Term to be 5 years 6 months.

As security for the Bank's exposure all existing security will remain in place and additional security by way of a Personal Guarantee from Clayton in the sum of £101k will be required exclusively for the EFG loan representing 25% of the loan amount. The Guarantee from HM Government will cover 75% of the loan amount and in view of the Government guarantee they will charge a 2% p.a. guarantee premium (reduced to 1.5% p.a. for premiums collected in 2009) on the reducing balance of the loan. The charge is collected by the Government quarterly by direct debit from Glasgow Chiropractic Ltd business account.

We shall also require an Inter Company Guarantee from Glasgow Chiropractic Ltd and Newcastle Chiropractic Ltd in respect of setting up the Group overdraft facility together with a Debenture from "Newcastle", we already hold a Debenture from "Glasgow".

The Bank are also looking to continue to receive Management Information monthly with the addition of aged lists of debtors and creditors for both "Glasgow" and "Newcastle" going forward.

I hope the above is as you recall from the meeting, however, should you have any queries please do not hesitate to contact either Ross or myself. Assuming the above is acceptable to you please confirm and we shall start putting in place the various measures required to put the various facilities in place."

358. These proposals were agreed the very next day. Mr Fordyce told Mr Clark that he had spoken to Dr Perks and "he would like to proceed with the application for the new funding packages".
359. The 2009 restructuring took a number of months to be completed. The EFG Loan was signed by Dr Perks on 11 May 2009. The new LIBOR loan for GCL of £573,000 was

signed by Dr Perks on 12 June 2009. The new LIBOR loan for the Partnership in the amount of £2,194,000 was signed by Dr Perks on 26 June 2009.

The 2009 swap

360. The proposal made by Mr Clark on 30 March 2009 was for a LIBOR loan with a “new hedging agreement put in place”, and with breakage costs not being paid up front but being “blended in with the new LIBOR hedge”. It is clear that Mr Clark’s intention at the time, and as reflected in later internal correspondence, was that there should be a new hedging arrangement put in place, by reference to LIBOR, with the breakage costs of the 2007 swap being “blended in”. Mr Clark’s entry on the RMP system for 12 May 2009 also referred to “Hedging as Pre COS” (i.e. preconditions) for the new LIBOR loan, which was internally designated by the Bank as “B20”. The contract for this new LIBOR loan, which was signed on behalf of the Bank on 3 June 2009, contained a number of conditions precedent, including that: “the Borrower has entered into an interest rate hedging instrument acceptable to the Bank at a level, for a period and for a notional amount acceptable to the Bank”. A later provision, headed “Hedging”, stated: “The Borrower shall ensure that an interest rate hedging instrument(s) acceptable to the Bank and at a level, for a period and for a notional amount acceptable to the Bank is maintained”.
361. There can therefore be no doubt that a LIBOR referenced swap was a condition of the Bank’s agreement to provide the new LIBOR loan.
362. However, on 9 June 2009, Mr Munro (a Director in Commercial Risk Solutions) proposed two options to Dr Perks in an e-mail which followed a discussion between them. The first option was for the Partnership to change its current hedging (i.e. the 2007 swap, which was referenced to Base Rate) so that it was in line with the (then anticipated) 2009 loan (i.e. was referenced to LIBOR). Mr Munro had calculated that this would involve a change in the fixed rate from 5.60% as per the First swap to 5.45% under the new LIBOR-referenced swap. The second option was for the Partnership to leave its current hedging (i.e. the 2007 swap) in place. This would involve a balance of £ 300,000 being unhedged. The full text of the e-mail was as follows:

“Further to our call a quick email to explain what I was discussing with you. As you know your debt is about to be restructured onto Libor from Base rate and the amounts/terms changed slightly. As you also know you currently have a base rate swap (eg fixed rate) at 5.60%, not including margin.

As discussed I think there are two things to consider.

1) Change you interest rate hedging to run exactly in line with your new libor loan. I have done some sums and I believe we could change the rate from 5.60% to 5.45% and there would be no extra fees or costs to pay. I have attached a spreadsheet to show what this would look like over the first 5 years of an assumed 15 year loan and what would happen is we would simply renegotiate in 5 years time.

Option

2) Draw your news facilities on libor but leave your interest rate hedge on base rate. This would mean you would have £1.9m of your debt fixed at 5.6% (excluding margin) and the remainder - £300k – at current libor – 0.67% before margin. You would also suffer the cost difference between base and libor on the £1.9m which is approx 0.17% at the moment but would vary from month to month. Technically it could act in your favour but only if Libor was to fall below base rate, which has not happened for some time.

I have tried to keep the options simple but if you feel you wish to explore another option we could discuss although I believe the Relationship Team are keen to get the loan redrawn onto libor sooner than later.”

363. Having been passed that e-mail by Dr Perks, Mr Fordyce then e-mailed Mr Munro on 9 June. He asked for a spreadsheet showing costings if option 2 was taken, based on current rates available. He also pointed out that the spreadsheet for option 1 appeared to have a rate of 5.40% rather than 5.45% as indicated by Mr Munro in his e-mail, and he asked for this to be checked. Finally, he asked Mr Munro: “Which option do you recommend?”.
364. Mr Munro does not appear to have provided a spreadsheet relating to option 2. However, his response in his e-mail dated 10 June 2009 did provide figures relating to that option. In response to the request for a recommendation, he provided some information as to what most customers tend to do, but made it clear that he could “not advise”. The e-mail indicates that he had also made that point in a call on the previous evening. The relevant text of the e-mail was as follows:

“Got your call last night but it is probably best I come back to you by email with some cashflows attached.

1) You are right the rate for new debt would be 5.45% - so I have updated cashflow.

2) Second idea is you leave current deal as is - £1.9m at 5.6% - which costs about £19,200 a month and then the rest to be floating approx. £275k over 15 years – which at current floating rates costs £1860 per month – although as that is floating could rise or fall. So total to remain as is £21100.

Obviously the new deal is slightly cheaper but it does lock you in for 5 years where as your current deal would expire in 2012. Also as option 2 has some “floating” debt then there is a risk that the costs of leaving the deal as is could increase if interest rates rise.

As mentioned I can not advise but what I would say is most customers do tend to have their debt equal to their interest rate management and it is unusual to have libor debt and base rate hedging.

Hope this answers your question”

365. In response Mr Fordyce pointed out that the spreadsheet had not been updated from 5.4% for option 1. He did not repeat his earlier request for a spreadsheet on option 2, no doubt because the relevant figures had been provided to him. He asked for confirmation that the first option was “what most customers go for” and Mr Munro responded: “Yes I would say the majority lock up their swaps with debt”.

366. The principal e-mail exchanges (those which took place prior to the question concerning “what most customers go for”) had been copied to Robert Clark and Ross Anderson in the relationship management team. This led to some internal exchanges on which Alisdair Hillis was also copied. It was clear from the exchanges that although the two options had been offered, the Bank would not have been willing to accept option 2 if the Partnership had chosen that option. Mr Clark, referring back to the offer which he had originally made on 30 March 2009, told Mr Anderson and Mr Hillis:

“Ross,

My understanding was that their was only one option i.e. a switch to LIBOR with existing base rate hedge rolled into a new LIBOR hedge to ensure no large debit re breakage costs against customer for breaking base rate hedge. The email offer that went out to Clayton only contained switch to LIBOR with new LIBOR hedge to be taken out.”

367. This led to Mr Anderson asking Mr Hillis to touch base with Mr Munro “to ensure we structure what has been agreed with Credit/ GG going forward”. Mr Hillis forwarded the internal e-mail exchanges, stating that it had previously been agreed that “we would dictate that he switches from Base to LIBOR hedge”. He asked Mr Munro whether he disagreed, and if not then to crack on with documenting it. Mr Hillis said that his preference was “to give Clayton as little leeway as possible as we have already pushed the boat out for him”. Mr Munro’s response was:

“Don’t disagree and I am working towards that – no documents needed if he agrees – just a call. Not speaking with Clayton he has me calling his “finance” guy.”

368. There was then a lengthy call on 12 June 2009 between Mr Fordyce, Dr Perks and Kevan Munro. The transcript occupies 13 pages, and both parties referred to aspects of this call in their submissions at trial.

369. At the start, Mr Fordyce referred to a matter that had caused “a bit of confusion” here. He explained that the amount currently outstanding under the 2007 Loan was £2.1 million, rather than £1.9 million as Mr Munro had suggested in his emails. This was because the Partnership had not been paying any of the capital element. Mr Fordyce said that, taking that into account, “option one is looking really like the most likely with the existing rate”. He said this before Mr Munro had said anything on the call which could be regarded as a “steer” towards option 1.

370. After Mr Fordyce had expressed his view that option 1 was more likely, there was the following exchange:

Munro: Yeah, so I spoke to the guys in sort of the core bank if you like, so Ross Anderson and erm Alastair Harrison they were kind of

thinking that option one is better, I mean I have to be careful because I can't advise you but

Fordyce: Of course, of course

Munro: Alright well, this makes sense then looking at it, it stacks up on a numbers basis from a costs point of view, it is not more expensive at the minute, I guess the risk is you are slightly tied in for slightly longer but then the facilities are being provided for longer anyway, so it's not...

Fordyce: Yeah

Munro: It's not unrealistic and as I said the majority of people like to have their hedging and their debt in line

Fordyce: Sure

371. Mr Munro then identified another advantage, relating to the possible mismatch between base and Libor rates, describing it as a "wee bit of risk in there". He then said that he could not advise, but "you know option one was the way that David preferred you to go if that makes sense".

372. Mr Fordyce then asked why the fixed rate available for the new LIBOR-referenced swap was still as high as 5.45% even though Base Rate was now 0.5%. Mr Munro explained that there were two reasons for this. He said that "you've still got a bit of that contract left if you like, so you still have to live with a bit of that, now there is a wee bit to add on the end". He then referred to the market at that time: although base rates were at 0.5%, the cost of a 5-year fixed rate would be roughly around 4.1% or 4.2%. Having referred to this, he then said that:

"... we have also got the existing debt or the existing deal at five point six to build in, so we try to blend the two together so that's where you get a slightly lower rate than the five point six but not massively lower".

373. He was then asked whether that element included "some element of fees". Mr Munro said that there were no fees charged: "it is just really blending the two together, so it's kind of like getting an average rate if that makes sense". Mr Munro then reverted to the point that whilst Base Rate was 0.5%, the markets "are pricing at but that will change dramatically back up the way".

374. Mr Fordyce asked whether there was any possibility of negotiation on the lending margin that the Partnership was paying. Mr Munro responded that this was not his area and that Mr Fordyce would need to speak to the relationship management team, but did provide the following explanation about how the Bank's lending margins had increased following the financial crisis:

"Two [percent] is not too bad...I know it sounds a bit crazy but the market has changed for that as well, you know, this time last year we might have been looking at one and a half or one and three quarters but it has completely changed and, you know, customers coming to us afresh

are always on about two and a half [percent] or some are up at threes or sometimes even up at fours. So it is just a different world now I am afraid on that one, but you know certainly go back to Robert [Clark] and Alasdair [Hillis] and Ross [Anderson] and say is this absolutely the best you can do, there is no harm in asking.”

375. Up until this point in the call, the discussion had been between Mr Munro and Mr Fordyce. At this point, Mr Fordyce handed over to Dr Perks and the rest of the conversation continued between Dr Perks and Mr Munro.
376. Dr Perks returned to the point which Mr Fordyce had initially raised about the rate of the new LIBOR-referenced swap, saying that it was “a bit confusing from our end”. He referred to it as “one of the options”. He said that he appreciated that there are “fees in there for the Bank and things”, but it seemed like a “big anomaly” that Base Rate was 0.5% and yet under the new swap the Partnership would be paying 7% and nearly 8% once its lending margin was included. There followed exchanges in which Mr Munro reiterated, a number of times, the explanations he had provided to Mr Fordyce.
377. Mr Munro again explained the two reasons why the rate for the new swap was significantly higher than 0.5%. First, the Partnership had the 2007 swap in place at 5.60%, and “if you were walking away...or selling the business there would be fees to pay so we have to build that back into it if you like”. Dr Perks said “yep”. Secondly, the market was predicting that LIBOR would rise in the near and medium-term future. He again used the word “blend” to indicate what was happening. In response to Mr Munro’s second point, Dr Perks said that “there’s no way to tell what the rates are going to be” and Mr Munro said that “that is just the market’s prediction it is not my prediction”. Mr Munro contrasted the current rate with the cost of a 5-year fixed rate, which was something like 4.2%. Dr Perks said that this was “still a long way away from 7.5”. Mr Munro then reminded him of the 2% lending margin. When asked about where the rate of 4.5% had come from (Mr Munro had actually referred to 4.2%), Mr Munro said:

“It is basically the market’s expectation of where interest rates are going to go because they have obviously fallen so quickly, there is now this expectation that interest is going to rise very quickly and actually they are going to overshoot where they were previously...”

378. Dr Perks said that he appreciated this but said that it appeared to him that the result was that the customer got a high rate when rates were high, but then when rates were low the Bank was “adding on a big fee”. Mr Munro corrected Dr Perks about this:

“It is not that RBS add on the big fee, you know, it’s a market price, if you phoned HBOS or Clydesdale and said what is your five year price and they were charging a two percent margin, you would still be getting the six point two.”

379. Dr Perks asked again where the other four percent came from, and Mr Munro explained again that it came from the market’s expectation of the future direction of interest rates. The conversation continued in this vein. Dr Perks then said that this appeared to mean that the customer never got “access to the discount”, which was a reference to the low current base rate. Mr Munro explained that the only way to do that would be for the

Partnership to “rip your old deal and start afresh”, by which, as he clarified, he meant cancelling the 2007 swap and then remaining unhedged.

380. This led to a discussion of break costs. This arose from Dr Perks saying that the “answer” was for him to pay current Libor plus 2%, for a total of 2.65%. Mr Munro said that “obviously you have got an existing deal where you have agreed to pay us five point six ... you want out of that deal, so we had to and work out what it is”. He was then asked about how break costs were calculated. For ease of explanation, Mr Munro took a figure of £ 2 million (rather than the £ 1.9 and £ 2.1 million figures previously discussed), and gave an explanation including how this would take into account (or “pass along”) the market’s prediction that interest rates would rise:

“Ok, two million, where you agreed to pay us five point six percent for another three years, ok. Now we have to say well, what is the three year equivalent of that at the current price, so let’s just say for the sake of argument three percent, so we take the difference, five point six minus three so you get two percent or two point six percent and you do two million times the two point six percent and then you times that by three years because that is the three years in effect that you owe us, so that comes to about a hundred and fifty grand and that is the break cost.

So we don’t go to the half [percent] because in your scenario we...you know, if a bank was not passing this along we would go to half, so we say five point six minus a half so you would actually get a break cost of five point one percent for three years which on two million would be, sorry five percent of two million...hundred grand so we times that by three, three hundred grand. So, you know, where you were saying, oh you don’t pass it along, half a percent, if we passed that along the half a percent now we would be charging you a three hundred thousand pound break cost but what we are saying is we think interest is going to go back up over three years, so we think a fairer measure of the break cost is to take that into account and we get a break cost of one hundred and fifty grand.”

381. Dr Perks then returned to the issue of what he would pay at that point if he simply wanted £2 million of lending on a variable rate, and Mr Munro responded that, based on the current rate of LIBOR and a margin of 2%, the answer was 2.67%. Dr Perks noted that “from our point of view 2.67 is a long way from 7.5” and Mr Munro responded: “I agree, but to get to that two point seven you would have to pay me a hundred and fifty grand on top of your loan because that is what you [have] got on an existing deal at five point six...” He then described the break cost figure as being between £ 150,000 and £ 175,000 depending on interest rates, which change from day to day.

382. Dr Perks then asked whether the Partnership would “need to hedge there or not”. Mr Munro said: no. He was then asked: “Do you hedge a variable rate, you don’t”. Mr Munro responded:

“Erm no, if want to go variable you can do, now I understand you don’t have to. You would have to go and speak again to Ross, Robert and Alastair to see if they are happy with that because obviously they would

have to weigh up the risk let's say interest rates shot up. I am not saying they will but saying they shot up to 7 percent so that means you are paying 9 and can us as a Bank be happy that you can afford that".

383. Dr Perks said that the Bank was happy that they could afford 7.5%, but that he was happy that they could afford 2.6%. He said that the two numbers were not even close, and that this was frustrating from a consumer's point of view. Having been told again that the £ 150,000 break cost arose because of the prior agreement, Dr Perks then complained that the Partnership had not wanted to enter the 2007 swap in the first place, prompting the following responses from KM:

Perks: We did not want to lock it in. We have never locked it in before. We have always been variable and it was only 12 months ago when you came to us and made us lock it in that we locked it in.

Munro: Sure.

Perks: I mean it was not our choice, [we] got forced to do it, and we had to do it and then, you know, six to twelve months later we're stuck with this interest rate we didn't want...

Munro: Sure.

Perks: So we kind of feel like we are on the receiving end.

Munro: I can understand. Erm, obviously I was not personally involved so I don't know why the Bank asked you to do that, you know it may have been the point that if you didn't do that they would not have lent you the money. I don't know...So you know the customers have to weigh up the fact that they...they were lent the money on certain conditions like any...any loan from a bank it has conditions attached to it, one of them was that they wanted to see fixed interest costs because at that point nobody thought interest rates would fall to half [a percent], they were more concerned about them going higher, and therefore we had to look at, you know, ability to service that debt that we were lending you the money.

Perks: Well that was the advice at the time.

Munro: Sure. And, you know, lots of customers did it, it's, you know, not unusual, sure people are not thinking it wasn't a shrewd move but you know, as you said no-one predicted rates to fall as heavily as they did.

384. Following this discussion, Dr Perks said that "it means that option one is the best option for us out of the two options". The conversation was as follows:

Perks: Okay, well at this stage it means that option one is the best option for us out of the two options.

Munro: I think option one of the two there is the best, you then have to sit down and say if I wanted to pay this break cost and add it into the loan, now I would say that the caveat around that is that the guys would then have to give you extra facilities which may or may not be possible and then you've got variable basis so you would have to throw that back at them. I would have to say speaking to the guys I don't think they would be too keen to do it, but...

Perks: Clearly they're not, clearly they're not.

Munro: Ok.

Perks: So I think option one is about it.

Munro: I would say you know, looking at it on a ... I can't give you advice but looking on a balanced view versus we're going to the numbers there, it kinds of stacks up. But you have to sit down and you know make sure you are happy with that.

Perks: I don't know about us being happy with it, we are not happy with it.

Munro: OK, no, I understand. Erm no happy is the wrong word.

Perks: [unclear] options the way we look at it.

Munro: Yeah, yeah that's ... I hear what you are saying.

Perks: Alright, I appreciate your time.

Munro: Alright, no worries sir.

Perks: There's a few things for us ... OK, well I will have a chat to Ian now and look at option 1 and get back to you shortly.

Munro: Ok

Perks: Yeah, ok, well I will have a chat to Ian now and look at option one and get back to you shortly.

Munro: Alright, no worries.

385. On 6 July 2009, Mr Fordyce emailed Mr Munro to inform him that the paperwork for the new loan had been sent to Robert Clark. He asked for Mr Munro to "let me know what "option 1" rates are currently available so that we can look at now fixing a new rate for the entire loan amount".
386. On the following morning, Mr Munro responded attaching details "as an example" of a new swap (referenced to 1-month LIBOR) for 5 years starting from 7 July 2009. The

rate was 5.5% excluding the lending margin but this “does involve paying break costs on existing deal”. He also said: “no fees”.

387. On the morning of 9 July 2009, Mr Fordyce confirmed to Mr Clark and Mr Munro respectively that he had received instructions from Dr Perks to proceed with the new loan and the new swap for the Partnership. He said that the rate “looks like 5.5% & margin”. Later that morning (at 11:07) Mr Fordyce had the first of two calls that day with David Tweedie, who was a colleague of Mr Munro. Mr Tweedie said that: “what we are going to look to do is cancel one deal and put a new deal in place”, which Mr Fordyce confirmed. Mr Tweedie ran through the details, as he understood them at that stage with Mr Fordyce. These included that the current deal was to be cancelled, and there would now be a new “Libor swap”, the initial notional amount of which would be £2.194 million (which Mr Fordyce confirmed). The 2009 swap was executed in a later telephone call later that day, after a discussion about a capital repayment holiday which led to the rate for the new swap reducing to 5.40%. Subsequently, Mr Fordyce signed a post-transaction acknowledgment for the 2009 swap which summarised its terms; and a Confirmation for the 2009 swap. The 2009 Loan was drawn down five days later, on 14 July 2009.

D3: Failure to explain key risks - discussion

388. The legal principles discussed in Section C3 and C4, concerning the 2007 swap, are applicable to the equivalent claim concerning the 2009 swap. The parties’ arguments are summarised in Section D1 above. I can therefore deal with the claim relatively briefly.
389. I consider that there is no substance to the case that the risks relied upon by the Claimants were not sufficiently explained. Furthermore, even if a fuller explanation had been given, this would have made no difference to Dr Perks’ decision to conclude the 2009 swap.
390. The first aspect of the Claimants’ case is that the very substantial break costs for breaking the 2007 swap were not explained. This is not borne out by the facts. Mr Clark’s e-mail of 30 March stated that the new arrangement would avoid the breakage costs having to be paid up front as they would be blended in with the new LIBOR hedge. This was evidently a point that had previously been discussed at the meeting held in the previous week. It is correct that no detailed calculation of the exact amount of the break costs was provided by the Bank. However, the principles of calculation had been broadly explained in the materials provided prior to the conclusion of the 2007 swap, as previously discussed. Moreover, the topic of break costs and their calculation was then the subject of specific discussion during the 12 June 2009 call, as described above. During that call, Mr Munro gave figures of £ 150,000 and up to £ 175,000, together with an explanation as to how the calculation was done. Subsequent to the call, in his e-mail of 7 July 2009, Mr Munro said that the rate of 5.5% did not include lending margin “but does involve paying break costs on existing deal”. Accordingly, both Dr Perks and Mr Fordyce were told, and in my view would have understood, that break costs for the 2007 swap were being blended into the new rate, and also the approximate size of those costs. There is no reason to think that they would have taken a different decision if given further detail as to the calculation or size of the break costs. Indeed, had they been interested in the precise calculation, following the discussion on 12 June, they could have asked for one.

391. A related aspect of this case, at least in closing, was an argument that there was a failure to explain that the new rate would “incorporate a fee (whether £ 22,000 or other AV)”. This aspect of the case did not feature in the Claimants’ written opening, which focused on the break costs rather than a different fee. However, Mr Clark’s e-mail of 30 March 2009 did clearly state that there would be a fee of £ 22,000 that would be chargeable and would be added to the loan. This appears to have been an arrangement fee for the new loan, and there is nothing to suggest that it was a fee for the swap or indeed that any fee was charged for the swap. Dr Perks and Mr Fordyce were therefore aware of this fee, and were content with it: indeed there was an immediate acceptance, on 31 March 2009, of the terms that the Bank had proposed.
392. There was no clear evidence that there was any “other AV”. It is possibly the case (as it was in 2007) that the Bank had a (relatively small) “turn” on the rate charged to the Partnership when compared to the rate available to the Bank in the market. I have previously rejected the argument that this was in the nature of a “fee”. Even assuming that there was a similar “turn” in case of the 2009 swap, and Dr Perks had been specifically told about it, it would have made no difference to his decision, for reasons explained in more detail below. Indeed, during the call, Dr Perks said: “I appreciate that there’s ... fees in there for the Bank and things”. In context, Dr Perks may have been thinking of the break costs, which were being rolled into the rate, but his statement was quite general and reflected his thinking that, one way or another, the Bank would be making some money from the proposed swap.
393. The second aspect of the case was the failure to explain the lengthening of the period for which the Partnership was committed. The 2007 swap had, by June 2009, just under 3 ½ years to run. The new swap would be for 5 years beginning in June/ July 2009, thereby lengthening the commitment period. However, this was an obvious point that must have been understood by Dr Perks and Mr Fordyce. Indeed, it was a point made very clearly by Mr Munro in his e-mail of 10 June: “Obviously the new deal slightly cheaper but it does lock you in for 5 years whereas your current deal would expire in 2012”. I do not accept that the Claimants needed a spreadsheet in order to appreciate this point, or indeed the cost of the existing swap: the latter was in any event summarised in Mr Munro’s e-mail of 10 June. Furthermore, during the phone conversation on 12 June, Mr Munro referred to the fact that the new swap was not more expensive at that time, but “I guess the risk is you are slightly tied in for slightly longer”.
394. The argument that Dr Perks would have acted differently if given further information about any of these matters had, in my view, an air of unreality about it and I reject it. Dr Perks was cross-examined on the topic of causation or inducement on Day 5 of the trial. He accepted that he was aware that there was a condition precedent in the 2009 loan that he needed to enter into an interest rate hedging product acceptable to the Bank. He said that the 2009 swap was “forced” upon him, that he didn’t want it. He said that he had no choice but to agree it. He even said during this part of the evidence, unconvincingly in my view, that he did not know what a swap was. He said that Mr Fordyce had told him that the Bank was “just going to ram this through, there is nothing you can do”. He was asked about the statements of Mr Munro that he could not advise, and Dr Perks said:
- “He advised us anyway. It wasn’t a matter of advice, they rammed this through, they gave me no choice. It wasn’t a matter of advice. The bank said: do this or we will make you bankrupt. That was their gun. They

said: you are insolvent, do as you are told, do as you're told. They shouted at me: you are insolvent, do as you are told".

395. He said that at this stage he did not think that the Bank was acting in his best interests. It was put to him that he would hardly be taking advice from the Bank, and his response was that he was just taking abuse from the Bank. When asked about the 12 June call, he said that the two options had been discussed between himself and Mr Fordyce prior to the call, and that Mr Fordyce's statement that option one was "looking really like the most likely" would have been agreed prior to the call. He said that "you have got me over a barrel because I am insolvent".
396. Towards the end of this line of questions, Dr Perks said that as far as he was concerned, both option 1 and option 2 were still on the table in the call on 12 June. He did not at that stage know that others within the Bank had in effect ruled out option 2. He said that at this time he did not appreciate that the Bank strongly preferred option 1. He said that he knew that the options were different, that he understood it "more or less" but he was still naïve back then and thinking that the Bank was helping them. He said that he "did select option 1, so I must have understood it enough to pick one of the options, yes".
397. Although this evidence of Dr Perks contained a certain amount of hyperbole and exaggeration, it was in my view essentially true that Dr Perks and Mr Fordyce considered that they had no practical alternative but to accept one or other of the two options which were proposed by Mr Munro. There was a possible third option, which was briefly discussed, in two passages, towards the end of the 12 June phone call; namely to break the swap, add the breakage costs to the new loan, and for the Partnership to be unhedged and to pay a variable rate. Mr Munro had told Dr Perks that "if want to go variable you can do", but said that Dr Perks would need to speak again to Ross, Robert and Alasdair. Later on, Mr Munro said that he thought that "the guys" might or would not be very keen on giving extra facilities and (as I read the transcript) the Partnership paying a variable rate without any hedging. Dr Perks said: "Clearly they're not, clearly they're not".
398. Accordingly, Dr Perks' practical choice was between options 1 and 2. He clearly discussed those possibilities with Mr Fordyce and decided that option 1 was preferable, not appreciating at that stage that if he had asked for option 2 (simply keeping the existing swap in place) the Bank would not have agreed. The reason that Dr Perks knew that he had to choose one of the two options was that he needed the restructured loan in order to attempt to move the business forward and give it a chance of a successful future. The position was therefore similar in many ways to 2007: Dr Perks wanted the new loan and the restructured arrangements and this meant that he had to choose between options 1 and 2. He made that choice, and would not have acted any differently if given any further detail on the risks which were allegedly not explained to him.
399. Accordingly, this aspect of the Claimants' case fails.

D4: Failure to advise

400. The Claimants' case was based, as with its 2007 case, upon both the common law and COBS 9.

401. I deal first with the common law claim, where the relevant legal principles are discussed in Section C5 above. The ultimate question is whether the particular facts of the transaction, taken as a whole and viewed objectively, show that the bank assumed a responsibility to advise the customer as to the suitability of the transaction. Many of the considerations which led me to conclude that there was no advisory responsibility in 2007 are equally applicable here. In particular, broadly the same relevant factors as negated any duty of care in 2007 (see paragraphs 288 - 294 above) lead to the same conclusion in the present case.
402. The argument which gives pause for further thought, however, is my view that, during the 12 June telephone call, Mr Munro gave Dr Perks and Mr Fordyce a distinct steer towards option 1. This had no equivalence with anything that Ms Fullerton had done in 2007.
403. Prior to the call, Mr Munro had not really given a significant steer in my view. His e-mail of 9 June had put forward the two options in a neutral fashion. He had then been asked for a recommendation, and had declined to give one, making it clear that he could not advise. He had added that most customers tended to have their debt equal to their interest rate management and that it was unusual to have Libor debt and base rate hedging. There is no suggestion or evidence that this statement, as to the approach of most customers, was misleading. Whilst that statement might possibly be regarded as something of a steer, I take the view that it can properly be viewed as simply the giving of information, probably in response to a question which he had been asked by Mr Fordyce on the call which had taken place on the previous night. Mr Fordyce certainly seems to have been interested in the choices made by other customers, as reflected in the question which he asked in his 10 June e-mail.
404. However, I agree with Mr Macpherson's argument that, during the call on 12 June, Mr Munro gave a much clearer steer towards option 1. This is not surprising, because Mr Munro's colleagues in risk management were not interested in option 2, and Mr Munro had then told them: "I am working towards that" (in other words option 1). During the call itself, Mr Munro said that the guys in the "core bank", including Ross Anderson, were "kind of thinking that option one is better", albeit that he then added "I mean I have to be careful because I can't advise you". He then said that option 1 "makes sense then looking at it, it stacks up on a numbers basis from a costs point of view". Towards the end of the call, after Dr Perks had said that at that stage "it means that option one is the best option for us out of the two options", Mr Munro said: "I think option one of the two there is best". He then said that he could not give them advice, but "looking on a balanced view versus we're going to the numbers there, it kind of stacks up". It seems to me that all of this was a steer, gently but reasonably firmly, towards option 1.
405. However, although this steer was given, it was accompanied by clear statements – both in the e-mail responding to the request for a recommendation, and on a number of occasions during the call itself – that Mr Munro could not and was not giving advice. This cannot in my view be disregarded when assessing whether any "advice" given by Mr Munro was such as to attract a duty of care on its part. Indeed, I consider it important in that context. So too Mr Fordyce's acknowledgment in the call that Mr Munro could not give advice. Accordingly, I conclude that the steer that was given in the 12 June call does not result in a different result, as far as the existence of an advisory duty at common law is concerned, to the conclusion that I have reached in relation to 2007.

406. However, the question of whether COBS 9 was engaged raises different questions, and is not determined by the absence of an advisory duty at common law. (I note in passing that COBS 9 has generally not been considered in the numerous swaps cases, because the transactions have been with companies who cannot claim under FSMA section 138D and COBS). The essential question is whether a personal recommendation was made. That question, in the context of COBS 9, was considered by Andrew Hochhauser QC in his thorough and valuable judgment in *Parmar*.

407. In paragraph [114], he said that in considering COBS 9, the court is concerned with substance over form, quoting Cooke J in *Basma Al Salaiman v Credit Suisse Securities (Europe) Limited, Plurami Capital LLP* [2013] EWHC 400 (Comm) para [19]:

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

408. In relation to the question of whether a recommendation or advice had been given, the Deputy Judge said:

“[118] Authorities such as *Rubinstein v HSBC* [2011] EWHC 2304 (QB) per HHJ Havelock-Allen QC, sitting as a Deputy Judge of the High Court, at [81], and Teare J in the *Zaki* case at [83]-[85], make it clear that there has to be 'a value judgment' [*Rubenstein*], 'an element of opinion' or 'some advice on the merits' [*Zaki*] on the part of the Bank official to constitute advice being given. The test is an objective one looking at the evidence in the round. One has to ask the question 'Has there been advice or simply the giving of information?' (see *Rubenstein* at [83] and *Thornbridge* at [38]).”

409. The recent judgment of the Court of Appeal in *Adams v Options UK Personal Pension LLP* [2021] EWCA Civ 474, para [75], in a different context, is to similar effect:

“It is plainly the case that the simple giving of information without any comment will not normally amount to “advice”. On the other hand, I agree with Judge Havelock-Allen QC that the provision of information which “is itself the product of a process of selection involving a value judgment so that the information will tend to influence the decision of the recipient” is capable of constituting “advice”. I also agree with Henderson J that “any element of comparison or evaluation or persuasion is likely to cross the dividing line”. I would add that “advice on the merits” need not include or be accompanied by information about the relevant transaction. A communication to the effect that the recipient ought, say, to buy a specific investment can amount to “advice on the merits” without elaboration on the features or advantages of the investment. ”

410. If a recommendation was in fact given, then contractual provisions which seek to negate the existence of an advisory relationship will not be effective in the context of a claim for breach of COBS: see *Parmar* paragraphs [133] – [134].
411. I think that the statements made in the 12 June 2009 call cross the dividing line between the giving of information and the giving of advice or making a recommendation. In *Parmar*, the Deputy Judge considered that Barclays had not steered the customer to a particular product: see paragraph 120 (8). For reasons set out above, I consider that the position is different in the present case. Mr Sinclair accepted that if, as I consider to be the case, COBS 9 was applicable, the Bank had not complied with its obligations.
412. However, for similar reasons to those which I have set out elsewhere in the context of inducement and causation, I consider that any breach of COBS 9 did not result in the Partnership entering into a swap that Dr Perks would not otherwise have concluded. The position in 2009 was that the Partnership was already bound by the 2007 swap. The business was technically insolvent, but had some prospect of recovery. Dr Perks plainly wanted the restructuring which the Bank was willing to give, and which offered some hope for the future. There is nothing in the evidence which suggested to me that a swap transaction was inherently unsuitable for the Partnership, particularly as part of a package aimed at giving additional breathing space to the business with the prospect of improved performance and recovery. Moreover, when considering that package, it is relevant to note that whilst the 2009 swap had the effect of lengthening the period for which the Partnership was committed, in one sense it had no immediate impact; because the Partnership was already bound by a swap which had over 3 years to run, and the rates payable under that swap were higher than the 2009 swap. I also bear in mind the fact that (as the 12 June conversation with Mr Munro indicates) the market was not anticipating that interest rates would stay at the very low level which they had reached by July 2009. Accordingly, there was the future prospect of interest rate rises, and the swap would provide protection against these.
413. The evidence of Dr Perks, summarised above, indicates that he (and Mr Fordyce) considered that if he wanted the Bank's continued support, which Dr Perks did, he would have to enter into a swap which provided protection against future interest rate rises. There would be a cost for that swap, but it was no greater than the cost of the swap to which the Partnership was already committed, and would remain committed for over 3 years into the future. Although there was a degree of hyperbole in Dr Perks' evidence summarised above, I think that it was basically true that Dr Perks considered that his only choices, if he wanted the Bank's further support, were between the two options which Mr Munro had presented. Since he wanted that support, he had to choose and, after discussion with Mr Fordyce, option one seemed to be the best choice. Dr Perks and Mr Fordyce had reached that conclusion before the phone call on 12 June, and indeed communicated the fact that this was their view before Mr Munro started to give his steer. The steer that was given in the call therefore had no material impact on Dr Perks' decision to conclude the 2009 swap. If there had been no steer, and if there had been compliance with COBS 9, the result would have been same.
414. Accordingly, although I consider that COBS 9 is applicable to a claim by the Partnership, and although there was a breach of COBS 9 by the Bank, the claim fails because the Partnership would have concluded the 2009 swap even if there had been no breach of COBS 9.

415. Furthermore, although I am not considering quantum at this stage, I found it difficult to see how the Claimants' complaints about the 2009 swap could lead to a significant recovery in terms of quantum. If the 2009 swap had never been concluded, and the 2007 swap had remained in place, then the business would still have encountered the difficulties which, later in 2009, led to the transfer to GRG described in Section E below. It would also have faced the difficulties which ultimately led to administration. Accordingly, as indicated elsewhere in this judgment, it seems to me that the Claimants' case, if it is to succeed at all, must realistically be based on the 2007 swap rather than subsequent events.

Section E: The claim in conspiracy

E1: Factual background and findings

The decision to transfer to GRG

416. On 28 October 2009, the Worst Cases Committee recommended that the connection be transferred to GRG. This part of RBS was known at the time as BRG or Business Restructuring Group, and was later renamed Global Restructuring Group or GRG.
417. The summary of the recommendation for transfer was authored by Mr Hillis (who was a director in the Bank's Portfolio Management Unit and the secondary relationship manager) and Mr Stuart Frame (who was at that time the primary relationship manager):

A re-structure was undertaken in March of this year which involved terming out o/d via EFG. It was intended that the interest only period to 31/10 would be utilised to repay some of the capital o/s in the firm.

Unfortunately, MI [management information] indicates that performance has been below levels projected and the company will not be able to service its debt if improvements are not made. Clayton has informed us of the following further action:-

- 1) Moved his family to a smaller house and rented his own.
- 2) Handed his wife's car back to further reduce his drawings.
- 3) Plans to sell 1 Scottish practice by end of 2009 and 1 in Newcastle by March, realising £100k each.
- 4) 3rd Chiro will be added to each practice as this is the more profitable than with 2.
- 5) Overall, Clayton plans to increase sales by 5% and decrease overheads by the same amount.

Projections for 12 months to 31/08/10 (not FYE) have been received and indicate improvement in performance by GCL, although NCL projected to struggle.

Given the level of uncertainty surrounding the sales/collections figures, the ability of Clayton to sell the practices ear-marked and the general economic climate, we feel that this connection would benefit from a transfer to GRG at this juncture.

418. Mr Hillis's email to Mr Frame on that day also referred to the fact that there was a £ 70,000 "bullet payment" due on 31 October 2009, and that "they are not in a position to pay". This £ 70,000 was a repayment of the loan made to the Partnership in October 2008 in order to pay for the cost of the dry rot problem. It was clear on the evidence that the Partnership was indeed unable to repay this loan, which was designated by the Bank internally as B19. The money was not repaid on the due date: a fact which belied Dr Perks' later assertions to the effect that he had never defaulted in any payment. For example, in an e-mail to Mr McCall on 26 November 2009, he said that: "I'm profitable and have and will meet every payment. I have assets". In his email of 7 May 2010 he said that: "We've never missed a payment and never will ..."
419. A default in repayment of a banking facility is, in my view, obviously a serious matter and will often evidence (and did evidence in this case) a company which is unable to pay its debts as they fall due and is therefore technically insolvent. Dr Perks in his evidence said that the £ 70,000 was "nothing", by which he meant in context that it was nothing compared to the amount of the money drained from the business by the swap. He did not, however, suggest that the company was in a position to meet this obligation, or indeed that it did so.
420. The above summary referred to the company not being able to service its debt if improvements were not made. The evidence was clear that capital repayments of loan facilities were due to be made at the end of 2009 and the beginning of 2010 under the agreements made as part of the 2009 restructuring, and that the business was not in a position to meet these obligations. In an e-mail sent by Mr McCall to Gregor Goodwin (whose involvement as an independent consultant was being considered by RBS) on 23 November 2009, Mr McCall said that the annual capital and interest servicing requirement once repayments kick in was £ 494,000. He said that at that time the business was not generating enough cash to start making these repayments, and therefore a further restructure would be required "once the diligence had been completed".
421. Dr Perks in his evidence suggested that it was "easy" to deal with the repayments. He meant by this, I think, that it would have been easy to make the repayments if matters had taken a different course from the start in terms of the existence of the swaps. He acknowledged, however, that there was no ready cash available to meet the repayment obligations. It is clear that contractual repayment under the loans was far from easy in late 2009/ early 2010, and that in practical terms it was impossible because the businesses were not performing well, Dr Perks did not have the cash available, and sales of assets would not be easily achieved, certainly in a short time-frame. In that connection, the 2008 financial crash had had an adverse impact on property prices, as well as the willingness of banks to lend to people such as individual chiropractors who might be looking to raise funds in order to purchase a practice.
422. None of the members of the "Worst Cases Committee", which made the recommendation for a transfer to GRG, is alleged to have been party to the alleged

conspiracy. The recommendation for a GRG transfer was agreed on 28 October 2009, with the Bank requiring an “IBR” (an independent business review).

423. I was referred by RBS to a number of internal Bank documents which described the reasons for the transfer to GRG. For example, Mr McCall’s email to Gregor Goodwin identified two key reasons: the inability of the business to generate enough cash to start making the repayments that were due, and the potential shortfall in the security held by RBS. Another internal document, headed GRG Internal Strategy and Review which appears to have been prepared in December 2009, also identified these two reasons. It stated that the two operating companies were profitable, but significantly behind the level that would allow amortisation over an acceptable time period. That document also identified as a reason the high level of directors’ drawings, although it noted that a large portion of those drawings was used to cover the shortfall between the debt service obligations of the Partnership and the rent received from GCL. Other internal documents, such as a note that appears to have been prepared by Mr McCall in connection with a meeting with Dr Perks in November 2009, tell a similar story. I accept that, as RBS submitted, the two core reasons for the transfer to GRG were: (i) the inability of the business to generate sufficient turnover and profit to repay its debt over an acceptable (or indeed any) time frame; and (ii) a concern that the Bank had a security shortfall in respect of both its lending to the Companies and the Partnership. The latter was on the assumption that, as appeared to the Bank to be likely, the value of the properties owned by the Partnership and charged to the Bank had fallen significantly.
424. I also accept RBS’s submission that there is no evidence whatsoever to support the allegation made by the Claimants that the transfer of the management of the Perks Business to GRG was driven by an ulterior motive on the part of RBS, or was part of an internal conspiracy within RBS, to profit from and at the expense of the Perks Business. There were in my view genuine and indeed compelling business reasons, described above, for the transfer to GRG. Any conspiracy would necessarily have to involve a very large number of individuals at the Bank, including the members of the “Worst Cases Committee” who actually made the transfer recommendation. There is no evidence of any such involvement. I am also sure that the two individuals who worked for GRG and who gave evidence at trial, Mr McCall and Mr Graham, acted with integrity throughout in relation to their dealings with Dr Perks and his business.
425. To my mind, it is obvious that with an actual default in the repayment obligation for £ 70,000, and with inevitable defaults in other loan facilities looming, something needed to be done. Dr Perks could not sensibly expect that RBS would simply allow things to continue as they were, with the Bank in effect forgiving the default, continuing to lend, and taking no steps to protect or improve its position. The options were limited. One option was to carry out a restructuring. If that were to happen in relation to what was by this stage clearly a struggling business, then the natural part of RBS for consideration of that possibility was GRG. Another option was an insolvency process. Indeed, at one point in his cross-examination, in the context of the restructuring arrangements which were in due course agreed, Mr Macpherson put to Mr Graham that this was the only realistic alternative option. Mr Graham accepted that this was an option, but one which RBS was looking to avoid. The only other option which occurred to Mr Graham was the possibility that there would be a managed run-down of the business, with the participation of its principal (Dr Perks) during the period of run-down. RBS had in the past sometimes agreed to arrangements to this effect. However, if this were the route to

be taken, it would again have been something which would have involved GRG, or at least there could be no criticism of a decision to refer a case to GRG for that purpose. In fact, as appears from the course of events described below, both RBS and Dr Perks wanted to see if the business could continue.

November- December 2009

426. Upon the transfer of the relationship management of the Perks business to GRG, the relationship was assigned to David McCall who was then responsible for managing the connection on a day to day basis. Dr Perks was informed of the transfer by Alisdair Hillis on 11 November 2009. Mr Hillis explained that “due to the lack of evidence of a sufficient improvement in turnover since we re-structured your facilities earlier this year”, his colleagues in credit management had decided that he would be better served by GRG. He said that they had many more tools in their box, and had been very successful with a number of customers in returning to the “Relationship Director”. Dr Perks did not assert that there had been a significant improvement in turnover, or that a transfer was not warranted. He assured Mr Hillis that he was “sorting this”.
427. On 9 December 2009, Mr McCall wrote a paper in which he summarised developments to date, and requested that RBS’s credit group extend facilities to 15 March 2010 in order to allow for diligence to be completed and the way forward agreed. The paper identified various problems, but said that the positive news was that the business was profitable and cash generative. It should be able to service interest only, but the primary concern was that it was not generating enough cash “to repay our exposure over a standard timeframe”. It described how the customer had proven to be very difficult since handover. At the initial meeting, Dr Perks had accepted RBS’s concerns and agreed the way forward, only for 3 days later to “dispute all of the agreed points and send a number of unprofessional e-mails”. The two e-mails that Dr Perks sent on 26 November 2009 were angry and, in my view, abusive and clearly unprofessional.
428. In his evidence, Mr McCall described the rapid shift in the tone of communications, and the deterioration of the relationship, which occurred almost immediately after the handover meeting. The tone and nature of these e-mails, which to some extent involved a personal attack on Mr McCall, was (as Mr McCall said) “very unusual, in the sense that I had few, if any, customers who ever communicated with me in this way”. Nevertheless, Mr McCall was keen to avoid an unproductive and unmanageable relationship, and to make progress towards a mutually beneficial outcome. In his view, the only alternative to progress would be to ask for the lending to be repaid in full, and this would usually result in a poorer outcome for both RBS and the customer. In the light of his concerns as to possible unmanageability, Mr McCall decided to involve Neil Graham, who was the regional director of BRG Scotland.
429. Amongst Dr Perks’ complaints was the number of people at RBS that he had been required to deal with. He also said that he had been forced into the “hedge loan”:

“Sign here ... it is just to protect you from any rise in interest rates and they are highly likely in the near future.

NO MENTION THAT IF RATES FELL WE COULDN’T
SELL THE PROPERTIES”

430. This was by no means the first time that Dr Perks had complained about the “Hedged Loan facility”. For example, on 23 November 2009, he had told Mr. McCall and Mr Hillis in an e-mail:

“We can show clearly that it was misrepresented to us when we were forced to sign up to it. Both Ian and I were present and Ian takes detailed notes of all meetings. (I doubt the RBS can even find who attended this meeting).”

431. Although Dr Perks proposed a number of “solutions”, these did not (at least from the Bank’s perspective) solve the fundamental problems of over-gearing and lack of cashflow which had prompted the transfer to GRG. For example, the main “solution” offered in Dr Perks’ email of 23 November 2009 was for him to buy a property that was currently owned by the Partnership. The solution, as proposed by Dr Perks, would involve the Partnership’s level of debt to the Bank dropping by £600,000 immediately. There would not need to be any break cost payment in respect of the 2009 swap because part of it could be moved to GCL. Dr Perks would pay the £600,000 using a 30-year mortgage, on which he would pay interest of (he suggested) 4% “which again drops our costs considerably” and which “takes pressure out of the system for both parties”.
432. RBS submitted that this “solution” was misconceived and/or did nothing to solve the underlying situation. In particular, Dr Perks was proposing that the 30-year mortgage would be provided by RBS itself. Thus, even if it were to be assumed that the Bank (or any bank) would be willing to offer a 100% debt mortgage over 30 years in the financial climate at that time (which I consider to be an unlikely assumption), the Bank’s exposure to the Perks business as a whole, including Dr Perks personally, would be unchanged. Furthermore, even if the Second swap could be partially novated to the Companies (thus avoiding the need for any break costs to be paid in cash), this would simply mean that the Companies became liable to pay the higher fixed rate thereunder on a portion of their debt. There would, accordingly, be no (certainly no material) change in the cashflow position overall.
433. On 2 December 2009, a meeting took place attended by Dr Perks, Mr Graham and Mr McCall. Relations at that meeting were reasonably cordial, in contrast to the e-mail communications which had preceded it. Certain next steps were decided upon. Mr McCall’s view at the time, which I consider to be his genuine view shared by Mr Graham, was encapsulated in the last paragraph of his e-mail to Dr Perks on 3 December 2009 following the meeting:

“I do not see this a being necessarily a difficult restructure and I am committed to working with you to try and arrive at a mutually acceptable solution. Yes, the process will have a cost attached, but if this results in a position where the Bank can support your business going forward, with a financial structure that is sustainable and acceptable to both parties, I believe this is the best way forward. However, I would stress that the dialogue needs to be productive and if you do not wish to proceed as outlined in our discussions, that is your decision and the bank will provide both GCL and you personally with a suitable timeframe to refinance your indebtedness to the Bank in full.”

434. On 4 December 2009, Mr McCall sent Dr Perks a four-step strategy, which included: (i) internal property diligence work; (ii) the involvement of Aileen Pringle as an independent business consultant; and (iii) the extension of the interest-only period on all loan facilities until 28 February 2010, by which time an appropriate restructure was to have been agreed. Dr Perks agreed to all aspects of this strategy, signing off as follows

“Very acceptable and great work. I will make sure I am in daily contact with Ian and staff to ensure these pay cuts commence early January. I will also aim to increase income. I will look at all options in terms of property or clinic sales.

My first aim is to keep the company intact and profitable as is. I do accept however that some sales may be necessary and I’m prepared to look at these options in the new year.”

The involvement of Aileen Pringle

435. Dr Perks’ response to Mr McCall’s 4 December e-mail contained his agreement to Ms Pringle becoming involved with the Perks business. On 2 December 2009, prior to Dr Perks’ agreement to her involvement, Mr McCall had sent Ms Pringle a lengthy email which set out the background, enclosed various financial documents, and identified what RBS required going forward. The e-mail evidences the desire of Mr McCall and RBS to seek an outcome beneficial both to RBS and Dr Perks’ business. In the opening paragraph, he said that since the business was profitable, “there is something to work with”. The e-mail is, as RBS submitted, irreconcilable with the allegation that Mr McCall was part of a conspiracy to extract profit from and destroy the Perks business. The main part of the e-mail was as follows:

“Summary of Key points;

1. 22 unit chain of chiropractor surgeries, 17 in Scotland and 5 in Newcastle. All 22 units are leased, 14 of which (all in Scotland) are leased from Clayton Perks (MD) & Leanne Kay (Clayton's wife), who own the 14 properties within a partnership.

2. We have both debt in the partnership (£2,264k plus swap exposure) and the trading company (£978k loans, £50k overdraft & c£80k asset finance). Whilst property values have fallen, the partnership debt is better secured and I think we could get out in full if needed. Company exposure is more risky, given outwith the government guarantee for £303k of the exposure, we are heavily reliant on the debenture cover, which I believe will be minimal in this market. Clayton Perks believes there is a value attached to each surgery, but clearly does not want to sell in this market, when values will be low.

3. The Bank restructured the facilities in Mar/Apr-09, providing a capital repayment holiday on all of the exposure. Repayments on the main 3 loans are scheduled to start in Dec/Jan/Feb (one loan starts each month) and the annual capital and interest

servicing requirement once repayments kick in is c£494k (assuming current base/libor rate). At the current time the business is not generating enough cash to start making these repayments and a further restructure will be required once the diligence has been completed. Combined with the potential security shortfall, this is the key issue why GRG has become involved in the case.

Remit

A. Satisfy yourself with the current financial position of the business and its viability. You will notice there are intercompany balances and directors loans, all of which you'll need to understand.

B. Establish a better management accounting reporting format going forward - I don't think what we get is particularly well laid out and we should be looking to improve this going forward. This is more a side issue but we should deal with. Happy to get your opinion on this once you've had a look.

C. Subject to viability, assist the directors in the production of a coherent plan for taking the business forward. There are a lot of potential options such as (i) degearing by selling property assets; (ii) selling surgeries & (iii) operational improvement. These are in no particular order - the key thing is that if the business is to go forward, the Bank needs to have a debt level and repayment profile that can be serviced over a reasonable timescale. This may mean that no degearing is required, but until you understand what cash the business can generate to service its obligations, we can do no more than guesstimate what the solution is. Clayton's solution is based on growing turnover and cutting costs (I don't necessarily buy this), but this is hard to deliver and you will need to take a view on this. There is a swap on the partnership debt, fixing the interest on £2,294k of debt at 5.4% plus margin (2%). As a result, any degearing options will need to be explored taking into account the effect on the swap.

D. The plan should include a fully integrated set of projections and narrative, and we can discuss potential funding options in due course.

E. Provide clarity on what the directors drawings are. Clayton has historically taken a lot of money out of the business (he funded a house build in Australia at one point). He has made a number of cuts, but I want visibility on exactly what is being taken out. I think it may be a combination of dividends and salary, and there are also directors loans outstanding (that are forecast to increase). This is to fund his living expenses (a lot of which will be sent back to Australia) but also has, to date, funded the shortfall between the debt service cost of the 14 properties in

his personal name and the amount of rent paid across by the surgeries towards this. Clearly we will need to agree an appropriate remuneration level going forward.

F. Can you check/confirm the formal leases in place for the partnership properties.

G. Prime Clayton on the pricing discussion (i.e. subject to viability and evidence of cash generation the Bank may support outwith standard parameters, but there will be a cost for such).

H. What value do you think the surgeries have (and therefore do we actually have better security cover under GCL/NCL)?

I. Review what property input we need - I can give you a copy of the existing valuations but do not want to waste time or money on full suite of further valuations if we don't think appropriate. We can then agree what work we get done once you have spent some time with the business.

Clayton seems a charismatic individual but thinks big and too far ahead. He needs to deal with the existing problems and worry about growth of the business much further down the line. As you will see from the e-mails he has sent me (attached), he is already suggesting solutions before we have understood where we are - he needs to slow down!

In terms of key personnel, Clayton in the key driver and decision maker. His in house accountant, Ian Fordyce, will be no more than a number cruncher.

There is quite a lot to take in so please give me a call after you have digested. I will forward you Clayton's contact details once I have confirmation from him. Clearly this is not set in stone and more issues may arise once you get involved”

436. It therefore appears, as indeed was the case, that Mr McCall was looking for Ms Pringle to assist in “taking the business forward”, adding that it was key, if the business was to go forward, for the Bank to have a debt level and repayment profile that could be serviced over a reasonable time period. Paragraph C under “Remit” also showed that Mr McCall had a number of options as to how matters might move forward, and had not settled on a particular course of action.

January 2010 meeting with Dr Perks

437. In the event, Ms Pringle did not have her first meeting with Dr Perks until 21 January 2010, with part of the reason for the delay being that Dr Perks returned to Australia in early December for approximately a month. In her evidence as to this meeting, which I accept, Ms Pringle described a pleasant meeting with both Dr Perks and Mr Fordyce. She liked both of them. Dr Perks was, however, very angry about an interest rate swap which the Partnership had in place. He did not express any objection to Ms Pringle’s

involvement. He acknowledged that “we needed to come up with a plan going forward (as the Bank had requested)” because there were loan repayments due or about to become due which the business was unable to meet. Dr Perks explained that his plan was to cut costs and increase turnover, and Ms Pringle agreed on this approach. It was agreed that they would work together on producing, over the next couple of months, a set of realistic budgets from which the business, and RBS, could work and assess the situation. The meeting did not (contrary to Dr Perks’ evidence) involve Ms Pringle telling Dr Perks that he was naïve and delusional: she did use those words much later (and in my view with justification) at a meeting in April 2012. I also accept her evidence that the strategy of cutting costs was something which Dr Perks had already identified and was intending to implement. It was not something forced upon him by Ms Pringle. Indeed, given that the turnover of the business had fallen, Ms Pringle said that her advice to any business in that situation would be to cut costs quickly and as far as possible.

March/ April 2010 extension of facilities and consideration of the way forward

438. In his earlier paper to GRG’s credit team in December 2009, Mr McCall had requested an extension of all existing facilities to 15 March 2010 in order to allow the way forward to be agreed. In a paper dated 23 March 2010, Mr McCall submitted a further application to the credit team requesting an extension of the date for review of the connection until 30 April 2010. (In due course, a further extension was needed).
439. In his 15 March 2010 application Mr McCall provided an update on the situation, which in my view was accurate:

“Aileen Pringle has been working with the company to review the financial position of the business and assist in the development of a mutually acceptable strategy going forward. Progress was slowed by the MD (Clayton Perks) going back to Australia for one month over the festive period. The main points of progress are as follows:

(1) Initial PMU [Portfolio Management Unit] view on the current valuations for the partnership property portfolio was that they could have fallen as much as 40%. Given this concern, we have instructed Speirs Gumley to carry out formal valuations, which are currently in course.

(2) Management accounts are up-to-date and Aileen has been working to agree finalised projections. The first set have been revised as we were of the view that they were too optimistic.

(3) Security review has been conducted with no significant issues raised.

(4) We informed Clayton Perks that we would not break the swap and absorb a portion of the breakage costs. He has acknowledged this and to date it has not been raised again.

Whilst ideally we would have liked to have agreed the way forward by now, we are not missing any opportunity on pricing as I do not believe the business will be in a position to pay increased margin or up front fees. The indication is that servicing anything more than interest will be incredibly tight and we will likely be reliant on an improvement in our underlying security asset values to reduce our shortfall over the medium term. We will of course seek to maximise any available debt reduction in the Company first, as this is where we are more exposed. With the central cost base being reasonably fixed, the business is heavily reliant on turnover to be viable, which at the current time is around the break even level (c£70k per week). To this end Aileen is exploring both further cost cutting opportunities and the ability to sell off a couple of surgeries to reduce the debt level.

The finalised deal will involve a PPA [Property Participation Agreement] over the partnership property portfolio and some element of deferred pricing within the company.”

440. In due course, Speirs Gumley produced valuations which showed a drop from 2007 levels, but not as great as 40%. The figure which Mr McCall then used was a value of £ 2,685,000.
441. At the end of April 2010, there was internal RBS correspondence involving Mr McCall and his colleagues as to the pricing and structure of a possible proposal to the Perks business. This began on 27 April 2010, with Mr McCall e-mailing Mr Graham saying: “just about arriving at deal time for GCL”. Before writing a credit application, and after a discussion with Ms Pringle, Mr McCall wanted to run a “pricing proposal and rationale past you before doing anything further”. He asked in particular for Mr Graham’s input on pricing. Mr McCall had it in mind to propose a further review of facilities at the end of the year, with no new money. This was to “allow for the trading business to try and demonstrate its viability”. It would also provide time for a newly re-designed website to take effect. Time would also mean that the swap breakage cost would reduce, and that there was a potential for property prices to increase.
442. The e-mail contains a number of detailed figures, upon which much attention was placed during cross-examination of the RBS witnesses. The figures on which Mr McCall was working would involve a “5 year nil base value PPA”. A “PPA” was a Property Participation Agreement, which essentially involved a percentage of property sales coming to the Bank and, at the end of the 5 year period, any unsold properties would be valued and RBS would be entitled to a percentage of that value. Mr. McCall was working on the basis that the relevant percentage would be 12.5%, and his modelling showed that this would produce a marginal IRR (Internal Rate of Return) to the Bank of 11.8%.
443. Mr Graham then sent this e-mail through to another colleague in GRG, Grahame Rae. He asked for his gut feel, and said that he would appreciate Mr Rae chatting to Mr McCall and then telling Mr Graham what he thought. Mr Rae then e-mailed giving what he described as a “5 min gut feel”. His e-mail opened with the statement that it was in “our interests to get the trading business more profitable than current break even to

allow for trading to repay the £ 1m debt rather than via asset sales”. One of his suggestions, with that aim in mind, was to “break the current swaps”. This would mean an increase in the firm debt, but debt service costs would reduce by approximately £ 100,000 per annum. He added that the revised structure would be a “win win for all given the extra profit in the trading entity can be swept by cash sweep to accelerate repayment and fact trading profitable helps with viability/gc argument”. The e-mail is one of many which negates the suggestion that RBS was aiming to destroy the business of Dr Perks.

444. Mr McCall responded to Mr Rae’s e-mail by stating that he liked some of Grahame’s points, and had done some more analysis. Mr McCall’s e-mail then contains some detailed figures, with a suggestion that Mr McCall’s gut feel was “to go for 14.5% PPA, with maximum reduction to 12.5% by negotiation”.
445. This internal discussion between individuals in GRG did not involve Ms Pringle. It was suggested on behalf of Dr Perks that RBS was looking to Ms Pringle to advise, or at least assist in advising, in appropriate pricing for the proposed transaction. I do not accept this suggestion. Both Mr McCall and Mr Graham were highly competent and financially numerate, and were well capable of working out and deciding upon the appropriate pricing for a restructuring proposal to be made to Dr Perks. There was no need for them to turn to Ms Pringle for any advice or assistance.
446. It is true, however, that the early part of the exchange (the string which started with Mr McCall’s “just about arriving at deal time” e-mail, and then the request for Grahame Rae’s gut feel and his response) was forwarded to Ms Pringle. This was forwarded on 28 April 2010 under cover of an e-mail in which Mr McCall stated:

“Please see my e-mail to Neil and Grahame’s comments below
– will discuss today and try to arrive at best solution”.

447. Ms Pringle replied within an hour (at 10.52), attaching a valuation schedule. She said that the breakage cost was the key. She also addressed other points raised by Mr Rae. Later that afternoon, Mr McCall e-mailed Ms Pringle with detail of the breakage cost. His e-mail said:

“swap breakage cost still £ 255k. On this basis, give some thought to what you believe is best structure and you can sell to Clayton – not sure how he’d react to breaking swap as I think he’s always assumed we wouldn’t lend him the money to do it and therefore it wasn’t an option.

I will then land at final proposal with Neil”.

448. Ms Pringle responded in the afternoon of 28 April by saying that Dr Perks was still in Australia and that she would meet with him on his return. She would “play around with this tonight”. On the following morning, she sent a number of different financial calculations to Mr McCall, saying in her email at 10.43 on 29 April 2010:

“Dave

4 different solutions attached – hopefully you understand the assumption at the top –

I think we need to get a balance between the level of PPA and recognising the trade co debt is being recovered – if we break the swap then Clayton has no equity in the properties unless values increase considerably”.

449. Ms Pringle (and indeed the other witnesses of RBS) were cross-examined on this sequence of documents. The substance of the cross-examination was that the exchange demonstrated that Ms Pringle had failed to understand that her role was to assist Dr Perks and his business, but here she was advising RBS as to what the Bank should do in its best interests. There was no attempt to argue Dr Perks’ corner, or put forward counter-proposals which would have been more beneficial to Dr Perks.
450. Ms Pringle’s response to this line of cross-examination was that she was not being asked to work out what was the best structure for RBS. She was focused on the best way forward for the two trading companies. For her, the most important aspect was that the two companies should continue to trade. The calculations which she provided, on the morning of 29 April 2010, were aimed at showing the undesirability (and in her view unfairness) of increasing the percentage of the PPA to take account of the increased debt consequential upon the breaking of the swap and its addition to the overall indebtedness. The calculations were intended to show RBS that the excess borrowing should not be taken into account in calculating the PPA percentage. A range of scenarios was provided to RBS in order to illustrate what the PPA percentage was relative to the internal rate of return. She explained in her evidence that what she regarded as the best scenario actually happened, because RBS left the PPA at 12.5% notwithstanding the increased indebtedness. She said that in her role, she always viewed herself as being independent, and she was here just using her judgement as to what was fair.
451. I found these answers to be convincing and consistent with the e-mail exchanges at that time.
452. A theme of the cross-examination of Ms Pringle was that she had not negotiated on behalf of the businesses as hard as she could, and had failed to put forward positions which would – if accepted by RBS – have been more favourable to the business or Dr Perks. It seemed to me, however, that Ms Pringle sought at all times to take realistic positions, recognising that a favourable outcome for the businesses required the agreement of RBS and that it was unproductive to take positions which were likely to be rejected. In my view, a good negotiator will know what battles to try to fight, and will seek to negotiate on matters which are of importance to his or her side, and concede matters which are recognised as being important to the other side. An illustration is the Bank’s proposal for a regular “cash-sweep”: in other words, using a proportion of spare cash to make immediate repayment to the bank. This was, as Ms Pringle explained, something which Dr Perks and Mr Fordyce had no difficulty with. As a matter which was important to RBS, but not important to Dr Perks, it would not have been sensible or realistic for Ms Pringle to pick a fight over it. In the context of the discussions relating to the PPA, Ms Pringle said (sensibly in my view) as follows:

“Again, I can’t recall exactly where it was in my witness statement, but I did say that sometimes in that role, I had to explain to the customer what the bank could and could not do. Now, there is no point in saying — the customer or me saying to the bank, do not charge a PPA, if the bank was going to charge the PPA and they had a — they had — my understanding was that they had set — well, they had a model and it was within these parameters that they used to set the pricing, and there is no point in saying, “I am not paying anything”, because that would just be a stalemate and nobody would move on. ”

May 2010

453. On 23 May 2010, Ms Pringle had sent Mr McCall a detailed set of cashflow forecasts for the Companies, alongside a lengthy email summarising the financial position of, and the work she had done with, the Perks business. It is not necessary to set out the detail of this e-mail in full. It is clear from Ms Pringle’s description that even after the cost-cutting measures that had been implemented, an improvement in turnover from the Companies was vital if the business was to survive. It is also clear that Ms Pringle’s focus in this e-mail to RBS was on ensuring that, under the terms of the restructure to be agreed between the Perks business and the Bank, the business was given time to show whether or not such an improvement could be made. At the end of her e-mail, she identified the risk that the trading performance did not improve, saying: “at least by giving time, a chance of improvement exists”. There is nothing in this e-mail which supports any suggestion of a conspiracy to further the interests of RBS, or that Ms Pringle was working against the interests of the business.

454. On 24 May 2010, Mr McCall provided a detailed paper to the credit team. This set out restructuring proposals, concluding:

“We face a difficult position where the Bank has allowed a customer to leverage up against property asset values without sufficient strength within the trading business that is ultimately responsible for servicing all the debt. Both cost cutting and income generation actions are being taken within the businesses and we can try and support a solvent turnaround without increasing our exposure. On this basis it is the right thing to do and hopefully in the medium term the debt will be reduced to a manageable level. Even if the turnaround fails, the passing of time should be beneficial to the underlying property asset values, which will assist the position should we ever need to seek property sales to recover our debt.”

455. The shape of the restructuring proposals was in summary as follows. The 2009 swap would be broken, and the break costs added to a new increased Partnership loan, thereby reducing the Partnership’s interest liability. There would be a continuation of the ongoing suspension of any capital repayment on the various loan facilities for varying periods of time: (i) the increased 2009 Loan (designated by the Bank B20) would remain interest-only for five years; (ii) the maximum available capital repayment holiday of 3 years (so an extension of a further two years), permissible under the scheme, would be utilised for the EFG Loan (designated as C8); and (iii) the £573k

GCL Loan (designated as C9) would remain interest-only for a further six months, with capital repayments starting after that and the final balance falling due after 18 months, to allow the Bank to re-assess the position when the EFG Loan had to start being repaid.

456. The restructure proposal involved “upsides” for RBS, which for this purpose used a separate company called West Register. These took the form of: (i) a 12.5% Property Participation Agreement in favour of the Bank over the properties owned by the Partnership; and (ii) West Register taking a 12.5% equity stake in the Companies. These “upsides” were far from guaranteed to yield any, or any significant, income for the Bank and/or West Register. The equity stake in the Companies was originally proposed by the Bank at 15% but, with Ms Pringle’s support, this was negotiated down to 12.5%.
457. These upsides were, as Mr McCall and Mr Graham said in evidence, the price which RBS sought to obtain in return for making available a package which would be well outside the normal lending parameters of the Bank. The rationale for them was explained at the time (both internally and to the business) as being to compensate the Bank for or reflect the significant risk which the Bank was taking in continuing to support the business on terms which were well outside its standard lending parameters in circumstances where, if the business did not improve, the Bank would receive nothing and might suffer a loss. Mr Graham explained in his evidence that the continuation of the facilities was not in itself profitable to RBS, when taking into account that there would be a higher cost for the capital which would be needed for what was a very risky business. The upsides were also a way of giving RBS a possible return on its increased level of risk, but without charging any upfront fees or increased margins and thereby adding to the burden of the Perks business.
458. I accept RBS’s submission that the paper from Mr McCall, and the correspondence which led to it, are irreconcilable with the Claimants’ allegation that the purpose of the 2010/2011 restructure was to injure (or even destroy) the Perks business.

Delay and finalisation of the 2010/2011 restructure

459. Effective agreement as to the terms of the 2010/2011 restructure was reached relatively quickly. In an e-mail sent on 18 May 2010, Ms Pringle described having had a very productive meeting with Dr Perks and Mr Fordyce that afternoon. There were only three outstanding queries. These were all addressed on 1 June 2010, with RBS clarifying the position in relation to the interest rate to be charged, and conceding the other two points which had been made by Ms Pringle: (i) the percentage PPA was to remain at 12.5% even if the PPA term was increased from 5 to 7 years; and (ii) RBS reduced its equity share to 12.5% (from 15%) at the suggestion/ request of Ms Pringle.
460. However, formal completion of the 2010/2011 restructure was significantly delayed due to a number of factors and in the event did not occur until February 2011. In the meantime: (i) the business had a very difficult winter of 2010 and had to ask for additional Bank support; and (ii) management of the connection in GRG handed over from Mr McCall to Euan Campbell.
461. The formal documents for the 2010/2011 restructure were finally signed on 25 February 2011. The Perks business had solicitors (Brodies) acting for it in connection with the 2010/11 restructure. Ms Pringle was cross-examined on a number of documents relating to the appointment of Brodies and the finalisation of the documentation for the

restructure. The theme of the cross-examination was, again, that Ms Pringle was again batting for RBS rather than the Perks businesses. It suffices to say that Ms Pringle dealt effectively with those questions, and I did not consider that she was motivated by anything other than the best interests of the business.

462. The 2009 swap was broken on 1 March 2011. The break costs were £225,000.
463. The intention had always been that these break costs and the £70,000 outstanding under facility B19 would be added to the 2009 Loan. That is clear from Mr McCall's 24 May 2010 credit paper where, based on a then estimated break cost of £255,000, Mr McCall noted that the Partnership Loan (B20) would increase, in terms of utilisation, to £2,519,000 (£2,194,000 + £255,000 + £70,000). There is no evidence, however, that a facility agreement was ever drawn up to reflect this.
464. RBS submitted (and I accept) that the documentary evidence showed that: (i) the break cost sum of £225,000 was drawn down (i.e. lent to the Partnership) on 10 March 2011, as shown by an email from Mr Campbell dated 10 March 2011; and (ii) both the Bank and the business recorded both the break costs and facility B19 as having been effectively incorporated into facility B20 from the time of the 2011 Restructure. Thus, on 4 May 2011, Mr Fordyce emailed Mr Campbell noting that he made the total Partnership loan balance £2,489,000, whereas Bank correspondence showed it as £2,584,000. Mr Fordyce's calculation of £2,489,000 included the £70,000 loan. On or around 12 September 2011, the Bank revised its figure for loan B20 to £2,489,000. The reason for the reduction, which RBS accepted, was that the swap breakage cost was £225,000, and was therefore lower than had originally been expected.

Events following the 2011 restructure

465. The business continued to trade marginally following the 2011 Restructure. Two clinics were sold: a clinic at Paisley and a clinic at Pollokshaws. In April and May 2012, however, the relationship between Dr Perks and the Bank completely broke down, for two main reasons.
466. First, the issue of repayment of the £573,000 GCL loan arose, with Dr Perks insisting (wrongly) that this had been incorrectly documented, and that GCL should have had seven years to repay it, or that he had been assured that the loan would not expire in October 2012.
467. Second, the Bank discovered that Dr Perks had breached his undertaking in the Subscription Agreement (entered into by West Register) not to receive emoluments of more than £104,000 per year, as a result of his use of a company credit card for personal expenses. This letter appears to have enraged Dr Perks.
468. On 17 May 2012, Dr Perks alleged that Ms Pringle, Mr Campbell and Mr Graham had "conspired to bring down the company to either grasp what cash they can or simply increase their equity holding". He said that he would use all legal avenues open to him to fight to survive. Ms Pringle then ceased working with him.
469. By the summer of 2012, turnover figures for the business were very poor, at approximately £45,000 per week, in circumstances where £70,000 had previously been agreed between Dr Perks and Ms Pringle as the "break even" figure. Mr. Campbell's

paper to Credit on 3 October 2012 noted that the business was in real difficulties and that, but for the retention of the proceeds from the Paisley sale, there would have been significant breaches of the facility agreements.

470. Also in or around November 2012, the Bank sent Dr Perks a new facility document in respect of the main Partnership loan (B20), recording the correct outstanding loan amount of £2,403,227. Dr Perks refused to sign this document.
471. The end of the working relationship, and the trading life of the Companies, came after Dr Perks took steps to lease practices without the Bank's consent, and his own team turned against him. I have already referred to this aspect of the case in Section B above. Although Dr Perks attempted to liquidate the Companies, the Bank appointed administrators thereto as qualifying floating charge-holder.

E2: Legal Principles

472. The relevant legal principles relating to conspiracy were summarised and considered by Bryan J in *Lakatamia Shipping Co Ltd v Nobu Su and others* [2021] EWHC 1907 (Comm). The requirements are as follows:

“a) A combination or understanding between two or more people;

b) An intention to injure the claimant. The intention to injure does not have to be the sole or predominant intention. It is sufficient if the defendant intends to advance its economic interests at the expense of the claimant;

c) Unlawful acts carried out pursuant to the combination or understanding; and

d) Loss to the claimant suffered as a consequence of those unlawful acts.”

473. On the authority of the majority of the Court of Appeal in *Racing Partnership Ltd v Sports Information Services Ltd* [2020] EWCA Civ 1300, it is not necessary for a defendant to know the unlawfulness of the means used to be liable in conspiracy.

E3: The parties' arguments

474. Although the Claimants' case in conspiracy originally covered numerous aspects of the events described above, the focus of their case in their written opening, and in their relatively brief closing submissions on this issue, was the way in which Ms Pringle was appointed and dealt with matters. The Claimants thus submitted that once RBS moved the business to GRG, it conspired to extract as much value from the business as possible. They said that the key to their argument were the following propositions:

- i) Ms Pringle owed and knew that she owed a duty to act in the best interests of the Group and/or Partnership. This duty of loyalty arose as a result of Ms Pringle becoming a consultant to the Group. It was contractual and/or fiduciary. The duty included a duty to inform the Group of important communications with RBS: a duty of transparency;

- ii) Ms Pringle breached that duty of loyalty by failing to act in the best interests of the Group when dealing with RBS; rather she acted to further the interests of RBS and preferred the Bank's interests over that of the Group. She breached the duty of transparency by dealing with RBS in secrecy from Dr Perks;
 - iii) RBS knew that Ms Pringle owed duties of loyalty to the Group and knew that Ms Pringle was acting in breach of that duty by working with the Bank to achieve the best outcome for the Bank, and by failing to share important communications from the bank with Dr Perks;
 - iv) RBS and Ms Pringle thereby conspired to damage the financial position of the Group by the use of the unlawful breach of duty by Ms Pringle to the Group; and
 - v) That conspiracy caused the Group loss and damage because, had Ms Pringle truly acted in the best interests of the Group, she would have obtained better finance terms and encouraged the Group to bring a claim against RBS for mis-selling of the 2007 swap and the 2009 swap.
475. In its written submissions for trial, RBS addressed in some detail the adequacy of the Claimants' pleading of conspiracy. Much of this argument addressed a much broader pleaded case than that ultimately advanced and summarised above. Fundamentally, however, its case was that the case in conspiracy should be rejected on the facts. RBS submitted that there was nothing in its extensive documentary disclosure which supported the conspiracy case.

E4: Discussion

476. As foreshadowed in my discussion of the facts in Section E1 above, I do not accept that RBS had an ulterior motive behind the decision to transfer the business to GRG. There was an actual default in repayment in October 2009, and further anticipated defaults under loan agreements where repayment obligations were due in late December 2009 and early 2010. The business did not have sufficient money to avoid default. Whilst it appears to be the case that the business was sufficiently profitable to allow payments of interest, Dr Perks had no entitlement to expect or require RBS to continue to lend on an interest-only basis and to forgive the obligations to make capital repayment. A bank is entitled to repayment of loans over a reasonable time-scale, and indeed in accordance with agreed contractual terms. The business was clearly in no position to do this in late 2009. A transfer to GRG, in order to see if an acceptable arrangement could be reached, was a permissible and indeed obvious course for RBS to take. It is clear from the documentary evidence described above, as well as the oral evidence of the RBS witnesses, that a large number of individuals at RBS, working in different roles and departments, all genuinely considered that the business was in serious difficulty in late 2009.
477. There was therefore a commercially reasonable and rational basis for the transfer to GRG and what became the 2011 restructure. The position was fairly summarised by Mr Graham in paragraph 25 of his witness statement, as follows. As things stood, the Perks business was unable to generate sufficient profits to service its debt, in particular by

making capital repayments. Something had to be done, and the 2010/2011 restructure seemed effectively to be the least bad thing the Bank could do. The Bank could simply have declined to provide additional facilities and asked for the outstanding debt to be repaid, but it was fairly obvious what would happen in that scenario, namely the insolvency of the Perks business and a negative outcome for the Bank, in terms of its recovery. The rationale behind the 2010/2011 restructure was to give the Perks business time to try and improve trading performance and generate cashflow to start paying down its debt (thereby reducing the Bank's likely loss) and, potentially, turn itself fully around.

478. Similarly, Mr McCall explained that some form of restructuring was clearly required in view of the default on the £ 70,000 loan and anticipated further defaults. There was therefore in his view no realistic alternative to the 2011 restructure, apart from simply asking for the Bank's lending to be repaid; a course which would inevitably result in insolvency. Although Dr Perks did put forward some other suggested alternative solutions, these tended to ignore the existing swap (which Dr Perks thought should simply be broken at no cost to the Partnership, or with the cost shared with the Bank) and in any event generally did not address the fundamental cashflow issue: i.e. the inability of the business to make capital repayments from the cash that it was generating.
479. It is clear from Dr Perks' evidence as a whole, and as articulated at length in an e-mail sent by Dr Perks on 6 April 2012, that Dr Perks ultimately found the terms agreed in the 2011 restructure as restrictive. But I agree with RBS that it is unsurprising that RBS, which had a significant exposure to the Perks business, was not prepared to allow Dr Perks the full freedom to run the business, essentially at the expense of the Bank, as he saw fit.
480. I do not accept that any individual at the Bank sought, or entered into the 2011 restructure, with the intention of injuring the Perks business or any of the Claimants. RBS had a commercial decision to take, as to whether it was willing to support the Perks business so as to give it a chance of turning round. If RBS had in late 2009 declined to extend facilities, and required repayment, I cannot see how the Claimants could have had a cause of action in conspiracy relating to a decision to decline to extend, and the likely insolvency that would result. In fact, RBS sought to give the Perks business a chance to continue and thereby to recover and reduce its debt, which was exactly what Dr Perks wanted. That decision cannot itself give rise to a cause of action in itself for conspiracy, not least because there would obviously be no intention to injure. In any negotiation and agreement for the continuation of lending facilities by a commercial bank, a bank will seek to agree commercial terms which protect its position and which to some extent constrain the customer's freedom of manoeuvre. For example, there may be covenants which have to be complied with, limits on amounts that can be drawn down, fees paid, rights given to the bank in the event of default and a large number of other contractual provisions. Such terms will inevitably be in a broad sense disadvantageous to the borrower in the sense that the latter might prefer to have the money, but at the same time to have no such constraints. But they are simply the price which is paid for the agreement of the bank to extend facilities in circumstances where it has no obligation to do so. It makes no sense in my view to analyse a normal negotiation of a banking facility, with the aim of reaching a mutually acceptable solution, as giving rise to an intention to injure for the purposes of conspiracy.

481. The Claimants' case, in substance, was that the intention to injure is to be found in two specific aspects of the contractual terms which were agreed, after negotiation, as part of the 2011 restructure: the 12.5% PPA in favour of RBS, and the acquisition by West Register (an RBS company) of a 12.5% stake in the Companies. However, no case is advanced that the 2011 restructure was reached under duress, and in fact the Perks business had the benefit of independent legal advice from Brodies prior to its conclusion. There was a basic, and in my view reasonable, commercial rationale for both of these aspects of the restructuring agreement. In late 2009, RBS was being asked to continue facilities to a customer which was in default on repayment obligations, with further defaults imminent, and with an obvious significant risk of non-payment in the future. The proposed transaction, as it took shape, involved not only additional time being granted, with capital repayment holidays, but also in one respect the addition in practical terms of new money: the 2009 swap was broken, but the breakage costs due to RBS were added to the overall debt, thereby increasing it. In addition, there were no additional charges by way of upfront fees or increased margins. Against this background, there was nothing uncommercial, let alone punitive or extortionate, in the particular "upside" terms that RBS required, namely the PPA and the equity stake.
482. The position in relation to the PPA was in my view well explained by Ms Pringle in her witness statement. Her evidence in relation to the PPA was that from an early stage she had anticipated and had informed Dr Perks that the Bank was likely to propose the PPA or something akin to it as part of any restructure proposal. This was because, in continuing to lend to the Perks Business (which was currently unable to make capital repayments), the Bank was lending to a higher tier of debt, and it was, as she saw it, natural to expect that the Bank would want to see a higher rate of return when doing so. Ms Pringle had extensive experience as an accountant, as head of a private office and in acting as an independent consultant to a number of RBS clients following the financial crash in 2008. She described the PPA as a well-known, established, principle of lending which she had seen many times before. The problem with pricing such debt at a higher level was that it often imposed a cash strain on the borrower which it could not afford. However, the PPA did not do that. It was a back-ended fee which did not affect the immediate day-to-day cashflow position of the business. The evidence of the other Bank witnesses was to similar effect. Ms Pringle said that once the rationale had been explained to Dr Perks, he understood the need for the PPA and was "much less unhappy about it than he was about the Bank's minority shareholding in the Companies".
483. Ms Pringle was less convinced about the need for the equity stake in the Companies. This was not, as I understood her evidence, because it was unusual or punitive. Rather, she thought that the Companies had no value: they had no cash and were almost completely reliant on funding from RBS. It was almost impossible to find buyers for the individual practices. There was no corporate conglomerate which wanted to buy them, and whilst it was theoretically possible to sell them to the chiropractors who worked there, they tended not to have any bank funding available to them. However, although both Ms Pringle and RBS did not ascribe value to the companies in 2009, it is clear that Dr Perks took a different view and in any event there was a prospect that the business would be turned around over a period of time. In my view, the taking of an equity stake was a rational thing for RBS to do as part of the price of continuing to support the business.

484. As already described, at the heart of the Claimants' case was the conduct of Ms Pringle, specifically the breaches of fiduciary duty which she allegedly committed with the connivance of RBS. In her witness statement, she said that it was nonsense for the Claimants to allege that she was part of a conspiracy, alongside RBS, to harm the Perks business. She did not accept that there was any conflict of interest when she was working for the Perks business. She said that she did not ever recall considering that there was any conflict of interest in her role as independent consultant to the Perks business. She regarded her role as to see the position from both sides and to try to find a solution that worked for both sides, but there was no particular difficulty or conflict of interest involved in doing that. She believed that the Bank often found her involvement helpful, partly because (as with other customers for whom she acted) she could act as a bridge of communication between the Bank and customer, and partly because she was not emotionally attached to the business and could bring different perspectives and ideas for improving the situation. The customer also generally found it helpful, not just in terms of the assistance she could offer based on her experience, but also because she could put its point of view across to the Bank and generally talk to the Bank in ways the customer could not, or felt that it could not. In the case of the Perks business, her position as a bridge of communication was unusually "extreme", because she was meeting separately with Dr Perks and the Bank, with practically no joint meetings between all parties.
485. Ms Pringle said that she was not paid by the Bank and ultimately she was there to try to help the customer, albeit that that help sometimes lay in explaining the Bank's concerns and what kind of solutions were and were not likely to be acceptable to the Bank. It was, she said, not true that Mr McCall instructed her to prefer the Bank's interests, and she did not do so. She did not recall ever thinking that she was receiving instructions from Mr McCall as to what to do.
486. As I have said, Ms Pringle was a most impressive witness. I have no doubt that she saw her role as described above, and that she was at all times seeking to assist the Perks business, albeit within the constraints of realism which – certainly at the end of the relationship, and as evidenced by Dr Perks' e-mail of 6 April 2012 – were not a relevant consideration for Dr Perks.
487. Ms Pringle was cross-examined on a number of communications which took place during the period of her involvement, with a view to showing that she was at times batting for RBS. I was unpersuaded by any of these points, whether individually or collectively. It seemed to me that when the context of these communications was explained, as it was by Ms Pringle, any suggestion that she was seeking to assist the Bank rather than the business for which she was working as a consultant, was unsustainable.
488. For example, there was much cross-examination of the sequence of e-mails relating to the PPA and which led to the scenarios prepared by Ms Pringle and sent to the Bank on 29 April 2010. Ms Pringle's work in that regard was directed, at a general level, to seeking to obtain a favourable outcome to the negotiation for a restructuring, but more specifically one which was more advantageous to the Perks business than RBS were, or might have been, looking for. The point that she was seeking to make to Mr McCall, as she explained in her witness statement, was that when the Bank was calculating the extent to which its lending to the Partnership was outside the Bank's normal or expected parameters, it should not use the proposed increased level of borrowing, including the

additional amount the bank was going to lend it to break the swap; because that was the very lending which (it was hoped) was going to enable the Companies to repay their debt. This was the point of her calculations, and she was successful in what she sought to achieve: the increased lending, resulting from the breakage of the swap, did not result in an increased PPA percentage over and above the 12.5% previously proposed by the Bank. The effect was that the Bank's internal rate of return was reduced from what it might otherwise have been. Thus, Ms Pringle can be seen here to have been working very much in favour of the Perks business, not against it. It is therefore consistent with other conduct on her part: for example, her assistance with the preparation of forecasts and other figures in the spring of 2010 which persuaded the bank to move forward with the restructuring, and also her downward negotiation of the equity participation to 12.5% from the 15% that the Bank was originally seeking.

489. It seemed to me that these examples of Ms Pringle working positively in favour of the business were sufficient in themselves to demonstrate the falsity of the Claimants' thesis that she was seeking to further the interests of the Bank. If that was her mindset, then why did she bother (for example) with negotiating the Bank's equity participation downwards?
490. Ms Pringle was also cross-examined on some exchanges at the time, much later, when the restructuring came to be finally documented, with the involvement of Brodies. By this time, the overall shape of the restructuring had long been agreed, and it seemed to me that Ms Pringle was doing her best to assist in ensuring that the deal was properly documented. She provided information to the Bank's solicitors for that purpose.
491. In his written closing, Mr Macpherson referred to various documents upon which Ms Pringle had not been cross-examined, and invited me to conclude that they showed Ms Pringle working against the interests of the business. I did not consider it appropriate to consider those documents. There was ample time available to the Claimants for cross-examination of the RBS witnesses. Ms Pringle was asked about a number of matters, which can in my view reasonably be regarded as representing counsel's view of the best points available. When she was cross-examined, Ms Pringle was able to explain the context of her communications, and as I have said she dealt effectively with every point that was put to her. If it is to be said that there were other points of significance, then in my view these should have been put to her. It would in my view be quite wrong to draw conclusions, contrary to those which I have reached on the basis of the questions that she was asked, by reference to materials about which she was not asked.
492. Accordingly, I do not consider that any breach of fiduciary duty on the part of Ms Pringle has been demonstrated. Accordingly, the case of unlawful means conspiracy also fails because no unlawful means have been proved. In any event, even if the Claimants could show that there was some breach of duty on the part of Ms Pringle (for example, there were arguments that she had not always passed on e-mails to Dr Perks – her evidence being that important e-mails were always discussed even if not given to Dr Perks or Mr Fordyce), I do not see how this gives rise to a claim in conspiracy against the Bank. There is nothing in the evidence which indicated that the Bank sought in any way to procure or connive at any breach of duty on the part of Ms Pringle.
493. I was also unpersuaded that the conspiracy case led anywhere at all in terms of loss. The alleged loss referred to in the Claimants' opening was that the loss arose in the following way: had Ms Pringle only acted in the best interests of the business, she

would have obtained better finance terms and encouraged the Group to bring a claim against RBS for mis-selling of the 2007 swap and the 2009 swap. I am not persuaded that any materially better terms were available from RBS. Nor was it Ms Pringle's responsibility to give advice as to the bringing of litigation, and indeed she was not cross-examined on the basis that this was her responsibility or that she failed in that regard.

494. Accordingly, the conspiracy claim fails because: there was no relevant combination; Ms Pringle did not act unlawfully; and there was no intention on the part of the Bank to cause loss. I am also unpersuaded that there was any loss, albeit I recognise that the quantification of loss does not form part of the present trial.
495. In his oral closing, Mr Sinclair said that the witnesses had taken the allegations of conspiracy very seriously, and they had had quite an impact on them, particularly on Ms Pringle. He invited me not only to refuse the claim, but also to "exonerate" them. I consider that this is the effect of this section of my judgment. I make it clear that all three individuals acted with integrity and that there is no substance in the case of conspiracy.

CONCLUSION

496. For the reasons set out above, the Claimants have failed to establish liability against RBS in relation to their various causes of action. Since the claim fails, there is a liability in principle for sums owed to RBS by the Partnership, but the quantification of such sums is for subsequent determination.