Neutral Citation Number: [2016] EWHC 3342 (Ch)

Case No: FL-2016-000004

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
FINANCIAL LIST

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21 December 2016

Before :

THE HON MRS JUSTICE ASPLIN DBE

- -

Between :

PROPERTY ALLIANCE GROUP LIMITED — **Claimant**

- and -

THE ROYAL BANK OF SCOTLAND PLC — **Defendant**

- -
- -

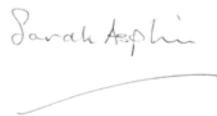
Tim Lord QC, Adam Cloherty, Kyle Lawson and Ben Woolgar (instructed by **Bird & Bird LLP**) for the **Claimant**
Richard Handyside QC, Paul Sinclair, Adam Sher and Laurie Brock (instructed by **Dentons UKMEA LLP**) for the **Defendant**

Hearing dates: 26th and 27th May, 7th, 8th, 9th 10th, 13th, 14th, 15th, 16th, 17th, 20th, 21st, 22nd, 23rd, 24th, 27th, 28th, 29th, 30th June, 4th, 5th, 6th, 7th, 8th, 12th, 13th, 14th, 15th, 18th, 19th, 20th, 25th and 27th July, 12th, 13th, 14th and 17th October 2016

- -

Approved Judgment

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



THE HON MRS JUSTICE ASPLIN DBE

Mrs Justice Asplin:

1. The Claimant, Property Alliance Group Limited ("PAG"), is a property investment and development business operating primarily in the North West of England with a portfolio including industrial sites, offices, retail and leisure property. The Defendant, The Royal Bank of Scotland plc ("RBS"), was at all relevant times the principal provider of PAG's commercial banking services. These proceedings arise primarily out of four interest rate derivative products (together referred to as the "Swaps") which RBS sold to PAG between 2004 and 2008.

2. PAG's claims fall into three distinct categories. First, PAG claims that the Swaps were mis-sold to it by RBS, in that they did not provide a solution to, or protect PAG from, its interest rate risk. In fact, it is alleged that PAG was ultimately left in a worse financial position than if it had not entered the Swaps. PAG claims, therefore, that the Swaps cannot properly be said to have been hedging instruments, and claims for rescission and/or damages arising out of RBS' representations and/or breaches of contract in connection with the sale of the Swaps (the "Swaps Claims"). Secondly, PAG claims damages for breach of contract arising out of its transfer from the RBS management team in Manchester to the RBS division in London known as the "Global Restructuring Group" or "GRG", and its subsequent management within GRG (the "GRG Claims"). Thirdly, PAG claims for rescission of the Swaps and/or damages for misrepresentation (including fraudulent misrepresentation) and/or breach of contract arising out of RBS' alleged participation in and knowledge of the manipulation of the London Interbank Offered Rate ("LIBOR") rates by both RBS and other LIBOR panel banks (the "LIBOR Claims"). I will deal with each category of claim in turn.

Background to the proceedings

3. PAG was formed by Mr David Russell in 2002 as an entity into which various of his existing property investment and development businesses were "hived up" and operated together. Mr Russell's businesses had historically banked with National Westminster Bank plc ("NatWest") at its Macclesfield branch. However, in or around September 2002 Mr Russell was informed that the Macclesfield branch was under pressure to transfer Mr Russell's business banking affairs to RBS in Manchester, RBS having acquired NatWest several years earlier. Accordingly, PAG and its principal officers, namely Mr Russell, PAG's managing director and majority shareholder, and Mr Ewan Wyse, PAG's finance director, were introduced to RBS personnel from around September 2002. From late 2002, PAG's banking affairs were gradually transferred over to RBS' Manchester real estate team, and by May 2003 RBS had become PAG's principal provider of commercial banking services. Mr Anthony Goldrick became PAG's relationship manager until Mr Matthew Jones took over that role in January 2004. Messrs Russell and Wyse were also introduced to Mr Andy Mannix of RBS's Treasury Division in 2003 and thereafter, to Mr Anthony Bescoby who was principally responsible for the sale of the Swaps.

4. RBS provided financing facilities to PAG from May 2003 until 2015 when, following the breakdown in the parties' relationship, PAG refinanced its entire RBS lending with HSBC. The facilities provided by RBS to PAG were revolving, and comprised two elements: "development facilities", which were relatively short-term borrowing

for the purpose of developing properties and were usually referenced to a margin over base rate, and "investment facilities", being borrowing to finance income-producing property investment assets, which were usually referenced to a margin over LIBOR.

5. Between October 2004 and April 2008, PAG entered into the four Swaps. The details of each of the Swaps are set out in an annexe to this judgment and the description of them below is intended only as an outline. The first Swap was entered into on 6 October 2004 in a notional amount of £10m. It had a maximum duration of ten years although it was cancellable at the behest of RBS on a quarterly basis after the first five years. It also had an upper cap of 6.25% and a lower cap of 5.25%. It is also described as having a floor of 5.25% and a lower floor of 3.30% (the "First Swap"). In October 2004, PAG had total facilities with RBS of around £32 million, comprising a development facility of approximately £13.5 million and an investment facility of approximately £18.5 million. Of that £32 million, approximately £20.6 million was actually drawn down.

6. PAG entered into a second Swap on 25 September 2007 with an effective date of 28 September 2007 in the notional amount of £15m rising to £30m four years into the term. It operated at 5% and was cancellable by RBS annually in years five to ten (the "Second Swap"). The third Swap was transacted on 14 January 2008 with an effective date of the 16 January 2008 in the notional amount of £20m. It was for a potential period of five years but was cancellable by RBS after the end of year three. Its terms as to interest rates were complex and are set out in the Annexe to this judgment (the "Third Swap"). At the time it entered into the Third Swap, PAG had total facilities with RBS of around £85 million, comprising a development facility of £50 million and an investment facility of approximately £35 million. Of that £85 million, approximately £70.9 million was actually drawn down. The fourth and final Swap was entered into on 16 April 2008 in the notional amount of £15m. The applicable rate was 4.8% and it was potentially for a period of five years. However, RBS had a right to cancel the Swap quarterly from year two. If cancelled PAG was required to pay Base Rate and RBS 3m GBP LIBOR (the "Fourth Swap").

7. In the spring of 2010, the management of PAG's banking affairs was transferred to the GRG division of RBS which was based in London. GRG managed the PAG relationship from that time until PAG's debt was refinanced in 2015. PAG alleges that it was mistreated by GRG, including on the basis that GRG engineered breaches of covenant in PAG's facility agreements and threatened to exercise powers under those agreements to impose unreasonable terms on PAG under a refinancing facility entered into in 2011.

8. On 7 June 2011 PAG terminated the Swaps, incurring a mark-to-market, ("MTM") break cost of £8.261 million. Concurrently, PAG agreed refinancing terms with RBS and entered into a composite facility on 7 June 2011 (the "2011 Facility"). As with the previous facilities, the 2011 Facility included two distinct "development" and "investment" tranches. However, it also comprised a third tranche, in respect of the MTM break cost incurred by PAG on termination of the Swaps.

9. These proceedings were commenced in September 2013, after the termination of the Swaps and entry into the 2011 Facility, but at a time when PAG's banking relationship with RBS was continuing.

The Witnesses

10. A large number of witnesses were called. From PAG, I heard evidence from Mr David Russell, the Managing Director and majority shareholder of PAG, Mr Ewan Wyse, PAG's Finance Director, Mr Robin Priest, PAG's deputy chairman from September 2009, Ms Anne Taylor, Mr Richard Malin and Mr Jonathan Morton-Smith, each of whom was consecutively a commercial banking adviser to PAG in the period from 2002-2008, and Mr Nick Davies, a surveyor who conducted certain valuations of PAG's property portfolio when at Lambert Smith Hampton.

11. PAG's two main witnesses were Messrs Russell and Wyse. Unfortunately, Mr Russell was not an entirely satisfactory witness. At times I found him to be evasive. He often failed to answer questions put to him and was prone to repeat a prepared view of events rather than give his evidence. On a number of occasions, in cross-examination he provided a new explanation for events which had not been mentioned in his witness statement, which was not evidenced in any way and which was not put to the RBS witnesses who allegedly provided the reassurances to which Mr Russell had referred. I also take into account his unabashed willingness to deceive the former RBS employees whose conversations he taped clandestinely and during which he stated that he was prepared to employ them which was untrue but which he considered to be a means to an end. I treat Mr Russell's evidence therefore, with some caution and do not accept it unless it is corroborated by other reliable witness evidence and/or contemporary documentation. Unfortunately, some of Mr Wyse's evidence was also unsatisfactory. He sought to repeat many of the first time explanations which Mr Russell had put forward during his cross-examination. He also provided some of his own which were neither in his witness statement, supported by contemporaneous documentation or put to the relevant RBS witness. As a result, I also treat Mr Wyse's evidence with a degree of caution. I will refer to the quality of the evidence given by other "PAG witnesses" where relevant.

12. From RBS I heard evidence from two sets of witnesses. First, the so-called "Non-LIBOR Witnesses", being Mr Anthony Bescoby RBS' main witness in the Swaps Claims, and the individual who sold the Swaps to PAG, Mr Anthony Goldrick and Mr Matthew Jones, PAG's relationship managers at RBS, Mr Scott McCoy and Mr Charles Didier, former GRG staff with responsibility for the PAG relationship and Mr Andrew Thomson and Mr David Whatham, two senior individuals within GRG. Secondly, I heard from the so-called "LIBOR Witnesses", namely Mr Paul Walker, initially a USD Money Markets trader at RBS, then RBS' Head of Money Markets from April 2009, and latterly Global Head of Money Markets from 2012, Mr Mark Thomasson, RBS' senior GBP Money Markets trader from 2006 to 2012, and Mr Scott Nygaard, RBS' Head of Short-Term Markets and Financing from 2008 to 2012.

13. Save to comment at this stage on the evidence of Messrs Nygaard, Thomasson, Walker and Bescoby, I will refer to the quality of the evidence on behalf of RBS where relevant below. I found each of Messrs Nygaard, Thomasson and Walker to be sophisticated, very guarded and at times evasive when giving evidence each having been interviewed extensively both by RBS itself and the relevant regulatory authorities. They were also prone to deliver a message rather than answer questions. Mr Nygaard, in particular, was prone to providing very lengthy answers in cross-examination, designed it seemed in order to obfuscate. I approach their evidence with

some caution. I also found Mr Bescoby to be evasive at times and treat his evidence with caution.

14. I also heard a large amount of expert evidence in four discrete areas to which I shall refer in more detail below.

Events relevant to the Swaps Claims and the GRG Claims in more detail

2002

15. Prior to the hive up of Mr Russell's property entities into PAG, on 1 February 2002 Mr Ian Barlow a director of Goldflare Ltd, a special purpose vehicle within the Russell group of companies, had a telephone conversation with Mr Buxton of RBS about derivative products. The note of that conversation taken by Mr Buxton records that his view was that at least 50% of the debt should be hedged preferably via a fixed rate, for 5 years but that "David Russell, the main principal, is a little less keen on hedging. Caps have been traded in the past via NMR", NMR being a reference to N.M. Rothschilds & Sons Ltd. Amongst other things, the note also records that it became clear that Mr Barlow was not familiar with the mechanics of hedging instruments and that Mr Buxton gave him a brief presentation on swaps, collars and caps which he appreciated.

16. Shortly thereafter, Mr Barlow met with JC Rathbone Associates Limited ("Rathbones"), a leading derivatives advisory firm. Following the meeting, Rathbones confirmed their ability to provide advice on hedging strategy and set out their charges for providing an advisory service in a letter dated 12 February 2002. They noted that Mr Russell's group of companies had around £30m of debt with a number of banks including RBS and Allied Irish Bank ("AIB") but that none of it was hedged and the group "has been considering putting a 5 year swap into place to cover a proportion of the loans." In that context, it was noted that: "we also understand that David Russell and Paul Wardle are of the opinion that the current level of circa 5.50% is high in comparison with prevailing short term rates." Rathbones went on to advise against a "vanilla" swap in all the circumstances and offered to produce a report.

17. In cross-examination, Mr Russell dismissed Mr Barlow as a bookkeeper and stated that he himself was not interested in hedging at the time and did not understand it. He said that he encouraged his staff to explore ideas of their own and the meeting with Rathbones must have been Mr Barlow's idea and arranged merely as a matter of respect and to promote networking. He added that he did not want to enter into any derivatives at the time. Despite the reference in Rathbones' letter and Mr Buxton's note to his views on rates, he maintained that he had not been looking at rates and did not want to enter into a swap. He also stated that the advice against a "vanilla" swap contained in Rathbones' letter had not been discussed with him. In the light of the content of Mr Buxton's note and Rathbones' letter, I am unable to accept Mr Russell's evidence that there had been no discussion of swaps at this stage and that he had not expressed any views about interest rates, nor I am able to accept his evidence that Mr Barlow and his staff in general, pursued their own ideas without reference to him. It seems to me that on the balance of probabilities that in the light of the content of the letter and the note, it is more likely than not that Mr Russell had expressed such views about rates and had considered swaps at this stage. Further, it was clear from

both the evidence of Mr Russell as a whole and of Mr Wyse that Mr Russell made all major decisions in relation to his companies over which he had tight control.

18. This is borne out in part by the fact that Mr Wyse attended a meeting with Rathbones on 11 September 2002, at which the development of a hedging strategy by the Russell Group companies was discussed. In their letter addressed to Mr Barlow at PAG of the following day, Rathbones explained how PAG might start to develop a hedging strategy and how Rathbones could assist in doing so by producing a report, addressing both "fixing" and more flexible strategies. Reference was also made to avoiding "unacceptable termination costs". Mr Wyse's evidence was that hedging strategy was discussed at the meeting. This is consistent with his contemporaneous note. However, despite having been noted by Mr Wyse as having attended, in cross-examination, Mr Russell did not accept that he was at the meeting. He maintained that he had no experience or knowledge of interest rate hedging products at this time nor when he and Mr Wyse attended a meeting on 24 September 2002 with Mr Andy Mannix from RBS's Financial Markets' division and Mr Schofield who was the relationship manager for Mr Russell's businesses at NatWest in Macclesfield. Mr Russell also stated in cross-examination that although he trusted Mr Wyse he was not "high powered" and did a good job "to a level" but "got out of his depth." In my judgment, given Mr Wyse's note, it is more likely than not that Mr Russell attended the meeting at Rathbones with Mr Wyse on 11 September 2002 and therefore, had at least some knowledge of interest rate hedging products at that time. Furthermore, in the light of Mr Wyse's level of involvement in arranging the Swaps and the detail contained in his notes, to which I shall refer below, I am not able to accept Mr Russell's attempt to downgrade Mr Wyse's contribution.

19. As I have already mentioned, Messrs Wyse and Russell met with Mr Andy Mannix and Mr Schofield on 24 September 2002 although in cross-examination, Mr Russell stated that he had no recollection of being there. Mr Wyse's notes of this meeting cover a very wide range of different alternative instruments which could be used to hedge, including "swaps", "caps" and "collars". Reference is also made to cancellable trades where RBS would have the option to cancel, value collars, where in addition to a cap and a floor, if the rate fell below the floor a higher fixed rate would be payable and trigger swaps which involved a fixed rate for a fixed period but if rates exceeded the "trigger", a higher interest rate would apply. Mr Wyse says that it was a note taking exercise for him because he had not come across these types of product before and that, in fact, he had no experience of hedging at all. I accept Mr Wyse's evidence that the range of products were new to him and that he was recording their features. However, in the light of his meeting with Rathbones earlier in September 2002 to which I have referred, I am unable to accept his evidence that he had no knowledge of hedging at all.

20. The next day, 25 September 2002, Mr Mannix sent a letter to Mr Russell in which he commented that it was "good ... to discuss ways in which we [RBS and PAG] can work together to reduce your exposure to interest rates on the debt you have with both NatWest and other providers." He went on: "Naturally we are very keen to provide the outcome you are looking for and feel that we have the solutions available for you to achieve this." He attached a paper which provided pricing and descriptions of the "alternatives you felt most suited your requirements". It also attached a draft ISDA Master Agreement. In fact, Mr Russell accepted in cross-examination that he had

asked about a few products and requested details about them. He stated that although there was no obligation to hedge at this stage, both Mr Goldrick and Mr Farrell in the Manchester office of RBS had been pressing him to do so.

21. The paper which was produced was addressed to David Russell Property Holdings Ltd and was headed "Interest Rate Risk Management Strategy Solutions". It stated that the pricing and descriptions of trades related to those which had been requested by Mr Russell at the meeting the previous day and on the front page stated:

> "[The paper was] intended for the recipient's sole use on the basis that recipient 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 places no reliance on us for advice or recommendation of any sort. We will not act as advisor on behalf of, or owe any fiduciary duties to, recipient in connection with any transaction…"

The paper was based on the assumption that £15m of the Russell companies' £30m debt would be covered by the derivative contract. It did not contain any recommendation. It set out explanations of, and pricing for, an interest rate collar (at 3-6% and 3-6.5%) and for a "trigger swap" whereby if 3-month GBP LIBOR hit a certain trigger rate, the customer would enter into a swap at a pre-determined rate. It also contained examples of US Dollar and Swiss Franc hedging. Last, it contained a number of bullet points under the heading "Please note:" in which it was explained amongst other things that hedging was separate from the underlying debt, that early repayment of the debt would not automatically cancel the hedging contract and that early surrender might involve exit costs or benefits which were dependent upon prevailing market conditions at the time of surrender. In cross-examination, Mr Wyse accepted that the description both of the collar and the trigger swaps were clear and that he understood them.

22. Thereafter, in early October 2002, Ms Anne Taylor, was engaged by PAG as a part time independent consultant. She had been employed by RBS from 1969 to 2001 and during part of that time was a Senior Manager specialising in commercial and corporate lending. She was a director of Turnbull and Harris from 2001 to 2003 and worked for Singer & Friedlander from 2003 to 2006. Mr Russell described her in a letter to Mr Schofield dated 9 October 2002 as a "banking consultant/specialist". In cross-examination, he stated that she was employed to assist Mr Wyse to set up proper systems and business plans and assist with borrowing in the light of the hive up and was not employed to advice on hedging. Mr Wyse described her main role as general banking but said that she was helpful on swaps.

23. Although Ms Taylor stated that she did not consider herself a hedging expert and would not have taken the job if she had been asked to provide hedging advice from the outset, she became involved with hedging almost immediately after her appointment. By 17 October 2002 she had spoken to Andy Mannix and was asking Mr Wyse to inform her when he received anything on hedging from AIB. In addition, in early November 2002, she drafted two letters to be sent by Mr Wyse, one to AIB and RBS and the other to HSBC and NMR in which it was stated that DRH/Alliance was close to making a decision about *"[its]* requirement for interest rate protection*"*

and asked each of the banks to quote for collars on three different sums being £5m, £10m and £15m, three different maturities being 5, 7 and 10 years and three different ranges of interest rate being 3-6.5%, 4-7% and 4-7.5%. In cross-examination, Ms Taylor described these as fairly simple products with which she was familiar. Mr Russell too described the alternatives set out in the letter as "straightforward" and "[not] complicated even for me."

24. On 15 November 2002, Mr Wyse emailed Ms Taylor stating that he had spoken to Mr Russell and that Mr Russell wanted them to proceed with AIB or even RBS in relation to a "collar @ 3% - 8%, apparently he has been offered this from Andrew Collard @ AIB for no premium . . . . on a total of £20m. NO PREMIUM." In cross-examination, Mr Russell accepted that he wanted a collar which he described as a "simple hedge", and that he was not willing to pay a premium. He also stated that although a hedge was not required at this stage, the inference was that that was what RBS would like. Mr Wyse accepted that he was shopping around at that time for nil premium collars despite the fact that the business was under no obligation to hedge at that stage.

25. Ms Taylor immediately telephoned AIB, but reported back that the 3%-8% collar Mr Russell wanted would now require a premium of £40,000. She was told to wait until either AIB or RBS was prepared to trade the collar at zero premium. Ms Taylor spoke again to AIB and reported back that they would be willing to trade the full £20 million. It was suggested that signed instructions be provided but that rates at RBS should also be monitored and that the trade would be completed with whichever bank could first meet the rates at no premium. Mr Wyse's notes of discussions between himself, Mr Russell and Ms Taylor about hedging include reference to the "contingent liability" represented by the collar in the event that rates fell below the floor.

26. Ms Taylor contacted Rathbones and on 21 November 2002 she emailed Mr Wyse to report a conversation about them arranging the interest rate collar through either AIB or RBS at no overall cost to DRH/Alliance. Thereafter, Ms Taylor was in regular contact with Mr Baxendall of Rathbones about the potential collar. She sent Mr Wyse a spreadsheet which broke down the 3%-8% collar into its constituent parts (i.e. the cap and the floor), separately valuing/costing each part and monitoring how close to 3.00% a floor would be on a nil-premium collar. In fact, no hedging was entered into at this time.

27. In the meantime, discussions were taking place between RBS and Mr Russell about the "hive up" into one company and a substantial new facility from RBS in order to pay off existing debt with NMR. Following a meeting with RBS in late November, on 4 December 2002 Mr Goldrick, PAG's Relationship Manager sent Mr Russell a letter setting out draft terms (subject to discussion and credit approval) for a 5-year £14 million LIBOR loan, with £11.5 million of the principal to be used to repay NMR lending and the balance for future property purchases. One of the requirements listed was that the loan would be "fully hedged for the term". From late 2002 until some time in 2003, Mr Neil Farrell, PAG's Business Development Manager worked with Tony Goldrick. He was not required to be cross examined but stated in his witness statement that it was a fair description to state that he was selling RBS' services to PAG on the basis that it was a "one stop shop" and that RBS and PAG were working together in a way which was aimed at growing the profitability of both parties.

However, he had no recollection of having said that PAG's and RBS' interests were "totally aligned."

28. Ms Taylor met with Rathbones on 20 December 2002 and emailed thereafter, stating that she was hopeful that PAG would be able to find a hedging structure that *"suits both PAG and RBS"*. In cross-examination she accepted that both pricing and hedging strategy had been discussed.

2003

29. Rathbones wrote to Ms Taylor on 8 January 2003 setting out their preliminary advice. In the letter, Mr Baxendall on behalf of Rathbones noted that Mr Russell felt that PAG's borrowing was unlikely to fall below £20 million in the foreseeable future and stated that Rathbones therefore considered it *"appropriate to install a hedge on this amount"*. He offered to produce a formal report detailing strategies and recommending a preferred strategy which they would ensure was acceptable to RBS and explained that the cost of advice and execution of the trade could be capped at £3,000. Rathbones were then instructed to produce such a report and duly did so. It was dated 16 January 2003. It noted that: RBS had indicated it required hedging for its facility; that "[PAG] is of the opinion that its aggregate borrowing is unlikely to fall below £20 million at any point in the foreseeable future. On that basis, there is relatively little risk of [PAG] being exposed to costs as a result of any hedging arrangement being terminated before maturity"; and that PAG would prefer not to incur premium costs. Different hedging strategies were set out and explained on the basis of a nominal amount of £20 million for five years including:

a) interest rate swaps which were not recommended in the light of the immediate increase in costs as a result of the prevailing swap rates;

b) interest rate caps which were described as providing *"maximum flexibility"* but required a cash premium;

c) collars which were also not recommended as a result of the fact that the cap would be purchased at the "offered" side of the market but the floor sold at the "bid side", doubling the spread it had to pay;

d) interest rate swaps with embedded floor which were recommended because they conferred a maximum cost whilst enabling benefit from short term rates remaining low; and

e) interest rate swaps with payer's "swaption" being a product which gave the purchaser a right, but not an obligation, to enter into a swap at a pre-determined strike and a variation on this in the form of a cancellable swap.

Rathbones recommended using one of the structured trades outlined in the paper, and, in particular, either the swap with an embedded floor or a shorter swap with the capacity to extend by way of a payer's swaption.

30. On 22 January 2003, Ms Taylor emailed Mr Wyse attaching a spreadsheet and some observations to *"complement the report from Rathbones"*. She stated that she had

"run a few numbers with different interest rate scenarios" by using "RBS treasury forecasts as a base and adjust[ing] downwards and upwards to see what the effect on borrowing would be under each scenario". She went on to state that:

> "The bottom line" is – if we think rates will fall and stay down for the 5 year period, then the swap with embedded floor . . . is the better option of the two – although if we really believe this we would be better taking an uncommitted facility renewed, each year – I don't really think we should do that.
>
> At a constant rate of 4.3%, the two options cost the same – anything above that the ordinary swap (o swap) wins.
>
> Will review the numbers with Rathbones before our meeting with Tony from RBS but I would favour the o swap! (I'll also check my formulas are right!)"

31. On 24 January 2003 Mr Goldrick sent RBS's proposed terms for the £14 million loan which included the requirement to be "fully hedged" for the term, and noted that RBS would be happy to provide a hedging line for up to £20 million. Ms Taylor immediately sought quotes from Rathbones and she accepted in cross-examination that the rates were considered favourable and Mr Russell did not want to wait to hedge until the hive up had taken place. It was agreed that the hedge could initially be traded with Urban Estates Ltd (one of Mr Russell's companies) before being transferred to PAG. On 30 January 2003, Ms Taylor informed Mr Wyse that RBS was happy to adopt this approach and noted that "if we want to, we can put some hedging in place more or less immediately". In cross-examination, Mr Russell stated that he imagined that if the rates were good, PAG would have pushed to do the trade.

32. On 30 January 2003, Mr Baxendall of Rathbones, acting on behalf of UES, requested pricing from Mr Bescoby of RBS for a £20 million swap and a £20m zero cost (i.e. zero premium) collar, with a cap of 8%, for which Mr Bescoby then quoted. Further quotations for different collars were sought the following day. In cross-examination, Mr Bescoby accepted that by "suitability" of the products for which he quoted, he meant that they matched the customer's stated views as to rates and its budget. He said that PAG had strong views about rates and the pricing he supplied was driven in part by Rathbones and in part by PAG's requests which I accept.

33. Thereafter, Mr Baxendall informed Mr Bescoby that UES intended to trade the collar which it had chosen with AIB and was looking to trade a swap with RBS. Further discussions ensued and on 5 February 2003, Mr Bescoby and Ms Taylor discussed RBS's pricing versus that of AIB and Ms Taylor identified that "DR [Mr Russell] has set his sights on 4.35% as his target rate for the swap." The following day, Mr Bescoby informed Ms Taylor that swap prices had risen, but she stated that UES still wanted to achieve the target rate of 4.35%. Mr Bescoby suggested one way of doing so was to look at a value collar, which he discussed with Mr Wyse and then followed up with a written proposal which he sent both to Ms Taylor and to Mr Wyse. In the paper, Mr Bescoby: noted that PAG/UES had explained that it had a strong view that Base Rate would remain around 4% but was comfortable fixing a portion of its debt if the 5-year swap rate got to 4.35%; set out the terms of the potential "value collar" which operated like a vanilla collar between 3.00%-6.00%, but with the additional

feature that if the floor was breached (i.e. if 3M GBP LIBOR dropped below the floor at 3.00%), PAG/UES would pay 4.35% for that quarter; and noted that:

a) the cap strike of 6.00% protected PAG/UES at the "stated budget rate";

b) the floor rate of 3.00% was 0.50% *below* the floor of a conventional collar, allowing PAG/UES to benefit more from falling rates than under such a collar; and

c) if the floor rate was breached, PAG/UES would pay 4.35% for that quarter, which was PAG's current preferred swap rate.

The notes to the paper included a statement that the recipient would 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, that PAG/UES placed no reliance on RBS for advice or recommendations of any sort and that RBS was not acting as advisor to PAG and did not owe any fiduciary duties to it. Mr Wyse accepted that RBS had provided terms and rates but that it had possibly not recommended either a hedging strategy or structure. He also accepted that PAG/UES had been "using" Rathbones at this stage.

34. Mr Bescoby spoke to Mr Wyse later on 6 February 2003, and was informed that Mr Russell was not keen on the "value collar" proposed by RBS but preferred to trade a £10 million swap and a £10 million 3%-6% collar. Later that day, Mr Wyse informed Mr Bescoby that David Russell Property Holdings Ltd had dealt the swap with AIB at 4.25% and requested that RBS agree to trade the collar at a premium of £35,000. Although the premium had moved to £37,000, Mr Wyse refused to pay more than £35,000 and the deal was sanctioned by Mr Goldrick albeit that those in the Treasury Department of RBS believed that it provided insufficient margin for the bank.

35. The terms of the 5-year 3%-6% collar with RBS (the "2003 Collar") having been approved by Rathbones, the confirmation document was signed by Mr Wyse on behalf of UES, albeit that it was intended that the transaction would be novated to PAG once the hive up was complete. In addition, the confirmation document also contained representations. They were that in entering into the 2003 Collar referred to as "the Transaction" UES was:

(i) acting for its own account and had made its own independent decision to enter into the Transaction and as to whether the Transaction was appropriate or proper for it based upon its own judgement and upon advice from such advisers as it had deemed necessary;

(ii) had not relied on any written or oral communication of RBS as investment advice or a recommendation to enter into the Transaction, it being understood that (a) information and explanations relating to the terms and conditions of the Transaction would not be considered investment advice or a recommendation to enter into the Transaction and (b) no written or oral communication received from RBS would be deemed to be an assurance or guarantee as to the expected results of the Transaction; and

iii) was capable (on its own behalf or through independent professional advice) of understanding and assessing the terms, conditions, merits and risks of the Transaction, and understood, accepted and assumed those risks.

It was also stated that RBS was not acting as a fiduciary for or an adviser to UES in respect of the Transaction. Mr Wyse accepted that he would have looked through the terms of the confirmation document and would have read the clauses. Although Mr Wyse suggested that he would have queried those clauses with Ms Taylor and then added that he could not remember whether he raised any concerns, there is no other evidence to suggest that he did so and on the balance of probabilities, it seems to me that he did not. As envisaged, the 2003 Collar was novated to PAG on 6 August 2003.

36. Thereafter, in a letter from RBS to PAG dated 17 July 2003, RBS had informed PAG that it was treating it as an "Intermediate Customer" within the FSA Rules. The letter enclosed a copy of RBS's Terms of Business (the pre-MiFID Terms of Business) and explained that by conducting business with RBS, PAG would be deemed to have accepted and agreed to those terms. One of the express terms contained in the pre MiFID Terms of Business was the basis on which RBS would deal with PAG, including the fact that it was providing "execution only" services and not advice.

37. In September 2003 a number of loans between NatWest/RBS and PAG were rationalised along with the £14m facility into a new £18.9 million facility plus a separate £3.5m loan to fund the development of a particular property (together referred to as the "2003 Facilities"). It is not in dispute that both loans contained RBS's standard Hedging Requirement. However, Mr Goldrick agreed with PAG that RBS would not insist upon further hedging at the time unless swap rates for the residual term increased to 6%.

2004

38. Although PAG met again with Rathbones in October 2003, it was not until May 2004 that the issue of hedging was revisited with RBS. On 7 May 2004 Mr Bescoby and Mr Jones met with Mr Wyse and Ms Taylor at PAG's offices in Old Trafford. In Mr Bescoby's report of the meeting he notes that it was agreed that PAG needed to increase its hedging cover to around 70% and that it had £20m hedging and total facilities of £44 million being £24.2 million at RBS and the balance of £20 million with AIB. In cross-examination, Mr Bescoby accepted that the need for further hedging was in the context of the obligation to do so under the 2003 Facilities. It is not in dispute that various "vanilla" solutions were discussed and priced, including an interest rate swap, but were rejected by PAG; Mr Wyse also asked about collars (both 3%-6%, like the existing 2003 Collar, and 4%-6% were quoted), although Mr Bescoby explained that both would require premiums given market conditions; and Mr Bescoby suggested that PAG could consider "double trigger swaps" in which Mr Wyse expressed an interest but was keen to lower the lower trigger (i.e. the 4.00%) if possible, as PAG's view was that rates might move down. In cross-examination, Mr Wyse accepted that he understood the explanation of the double trigger swaps.

39. In his note of the meeting, Mr Bescoby describes Ms Taylor as an adviser. However, in cross-examination she stated that she may have been at the offices at the time and attended merely as a general banking adviser. If and to the extent that Ms Taylor intended to disavow any knowledge of derivative contracts by the use of such a title, I

am unable to accept her evidence. It seems to me that although she may not have been a derivatives specialist, her involvement in PAG/UES's swaps strategy from the moment that she became a consultant and in particular, her provision of projected figures to Mr Wyse, is contrary to such a conclusion. She clearly had a working knowledge of the basic relevant factors.

40. On 10 May 2004, Mr Bescoby discussed double trigger swaps with Mr Wyse, quoted for a 3%-6% collar and gave Mr Wyse prices for PAG to sell its existing hedging. Mr Wyse's notes show that at the same time Mr Wyse was also exploring hedging options with Ms Taylor and with AIB, which had quoted a number of different products. On 11 May 2004 Mr Bescoby proposed a variation on the double trigger swap and Mr Wyse then called Mr Bescoby to tell him that if RBS could lower the level of the swap rate to 6.20% PAG would trade the 3.50% to 5.75% double trigger swap. In cross-examination, Mr Bescoby accepted that he had not provided any information about break costs and the scale of such costs if PAG wished to close out the trade before the end of the period nor did he provide any information about the "MTM" at the outset.

41. In fact, market conditions moved away from PAG and later that morning Mr Bescoby emailed Mr Wyse to say that the 6.20% rate was not achievable. Thereafter, on 13 May 2004 Mr Wyse left a voicemail for Mr Bescoby, explaining that PAG was "cooling" on the double trigger swap due to concerns about the level of the lower floor given that PAG considered that rates would fall and instead requesting pricing for a 3% - 6% collar. However, on 1 June 2004 Mr Wyse told Mr Bescoby that having discussed the matter with Mr Russell that PAG was going to put hedging on hold.

42. In any event, on 16 June 2004, Mr Bescoby emailed Mr Wyse stating:

> "We have finally seen a reversal of the recent daily increases in swap prices, with yields falling c10 basis points over the last 24 hours, in light of this I thought it appropriate to re-visit your hedging requirements.
>
> The attached proposal provides a collar structure with a significantly reduced premium payable and similar protection to a straightforward collar, for a limited risk."

A presentation headed "Structured Hedging Solution" in relation to a "Flexible Value Collar" was attached. The presentation included a number of further bullet points under the heading "Advantages" including "protects a worst case interest rate" and "Guaranteed hedging (subject to 10 'caplets' out of the 20 fixings being active)", amongst other things. Under the heading, "Considerations" the following bullet points appeared:

- "If 3 month LIBOR goes above current swap level of 5.60% company is exposed to higher rates up to cap strike of 6.00%
- However no increased risk over and above conventional collar structure
- If 3 month LIBOR goes below floor levels the company is obliged to pay fixed rate of 5.60% for that 3 month period

- However this is no worse than current swap rate of 5.60%"

The presentation also contained a graph depicting the "current view on 3 month LIBOR" through to February 2009 compared with the cap and floor. The following statements appear under the heading "Conclusions":

- "PAG are happy to look at increasing hedging to reflect the company's debt profile.

- By referencing the current thinking on UK interest rates and using RBSFM's superior product base we can structure a hedge to provide a suitable structure.

- Current documentation and credit lines are suitable to support the re-structure."

Lastly, under the heading "Important Information" it stated amongst other things:

> "You will be exposed to interest rate risk if there is a mismatch between the start dates of the underlying borrowing and any 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.
>
> 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 break 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.
>
> 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. . . . . "

43. In cross-examination, Mr Bescoby explained that the proposal was produced by reference to a template and that by its title he had represented both that the proposed derivative contract was a "hedge" and that it was a "solution" to PAG's interest rate issues. However, he denied that the reference to "10 caplets and 20 fixings" was misleading on the basis that the instrument would only continue for a second term of 5 years at RBS' option. He did accept, however, that the reference to protecting a worst case under "Advantages" was only true if there were a second term of 5 years. In addition, he accepted that the presentation makes no reference to MTM although he was able to calculate it within minutes whereas PAG did not possess the sophisticated software necessary for the task. He also stated that he considered the product to be appropriate for PAG because it provided interest rate protection at no premium.

44. In any event, Mr Bescoby emailed Mr Wyse again on 5 August 2004 with a further trade idea. The email explained that under the proposed trade which had a 10-year term and a £10 million notional: if 3M GBP LIBOR fixed at 6.25% or higher, PAG would pay 6.25%; if 3M GBP LIBOR fixed above 4% but below 6.25%, PAG would pay 3M GBP LIBOR within a range from just above 4% to 5.25%; and if 3M GBP LIBOR fixed at or below 4.00%, PAG would pay 5.00%. In the email, Mr Bescoby also stated:

> "The structure has a ten-year term although the bank has the right to cancel the trade after 5-years and quarterly thereafter. So the company has guaranteed protection for 5-years although this could run for 10-years."

Mr Bescoby also stated that PAG would need to consider whether or not it thought that 3M GBP LIBOR would fix outside the 4.01% to 6.24% range in the next five years. Mr Wyse forwarded the email to Ms Taylor, asking for her comments. In cross-examination, Mr Bescoby stated that he considered the product suitable because it provided protection for the first 5 years on a basis which was better than "vanilla" 5 year products and avoided a premium. He accepted that PAG would be paying by taking the risk that RBS would cancel the instrument if rates were above the collar in the second 5 year term, leaving PAG unhedged, or would continue the instrument if rates were low, in which case, PAG would only be able to break the agreement at a cost, the scale of which was not mentioned. Mr Russell stated that despite Mr Wyse's note that the instrument was "only" callable by RBS, he believed that it would only be called in the second five year period in partnership with PAG and that if rates dropped they would be able to restructure the arrangements.

45. In fact, Mr Jones met with Mr Wyse on 19 August 2004 and informed him that the new £10 million facility was likely to require 100% hedging. However, it was agreed that PAG be given a 6 month window in order to complete it. This was confirmed by RBS credit on 7 September 2004. Contemporaneous internal RBS documentation setting out a review of PAG's position, recorded that the 100% hedging requirement on the investment borrowing would require an increase in the hedging line (in the sense of an internal credit facility) from £750,000 to £2.25m. Mr Bescoby accepted that the increased figure had come from him and that he did not tell PAG about it.

46. On 7 September 2004, Mr Russell attended another meeting with Rathbones. In cross-examination, Mr Russell stated that he had only met with Rathbones as a matter of courtesy rather than to seek advice. However, in his letter to Rathbones of 10

September 2004, he made reference to "valued advice." It seems to me on the balance of probabilities that although Mr Russell may have wished to be courteous, advice was received and his attempt to downplay it did him little credit. This is all the more so in the light of the advice paper dated 16 September 2004 which was produced by Rathbones setting out their recommendations including that PAG should increase its hedging by £10 million and should cancel the 2003 Collar and implement two £10 million tranches of hedging, in the form of a 3-year swap with a 3-year embedded floor and a 5-year swap with a 3-year embedded floor (the "Rathbones 2004 Paper") and the fact that Mr Russell utilised it at a meeting with RBS on 1 October 2004.

47. In any event, on 8 September 2004, Mr Wyse had telephoned Mr Bescoby, and requested an update on the "multi-callable value collar" which Mr Bescoby had described in his email a month earlier. Mr Bescoby had sent an email to Mr Wyse "refreshing" the idea and explained that he had managed to reduce the floor below 4.00%. The trade was based upon a £14m notional and a 10 year term subject to RBS's right to cancel. The rate structure was such that PAG's "best case" rate was just above 3.90% and its "worst case" rate of 6.25%. Mr Bescoby stated that the trade was for 10 years but was cancellable by RBS after 5 years and quarterly thereafter, so that the "company has guaranteed protection for 5 years although this could run for 10 years". He also added: "The key question is- do you think that 3 month LIBOR will fix outside of the 6.24%-3.91% range in the next 5/10 years?" In cross-examination, Mr Bescoby accepted that PAG would be locked into such a structure potentially for ten years at the rates set out and that he had not told them about the MTM at the outset, the potential scale of, the break costs or the extent of the hedging credit line which had been put in place. Nevertheless, he considered that matters were clearly set out and that had he told PAG about the extent of the credit line, they would still have gone ahead.

1 October 2004 Meeting

48. Thereafter, Rathbones provided further pricing information in an email dated 24 September 2004 which Mr Wyse forwarded to Mr Bescoby on 30 September, with a view to discussing it at the meeting arranged for the following day. On 1 October 2004, Messrs Wyse and Russell on behalf of PAG, met with Messrs Jones, Duckett and Bescoby of RBS. Mr Russell explained that he considered that there was a strong chance that floating rates could fall below 3.50%. He went on to provide RBS with a copy of the Rathbones 2004 Paper and asked for Mr Bescoby's views on it. Mr Bescoby explained that whilst the suggestions were reasonable, the proposal carried the risk that PAG could be locked into a rate of 5.40% for the final two years. In cross-examination, Mr Russell stated that he considered this to be advice from RBS which he accepted.

49. It is not in dispute that the discussion turned to the multi-callable value collar which Mr Bescoby had proposed in August, the details of which had been refreshed in September and which Mr Wyse described as a recommendation from RBS. However, given Mr Russell's view that rates might fall below 3.50%, he asked whether the floor could be lowered to reflect that assessment, to say 3.30% and he indicated that PAG might be prepared to pay a premium. In cross-examination Mr Bescoby accepted that although he would have told Messrs Wyse and Russell that there would be no hedge if RBS chose to cancel the instrument after 5 years or at any quarter thereafter, he would not have discussed break costs were PAG to wish to cancel the instrument.

50. Mr Wyse's handwritten note of the meeting records: "RBS can cancel after 5 yrs – but not an issue" the second phrase being linked by a line to "DR" and a tick. Although Mr Bescoby had no recollection of the phrase or of having used it and denied having sought to re-assure PAG, both Mr Wyse and Mr Russell stated that the cancellation rights were not an issue because it was understood that hedging would be re-visited in five years, that re-structuring would be negotiated and that this was against a background of an expectation by all that PAG's borrowing would increase. However, Mr Russell went further to say that he understood that the derivative would only be cancelled in the joint interests of PAG and RBS to be decided by him and Mr Goldrick and that he would not have entered the trade if the cancellation rights had been solely vested in RBS. It seems to me that the "not an issue" note together with the tick is consistent with the evidence of both Mr Russell and Mr Wyse that Mr Russell was not concerned about the prospect of cancellation because he believed that there would be restructuring in the light of increased borrowing in the future. There is no documentary or other evidence to corroborate Mr Russell's further evidence that the derivative would only be cancelled in the joint interests of PAG and RBS and I am unable to accept his evidence in that regard.

51. Shortly thereafter, on 5 October 2004 Mr Bescoby sent Mr Wyse a presentation entitled "Structured Hedging Solution" which contained reference to a structure with a 3.30% floor in line with Mr Russell's views on interest rates. In his covering email he made reference to amended pricing reflecting the company is [PAG] view on the future path of interest rates. The presentation stated that RBS had the right to cancel the swap after 5 years and every quarter thereafter and explained the structure of the product. The presentation included a statement that "the company has a guaranteed hedge for 5-years, which could run for a further 5 years" and a table which showed what PAG would pay depending on the prevailing 3M GBP LIBOR rate. It also identified considerations relevant to PAG's decision whether to enter into the trade, including that if 3-month GBP LIBOR fell below the floor of 3.30%, PAG would pay 5.25% for that quarter. In addition, it contained a graph showing projected LIBOR rates over the 10 year term under which it was stated that it was forecast that LIBOR would remain within the collar rates for the full term but that it could not be guaranteed. Further it contained "Presentation Notes" which set out the basis upon which RBS was acting and provided warnings the relevant parts of which are as follows:

> "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 break 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.

> 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."

52. Mr Wyse accepted that the presentation was clear and reflected PAG's views on interest rates. He sent it on the same day to Ms Taylor for her consideration. She responded, described the proposal as "reasonable" and explained her reasoning before concluding "I think it looks OK". In cross-examination, Mr Bescoby stated that the transaction provided much improved rates from those in the market in the first five years, the period that the client needed, and which matched Mr Russell's view on rates. He said that although the presentation was entitled "solution" it was not put forward as a recommendation but was provided to PAG based on their views. He accepted that it was not a hedge against rising rates in years 6 to 10 but was for the first five years. He reiterated that that had been explained and that it was for the client to evaluate and decide.

53. Mr Bescoby telephoned Mr Wyse the following day. His call report records that Mr Wyse was "quite keen" on the new levels of the cancellable value collar and would meet with Mr Russell to discuss it. It is not in dispute that during the conversation, Mr Bescoby: reiterated that the structure was only cancellable by RBS; mentioned break costs, it being Mr Wyse who made the point that if PAG wanted to break the swap such costs would arise; and that Mr Wyse stated that PAG was "keen to get some cover out beyond the existing hedges". In cross-examination, Mr Bescoby explained that it was not RBS policy at the time to provide examples of the possible range of break costs which might arise, to advise clients of the extent of the hedging credit line put in place or to provide scenario examples. He explained that the credit line was calculated on an "absolute worst case" basis and upon the internal banking price structures. He also reiterated that he considered the presentation to be fair and neutral, that he put it forwards in good faith and considered it a sufficient basis from which PAG could make an informed decision.

54. Later that day, being 6 October 2004, Mr Wyse called Mr Bescoby back to say that if RBS could do the trade with a lower notional amount of £10 million, rather than £14 million and at a premium of £30,000, rather than £50,000, PAG would proceed with the transaction. Mr Bescoby's record of the conversation includes reference to having repeated that the instrument was only callable by RBS, Mr Wyse having noted that if PAG wished to break after 5 years there would be break costs and having noted that PAG wanted further cover after the present hedging instruments expired in 2008. Thereafter, Mr Bescoby checked with Mr Jones whether a reduction to a notional amount of £10m would be acceptable in the light of the hedging requirements in the loan facilities. Mr Jones confirmed that it would as the investment loans at that stage totalled £20 million, PAG having already hedged £10m with RBS. Mr Bescoby then telephoned Mr Wyse and confirmed that RBS would trade the multi-callable value collar for a £10 million notional amount at a premium of £30,000 and went through its terms and agreement was reached in the terms which became the First Swap.

55. A post-transaction acknowledgement contained in a fax was signed by Mr Russell on 7 October 2004. It set out the terms of the trade. It contained a statement: "Please note

that this document constitutes your acknowledgement to the economic terms of the transaction entered into between (RBS/NatWest) and yourself and also the disclosures on the accompanying schedule…". The Schedule contained a series of Notes including:

> "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 break 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."

56. In cross-examination, despite making no reference to it in his witness statement, Mr Russell said that he had been told not to worry about the matters contained in paragraphs 8 and 9 of the Notes because they were only the standard requirements of RBS' credit department. Mr Russell added that he had relied on RBS and had been reassured by Mr Goldrick, Mr Bescoby and Mr Matthews. I am unable to accept Mr Russell's evidence in this regard. It seems to me that on the balance of probabilities, had Mr Russell been told not to worry about the terms contained in paragraphs 8 and 9 he would have referred to it in his witness statement and would have been able to pinpoint at least with some accuracy when he had received the reassurance and the circumstances in which it was given which he was unable to do. Mr Bescoby and Mr Matthews. Given its significance, it seems to me that had it occurred, on the balance of probabilities, it would have been included.

57. The formal confirmation was dated 11 October 2004 and was also signed by Mr Russell. It contained the same terms. In particular, the following matters were set out:

> "(a) Non-Reliance: It is acting for its own account, and it has made its own independent decisions to enter into this Transaction and as to whether this Transaction is appropriate or proper for it based upon its own judgement and upon advice from such advisers as it has deemed necessary. It is not relying, and has not relied, on any communication (written or oral) of the other party as investment advice or as a recommendation to enter into this Transaction; it being understood that information

> and explanations related to the terms and conditions of this Transaction shall not be considered investment advice or a recommendation to enter into this Transaction, no communication (written or oral) received from the other party shall be deemed to be an assurance or guarantee as to the expected results of this Transaction.
>
> (b) Assessment and Understanding: It is capable of assessing the merits of and understanding (on its own behalf or through independent professional advice), and understands and accepts, the terms, conditions and risks of this Transaction. It is also capable of assuming, and assumes, the risks of this Transaction.
>
> (c) Status of Parties: The other party is not acting as a fiduciary for or an adviser to it in respect of this Transaction."

The same day, Mr Wyse sent the terms of the First Swap on to Rathbones stating: "I trust you think it's a good deal." Rathbones responded in a letter from Andrew Walsh dated 26 October 2004. Mr Walsh set out a number of "concerns" about the First Swap. The relevant passages are as follows:

> "While the callable collar will provide the Group with maximum rate protection at 5.25% or 6.25% for a 5 year period, the structure does provide us with a number of concerns. The first is a question of value for money. The complexity of the structure makes accurately assessing its value extremely difficult as it involves the purchase from and sale to RBS of a number of options. In addition the structure is skewed in the favour of the bank as the options purchased by the Group are done so on the offered side of the market, while those sold by the Group are on the bid side of the market. As this structure has been 'generated' by the treasury it also eliminated the possibility of entering into a competitive pricing situation between RBS and Allied Irish to ensure best pricing of the hedging.
>
> The floor component of the structure requires the Group to speculate on the movement of floating rates, the Group having to take the view that floating rates will remain above 3.30% for the full 10 year term of the structure, as RBS will not cancel it in a low rate environment. Should the floor be 'exercised' the additional cost of at least 1.95% would be unpleasant.
>
> The structure only provides protection for 5 years. The bank having the option to cancel the structure at any point over the final 5 years poses a problem when it comes to compiling a future hedging strategy as it is impossible to determine whether the structure would be in place or not. Furthermore, the protection will disappear if rates rise, a situation where it would be most needed.

> Finally, this structure is extremely inflexible should the Group decide to refinance the underlying facility with another lender. Normally it is possible to novate hedging from one lender to another, eliminating the need to cancel and re-implement hedging and so avoiding the bid/offer spread. However the opaque nature of the structure makes novation almost impossible, the only alternative being to cancel. The costs associated with cancellation are again skewed in the favour of the bank as any value to the Group is reduced being calculated of the bid side of the market, while that due to the bank is inflated being calculated on the offer side.
>
> ...
>
> In short, we do not have too much concern over the potential cost incurred by the trigger, but do dislike the bank's ability to remove the hedging after the initial five year period. We would advise against the cancellable feature in future hedging structures."

58. Mr Wyse responded by letter on 5 November 2004 in which he noted that PAG had "actually moved almost in the opposite direction to your advice" and that "although we may seek to work with you in the future, we did not find it necessary to use your company to assist us" and that in the circumstances "I trust you will agree that the raising of your recent invoice … was inappropriate". It was on the basis that the invoice was not paid that Messrs Russell and Wyse said that advice had not been received from Rathbones, which I have already stated that I am unable to accept.

59. In the meantime, following the First Swap, Mr Bescoby had emailed Ms Diamond, a colleague in the RBS Treasury Department, summarising the way in which the First Swap had come about. He says that this was for the purpose of being uploaded onto an internal web page. He stated that the First Swap was the first of its type that RBS had traded and had been created to suit the needs of the client. In cross-examination, he accepted that he could not recall doing another transaction of that type and that it was novel because it was "all rolled in". He added that PAG had been reluctant to pay premiums and that PAG had obtained a hedge which matched its view of future interest rates and compared well with vanilla products in the market at the time.

2005

60. On 29 April 2005, PAG and RBS executed a 1992 ISDA Master Agreement (Multicurrency – Cross Border) and Schedule (the "ISDA Master Agreement") dated as of 7 October 2004. The ISDA Master Agreement: stated at clause 9(a) that the Agreement (which was defined at clause 1(c) as meaning the ISDA Master Agreement and all confirmations under it) constituted the entire agreement and understanding of the parties with respect to its subject matter and superseded all oral communications and prior writings with respect thereto; and contained a series of representations at Part 5(c) of the Schedule which were also repeated in each of the Confirmations entered into for each of the Swaps. The representations were stated to have been made by each party to the other on the date a Transaction was entered into,

unless there was a written agreement between the parties which expressly imposed affirmative obligations to the contrary in respect of that Transaction.

61. PAG dispensed with Ms Taylor's services on 9 May 2005. Further, it was not until October of that year that Mr Wyse discussed hedging again. On this occasion it was with AIB which provided quotations for a number of proposals for swaps and caps. In an email of 10 October 2005 containing pricing for 3-year and 5-year swaps and 3-year and 5-year caps at 5%, 5.50% and 6%, Mr O'Carroll of AIB referred to Mr Russell's view that interest rates would go below 4%. In fact, in cross-examination, Mr Wyse confirmed that it was his recollection that Mr Russell's view was that rates would drop below 3%. Following a further, oral request on 12 October 2005 AIB sent through quotations with strikes at 6.5% and 7% and Mr Wyse responded: " … how about doing the 5 year 6% for 20bps or the 7% for 15bps based on £10m? If so we could have a deal", which he followed up later that morning with a further email saying "we will sign up once we can get 6.5% for 25bps or 7% for 15bps". AIB sent through further quotes for swaps and caps on 17 November 2005, offering to monitor prices for 3-year and 5-year rates and let PAG know whether the levels which PAG had indicated were acceptable and achievable. Further quotations were provided on 25 November 2005 and in February 2006.

2006

62. Having leased a private jet with payments due in US dollars, in mid 2006, PAG traded with AIB a strip of 58 currency forwards to hedge against the foreign exchange exposure. Thereafter, in late September 2006 Mr Wyse approached AIB again about hedging, inquiring about their 5-year (swap) rate. AIB responded with quotes, before Mr Wyse explained that having discussed with Mr Russell, they both felt that a cap might be worth looking at. He then set out the terms of a deal to which he would agree – namely a 6% cap for 3 years on £20 million, for a fee of £50,000 and asking whether this was *"achievable"* given market conditions.

63. In the meantime, on 10 February 2006, Mr Walter Logan of RBS Credit had noted in the log that further hedging should remain on the agenda for PAG. Mr Jones, PAG's Relationship Manager had also noted on 3 February 2006 that the credit line in relation to hedging for PAG, referred to in the note as the "IRM" and the "G2 Facility" respectively, was £2.25m. Mr Bescoby accepted that the figure related to worst case contingent liability in relation to PAG's hedging products and that he would have provided the figure. On 14 February 2006, the RBS corporate credit committee met to approve an increase in PAG's existing investment facility by £1.9 million to £22.5 million and of its development facility by £25 million to £35 million. Further loan facilities were executed on 27 April 2006 (together referred to as the "2006 Facilities"). The investment facility contained a provision for hedging at clause 10.13 requiring PAG to "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." Provisions of this kind are referred to throughout as the 'Hedging Requirement'.

64. Hedging was discussed again by Mr Jones and Mr Wyse in early October 2006, and a meeting took place between Mr Wyse and Mr Bescoby on 12 October 2006. At the meeting Mr Wyse stated that PAG was looking to increase its hedging by £20 million, half of which was to be with RBS and half with AIB. The additional £10 million with

RBS would cover the investment facility, which Mr Wyse anticipated would soon be £30 million. Mr Wyse explained that he had been shown "vanilla" collars by AIB but that PAG was not interested in a swap given the prevailing rates. Mr Bescoby suggested a structure similar to the First Swap, but with the added feature that where 3M GBP LIBOR fixed between the cap and floor PAG would pay 3M GBP LIBOR *less* 0.25%. The trade would be for 5 years, extendable by RBS for a further 5 years. He also recorded in his meeting note that he had stated that the 2003 Collar could be "exited for no cost." In his note of the meeting, Mr Wyse recorded next to this statement "∴ no fee". Mr Bescoby asked whether AIB had discussed "pay as you go" caps, which Mr Wyse said they had not, and also provided quotes for such a cap at 5.5%, which could be entered into alongside the value collar.

65. On 16 October 2006, Mr Bescoby emailed Mr Wyse with updated and improved rates, calculated on the basis that the 2003 Collar was to be cancelled at no cost and the new cancellable/extendible value collar and cap would be entered into. In a later email of the same day, he informed Mr Wyse that Mr Jones was going to Credit on Thursday and that he had "put forward the hedging line which would be required to cover these deals". In fact, the credit line necessary for the further trade was £3m and in email correspondence between Mr Jones and Mr Bescoby it was proposed that it be increased to £4.75m. In fact, the line was eventually increased to £5m to cover future trade and market movements and internal RBS memoranda record that it was contemplated that if the bank did not provide re-financing for PAG on the expiration of its facility, it would be necessary for PAG to terminate the derivative contracts and pay break costs as a consequence. Mr Bescoby accepted that PAG had not been informed about the size of the credit line and stated that it was not RBS's practice to inform customers of the size of the credit line relating to derivative trades.

66. On 20 October 2006 Mr Wyse emailed asking for a quote for a 3%-5.5% collar for 5 years and Mr Bescoby responded quoting a premium of £145,000 per £10 million hedged, which he explained reflected the fact that the floor was so far away from current and forecasted 3M GBP LIBOR that it was not "worth much" before asking whether the extendible value collar had been of any interest. Thereafter, on 6 December 2006 Mr Wyse contacted Mr Bescoby asking for an "update on any new strategies, inc. swaps etc" and Mr Bescoby responded explaining that swap yields had moved down, and giving pricing for a bank cancellable value collar proposed at the 12 October 2006 meeting, along with a cap. On the same day, Mr Wyse had had a meeting with HSBC at which he had discussed hedging. Mr Wyse accepted in cross-examination that he was interested in transactions which either involved no premium at all or only a small premium.

67. It is both Mr Wyse and Mr Russell's evidence that throughout this period they were being pressed by RBS to enter more hedging transactions. Mr Wyse added, however, that it was appreciated that RBS would ask for more hedging when the facilities were renewed in December and that PAG wanted to be "ahead of the game." On 15 December 2006, the RBS Corporate Credit Committee conducted its annual review, which was followed by a further extension of PAG's facilities. The development loan facility was increased from £35 million to £50 million and the investment loan facility was increased to £35.3 million.

2007

68. On 4 January 2007, Mr Bescoby sent out a marketing circular by email to clients including Mr Wyse, explaining that swap rates had increased significantly over the previous month and attaching a suggested trade which he stated would allow for significantly lower costs over three months, and potentially longer if RBS did not cancel the trade. On 30 January 2007, a further meeting took place at which Mr Bescoby and Mr Wyse were present. In his witness statement, Mr Russell states that he was also there, although Mr Bescoby's meeting note does not record him as an attendee and there is reference to Mr Wyse discussing the issues raised with Mr Russell at a later date. In cross-examination, Mr Russell said that he might not have been there all the time. In my judgment on the balance of probabilities, given the omission of Mr Russell as an attendee in the meeting note and the references in the body of the note to subsequent discussion of issues with Mr Russell, he was not present.

69. At the meeting PAG's current lending and its hedging with RBS and AIB were discussed and Mr Wyse acknowledged that PAG needed to increase its hedging and that its investment debt continued to grow. Mr Wyse explained that PAG was exploring a complex tax structure with Ernst & Young ("E&Y") which would involve notionally converting a portion of PAG's debt from Sterling into Japanese Yen, to take advantage of low Yen interest rates in a tax-efficient manner. Mr Bescoby suggested that PAG consider some different structures, including a cancellable dual rate swap, which he explained to Mr Wyse, including the fact that it was only guaranteed for the period prior to the cancellation right being exercisable. Mr Bescoby also provided Mr Wyse with updated pricing on some vanilla instruments including a 5-year swap, 10-year swap, 5-year 6.00% cap, 10-year 6.00% cap, and 5 and 10-year zero premium collars. Mr Russell stated in cross-examination that the Yen structure was very complicated and was only being mentioned to put RBS off hedges. There is no documentary evidence in support of Mr Russell's contention and I am unable to accept it particularly in the light of the meeting of 22 February 2007 to which I refer below.

70. PAG also attended a meeting to discuss hedging with HSBC on 20 February 2007. After the meeting, Mr Maund of HSBC sent a detailed email referring to the discussions, and attaching information about "Extendable swaps" and "multi-callable swaps". He also attached two fact sheets, one for the "Extendable Swap – LIBOR Linked" and one for the "Multi-callable Swap". In the notes on the Extendable Swap it was explained that: the effect of granting the bank the right to extend the swap was to lower the fixed rate payable below the prevailing market rates; the bank would exercise the option based on their own interest; and highlighted the risk of break costs and that these would be based upon prevailing market rates. In the case of the Multi-callable Swap, which was cancellable by HSBC after three months and every three months thereafter, it was stated that the trade was not a hedge (because it could be cancelled every three months from the start) but was an interest rate management tool and highlighted the risks if the bank cancelled the trade and the company was left floating.

71. On 22 February 2007 Mr Bescoby emailed Mr Wyse with an update and a possible hedging proposal. Mr Wyse responded, saying that he was attending a meeting with E&Y the following week about the Japanese Yen funding structure and asking

whether Mr Bescoby was the right person to contact about this which Mr Bescoby confirmed. The meeting took place with E&Y on 27 February 2007. The discussions in relation to a Yen currency swap continued into May 2007 and on 18 May 2007 Mr Wyse spoke to Mr Bescoby and asked him to quote a credit line and provide a term sheet for a £50 million 2-year and 3-year JPY-GBP cross-currency swap. During the telephone call Mr Bescoby explained that a significant credit line would be needed for such a trade and that there was a chance that Mr Jones might wish to take that exposure into account for the purposes of loan-to-value ("LTV") calculations. On 21 May 2007, Mr Wyse emailed E&Y, reporting back on his conversation with Mr Bescoby and referred to the need for RBS to calculate a contingent liability figure. Thereafter, on 22 May 2007 he provided PAG with a detailed term sheet explaining how the cross-currency swap would work and a presentation. The presentation included reference to the credit line needed for the swap and stated:

> "• The credit line aims to cover any potential mark to market loss in the event of counterparty default
>
> • The credit line required for a cross-currency swap is larger than a credit line for a vanilla GBP swap, as it takes into account potential adverse movement in GBP/JPY foreign exchange rates, JPY interest rates and GBP interest rates
>
> • Contingent liability lines required for cross-currency swaps (subject to credit approval): 2 year term - £18 million; 3 year term - £25 million."

72. The Presentation also included Notes in similar terms to those in the Presentation of June 2004 which included reference to break costs in the event that a swap was terminated early and that such costs would represent the replacement cost of the contract and would depend on market conditions at the time. It did not provide any indication of the possible extent of such costs or any modelling of break costs in different interest rate scenarios. Mr Wyse forwarded the Presentation to E&Y, and referred expressly to the contingent liability which RBS needed to factor in. That afternoon, Mr Bescoby also spoke to Mr Wyse. His email to Mr Jones in which he refers to the conversation is consistent with credit lines having been discussed. In particular, Mr Bescoby wrote that Mr Wyse had been "slightly taken aback" by the size of the credit line necessary for the currency swaps but that he had explained. Mr Bescoby added: "I think he understands(!)" However, in cross-examination, Mr Wyse said that he did not understand the credit line point and would not have thought it affected PAG's position with the bank.

73. Mr Bescoby also made a note of a discussion between Mr Wyse and Mr Jones on 4 June 2007 in relation to the Japanese Yen structure in which he recorded that PAG appeared to moved away from the "CCS" in part as a result of the "level of the credit line attached." The following day, Mr Wyse spoke to Mr Bescoby, and informed him that PAG wanted to go ahead with the Japanese Yen funding structure and explained that they would need to go to credit. Yet further discussions took place with Mr Bescoby on 8 June 2007 which ended in Mr Wyse stating that further discussion with E&Y would be necessary after which he would revert back.

74. Eventually on 9 July 2007, Mr Wyse informed Mr Bescoby that PAG would not be proceeding with the Japanese Yen structure and would therefore like to discuss further Sterling hedging. Mr Bescoby proceeded to discuss a possible trade, in the form of a complex extendible value collar plus a cap, which he followed up with an email later that day in which he mentioned breaking one of the existing trades, with reference to payment being made by RBS to PAG. The email also included quotes for 5-year and 10-year swaps and premiums for 5-year and 10-year caps at 7.00%. In cross-examination, Mr Wyse accepted that Mr Bescoby would have explained the structure to him during their telephone conversation.

75. In the meantime, Messrs Wyse and Russell had met with Mr Jones on 3 May 2007. As a result of the meeting, Mr Jones wrote to Mr Wyse on 4 May stating amongst other things:

> " . . .
>
> We have today updated the facility monitoring spreadsheet you are familiar with, following the drawdowns you have today requested, ...
>
> By adjusting any of the lines within the Development facility, you can see that around another £800k is available before the overriding interest cover level falls below the 120% level. However should interest rates rise to 5.50% next week as widely expected, then the facility will fall to 118% interest cover and therefore be in breach of the covenants. . . ."

The attached schedule set out details in relation to the investment loan referred to as G1 and the investment facility referred to as G5 and revealed cover of 121% against a requirement of 120%. There was no express reference to the G2 Facility but there was a footnote to the schedule which read:

> "1) Hedging arrangement held with investment portfolio 100% hedged, paying 3 month Libor."

76. In July 2007, Mr Richard Malin was engaged to work on a consultancy basis on behalf of PAG having been recommended by Mr Goldrick. He had had a career in finance as well as property finance. In cross-examination he stated that he had never arranged any hedging but had assisted clients in making them aware of what was available and giving an introductory explanation of hedging and the products on offer. He then sought to put clients in touch with hedging experts/advisers, such as Rathbones. Although he stated that he would not describe himself as a specialist, he was willing to express a view on hedging and in his initial letter to PAG he stated that one of the services he was offering was "Finance advice to include interest rate hedging advice where appropriate". His CV which was attached, included reference to having "…advised on business strategy, interest rate management, and financial structures" since 1995. In a letter dated 26 July 2007 from Mr Wyse to Mr Jones at RBS, Mr Wyse explained Mr Malin's recruitment in the following way:

> "In order to strengthen and have a greater understanding of what funding partners require in the future we have taken on

> the services of Richard Malin. ... His role will be on a part time consultancy basis, where he will assess our current banking arrangements, provide recommendations and advise on new and future strategies including interest rate hedging and identify potential providers of finance. ..."

77. In fact, before his appointment by an email of 10 July 2007, Mr Wyse had sought Mr Malin's views on the latest hedging offering from RBS. However, Mr Wyse's evidence was that the reference to hedging in the description of Mr Malin's role was "a simple error". However, he accepted in cross-examination that it "wasn't necessarily an error", but that Mr Malin "didn't turn out to be the person that we wanted . ." Mr Russell also stated in cross-examination that it soon became clear that Mr Malin "did not have a clue about hedging". However, in the light of Mr Malin's heavy involvement in PAG's hedging strategy referred to below and his explanation of his experience, I am unable to accept Mr Russell's estimation of Mr Malin which appears to be another example of his attempting to downplay the assistance received by PAG in relation to hedging generally. I am also unable to accept Mr Wyse's evidence that the inclusion of the reference to hedging in the description of Mr Malin's capabilities had been an error.

78. Mr Malin accepted that he had advised property companies in relation to finance since the mid 1980s and that he had also been a non-executive director at Bruntwood, a large property company in the north west and had advised the board on the derivative products available, contacted Rathbones, obtained benchmark quotes and options and put a report to the board.

79. In any event, on 16 July 2007, Mr Malin suggested a hedge with a 7% cap and on 19 July 2007 Mr Wyse reported back to Mr Malin that the RBS quotation for such a product was a premium of £220,000. Mr Bescoby spoke to Mr Wyse, who expressed concerns about the proposed extendible value collar on the grounds that PAG feared that the floor would be breached (and that PAG would therefore have to pay the higher fixed rate). Mr Bescoby and Mr Wyse then discussed expectations as to 3M GBP LIBOR, with Mr Bescoby explaining that whilst there could be no guarantees, market expectations were that 3M GBP LIBOR would not fall below 5.25% (when compared to a floor of 4.75%). To illustrate current expectations, Mr Bescoby then sent an email attaching a spreadsheet with the current forward curve as well as swap and cap pricing. Following this conversation Mr Wyse sought further advice from Mr Malin who then telephoned Mr Bescoby himself on 20 July 2007. Mr Bescoby's note of the telephone call records amongst other things that: "Richard Malin now acting as advisor – he has taken a view on the structure we have shown – he hates it!". The note also records that Mr Malin felt that the market view reflected in the forward curve was too pessimistic and that 3M GBP LIBOR might well fall below 4.75% over the next 10 years and that he considered the extendible collar to be too risky and could be costly if rates fell. Mr Malin confirmed in cross-examination that those were his personal views but that he was not an expert and that he was only putting forward to PAG what was on offer and stating what he would do.

80. In a subsequent email to Mr Wyse of 20 July 2007, Mr Malin amended Mr Bescoby's spreadsheet and commented:

> "I have taken Tony's spreadsheet to see what our exposure is if we buy a 7% cap and if the yield curve is correct (which, of course, it won't be).
>
> The result is attached.
>
> Once we spread the cost of the cap over the period we will be pay more than the assumed 3-mos Libor in the yield curve, and thus more than a 5-Year or 10-Year swap.
>
> However, the premium is only 9 Bpts over 5-Years or 6 Bpts over 10-Years and, as I think the yield curve is on the high side (if not the very high side) I think we should consider this.
>
> We would not then be giving RBS a put on us for 10 years at 4.75%
>
> If we do not want to pay £220k up front, I am sure RBS will rentalise it.
>
> We then have a fully tradeable instrument- albeit one I doubt we will ever collect.
>
> If rates are below the projected yield curve we would make substantial savings
>
> Of course, we need ascertain if the banks will evaluate our income covenants using the 7% cap, and make sure there is enough income if they do."

81. Mr Bescoby sent a further email to Mr Malin on 23 July 2007, offering an extendible vanilla collar and on 27 July 2007 Mr Wyse sent Mr Malin an email in which he asked for advice about a plan (upon which Mr Russell was said to be keen) to buy £20 million worth of CHF as part of a move to swap GBP denominated debt into CHF in order to take advantage of lower interest rates. The same day Mr Wyse sent a letter to Mr Jones, a draft of which had been sent to Mr Malin for his comment. The letter introduced Mr Malin as PAG's new adviser and noted that his role was to: "assess our current banking arrangements, provide recommendations and advise on new and future strategies including interest rate hedging".

82. In August 2007, PAG started to receive a copy of the weekly bulletin on derivatives, contracts and interest rates movements produced by Rathbones. A meeting also took place with AIB at which Mr Wyse requested pricing for various specific caps and swaps. Thereafter, on 29 August 2007 the Treasury team at RBS, of which Mr Bescoby was a member, sent a generic email to RBS clients including PAG which referred to the increases in 3M GBP LIBOR and set out a possible trade idea. It was for a ten year term subject to RBS' right to cancel after 12 months and quarterly thereafter. Amongst other things, it was noted that if RBS called the swap, the counterparty would revert to paying a floating rate but having had the benefit of a lower rate for 12 months. Mr Wyse forwarded the proposal to Mr Malin asking for his thoughts and replied to Mr Bescoby stating:

> "Further to your earlier email and proposed hedging instrument I can confirm that although the first year looks attractive at 4.99%, we are reluctant to sign up to a further 9 year term at 5.35%.
>
> We may be interested in either a cap or swap depending on the rates, and would be grateful if you could provide indicative prices."

Mr Bescoby responded with further quotes which were forwarded on to Mr Malin.

83. On 18 September 2007, a meeting took place between Mr Wyse, Mr Russell and Mr Malin for PAG and Mr Bescoby, Mr Goldrick and others on behalf of RBS, to discuss hedging. Mr Wyse's note of the meeting records that there was discussion of a callable structure which RBS could extend to a full 10 year term. Mr Wyse also accepted that he had indicated that Mr Russell had a "target rate" of 5.00% in mind and asked Mr Bescoby whether he could offer a trade at that level. Mr Russell stated in cross-examination that he regarded 5% as a fair rate. However, he accepted that he had no recollection of the meeting. In any event on 20 September 2007, Mr Bescoby sent an email to Mr Wyse and Mr Malin headed "structured hedging idea to achieve 5%!". In the body of the email Mr Bescoby explained that following the meeting he had been looking at ways to "achieve David's target swap rate of 5%" and added that "by putting a twist on the extendable structures ... discussed" he had come up with such a structure which he set out. The terms of the proposed trade were that: it would commence on 30 September 2007 in relation to a notional sum of £10 million; PAG would pay 5.00% fixed and receive 3M GBP LIBOR; and after four years on 30 September 2011 RBS would have the right to extend the trade for a further 12 months on a notional of £20 million and at yearly intervals thereafter, until 30 September 2017. In the email the advantages of the structure were highlighted when compared to current market rates, with 3-month LIBOR at 6.55%, 4-year swaps at 5.75% and 10-year swaps at 5.49%. It was also noted that the contract involved the risk that PAG could pay 5.00% on £20 million until September 2017, and that if RBS did not extend the contract, PAG would return to a floating rate.

84. The proposal was discussed by Mr Wyse and Mr Bescoby on the telephone that day. The terms were explored and Mr Wyse set out his understanding of the trade which Mr Bescoby confirmed to be accurate. In particular Mr Wyse commented that the contract was extendable only by RBS and that if the bank "pulled out" PAG would be left with the floating rate. In addition, Mr Wyse asked whether the guaranteed 4 year period had been chosen because that "worked" which Mr Bescoby confirmed, saying that the guaranteed period could be extended to 5 years but in that case the fixed rate would need to be higher than 5.00%. Further, in relation to the potential for the term to be extended at the behest of RBS, Mr Bescoby added:

> ". . . you're tied in for ten years and if it's catastrophic and rates fall, then obviously . . . you're left paying 5% on a higher amount . . "

Mr Wyse commented that it seemed a good deal which was confirmed by Mr Bescoby and he stated that he would discuss it with Mr Russell and with Mr Malin. In cross-examination, Mr Wyse stated that he considered that there was benefit in entering the

contract at 5% but that PAG had been reassured by both Mr Bescoby and Mr Jones that PAG would be able to re-negotiate the contract if, in fact, rates fell. Mr Russell added that his understanding was that the arrangements with RBS would be restructured and that he never thought that the break costs would be in the region of £2m. In cross-examination, Mr Bescoby said that he could not recall any discussion about restructuring in PAG's favour. He also stated that he had only discussed structured products because the pricing for vanilla swaps had already been provided and did not achieve the 5% rate which Mr Russell required and about which he had strong views. He also accepted that he had neither informed PAG of the possible scale of any potential break cost or the mark to market cost of the contract. Nor did he inform PAG of the extent of the credit line put in place in the bank's internal records in relation to the potential trade. It was for £2.5 million. Mr Bescoby explained that it was not RBS's policy to provide that information to a customer.

85. In fact, the proposal was sent on to Mr Malin who accepted that he was asked for his advice but whose evidence was that he was not the prime mover in such matters and that, in fact, Mr Russell had his own agenda. Mr Russell also accepted that the market rates having changed, he wished to wait until a rate of 5% could be achieved and that it was his idea to increase the notional of the trade from £10m (increasing to £20m after 4 years) to £215m (increasing to £30m after 4 years). He said that it was a way of showing faith in RBS and keeping "aligned." Mr Russell's instructions to trade on that basis when the rate dropped back to 5% was communicated in an email to Mr Bescoby from Mr Wyse of 21 September 2007 which was also copied to Mr Malin who replied: "understood and agreed".

86. On 25 September 2007, market conditions having changed, RBS executed the trade, and Mr Bescoby telephoned Mr Wyse to tell him and to confirm the terms. The Second Swap was on the terms set out in the Annexe to this judgment. RBS sent PAG a Post Transaction Acknowledgment (the PTA) the same day. It was signed by Mr Wyse and returned that day. A formal confirmation of the Second Swap was signed by Mr Russell and faxed back to RBS on 5 November 2007. The PTA contained notes including the following:

> "5 You will be exposed to interest rate risk if there is a mismatch between the start dates or 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.
>
> 6 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.
>
> 7 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.

> 8 You are acting for your own account, and have made an independent evaluation of the transactions entered into and their associated risks and have had the opportunity to seek independent financial advice if unclear about any aspect of the transaction or risks associated with it and you place, or have placed, no reliance on us for advice or recommendations of any sort."

87. Mr Wyse accepted that he had read the notes before he signed the PTA but reiterated that he and PAG had been relying upon RBS completely. He also confirmed that he was very pleased with the Second Swap and on the telephone to Mr Bescoby on 25 September had commented that it would improve PAG's ICR cover. Mr Wyse had emailed Mr Malin to tell him "We got there" and asking him to review the documents. PAG also entered a £10m swap with HSBC on 27 September 2007 and informed AIB that PAG had entered a trade with RBS. Although there was nothing in the documentation relating to PAG's loan facility with HSBC requiring the company to hedge, it was Mr Russell's evidence in cross-examination that HSBC management had required it.

88. That day, Mr Malin spoke to Mr Bescoby on the telephone. Mr Malin expressed surprise at the terms of the Second Swap about which PAG was very surprised and delighted and how the rate of 5% had been achieved. He stated that he could not work out how RBS was doing it because there was no value in the yield curve for them. Mr Bescoby explained that it just worked in the market at that time. Mr Malin drew attention to the "conditionality" of the terms and the MTM, pointing out that as a result, it would not have appealed to his former employers. They also discussed the circumstances in which RBS would decide to exercise its right to terminate the Second Swap and what would happen if PAG wanted to terminate the arrangement. The relevant part of the transcript was as follows:

> "RICHARD MALIN: But presumably, in the coming years, there will be -- or maybe you can tell me as well, is there anything that Alliance could ever do to get out of the transaction?
>
> TONY BESCOBY: Well, it'll just ----
>
> RICHARD MALIN: Or will it have to come cap in hand to you?
>
> TONY BESCOBY: Well, it'll just have a market value. You know, it'll just be such that it'll have a market value. You know, if yields go up significantly, you know, the value of the option will be diminished.
>
> RICHARD MALIN: Yes.
>
> TONY BESCOBY: And the value of the swap will be greatly enhanced, so actually, you know ----

RICHARD MALIN: It almost sounds to me they may cancel each other out.

TONY BESCOBY: Well, they do, yes. That's how these things work, because they come to a point where if they're both in equilibrium, there is a call to be made about whether we, you know, whether we just walk away from this thing or not.

RICHARD MALIN: Yes.

TONY BESCOBY: But if the value of the swap -- if the negative value of the swap to us (i.e. positive value to the customer, i.e. rates going up).

RICHARD MALIN: Yes.

TONY BESCOBY: If the negative value of the swap is such that it does not, you know, it's greater than the positive value of the option that we hold.

RICHARD MALIN: Yes.

TONY BESCOBY: Then it's likely that will cancel.

RICHARD MALIN: Yes.

TONY BESCOBY: So if rates went -- you know, at the extreme, so if rates were at 6.50 and were forecast to stay there for the remaining six years of the life of the transaction, it's highly unlikely that that transaction would continue to carry on, you know what I mean.

RICHARD MALIN: Yes.

TONY BESCOBY: And the other side is if rates were down at 4%, then it's likely that we would carry it on.

RICHARD MALIN: Yes.

TONY BESCOBY: But I think the key thing to these, and you probably hit the nail on the head what you just mentioned there, is getting a level where the customer is comfortable.

RICHARD MALIN: Yes.

TONY BESCOBY: With the call or the put, if you like.

RICHARD MALIN: Yes.

TONY BESCOBY: That the bank hold.

RICHARD MALIN: Yes.

> TONY BESCOBY: So, you know, in property alliances group, David's view was 5% is fantastic.
>
> RICHARD MALIN: Yes.
>
> TONY BESCOBY: You know, if rates go below 5% am I really bothered if I'm holding a swap at 5%?
>
> RICHARD MALIN: No.
>
> TONY BESCOBY: If that's what I want anyway.
>
> RICHARD MALIN: As I said to him and to Ewan, if rates go back to 4%, then although this will prove expensive.
>
> . . .
>
> RICHARD MALIN: I can't see under any situation that it's going to be, you know, like an Evans of Leeds or something, or an MEPC, paying hundreds of millions of pounds to break a 35 year debenture at 11% sort of idea.
>
> TONY BESCOBY: No, absolutely.
>
> RICHARD MALIN: It isn't going to be, it seems to me, it isn't going to be terribly significant."

89. In cross-examination, Mr Malin accepted that he had explained the disadvantages of such a transaction to PAG before the Second Swap was entered into and had explained what the impact of the contract would be. He also accepted that he knew that PAG would have to pay break costs if it wished to terminate the arrangement and that RBS would decide to terminate only if it was in its own interests to do so. He added that there was some comfort in the fact that RBS was pushing the relationship with PAG forward and that the risk was one which was worth running. Mr Bescoby's evidence in cross-examination was that he considered the Second Swap to be a hedge for the first four years during which it would reduce interest rate risk. He added that PAG was looking for protection for the first four years at rates which were below those in the market, that the remainder of the contract was a quid pro quo and that he had highlighted the risks.

90. In the meantime, on 11 September 2007, PAG had received a letter dated 31 August 2007 by which RBS notified PAG that from 1 November 2007 it would be classified as a Professional Client and be subject to new terms of business in relation to "all our dealings". The letter provided that PAG would be treated as having agreed those terms if it continued to deal with RBS after 31 October 2007. These terms were referred to as "the MiFID Terms of Business". At clause 4.2 they provided that RBS would provide PAG with a "non-advisory dealing service" and at clause 4.3 provided that unless it had specifically agreed to do so, RBS would not provide PAG with advice on the merits of a particular transaction or provide it with a personal recommendation and that PAG was obliged to make its own assessment of any transaction.

91. On 3 October 2007, Mr Bescoby sent an email to the RBS North Property Team which attaching an article in the journal, "Property Week" written by a Ms Bowie of Rathbones, entitled "Swaps: panacea or poisoned chalice" in which amongst other things, she had commented: "For borrowers, purchasing a cancellable swap rarely leads to a happy ever after." Mr Bescoby commented on the article in some detail in his email and concluded:

> "In short callable structures are just one of a number of solutions which GBM can provide to clients as part of an overall risk management strategy. They are not a hedge but can satisfy a desire for lower rate funding for a pre-determined period…"

In cross-examination, both Mr Goldrick and Mr Jones confirmed that they had read Mr Bescoby's email at the time.

92. Meanwhile, and notwithstanding that PAG remained in breach of its ICR covenant, on 21 September 2007 PAG sought further additional funding due to increased costs in relation to one of its projects. Mr Jones stated that he would seek a further temporary relaxation of the ICR covenant through to January 2008. Thereafter, on 12 October 2007, Mr Jones informed Mr Wyse that credit had given approval for a further temporary waiver of PAG's breach, up until the end of December 2008. A formal waiver letter, which identified PAG's breach of covenant and formally set out RBS's decision to waive it, followed.

93. Mr Wyse telephoned Mr Bescoby, on 5 November 2007 saying that he had heard from Richard Malin that RBS was offering a cancellable trade with a fixed rate of 4.80% in which he expressed interest. Mr Bescoby explained that RBS had a cancellation right after 3 months, with the consequence that the rate achievable for a 10-year swap was as low as 4.80%. Mr Wyse accepted that the counterparty would be "tied in" for 10 years unless RBS cancelled and Mr Bescoby explained the factors which were relevant to whether RBS would cancel such a deal. He also explained that in present market conditions the bank could offer a rate of 4.88% in relation to a contract cancellable by the bank after 3 months. In cross-examination Mr Wyse accepted that he had understood the 'downside" of such a deal.

94. Mr Bescoby then sent an email setting out the two options discussed and noted that the "second option provides a lower fixed rate, guaranteed for a longer period, in return for paying a slightly higher rate after the guaranteed period (subject to calls)". Mr Wyse sent the email on to Mr Malin who responded saying that compared to 3M GBP LIBOR these were "attractive rates" and recommended the first option, before cautioning that RBS were forecasting a Base Rate reduction the following week so it might be worth holding off, or putting in a firm order at 4.85% for the first option or 4.7%/4.9% for the second. However, having discussed the matter with Mr Russell, on 7 November 2007 Mr Wyse emailed Mr Malin explaining that Mr Russell had rejected the latest idea on the basis that he did not want to be tied in for 10 years when he anticipated that rates would fall below 4.8%.

2008

95. On 9 January 2008, Mr Bescoby telephoned Mr Wyse and informed him that swap rates had fallen and asking whether PAG might be interested in looking at some hedging options. Mr Wyse asked him to send some ideas through and explained that he had spoken to HSBC the day before and they were quoting 10 year rates at 4.45%. At around the same time, Mr Wyse then emailed his hedging contact at AIB, describing the HSBC offer and noting that "Our view is that even if the bank cancel after 1 quarter it is worth our while doing, unless we think that the base rates are going to fall below 4.45%" and asking whether AIB could match this and to "advise ASAP as will need to move quickly to secure this deal".

96. On 11 January 2008, Mr Bescoby and Mr Wyse spoke again on the telephone. Mr Bescoby noted that Mr Jones had told him that Mr Wyse had expressed an interest in the cancellable trades which had been under discussion which resulted in a fixed rate of around 4.30% but warned that because such trades were callable after only 3 months, RBS was not able to include them in PAG's ICR covenants. The transcript of the conversation records Mr Wyse as responding: "Fair enough. I think we're just looking on a very short-term basis". It also records that Mr Bescoby mentioned that it would be necessary to "review the hedging line again" and stating that it was "fantastic" and "a great trade". In cross-examination, Mr Wyse accepted that the conversation was concerned with the trades in which he was interested but stated that he viewed the credit line merely as a bank issue which he did not understand. Mr Bescoby stated that it was his personal view that the proposed trade was attractive in comparison with market rates. He also accepted that he had not informed Mr Wyse of the break costs which would arise, if, for example, RBS chose not to re-finance PAG at the expiration of its loan facilities.

97. As requested, Mr Bescoby sent Mr Wyse an email entitled "callable structures" which set out the possible trade under discussion including factors under the heading "Benefits" and others under the heading "Considerations". The email described the trade (which was for 10 years but with RBS having a right to cancel after 2 years and quarterly thereafter), with an initial notional of £10 million for two years, then £20 million for the remaining 8 years (subject to calls); noted the fact that the proposed trade had a "2 year guaranteed period" and could therefore be included for the purposes of calculating interest rate covenants; noted that total hedging with RBS if implemented could be a maximum of £60 million (i.e. up to £20 million for that trade, plus £10 million on the First Swap and up to £30 million on the Second Swap). The considerations listed included: "If not called you could be paying 4.27% on £20m (how far do you think 3[M] rates will fall)". Mr Bescoby also stated that once Mr Wyse had spoken to Mr Russell he should let Mr Bescoby know as he would need to "run [the trade] past credit." Mr Wyse immediately forwarded the email to Mr Malin, asking for his thoughts and added "AIB came back with 4.35% against the 4.45% deal from HSBC". Later in the day, Mr Wyse responded saying "this seems to be the favourite now. What would the cap be if the floor was 3.75%?". He sent the response on to Mr Malin. In fact, Mr Russell decided not to go ahead.

98. Thereafter, during a telephone call on Monday 14 January 2008, Mr Bescoby told Mr Wyse that the market had moved in PAG's direction, so that RBS was able to offer a trade in which: (a) there was a cap of 5.25%; (b) there was a floor at 3.90%; and (c) if rates fell below the floor, the rate payable would increase by the differential between

3M GBP LIBOR and the floor (up to a maximum of 5.25%). The proposed trade would be guaranteed for three years, with RBS having the right to extend for a further two years on the same terms. Mr Wyse confirmed that the trade was the same as that discussed previously but for a 3.9% rather than a 4% floor which Mr Bescoby confirmed. Mr Wyse then forwarded the email to Mr Malin, discussed the matter with Mr Russell and then emailed Mr Bescoby confirming that PAG wished to proceed with the trade for £20 million, with a cap at 5.25% and a floor at 3.90% and with the other terms as set out in the email of 11 January and the Third Swap was entered into. Its precise terms are set out in Annexe to this judgment. A Post Transaction Acknowledgment was sent the same day and subsequently signed by Mr Russell. A formal confirmation of the Third Swap was also sent to PAG in due course and was executed by Mr Russell.

99. In February 2008, PAG's loan facilities with RBS were the subject of an annual review. At the meeting of the credit committee on 27 February 2008 Mr Jones explained that he was seeking: (a) a £1.3 million increase in the investment facility (in order to accommodate transfers from the development facility), plus a 5-year renewal of the facility (including 2 year capital repayment holiday); (b) a reduction in the development facility from £50 million to £36 million (to remove existing headroom – i.e. undrawn facility); and (c) to hold the LTV covenant at 75% (rather than ratcheting down to 70%), plus an ICR covenant at 1.25. The committee asked whether Mr Jones was happy with the recommendation of credit that there be a rolling property revaluation programme, to bring the valuations up to date. Mr Jones said he had agreed this with credit, with 20% of properties being revalued each year. The committee asked where surplus cash was going and why this cash was not being used to pay down some of the facilities with RBS. Whilst Mr Goldrick explained that surplus cash tended to be reinvested, the committee advised that it had concerns about PAG incurring significant costs on its own private jet and very high entertainment costs when PAG had a very high LTV, especially given that market conditions (and the commercial property market in particular) were getting tougher. The committee stated their view that the 1% margin over Base Rate for the development facility was "off market" (i.e. lower than the market) and suggested the relationship team look to increase this in the future, and to move £30 million of the development loan over to LIBOR (rather than Base Rate). The committee expressed the view that PAG needed close supervision and that further breaches of covenant might well trigger the need for a renegotiation.

100. At a meeting on 5 March 2008, Mr Jones discussed the credit committee's decision with Mr Wyse. Amongst other things he mentioned the fact that 20% of the properties would need to be revalued each year and that £30 million of the development loan would be moved to LIBOR. In relation to the latter, Mr Wyse expressed concern and Mr Jones said that he could speak to Mr Bescoby about possible ways in which hedging might be used to ameliorate the change. A telephone discussion ensued that day between Mr Wyse and Mr Bescoby during which Mr Wyse described market conditions as "a bit strange…five year rates seem to be up and down at the moment" and having stated that he was not looking for anything specific, noted that PAG's 2003 Swap with AIB was about to expire and that he wondered "where things are up to".

101. That afternoon, Mr Bescoby sent an email setting out pricing for a callable trade with the following features: a term of 5 years, subject to RBS's cancellation rights; PAG to pay 3.95% for the first 6 months, then 4.65%; PAG receives 3M GBP LIBOR; and RBS has the right to cancel the swap after 6 months and quarterly thereafter. Mr Bescoby explained that the trade set out above would eliminate the risk of paying floating LIBOR for 6 months but that if the swap were called by RBS PAG would revert to paying LIBOR which might still be higher than Base Rate. He suggested therefore, that PAG consider a variation on the callable swap which would allow it to continue to pay Base Rate in such a situation. The terms of the trade proposed were: a 5 year term; PAG pays 4.75% guaranteed for the first 12 months; PAG receives 3M GBP LIBOR; after 12 months, and quarterly thereafter, RBS has the right to cancel the swap; and if RBS cancels the swap RBS pays 3 month LIBOR and PAG pays RBS average Base Rate for the remainder of the life of the trade. Mr Bescoby further explained that the effect of this second proposed trade would be that PAG would receive 3M GBP LIBOR throughout thereby negating its exposure to 3M GBP LIBOR under its loans and would either have to pay 4.75% fixed (if not cancelled by RBS) or (if cancelled) average Base Rate. He stated that the "*cost*" of that additional feature was reflected in the 4.75% payable (which was higher than the rate quoted for the first callable swap quoted in his email). Mr Bescoby accepted in cross-examination that this was the first time that RBS had devised a product of this kind to ameliorate the effect of having to move borrowing to the LIBOR rate and that as far as he was aware only PAG took it up.

102. Mr Jones reported the credit committee's decision to PAG by an email of 6 March 2008. In the email Mr Jones stated that "different market conditions, primarily driven by the "credit crunch" that emerged in the third quarter of 2007, and the liquidity issues which have persisted since" meant that RBS needed to align facilities with its own funding structure. He went on to add that:

> "LIBOR represents the true funding cost to the Bank, i.e. we obtain our deposits from the London Inter Bank market, and it therefore seems logical to bring our funding costs into line. There are now however additional cost implications to the Bank if funding is held on Base Rate, where the related position within the Bank's capital requirements are held in Libor. Therefore for facilities where there is a significant element of Base rate related debt, there would need to be a natural consequence to the margin charged to take account of this."

He went on to note that Mr Bescoby had recently provided "*hedging ideas*" which were aimed at dealing with the move from Base Rate to LIBOR funding; and set out the rest of the credit committee's decision, including the rolling revaluation programme.

103. Thereafter, on the telephone on 7 March 2008, Mr Wyse told Mr Bescoby that he had discussed the hedging ideas with Mr Russell and that he was *"quite up for doing something"*. In this regard, Mr Russell stated in cross-examination that PAG was merely trying to keep RBS happy but, in fact, he was not eager to hedge. However, he accepted that PAG was also in touch with AIB that day to see if they could match rates and that he had already decided on a £10m and a £20m trade. In the light of his

admission, I am unable to accept Mr Russell's evidence that PAG was merely trying to keep RBS happy.

104. In any event, during the telephone call on 7 March 2008, Mr Wyse also stated that Mr Malin had brought little to the discussions, that he and Mr Russell made up their own mind and that Mr Goldrick had recommended another person, a Mr Morton-Smith and that Mr Wyse wanted to run the ideas past him. Mr Morton-Smith had been a banker at Midland Bank and subsequently HSBC and had spent twenty years specialising in real estate and asset backed lending, before becoming a consultant. He stated in cross-examination that he had focussed on the management of debt, of which the interest rate element was part but not the primary focus. He stated that he had not been involved in choosing interest rate products but knew what they were, which I accept.

105. In any event, Mr Wyse also mentioned that if PAG were to enter another derivative for £30m it would be over and above the RBS loan. He asked whether that would be a problem. Mr Bescoby explained that the swaps hedged the "market risk" and that provided credit were happy with the security (i.e. to cover any contingent liability represented by the hedging), this should not cause an issue from RBS's side. Given this indication from PAG, Mr Bescoby contacted Mr Jones setting out the terms of the trades and noted that the hedging line required for the trades was £2.7 million, and that the total credit line for PAG's hedging needed to increase from £5.5 million to £8.2 million.

106. Thereafter, on 11 March 2008 Mr Wyse and Mr Russell met with Mr Morton-Smith who amongst other things, was asked about his views on the proposed trades set out in the email from RBS of 5 March 2008. In fact, Mr Morton-Smith did not recall discussing the matter at that meeting. In any event, on 13 March 2008, Mr Wyse telephoned Mr Bescoby and told him that Mr Morton-Smith wanted some time to think over the hedging and that PAG would be meeting with him again in two to three weeks, and that hedging would be put on hold until they had held those discussions. Thereafter, on 1 April 2008 Mr Wyse contacted Mr Bescoby to ask for a pricing update on the structures described in Mr Bescoby's email of 5 March 2008. That day Mr Wyse discussed the proposed trade with Mr Morton-Smith, who suggested speaking to AIB. Thereafter, on 2 April 2008 Mr Wyse emailed Mr Morton-Smith to tell him that AIB had quoted 4.81% on the stepped callable swap (versus RBS's 4.82%, quoted by Mr Bescoby that morning) and also a 5-year vanilla swap at 5.03%. Mr Morton-Smith responded later that evening saying that although the decision was that of Mr Russell and Mr Wyse: "on the face of it both these look attractive" before noting that:

> "My only caveat is that interest rates are particularly volatile in the short term – this makes 5 years look like a very long time. Bottom line to me is that these rates do not look uncomfortable over the longer term for what is a long term investment business and brings an essential stability for the overall business".

107. On 7 April 2008, Mr Wyse emailed Mr Bescoby and informed him that he would be meeting with Mr Russell to discuss hedging. Mr Wyse asked whether prices had moved, and also requested the current price of a 5-year (vanilla) LIBOR swap. Less

than ten minutes later Mr Wyse also sought quotes (including for 5-year swaps) from AIB which he then passed on to Mr Morton-Smith. Mr Wyse then received a circular from AIB, discussing the economic situation and predicting an imminent Bank of England rate cut whilst noting increasing swap rates and "option premiums" reflected the lack of confidence of banks in lending to one another and giving pricing for vanilla swaps and caps. The following day he emailed Mr Bescoby saying that PAG were going to hold off until the anticipated rate cut and asking for his "*latest strategies*" by Monday lunchtime, along with *"anything else you consider suitable"*. Following the Bank of England cut to Base Rate on 10 April 2008, on 11 April 2008 Mr Bescoby emailed Mr Wyse with updated pricing namely that: the rate for a 5-year swap was 5.05%; the rate for a 5-year swap where RBS had the right to cancel at 6 months and quarterly thereafter was 3.95% for the first 6 months and then 4.78% thereafter; and the rate for a 5-year callable base rate converter swap guaranteed for 12 months and with RBS having quarterly termination rights thereafter was 4.82%.

108. Mr Wyse forwarded this on to Mr Morton-Smith noting that "we'll look to sign up via RBS and/or AIB" and that he was meeting with Mr Russell on the following Monday to "discuss hedging generally" and that in advance of that meeting he was going to be "at AIB…to see what they have to offer". Mr Morton-Smith responded on 14 April 2008 saying that he was interested to hear what AIB had to offer. He also stated:

> "RBS seem to be trying hard and compared to straight Swap from Lloyds (see below), their latest structure looks good. However, pressure on LIBOR and interest rates generally must surely be down at this time. My concern is that by leaving the option for RBS to cancel after year 2, you are likely to be paying higher than the norm for three years. If you want certainty for the full term a straight Swap at 5.01% or there abouts is the alternative.
>
> Overall these rates are still historically fairly low and you may feel that a proportion of your hedging strategy should be fixed and certain with a proportion taking some risk but seeing immediate short term benefit. The strategy needs to be considered given that you are currently short on hedging over your whole debt.
>
> It might be useful to align your hedging strategy to the investments. If the long term investment strategy is to hold assets rather than trade, it may be that you would wish to have hedging aligned to the investment portfolio to create certainty of debt service cover -you can park the debt and the assets and focus on the development activities."

Mr Morton-Smith also went on to provide quotations of trades (for swaps, callable swaps and collars, each of varying durations) which he had obtained from Lloyds TSB. Mr Wyse responded attaching the 14 April 2008 Rathbones Bulletin, before setting out AIB's latest 5-year hedging offering. On 15 April 2008, Mr Bescoby sent through a further update on pricing of both the stepped callable swap and the Base Rate converter swap which Mr Wyse then forwarded to AIB asking for its rates.

109. On 16 April 2008, Mr Wyse telephoned Mr Bescoby and expressed an interest in the second option quoted by Mr Bescoby on 15 April 2008 stating that "we need 15 mill on that". Mr Wyse said that Mr Russell would also trade if RBS could offer a 4.90% fixed 5-year swap, for a further £15 million. Mr Bescoby responded that whilst he could not offer a 5-year swap at 4.90%, he could offer a cancellable swap at 4.90% and that PAG could see how far it could go before it was called. Shortly thereafter Mr Bescoby telephoned Mr Wyse back and explained that RBS could still offer a callable Base Rate converter swap with a strike at 4.80%, with the first call after 12 months. He asked Mr Wyse again how much PAG wanted to trade and was told by Mr Wyse "£15 million". A trade on those terms was then entered into which became the Fourth Swap. The terms of the Fourth Swap are set out in the Annexe to this judgment. The same day RBS sent PAG a Post Transaction Acknowledgment for the Fourth Swap which set out its terms and contained the PTA Notes. It was signed by Mr Russell on behalf of PAG and faxed back to RBS that day.

110. During the same telephone call, Mr Bescoby then referred to the earlier conversation about a trade at 4.90% and said that he could offer a 5-year cancellable swap with a 3-year guaranteed period at 4.90%. Mr Wyse said that that rate was probably better than a 3-year swap, which Mr Bescoby confirmed, noting the 3-year swap rate was about 5.05%, with 5-year swaps being around 5.07% or 5.08%. Mr Bescoby confirmed that it would be a "five year trade, you're guaranteed to pay 4.90% for three years. After that period we take a view on it and decide whether we're going to cancel it" and noted that the cancellation option meant the price offered was lower than a vanilla 3-year swap or 5-year swap.

111. In addition, on 16 April 2008, PAG also entered into a further stepped cancellable trade with AIB. It had a 5-year term, subject to AIB's cancellation rights every quarter after an initial fixed period of 6 months. It provided for PAG to pay 3.95% for 6 months, then 4.75% and PAG would receive 3M GBP LIBOR. In this regard, Mr Russell stated in cross-examination that his preference was for "vanilla" swaps but that anything other than the callable versions which were purchased would have attracted a large premium. He also stated that AIB had seen what RBS had offered PAG and that was why they had followed suit in offering a stepped callable trade. Mr Wyse added that although there was no obligation to hedge with AIB they had been encouraged at meetings and on the telephone.

112. In an email to Mr Morton-Smith also of 16 April 2008, Mr Wyse explained that in addition to the RBS and AIB trades entered into that day, Mr Russell was "happy to put £15m" on a 3 year cap/trigger deal proposed by AIB if the prices came back to those quoted and would do another £15m on a 5 year LIBOR fix once the rate came down to 4.90%. He stated that he had put both banks on alert. As a result, on 18 April Mr Wyse informed AIB that he had given the same instruction. In cross-examination Mr Russell accepted that he had considered 4.9% to be an attractive rate.

113. That same day, Mr Morton-Smith provided PAG with a draft document entitled "Review of Banking" which amongst other things contained reference to the "Credit crunch" and its effect upon liquidity and banking in general. It was also noted that both gearing and the loan to value against property assets were very high. On 25 April 2008, Mr Bescoby sent Mr Wyse an email in which he explained that work had been done on a swap idea which involved taking advantage of the dislocation in the money markets between 1 and 3 month LIBOR. He set out the terms and attached a

paper which explained the idea in more detail. The material was forwarded to Mr Morton-Smith and a few days later, Mr Wyse emailed updated terms to Mr Morton-Smith noting that "David suspects there is a catch, but is happy to sign up to this" and explained that RBS would benefit by the differential between 1M and 3M GBP LIBOR (circa 40 basis points), albeit that they would then "give" 10-12 basis points to PAG, hence the guaranteed saving. On 17 May 2008 Mr Morton-Smith responded, agreeing that "there must be a catch!" before noting that whilst the bank clearly benefited more than PAG, "every little helps". Thereafter, after a telephone conversation between Mr Bescoby and Mr Wyse on 19 May 2008 during which Mr Wyse set out his understanding that: ". . .you're gaining by the fact you're getting the difference between one month and three month LIBOR off us less what you're giving us . ." the first of a number of basis swaps was concluded which Mr Wyse accepted led to significant savings by PAG, none of which are the subject of these proceedings.

114. A new development loan had been concluded on 14 May 2008 which expired in February 2009. The total loan was up to £36 million, of which no more than £18.768 million could be drawn at Base Rate, and that had to be drawn within three months. The remainder of the loan (linked to LIBOR) had to be drawn no later than 31 October 2008, failing which RBS was entitled to cancel it.

115. Despite the fact that there was no obligation to do so at the time, the current hedging requirement being 100% of the investment loan which had been met by the £60m trades in place, in October 2008, Mr Wyse was in contact with AIB asking for quotes on a 5 year LIBOR swap and further telephone discussion took place between Mr Wyse and Mr Bescoby on 4 November. On 6 November 2008 Mr Wyse emailed Mr Bescoby saying "We'll do £20 million at 3.35%, or tomorrow's rate if its better. Please call". In fact, PAG decided to wait and entered into a further basis swap in the meantime.

116. In early December 2008 Mr Bescoby emailed Mr Wyse and noted that as a result of the terms of the two collar structures being the First and the Third Swaps and the prevailing 3M LIBOR fixing at 3.28125% it was "likely that PAG will be paying a higher interest cost on both structures". A telephone discussion took place as a result on 10 December 2008 during which Mr Wyse asked about the possibility of breaking the First and Third Swaps what those costs would be and having those "costs…rolled up into a new deal". A further discussion took place on 17 December 2008 during which Mr Bescoby suggested that it would be necessary either to increase the notional of the hedging or increase the length of the term, perhaps to 2019. He added that this would have a "quite a hefty…hedging line implication" which would have to be approved by the credit committee.

2009

117. Mr Bescoby provided further ideas about restructuring trades on 13 January 2009 and commented once more that it would be necessary to go to credit in order to "increase the hedging line". On 15 January 2009, Mr Wyse asked for the break costs for the two callable structures the restructuring of which was being discussed and was supplied with the details which totalled £2.998m. Mr Wyse sent the figures on to Mr Morton-Smith with no comment. However, he says that he was surprised but not concerned.

118. On 12 February 2009 a meeting took place between RBS and PAG to discuss the possible renewal and/or restructuring of PAG's facilities. The re-negotiation took place over a number of months and included an informal valuation of PAG's properties carried out by a specialist member of RBS staff. PAG's portfolio was valued at £79.7m. On 21 April 2009, Mr Russell wrote to Mr Jones criticising the valuation suggesting that it ought to be in the order of £83m. PAG went before the RBS Watch Committee on 8 May 2009, Mr Jones having prepared a paper in which the reason for appearance was noted as "Forecast LTV covenant breach". Under the heading "Risk Analysis" he also noted: "Leverage – overarching test at 73% against 75% covenant, although against mainly historic values. PFG desktop exercise undertaken which views this could have moved out to 90% (customer estimates 80%). Under "Bank Strategy" he also noted: "… Customer reluctant to formally re-value assets in current market, thereby resetting loan over a term against reduced values. . . Retaining PFG's values for the "development" assets, although agreeing to "meet the customer half way" on the Investment Assets at an 8% yield, produces an overall LTV position of 80%, and we therefore propose a 12/18 month facility of £66.7m." Very shortly afterwards, on 12 May 2009, it was agreed that the existing lending facility be extended to the end of May 2009.

119. PAG was considered by the Credit Committee at a meeting on 29 May 2009 when amongst other things, the valuation/LTV position was discussed and recorded in the following terms:

> "Committee opined that, in reading the PFG comments, the inference was that there was probably no point in getting new valuations on the PAG portfolio at this stage. D Meppem explained that the client's concern was the position could come out being much worse than expected, and he went on to explain the reasoning behind this. With difficult market conditions now being seen, there would be few appropriate comparables available and those transactions that were being seen in the market would tend to be forced sales, and that resulted in values being impacted. In addition, some valuers would use these poor market driven values as a basis for revaluing the PAG assets, whereas other valuers would take a longer term market view in providing fresh valuations. In PFG's eyes, PAG's were good assets which would bear up and provide strong values, as and when the market recovered. Given the reasons outlined, there was therefore comfort with not obtaining new valuations at this stage.
>
> ...
>
> In general terms, PAG's portfolio of assets was opined to comprise those which would be acceptable, so long as no LTV test was undertaken – if market values were tested then clearly values would be lower – but if PAG or the Bank had to act against the portfolio then we'd probably see an LTV of between 80 and 100%."

Thereafter, a new facility was proposed on 9 June 2009 and finally agreed and signed on 13 August 2009. The covenants under the 2009 Facility were set at 81% (LTV) and 120% (ICR) and clause 10.9 provided that:

> "The Borrower authorises the Bank from time to time to obtain an up to date professional valuation of all or any of the Charged Properties from a valuer/surveyor acceptable to the Bank and the Borrower shall meet the cost of any valuations obtained by the Bank provided that the Borrower shall not be liable for the cost of more than one valuation for each of the Charged Properties in any one calendar year other than a valuation obtained following the occurrence of an Event of Default."

Meanwhile on 1 July 2009 Mr Wyse emailed Mr Andrew Walsh of Rathbones, asking for advice in relation to PAG's hedges with AIB, HSBC and RBS, and requesting a meeting. A note of advice given by Mr Walsh of Rathbones dated 10 August 2009 taken by Mr Wyse records that it was estimated that it would cost £9m to break the derivative contracts with RBS. In September 2009, Mr Robin Priest, the Managing Director of Beachwood Ltd, a real estate advisory service, was taken on by PAG as a consultant to assist on banking matters and, in particular, re-financing and raising equity financing, in place of Mr Morton-Smith.

2010

120. By December 2009, the rates which PAG was paying under each of the Swaps far exceeded the 3M GBP LIBOR which was around 0.60%. On 11 January 2010 a meeting took place between Mr Wyse, Mr Bescoby and Mr Zwicky-Ross, a director in the Real Estate Finance section of RBS Corporate. The purpose of the meeting was to discuss a possible restructure of PAG's hedging portfolio. There is a question as to whether Mr Russell was also present. Although Mr Bescoby stated that he had no independent recollection of the meeting, relying upon his call report which makes no mention of Mr Russell, he corrected his written evidence in examination in chief and stated that Mr Russell was not at the meeting. However, it was Mr Wyse's evidence that Mr Russell was at the meeting and Mr Russell stated that he had been there at least for part of the meeting.

121. The importance of whether Mr Russell was present is because it was at this meeting that both Mr Russell and Mr Wyse say that they were told for the first time about the extent of the break costs on the Swaps which were £6.7 million at that stage. Mr Russell described it as the worst day of his business life and added that he could not overstate the shock and devastation. It seems to me that on the balance of probabilities that it is more likely than not that Mr Bescoby's note would have mentioned Mr Russell as present at the meeting and would have recorded his alleged reaction in relation to the break costs had he been there and therefore, I am unable to accept the evidence of Messrs Wyse and Russell in this regard. I also consider that the lack of any other contemporaneous documentary evidence, in the form, for example, of a letter to RBS, recording Mr Russell's shock and horror at the break costs supports my conclusion. In any event, as Mr Wyse accepted in cross-examination, he had already been advised in January 2009 that the break cost for two of the Swaps would be almost £3 million and PAG had been advised by Rathbones in August 2009 that it would cost in the region of £9 million to break all four Swaps. I am unable, therefore,

to accept the evidence of Mr Russell that he was told about the break costs and their magnitude for the first time in January 2010 and was deeply shocked.

122. On 19 January 2010, Mr Bescoby sent Mr Wyse a paper regarding a possible restructure of PAG's hedging. Reference was made in the paper to PAG closing out some of the hedging at a cost of £1.065 million and £1.33m respectively, whilst noting that the Global Banking and Markets division of RBS (for which Mr Bescoby worked) would need to discuss with Credit whether this was acceptable and that "any re-structure would need to be executed within existing hedging lines". The paper (which included a chart of the LIBOR yield curve showing swap rates) noted that the proposed strategy suited a view that LIBOR would not increase as much as the implied forward levels were suggesting, and stated that: "The company needs to consider its views on the future path of interest rates before making a decision on whether to restructure using this method." Mr Wyse responded to Mr Bescoby on 5 February 2010 noting that PAG's assessment was that interest rates were going to rise to over 4% within two years and that as a result, PAG had decided to leave hedging for a while. However, the following day Mr Wyse emailed Mr Zwicky-Ross attaching a completion statement for one of PAG's properties at Chorley and suggested once more the possibility of using part of the proceeds of sale to meet the break costs of one of the Swaps. The Chorley issue was discussed again during a teleconference on 9 March 2010 in which Mr Goldrick participated. Mr Wyse's note records the requirement for PAG to "Send AIB facility to RBS" and, in relation to the proceeds of the Chorley property, records PAG retaining £500,000 "re tax & fees", applying the majority of the remainder "say £2.5m" against its debt, but retaining a "Balance of approx £1m to be offset against hedging". Further on 10 March 2010 Mr Bescoby sent Mr Wyse updated break costs for the Swaps which totalled in the region of £8m. Mr Wyse responded stating merely that he noted that the costs had increased substantially since they had met in January and that it was no doubt down to market rates.

123. In the meantime, a meeting was arranged with Mr Walsh of Rathbones on 3 March 2010. Mr Wyse forwarded the break costs obtained from Mr Bescoby to Rathbones for their consideration and noted that PAG and RBS had discussed the utilisation of the sale proceeds of the Chorley property. He also asked for Rathbones' advice as to how to utilise £1,182,000 against hedging, including which swaps to break or whether to keep the money on deposit and see if break costs reduced. On 16 March 2010 Rathbones sent a "proposal letter" addressed to Mr Russell in which PAG's position was described as "very fully hedged" and likely to become over-hedged at high cost at a time when floating rates had plummeted. It was suggested that RBS be persuaded to extend their hedging line by £2.5 million. It was noted that "pressure could be brought to bear" by a number of techniques including making allegations of mis-selling based on the sale of derivatives without third party advice which would be "impossible to prove" but would "prove very embarrassing". On 16 April 2010, Mr Wyse emailed Rathbones to confirm that it intended to proceed with their proposal. At this time, a draft letter was also produced for Mr Russell to send to HSBC dated 21 April 2010. It referred to alignment between PAG's interests and that of the bank and contained complaints about the derivatives taken out with HSBC on its advice. In cross-examination, Mr Russell accepted that this had arisen during restructuring discussions and that ultimately HSBC agreed to write off their hedge.

124. Meanwhile, on 25 March, 2010 PAG was referred back to the Watch Committee for a third time. It was at this meeting that it was recommended that PAG be referred to RBS' Global Restructuring Group, ("GRG"). The note of the meeting records:

> ". . . whilst David Russell (DR) may be a skilled operator, there were a number of concerning features here including high LTV on the investment assets with no ability to amortise other than from AIB funded assets, marginal cashflow position reliant upon income to cover overheads, split banking where the customer was now arguably in default under our loan agreement and in the absence of a signed AIB document no clarification of the position of other lenders who were also providing overdraft to cover liquidity needs. In addition there was also an associated land loan at c.100% LTV with no exit in place at present…As a result Committee felt GRG's input was now required in terms of our strategy."

The same day, Mr Alan Cocking emailed Mr Logan copying in Mr Thomson and stated: "Agreed at Watch this is a GRG referral." The minutes of the meeting were taken by Farrah Sefidchehreh, a junior member of staff and forwarded to Graeme Hunter, Portfolio Management, CIB for approval. In his email of 6 April 2010, he asked her to reduce the size of minutes wherever possible and attached an amended version. He had added some comments and deleted others including reference to the client being compliant with covenants and the bank not being reliant upon asset sales. The GRG referral form dated 7 April 2010 recorded that the "Prime reasons for GRG involvement" were as follows:

> "High LTV on the investment assets with limited ability to amortise/de-gear other than from AIB funded assets &/or asset sales.
>
> PFG input in 5/09 indicated LTV at c.80% on RBS portfolio; 90%+ including hedging. Re-valuation exercise now required as part of refinance/restructure.
>
> Tight liquidity with reliance on income other than rental to provide headroom to cover business overheads.
>
> Multi banked with limited visibility on stance being taken by other lenders & wider liquidity."
>
> Russells' Loans at c.100% LTV with no clear exit."

125. In cross-examination, Mr Scott McCoy, who was the employee in GRG to whom Mr David Whatham assigned the PAG connection, explained that he was not involved in the transfer of PAG to GRG but understood that one of the reasons was the level of MTM. He added that it was RBS' exposure as a whole, of which the MTM was part and that the high LTV was a concern. He also stated that he was not familiar with the appendix to a GRG Manual which stated that mandatory transfer to GRG applied where a customer litigated against the bank.

126. Following the referral, discussions took place between PAG's relationship management team and the Credit Department. On 26 April 2010 Mr McCoy confirmed his view that the full Chorley sale proceeds should be used to repay the loan, in circumstances where the LTV was apparently high but in any event uncertain.

127. Meanwhile, on 27 April 2010, a meeting took place at PAG's offices, attended by Mr Bescoby, Mr Russell, Mr Wyse, Mr Rathbone and Mr Walsh, to discuss a potential restructuring of the Swaps. Mr Bescoby's note records that: "DR [Mr Russell] acknowledged that they probably over hedged over the past few years (which has led to the current position) – in hindsight he suggested they should have stopped at c£40-45m, he did advise that this was nothing to do with RBS, it was a company decision which they take full responsibility for." However, Mr Russell denies that he made such an acknowledgment and Mr Wyse does not recall it. He stated that Rathbones gave Mr Bescoby a "hard time" about the Swaps. On the balance of probabilities, it seems to me that it is more likely than not that Mr Bescoby's meeting note records the gist of what was said. To suggest that Mr Bescoby would have fabricated that part of his note is a very serious allegation to make and is not supported by other documentary evidence.

128. The following day, 28 April 2010, Mr Wyse and Mr Bescoby discussed the matter on the telephone. Mr Bescoby explained that, having discussed it with Mr Goldrick, RBS did not consider that Rathbones' proposal was workable because it made no difference to its immediate interest costs. As such, the proposal to buy back the options would not improve cashflow (and thereby permit some amortisation of RBS's facilities).

129. In an email of the same day from Mr McNicholas to Mr McCoy, he stated amongst other things: "As I indicated the discussion with the client regarding the [sic] their interest rate strategy is proving interesting." Mr McCoy's evidence was that PAG had raised its concerns about the Swaps and the level of MTM but he was not clear that they were complaining at this stage. He also stated that he had informed PAG that LTV was being considered in the context of it re-financing its borrowing and the risk which that entailed. He stated that that was the case despite the fact that Russells had been graded as having a 2.56% likelihood of default which was not within the range requiring mandatory referral to GRG. A further email also of 28 April 2010 from Philip Holland to Alan Cocking states: "Things not as simple as portrayed to GRG" upon which Mr McCoy was unable to shed any light. Neither Mr Holland nor Mr Cocking gave evidence.

130. On 21 May 2010, Mr Goldrick wrote to Mr Russell confirming a meeting on 2 June and explained that Mr McCoy from GRG would attend. In relation to GRG he explained that:

> "... This unit works with customers who, for whatever reason, no longer meet the Bank's generally accepted lending criteria and/or where there are breaches of lending covenants.
>
> Your file has been referred to Scott predominantly due to the perceived refinance risks in relation to the loan agreement which expires in December.

> Scott's role is to seek to understand the challenges that the business is currently facing and to explore possible solutions. This will include an opportunity to discuss the company's interest rate hedging strategy, and the use of asset disposal proceeds.
>
> ...
>
> Ultimately, the aim is to assist in the restoration of the businesses financial position within parameters acceptable to all parties concerned which will enable transfer of your file back to my control."

131. On 27 May 2010, Mr Walsh emailed Mr Wyse a draft of a letter to Mr Russell dated 1 June 2010 setting out Rathbones' views in relation to the Swaps together with their recommendations. Thereafter, Mr Wyse liaised with Mr Walsh in relation to amendments to the draft. In particular, on 1 June 2010 Mr Wyse emailed Mr Walsh asking if he could further amend the letter by including an additional sentence in relation to the cost of removing RBS's right to extend the Third Swap beyond January 2011, which read: "This appears quite expensive and perhaps an area RBS may want to resolve internally". He also asked Mr Walsh why the cost of removing RBS's option to extend the Third Swap was so expensive, particularly when compared with the cost of cancelling the bank's option to increase the notional of the Second Swap. In his response, Mr Walsh explained that: "In a low rate environment the option to extend a hedge is in the money and therefore more expensive, whereas an option to cancel the hedge is out of the money and unlikely to happen resulting in the lower cost to buy it back."

132. The final version of the letter which was used at the meeting with RBS on 2 June 2010: summarised PAG's hedging as totalling £60 million "with the likelihood that RBS will exercise its right to increase this amount by a further £15 mill in September, 2011"; stated that "The Company has, therefore, lost control over the management of its interest rate risk" but noted that "Fortunately, current low market levels have reduced the value of the bank's options to terminate the two swaps at a relatively low cost"; suggested that PAG needed to remove the Bank from "having control over the quantum of its hedging" and reducing the amount of that hedging, reiterating that: "As noted above, the only advantage of the level of prevailing market rates is that the cost of terminating the existing bank option to cancel the two interest rate swaps is relatively small" but also discussed the (more expensive) removal of RBS's right to extend the Third Swap; noted RBS's further right to increase the notional amount on the Fourth Swap in September, 2011, and recommended that the Fourth Swap be terminated; and stated that:

> "As independent advisers we have worked on a large number of hedging portfolios in the past couple of years where the advice given by banks on hedging structures has been based on encouraging their customers to speculate and has been totally inappropriate. The advice given to the Company would rank amongst the worst examples of structured products of a toxic nature. No doubt the bank was instructed to recommend instruments that produced a short term and immediate below

> market rate… While we have not seen the specific recommendations that RBS proposed to the Company, we would expect them to contain a standard health warning together with the recommendation that the Company took independent advice. As we assume the Company did not heed this advice, we would doubt that the Company has any legal grounds on which to accuse the Bank of mis-selling (although it would appear that some European entities are pursuing this course of action) . . ."

133. At the meeting between Mr Goldrick, Mr McCoy, Mr Russell and Mr Wyse on 2 June 2010, amongst other things, Mr McCoy explained that a new valuation and security review were required as first steps to clarify PAG's LTV position and establish the appropriate way forward. In cross-examination, Mr McCoy stated that the security review was certainly a requirement for clients when transferred to GRG. In relation to the valuation, PAG was fairly confident that it would be within its covenants and that in the light of the re-financing concern, it was perfectly reasonable to obtain the valuation. In an email exchange between Mr McCoy and Mr McNicholas on 23 April 2010, it was noted:

> "We do have the right to call for valuations immediately, which underpinned my recommendation to REF Watch Committee to bring forward the valuation process (originally agreed with client to commence in September, in anticipation of the facility expiry in December).
>
> A formal valuation was not taken last year- it was agreed as part of a holding strategy with the client last year that the LTV covenant would be based on PFG numbers (given concerns regarding the lack of liquidity and comparable evidence in the marketplace for secondary assets).
>
> The net sale proceeds of circa £4.03m, compares favourably with PFG's estimate of circa £3.1m (April 09).
>
> The last formal valuation appears to have been undertaken in 2006 (postulated £4.9m). We have only a hard copy on file."

134. Thereafter, Mr Russell and Mr Goldrick had a discussion on the telephone on 4 June 2010. In a subsequent email to Mr Zwicky Ross and Mr McNicholas, of the same date, Mr Goldrick stated:

> "I asked him [Mr Russell] what we should do about Russells and he was happy that Paul writes to Andy [Mr Russell's nephew] explaining that Russells aggregation with Alliance and the restructuring of the latter means that separate staff from the Bank will need to get involved…"

Mr Russell denies having agreed to this and suggests that the email is a fabrication. In cross-examination Mr Goldrick stated that he could not recall the conversation itself. It was not put to him that the email was a fabrication. I am unable to accept Mr

Russell's evidence in this regard. It seems to me that on the balance of probabilities it is more likely than not that the content of the email reflected the conversation and was not a fabrication. Furthermore, Mr Russell's failure to complain at the time about what is now characterised as a breach of confidence in contacting Russells supports the conclusion that the content of the email is more likely than not to have been accurate.

135. In any event, following the meeting of 2 June 2010, Mr McCoy obtained a quotation for the valuation, from DTZ for £34,500; and for the security review, from Berwin Leighton Paisner for £9-12,000. Once the estimates had been forwarded to him, Mr Wyse forwarded them on to Mr Priest who responded suggesting that PAG should resist the security review but stating that:

> "On the valuation, we will not get anywhere with them without it so I do not think there is any choice in the matter – any conversation we have with them without it will be meaningless. DTZ are ok in my experience but we should insist on seeing the instruction they are given if we are paying."

136. Nevertheless, on 6 July 2010 Mr Priest emailed Mr McCoy asserting that PAG's LTV was 69% and that PAG did not believe that a valuation was necessary at that stage. Mr McCoy responded on 12 July 2010 making clear that whilst he hoped the LTV was indeed 69% that did not accord with RBS's internal valuations and that a valuation would therefore be useful to clarify the position and determine next steps. In fact, RBS agreed to use Mr Davies of Lambert Smith Hampton in Manchester rather than DTZ.

137. Around this time, PAG was seeking to re-finance with a different bank with the assistance of Mr Priest. A presentation was prepared for Barclays to which Mr Jones had moved and meetings took place with a number of other banks including Co-operative Bank, Deutsche Pfandbrief, HSBC and Santander. On 22 July 2010, a further meeting took place between Mr McCoy, Mr Wyse, Mr Russell and Mr Priest. Mr Wyse's notes of the meeting indicate that in response to queries as to why PAG were in GRG, Mr McCoy explained RBS's concerns over leveraging. In particular it was explained that PAG's LTV appeared to be 80% or higher, and 91-100% including the hedging. Mr McCoy explained that the target covenants were 65% (LTV) and 150/175% (ICR). Following the meeting, Mr McCoy emailed Mr McNicholas, seeking confirmation that although the PAG loan expired at the end of 2010, as a *"core client"*, "the business" (i.e. frontline) would wish to renew rather than "exit" the relationship which was confirmed.

138. On 19 August 2010 Mr Russell accepted RBS's appointment of Lambert Smith Hampton and commented that although he understood that a security review would be a condition precedent for any new lending by RBS, it should be "held off" pending PAG's proposals. In a subsequent email Mr McCoy stated his preference that it should be commenced given that RBS would not be able to consider any proposal without the benefit of such a review. Mr Russell acceded but in cross-examination stated that he felt he had no choice.

139. The next day, on 20 September 2010 Mr Davies emailed Mr Wyse his draft valuations for the RBS portfolio which came to a total of £83.23m. In cross-examination, Mr

Davies accepted that he must have sent the draft to Mr Wyse in order to discuss the values for the properties with him. Two days later on 22 September 2010, Mr McCoy chased Mr Davies, asking whether he would be able to send through a copy of the valuation or even the main body of the report, with appendices to follow. Mr Davies replied saying: "I have 24 property schedules in draft. I have had two meetings with the customer and it is clear I need info from the customer on 5 properties….The total portfolio value is looking circa £86.5 million"**.** Mr Davies' evidence was that he worked with the client and often had numerous questions about properties which only they could answer. In fact, the finalised report was provided to RBS on 7 October 2010 and contained the increased portfolio value of £86.5m.

140. Thereafter, on 24 September 2010, Mr McCoy emailed Mr Russell informing him of the estimated valuation figure, which he explained would give an LTV figure of 77% and explained that even if the proceeds from the Chorley sale were included, PAG's LTV would be outside RBS's standard lending criteria, and that including the MTM of the Swaps which stood at £9.6m odd, PAG's LTV would be even further outside those criteria at 84%. He then set out options for resolving the position, which included refinancing with another lender, sale of properties or an injection of equity to bring down the LTV. Mr McCoy also asked about whether the loan to David Russell Settlement No 2 (which was due to expire on 30 September 2010) would be repaid. In cross-examination, Mr McCoy agreed that the MTM on the Swaps was the real problem and was a significant credit issue when PAG was transferred to GRG.

141. On 19 October 2010, Mr Russell sent a letter of complaint which had been substantially drafted by Mr Priest, to the then Chancellor of the Exchequer and Mr Russell's local MP, George Osborne. Amongst other things, Mr Russell stated that PAG had been required to adopt hedging arrangements as part of its facilities and that the derivatives sold by RBS were "anti-hedges", which meant the Company suffered a penalty if interest rates remained low but was not protected if there was an upward spike, which he claimed was due to options which could be exercised by RBS in its "sole discretion"; claimed that the cause of the high break costs (£9.25 million) was the embedded options; referred to the fact that the contractual documentation between RBS and PAG made clear that RBS was not acting as advisor, but claimed that the "reality" of the situation was that PAG had no choice but to accept those terms; claimed that he hoped that PAG could avoid taking RBS to court but (notwithstanding that PAG had not yet intimated any claim to RBS), the "early signs from [RBS] are not promising"; despite not having proposed it to RBS, referred to a "simple solution" which he stated had been presented to RBS, namely to exercise its options to cancel at no cost; asserted that PAG had never breached any of its covenants; and asked for assistance to request RBS to "recognise its obligations". It was Mr Priest's evidence that he was concerned to engage someone with authority because PAG felt frustrated that it had been transferred to GRG, were seeking to negotiate with strangers and that Mr McCoy had insufficient authority to deal with the real issues. He accepted that the letter to Mr Osborne was a negotiating ploy.

142. Three days later, on 22 October 2010, Mr Priest wrote to Mr McCoy on PAG's behalf to "set out [PAG's] proposals in respect of the financing". The letter contained much of the material included in the letter to the Chancellor of the Exchequer and included a statement that the financial products, being the Swaps, had been mis-sold, a reference to the possibility of litigation and the hope that RBS would exercise its

option to cancel the Swaps at no cost to PAG. A proposal for "Heads of Terms" for a proposed 5 year facility commencing with an LTV of 72.5% (reducing to 65% over the 5 years) was attached. The response to the October 2010 Complaint was sent by Laura Barlow (Head of GRG UK), on 25 November 2010. A further response was sent to Mr Priest by Mr Seb Sims (an Associate Director at GRG who was replacing Mr McCoy). This response reiterated that PAG's LTV (including the MTM of the Swaps) was well outside RBS's standard lending criteria, reminded PAG that its facilities expired on 31 December 2010, and suggested that PAG put forward a further proposal to RBS with a view to meeting as soon as possible. The suggestion that any financial products had been mis-sold to PAG or that RBS had given PAG any advice about them was also rejected.

143. On 7 December 2010, a meeting took place to discuss PAG's refinancing, which was attended by Mr Charles Didier, who had replaced Mr McCoy as PAG's relationship manager in late 2010, Mr Whatham, Ms Barlow, Mr Russell and Mr Priest. Mr Didier's note of the meeting records that PAG expressed concern regarding the Swaps which in their view had been mis-sold and which Mr Priest described as some of the worst he had seen. It was emphasised that an equitable solution was necessary. It states that Mr Whatham said that the options could be bought back by PAG for £480,000 and that RBS was preparing a number of possible options for restructuring the Swaps. Mr Whatham explained that RBS had hedged its own position under the Swaps in the market, such that terminating the Swaps at zero cost to PAG would result in its bearing a loss of approximately £9 million. Mr Whatham stated that RBS was not prepared to do this as PAG had willingly entered into the Swaps. The note also records that Mr Russell stated that PAG had taken independent advice when entering into the Swaps. Mr Russell denies having made such an acknowledgement. However, Mr Didier stated that that was what he recalled and although Mr Whatham could not recall the meeting, he stated that he always reviewed the minutes of meetings and would have removed the sentence if it had not been correct.

144. Thereafter, in an email of 8 December 2010 Mr Whatham made clear to Mr Priest that whilst RBS was committed to reaching a constructive restructuring, it was not prepared to cover all or part of the negative market value of the Swaps. On 9 December 2010 Mr Didier sent Messrs Russell and Priest a number of options for restructuring the Swaps and the associated refinancing. A further meeting took place on 17 December 2010 attended by Mr Didier, Mr Whatham, Mr Sims, Mr Priest and Mr Rathbone of Rathbones. Mr Rathbone discussed the Swaps and stated that they were not appropriate for PAG, making particular reference to RBS' cancellation rights. Mr Didier's note records that Mr Whatham noted that vanilla swaps with the same notional amounts would also have had an MTM cost at that point, such that PAG's concern appeared to relate to the *additional* MTM created by the cancellation rights versus a vanilla swap, and that Mr Priest and Rathbone confirmed this was so. In fact, the note makes reference to Mr Priest being satisfied with a half way house as opposed to RBS bearing all of the break costs. A proposal under which PAG would break the Swaps and blend a portion of those costs into a new derivative was discussed.

2011

145. On 6 January 2011, Mr Russell, Mr Priest and Mr Wyse had a telephone conference with Mr Walsh of Rathbones to discuss further progress on hedging matters. Amongst

the advice given by Rathbones was a suggestion that (in circumstances where Rathbones thought it unlikely that RBS would "be prepared to swallow some of the restructuring costs"), RBS might be asked to provide a loan to pay the full MTM of the Swaps and close them out. On 17 January 2011 RBS notified PAG that it was exercising its right under the Third Swap to extend the termination date to 2013. On 19 January 2011 Mr Priest wrote to Mr Whatham stating amongst other things that it had been Mr Russell's "understanding" that the Swaps would be managed by RBS in a way which was not detrimental to PAG, including (if required) that they would be "restructured to avoid penalties". Reference was also made to PAG having received advice from counsel in Manchester and leading chambers in London and explained that PAG would send a "composite proposal as to how the position between us may be resolved". On the same day PAG sent through its "composite proposal" to Mr Whatham. A few minutes later, Mr Priest emailed Mr Whatham and stated:

> "As we mentioned in an earlier email, we feel it is appropriate to reserve our position with respect to the four derivative contracts we currently have in place with RBS and hence the attached letter. We very much hope that this can be consigned to history by reaching agreement on the refinancing but I am sure you understand our position."

146. After further meetings in January, a yet further meeting was scheduled for 16 February 2011 at which RBS proposed an approach to the negotiations using a "Mid Point Scenario", whereby the terms proposed to PAG would fall between: (1) the "market-facing" terms upon which RBS would have entered into the same facility with a new customer, and (2) the terms proposed by PAG in its January 2011 proposal. A spreadsheet was put forward setting out its view of (1) "market terms"; (2) PAG's proposal from January 2011; and (3) RBS's proposal in the form of the "mid point". Mr Wyse's note in preparation for that meeting makes reference to "no revaluations" and his evidence was that PAG was reassured that there would only be a revaluation of PAG's property portfolio if the outcome was likely to be positive which Mr Didier refuted in cross-examination. He also stated that he considered that PAG would not pursue its Swaps complaint if the re-structuring of the debt took place.

147. In an email that day to Mr Walsh of Rathbones, Mr Priest described the discussion at the meeting at RBS. He recorded:

> "The bad news is that they are back to 3 years. The good news is that they accepted that there is merit in our arguments on the derivatives at least from a moral perspective and that the bank is willing to meet us part way therefore. The way they have done so is to compare the proposal we made in January to where a new 3 year facility for Alliance would be today and to pick a point between these two. The bottom line is that the Bank is offering an incentive of £2.648 million and we in the meeting said we would settle at £3.3 million. . ."

Mr Priest stated in cross-examination that RBS would not formally link the re-financing with compensation in relation to the derivatives and did not accept that there had been mis-selling, although there was a link as far as PAG was concerned and that a dimension of the figures which he had put forward related to the break costs

on the derivatives. He also accepted that an element of the proposals being made may have been to settle potential litigation in relation to the Swaps. Mr Didier however, stated that he had not stated that there was merit in PAG's arguments in relation to derivatives and considered them solely to be a negotiating ploy. However, he believed that the terms on offer were better than those available in the market and believed that PAG would not progress their derivatives claims. The following day, 17 February 2011, Mr Didier sent an email which attached an amended version of the "mid-point analysis", showing the updated RBS proposal. This crossed with a further proposal contained in a further spreadsheet, sent by Mr Priest both of which were discussed at a further meeting on 18 February 2011.

148. Thereafter, Mr Didier set out the position as he saw it. He stated that he considered the parties to have made very good progress and that they were only some £200,000 apart in terms of total cost over the full three year term. Later that evening, Mr Priest sent Mr Didier a revised proposal in which he stated that:

> "I believe that RBS and Alliance should be fully aligned in seeking to reach agreement as soon as possible and to execute definitive documentation of the refinancing facility by March 31st 2011. To this end, we have in the last few days carefully reviewed the correspondence between us since October 2010 and have also considered our position in the context of the banking market soundings we have taken in the last two days. . . . . while the Bank [RBS] currently accepts no legal responsibility for any detriment to Alliance [PAG] resulting from the four derivative contracts [the Swaps], the Bank [RBS] is willing to negotiate refinancing facility terms that reflect a mid-point between [PAG's] refinancing proposals of 19 January 2011 and current market conditions. . . . We would again emphasise that we wish to resolve the refinancing and the derivatives position as soon as practicable so that we can all focus upon generating future business to mutual profit."

In cross-examination, Mr Priest explained that he considered his reference to the refinancing and derivatives position being "resolved" meant that he intended a new agreement to be signed under which PAG's position would be crystallised or protected and new hedging would be put in place. He emphasised that neither the proposals nor the agreement which was signed made any mention of future claims in relation to the Swaps.

149. On 25 February 2011, a further meeting took place between Mr Didier and Mr Priest. On 2 March 2011, Mr Priest confirmed to Mr Didier that PAG "was prepared to accept the pricing presented on Friday, based upon the structure set out in our letter of February 23rd" but stated that this agreement was subject amongst other things to unwinding the existing derivatives and the putting in place of new hedging at break-even pricing for RBS. Mr Didier responded stating amongst other things that RBS would price any new hedging as it would any new swap product and that PAG should consult Rathbones to establish market pricing. A meeting took place the following day on 3 March 2011 between Mr Didier, Mr Sims, Mr Russell and Mr Priest, after which draft Heads of Terms were provided by RBS. Amended versions of the Heads of Terms were subsequently circulated first by Mr Wyse, and by Mr Didier on 14

March 2011 and on 21 March 2011, following provision by Mr Didier of a further version of the Heads of Terms on 17 March 2011, Mr Priest confirmed that they were now "fine" but that the definition of "interest coverage ratio" needed to be finalised.

150. In an internal form submitted on 31 March 2011 completed by Mr Didier on 31 March 2011 he recorded under the heading "strategy" as follows:

> "PAG: strategy to return to satisfactory
>
> Expired facility to be refinanced by a new 3 year term facility
>
> Swap position and mis-selling complaint to be addressed by closing out all swaps and capitalising the mtm to debt
>
> 100% cash sweep to provide partial amortisation
>
> Security review to be completed as part of the documentation of the new facility …"

On 10 May 2011, Mr Didier sent a re-structuring paper and annual review which he had prepared to Ms Lorna Brown, the head of GRG. In the "strategy" section it noted as follows:

> • Return to satisfactory via restructure of the current facility in line with the Heads of Terms…
>
> • Hedging to be restructured with a new "B" tranche of debt to fund the swap break costs….
>
> • A consensual agreement has been reached regarding the treatment of the current swaps, addressing the executive level complaint and the restructure of the facility.

151. Towards the end of the negotiation process, PAG objected to RBS's requirement for co-insurance and syndication clauses and also to aspects of RBS's proposed wording in relation to bifurcation. This culminated in an email from Mr Priest to Mr Didier of 20 May 2011 which was copied to Mr Whatham. The relevant parts read as follows:

> "Bank policy is interesting I'm sure. We are more concerned with commercial reality.
>
> We are not agreeing to the three matters at issue so we should perhaps work out what happens next…
>
> That is our final position… Assuming your position remains the same then we need to discuss what happens next since there will be no refinancing and we will revert to legal action in respect of the derivatives."

Mr Whatham responded stating:

> "I suggest rather than emails threatening things that will simply result in you going to court and us accelerating and appointing receivers – which is not in your interests or ours, we have a conversation on Monday.
>
> ...
>
> We have come so far and each side has compromised on a number of matters, so it would be a shame if we failed to agree what are relatively minor matters at the last hurdle."

In fact, PAG agreed the co-insurance clause, RBS conceded the syndication point and agreed to PAG's amendment to the bifurcation clause. In cross-examination, Mr Priest did not agree that the implication from the correspondence was that if an agreement was reached on the restructuring, PAG would not proceed with legal action in relation to the derivatives. He stated that it was accepted that PAG was not obtaining the deal it really wanted and that Mr Whatham never considered that PAG had a case in relation to the derivatives to settle. He reiterated that in his view once the re-financing was agreed PAG would have preserved its options and would "live to fight another day." He added that there was nothing which indicated that it was a full and final settlement, that PAG was not able to agree the five year period for funding which it had required and that although the liability on the Swaps was crystallised at £8.2m none of that sum was borne by RBS. He stated that he did not consider that the restructuring deal provided PAG with much value and that he had only used the threat of litigation in order to achieve the best terms possible from the bank.

152. On 7 June 2011, the new facility was finally agreed and signed by PAG. Clause 21.5.1 of the 2011 Facility was as follows:

> "The Lender may, at any time, require the Valuer to prepare a valuation of each property. The Borrower shall be liable to bear the cost of that valuation once in every 12 Month period from the date of this Agreement or where a Default is continuing.

Although Mr Didier denies any recollection of it, Mr Priest says that he recalls a discussion to the effect that Mr Didier said that it would not be in RBS's interests to trigger a default and as AIB had waived a similar provision, Mr Russell had assumed that RBS would do the same. However, Mr Priest could not remember at which meeting the alleged discussion had taken place. It seems to me that even if the discussion took place, it would not be evidence of an agreement by RBS to waive its ability to call for a valuation and therefore, it is not necessary to decide.

153. As part of the refinancing on 7 June 2011 PAG also broke each of the Swaps and entered into a new hedging transaction, in the form of an interest rate swap on a notional value of £4.1 million (the "2011 Swap"), under which PAG paid a fixed rate of 3.5% and received 3-month GBP LIBOR. PAG also entered into a cap at 3.5% on a notional value of £45.9 million, with the cap "embedded" into the 2011 Swap.

154. On 30 August 2011, Mr Russell emailed a Mr Rigby at HSBC in relation to PAG's loan facility and hedging with that bank and noted amongst other things:

> "As we discussed, we have settled an inappropriate "hedging" position with a competitor bank ..."

In a further letter of 9 November 2011 to Mr Rigby, he added amongst other things:

> "In fact other Banks have taken on this point and their responsibilities and resolved these issues in a commercial and ethical manner. It may well be that they did not wish to have the matter dragged through the courts, with the ensuing publicity, and face the potential loss with its impact of all other similarly placed derivatives and/or hedges."

In cross-examination, Mr Russell stated that he had not "settled" with RBS, that RBS and HSBC were not competitors and that he had made it all up to get Mr Rigby to agree to his terms. However, during a conversation with Mr Goldrick, Mr Russell stated that PAG had "settled the RBS stuff" and in a conversation with Mr Jones stated that PAG had agreed that it would not "have a go" about the hedges.

155. Despite the conclusion of the restructuring, PAG remained under the control of the GRG of RBS. One of the remaining issues was stated to be the relationship with Russells Limited in which PAG was a 50% shareholder. On 24 June 2011, Mr Sims emailed Andrew Russell, the managing director of Russells Limited explained that RBS's preference was for the Russells Limited loan to be repaid in full upon expiry, rather than extending its facilities, proposed that the term of a loan RBS had made to Russells LLP (a related entity) be shortened in return for an extension of the Russells Limited loan and set out the further information he required in order to seek and structure a loan extension for Russells Limited.

156. Thereafter, on 31 October 2011, Mr Wyse enquired of Mr Didier when PAG would be being transferred out of GRG and back to the front line Manchester team. Mr Didier responded later that day referring to the lack of information received from Russells. In December 2011, RBS were informed that Russells Limited was in the process of refinancing its facilities with the Co-Op Bank. The terms of a three month extension on the facility to allow the refinance to be completed, was approved by Mr Whatham on 15 December 2011. The refinance was eventually completed on 9 March 2012.

2012

157. Meanwhile, in January 2012 PAG was once again actively considering its hedging position, and had requested pricing from RBS for further hedging, to extend the maturity of the current trades and to replace the existing caps with a swap. These ideas were also discussed with Rathbones, Mr Wyse explaining that PAG had loans of circa £69 million of which £19 million was floating and stating that it was not "adverse to committing £20m - £50m". In fact, Mr Russell decided not to proceed with hedging because of Rathbones' view that LIBOR would continue to fall.

158. On 29 June 2012 Mr Didier informed Mr Wyse that:

> "I have begun the internal process to return the PAG connection to my frontline colleagues in Manchester. I'm sure you will be glad to be back in local hands "good bank" and

> away from GRG. As part of this process I will need to address the situation for David Russell and Valerie Russell Trust Facilities. Is it best for me to do this with you or directly with David?"

Mr Didier also requested information from Mr Wyse in relation to these facilities which Mr Wyse provided on 9 July 2012. However, the application for renewal was not progressed by the time Mr Didier left RBS in September 2012 and Mr Thomson took over his role. On 3 October 2012, Mr Mihai Antoci who was supervised by Mr Thomson, emailed Mr Wyse with a request for some information in advance of PAG's annual review. Mr Wyse responded and requested an update on PAG's return to the frontline noting that Mr Didier had previously suggested this would happen after the first anniversary of the 2011 Facility, in June 2012. Mr Antoci confirmed that GRG was working on a return to frontline and that as part of the annual review it would be recommended to the credit committee. He also stated that the quicker information could be provided, the sooner the transfer could be processed. Thereafter, on 5 November 2012, Mr Antoci informed Mr Wyse that the expired loans needed to be resolved and this would unfortunately delay the transfer back to the frontline.

159. On 29 November 2012, Mr Antoci informed Mr Wyse that a new valuation would be required for the properties over which the Settlement Trust Loans were secured. He also explained that, as an indication of RBS's current policy, it would be looking for an LTV of 60% and a margin of 3.5% above LIBOR plus a 1% arrangement fee. He concluded by noting that he was keen to move things forward and return PAG to front line as soon as possible. On 7 December 2012 Mr Wyse asked Mr Antoci to contact LSH (and Mr Davies specifically) for the valuations and stated that Mr Antoci did not need to seek an alternative quote. On 11 December 2012, Mr Antoci responded to Ricky Northcott from GRG Credit with answers to the various questions, including, in relation to valuation, that GRG were not looking to instruct a revaluation at that stage. Mr Northcott responded on 12 December 2012 confirming Credit approval of the annual review but stating:

> "I note that we have the right to call for revaluations on an annual basis but do not intend to request at this time given the debt is performing and reducing in line with expectations and there would be little benefit to potentially flagging an LTV breach…Whilst I am willing to accept this position we may find that this is an obstacle when it comes to progressing RTS [return to the frontline] discussions which is exactly what I have seen on another case in this position (as I'm sure Dave will confirm)."

Mr Whatham replied and commented that there were "some reputational issues around this one." In cross-examination Mr Whatham stated that that was intended to be a reference to Mr Russell's complaints.

2013 - 2014

160. On 30 January 2013, Mr Wyse emailed Mr Antoci again amongst other things querying when PAG might be returning to the frontline. Mr Antoci responded on 4 February 2013 explaining that RBS policy was that there could be no RTS if there

were expired lines (which included the Settlement Trust Loans, which were aggregated with PAG) and that this was causing delays, but that he would push for the transfer to be effected as soon as possible. Richard Moor of Knight Frank emailed on 14 February 2013 Mr Antoci to "confirm" his valuation of the two properties against which the first (and larger) of the Settlement Trust Loans (the No. 1 Loan) was secured. The total value for the two properties was £900,000, which as against a loan of £1,150,133 gave an LTV of 128%, as Mr Antoci confirmed to Mr Thomson. Thereafter, a meeting took place the following day (15 February 2013) at which Mr Thomson explained that PAG could not be returned to the frontline until the Settlement Trust Loans were resolved, and that the No. 1 Loan could not be renewed given the high LTV. On 22 February 2013 Mr Russell wrote to Mr Thomson complaining about the refinancing options for the No. 1 Loan presented at the meeting and GRG's stance on PAG's return to the frontline, as well as disputing Knight Frank's valuations. Mr Thomson responded to Mr Russell's letter on 11 March 2013 again making clear that transfer to the frontline could not take place until an acceptable refinance or full repayment of the No 1 Loan had taken place and that a valuation was required before any refinancing of PAG's facilities on their expiry.

161. On 12 March 2013, Mr MacDonald from the team in Manchester queried whether the most recent valuation for the portfolio was from 2010, which Mr Antoci confirmed. The following day Mr Antoci informed Mr Whatham he had had a call from Mr McDonald in which he stated that the properties would need to be revalued before the Manchester office would accept the return of the PAG relationship. Mr Thomson also noted that (1) RBS had a right to call for a revaluation under the 2011 Facility; and (2) at the last revaluation (in 2010), the LTV was 79.5% (against a covenant of 80%) and that since then rents had dropped from £6 million to £5.5 million. He therefore suggested that they advise Mr Russell that RBS would seek a new valuation.

162. A meeting took place on 22 March 2013 attended by Mr Wyse, Mr Russell and Mr John Kilty on behalf of PAG and Mr Thomson, Mr Sefton and Mr Antoci for RBS, at which the rationale for a valuation was discussed. At the meeting, Mr Russell stated that it had been agreed that a revaluation would not be undertaken as part of the negotiations for the 2011 Facility although it had not been recorded. He also stated that due to the swap mis-selling complaint, RBS had offered better terms for the 2011 Facility. However, Mr Thomson pointed to the presence of the revaluation clause in the 2011 Facility. Further, in cross-examination, Mr Thomson stated that he had requested a valuation because it had been requested by the frontline who would not accept PAG back without it and Mr Whatham stated that the reason that the valuation was required and carried out was because it was required by the frontline. I accept their evidence in this regard.

163. Thereafter, on 5 April 2013 Mr Andrew Innocent, a secondee at RBS from Savills, sent Mr Thomson his "high level views" on the value of PAG's properties. On 30 April 2013 Mr Russell emailed Mr Thomson stating that a valuation should not be undertaken and referring to PAG's alleged agreement with Mr Didier regarding the exercise of the valuation clause in the 2011 Facility. However, following internal discussion with Mr Whatham, on 10 May 2013 Mr Thomson confirmed RBS's intention to seek a new valuation.

164. On 26 June 2013, PAG's then solicitors sent a letter before action making various complaints about the Swaps, although none about PAG's treatment in GRG. In any

event, RBS made clear that it would be proceeding with a valuation and Mr Davies of LSH was formally instructed on 12 August 2013. Thereafter, on 23 October 2013 LSH provided RBS with its draft reports in respect of all but four properties. The following morning, he emailed a spreadsheet entitled "Final Values-2013 (with comments)" to Mr Wyse but not to RBS. The spreadsheet showed a total value for the properties of £82,240,000. Once the further four valuations were available, a spreadsheet produced by RBS recorded the total value of PAG's portfolio at £81,915,000 resulting in an LTV of 81.91%, on the basis of a loan balance of £67,098,862. Mr Innocent having provided comments on the Lambert Smith Hampton draft valuations, on 5 November 2013 Mr Sefton of RBS emailed Mr Davies with queries in respect of nine properties. Having responded to the queries, Mr Davies reaffirmed his opinion on seven of the nine properties but reduced his value on two. RBS forwarded further queries about a particular property at Freetrade Exchange. On 28 November 2013 Lambert Smith Hampton issued its final valuation report which was sent to PAG on 5 December 2013. It contained a total market value for the portfolio of £81,680,000. Thereafter, on 20 December 2013 Mr Thomson sent PAG a Reservation of Rights letter in respect of the breach of PAG's LTV covenant under the 2011 Facility. After some confusion, a hard copy having been sent out which included a final figure of £81,915,000, on 3 January 2014 Lambert Smith Hampton sent a letter formally confirming that the correct total value was £81,680,000. Mr Davies stated in cross-examination that it was not unusual to receive queries from a bank but that he had been surprised that RBS raised nine queries in relation to his draft valuation and the further queries in relation to Freetrade Exchange.

165. Thereafter, negotiations proceeded in relation to PAG's breach of covenant, which culminated in an agreement on 9 April 2013 whereby PAG made a capital reduction of £850,000 and paid £50,000 of default interest (half of what was due) and RBS took no action in respect of the breach.

166. As I have already mentioned, Mr Russell met with Mr Jones and Mr Goldrick during 2013 (both of whom had left RBS by that stage) on the pretext of offering them consultancy roles with PAG. He surreptitiously recorded the meetings and the transcripts have been in evidence.

167. On 23 April 2014 the management of PAG was formally transferred to RBS's newly established Capital Resolution department. PAG having been made aware that RBS did not wish to refinance PAG's borrowings, sought refinance elsewhere and secured a facility with HSBC in July 2014. In late May 2014, however, PAG requested a 6-week extension of time to repay the 2011 Facility and the 2011 Facility was extended until 18 July 2014 on the basis that PAG would pay a margin equivalent to the default interest which would otherwise be due under the 2011 Facility and payment of a fee. In the event, RBS agreed to an extension until 31 July 2014 and agreed not to require an extension fee. The repayment of PAG's RBS loan was completed on 25 July 2014. Thereafter, on 30 July 2014, despite the lack of any obligation to do so, PAG entered into a cap with HSBC (with a notional of £27.3 million).

Expert evidence in relation to the Swaps Claims

168. Expert evidence in relation to interest rate derivatives was adduced pursuant to paragraph 16 of the Order of Birss J dated 24 November 2014. The order provided that the evidence could cover (i) whether each of the Swaps was a 'hedge' and (ii)

whether each of the Swaps was suitable for PAG. Mr Hanif Virji provided a report on behalf of PAG. He is a partner in AHV Associates LLP and a director of AHV Financial Markets Ltd, a derivatives and corporate finance advisory firm who since the formation of AHV in 2001 has advised on interest rate, equity, hedge fund, foreign exchange and credit derivatives and, in particular, upon mis-selling. Ms Georgina Robbins provided an expert's report on behalf of RBS. She is a director of Georgina Robbins Associates Ltd and described herself as a senior regulatory compliance executive with experience in international securities and investment banking. In her report, she stated that her consultancy specialised in providing FCA compliance advice and consultancy services to major financial institutions.

169. Mr Virji gave his evidence clearly and confidently. In summary, first, in his opinion, an "interest rate hedge" is "a product which if transacted mitigates the adverse consequences of changes in interest rates" and "will reduce the risk of loss should interest rates change." Where the product eliminates some interest rate risk but assumes others, he also considers that "products in which the assumed additional risk cannot be understood, monitored, controlled, valued or where they outweigh its risk mitigation element should not be considered as hedges." He gives as examples of such instruments those in which there may be a mis-match in the amount being hedged; a mis-match in the maturity of the hedge when compared to the tenor of the risk that is being hedged (loan repayment date, for example); or where the risk of increasing interest rates is mitigated but other risks are assumed such as the risk of interest rates falling or the risk that the counterparty may at its discretion only increase the amount being hedged or extend or cancel the tenor of the hedge at no cost to itself. He is also of the opinion that an instrument must be judged at the outset and that it must be viewed as a whole rather than dissected into parts.

170. As to the First Swap, Mr Virji considered the advantages to be minimal and to be far outweighed by the disadvantages. In any event, he considered the mismatch of maturity of the First Swap and the facility and the cancellation options in RBS's favour to be determinative. In his opinion, therefore, the First Swap was not a hedge. For the same reasons, he considers it to be a speculation rather than a hedge and therefore, not suitable for PAG. As to the Second Swap, he also concluded that the disadvantages outweighed the advantages and accordingly was not a hedge nor was it suitable. He accepted however, that he had not set out any quantification of those elements. The same was true in relation to the Third and the Fourth Swaps. Instead, of the Swaps, Mr Virji considers that derivative contracts in the form of caps would have been the appropriate product for PAG although he accepts that those products required payment of a premium of somewhere in the region of £200,000.

171. Ms Robbins accepted that her expertise was in regulatory compliance in relation to the sales of equity derivatives and rather surprisingly, also accepted that she had never structured, designed or priced a derivative or been involved with interest rate derivatives. She was unable to answer questions about the structuring of interest rate derivatives and quite candidly stated that such questions "would be more appropriate for a derivative trading expert." Her evidence was given haltingly and at times, she was unable to answer the questions put to her. In cross-examination, she also stated that she had been instructed not to compare different derivative products but to consider the Swaps from the perspective of the relevant FSA rules at the time.

172. In her report, Ms Robbins approaches the Swaps from a regulatory perspective. However, she stated that in her opinion a hedge was "a transaction or strategy that in some way contains or mitigates a party's exposure to risk" and that all the Swaps operated in that way. She also stated that she did not consider that whether an instrument was a hedge or not turned on whether there was an exact match between the Swap's effective and maturity dates and the effective and maturity dates of the loan facilities in question and considered that such mismatching could be part of a hedging strategy and whether it was a hedge would depend upon PAG's commercial and investment objectives. She also did not consider that the cancellation and extension features contained in the Swaps had the effect of preventing them from being hedges. She considered that they were plainly hedges during the guaranteed period and that the counterparty had accepted the risk that they would be cancelled; that during the periods between rights of cancellation, which operated on an annual basis, (as in the case of the Second Swap) or after the right of extension passed, the Second and Third Swaps continued to be hedges; that where the cancellation right arose on a quarterly basis after the guaranteed period, the effectiveness of the Swaps as hedges was limited; and that the extension and cancellation rights are the corollary of a reduction in the headline interest rate achieved and part of the overall pricing package of the hedge.

173. She also stated in cross-examination that it would be rare that a bank would assume an advisory relationship and therefore, would be unlikely to discuss break costs or MTM in relation to a derivative with a client and otherwise that there was no obligation to do so. In fact, she stated that it was not industry practice to do so at the time. She was also of the opinion that the question of whether the advantages outweighed the disadvantages of a swap was irrelevant to the question of whether they were hedges. As to suitability, Ms Robbins set out a detailed consideration of the relevant FSA rules and considered whether personal recommendations or advice was being given. She concluded that the Swaps were appropriate and suitable investment products for PAG.

A. <u>The Swaps Claims</u>

174. For ease of reference, the precise details of each of the four Swaps are set out in a table annexed to this judgment. PAG's claims in relation to the sale of the Swaps are characterised under three main headings: the Swaps Misstatement Claims; the Swaps Misrepresentation Claims; and the Swaps Contract Claims. The Swaps Misstatement Claim is based on ***Bankers' Trust International plc v PT Dharmala*** [1996] CLC 518 and Mr Lord submits that the central question is whether RBS having provided explanations about each of the Swaps, failed in each case to give PAG a full, accurate and proper explanation which was adequate in all the circumstances PAG's Swaps Misrepresentation Claims can be summarised as follows: Did RBS misrepresent the Swaps when it represented that they would "hedge", "protect", "de-risk", and be a "solution" to, PAG's interest rate risk exposure under certain of its RBS lending ("the Hedging Representations") and that they were "suitable" for PAG and that purpose ("the Suitability Representation")? Lastly, for the purposes of PAG's Swaps Contract Claims it is necessary to determine whether the sale of the Swaps pursuant to RBS' standard form hedging requirement, was in breach of terms which should allegedly be implied into the contractual agreements between the parties.

a) *The Swaps Misstatement Claims*

175. It is common ground that RBS did not owe PAG a general duty to advise in relation to the Swaps and that PAG is contractually estopped from bringing such a claim. As I have already mentioned, PAG's Swaps Misstatement Claims are based instead upon the duties considered in ***Bankers Trust International v PT Dharmala Sakti Sejahtera*** [1996] 1 CLC 518 and ***Crestsign Ltd v National Westminster Bank & Royal Bank of Scotland*** [2015] 2 All ER (Comm) 133. The ***Bankers Trust*** case concerned the sale of interest rate derivatives to the holding company of the financial services division of a group of companies with five divisions trading in areas of finance, electronics, real estate, commodity trading and manufacturing, and consumer and retail businesses ("DSS"). The duty alleged by DSS, extended to "explaining fully and properly . . . the operation, terms, meaning and effect of the proposed swaps and the risks and financial consequences of accepting them" and was founded on the principles contained in the decision in the Court of Appeal in ***Cornish v Midland Bank plc*** [1985] 3 All ER 513 and ***Box v Midland Bank Ltd*** [1979] 2 Lloyds Rep 391 which Mance J (as he then was) described at [533D-E] in the following terms:

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

He went on to add:

> "Mr Milligan accepted that BTCo and BTI did in the present case owe a duty to take reasonable care not to misstate facts in any of the relevant meetings or letters. DSS alleges that explanations and advice were tendered which went beyond the mere statement of facts, and that BTCo and BTI owed correspondingly broader duties."

176. At 555D-E Mance J found that most of the basis for "the suggested duty to explain fully and properly the questions of terms, meaning and effect of swap 1" were lacking. He went on:

> "It is true that there was a disparity in expertise between BTCo on the one hand and DSS on the other. Nevertheless Mr Thio and Mr Kong were experienced in financial matters and deliberately interested themselves in a transaction which, in my judgment, they must well have understood to be speculative. They did not ask and they were not entitled to expect BTCo to act as their advisers generally. Nor did BTCo and BTI make particular statements giving rise to any particular advisory duty at the meeting or in their letter of 19 January 1994 or otherwise."

He addressed the existence and extent of a duty of care in relation to the second swap at 573H and following. At 573H he stated:

> "In so far as BTI made representations to DSS regarding the nature or risks of swap 2, it is conceded by Mr Milligan that BTI owed to DSS a duty not carelessly to mistake [misstate] facts, a duty which would in my judgment have been breached to the extent that any such representations were inaccurate. On the facts which I have found, this duty would oblige BTI and BTCo to present the financial implications of the proposal by a properly constructed graph and letter. The downside and upside of the proposal should have been presented in a balanced fashion. . . ."

177. This is a passage upon which Mr Lord relies. However, Mance J went on at 574B to consider DSS' allegation that BTI had a "broader duty to explain fully and properly the operation, terms, meaning and effect of swap 2." Having considered various factors, including the fact that the relationship was "essentially commercial" he concluded at 574F- G that:

> "The courts should not be too ready to read duties of an advisory nature into this type of relationship. BTCo's conduct in proffering swap 2 as a means of avoiding loss on swap 1 and the terms in which BTCo recommended swap 2 for consideration are factors which I accept tend to favour the recognition of broader advisory duties on BTCo's and BTI's part. But before recognising any such duty the court must consider the well-recognised, overlapping criteria of (a) foreseeability (b) proximity and (c) fairness, justice and reasonableness in the context of the particular relationship and situation and in the light of the type of harm (here financial loss) against which protection is sought. The ultimate decision whether to recognise a duty of care, and if so of what scope, is pragmatic."

178. At 575A-C he concluded that in the circumstances BTI owed duties to present the terms and effects of each swap accurately and fairly but not to advise about other possible transactions. In this context he went on to consider the failure to give information about the considerable MTM which was not information which anyone at the time would have expected to be disclosed. He dealt with the matter in the following way at 575F-H:

> "I accept that it would, if disclosed, have been likely to cause DSS to think very hard about swap 2. The fact remains that this is not information of a nature which anyone at the time would have expected to be disclosed before such a transaction. DSS in particular never sought any information or assurances about BTCo's or BTI's profit or about the possibility or cost of reversal of either swap before entering into either. Each swap was entered into as a longer term speculation, and with a view to awaiting events and profiting (or, if the worst occurred, losing) according to the actual movements of rates over the next year. Neither swap was entered into with a view to reversing or trading the transaction on the current market at an earlier stage. I would add that the swaps were also based both on Dr Williams' forecasts and on such views as DSS itself had

> about the future market. They were not based on any representation about general market expectations, which were probably also one reason for the adverse current market value of swap 2 in mid-February 1994. In all these circumstances it is not, in my judgment, appropriate to treat BTCo or BTI as having assumed or incurred a duty to explain the adverse current market value."

Finally, at 576B-C he concluded that in the circumstances of that case, the relationship between the parties did not impose on BTI "any other or greater duty of care than a duty to represent fairly and accurately any facts and matters in relation to which either did make representations."

179. The ***Crestsign*** case, which forms substantially the basis of Mr Lord's Swap Misstatement Claim concerned the sale by the bank of a 10-year interest rate derivative product to a small private commercial property company where the bank had insisted on hedging as a condition of a loan. The product was cancellable during the last four and half years of its duration. The loan was for £3.45m for five years. Amongst other things, the derivative contract gave NatWest cancellation rights after 5.5 years and every three months thereafter. At [41] of his judgment, the Deputy High Court Judge, Mr Kerr QC (as he then was) found that Mr Parker on behalf of Crestsign had the impression that there would be a penalty if Crestsign wished to terminate the derivative contract early and that there was some mention of exit or break costs but no attempt to explain or quantify them beyond a vague explanation that it would depend upon variables in the market place at the time of termination. In addition, the bank had produced a "Risk Management Paper" in which it was stated that break costs could be "substantial", that the notes were important and that time should be taken to read them.

180. The bank accepted that it was under a duty not to make a negligent misstatement which was pleaded as a common law duty of care to give information which was not misleading and which the Deputy Judge noted was often referred to as a duty not to misstate. However, Crestsign contended for what was referred to as a "mezzanine" duty, less onerous than the duty to give advice but more onerous than the duty not to misstate. He held at [146] that it was Mance J's statement of the law in ***Bankers Trust*** which governed the position. At [150] the Deputy Judge stated as follows:

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

181. He went on to hold at [153] that in the circumstances, the bank was "under a duty to explain fully and accurately the nature and effect of the products in respect of which

[it] chose to volunteer an explanation." He rejected the proposition that the duty went as far as a 'duty to educate' in the sense of giving a comprehensive 'tutorial' and satisfying himself that Mr Parker understood every aspect of each product, including a detailed account of the risk associated with each …" but concluded that the duty "extend[s] to correcting any obvious misunderstanding communicated by [the client] and answering any reasonable questions [it] might ask about those products in respect of which Mr Gillard had chosen to volunteer information." See [154] and [155].

182. The Deputy Judge did not accept that the bank was obliged to disclose the existence or extent of the credit line put in place in relation to the derivative, holding that it was an internal measure not normally disclosed to bank customers: [157]. He went on at [165]-[166] to reach the conclusion that the bank had given just enough information to avoid a breach of its duty in relation to break costs which had been described as "substantial" and had been explained as calculable by reference to prevailing market conditions "and include costs incurred by us in terminating any related financial instrument or trading position.". He went on (at [167]) to point out that the use of the term "substantial":

> ". . . may well have invited further enquiry… If Mr Parker [the customer representative] had asked: "Are we talking about tens of thousands or hundreds of thousands?" Mr Gillard would have come under a duty to say that it could well be in the hundreds of thousands. But Mr Parker did not ask."

183. Both Mr Lord and Mr Handyside also took me to ***Thornbridge Ltd v Barclays Bank plc*** [2015] EWHC 3430 (QB) a case in which both ***Crestsign*** and ***Bankers Trust*** were considered in some detail. Mr Lord submits that to the extent that it sought to restrict the alleged duty to explain fully, it is wrong. Mr Handyside on the other hand, commends it to me and, in particular, the reasoning at [118] – [131]. The case concerned the sale of a derivative contract in the form of a swap to a private property investment company pursuant to a hedging requirement in loan documentation. In relation to the ***Bankers Trust*** case, HHJ Moulder sitting as a judge in the High Court held at [125]:

> "Accordingly it seems to me that the principle which can be derived from that case is that a positive duty would exist only in the context of an advisory relationship or (absent any undertaking to inform) if it rendered inaccurate or unreasonable the information provided. It is not in my view authority for a wider or broader duty to provide information in the absence of an advisory relationship."

She went on to consider the treatment of ***Bankers' Trust*** in ***Crestsign*** and added:

> "127. In arriving at that conclusion the Deputy Judge accepted (at 150) that the bank needed to provide information about the products on offer in order to sell one of them to Crestsign and in doing so the bank had a duty not to mislead but stated that the bank must provide the explanation fully and accurately so that the customer was sufficiently aware of the nature and effect of the hedging products on offer to be willing to sign up

> to one of them. He concludes: "it seems to me that Mr Gillard's duty was to explain fully only those products which he wished to sell to Crestsign."
>
> 128. As I have stated it seems to me that the dictum of Mance J relied on by the Deputy Judge is not as extensive as it might appear taken in isolation. Each case must depend on its facts but to the extent that the Deputy Judge was making a point of more general application, it seems to me that the Deputy Judge would in effect have elevated the duty of a salesman to that of an adviser. As I have already indicated in relation to the issue of whether the Bank assumed an advisory relationship, the authority of Springwell reminds the court of the distinction between an adviser and a salesman and in my view the duty of a salesman is not to mislead but in the absence of an advisory relationship, a salesman has no obligation to explain fully the products which it is trying to sell."

184. She went to deal with the treatment of ***Green & Rowley v RBS*** [2014] Bus LR 168 (another swap case) in ***Crestsign*** at [129] and at [130] stated:

> "130. In my view the dictum of Tomlinson LJ is relevant regardless of any argument as to whether a common law duty of care could exist independently of the COB rules. The significance in my view of the dictum of Tomlinson LJ at 17 is that he sets out the extent of the Hedley Byrne duty and in so doing addresses the issue in this case, namely whether the Hedley Byrne duty extends beyond a duty to take reasonable steps not to mislead. He states:
>
> > "the judge observed, rightly in my view, although I paraphrase his language, that the Hedley Byrne duty does not comprise a duty to give information unless without it a relevant statement made within the context of the assumption of responsibility is misleading. Thus in so far as COB 2.1.3R refers to a duty to take reasonable steps not to mislead, this is comprised within the common law duty, but in so far as it refers to a duty to take reasonable steps to communicate clearly or fairly, this introduces notions going beyond the accuracy of what is said which is the touchstone of the Hedley Byrne duty. The duty imposed by COB 5.4.3R to take reasonable steps to ensure that the counterparty to a transaction understands its nature the judge regarded, again rightly in my view, as well outside any notion of a duty not to misstate, as he characterised the Hedley Byrne duty to be.…"
>
> I do not therefore accept that the case can be distinguished either on the basis that it was not argued that a common law duty of care could exist independently or as limited to its own

> facts. It is a clear statement of the extent of the common law duty although I accept that it was obiter."

At [146] she rejected a requirement that the Bank would provide the claimant with such information about break costs as would enable it properly to understand the risks of the transaction; to understand its advantages and disadvantages as compared with the other products presented in the written presentation; and to make a fully informed decision as to whether or not to enter into the swap concluding that it did not reflect the duty at common law already considered and that such a view was consistent with the decision in the ***Green & Rowley*** case. That was a case in which on appeal the claimants wished to argue that compliance with the COB Rules required the bank not only to warn that break costs could be substantial but also to explain clearly and fairly the true potential magnitude of those costs so that as the potential counterparty they could understand it. It was said, that there was inadequate disclosure of break costs with which the judge at first instance had disagreed. Mr Lord submits that the duty under consideration was, in fact, a full duty to advise.

185. Mr Handyside submits that the approach adopted by Tomlinson LJ in ***Green & Rowley*** and by HHJ Moulder in ***Thornbridge*** is correct and that the dictum in ***Bankers Trust*** is not authority for a wider duty on a bank beyond the duty not to mislead including by way of partial explanation. In his written opening he submitted that the Deputy Judge in ***Crestsign*** was not accepting a "mezzanine" duty but regarded the duty to explain as a facet of the duty not to mislead in the sense of a full rather than a partial explanation. He emphasised that the Deputy Judge had made clear that the duty did not go as far as a duty to educate and whether or not the duty to provide a "full" explanation when an explanation was offered was to be considered to go beyond the duty not to mislead by partial explanations. Further, the Deputy Judge in ***Crestsign*** was clear that it did not extend to: providing an explanation of how breakage costs were calculated; providing examples of break costs (including modelling); identifying the bank's own calculations of potential break costs in the form of the hedging credit line; providing further information about break costs other than that they were "substantial"; or providing an explanation of the cancellation options beyond identifying their existence.

186. As I have already mentioned, it is common ground that if the duty exists its scope is dependent upon the relevant circumstances. Mr Lord submits that having proffered an explanation of the products which it wished to sell to PAG, RBS was under a duty to provide a full, accurate and proper explanation which it failed to do. In this regard, he relies in particular upon the failure to inform of the MTM figure at the outset in relation to each of the Swaps, the failure to provide indications of break costs and the failure to provide any worked examples of the effect of each of the Swaps depending upon possible interest rate movement and other relevant circumstances over the life of the contracts. He pointed out that: the RBS witnesses stated in cross-examination that at the relevant time RBS had a policy of not informing customers of the scale of potential MTM / break cost liabilities when selling interest rate derivative products which is not disputed. He submits therefore, that RBS could not have complied with the duty to proffer a full, accurate and proper explanation of each of the Swaps which it intended to sell to PAG, and to correct any obvious misunderstandings; and PAG specifically raised questions with RBS about the implications of the products, the effect of RBS's termination rights and the potential scale of break costs which were

not answered by Messrs Bescoby, Jones and Goldrick. Further, he submits that it ought to have been obvious to RBS that PAG was labouring under various "obvious misunderstandings" about the products sold, yet it chose not to correct them.

187. Mr Lord says that the following should also be taken into consideration: the novelty and complexity of the Swaps; that RBS generally presented its 'explanations' as being comprehensive, which is consistent with Mr Bescoby asserting in cross-examination that his goal was "to ensure that the customer understood [the] risks and was making an informed decision" and that he was required to present any downside risk fully and fairly to avoid a real risk of the customer being misled; that RBS knew that PAG had no ability properly to analyse and understand the Swaps for itself and that an indication of the scale of potential MTM/break cost liabilities would enable PAG properly to understand the downside risk; the long-term relationship characterised by increasing trust on the part of PAG as part of a continuum in relation to hedging; that PAG had come to rely on RBS to present any significant or material downside risk in a product; and that in emails on 12 and 16 October 2007 and 9 July 2007 Mr Bescoby had discussed breaking existing instruments at no cost and accordingly RBS knew or ought to have known that PAG believed that such products could be terminated at no cost or modest cost at most.

188. In particular in relation to the First Swap, Mr Lord draws attention to the characterisation of "advantages" and "considerations" in the "Solution Paper" put forward by RBS in which "a break cost" was only mentioned in the small print. In relation to the Second Swap he drew my attention to the email from Mr Bescoby to Mr Malin on 20 September 2007 in which there was reference to a number of matters described as "the main consideration" which were having to continue to pay 5% until the end of the term in 2017 and the consequences if RBS did not extend the swap, but made no mention of break costs at all. The same day, on the telephone, Mr Wyse referred to the proposed transaction as a "nice simple hedge" which Mr Lord says illustrates the fact that he did not understand which Mr Bescoby knew. He also refers to a subsequent part of the conversation as follows:

> " EWAN WYSE: We're tying it up.
>
> TONY BESCOBY: Yeah, you're tied in for ten years and if it's catastrophic and rates fall, then, obviously, you know, you've got -- you're left paying 5% on a higher amount.
>
> EWAN WYSE: But ----
>
> TONY BESCOBY: But basically, we/he thought that -- you know, they thought that the sort of fair value, if you like, of that swap was around about 5%, then, you know, you shouldn't be too concerned about that, really."

Mr Lord submits that Mr Bescoby should have told Mr Wyse about the extent of break costs during this part of the conversation and the only reason he did not do so must be because it would have put the client off.

189. Although it occurred after the Second Swap, Mr Lord also points to the conversation between Mr Malin and Mr Bescoby on 27 September 2007 when Mr Malin asked how

the deal had been done and Mr Bescoby failed to say that it was because of the extent of the contingent liability. He also submits that the conversation reveals a focus on the headline rate rather than the underlying detail and the downsides and a failure to explain about break cost, the extent of which he was aware, even when discussing the fact that PAG would be locked in at 5% even if interest rates fall. In relation to the Third Swap, Mr Lord makes a similar point in relation to an email from Mr Bescoby to Mr Wyse of 1 November 2008 in which the benefits and considerations were set out but no reference was made to break costs. When the proposed trade was discussed on the telephone on 14 January 2008, no reference was made to the MTM when Mr Wyse noted that the deal was "pretty attractive." Lastly, in relation to the Fourth Swap, Mr Lord points to the fact that it was described as "pretty attractive" and that no reference was made to break costs under the heading "How it Works" in Mr Bescoby's email of 5 March 2008 and in his further email of 11 April 2008.

190. Mr Lord submits therefore that not only did a ***Bankers Trust/Crestsign*** duty exist but RBS was unquestionably in breach of it. No indication at all was given of the potential scale of break costs and when Mr Wyse and Mr Malin raised issues about being tied in to the swaps for a long time at RBS' option, RBS either ignored the point or said that PAG should not be concerned. It also concealed the extent of the MTM at the outset and credit line on its books being Facility G2. He says therefore, that it is quite clear that but for the breach, PAG would not have entered the Swaps which he says is a matter of common sense. He also points out that it was not put to PAG's witnesses that they would have gone ahead even if they had known the scale of the break costs and therefore, it is not open to RBS to rely upon such a case.

191. Mr Handyside submits that in the circumstances, the duty does not exceed the duty not to mislead and cannot extend to an explanation of products expected of an adviser. He points to ***Crestsign*** as authority that there is no obligation to provide MTM figures, break costs or to provide scenario analysis and ***Bankers Trust*** for the proposition that there is no duty to provide MTM figures of a trade at the outset. He also submits that there is no magic in the term "substantial" used in the ***Crestsign*** case in relation to break costs. Mr Handyside submits that a generic warning that there may be break costs is sufficient particularly because PAG was always aware of break costs and had been advised by Rathbones in 2003 that such costs would be substantial in relation to a contract proposed at that time. He points to the conclusion of the Deputy Judge in ***Crestsign*** at [165-167] that in that case the generic warning that they might be substantial was sufficient and that there was no duty to provide further information in the absence of enquiries. He also points to the unchallenged evidence of Ms Robbins that it was not market practice at the time to provide details of potential break costs. He also submits that PAG had in-house advisers in relation to the swaps who were fully aware that they could obtain advice from Rathbones, who were in a position to calculate break costs if asked or that they could have asked RBS to do so but did not.

192. Further, Mr Handyside points out that PAG: was far larger and more sophisticated than the customer in ***Crestsign***; had professional staff including a finance director; had access to and it is said, used advisers both in-house and otherwise; was under no time pressure; had prior experience of interest rate products and had purchased them from other banks and had experience of other sophisticated products and structures including Yen and Swiss Franc structures known to RBS; was a professional and not a

retail client, was provided with more information including about hedging lines and break costs than in ***Crestsign***, was offered caps which it now says it ought to have been recommended and entered trades no more complicated than that in ***Crestsign***. He also draws attention to the fact that there is no evidence of any market practice of providing detailed information including financial modelling of the kind which PAG says should have been forthcoming, even by advisers; PAG was fully aware that RBS recorded a contingent liability against each Swap hence the discussions about the need for hedging credit lines and the detailed discussion in relation to the Yen financing plans where Mr Bescoby provided contingency liability figures which were as high as £25m and discussed how they were calculated; there is no basis for the allegation that break costs were likely to be very significant although there was a risk that they might be; references to break costs were also made.

193. In this regard, Mr Handyside referred me to: the paper prepared in 2002, which contained notes which warned that the early surrender of the contract might involve exit costs (or benefits); the 6 February 2003 presentation on the 5 year collar which stated: "In the event the market has moved against a transaction you have undertaken, you may incur substantial costs if you wish to close out your position"; the Presentation Notes to the June 2004 "Structured Hedging Solution" Paper; the Presentation Notes in the October 2004 Paper; Mr Bescoby's about discussion the risk of break costs on a call with Mr Wyse on 6 October 2004, during which Mr Wyse confirmed that he was aware of that risk; Mr Wyse accepted in cross-examination that he "clearly understood" that if RBS did not exercise its option and PAG wanted to break the trade early it would have to pay break costs but that he did not anticipate wishing to cancel early; each of the signed PTAs for each of the Swaps contained specific warnings about breakage costs; and in oral evidence Mr Russell accepted that he knew of the risk of break costs. Mr Handyside submits therefore, that PAG was fully aware of the position in relation to break costs and therefore, even if there were a duty in the form alleged by PAG and even if RBS was in breach, any loss was not caused by it because PAG would have entered into the Swaps in any event.

Conclusion:

Is there a duty of care and if so, what is the extent of the duty owed by RBS?

194. Was there a duty of care owed to PAG of the kind alleged and if so, what was the extent of that duty? Was RBS required to provide full scenario modelling in relation to each of the Swaps and to give details of the potential break costs and the MTM at the outset? It is said that these arise from a duty fully, properly and accurately to explain the transactions, an explanation of sorts having been tendered. Before considering the circumstances of this case, I must turn back to the authorities.

195. In my judgment, it is clear from the passage in ***Bankers Trust*** at 533D-E itself if read as a whole, that the allegations in that case were of the existence of a duty going beyond the duty to take reasonable care not to misstate facts and that the existence of a broader duty and, if so, its scope, are entirely fact sensitive and turn upon the "precise nature of the circumstances and of the explanation or advice which is tendered": [533D]. It should also be borne in mind that Mance J's conclusions arose in circumstances in which although a general advisory duty was not alleged, "the advisory duties and breaches [which were] alleged are effectively comprehensive so far as the subject-matter of this case goes. But it will be necessary to consider the

possibility that more limited duties were assumed or arose." [529A] However, having considered the relevant facts Mance J decided that no more wide ranging duty arose. He rejected such a duty in relation to the first swap. In relation to the second swap, his conclusion at 573H that the bank was obliged to provide a properly constructed graph and letter setting out the financial implications of the proposal arose in the context of a duty not carelessly to misstate facts and his conclusion that the information which had been provided had been misleading and partial: 561G-562E. He went on to consider the "broader duty to explain fully and properly the operation, terms, meaning and effect of swap 2" at 574 and considered a number of factors before noting that the court must consider the well recognised criteria when imposing a duty of care and noted that the ultimate decision is a pragmatic one.

196. It seems to me therefore, without falling into the trap of construing Mance J's judgment as if it were a statute, that the potential duty of care under consideration is wider than a duty not to misstate, is fact dependent and as HHJ Moulder pointed out was being contemplated as a duty falling on the advisory spectrum. Accordingly, if the decision in ***Crestsign*** was intended to go further, and to suggest that once information is provided by a bank, a salesman is always under a duty to explain fully the products he wishes to sell without a broader advisory relationship having arisen, I decline to follow it. As HHJ Moulder pointed out, to take such an approach is to blur the line between a salesman and an advisor. In my judgment, such a conclusion is also consistent with the observations of Tomlinson LJ in ***Green & Rowley v RBS***.

197. It is necessary, therefore, to consider the relevant circumstances in this case and to determine whether a broader duty of care should be recognised here and if so, its extent and scope. In additional written submissions in relation to the ***Bankers Trust*** case, PAG submits that the factors in this case are much stronger than those in ***Bankers Trust*** itself. Reliance is placed upon: (i) the fact that contrary to the circumstances in ***Bankers Trust***, the Swaps were transacted pursuant to the hedging requirement in order to hedge exposure to interest rates rather as a form of speculation; (ii) PAG was much less sophisticated than DSS in Bankers Trust and was at a considerable information disadvantage and did not have the ability properly to assess the implications of the Swaps and in particular, was unable to assess the break costs; (iii) in comparison with one written and one oral presentation in ***Bankers Trust***, the explanation given was extensive and purported to set out both the advantages and "considerations" of the transactions; (iv) unlike in ***Bankers Trust***, numerous enquiries were made about the implications of being tied into the Swaps and the extent of break costs; and (v) RBS's policy of not revealing information about the potential scale of break costs to counterparties.

198. RBS also draws attention to five factors: (i) it was Mr Virji's evidence at paragraph 33 of his report that the MTM of the Swaps on entry was relatively low being essentially RBS' AV ("added value" which in effect represented RBS's margin); (ii) the MTM, unlike in ***Bankers' Trust*** was not a surprising feature but was perfectly normal; (iii) PAG never proactively sought information about the amount of RBS' margin; (iv) PAG never sought information about the amount of MTM on entry into the Swaps or any quantified analysis of it during the lifetime of the Swaps; and (v) none of the Swaps were entered into with a view to reversing or trading them but were expected to remain in place until their expiry. It was also pointed out that Ms

Robbins' unchallenged evidence was that it was not usual at the time to provide details of potential break costs or initial MTM.

199. First, it seems to me that although PAG was not of the calibre of the counterparty in ***Bankers Trust***, neither was it as unsophisticated as the party under consideration in ***Crestsign***. PAG is a substantial property company, was a professional and not a retail client of the bank, and its officers and professional staff are not unsophisticated by any means. They had entered into numerous derivative products with other banks and had contemplated entering into complex foreign currency structures which required a very considerable credit line. Mr Russell also had his own very strong views about interest rates and the kind of products he was interested in and through Mr Wyse actively sought trades of particular kinds.

200. Secondly, at all material times, PAG had a series of banking advisers who may not have been derivatives specialists or able to compute potential break costs or MTM but were aware of the potential for such costs to arise, to consider the potential consequences of terms being proposed and to point PAG in the direction of those able to calculate MTM/break costs. It was quite clear for example, from the discussion between Mr Bescoby and Mr Malin on 27 September 2007, that Mr Malin well understood the effect of RBS' ability to continue or cancel the Second Swap including the potential for considerable potential break costs. I also take into account, in this regard, the advice received from Rathbones in 2002/3 and on subsequent occasions which made reference to break costs, and, in particular, the concerns voiced by Rathbones about the terms of the First Swap, albeit after it had been entered into, which were ignored in relation to the subsequent Swaps. Thirdly, PAG never sought information about the amount of MTM on entry into the Swaps or thereafter. Fourthly, I consider it relevant that unlike the claimant in ***Crestsign***, PAG was under no time pressure to speak of.

201. It is also relevant that it was not general market practice to give information about potential break costs and the MTM at the outset at the time. In this regard, I reject Mr Lord's formulation of this factor which involves seeking to imply some wrongdoing on the part of RBS in following a policy which was market practice. I also take into account the specific warnings about break costs, mismatch and other matters which were first voiced by Rathbones in September 2002 and were mentioned in the first RBS paper provided to Mr Russell that month and repeated in the presentations of June and October 2004 entitled "Structured Hedging Solution", the specific reference for such costs to be "substantial" and the warnings in each of the PTAs. I also consider it relevant that PAG was made aware of the existence of a hedging credit line on numerous occasions including, for example, the presentation in relation to cross currency swaps in May 2007. Further, as the Deputy Judge observed in ***Crestsign,*** the credit line figure was produced for internal purposes on a worst case scenario and could not be expected to have been revealed. It is also relevant that it was not envisaged that it would be necessary to break the Swaps because it was expected that PAG's borrowing would continue to increase and the unprecedented drop in interest rates could not have been forecast.

202. In my judgment, the fact that the explanations given were more extensive than in ***Bankers Trust***, militates against the existence of the duty of care rather than for it and the question of whether those explanations were misleading can best be dealt with under the pure misstatement heading. It is also important to bear in mind that any duty

to advise had been expressly excluded by the terms of the parties' contractual arrangements and was repeated, for example, in the PTAs, that the relationship between the parties was essentially commercial, despite the assertion that trust grew over time and the subject of standard contractual documentation. All in all, therefore, in my judgment, taking into account foreseeability, proximity and fairness, justice and reasonableness in the context of the PAG/RBS relationship and in the light of the type of loss which it is sought to recover, there was no duty of care in this circumstance of the kind contended for.

203. In any event, I have already found that PAG was aware of the potential for break costs which would vary according to market conditions and was also fully aware of the internal credit line necessary in relation to the Swaps. Further, it did not request any information about the extent of the MTM despite being aware of its existence. In my judgment therefore, not only was there no duty to reveal the extent of the break costs, the MTM at the outset or from time to time throughout the life of the Swaps but in any event, PAG did not enter into the Swaps as a result of the information having been withheld. I should add that to have any purpose or meaning it would have been necessary to provide information in relation to break costs on a regular basis, something which is not alleged.

204. What of the alleged duty to provide scenario analysis as part of a duty to explain fully? It seems to me that in the light of the unchallenged evidence that such scenarios were not generally provided at the time, and the conclusions that I have reached in relation to the wider duty of care, that there is no breach in this regard. Was RBS in breach of the duty not to misstate by failing to provide such scenarios? In my judgment, it was not. The information which was provided was not inaccurate. I consider the position to be the same in relation to break costs and MTM.

205. Accordingly, the Swaps Misstatement Claims fail.

(ii) ***The Swaps Misrepresentation Claims***

206. PAG alleges that ten representations were made fraudulently by RBS and relied on by PAG when entering into the Swaps with the result that each of the Swaps should be rescinded. In essence, they are that the Swaps were "hedges" or a "hedging solution", would "protect" and "de-risk" ("the Hedging Representations"), that the Swaps were "suitable" and/or "a solution", (the "Suitability Representations") ; and that the parties' interests were aligned, the Swaps would complement/support/reflect PAG's borrowing, RBS' termination rights under the First, Second and Fourth Swaps were "not an issue", the Swaps were each a requirement of the Credit Committee and the Swaps were each acceptable "hedging instruments' under the Hedging Requirement and according each was a "hedge" ("the Other Representations"). The representations upon which PAG had focussed are the Hedging Representations and the Suitability Representations.

207. It is not in dispute that in order to succeed in its misrepresentation claims PAG must prove that: the representations were made to it; PAG understood the representations to have been made; the representations were false; PAG was induced by the representations to enter into the Swaps and RBS intended the representations to induce PAG to do so; and PAG is not precluded by contract from advancing its claim. In addition, to succeed in an allegation that the representations were made

fraudulently, it is necessary to show that the relevant person: knew that the representations were being made and that they were intended to be understood in the misleading sense; and knew or was reckless as to whether they were false.

The Hedging Representations

208. Mr Lord submits that it is quite clear that the Hedging Representations were made and that each of the Swaps was referred to on numerous occasions as “hedges”. Mr Bescoby accepted that he had described each of the Swaps to PAG as a hedge and Mr Jones accepted that he would have used the word “hedge” generally when presenting or discussing the Swaps. The real dispute is as to whether the statements are actionable and what the reasonable representee in PAG’s position would have understood the term to mean. Mr Lord submits that the term “hedge” would be understood to have its ordinary and natural meaning as elucidated by Mr Virji and accepted in cross-examination by Mr Bescoby, that a hedge is an instrument to reduce the hedging party’s exposure to the relevant risk. Furthermore, he says that it must be viewed in the contractual context between the parties which was the hedging requirement contained in the various Facility Agreements from time to time.

209. As to falsity, Mr Lord relies upon the evidence of Mr Virji and says that Miss Robbins’ evidence on behalf of RBS was for the most part irrelevant and she accepted she had no competence to give it. Therefore, reliance should be placed upon the evidence of Mr Virji who stated that none of the Swaps was a hedge because of the cancellation/extension options in favour of RBS, the increased risk to which PAG was exposed and the mismatch between notional amounts and duration of swap and loan. He also submits that each of the Swaps was a single indivisible instrument and must be considered as such, in the light of its overall effect. He submits that RBS’ use of the term “partial-hedge” is an oxymoron.

210. Mr Lord also submits that RBS’ witnesses accepted that PAG would have relied on the Hedging Representations and that it would be reasonable for PAG to have done so. He says that it is equally clear that RBS’ representations induced PAG to enter into the Swaps. In fact, he says that there is a presumption of inducement which arises because it is inherently likely that a representation that a product is a hedge would be material to a person entering into a hedging instrument, the presumption being particularly strong if fraud or recklessness is proved. Further, he says that RBS failed to put to PAG’s witnesses that if they had been told that the Swaps in substantial part were not hedges that they would still have entered into them and thus is fixed with PAG’s unchallenged evidence on reliance.

211. PAG goes on to contend that the Hedging Representations were made fraudulently with the result that the Swaps are liable to be rescinded and RBS is liable in deceit. He submits that Messrs Jones, Bescoby and Goldrick appreciated that PAG might reasonably understand the Hedging Representations as meaning that each was a hedge, knew that none of them were but at best were partial hedges and intended PAG to rely upon the representations. In this regard, Mr Lord also relies upon Mr Bescoby’s email to Messrs Jones and Goldrick of 3 October 2007 which they accepted they read at the time, in which Mr Bescoby stated that short callable structures were not hedges.

212. Mr Handyside on the other hand, whilst accepting that words such as "hedge" or "protect" were used does not accept that any actionable representation was made that each of the Swaps were "hedges" in the sense contended for by PAG. RBS submits that the use of the word "hedge" would not have been understood in isolation by a reasonable representee as a representation as to the quality of the transactions. Reliance is placed upon what is said to be the generic nature of the word and the contractual context of a non-advisory relationship. Mr Handyside also submits that the mere fact that a hedging product has a cancellation option does not render it no longer a hedge. During the guaranteed period it is a hedge and during the non-guaranteed period it may operate as such.

213. In addition, he says that hedges do not have a fixed market definition and therefore, Mr Virji's opinion is not relevant. Moreover, he says that Mr Virji's views are extreme. His view that any product where there is a mismatch between the amount or length of the swap and the loan cannot be a hedge, Mr Handyside says cannot be maintained. He says that Mr Virji elides the question of what is a "hedge" and what is an "appropriate hedge" and notes that the product under consideration in the ***Crestsign*** case was cancellable and was entered into subject to a hedging requirement in the loan documentation. He also submits that any statement about a "hedge" in the sense alleged by PAG was not a statement of fact but of belief which could only be falsified by dishonesty. However, the evidence was that all of the RBS witnesses genuinely believed the Swaps to be hedges.

214. In this regard, Mr Handyside took me to passages from the judgment of Hamblen J (as he then was) in ***Standard Chartered Bank v Ceylon Petroleum Corporation*** [2011] EWHC 1785 (Comm). In that case the defendant had sought to protect itself from the rise in oil prices by entering into oil derivative transactions with the claimant bank. One of the claims was based on alleged implied misrepresentations that the transactions were a "a true hedge", amounted to "a proper hedging strategy" and were consistent with the justification for hedging stated in a report. It was alleged that the implied representations arose from the term sheets which stated that the transactions in question were a "hedge" for the Defendant's exposures and could provide "protection" against further rises in oil prices and contained references to "full hedge" and "limited hedge." Having considered how to distinguish a hedge from speculation, and noting the difficulty in doing so at [339], at [562] Hamblen J (as he then was) found that there was no basis in the term sheets when read as a whole for the alleged implied representations. He went on at [562(3)] and [562(4)] as follows:

> "(3) The Term Sheets do not refer to any of these matters and they are vague, imprecise and inherently implausible statements for a selling bank to make. The vague and uncertain nature of the statements mean that they are ill-suited to constitute actionable statements. What, for example, is meant by a "true hedge", a "proper hedging strategy" and how, precisely, is a bank meant to judge whether the benefits for its counterparty of any transaction outweigh the risks? A reasonable person would not have understood that SCB was making representations in such vague and ill-defined terms.
>
> (4) This is all the more so when one considers the disclaimers set out in the Term Sheets and all the other documentation

> relating to the transactions. In particular the Term Sheets stated at the bottom of every page "This document … is for discussion purposes only and does not constitute any offer, recommendation or solicitation to any person to enter into any transaction or adopt any hedging, trading or investment strategy" that "SCB has no fiduciary duty towards you, and assumes no responsibility to advise on and makes no representation as to the appropriateness or possible consequences of the prospective transaction" and that "You are advised to make your own independent judgment with respect to any matter contained herein". The alleged representations may be said to be as to the "appropriateness" of the transaction, and in particular its appropriateness as a matter of hedging strategy, which is specifically something the document makes no recommendations on and upon which CPC is to make its own independent judgment."

Mr Handyside says that the Hedging Representations are equally vague here and that they must be seen in their contractual context.

215. Lastly, Mr Handyside submits that PAG did not enter into the Swaps on the basis of representations that they were "hedges". It did so because Mr Russell was eager to reach his target rate of 5% on the advice of his advisers and because of the ICR covenants. PAG's witnesses did not understand "hedge" in the way argued for by PAG at the trial and Mr Russell claims that he never read any of the documents in any event. Further, RBS expected PAG to make its decisions based upon its own assessment and those of its advisers. Further, PAG was well aware of the cancellable nature of the Swaps and accordingly, it cannot have relied upon the term "hedge" and claim that it negated that very characteristic.

Suitability Representations

216. Mr Lord submits that there is no doubt but that RBS represented the Swaps as being "suitable" and a "suitable solution" for the purpose of hedging PAG's interest rate risk under the investment facilities and that suitability is a straightforward concept with a clear meaning. Furthermore, he says that the representations were false for the reasons explained by Mr Virji in his evidence. None of the Swaps, it is said, were suitable for PAG in order to reduce its exposure to interest rate risk. In summary, the reasons expounded by Mr Virji were the extensive cancellation rights in favour of RBS, the increased risks to which PAG was exposed by the Swaps and the mismatches of notional amount and duration. Further, as to inducement and reliance the same points arise as in relation to the Hedging Representations.

217. RBS denies that the Suitability Representations were made. It is submitted that in the context of a non-advisory clause very clear wording would be needed. In this regard, Mr Handyside also points to Mr Virji's acceptance that suitability in relation to derivative contracts is a complex matter and submits that PAG cannot have thought that the Suitability Representations were being made and that Mr Russell himself did not appear to think that the representations of suitability for PAG were being made, rather that they were suitable for RBS. In any event, RBS submits that the representations, if made, were not false and that there was no inducement or intention

to induce. RBS submits that in the light of Mr Russell's target for interest rates, his aversion to up front premiums and his desire to consider a variety of different financial products to reduce PAG's headline borrowing rate, the Swaps were suitable. Mr Handyside points out that until July 2009, PAG was a beneficiary under the Swaps and had it not been for the unprecedented and unforeseen collapse in interest rates the Swaps would have been a success for PAG. Further, he says that the mere fact that the Swaps were cancellable did not render them unsuitable; it was the corollary of the reduction in the headline rate and was well understood by PAG. Further he says that the fact that the Swaps were heavily structured did not render them unsuitable. They were understood by Mr Wyse, Mr Russell and their advisers. Lastly, he says that the possibility of having to pay break costs did not render them unsuitable. That is a feature of almost all hedging products and was well understood by PAG.

Other Representations

218. Mr Lord accepts that the Other Representations are for the most part variations upon the theme of PAG's principal complaints and it was not clear to me that he pursued them in closing, or at least not with any vigour. In any event, he submits that the evidence supports his submission that each of the Other Representations was false and that RBS knew them to be false or was reckless as to whether they were true. In relation to each of the representations, PAG also submits that even if the subject matter of the representations were matters of opinion they remain actionable representations because they amount to an implicit representation that the representor had reasonable grounds for the opinion.

219. The first of these is that the interests of PAG and RBS were "totally aligned". Mr Lord relies upon Mr Goldrick's statement to Mr Russell at a meeting on 3 May 2007 that "we are all on the same team and working towards the same goals", Mr Bescoby's statement at the meeting on 18 September 2007 that "our interests are aligned" and the reference in Mr Farrell's witness statement, (Mr Farrell not having been cross examined) to him having stated to Mr Russell at a dinner on 19 June 2003 that PAG and RBS were "totally aligned". Mr Lord says that it is abundantly clear that interests were not aligned. RBS denies that the "totally aligned" representation was made and if it was, it is said that it was not actionable or an inducement to enter into the Swaps, nor was it false.

220. The alleged representation that the Swaps were designed to "complement, support and reflect" PAG's borrowing is said to arise from the existence of the Hedging Requirement and was made or was implicit. Put another way, it is said that it can hardly be suggested that the Swaps were divorced from the borrowing. Reliance is also placed upon Mr Goldrick's acceptance in cross-examination that the hedging was "integral" to the lending. However, Mr Lord says that the Swaps were entirely divorced from the underlying lending for the reasons Mr Virji explains.

221. As to termination rights "not being an issue,", Mr Lord relies upon the 1 October 2004 meeting and a meeting on 18 September 2007. He says that such representations are consistent with Mr Bescoby's assertions during telephone calls that PAG should not be "concerned" or "bothered" about termination rights. If the representations were made, RBS accepts that they were false.

222. As to the Swaps being required by the Credit Committee as a condition of continuing finance and being "acceptable' under the Hedging Requirement, Mr Lord submits that there is little dispute that they were made and that they were false because the Credit Committee noted the limitation of the Swaps as hedges "from a risk perspective" and they were sold pursuant to the Hedging Requirement. In relation to being "required by Credit" he points to Mr Bescoby's acceptance in cross-examination that he led PAG to believe that the Credit Committee were content with the Swaps. RBS says that the representations should be reasonably interpreted to be references to the need for the Credit Committee to approve the hedging credit line in each case.

Knowledge and Fraud

223. PAG also contends that each of the Swaps Representations was made fraudulently in the sense that Messrs Jones and Bescoby knew that they were being made, that they would be understood in the way in which PAG contends and that they were untrue or were reckless as to whether they were true or not. The same is said to be true of Mr Goldrick in relation to the First and Second Swaps. In cross-examination, Mr Goldrick stated that he knew that the First and Second Swaps were being put forward pursuant to the Hedging Requirement and appeared to understand the risks involved in the structures being offered in the sense that Mr Jones reported to him and he would have been made aware of central issues. Mr Bescoby stated in cross-examination that he only believed that the proposals provided to PAG were suitable on the basis of the information which had been provided to the bank although he did accept that it was reasonable for Mr Wyse to assume that by sending out proposals he (Mr Bescoby) was representing the content to be a suitable hedging instrument. Mr Jones on the other hand had no hesitation in accepting that PAG would rely on presentations sent out and that the presentation of October 2004 was intended to communicate that the instrument referred to was a hedge. He also accepted that in terms of credit analysis the First Swap would not be a hedge after year 5. In any event, Mr Bescoby was the author of the email of 3 October 2007 which was read by both Mr Jones and Mr Goldrick. In that email Mr Bescoby stated that the type of structures of the kind being put forward were not hedges. On that basis alone it seems to me that from that time onwards each gentleman knew that any representation that they were hedges was not true or at least was reckless as to it.

224. In this regard, Mr Lord relies upon the evidence of Messrs Russell and Wyse to the effect that Mr Jones had told them on a train journey in July 2010 that a credit committee member had asked Mr Jones whether his clients realised that they did not have a hedge and were not protected by the Swaps. In cross-examination, Mr Jones stated that he could not recall the conversation but had answered, "yeah" when the conversation was referred to during the discussions in November 2013 which were recorded clandestinely. It seems to me that on the balance of probabilities, given Mr Jones' non-committal approach in cross-examination and his acknowledgement of the conversation in the recorded conversations, that the evidence of Messrs Russell and Wyse is to be preferred in this regard.

Contractual basis of dealing

225. RBS also contends that all of the representation claims are precluded by a defence of contractual estoppel and I was referred to the key legal principles summarised by

Hamblen J (as he then was) in ***CRSM v Barclays*** [2011] EWHC 484 (Comm) [2011] 1 CLC 701 at [505]:

> "(1) It is possible for parties to agree that one party has not made any pre-contract representations to the other about a particular matter, or that any such representations have not been relied on by the other party, even if they both know that such representations have in fact been made or relied on, and that such an agreement may give rise to a contractual estoppel.
>
> (2) If a term is to be construed as having this effect (and thereby prevent from arising the ordinary consequences which would otherwise follow as a matter of law) clear words are necessary – see *Peekay* para. 57; *Board of Trade v Steel Bro & Co Ltd* [1952] 1 Lloyd's Rep 87 at p95.
>
> (3) Whether or not a clause or collection of clauses has this effect is a matter of construction of the contract.
>
> (4) The principle may not apply where there has been a misrepresentation as to the effect of the contractual documents which give rise to the estoppel – see *Peekay* para. 60; *Springwell* para. 166".

226. It is submitted that all the dealings in relation to the Swaps were governed by express contractual terms which provided that PAG was not relying upon RBS for advice or recommendations and that it assessed and understood the products for itself contained in the schedule to the ISDA Master Agreement and each Confirmation provided at the date of entry into each Swap. They were in the following form:

> **"Non-Reliance**. It is acting for its own account, and it has made its own independent decisions to enter into that Transaction and as to whether that Transaction is appropriate or proper for it based upon its own judgement and upon advice from such advisers as it has deemed necessary. It is not relying on any communication (written or oral) of the other party as investment advice or as a recommendation to enter into that Transaction; it being understood that information and explanations related to the terms and conditions of a Transaction shall not be considered investment advice or a recommendation to enter into that Transaction. No communication (written or oral) received from the other party shall be deemed to be an assurance or guarantee as to the expected results of that Transaction.
>
> **Assessment and understanding**. It is capable of assessing the merits of and understanding (on its own behalf or through independent professional advice), and understands and accepts, the terms, conditions and risks of that Transaction. It is also capable of assuming, and assumes, the risks of that Transaction."

227. RBS contends therefore, that PAG is precluded from reliance on the representations or statements that the Swaps were or were not hedges. Mr Handyside points out that Mr Russell's claim in cross-examination that Mr Goldrick and Mr Jones had told him that the documentation was merely standard banking documentation which could be ignored was not the pleaded case, did not appear in any of the witness statements and was not put to the RBS witnesses. Furthermore, he pointed out that Hamblen J considered similar clauses in some detail in ***CRSM v Barclays*** at [510] – [532] and decided that: the non-reliance clause was focussed on investment advice and recommendations; the second sentence precludes reliance upon any communication as investment advice or as a recommendation; whilst the third sentence prevents a communication received from being an assurance or guarantee of results of the transaction. Accordingly, Mr Handyside submits that PAG is precluded from advancing its claims based upon the Complement/Support Representation, the Hedge Representation, the Protection Representation, the Solution Representation, the Suitability Representation, the Acceptability Representation and the Termination Right Representation. Further, in summary it is said that the effect of the clauses is that PAG agreed that it understood the risks of the Swaps and accepted those risks. Therefore, any claim based upon a contention that PAG misunderstood the terms, the conditions or the risks is precluded. Mr Handyside also relies upon ***UBS AG v Kommunale Wasserwerke Leipzig GmbH*** [2014] EWHC 3615 (Comm) and draws attention to paragraphs [780] – [782] at which an identical clause to that considered by Hamblen J in the ***San Marino*** case was considered by Males J.

228. RBS submits that the representations relied upon are indistinguishable from investment advice and to treat them otherwise would drive a coach and horses through the established case law on contractual estoppel. RBS also submits that: the ***KWL*** case is authority for the proposition that the scope of contractual estoppel should be assessed by reference to the actual wording of the particular documentation; and that PAG cannot rely upon section 3 Misrepresentation Act 1967 which has no application in the circumstances because none of the Representations "exclude or restrict" a liability to which RBS would be subject. In response, Mr Lord points out that such a defence could not apply to claims in fraud or deceit. He also submits that the duty not to misstate or mislead is not an advisory duty and therefore, the point is misconceived.

Conclusion in relation to the Swaps misrepresentation claims:

229. In relation to each of the alleged representations, it is important to consider them in their factual context and in the light of the contractual relationship between the parties. The Swaps were entered into and the statements as to "hedge" and "protection" made in the context of the Hedging Requirement in the Facility Agreements which also contained express provisions excluding any advisory duties or fiduciary relationship. The representations were also made in the context of emails setting out the detailed provisions of each of the proposed trades and the PTAs which followed. Those PTAs made clear that PAG was acting on its own account and stated that it would be exposed to interest rate risk if: there was a mismatch between the start dates or end dates of the underlying borrowing and any interest rate protection; there was a difference between the value of the borrowing and the notional principal under the Swap; and that break costs would be incurred if the Swaps were closed before their maturity (including a short explanation of the way in which such costs might arise).

230. It is also clear that at least from 3 October 2007, when Mr Bescoby sent his email, Messrs Bescoby, Jones and Goldrick did not consider short callable structures to be hedges but did consider that they could form "part of an overall risk management strategy" and "satisfy a desire for lower rate funding for a pre-determined period." Further, Mr Bescoby, in cross-examination, accepted Mr Virji's definition of a hedge. However, it seems to me that in the context to which I have referred, the reasonable representee would not have understood the references to "hedge" in the way for which PAG contends. In those circumstances, including, in particular, the non-advisory relationship arising from express contractual terms, in my judgment a reasonable representee would have considered the term to be generic and would not have understood the phrases used as a representation as to the quality of the transaction upon which they could rely.

231. This is the more so because of the terms set out in the schedule to the ISDA Master Agreement and in each of the Confirmations/PTAs. The terms set out under the heading "Non-Reliance" make clear amongst other things that PAG in this case was "making its own independent decisions to enter into" each Swap and as to whether it was "appropriate or "proper', was not "relying on a communication written or oral . . . as investment advice or as a recommendation to enter into" the Swaps and that "information and explanations related to the terms and conditions of a Transaction" were not "investment advice" or "a recommendation to enter into" the Swap. The clause is similar to the one considered in the ***CRSM*** and ***KWL*** cases in which the wording was held to be focussing on investment advice and recommendations. The reasoning applies equally here. In my judgment, these are clear words which should be construed to mean that explanations of the terms of the Swaps and oral statements made about them could not be relied upon as investment advice or recommendations. It seems to me therefore, that even if the use of the term "hedge" was sufficiently clear to be relied upon by a reasonable representee to mean what Mr Virji suggests, reliance upon it has been excluded by means of contractual terms. I accept that such a defence does not affect claims in fraud. I have also found that the duty not to misstate was not breached and that a "mezzanine" duty did not arise in this case. However, had it arisen, I accept that it would not have fallen naturally within the Non-Reliance clause.

232. Furthermore, and even if I am wrong about the nature of the "Hedge Representation", and in addition, reference to a hedge should be construed in the narrow way put forward by Mr Virji, I consider the evidence of Mr Wyse and Mr Russell to be fatal to their contention that they entered into the Swaps in reliance upon the Hedging Representations. In cross-examination, it was clear that neither gentleman understood a hedge in the way described by Mr Virji and relied upon for the purposes of this aspect of the claim. Accordingly, neither Mr Russell, PAG's ultimate decision maker, nor Mr Wyse its Finance Director could have relied upon the "Hedge Representations" in the manner alleged. The cancellable nature of the Swaps was also fully understood by PAG. This was revealed, for example, in the discussion between Mr Malin and Mr Bescoby on the telephone. Therefore, PAG cannot have understood the reference to a "hedge" to mean as Mr Virji suggests and to have relied upon it in that way. Furthermore, it seems to me that the appetite and eagerness for derivatives shown by PAG which sought quotations on numerous occasions in relation to various structures, rates and amounts, both from RBS and other banks, also weighs against reliance upon a representation that the Swaps were "hedges" in the narrow sense. In

my judgment, Mr Russell's conduct was much closer to speculation upon interest rates. The same reasoning applies in relation to the use of the word "protect".

233. In my judgment, the claims in relation to the "Suitability Representations" must also fail. As Mr Virji accepted, suitability in relation to a derivative contract is a complex matter and would have required detailed knowledge of PAG's business. In the circumstances, including the contractual context, it seems to me that a reasonable representee would not have understood the representations in the way in which PAG contends. This is all the more so in the light of Mr Russell's evidence in cross-examination to the effect that he did not consider the representations to have been made.

234. In any event, it seems to me that they fall clearly within the "non-reliance" clause being either investment advice or a recommendation and therefore, PAG is contractually estopped from relying upon them. If that had not been the case, I would also have found that despite the fact that the Swaps were cancellable and did not match the length of the loan, matters which were highlighted in the documentation, they were suitable in the sense that they met Mr Russell's target interest rate and did not include a premium.

235. I will deal with the Other Representations shortly. First, in relation to the "totally aligned" representations. I have already found that the representation was not made at the meeting on 1 October 2004. As to the other occasions, it seems to me that the representations were of a vague, imprecise and uncertain nature ill-suited to amount to actionable statements.

236. As to the alleged representation that the Swaps would "complement, support and reflect" PAG's borrowing, in my judgment it falls squarely within the Non-Reliance clause and accordingly, PAG is contractually estopped from relying upon it. In addition, even if that were not the case, in my judgment such a representation said to be implicit from the Hedging Requirement fails for the same reasons as the Hedging and Suitability Representations.

237. As to termination not being an issue, I have already found that on 1 October 2004, the phrase was used to mean that it was not an issue to Mr Russell and that I do not accept his further evidence that the derivative would only be cancelled in the joint interests of PAG and RBS. I should add that I consider the assertions made by Mr Bescoby on the telephone to be of a different nature. They were made in the context of comments about the effect of the prevailing interest rate.

238. The "acceptable to or required by the Credit Committee" representation, seems to me to be another variation on the "complement, support and reflect" representation and fails for the same reasons.

239. Lastly, as to the allegation that it was represented at a meeting on 18 September 2007 that the products were in-house and controllable and would be restructured to PAG's advantage if need be: Mr Russell had no independent recollection of the meeting and the notes do not support PAG's contention in relation to the alleged representation; Mr Malin said nothing about it in his evidence; and Mr Wyse had only a hazy recollection of the meeting. Taking into account these matters and the fact that PAG

did not act upon the alleged representation in 2010, it seems to me that on the balance of probabilities that the representation was not made.

240. In my judgment, therefore, the Swaps Misrepresentation Claims fail.

(iii) The Swaps Contractual Claims

241. Lastly, in relation to the Swaps, PAG contends that terms should be implied into the various contracts between the parties that the Swaps would be suitable for the contractual purpose of hedging PAG's interest rate risk, it would act in good faith and in accordance with commercial fair dealing and that RBS would not withhold from and/or fail to disclose to PAG important information about the "hedging" undertaken pursuant to the Hedging Requirement. Under the Hedging Requirement contained in the Facilities PAG was required to "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 entered into and maintained."

242. It is said that applying the orthodox principles, restated most recently in the Supreme Court in ***Marks and Spencer v BNP Paribas Securities Services Trust Co*** [2015] UKSC 72, [2015] 3 WLR 1843, if the Facilities are construed against the relevant factual background, such provisions would be so obvious they would go without saying and without them the contracts and the Hedging Requirement would lack contractual coherence. It is said that it would be bizarre if the Hedging Requirement countenanced anything other than hedging that would be suitable for the hedging purpose and that in that context one party could withhold information central to the shared contractual purpose of hedging.

243. Although the contractual claims were pleaded in relation to an alleged "Customer Agreement", Mr Lord explained in oral submissions that it was intended as a portmanteau phrase which refers to all of the contractual agreements between the parties including each of the lending Facilities.

244. It is alleged that RBS was in breach of the contractual suitability obligations for the same reasons as relate to the Suitability Representations, breached its good faith duty and misused its powers. In relation to the alleged implied term not to provide unclear, unfair and misleading communications, Mr Lord puts the claim in two ways. First, he submits that the Facilities contained an implied term of the nature described by Thomas J (as he then was) in ***Larussa –Chigi v CS First Boston Ltd*** [1998] CLC 277 and/or alternatively, by incorporation by reference of the rules in the FSA Handbook. The Pre-MiFID Terms of Business provide at cl. 1.5 that "All business we conduct with or for you shall be governed by these Terms of Business and applicable law" and "Applicable law" is defined as "… including without limitation the FSA Rules…" The "FSA Rules" are in turn defined as meaning the rules in the FSA Handbook. The Post-MiFID Terms of Business provide at cl. 2.3 that "For the purposes of these Terms, applicable regulations shall include the FSA Rules, the rules of any other relevant regulatory authority or exchange and any applicable law and regulations in force from time to time ("Applicable Regulations"). Where these Terms conflict with Applicable Regulations, the latter shall prevail". It is said that the effect of both the pre-MiFID and Post-MiFID Terms of Business was to incorporate the clear/fair/not misleading obligation. Reliance is placed upon ***Brandeis (Brokers) Ltd v Black*** [2001] All ER (Comm) 980, a case under the previous SFA regime in which Toulson

J (as he then was) held that where the agreement provided that its terms were "subject to SFA Rules" those rules were incorporated by reference. It is said that RBS breached the duty to provide clear and fair communications which were not misleading. The breaches upon which Mr Lord focussed were: the failure to give any indication about the potential scale of break costs/MTM liability and the existence/extent of the G2 facility; the description of the Swaps as "hedges"; and the description of the products as "fantastic" and "great" for PAG.

245. In response, RBS submits that there was no Customer Agreement and in any event, the terms which it is suggested should be implied are contrary to express terms and are not necessary. In fact, it is said that if they were to be implied, the result would be revolutionary. In particular, RBS says that the Good Faith term would not be implied there being no general doctrine of good faith in English contract law, this case not falling within the limited exceptions. Further, the contractual documentation is standard including the ISDA Master Agreement. Secondly, it is submitted that the discretion/power implied term will not be implied because there is no true contractual discretion upon which a ***Socimer*** type implied term could bite. Further, it is submitted that the alleged information sharing term would not be implied. It is described as being in reality a pre-contractual duty to disclose or a duty to inform. This it is said, runs contrary to the express provisions of clause 4.7 of the Pre-MiFID Terms of Business, clause 4.2 of the MiFID Terms of Business and clause 5(c)(iii) of the Schedule to the ISDA Master Agreement, each of which provides that RBS was not advising PAG. It is also said to be contrary to clause 4.4 of the MiFID Terms of Business which provide that whilst the content of any opinion, research or analysis was believed to be reliable RBS did not represent that it was accurate or complete, and clause 6.5 which provided that any information provided by RBS was believed to the best of RBS's knowledge and belief to be accurate and reliable but no further representation was made, warranty given, or liability accepted as to its completeness. In other words, it is said that these express terms made clear RBS did not accept responsibility to share information beyond that which it provided.

246. Lastly, it is said that the clear/fair communication term would not be implied. Although RBS owed a regulatory duty to communicate in a way which was fair, clear and not misleading, it is not enforceable by PAG as a result of section 138D FSMA. It is submitted therefore, that it is not appropriate to achieve the same result by the back door. In addition, Mr Handyside submits that the Conduct of Business Source Book which forms part of the FSA, now the FCA Rules (the COBS rules) have not been incorporated by reference. Clause 1.5 of the pre-MiFID Terms provides:

> "All business we conduct with or for you shall be governed by these Terms of Business and applicable law so that:-
>
> (a) If there is any conflict between (i) these Terms of Business, and (ii) any applicable law, we shall be entitled to comply with such applicable law rather than these Terms of Business.
>
> (b) We may take or omit to take any action we consider fit in order to ensure compliance with any such applicable law and neither we nor any of our affiliates [etc] shall be liable as a result of any action taken in good faith by us or any third party selected by us and acting on your behalf to comply therewith;

> (c) Such applicable law and all such actions so taken shall be binding on you; and
>
> (d) Both of us recognise that, save to the extent provided above, the applicable law is not, and is not intended to be, incorporated into these Terms of Business so as to give rise to any additional rights and/or obligations as between us except to the extent expressly required by statute or any other applicable law."

Applicable law was defined in Appendix 1 as including: "all applicable law, rules and regulations, including without limitation the FSA Rules…" Clause 2.3 of RBS's updated terms, the MiFID Terms of Business provides:

> "For the purposes of these Terms, applicable regulations shall include the FSA Rules, the rules of any other relevant regulatory authority or exchange and any applicable laws and regulations in force from time to time ('the Applicable Regulations'). Where these Terms conflict with Applicable Regulations the latter shall prevail."

247. RBS submits that on their face, neither of these terms incorporate COB or COBS into the contractual arrangements between the parties. They merely provide for situations of conflict and indeed clause 1.5(d) specifically disavows incorporation. It also points out that previous attempts, on very similar wording, to suggest that an obligation to comply with COBS can be implied as a matter of necessity or have been incorporated by reference have been rejected by the Courts most recently in ***Bailey v Barclays*** [2014] EWHC 2882 (QB) and in the ***Thornbridge*** case.

248. In any event, RBS submits that it did not act in bad faith by offering the Swaps to PAG "to make as much revenue as possible." This was not put to Mr Bescoby and was wrong in any event. RBS offered a wide range of products and did not recommend any particular contract. Secondly, it submits that it did not breach any alleged duty of disclosure; there is no such duty; and in any event, adequate information was provided, particularly in relation to break costs. Thirdly, the Swaps were not unconscionable transactions and lastly, there was no breach in relation to issues of "suitability" and "genuine hedge."

Conclusion:

249. First, should a term be implied into the Facility Agreements that the Swaps would be suitable for the contractual purpose of hedging PAG's interest rate risk? In this regard, it is necessary to consider in some detail, the contracts into which it is alleged that the term should be implied in the light of their factual context. Despite having abandoned the concept of a Customer Agreement and having explained that it was merely a phrase for each of the contracts between the parties, Mr Lord did not descend to detail. His submissions were made on the basis of the Hedging Requirement and the pre-MiFID and MiFID Terms of Business. Having considered this matter carefully against the background of the standard terms of the loan agreements, and the remainder of the relevant background including the relationship between the parties, I do not consider that those contracts and the hedging requirements require the implication of such a term in order to provide business efficacy or coherence or to put

it another way, that notional reasonable people in the position of the parties at the time would have concluded that that was the position.

250. Secondly, should a term to the effect that RBS must act in good faith and in accordance with fair dealing be implied? I have considered this in some detail under the GRG Claims below and will not repeat matters here. Suffice it to say that in my judgment, applying the principles in the ***Marks & Spencer*** case, in my judgment, such a term cannot be implied. It is contrary to the spirit of the express terms of the Facility Agreements excluding equitable or fiduciary duties. In addition, it seems to me that as Andrews J pointed out in ***Greenclose v National Westminster Bank*** [2014] EWHC 1156 (Ch), [2014] 1 CLC 562 such a term is unlikely to arise by way of necessary implication in a contract between two sophisticated commercial parties negotiating at arms' length. This is all the more so in the light of the fact that agreements between the parties were on standard ISDA terms.

251. Thirdly, should it be implied into the Facility Agreements that RBS would not withhold or fail to disclose important information about the "hedging" undertaken under the Hedging Requirement? In this regard, I agree with Mr Handyside that in effect, PAG is seeking to achieve by the back door what cannot be achieved by the front and runs contrary to express terms.

252. The Swaps Contractual Claims fail therefore.

General Defences to the Swap Claims

Compromise?

253. In any event, in case I am wrong in my conclusions I must also deal with the general defences to the Swaps claims. First, in its defence, RBS contends that the Swaps claims were compromised by PAG as the quid pro quo for better than market terms offered by RBS in relation to the 2011 Facility. However, RBS accepts that very clear words would have been necessary in order to settle the fraud claims and therefore contends that only the non-fraud claims were settled.

254. Mr Lord says that this is an extraordinary contention in the absence of any written terms or documentation to suggest that this was the case or even to evidence that an oral agreement was reached. He also notes that the Heads of Terms in relation to re-financing which culminated in the 2011 Facility made no mention whatever of a compromise of claims. He asks rhetorically what exactly it was which is alleged was settled. In PAG's written closing reference is made to a passage from ***RTS Flexible Systems Ltd v Molkerei Alois Muller Gmbh*** [2010] 1 WLR 753 at [45]:

> "Whether there is a binding contract between the parties and, if so, upon what terms depends upon what they have agreed. It depends not upon their subjective state of mind, but upon a consideration of what was communicated between them by words or conduct, and whether that leads objectively to a conclusion that they intended to create legal relations and had agreed upon all the terms which they regarded or the law requires as essential for the formation of legally binding relations".

Mr Lord submits that whilst a compromise was on the table it is clear from the evidence of Messrs Russell, Wyse and Priest that an agreement was never reached. Furthermore, Mr Lord referred me to Mr Whatham's acceptance in cross-examination that the ordinary way to settle a mis-selling claim would be to do so in writing and that it had been a mistake not to do so. Mr Whatham was also asked about the absence of any reference to a compromise in the Heads of Terms and responded:

> "A. I think if there had been, at that point, a revised swap mis-selling claim and we were dealing with that and this was in settlement of a swap mis-selling claim, then that would be in there. But in hindsight, I would lower that threshold to cover that one.
>
> Q. What does that mean?
>
> A. It means it was a mistake not to cover off that eventuality at that time."

Mr Didier also accepted in cross-examination that the idea of obtaining a settlement in writing had been raised with him and he was fully aware of it. Having been asked about the use of the word "comprehensive" which was used in relation to the Heads of Terms by Mr Priest to Mr Didier and it having been suggested that the implication was that the Heads of Terms included all matters which were to be agreed, Mr Didier answered:

> "A. I would agree with that, and also that I understood that if a consensual restructure could be completed they would not pursue the swaps complaint."

Mr Lord points out that this all took place at a time when two firms of solicitors were acting for RBS, one in relation to the negotiation of the 2011 Facility and another, it seems, on behalf of the Manchester Swaps Desk. In addition, he says that the evidence of Mr Didier and Mr Whatham shows that the parties were not ad idem to the knowledge of RBS. The passage from Mr Whatham's cross-examination is as follows:

> "Q. As far you were concerned, if you had asked PAG to record it in writing, this position, they would have done so; is that right?
>
> A. I don't know what they would have said. If I thought it was the right thing to do and that needed to be done formally, then I would have put that on the table.
>
> Q. When you said you don't know what they would have said, you don't know whether they would have agreed? That's what you mean, isn't it?
>
> A. Well, knowing the way PAG had done, if we had asked for something late in the day then that would have been "Well, we want something else back in return if you want that writing".

> So that may well have been how it would have done. If I needed it in, it should have been up there at the beginning and we would have discussed it."

Mr Didier responded as follows:

> "Q. The reason, Mr Didier, that you took that course is because you knew that PAG would not agree to give up any swaps claims; that's right, isn't it?
>
> A. I did not countenance it at the time, I did not consider if they would enter into such agreement."

Furthermore, Mr Didier accepted that he had focussed on getting the re-financing done and had avoided discussion about liability for the mis-selling of the Swaps. In fact, Mr Whatham made a distinction between settlement of litigation which was not on foot at the time and "an acknowledgement that if we came to an agreement between two parties in a relationship, the customer complaint would go away." He explained that litigation was just something that had been threatened as part of negotiation, an amicable solution was signed and everyone moved on. In fact, Mr Whatham went as far as agreeing that there was no swap mis-selling compromise agreement:

> "Q. It's right, isn't it, Mr Whatham, that if RBS thought that PAG was agreeing to give up any subsequent swaps claims, it would have been a very obvious step for RBS to take to procure that agreement by PAG to have that agreement set out or recorded in some document?
>
> A. I think in hindsight that would have been the right thing to do. The thought process I had at the time was that we were not admitting to any error or problem with the swaps, but that we were dealing with a customer complaint. And by entering into the restructure we dealt with the customer complaint, because all the way along it had been made clear that right the way from the George Osborne letters, through to subsequent, every now and then Robin would write a letter or David would write a letter on the subject, it was always the subject if we basically don't get what we want. And my reading of coming to an amicable conclusion and getting an offmarket deal sorted that out, and I discussed that with Laura and we agreed that we didn't need anything specific in there that would look like we were agreeing that there was any swap mis-selling compromise agreement, because there wasn't."

255. Furthermore, Mr Lord says that if anything, PAG represented that it would give up its complaints if a "mutually acceptable settlement" was reached. In fact, Mr Priest's evidence was that PAG was not happy about bearing the entirety of the MTM in relation to the Swaps which was what was agreed eventually. Numerous other matters are taken in the written closing which is it not necessary to rehearse.

Conclusion:

256. It seems to me quite clear that no agreement was reached to compromise the claims arising from the Swaps. I come to this conclusion having considered the evidence both on PAG's behalf and on that of RBS and bearing in mind the passage from the ***RTS Systems*** case to which I have referred. In my judgment there is no evidence from which to conclude that the parties intended to create legal relations and agreed upon the essential terms in relation to such a compromise. I accept the evidence of Messrs Russell, Wyse and Priest in this regard. Further, had such an agreement been reached it seems to me that it would have been more likely than not that it would be reflected somewhere in the copious documentation before the court. No reference to a compromise is made. In addition, in my judgment, the evidence of Mr Didier and Mr Whatham in cross-examination is fatal to the existence of a compromise. In summary, Mr Didier accepted that he had discussed with his colleague whether there should be a written compromise and was aware of the issue. He also accepted that he did not countenance it at the time and did not consider that PAG would enter into such an agreement. Mr Whatham accepted that there was no compromise agreement. It seems to me therefore, that there was no intention to create legal relations in this regard and the parties were not ad idem. In addition, of course, at that stage there were only customer complaints and the litigation had not been commenced. Although that it is not definitive, it seems to me that it provides an important context for the evidence to which I have referred.

Limitation?

257. Secondly, in its defence, RBS contends that PAG's claims in relation to the 1st Swap which was entered into in 2004 are time-barred, the six-year limitation period for claims based on tort and contract having expired in 2010. Proceedings were issued on 17 September 2013. Mr Lord, however, submits that there is no period of limitation which can apply to the claim for rescission for misrepresentation: section 36 Limitation Act 1980 and ***P&O Nedlloyd BV v Arab Metals Co (No 2)*** [2007] 1 WLR 2288 and insofar as PAG's common law and contractual claims are concerned, insofar as they are based upon fraudulent misrepresentations, he relies upon section 32(1)(a) Limitation Act 1980 to extend the limitation period. Further, he submits that there is no defence of laches or acquiescence; laches is inapplicable to the common law claims; and there is insufficient delay and in any event, no delay which would give rise to the conclusion that it would not be inequitable to deny PAG the relief it seeks.

Conclusions:

258. I agree with Mr Lord. In relation to rescission for misrepresentation, and claims in fraud and in relation to fraudulent representations, he is quite clearly correct. I also agree that laches is not applicable to common law claims and that, in any event, there was insufficient delay to render it inequitable to deny PAG relief and no basis for a defence of acquiescence.

B. The GRG Claims

Implication of terms

259. PAG also claims that each of RBS's powers under what it describes as the "Customer Agreements" are subject to an implied term. It is pleaded that it was an implied term that RBS would: "perform the agreement in good faith and would not perform it in a commercially unacceptable or unconscionable way" (the "Good Faith Implied Term") and "exercise its powers and discretions under the agreements . . . reasonably, in a commercially acceptable or rational way, in good faith, for a proper purpose (i.e. the purpose for which such power or discretion was conferred) not capriciously or arbitrarily and not in a way that no reasonable lender, acting reasonably, would do" (the Discretion/Power Implied Term). Both implied terms are described as "***Socimer***" terms after the decision in ***Socimer International Bank v Standard Bank London Ltd*** [2008] EWCA Civ 116, to which I referred under the heading of the Swaps Contractual Claims.

260. PAG contends that it was transferred to, managed and retained in GRG in breach of such implied terms. RBS denies the existence of the Customer Agreements and contends that the question of where PAG was managed did not concern or engage any contractual term at all. There are eleven pleaded allegations of breaches of the alleged implied terms whilst PAG was managed in GRG. PAG focussed, however, on what it submitted were the most important of these which were:

    a) Improperly calling for valuations of PAG's portfolio in 2010 and 2013, the latter after it had decided not to re-finance PAG;

    b) Manipulation of the 2013 Valuation downwards in order to increase the default payment payable by PAG in order to apply as much pressure as possible after it had commenced litigation against RBS;

    c) Threatening to appoint receivers over PAG unjustifiably;

    d) Committing a breach of confidence by disclosing PAG's transfer to GRG to Russells without authorisation; and

    e) Demanding an onerous and allegedly unnecessary security review at PAG's expense.

261. As I have already mentioned, Mr Lord explained in opening that the reference to the Customer Agreement was intended as a portmanteau phrase referring to all the agreements between PAG and RBS. The power to value PAG's portfolio is contained in clause 10.9 of the 2009 Facility and in clause 21.5.1 of the 2011 Facility in substantively the same form, both of which have already been set out. There is no express power or discretion in either of the Facilities or any of the documentation between the parties which governed the individuals, team or department which would manage PAG, nor do they contain an express power in relation to a security review. The review was undertaken as a precursor to agreeing the terms of the 2011 Facility. It was first mooted at a meeting between Mr Goldrick, Mr McCoy, Mr Russell and Mr Wyse on 2 June 2010 and subsequently a quote was obtained from Berwin Leighton Paisner of £9-12,000.

Application of "Socimer principle"?

262. Mr Lord dealt with the two alleged implied terms together by reference to the "***Socimer***" line of authorities. He submits that whether such terms are to be implied depends upon whether RBS possessed a "contractual power or discretion" or a "bare contractual right": ***Mid Essex Hospital Services NHS Trust v Compass Group UK and Ireland Ltd*** [2013] EWCA Civ 200. The much quoted passage from the judgment of Jackson LJ is at [83]:

> "An important feature of the above line of authorities is that in each case the discretion did not involve a simple decision whether or not to exercise an absolute contractual right. The discretion involved making an assessment or choosing from a range of options, taking into account the interests of both parties. In any contract under which one party is permitted to exercise such a discretion, there is an implied term. The precise formulation of that term has been variously expressed in the authorities. In essence, however, it is that the relevant party will not exercise its discretion in an arbitrary, capricious or irrational manner. Such a term is extremely difficult to exclude, although I would not say it is utterly impossible to do so. . . ."

The line of authorities to which Jackson LJ referred and which he had considered in the paragraphs of his judgment preceding [83] were ***Abu***

Dhabi National Tanker Co v Product Star Shipping Ltd (The "Product Star") [1993] 1 Lloyd's LR 397, ***Horkulak v Cantor Fitzgerald International*** [2004] EWCA Civ 1287, [2005] ICR 402, ***Socimer International Bank Ltd v Standard Bank London Ltd*** [2008] EWCA Civ 116, [2008] 1 Lloyd's LR 558 and ***JML Direct Ltd v Freestat UK Ltd*** [2010] EWCA Civ 34.

263. In "***The Product Star"*** the charter-party provided that the vessel should not be required to proceed to any port which the master or owners in their discretion considered dangerous. The master and owners had refused to allow it to enter a port on account of war risks. Both the Commercial Court and the Court of Appeal held that this refusal was a breach of contract. Leggatt LJ, with whom Balcombe and Mann LJJ agreed stated the relevant principle as follows at page 404:

> "Where A and B contract with each other to confer a discretion on A, that does not render B subject to A's uninhibited whim. In my judgment, the authorities show that not only must the discretion be exercised honestly and in good faith, but, having regard to the provisions of the contract by which it is conferred, it must not be exercised arbitrarily, capriciously or unreasonably. That entails a proper consideration of the matter after making any necessary inquiries. To these principles, little is added by the concept of fairness: it does no more than describe the result achieved by their application."

264. In the ***Horkulak*** case the claimant recovered damages for breach of contract against his former employer, representing loss of earnings. The Court of Appeal held that his

lost discretionary bonus should form part of the damages. It was an implied term, based on the common intention of the parties, that there would be a genuine and rational exercise of the discretion by the employer. In ***Socimer*** itself a contract for the sale of assets between banks entrusted the task of valuation to one party. The Court of Appeal noted that the contract conferred on one party a power to make decisions which would affect both parties. It was held that the contract was subject to an implied term. Rix LJ (with whom Lloyd and Laws LJJ agreed) noted that the decision-maker's discretion was limited as a matter of necessary implication. He was obliged to act honestly. It was also noted at [66] that there was "need for the absence of arbitrariness, capriciousness, perversity and irrationality".

265. In ***JML Direct*** the defendant operated a satellite television service and the claimant was a provider of television shopping channels. It was agreed that the claimant should have two of its shopping channels on the defendant's platform and that the defendant would have discretion in the allocation of logical channel numbers. It was held both at first instance and in the Court of Appeal that, in exercising its discretion, the defendant was under an implied obligation not to act in an arbitrary, irrational or capricious manner. Moore-Bick LJ, with whom the Master of the Rolls and Toulson LJ agreed, added at paragraph 14:

> "Such an obligation is likely to be implicit in any commercial contract under which one party is given the right to make a decision on a matter which affects both parties whose interests are not the same."

Having reviewed those cases, Jackson LJ stated at [82]: "In each of the above cases the implied term was intrinsic. The contract would not make sense without it. It would have been absurd in any of those cases to read the contract as permitting the party in question to exercise its discretion in an arbitrary, irrational or capricious manner."

266. I should add that the ***Mid Essex*** case itself was concerned with a contractual term to award service failure points or make payment deductions under a contract to provide catering and cleaning services to an NHS Trust. The contract contained express rules as to their calculation. It was held that the discretion was of a very different nature from those considered in the cases which had been reviewed and simply permitted the NHS Trust to decide whether to exercise its absolute contractual right to award points and make deductions. There was no need for implication because if the Trust awarded more than the correct number of points or deducted more than the correct amount, it would be in breach of the express terms.

267. Mr Lord also relies upon a passage in the judgment of Baroness Hale in the Supreme Court in ***Braganza v BP Shipping Ltd & Anr*** [2015] 1 WLR 1661 at [18]. That case was concerned with a death in service benefit payable under a contract of employment save where in the opinion of the company or its insurers the death resulted from the employee's own wilful act. The employee disappeared from a vessel overnight and was declared lost overboard presumed drowned. Payment of the death benefit was refused on the ground that an investigation team had concluded that the most likely explanation for his disappearance was suicide. Baroness Hale stated:

> "18 Contractual terms in which one party to the contract is given the power to exercise a discretion, or to form an opinion as to relevant

> facts, are extremely common. It is not for the courts to rewrite the parties' bargain for them, still less to substitute themselves for the contractually agreed decision- maker. Nevertheless, the party who is charged with making decisions which affect the rights of both parties to the contract has a clear conflict of interest. That conflict is heightened where there is a significant imbalance of power between the contracting parties as there often will be in an employment contract. The courts have therefore sought to ensure that such contractual powers are not abused. They have done so by implying a term as to the manner in which such powers may be exercised, a term which may vary according to the terms of the contract and the context in which the decision-making power is given."

268. Mr Lord submits that the implied terms for which PAG contends fall squarely within the test for implication in the ***JML*** case: RBS is required to make decisions in the management of PAG and exercises discretions; and the interests of both parties are affected and those interests are different such that RBS has a conflict of interest. In addition, he says that the protective rationale for such terms set out in the ***Braganza*** case is particularly strong. RBS was the stronger party upon which PAG was dependant and could not re-finance without great difficulty. In his oral closing Mr Lord also took me to the judgment of Dyson LJ (as he then was) in ***Paragon Finance v Nash*** [2002] 1 WLR 685 in which he held at [30] and following, that he could not accept the submission that the power given to the claimant under the loan agreements to set interest rates from time to time was completely unfettered. He stated that:

> "If that were so, it would mean that the claimant would be completely free, in theory at least, to specify interest rates at the most exorbitant level. It is true that in the case of the Nash agreement clause 3.3 provides that the rate charged is that which applies to the category of business to which the claimant considers the mortgage belongs. That prevents the claimant from treating the Nashes differently from other borrowers in the same category. But it does not protect borrowers in that category from being treated in a capricious manner, or, for example, being subjected to very high rates of interest in order to force them into arrears with a view to obtaining possession of their properties."

Mr Lord says that by parity of reasoning this applies quite clearly to RBS's revaluation power and the power to call for a security review. A security review or a revaluation of the property portfolio could be demanded every month, for example, whatever the prevailing circumstances, and the protection afforded by the limit upon the number of valuations for which PAG was required to pay is insufficient to protect from all vices. Equally in relation to the general management of the borrowing relationship, Mr Lord submits that if there were no implied terms of the kind for which PAG contends RBS, for example, could have managed PAG from Tokyo or changed the relationship manager every week. He says that such a power obviously arises under the contract. Furthermore, he emphasises that the fact that RBS had a power, for example, to call for a revaluation does not render it truly a binary choice and that the existence of a binary choice is not necessarily a bar to the implication of

terms. The choices on the face of it, both in ***Braganza*** and ***Product Star*** for example, were binary. In fact, he says that RBS possessed discretions, its decisions affected both contracting parties and there was a conflict of interest: ***JML Direct***.

269. Lastly, Mr Lord submitted that any suggestion that PAG must prove bad faith in the sense of dishonesty in order to show that the implied terms are breached is wrong. He submits that the alleged implied terms in this regard fall into two: first those forbidding irrationality/arbitrary behaviour; and secondly, those forbidding bad faith. He says that the relevant test for bad faith is: "objective in the sense that it depends not on either party's perception of whether particular conduct is improper but on whether in the particular context the conduct would be regarded as commercially unacceptable by reasonable and honest people", as explained by Leggatt J in ***Yam Seng Pte Ltd v International Trade Corporation Ltd*** [2013] 1 All E.R. (Comm) 1321 at [145] and that a contractual claim in bad faith is not the same as one in dishonesty: ***Yam Seng*** at [137] - [138].

270. Mr Handyside on behalf of RBS dealt with the first alleged implied term separately. He dubbed it a general duty of good faith, and submitted that PAG's position in this regard is hopeless. He referred me to the judgment of Jackson LJ in the ***Mid-Essex*** case at [105] where he stated:

> "… I start by reminding myself that there is no general doctrine of "good faith" in English contract law, although a duty of good faith is implied by law as an incident of certain categories of contract: see *Horkulak* at paragraph 30 and *Yam Seng Pte Ltd v International Trade Corporation Ltd* [2013] EWHC 111 (QB) at paragraphs 120-131. If the parties wish to impose such a duty they must do so expressly.

He also took me to a passage from the judgment of Leggatt J in the ***Yam Seng*** case itself at [131] which is as follows:

> "Under English law a duty of good faith is implied by law as an incident of certain categories of contract, for example contracts of employment and contracts between partners or others whose relationship is characterised as a fiduciary one. I doubt that English law has reached the stage, however, where it is ready to recognise a requirement of good faith as a duty implied by law, even as a default rule, into all commercial contracts. Nevertheless, there seems to me to be no difficulty, following the established methodology of English law for the implication of terms in fact, in implying such a duty in any ordinary commercial contract based on the presumed intention of the parties."

Mr Handyside submits, therefore, that the question is whether PAG can show that such an implied term is necessary or obvious in this case which he says it plainly cannot.

271. First, he points out that there is no express mention of such a duty in any of the contracts and that, in fact, a number of the clauses militate against such a broad

implied term. Clause 4.8 of the pre-MiFID Terms of Business, for example, provided that none of the services provided by RBS would give rise to any fiduciary or equitable duties on RBS's part; and Clause 6.2 of the MiFID Terms of Business also stated that (unless specifically agreed in writing) the provision of services would not give rise to any fiduciary or equitable duties on the part of RBS. Second, he submits that there is no basis for any assertion that a series of relatively short-term contracts between PAG and RBS constituted contracts of the kind considered in ***Yam Seng*** where Leggatt J's examples were of "some joint venture agreements, franchise agreements and long term distributorship agreements". Third, Mr Handyside emphasises that the ISDA Master Agreement is a widely used standard form agreement into which it would be urprising if such terms were implied. Fourth, he drew attention to ***Greenclose v National Westminster Bank*** in which Andrews J rejected the contention that NatWest's right to exercise an option to cancel or to extend an interest rate swap in an ISDA Master Agreement and confirmation was a right which was subject to an implied term of good faith. She stated at [150]:

> "…such a term is unlikely to arise by way of necessary implication in a contract between two sophisticated commercial parties negotiating at arms' length. Leggatt J's judgment in *Yam Seng Pte Ltd v International Trade Corp Ltd* [2011] EWHC 111 (QB); [2013] 1 CLC 662, on which Greenclose heavily relies, is not to be regarded as laying down any general principle applicable to all commercial contracts. As Leggatt J expressly recognized at [147] of that judgment, the implication of an obligation of good faith is heavily dependent on the context."

Mr Handyside points out that the claims in relation to the threat to appoint receivers, the use of proceeds of the site at Chorley and the "Russell Claims" all rely on this implied term and therefore, fail.

272. In relation to the second alleged implied term, Mr Handyside submits that the starting point is the need for a contractual discretion or power in relation to which it is necessary to imply a term. He says that such contractual discretions do not exist and therefore, there is nothing upon which the ***"Socimer"*** principle can bite. In this regard, he relies in particular, upon [83] in the judgment of Jackson LJ in the ***Mid Essex*** case which I have already set out. In relation to the Revaluation power he submits that it gave RBS a right to appoint a valuer to prepare a valuation and that the power was absolute. There was no range of options and PAG was protected from repeated valuations which the bank would have to pay for. The parties had agreed an express control mechanism and therefore, there is no room for necessary implication. In relation to the "Relationship Team Implied Power" Mr Handyside says that the insurmountable difficulty for PAG is that no such contractual power or discretion exists. He says that the management of PAG within RBS was an internal matter which did not affect the parties' contractual rights and that Mr Lord's examples of management from Tokyo are far-fetched. In relation to the Revaluation Power he submits that the power is absolute and is not subject to any assessment.

273. Further, in oral closing Mr Handyside took me to ***Myers v Kestrel Acquisitions Ltd*** [2015] EWHC 916 (Ch) at [61] where Sir William Blackburne decided that the contractual provisions in relation to the valuation of assets in particular circumstances

amounted to an absolute contractual right. Once the holders of the discounted loan notes had resolved to amend the discounted loan note 1, under clauses 2.3 and 2.4 Kestrel was obliged to modify that loan note. It did so, if the holders of the vendor loan notes did not do so pursuant to a provision drafted as a power to modify. However, he held that the power was not a discretion involving a choice from a range of options but the exercise of a contractual right whether or not to modify the loan note without the consent of the holders. Mr Handyside also drew my attention to Sir William Blackburne's judgment at [50] at which he notes that there is no power to imply terms in order to make a contract fairer or more reasonable.

274. In addition, Mr Handyside submits that the power in relation to interest rates in ***Paragon*** was a discretion in any event. He also commends to me the approach of Andrews J in ***Greenclose Ltd v National Westminster Bank plc*** in which albeit obiter, she declined to imply a duty of good faith and held that the derivative product in question contained provisions providing that the bank had an absolute right to extend the term for a further two years. She also rejected the implication of a general good faith term and approved the approach adopted in ***TSG Building Services plc v South Anglia Housing Ltd*** [2013] BLR 484 in which Akenhead J had refused to imply a term that an unqualified right to serve notice to terminate a contract should be exercised in good faith despite an express clause in the contract requiring the parties to work together in a spirit of trust, fairness and mutual cooperation. She concluded that precisely the same reasoning applied in the context of an unqualified option or right of one contracting party to extend the contract at the end of its initial term. See [144] – [151].

Conclusion:

275. I shall consider each alleged implied term in turn. First, is it to be implied that RBS would "perform the agreement in good faith and would not perform it in a commercially unacceptable or unconscionable way" (the "Good Faith Implied Term")? In this regard, I remind myself of the passage in the judgment of Jackson LJ in the ***Mid Essex*** case at [105] that there is no general duty of good faith in English contract law, although it may be implied in certain categories of contract such contracts of employment. However, as Leggatt J stated in ***Yam Seng*** at [131] in a passage cited by Jackson LJ, following the established methodology of English law for the implication of terms, such a term may be implied based on the presumed intention of the parties.

276. In my judgment, applying that established methodology, such a term cannot be implied in the 2009 and 2011 Facility Agreements which were contracts between sophisticated commercial parties negotiated at arm's length. In this regard, I take into account that the contracts do not fall within any of the recognised categories in which good faith is to be implied and their express terms and standard terms excluding any fiduciary or equitable duties arising in the provision of the services by RBS, militate against such an implication. In the circumstances, it seems to me that such an implied term cannot have reflected the presumed intention of the parties nor is necessary for the proper functioning of the contracts. Accordingly, I agree with Mr Handyside that such a term should not be implied in what is standard banking documentation.

277. Secondly, is the Discretion/Power Implied Term to be implied? I agree with Mr Handyside that the starting point is to identify a power in relation to which one party

to the contract is required to exercise a discretion, conduct an assessment or arrive at an opinion in relation to an issue which affects the contractual rights of both parties. It seems to me that this is clear from all of the ***Socimer*** line of cases to which I have been referred and is inherent in the analysis of those cases conducted by Jackson LJ in the ***Mid Essex*** case at [78] – [82] and his conclusion at [83]. Such a conclusion is also consistent with the Supreme Court decision in ***Braganza*** in which the contracting party was required to form an opinion as to the cause of death in the context of an employment contract. It is also consistent with: the ***Mid Essex*** case itself in which it was held that it was unnecessary to imply a term because the contractual provisions created an absolute contractual right as to the imposition of default points in certain circumstances; and the decision of Sir William Blackburne in ***Myers v Kestrel*** in which he also decided that the contractual provision did not create a discretion and accordingly, refused to imply a term. I agree that reliance on the question of whether the decision is binary, to which reference has been made in the authorities, is not of much assistance. It seems to me that as Jackson LJ pointed out in ***Mid Essex*** at [83], what is relevant is whether the decision requires the contracting party to make some kind of assessment or to choose from a range of options. It is the exercise of that power which renders the implication of a term that it should not be exercised arbitrarily, capriciously or in an irrational manner, necessary.

278. What of the valuation clause? In my judgment, no element of discretion, assessment, or formulation of opinion arises under clause 10.9 of the 2009 Facility. RBS is authorised to obtain an up to date professional valuation from time to time. Any elements of assessment or opinion are those of the professional valuer and not the bank. It seems to me quite clear that it has an absolute right to call for the valuation and accordingly, that the ***Socimer*** line of authorities and the necessary implication of terms in order to control the otherwise unfettered exercise of a discretion/assessment or formulation of opinion does not arise. To put the matter another way, in my judgment it is neither necessary to imply such a term in relation to the valuation power in order to make sense of the contract nor can it have reflected the presumed intention of the parties. It seems to me that sophisticated commercial parties who were advised and were at arm's length, contracted on the basis of standard terms and provided some protection to the borrower by the inclusion of the provision in relation to payment for the valuation. Furthermore, it seems to me that it is relevant that in the absence of a general implied term as to good faith, the lender is entitled to take into account its own interests when exercising the valuation power provision in order to determine whether the borrower is in breach of covenant and the loan should be repaid. Further, although clause 21.5.1 in the 2011 Facility includes the word "may", in my judgment the position is the same. If the clause is read as a whole, it does not include a discretion, assessment or formulation of an opinion any more than the use of "may" did in the circumstances considered in ***Myers v Kestrel***. It entitles RBS, the Lender, to instruct a valuer.

279. In my judgment, the position in relation to the security review is even stronger. In his email of 19 August 2010 sent on his behalf to Mr McCoy, Mr Russell accepted that such a review was a condition precedent of any new lending. Thereafter, on 18 March 2011, Mr Priest emailed Mr Didier authorising the instruction of solicitors at PAG's expense. In the circumstances, there is no room for the implication of a ***Socimer*** style implied term and even if there were, in my judgment, it was not breached. The completion of a security review at the cost of £4,000 was a condition precedent to the

2011 Facility Agreement in relation to lending which RBS was not obliged to extend. There is no evidence to support the allegation that the requirement was capricious or unreasonable.

280. Lastly, what of the alleged Relationship Team Term? In my judgment, Mr Lord's argument suffers from a number of fatal flaws in this regard. The banking services are obviously rendered as a result of and under the 2009 and 2011 Facilities respectively. However, there is no express term as to the identity of the personnel who will provide those services or their location. It seems to me that it would be surprising if there were. They are perfectly properly matters of internal arrangement. The absence of an express term leads to two conclusions which are adverse to PAG's case. The first is that there is no contractual right to be managed by particular individuals in a particular division of the bank or in a particular location in the first place. The second is that there is no express term in relation to which it is necessary to imply a term for the purposes of business efficacy. Even if one takes a broader view of the services rendered under the Facilities, it seems to me that it is not necessary to imply a term of the nature advocated by PAG. It cannot have been the intention of the parties viewed objectively. If Mr Lord were right, questions as to reasonableness would arise whenever a customer's relationship manager was changed or when the bank chose for its own reasons to transfer a borrower's key contact to a different branch of the bank. In addition, it seems to me that not only is there no foundation for such an implication but even if there were, Mr Lord's formulation is too uncertain and vague. Which key individuals or members of the team does he say are affected by the implied term and which geographical locations are acceptable or unacceptable?

281. As a result of my conclusions, it is not strictly necessary to consider the GRG Claims any further. However, given the length of time which was spent at trial on the GRG Claims and the extent of the submissions, and in case I am wrong about the implication of the terms, I will go on to consider whether they were breached in the way which PAG alleges.

If the terms are to be implied were they breached?

a) *Transfer to GRG*

282. If I am wrong and the alleged implied terms are to be implied into the contractual arrangements between the parties, were those terms or any of them breached? First, PAG alleges that its transfer to GRG was both irrational and in bad faith. It is said that PAG was a conspicuously weak case for restructuring, there was no risk of default, PAG having an excellent cash flow given market conditions, none of the mandatory triggers applied and none of RBS's reasons stood up to scrutiny. For example, PAG relies upon the percentage placed upon PAG's probability of default by RBS which was between 1.28 and 1.81% whereas mandatory transfer to GRG required a percentage of 24.48%, that PAG was a "core client" and had never been in breach of covenant despite the global recession. Furthermore, Mr Lord describes RBS' three stated reasons as trivial: the provision of a signed copy of a facility agreement with AIB which had in fact, been provided; the aggregation of PAG's lending with that of Russells of which PAG owned 50% of the shares despite the lack of an cross-collateralisation or guarantee; and PAG's ICR which was within covenant.

283. Mr Lord also draws attention to the "Things not as simple as portrayed to GRG" email between Messrs Holland and Cocking, what he describes as a hidden agenda, Mr Cocking's acceptance that it was perhaps "a more marginal case than some" and the email chain in which Mr Catton stated "it's not obvious from the form why we think this needs grg tlc." He adds to this the treatment of the minutes of the Watch Committee at which PAG's referral was considered and submits by his substantial editing of the minutes, Mr Hunter sought to paint PAG as a problem borrower. In this regard, he also points to the fact that none of the relevant members of the Credit team on the frontline at the time, including Messrs Cocking, Holland, Hunter, Zwicky-Ross and McNicholas were called to give evidence and invites the court to draw adverse inferences from their failure to be called. Although it is not known whether they are still employed by RBS, Mr Lord points out that other former employees have given evidence in this matter.

284. PAG submits that the main reason upon which RBS relies is also insufficient. It is said that none of Mr McCoy, Mr Thomson and Mr Whatham could offer a consistent account of how PAG's LTV figured in its transfer and Mr Thomson disclaimed reliance upon LTV at all. Furthermore, it is said that objective consideration of PAG's LTV did not warrant a transfer and it was acknowledged in RBS's own internal documents that LTV was highly unreliable in the relevant period. Further, the only way in which the LTV would exceed the levels prescribed by RBS would be if the MTM in relation to the Swaps was taken into account, which Mr Whatham accepted. This is characterised as unreasonable and/or an act of bad faith because they were not part of PAG's lending covenants.

285. PAG contends that the real reasons for its transfer were two-fold and in bad faith. First, it is said that it was intended to stifle complaints about the Swaps and contemplated litigation and secondly, to extract as much revenue from PAG as possible. As to the first, Mr Lord points out that one of the mandatory triggers for transfer to GRG was "Customer litigates against Bank". Mr Lord submits that the purpose of the litigation trigger was to pressure customers into dropping their litigation through GRG's "tougher" approach, and specifically the imposition of a 100% sweep of free cash, which would deprive a borrower of funds for litigation. In this regard, Mr Russell stated that PAG had been complaining about mis-selling of the Swaps prior to its transfer. Mr McCoy accepted that PAG's concerns about its MTM were figuring in GRG's discussions about PAG at the time and Mr Lord says it is implausible these did not extend to PAG's complaints about its hedging. In any event, he points to Mr Thomson's acceptance that an email between Mr McCoy and Mr McNicholas of 28 April 2010 in which Mr McNicholas had stated: "As I indicated the discussion with the client regarding the interest rate strategy is proving interesting" indicated that PAG was complaining about the selling of the Swaps.

286. As to the second, it is said that Mr Thomson's evidence revealed that he had West Register in mind for PAG. Where the property of RBS clients was sold to West Register, on an insolvency, GRG benefited. This, it is said, was clearly in bad faith. Once this strategy was abandoned it is said that monies were extracted from PAG via increased rates and one off charges. It is said that Mr Thomson accepted that the amount of value extracted from a borrower was independent of the actual risk it posed to RBS. Accordingly, it is said that such extraction is irrational and in bad faith.

287. Mr Handyside submits that the entirety of this claim has been achieved by reverse engineering from the conclusions in the Tomlinson Report which related to the treatment of RBS customers in GRG and was published in November 2013. He says that Messrs Russell and Wyse's references to "relentless pressure" and "ruthlessness" on the part of RBS are not borne out by the contemporaneous documentation and furthermore, were not supported by the evidence in cross-examination of Mr Priest who took the lead on PAG's behalf in the negotiations for re-financing and described RBS's role amongst other things as 'reasonable', 'friendly', 'helpful' and 'constructive'.

288. In relation to the transfer of PAG to GRG, Mr Handyside says that RBS focused on PAG's high LTV and low ICR which led to a significant "refinance risk" in relation to a Facility which expired at the end of 2010. PAG's LTV was understood to be 82% and 90% if the MTM was taken into account whereas RBS' standard lending criteria at the time were 65% LTV and 1.75 ICR. Accordingly, there was a real risk that unless PAG deleveraged it would not be able to re-finance its borrowings whether with RBS or another lender when the facilities came to an end at the end of 2010. Furthermore, it was Mr Whatham's unchallenged evidence that RBS's lending criteria had changed and the frontline bank did not have authority to lend at levels outside those criteria.

289. As to the first of the two reasons which PAG say lay behind the transfer, namely the extraction of value, Mr Handyside says that there is no evidence of this at all and that PAG can only rely upon inferences from the Tomlinson Report. As to the second alleged real reason being a desire to stifle alleged complaints about the Swaps, RBS says that PAG had not complained at the time and therefore, there was nothing to stifle, there is no documentary evidence of any complaint and Mr Russell's vague claims of repeated complaints to Mr Goldrick were never put to Mr Goldrick himself. In relation to what he describes as PAG's conspiracy theory, Mr Handyside submits that they are highly implausible in that they would have involved dozens of people and required them all to lay a false paper trail. In particular, in relation to the Watch Committee minutes, he says that Mr Cocking's email of the same day stating that the decision was made to transfer PAG to GRG must bring to an end any conspiracy theory in relation to the minutes and also points out that it was not put to Mr Goldrick that the minutes had been "doctored".

(ii) Retention in GRG

290. It is alleged that PAG was wrongfully retained in GRG. As I have already mentioned, it is said that the true reason was to stifle claims against RBS by making business as difficult as possible and imposing a 100% 'cash sweep' in order to maximise value for RBS and deprive PAG of funds for litigation. The three reasons given are said to be without foundation. They are first, the need for information from Russells, secondly, issues in relation to two family settlements and thirdly, the need to complete the 2013 Valuation. In relation to Russells, it is said that there was no need for aggregation of the debt and therefore, for the information. In relation to the family settlements the issues were not raised until July 2012 despite RBS having been aware for a considerable time. Mr Whatham stated in cross-examination that they were not a good reason to keep PAG in GRG. As to the 2013 Valuation, it was wholly unnecessary for the reasons explored below.

291. RBS on the other hand points out that there is no documentary evidence of any kind to support the alleged true reasons for retaining PAG in GRG, something which Mr Lord counters by reference to a policy of avoiding the production of documents where there might be litigation and RBS' very poor response to its disclosure obligations in this case. In any event, Mr Handyside says that the allegations also require the court to believe that numerous individuals at RBS both in GRG and Credit produced a large amount of documentation in order to cover up the "true" reasons, something which he says is at best, highly implausible. He submits that the answer was more prosaic in that RBS procedures, including RBS' standard aggregation policy required not only PAG but also Russells and the family settlements controlled by Mr Russell to be returned to satisfactory. (He also points out that the aggregation had taken place a number of years earlier.) Delays by Mr Russell in dealing with the long expired loan and inefficiency by RBS resulted in a failure to return PAG to the "front line." Further, it was the front line and not GRG which required the 2013 valuation to take place before PAG could be returned. Mr Handyside submits that Mr Thomson's evidence about a decision not to re-finance PAG in mid 2013 was confused and the evidence of Mr Whatham should be preferred.

Admissibility of Mr Sefton's witness statement

292. In this regard, PAG seeks to rely upon passages from the witness statement of Mr Sefton which was served but Mr Sefton was not called to give evidence on behalf of RBS. The paragraphs in question are as follows:

> "2. In relation to PAG, my understanding when I came to work on the file in early 2013 was that RBS was not inclined to continue financing PAG beyond the expiry of the 2011 Facility in June 2014.
>
> …
>
> 38. As I mentioned above, it was my understanding when I came to work on the file in early 2013 that RBS was not inclined to continue financing PAG beyond the expiry of the 2011 Facility in June 2014, largely in view of PAG's high LTV ratio."

Mr Lord says that these paragraphs support the evidence of Mr Thomson about the date on which a decision was taken not to re-finance PAG's loans. PAG seeks to rely on them pursuant to CPR 32.5(5), which reads:

> "(5) If a party who has served a witness statement does not—
>
> (a) call the witness to give evidence at trial; or
>
> (b) put the witness statement in as hearsay evidence, any other party may put the witness statement in as hearsay evidence."

The question, therefore, is whether it is entitled to rely upon part only of a witness statement, the remainder of which does not support its case.

293. Mr Lord submits that as a matter of principle there is an obvious interest in the court having all relevant material before it to determine the dispute, especially as RBS does not contend that Mr Sefton's evidence is untrue. Secondly, he says that there is nothing in the wording of CPR 32.5(5) which suggests that the whole statement must be put in. Thirdly, he says that there can be no concern about 'cherry-picking' to create a misleading impression because the paragraphs in question stand on their own but that in any event, RBS would be entitled to adduce the remainder of Mr Sefton's evidence as hearsay if it wished to do so. Lastly, he says that RBS's position generates serious oddities. If the statement had been given in other proceedings it would be admissible and Mr Lord asks if Mr Sefton had given three witness statements in this case, why should PAG be able to put in only one of them and not all three?

294. Mr Handyside says that the rule is clear. It refers to a witness statement and not to a part of it. It is submitted that that is a reflection of the well-established principle that a party cannot in general impeach the credit of its own witness. If PAG wishes to rely on Mr Sefton's statement as hearsay evidence (i.e. for the truth of its contents) it cannot also disclaim other parts of his statement as untrue. Mr Handyside relies on ***McPhilemy v Times Newspapers Ltd (No 2)*** [2000] 1 WLR 1732 in this regard for the proposition that a party is usually prohibited from asserting that evidence given in chief by a witness whom he has called is untruthful, or impeaching his own witness.

295. Mr Lord submits however, that ***McPhilemy*** concerned a different point which was whether the Claimant could put in a witness statement given by a party the Defendant had in the event not called for the purpose of showing certain parts of that evidence to be false. On the contrary, he says that PAG seeks to rely on parts of Mr Sefton's evidence as true. The issue was dealt with by Brooke LJ at 1739H – 1740B as follows:

> "The rules of evidence have grown up, as I have said, largely in more traditional times when the parties called their evidence orally. Mr. Price is relying on the change of rule, in my judgment, to drive a coach and horses through the principles of the law on evidence as they have previously been understood. He wishes to put before the jury as hearsay evidence on his client's behalf the evidence of a man which he wishes to say, straight away, is to a very substantial extent untrue. When I asked him whether he would accept that Mr. Abernethy, who is not a party to the proceedings, should be allowed to be called and cross- examined by Mr. Caldecott, he said "No." He regarded this as a very unfair suggestion on the basis that, if Mr. Caldecott decided not to call him, he should not be in a better position by being able to have more scope in cross-examination than he would with one of his own witnesses in evidence-in-chief. However, I know of no principle of the law of evidence by which a party may put in evidence a written statement of a witness knowing that his evidence conflicts to a substantial degree with the case he is seeking to place before

> the jury, on the basis that he will say straight away in the witness's absence that the jury should disbelieve as untrue a substantial part of that evidence."

Conclusion in relation to Mr Sefton's evidence:

296. In my judgment, CPR r 32.5(5) is quite clear. It refers to a witness statement and not to part or parts of it. Furthermore, it seems to me that by seeking to put in only those parts of Mr Sefton's witness statement upon which PAG seeks to rely, Mr Lord is attempting to avoid the very iniquity which was being addressed by Brooke LJ in the ***McPhilemy*** case. If he sought to rely on the entirety of the statement, which conflicts to a substantial degree with PAG's case, he would have to say straight away that a large part of it is untrue. Further it seems to me that if Mr Lord were right, there would be real concern that cherry picking out of context would arise. It seems to me that it is no answer to say that the party who originally had chosen not to call the witness could seek to put in the remainder of the statement under a cover of a hearsay notice. Apart from anything else, there might not be any ground upon which such a notice could be relied upon. Accordingly, I refuse the application to admit the paragraphs of Mr Sefton's witness statement to which Mr Lord has referred.

(iii) Other breaches

297. Of the further eleven alleged breaches, Mr Lord focussed on five. First, it is said that RBS committed a breach of confidence by disclosing PAG's transfer to GRG to Russells without authorisation. Mr Lord submits that Mr Russell's evidence on this point was clear and convincing, and Mr Goldrick did not deny this allegation. Second, it is said that RBS demanded an unnecessary and onerous 'Security Review' at PAG's expense which was capricious. It is submitted that Mr McCoy, who ordered the review, was unable to defend it. Third, RBS wrongly called for revaluations of PAG's portfolio in both 2010 and 2013. As to 2013, Mr Lord submits that Mr Thomson's evidence was that he had, in fact, taken the decision not to refinance PAG by May 2013 and Mr Whatham accepted that, in those circumstances, there was no good reason to call a valuation and the assertion that the decision was not taken until November is unsustainable. In addition, Mr Lord relies upon the fact when negotiating the 2011 Facility, Mr Didier had assured PAG that no such valuation would be called. Fourth, it is alleged that RBS manipulated the result of the 2013 Valuation downwards by applying improper pressure on the valuers (Lambert Smith Hampton) in order to increase the size of the default payment PAG had to make to RBS and place as much pressure on it as possible after it had begun its litigation against RBS. Fifth, it is said that Mr Whatham threatened to appoint receivers over PAG's assets unjustifiably flinging a set of keys on the table in a threatening manner, something which in cross-examination he accepted he "may well have" done.

298. In relation to the aggregation of the Russells and PAG borrowing, Mr Handyside points out that the decision was made by Corporate Credit in 2008 and not by GRG at all, a decision about which there was no complaint. The suggestion that aggregation policies generally were irrational, is said to be absurd. In relation to the alleged breach of confidentiality, RBS relies upon the contemporaneous email from Mr Goldrick following a conversation with Mr Russell which is said to evidence Mr Russell's express permission for RBS to contact Russells. Mr Handyside also points out that despite the fact that Mr Russell now says that he told Mr Goldrick not to contact

Russells, he made no complaint at the time, which is described as inconceivable and the very serious allegation was not put to Mr Goldrick in cross-examination.

299. As to the security review, Mr Handyside's response is simple. He says that there is no basis to suggest that it was capricious or irrational to require a security review, to which PAG agreed, as a condition of new lending. Further, it was Mr Priest's evidence in cross-examination that looking back the desire for a security review and a valuation reflected RBS' nervousness about what would happen if PAG ended upon in administration or receivership and its desire overall, to sort out the re-financing and the Swaps issues and return PAG to the frontline.

300. As to the calling of the 2010 Revaluation, RBS submits that it was entirely reasonable, RBS having an absolute contractual right to do so and not having obtained a valuation for four years during which time the market had been turbulent. In addition, no meaningful discussion about re-financing could take place without knowing the value of the security, something which Mr Priest readily accepted. As to the 2013 Valuation RBS submits: that Mr Didier made no promise that RBS would not call a valuation. He relies in this regard upon Mr Priest's evidence in cross-examination that Mr Didier had said that the valuation clause had to be in the agreement and that PAG would have to accept that the bank would not abuse the clause and that Mr Russell may have assumed from this that the position would be the same as with AIB which had waived the right to call for a valuation; and secondly, that the impetus for the 2013 valuation had come from the front line; and that the decision not to refinance came about in November 2013 as evidenced by amongst other things, an entry in an internal credit record made by Gary Jessop and dated 12 December 2013 as follows:

> "Overall the 2011 terms appear somehow generous with no real deleverage targets, although in mitigation the ambition then was to RTS the account.
>
> With the advent of RCR that ambition has now changed ... "

It is submitted that Mr Thomson's eventual acceptance in cross-examination that a decision not to re-finance PAG had been reached by mid 2013 was confused and should be seen in the light of his rejection of the suggestion that it had been decided in April of that year and his statement that it was looking less likely in August. By contrast, it is said that Mr Whatham's evidence was clear that:

> "Q. You agree that if Mr Thomson is right, and by 13 May 2013 he's formed the view that RBS would not be refinancing PAG in June 2014, there would be no good reason for him to seek --
>
> A. I think he's got his dates wrong. Sorry, the dates don't make sense. We didn't know about RCR until November 2013.
>
> Q. I think all you have to agree -- the question is only --
>
> A. I can agree, but the dates don't make sense. Then I would be agreeing with something -- I agree with your statement that if,

> in May 2013, he thought they wouldn't be refinanced, but I think he's getting confused, because when I told him to tell them they would have to be repaid that was in light of RCR."

Mr Handyside also relied on an email from Mr Northcott to Mr Antoci of 12 December 2012, in which he expressed the view that failing to carry out a valuation would be an "obstacle when it comes to progressing RTS discussions" with which Mr Whatham agreed.

301. In relation to the alleged pressure on Lambert Smith Hampton Mr Handyside points out that the allegation in relation to the first figure of £82.84m has been abandoned in the light of Mr Davies' evidence. As to the reduction from £81.915m to the final figure of £81.68m Mr Handyside points out that Mr Davies accepted that he did not question the legitimacy of the questions posed in relation to his valuation and that the number of queries would depend on the size of a portfolio. As to the threat to appoint receivers, Mr Handyside says that the evidence of Mr Whatham is to be preferred namely that he may have said the words but not in a threatening manner, particularly in the light of Mr Wyse's own note of the 10 April 2013 meeting in which he recorded "not what he wants" after the reference to taking the keys back which Mr Russell accepted was said.

Conclusion – were the alleged implied terms breached?

302. If I had found that the alleged terms should have been implied in the light of the ***Socimer*** principle, I would not have found that RBS was in breach of those terms in relation to PAG's transfer into GRG, its retention in GRG and the other alleged breaches relied upon. First, in relation to the transfer into GRG, it is important to bear in mind that there was no contractual right to be managed by a particular team with RBS, in a particular location. Secondly, in my judgment, there is no basis for the allegation that the transfer was irrational or conducted in bad faith.

303. Despite the fact that the contemporaneous emails contain a number of cryptic remarks which remain unexplained in the light of the fact that their authors were not called to give evidence, it seems to me that it is highly implausible that the remainder of the substantial documentation is inaccurate. Given that Mr Whatham, Mr McCoy and Mr Thomson from GRG were called, I also decline to draw adverse inferences from the failure to call each and every correspondent involved in this matter. Although each such failure must be judged on its own facts, it seems to me that in general, parties should seek to limit the number of witnesses called in the light of the overriding objective.

304. In any event, it was not put to any of Mr Whatham, Mr Thomson and Mr McCoy that the such documentation was a sham. It also seems to me that the concerns raised about the Watch Committee notes come to nothing when viewed in the light of Mr Cocking's email to Mr Logan and copied to Mr Thomson, sent very shortly after the meeting in which reference was made to the decision having been made to transfer PAG to GRG. Furthermore, the fact that the witnesses referred to a variety of reasons for transfer, does not seem to me to be enough to found a claim of bad faith, arbitrariness or capriciousness. Equally, the fact that PAG's LTV was much lower than the level justifying mandatory transfer when viewed in isolation, is neither here nor there. It seems to me that the combination of reasons set out in the GRG Referral

Form dated 7 April 2010 render the allegation of bad faith, arbitrariness and capriciousness hopeless.

305. I also agree that there is no evidence to support what PAG describes as the "real" reasons for its transfer. First, there is no evidence that there was a campaign to extract as much as possible from PAG. I will deal with the valuation and security review below. Secondly, the only evidence of complaints about the Swaps at this stage (which it is said were intended to be stifled by the transfer) is Mr Russell's evidence in cross-examination that he complained on numerous occasions to Mr Goldrick. He was unable to be precise about the complaints or the occasions on which they were made and the point was never put to Mr Goldrick. In the circumstances, I am not able to accept Mr Russell's evidence and consider that there is no foundation for the "stifling complaints" alleged "real" reason.

306. What of PAG's retention in GRG and the other alleged breaches? First, as I have already mentioned, in my judgment, there is no evidence to support the contention that PAG was either transferred to GRG in order to maximise the monies which might be realised by RBS or to deprive it of funds for litigation. Furthermore, I do not accept the three reasons given by RBS were without foundation. It is said that there was no need for the aggregation of PAG and Russells lending and therefore, the need for information from Russells should not have arisen. In fact, it is not in dispute that the aggregation of the debt had occurred some years earlier and was not a decision made by or with reference to GRG. In those circumstances, it seems to me that it cannot be said that the need for information about Russells debt before any return of PAG to the frontline was capricious or arbitrary in any way. Further, it seems to me that the fact that the issues in relation to the Russell Family Settlements were not raised until 2012 is not a firm basis for the allegations made although I accept that as Mr Whatham said in evidence, they were not sufficient on their own to keep PAG in GRG. I agree with Mr Handyside that as Mr Whatham and Mr Thomson explained, the delay was for a more prosaic reason, namely overwork.

307. As to the alleged breach of confidence in revealing PAG's transfer to GRG to Russells, in the light of the contemporaneous email from Mr Goldrick and Mr Russell's failure to complain at the time, I am unable to accept his evidence. It seems to me that on the balance of probabilities, the contact was authorised. As to the security review, in my judgment, there is insufficient evidence to support the contention of capriciousness, arbitrariness or bad faith in this regard. The review was agreed to as a condition for new lending. What of the two valuations? As to the 2010 Valuation, once again, I consider that there is no ground for the allegation that it was required in bad faith or capriciously. As Mr Priest accepted in cross-examination, it was not possible to conduct a meaningful discussion about re-financing without an up to date valuation. In relation to the 2013 Valuation, I accept Mr Priest's evidence that Mr Didier had said that the valuation clause had to be in the 2011 Facility, that PAG would have to accept that the power would not be abused rather than there having been any waiver of the right to call for a valuation. Further, it seems to me that the documentary evidence all points to the valuation having been a requirement of the front line before they would accept PAG back.

308. The last question therefore, is whether the 2013 Valuation was pointless and therefore, ordered in bad faith because it had already been decided that RBS would not re-finance PAG's borrowing. In this regard, I prefer the clear evidence of Mr

Whatham that to the extent that Mr Thomson stated that a decision had been taken by May 2013 not to re-finance PAG's borrowing but also stated that he was coming to that view in August of that year, he was confused. Mr Whatham was quite clear that he had told Mr Thomson who worked for him to tell PAG that the borrowing would have to be repaid in the light of the creation of RCR which did not occur until November 2013. As to the reduction in the value placed on the portfolio, in my judgment, there was nothing in Mr Davies' evidence to suggest that he had been placed under improper pressure to reduce his figures which could be construed as bad faith towards PAG. He stated that he did not question the legitimacy of the questions posed. Lastly, however, I do consider that, as he accepted, Mr Whatham did threaten to appoint receivers, albeit that the note of the meeting taken by Mr Wyse states that he did not want to do so. It seems to me on the balance of probabilities and taking into account the interpretation placed upon the incident by Messrs Russell and Wyse which I accept, that the incident amounted to an improper threat. However, it is unclear to me where that leads. It does not seem to me that one incident of that kind can be sufficient basis for a conclusion that the alleged implied duties were breached.

C. The LIBOR Claims

309. The LIBOR Claims arise because each of the Swaps was referable to the GBP 3M LIBOR rate. It is alleged however, that conduct in relation to LIBOR in all currencies and tenors is relevant because had it been known that any alleged manipulation of LIBOR was going on, PAG would not have entered into the Swaps which were LIBOR based. The claims are advanced in two main ways: a claim for rescission on the ground that RBS made a number of misrepresentations, including fraudulent misrepresentations about LIBOR and the way in which it was set, similar to those considered in ***Graiseley Properties Ltd v Barclays Bank plc*** [2013] EWCA Civ 1372 (the "LIBOR Misrepresentation Claims"); and a claim for damages on the ground that RBS breached a number of implied terms in each of the Swaps similar to the alleged representations.

310. LIBOR is an acronym for the London Interbank Offered Rate. It is not in dispute that at the relevant times, LIBOR was calculated daily on behalf of the British Banking Association (the "BBA") by Thomson Reuters, and was published for 10 different currencies including pound Sterling, US dollars, Japanese Yen and Swiss Francs and for fifteen different maturities or "tenors" ranging from overnight to 1 year. Equally, the way in which BBA LIBOR was arrived at at the relevant times is common ground. The BBA chose a panel of banks for each LIBOR currency. In fact, RBS was a member of the panel for each of the ten currencies for which LIBOR was published. At all material times there were sixteen members of the panel for the purposes of setting GBP LIBOR. Each London business day, each member of the relevant panel made a submission to Reuters in respect of each tenor of the relevant currency. The submission was intended to represent that member bank's opinion as to:

> "The rate at which an individual Contributor Panel bank could borrow funds, were it to do so by asking for and then accepting inter-bank offers in reasonable market size, just prior to 11:00 [am] London time."

This formulation has been referred to as the "BBA LIBOR Definition". Once the submissions had been made, Thomson Reuters discarded those which fell in the highest and lowest quartiles, before calculating the mean of the remaining banks'

submissions in the remaining middle quartiles. Both the result which became the published LIBOR rate for the day, and the submissions of each of the panel banks were published each day.

311. It is also not in dispute that the BBA LIBOR Definition must be read in the light of guidance produced by the BBA from time to time, including a BBA Discussion Paper circulated on 19 May 2008, a June 2008 Consultation Paper, the July 2009 "Terms of Reference for LIBOR Contributor Banks" and the October 2009 "Guidelines for Contributing BBA LIBOR rates". The relevant part of the guidelines which appeared on the BBA website were:

> "The rate at which each bank submits must be formed from that bank's perception of its cost of unsecured funds in the London interbank market. This will be based on the cost of funds not covered by any governmental guarantee scheme.
>
> Contributions must represent rates at which a bank would be offered funds in the London interbank market.
>
> Contributions must be for the specific currency concerned and not the cost of producing the currency by borrowing in a different currency and obtaining the required currency via the foreign exchange markets.
>
> The rates must be submitted by members of staff at a bank with primary responsibility for management of a bank's cash, rather than a bank's derivative book.
>
> The definition of "funds" is: unsecured interbank cash or cash raised through primary issuance of interbank Certificates of Deposit."

312. Further, the BBA Guidelines provided amongst other things that:

> "The strength of the system is that the rates submitted into the process are a bank's own view of its cost of funds, based on the totality of the information available to a bank from both internal and external sources.…
>
> Whilst a bank's LIBOR submissions are its own perception of where it could take funds, this is shaped by a wide number of factors…
>
> Contributors should consider external indicators when forming LIBOR rates but ultimately they must derive from a bank's own view."

313. In addition, it is common ground that the BBA Definition is concerned with an "offer rate" in contrast to a "bid rate". An "offer" rate reflects the rate at which a bank will look to lend funds which is higher than its bid rate. Furthermore, it is not in dispute that the BBA LIBOR Definition, when read with the BBA Guidelines, relates to unsecured funds in the sense of either cash or interbank certificates of deposit not covered by any government guarantee and to funds of reasonable market size (which

is dependent upon current liquidity levels). Furthermore, the evaluation must be reached around 11 am London time in relation to the interbank market in London. In addition, it was made clear in the BBA Consultation Paper and the BBA Terms of Reference Appendix 1 that the rate had to be derived from borrowing in the particular currency and tenor and not from the cost of producing a currency by borrowing in one currency and then accessing the required currency via the FX market.

314. However, PAG submits that in circumstances where there was no bank willing to lend in a particular currency and tenor, a member of the relevant panel was obliged to make no LIBOR submission that day. RBS submits that: such an approach contradicts the BBA Guidelines; is irreconcilable with how the BBA, the FSA, and the Bank of England understood the definition; and would produce perverse results. RBS referred me to the BBA Terms of Reference which states amongst other things:

> "1. Each contributor bank must provide the Designated Distributor (currently Thomson Reuters) by 11.10 each London Business day with rates in all those currencies and periods to which it has agreed to contribute.
>
> 2. The rate at which each contributor submits must be formed from that bank's perception of its cost of funds in the interbank market. In the event that a given period has no market offer then the contributing Bank is required to use its market knowledge to supply an appropriate rate that is, as far as is possible, a fair and accurate reflection of that bank's opinion of its cost of funds.
>
> …
>
> 6. Contributor banks must undertake to provide rates on every London business day."

In any event, the making of submissions in the circumstances described by PAG was referred to as "Financial Crisis Manipulation".

315. The second key area of disagreement is as to whether a member of the panel is obliged to make a LIBOR submission the same as the rate at which it has borrowed in the relevant currency/tenor on a particular day. Mr Handyside on behalf of RBS submits that that is not the case, the process being more nuanced than a direct reflection of the most recent trade, whereas it is PAG's case that a submission which was materially different from the rate at which such a transaction took place if it were around the time of the LIBOR submission and in reasonable market size would necessarily be non-compliant. RBS submits that actual trades might not, in the expert judgement of the submitter, be considered the appropriate rate to submit because for example: the most recent transaction may not be considered reflective of other trading and the market price; the transaction may have been particularly large, or particularly small; or might reflect bespoke, non-market terms. In this regard, Mr Handyside referred me to the following extract from the BBA Guidelines:

> "Under certain circumstances, contributor banks will take funds at levels above or below LIBOR, for example when dealing in

> particularly large or particularly small size. However, this does not necessarily mean that they should raise or drop their rates to these levels. LIBOR is the rate at which an individual Contributor Panel bank could borrow funds were it to do so by asking for and then accepting inter-bank offers in reasonable market size, just prior to 11:00am London time. That is, it is the rate a bank could take funds at an arbitrary time in the market, not the rate that one institution will show money to a contributor whose name they are specifically looking for at a particular moment.
>
> To emphasise this further, if one morning a bank funds at considerably below (or for that matter, above) its most recent quoted LIBOR submission it does not follow that the bank should change its LIBOR to this rate for the day. In the current market, which is still stressed and volatile, bid-offer spread is still very wide. Flows come and go. A bank should have a reasonable expectation that ceteris paribus the rate it submits today should still hold tomorrow morning."

316. It is not disputed, however, that the financial crisis had a number of effects. The turmoil in the financial markets meant that market conditions from day to day became extremely variable which meant that the published LIBOR rate on a particular day was a less reliable guide to future lending conditions (and bank borrowing costs) than it had previously been. In fact, market conditions were even liable to change over the course of a day as well as overnight with the effect that trades were liable to be conducted at very different levels at different points in a day.

LIBOR evidence generally

317. The witnesses who gave evidence on behalf of RBS in relation to LIBOR were Messrs Thomasson, Walker and Nygaard. However, it is alleged that a large number of RBS employees were aware of the bank's LIBOR misconduct and have not been called. Those who are referred to in the pleadings as "the Relevant Individuals" are Messrs Thomasson, Walker and Nygaard together with: Johnny Cameron (Chairman of Global Markets and member of the RBS Group Board of Directors); Guy Whittaker (RBS Group Finance Director and member of the RBS Group Board of Directors); John Cummins (RBS Group Treasurer); Peter Nielsen (Global Head of Markets, Corporate and Institutional Banking); Brian Crowe (Chief Executive of Global Banking and Markets); Graham Niblock (Head of Short Term Markets and Financing); Kevin Liddy (Global Head of Short Term Interest Rates and Trading); and Stewart Booth (Global Head of Credit Trading at RBS). I am asked to draw adverse inferences from the fact that the majority of the individuals, some of whom are still employed by RBS in senior positions, have not given evidence.

318. At all material times, Mr Mark Thomasson was the primary submitter for 3m GBP LIBOR. He was also the senior GBP money markets trader at RBS between late 2006 and March 2010. Mr Thomasson was responsible for the overall funding and liquidity needs of RBS and would liaise with Mr Paul Walker and on occasion make submissions on his behalf in relation to US$ LIBOR. His evidence as to the process by which the submissions were made can be summarised in the following way. First,

as a senior money market trader he set a number of pricing "curves", which formed the basis of pricing across the bank. There were four main curves of particular relevance. They were: the Master Curve; the "Standard" Bid and Offer Curves; the Sales Curve; and the "LIBOR" Curve. The Master Curve was in effect one set of values for each tenor and currency. These rates would be based upon manual input from money markets traders together with information received via live feeds from external sources. Both the Standard Bid and Offer Curves and the LIBOR Curve were derived from the Master Curve. The "Standard" Bid and Offer Curves generally moved in tandem with movements in the Master Curve. The "LIBOR" Curve, was itself derived from the offer price on the Standard Curve. It could be amended manually although Mr Thomasson stated that he did so very rarely. Mr Thomasson described the LIBOR curve as a snapshot of the offer price on the Standard Curve taken just before 11am each day. I accept his evidence in this regard.

319. When he arrived at the office at around 6.30am, Mr Thomasson would consider whether the Standard Curve needed to be updated in light of market movements overnight, which he assessed by reference to a large number of factors, including conversations with money market brokers, review of press reports, and live market data, including RBS's own cash requirements. He was responsible for RBS's GBP LIBOR submission at around 11 am each morning. The LIBOR Curve would always be in a 'frozen' state before the LIBOR submission was made, in order that it could be published directly to the BBA via Thomson Reuters. Having 'frozen' the LIBOR Curve, Mr Thomasson would either leave the LIBOR Curve as it was or manually amend it, if necessary. Mr Thomasson explained, for example, that he would adjust RBS's LIBOR Curve for short-term rates where the standard pricing for those rates was set with wider spreads than the underlying market. However, he stated that he did so rarely. He also stated that during the relevant period no requests were ever made to him improperly to influence GBP submissions and if they had been, he would not have acceded to them.

320. Mr Thomasson accepted that during the relevant period when he had been Head of Money Markets at RBS he had sat with money market and derivative traders in an open plan dealing room and with whom, for part of the time, he was "embedded". He also accepted that the conflict between their functions and that of LIBOR submitters had not been recognised, whether at RBS or elsewhere. It was not until 2012 that a different system was put in place for LIBOR setting. He also accepted that: the effect of funds from corporate sources and government sources and small deposits fed into the Master Curve; and that the RBS bid rate was informed by its demand for currency and that there was a link between funding from non-interbank sources and the bid rate which was extrapolated from the Standard Curve. In addition, he accepted that a bank's offer rate is higher than its bid rate or passive rate which is the bank's quoted rate for customers or institutions which offered money to it and that the offer rate, in part, reflects the credit risk of that bank although he added that it might also reflect lack of liquidity in the market.

321. He added that he did not consider actual trading to be necessary for the purposes of a submission within the BBA definition, although trades would be the best indicator having discounted the outlying ones. In fact, he went on to accept that in times of illiquidity in the inter-bank market, he had submitted 8 basis points above RBS's bid rate as the RBS LIBOR submission as his perception of where the inter-bank rate

would be, despite the fact that the bid rate was derived in a way which was not confined to inter-bank trading and included internal transactions. He added that the bank would not borrow at a rate above which it would lend. He accepted that he discussed LIBOR with the derivatives and money market traders in the general sense of discussing likely rate moves and the funding needs for the purposes of their books and that they expressed preferences as to the rate of LIBOR in a general sense and that he was able to speak to them on an intercom system which was not recorded at the time. However, he said that he had never been aware of the improper requests which were made in relation to submissions to be made in relation to JPY and CHF LIBOR and that he did not take account of the preferences of any of the traders relating to profit on their trades.

322. He was asked about a passage in a Bloomberg instant messaging chat between Nicholas Foo and Lin Min Hong on 24 May 2011, in which Mr Foo had stated that "the GBP Swaps desk" came to his side from time to time to ask for help on their positions although he added that they usually said "no". Mr Foo joined RBS as a graduate trainee in August 2010 and left in May 2012. He was on the money markets desk. Mr Thomasson accepted that he would have given Mr Foo training in the basics of how the money market desk functioned and that Mr Foo would have had discussions about LIBOR and the LIBOR submission process with other members of the team. Mr Thomasson's response in cross-examination was that the conversations had been misunderstood, that there were no requests and he did not take the positions of Swaps traders into account when making LIBOR submissions. In this regard, he referred to another Bloomberg chat between Mr Foo and Miss Hong on 1 May 2011 when Mr Foo had stated: "im just wondering why when my desk sets libor, we dont find out whats the exposure of other desks to libor .." which Mr Thomasson said illustrated Mr Foo's confusion and that whether a profit or loss would be made on trades was not taken into account. I have to say that on the balance of probabilities and taking into account that neither Mr Foo nor Ms Hong were called to give evidence, when the two extracts are read together, in my judgment, it is more likely than not that Mr Foo was confused and they do not form a basis for a conclusion that LIBOR submitters took account of trading positions in an improper manner.

323. Mr Lord also cross examined Mr Thomasson at length about the passage from his interview with the FSA in which he was questioned about Mr Brent Davies' evidence to the FSA that: "from my time working on the sterling desk, the cash LIBOR setter would take into account what he'd learned from the market, I guess via brokers. He'd take into account his fixings, both on and off the balance sheet on the day. He would also take into account the positions of close-by colleagues on the swaps desk." Mr Davies worked as a GBP money markets trader at RBS from August 2008 until July 2009 and had been a money market trader since 2006. Mr Thomasson maintained that he had not taken account of individual positions. The conclusion of the relevant passage of cross-examination is as follows:

> "Q. Are you justifying the position on the basis that you heard derivatives traders expressing preferences for where LIBOR would move, that was something which you put out of your mind when you made your LIBOR submission; is that really what you are saying?

> A. We are talking about LIBOR, the path of LIBOR, what would suit people over a path of a period of time. As I say, it could be in terms of a broader strategy where people would have these spreads. I mean, the derivatives traders would trade relative value, so one instrument against another, and look at the basis as in relationship between the instruments and how they move, so when they talk about things suiting them it isn't necessarily on the spur of the moment at that point in time.
>
> Q. I'm going to suggest to you, Mr Thomasson, that you did take into account derivatives traders' preferences for LIBOR movements when you were making your submissions on behalf of RBS?
>
> A. I did not.
>
> Q. I'm going to suggest to you that you did take into account RBS's money market positions when you made your LIBOR submissions on behalf of RBS?
>
> A. I did not."

Mr Thomasson's evidence was that he only discussed matters with traders in order to have a picture of the general environment and likely course of interest rates and in order to gain useful insights into the market and RBS funding needs. He also stated in his witness statement that Mr Davies had not reacted positively to his move to the money markets desk or engaged with the business particularly. Numerous communications from various individuals including Mr Tom Hayes of UBS to Mr Davies asking for manipulation of the rate in JPY LIBOR were put to Mr Thomasson who stated that he had not been aware of them and that the LPY desks were some fifty feet away across a noisy trading floor. He also stated that although Mr Davies had sat within feet of him for part of this time at RBS, he (Mr Thomasson) was not aware of any improper requests having been made. He also accepted that as with any other broker, he had met Mr Davies socially after he left RBS.

324. Mr Thomasson was also taken to an email exchange on 17 July 2009 with Mr Ewan of the BBA under the heading "GBP 3 month fixings". Mr Thomasson had asked:

> "Has there been any comment on the GBP 3 month fixings over the past three days, I am struggling to understand how a bank can fix 11 bps lower yesterday and move back up 6 bps today in a market that has most contributors unchanged to 2 bps lower?"

Mr Ewan replied that day:

> "I have been in touch with Reuters, they are going to improve the monitoring of LIBOR submissions in two ways. Firstly they will tighten the tolerances on submissions so that a movement of more than 5bp on previous submissions triggers an alarm, and therefore a call to the contyributor [sic], and secondly a

> check on submissions whereby any contributor than submits a rate that moves up or down more than double the average movement up or down for the day triggers an alarm and therefore a call.
>
> They will roll this out over currencies and maturities, starting with USD, GBP and CHF 1m, 3m and 6m. Development will be next week, testing the week after and it will go live August 4th. In the meantime, Reuters analysts will do these checks by eyeballing the data."

Mr Thomasson accepted in cross-examination therefore, that he was aware that a movement of 5 basis points would trigger an alarm. In response to the proposition that he was aware that a smaller movement would not, and therefore, by implication that he had chosen to move his LIBOR submissions in a subtle manner, he drew attention to the second check to which Mr Ewan referred and stated that he had not done so.

325. In this context, Mr Thomasson was asked about two digital diary/calendar entries he made on 18 August 2009 and 11 September 2009. The first was made as a reminder for 21 August 2009 and the second as a reminder for 16 September 2009. The entries read, respectively, "*3mth fix low*" and "*LOW 6 MTNHS*". He was questioned about them during his interview with the FSA but it made no findings in relation to them against RBS in its Final Notice. Mr Thomasson explained in his witness statement that he does not remember making the entries and cannot recall what they meant. However, he refuted any suggestion that they were reminders to set LIBOR in a particular way on the days in question. He says that he could not decide on a submission until the day in question and that in order to alter his submissions in some way in order to make a profit on a particular transaction he would have had to change the entirety of RBS' pricing model. He points out that the RBS standard pricing curve for GBP was subject to intense scrutiny and unusual movements would have been readily identifiable. Furthermore, he refuted any suggestion that they were set to alert him in relation to LIBOR setting rather than as part of a general recognisance when he arrived at the office at around 6.30am. He explained that he would have seen them early in the morning and certainly long before the LIBOR setting process which did not occur until 11am. His best guess as to the purpose of the entries was that they were observations or queries about something he may have observed in the market of which he wanted to remind himself, or that RBS might have been expecting to receive a large amount of money on a particular date. He accepted that the LIBOR submissions actually moved lower on each occasion but a comparison with the submissions of the other panel banks shows that his submissions on those dates were in line with the overall trend. In cross-examination he refuted strongly any suggestion that they had been a reminder to make LIBOR submissions to benefit trading positions.

326. The relevant section of the cross-examination is as follows:

> "Q. These calendar entries of yours, they would be popping up, wouldn't they, too late for that -- they would be coming up after you had carried out this sort of market reconnaissance task that you do over the first part of your day; isn't that right?

A. The point I was trying to make earlier, I look at my calendar and see what was in it as soon as I came in, in the morning, so I would see those -- I don't think the timing is relevant in that regard.

Q. I suggest to you, Mr Thomasson, that it is relevant and what it's doing, it's reminding you to take those - - it's giving you an actual reminder that around about 8.30, 9.00, 9.30, 10 o'clock, you've got to be taking into account those fixes and I suggest the reason that you made them was because that was the time that you would be preparing to make the RBS LIBOR submissions on those days; that is right, isn't it?

A. No, that is not correct, as I said. We would start the day earlier than that and would then fix our master curve which would drive the pricing aligned to the 8 basis point spread between bid and offer and, from then on, as the day evolved, I would take into account everything that was going on. Those observations may have caused me to question something about our requirement for funding. I notice particularly in this period, in -- well, in both of these, we had seen dramatic moves in our rates for the month of August, which was the three months, our rates had gone from the start of the month, 93 basis points down to 71 by the end of the month and on the month of the six-month entry our rate had gone from 103 down to 77 basis points. So we were seeing a market that was moving quite aggressively and there was clearly a changing funding requirement. Sorry to go on, but I've looked through the trades around this time, particularly three months was a much more liquid market and we have both trades where we have issued certificates of deposit and taken cash and we've also been buying other banks' certificates of deposits, so there was liquidity in the markets and the rates we have set are completely appropriate.

Q. Were those to coincide with requests from derivative traders, Mr Thomasson?

A. No, they were not.

Q. Were they to coincide with other market positions that you might have had on your book?

A. No, they were not. As I say, it was a reflection of the funding environment. We had an outlier in six months since the end of the prior month. We had been significantly higher than a number of the other panel banks, which would lead me to assume that our bid rate in the market was significantly higher than most of our peer group and we would have been picking up funding."

327. In this regard it is said that there were similar calendar or diary entries which were made by Barclays submitters which matched documentation from traders requesting that their positions be taken into account and which the FSA found to have amounted to evidence of improper manipulation of LIBOR submissions.

328. Mr Scott Nygaard was employed by RBS from April 2006 until February 2013, and was first based in Tokyo and then became Head of Short Term Markets and Financing in London and as such was responsible for supervising the money markets team including LIBOR submitters until that function was passed to a different division of the bank in 2012. Having been interviewed by the FSA, he agreed to resign from RBS in 2013. He accepted that the FSA had found that Mr Paul White was involved in inappropriate conduct in relation to JPY LIBOR and CHF LIBOR during the period in which Mr Nygaard was his supervisor but stated that it had not crossed his mind that anything inappropriate might have been going on. He added that at the time he had not identified a potential conflict of interest where RBS derivatives traders were liaising closely with money markets traders who were making the LIBOR submissions. He also explained that money market traders do not work in a vacuum but observe the trading taking place to have a sense of the market. He also accepted that RBS counterparties would have reasonably expected and assumed that LIBOR represented the rate set in accordance with the BBA Definition.

329. He stated that he considered that the BBA Definition and Guidance made it very clear that where there was no available transaction data in a currency or tenor, LIBOR should be set using expert opinion or perception and that there was nothing wrong in doing so. He also accepted that before 2012, RBS did not have a specific LIBOR setting process. He also stated that the RBS pricing curve reflected its position in the market, was based on an offer rate and "was essentially equivalent" to a LIBOR setting. However, he also added that all things being equal, the curve also reflected the level at which RBS would expect to receive funds in the interbank market and that for the purposes of submitting LIBOR he saw the offer and bid rates as one and the same. When it was put to him that RBS was not deriving its pricing curves with the BBA LIBOR submission process in mind, but with its own funding position at the forefront, he answered:

> A. (Pause) RBS's funding position requirements was a factor in addition to the market information that was made available through brokers and through sales and in addition to movements in related markets that the trader might use to hedge those positions with and so all -- there are a myriad of factors that flow in that would drive the pricing of the curve, which would be the equivalent of our LIBOR.

The cross-examination went on:

> Q. Mr Nygaard, what I'm asking you to confirm is that when RBS is deriving its pricing curve, it's not doing that in order to derive the right rate under the BBA definition, is it? That is not the purpose of the pricing curve, is it?
>
> A. (Pause) The purpose of the pricing is obvious, but in addition --

> Q. What is the purpose of the pricing curve?
>
> A. To present a correct face to the market in terms of the bid and offer that each money market trader is showing and it represents in the trader's mind the offered side, the maximum level that he believes the market would be willing to lend to him at, which would be his offer, which would be the equivalent of the BBA submission.
>
> Q. Mr Nygaard, I know you assert that the effect is to satisfy the BBA approach, but I think you know what I'm asking you really, which is to come back earlier in the piece. Just confirm that when an RBS money market employee is working on the pricing curve, they were never doing so or being asked to do so in order to calculate a BBA LIBOR rate, were they?
>
> A. That should have been part of his consideration, I might add, as a member of the money market and FX committee at the BBA that what we were doing was commenting on other banks and I might add that with my experience at Deutsche Bank for many years and then, of course, at RBS and of course my understanding of how ABN AMRO, which is a bank that we took over in October 2007, that this was market practice in terms of how these banks would go about setting LIBORs. This was common."

330. Further, in cross-examination Mr Nygaard reiterated that he had not been aware of derivatives traders asking for their trading positions to be taken into account in the LIBOR process whilst he was working in London and that to do so directly would be wrong. However, it was put to him that an email exchange with Andrew Smoler, a derivatives trader in Singapore dated 17 September 2008 was evidence to the contrary. Mr Smoler had informed Mr Nygaard of his position and that Mr Walker was intending to set at a particular level. Mr Nygaard had responded: "I understand. Jimmy is also running very short usd vs jpy day to day I believe." In cross-examination, Mr Nygaard stated that it would not have crossed his mind that there was any attempt to feed into the LIBOR setting process and that the communication was entirely legitimate because Mr Smoler was informing him that he might lose money on the transaction. In this regard, I accept his evidence.

331. Mr Nygaard also gave evidence about the sequence of events when in August 2007, Brevan Howard (a large hedge fund client) had requested a call with someone from the money market desk who was responsible for making RBS's LIBOR submissions. He had recommended that they should speak to Mr Walker, who was the senior USD money markets trader at RBS from around October 2006 until May 2013 and had primary responsibility for US$ LIBOR submissions. Mr Nygaard then called Mr Walker to provide him with some "background" in advance of the Brevan Howard call. In summary, on this call:

i) Mr Walker explained to Mr Nygaard that Neil Danziger (an RBS JPY derivatives trader) had given him the impression that Brevan Howard were

"getting hurt" by high JPY LIBOR rates and that they had therefore asked Mr Danziger to "set his LIBORs low";

ii) Mr Nygaard cautioned Mr Walker that "I think we need to be careful about how we speak with them about what we, … how the rate is set, what we expect the rate to be ... I just wanted to make sure that when you speak to them, they don't pin you down";

iii) Mr Walker indicated that he understood and then went on to provide Mr Nygaard with essentially the same explanation about how RBS (and other banks) were making their LIBOR submissions as he had given to Mr Yexley and Mr Milne earlier that same morning:

> "Well, I mean the spreads on LIBORs are so huge now, I mean you're getting, like a twelve basis-point spread on people's fixings, just because people are setting them to where suits their book basically ... I think the markets have completely broken down as regards, like those kind of fixings now, because there's no underlying market anymore ... LIBOR is what you say it is, basically."

iv) Mr Walker concluded by reiterating his understanding from Mr Danziger that if RBS didn't set JPY LIBOR where Brevan Howard wanted it then "they're not going to deal with us anymore", to which Mr Nygaard's response was: "Yeah. Talk about collusion!"

332. Shortly after Mr Nygaard had spoken to Mr Walker, he discussed the Brevan Howard call with Jimmy Tan (an RBS derivatives trader based in Singapore) over Bloomberg instant messenger in the following way:

> "SCOTT NYGAARD: Jimmy, are you planning to join that call with BH?
>
> JIMMY CHI MIN TAN: i am thinking abt it ... Bernie [Ward, an RBS bond trader] saying we shud avoid it as best as we can in saying anything ... BH will want to tape the call and might use it agst us in any fixing ... am sure they are abt to complain to BBA and FSA.
>
> SCOTT NYGAARD: could be. I spoke with Paul, the mm trader, and told him to be careful ... Not to say where we plan to set rates or let them pressure us ... I think Bernie is a little too worried.
>
> JIMMY CHI MIN TAN: am sure ... they sounded a bit like blackmail ... saying why we fixing high and we have good relationship with them now ... which could be affected in future ...
>
> SCOTT NYGAARD: I don't think they would try and screw us with the BBA. Just try to pressure us a bit to lower the rate ...

> JIMMY CHI MIN TAN: i might just sit in ... and not speak
>
> SCOTT NYGAARD: Paul said that Neil would be on the call too.
>
> JIMMY CHI MIN TAN: yes ... cos Neil is the one setting the jpy libor in london now ... for this week and next ... Paul White is on leave
>
> SCOTT NYGAARD: I see.
>
> JIMMY CHI MIN TAN: and we want high fix in 3s
>
> SCOTT NYGAARD: go Neil! ... hahahaha"

333. In cross-examination, Mr Nygaard denied any knowledge of LIBOR manipulation or lowballing and suggested that as the discussion concerned JPY Yen which Mr Tan was found to have fixed, he may have been a "bit paranoid." Mr Walker stated in cross-examination that it was ludicrous to suggest that such a request would be made and that the bank would accede to it.

334. In relation to the passage of the chat in which Mr Tan stated: "and we want high fix in 3s" to which Mr Nygaard responded: "go Neil! Hahahaha" it was suggested in cross-examination that Mr Tan was indicating that RBS's own positions meant that it wanted a high fix for three-month LIBORs. Mr Nygaard responded: "I don't believe that is how I interpreted it at that point." When asked about the "go Neil! Hahahaha" comment he explained: ". . . My response is that this is a sort of a release of a build-up of stress that instead of bowing to Brevan Howard's supposed pressure, we are going to do the right thing, and I'm saying "Yes, go Neil!"" It is not in dispute that Mr Tan was dismissed for trader manipulation and in proceedings he commenced in Singapore, it was alleged that Mr Nygaard had been aware of the manipulation which Mr Nygaard flatly denied. Mr Nygaard also denied that so far as he was aware any lowballing had taken place and he denied that he was implementing a lowballing policy. However, in the transcript of Mr Nygaard's interview with the FSA, he recognised that ". . . this looks really bad" and acknowledged that "[i]n hindsight I would say that this was a clear sign that these guys were being tempted to do this kind of thing." PAG submits that Mr Nygaard's explanation given in cross-examination is absurd.

335. Mr Nygaard was also one of the many recipients of an email dated 29 August 2007 from Mr Ian Bedford which was part of a long running discussion at the time. Amongst other things he stated:

> "Much of what we are now seeing was brought to a head on 9th August, when the interbank cash markets became illiquid in any maturity beyond overnight. The actions by the Fed and the ECB managed to bring some more normality to very short maturities, but today we have seen the USD cash market return to the state that it found itself in early on 9th August. The Libor fixings have now started to rise again, with one month USD Libor setting today at 5.565% ... up from 5.5025% on Friday

> ..... not that I've heard about any possible Fed rate rise? Additionally, one of the contributors (major bank) to the USD Libor fixing suggested that 5.65% was their 'reference rate' for today. One month GBP Libor fixed today at 6.5025% ...... the 'mechanism' is definitely still broken."

Mr Nygaard also received an email dated 20 November 2007, from Mr Niblock which was copied to Mr Nielsen amongst others in which Mr Niblock stated:

> ". . . We have paid libor +1-2bp ourselves at times if the size and period suits. Libor is in any case of little consequence at the moment as it should be 10-15 higher in reality. We have the brokers all primed to show us whatever cash is out there so that we can counter the price however we can have a different, more open discussion with the clients directly."

Mr Nygaard stated that he struggled to understand what Mr Niblock was talking about.

336. Mr Nygaard was also asked about a sequence of emails with senior management in September 2008. On 24 September 2008 Mr Nygaard sent an email to Messrs Nielsen, Cameron, Crowe and Cummins amongst others, headed "Quick Liquidity Update". In it he stated that he wanted to give a flavour of what was going on in the money markets and added:

> "Libors are, at best, a guess at where we think the market ought to be. Lack of liquidity makes them purely indicative."

337. Mr Nygaard's response when it was asserted that by this time he had appreciated that LIBOR rates did not provide an accurate reflection of where cash was being lent or the rates at which cash was being offered in the interbank market was:

> "A. It's very important to note the date of this email, 24 September 2008, this is a Wednesday; Lehman went bust on the previous Sunday. The market froze. This was, you know, a once in a generation event, maybe even a bigger event than that, and so the markets had literally frozen up in that week and so I think it's a fair description of what we were -- what I was trying to describe to senior management, what was going on immediately following this event."

338. On 26 September 2008 Mr Crowe emailed Mr Nygaard, copied to Messrs Cameron, Cummins and Nielsen under the heading "Market Disruption Clause". He stated:

> "At the BBA Wholesale committee today, a good point was made about exercising the market disruption clause. Any bank which quotes to the LIBOR panel could not quote a cost of funds greater than their Libor quote to the panel. Thus in the USD Libor where dispersion has been about 110 bps, the only people who could make a claim are those who fix above the average. For RBS it means our LIBOR would need to be higher

> than historically. Scott, could you send a complete list of quotes over the last two weeks from all 16 banks for USD to give a better idea of dispersion pls. . .”

Mr Nygaard replied: “working on it. I understand . . . your point” and Mr Cameron responded: “Does that mean one cld never claim a cost of funds above one's own quote? I guess so. That's hardly worth the effort” to which Mr Crowe replied: “That's my interpretation because if our cost of funds is higher we have to quote it to the BBA LIBOR panel. Therefore, by definition . . .”. Mr Nygaard was asked about the meaning of the exchange between the senior executives and whether it reflected an awareness on Mr Cameron’s part that RBS’s LIBOR submissions had been too low and lower than their cost of funds. He stated:

> A. ...I think they are missing the point that it is possible to submit your LIBOR at a higher level, above the BBA submission -- sorry, the average, and still potentially be able to invoke the market disruption clause.
>
> ...
>
> A. I don't interpret it that way. Johnny is the chairman of the bank -- of the investment bank. He was Brian Crowe's boss, he's many layers above me. I don't -- I wouldn't expect him to know the details and the technicalities of the LIBOR market. I don't think he would be aware of where we were setting versus the BBA LIBOR itself. Hence, I think -- I mean, you know, the request from Brian, to give me some background information a historic rate settings, would be useful for them to understand or have a better picture of what was going on.
>
> ...
>
> ...The concern actually that we had was that we continued to provide client services as we promised. We didn't want to be seen to be not doing what we said we would do. That was really what was kind of driving the discussion. The other part of this, I think it's important to note too, because I don't know if we'll get to that elsewhere, but we frequently talked about our cost of funds in the money market world, and there was -- most of the assets on the books of the bank were rolling on a one-month to three-month basis and, frankly, that is how the bank was run for many years, funding these short-dated assets on a short-term basis. When the crisis hit and, certainly the beginning of 2007, we began to try to extend the duration on the liability side, beyond three months. The implication of that is that our funding was actually more expensive than the levels at which we were rolling our assets at, because we were taking longer term funds to fund shorter term assets. In addition, we were taking more and more long-term liabilities through our group treasury that was issuing anywhere from two years out to ten years cash and swapping it down to curve, it could be one month plus 100 or 150, and we were funding assets at LIBOR flat, out of the money market book.

> So there are a number of issues kind of being discussed or underlying this talk about the market disruption clause. Ultimately, we decided not to invoke it. The other aspect of this is that we weren't just talking about what was going on in London, we were talking about what was going on in other centres, in particular in Asia ..."

339. I was also referred to an extract from a transcript of a telephone conversation between Mr Paul Walker and Mr Cummins of 2 October 2008, in which the following is recorded:

> "JC: . . . Bloomberg are asking about LIBOR, you know, actually, 'If there's no trading on, how can any post any levels?' So basically that's where we offer and I believe, you know, some stuff has been done in, like, Asia, and things.
>
> ...
>
> JC: I believe, you know, some clients have taken money down using that as a reference rate.
>
> Paul: Oh, what, our LIBORs?
>
> JC: Yes.
>
> Paul: Yes. I mean, our LIBORs, we support our business totally at our LIBORs.
>
> JC: If we'd post LIBOR, then we-, then that's our price, and if someone would do that, spread on that, that's what they get.
>
> Paul: Exactly. As far as our franchise is concerned, I quote an eight basis point spread from one month to one year, and everything is done on that spread.
>
> JC: Have we actually taken any? We have taken some-, are we taking any term money today at all?
>
> Paul: I've seen some one-month.
>
> JC: That's a result.
>
> Paul: Yes. Well, one month and loads and loads of overnight.
>
> ...
>
> Paul: So we support ours.
>
> JC: So I can go back to Bloomberg and say, 'Look, we support it and that's the price for our customers ...

> Paul: That's for our business, those are our rates, yes. I mean, you've got, between fixing banks now that go into the BBA LIBOR, you've got generally about 120 basis point spread between banks, between the US banks at the lowest. Barclays tends to be the highest.
>
> JC: I don't want to be in a gold medal spot.
>
> Paul: No. I know. Peter Nielsen is pushing that way, so it might be something we need to (talking over each other 02.21).
>
> JC: What, he wants to be in a gold medal spot?
>
> Paul: He basically wants to be up there with Barclays.
>
> JC: I don't mind being in the bronze medal spot.
>
> Paul: Well, pretty much that's what we are, but when we're in the bronze medal spot, above us is Barclays and HBOS, so that doesn't look very nice.
>
> . . ."

In relation to the "gold medal spot" exchange, Mr Nygaard maintained that he believed that the LIBOR submitters were setting the rate properly regardless of any discussions which senior executives might have had.

340. On the same day, having had a call with Mr Nielsen, Mr Nygaard spoke with Mr Paul Walker and reported that Mr Nielsen had asked, 'Why aren't we the highest?' and that Mr Nygaard had replied: 'We do not want to be the highest. We certainly don't want to be higher than HBOS or Barclays.' He also mentioned that Mr Nielsen had stated that he was "getting complaints" about the "difference in pricing". In cross-examination, Mr Nygaard explained that the complaints were from sales teams around the world about rates.

341. Further, in an email to Mr Cummins, amongst others, of 16 October 2008, Mr Nygaard stated:

> "Given the good reception and the orders we still have, it makes sense to move our price a bit. I suspect there will continue to be growing demand for this paper- which will be filled to a certain extent as our competitors finally come on line, but creating a perception of scarcity in the short end may help us push the relative value of our regular paper.
>
> We will slowly edge our libor settings down relative to the rest of the panel members as well, but keep aggressive pricing for our deposit raising initiative."

However, in cross-examination he denied that this was an example of lowballing. He stated that RBS had been issuing government guaranteed paper with great success and

had received a significant amount of funds as a result and he was letting his superiors know that the liquidity in the interbank market was improving.

342. As I have already mentioned, Mr Paul Walker was the senior USD money markets trader at RBS from around October 2006 until May 2013 and had primary responsibility for US$ LIBOR submissions. Mr Walker was promoted to Head of London Money Markets in April 2009 and to Global Head of Money Markets in 2012. He was dismissed for gross misconduct in February 2013 and was subsequently re-employed and given an opportunity to resign which he did in May of that year. In the case of US$, JPY and CHF LIBOR, RBS admits a total of 155 instances of attempted or actual manipulation of LIBOR by RBS employees or employees of its affiliates. They are set out in Schedule A to the Re-Re-Amended Defence.

343. In cross-examination, Mr Walker accepted that LIBOR was an important benchmark for derivatives transactions and that a counterparty would have assumed that the rate represented what it was supposed to be in accordance with the BBA Definition. He also stated that before the financial crisis, a transaction of reasonable market size might have been in the region of USD 100m but afterwards it was much smaller and that the best evidence of the rate at which a panel bank could have borrowed in the interbank market was the actual trading in that market.

344. He stated that it was generally the case that the LIBOR submission was generated by reference to the offer side of the RBS Master Curve but when the market spreads dictated it, manual adjustment to the curve would be necessary and that such manual adjustment had been necessary in late 2009 and early 2010. He stated that because there was so much liquidity in the market he had narrowed his bid offer spreads to reflect the interbank market being much closer to the passive market than it had previously been. However, the actual setting of LIBOR or the creation of submissions was a two minute job in a ten or twelve hour working day but that one was setting the curve for the entirety of the day and that when setting that curve all the factors relevant to the BBA Definition and Guidance needed to be taken into account. In any event, he added that his LIBOR rate was the rate at which he perceived he could borrow in the interbank market at that point in time, reflecting where he felt he could get money at the passive rate and his LIBOR offer where he felt he could get funding in the interbank market. He stated that information was freely exchanged with derivative traders and that they could communicate by many means including the intercom system which worked both throughout the London premises and internationally.

345. In a conversation between Mr Walker and Mr Robin Milne, a money markets broker from ICAP on 20 August 2007 he stated that "People are just setting it [LIBOR] as it suits their books." He had a similar conversation the same day with a Mark Yexley of Tullett Prebon:

> "People are just setting LIBORs to suit their books. There's no, kind of-, LIBOR is irrelevant now ... it's just where you've got your fixes, really ..."

346. In a transcript of a telephone conversation between Mr Walker and Mr Nygaard which also took place that day, Mr Walker stated: "Yes. Well, I mean the spreads on LIBORs are so huge now, I mean you're getting, like a twelve- basis-point spread on

people's fixings, just because people are setting them to where suits their book, basically." He went on: "I think the markets have completely broken down as regards, like, those kind of fixings now, because there's no underlying market anymore" with which Mr Nygaard agreed. He went on: "LIBOR is what you say it is, basically."

347. In cross-examination Mr Nygaard accepted that he was aware at this stage that the market had been very dislocated. Mr Walker explained that when he spoke of "suiting their books", he was talking about "the fact that banks had a different make-up of their balance sheet, different access to funding, . . . and were able to obtain interbank money at differing levels from their peer group." He went on to add that: "Talking about banks just setting it for their daily fixings means that banks would go up and down within the 16 banks every day, and that's not what happened. The spread between banks got bigger and bigger and bigger, and the banks got more and more strained, or the better ones got better and the worse ones got worse." It was for this reason that he said he described LIBOR as "broken". Mr Walker also stated that he did not understand why a bank would lowball because the market would know if they were paying at a higher rate than their LIBOR submission.

348. In relation to trader manipulation, Mr Walker accepted that he had dealt with requests from traders inappropriately and had lost his job as a result. He was referred to a conversation which took place with a Mr Giardino on 16 August 2007 which contained reference to wanting "really, really low ones in case they do . . .cut" and an extract from the transcript of his interview with the FSA. The FSA found this to be evidence of Mr Walker having taken into account the impact of LIBOR submissions on the profitability of transactions. However, Mr Walker stated that he was taking account of the liquidity in the market rather than trading positions and denied setting the rate to suit his own trading book. RBS submits that the FSA was wrong in its conclusions. In cross-examination, Mr Walker explained:

> "It's two things. So the market had risen quite dramatically, and then in the days running up to this Thursday, these discussions were – rates had started to drop dramatically. Going into a Fed meeting on the Friday, we had been given huge amounts of cash and I had more cash coming in on the Friday, and I wouldn't have mentioned a specific rate, I'm just telling Dave that, you know, the front end of the market, the one month, I think this one month, is very, very liquid, so don't overpay."

RBS submits that Mr Walker's reference to the rate cut would have no meaning if PAG and the FSA were correct.

349. Mr Walker was also taken to an email of 13 November 2007 to a trader named Mr Neil Smith from RBS Connecticut in which he stated:

> "yeah thats part of it definitly if you have to be Libor+ then make sure Libor is low, also same as i said friday it suits me for fixings for low libors much like alot of banks as this time of month asset rolls are quiet. Did u see Citi London set the 3 months at 4.84 today. Really feels like Libors could blow out."

To which he responded that he was talking about the market and did not understand part of what he had written. In a mindalign chat with Mr Thomasson of 28 November 2007 Mr Walker stated:

> "im fixing usd 2 3 months at 5.15 way above expectations but more reflects market and if i were to really reflect it id be at 5.20 !"

In cross-examination he denied that this was an example of lowballing and explained that: "at this point in time I'm very negative about the market and I'm trying to get across that to everybody in RBS that market conditions are going to worsen. . . So being that that is the only trade, I'm trying to get a point across that I'm setting my rates at 5.15 today because that reflects the interbank rate for me today, but my expectation is it's going to go higher." He also accepted that he was referring to the BBA USD LIBOR submission in two and three month tenors.

350. He was also cross examined about a passage in the conversation with Brevan Howard in which he had referred to there being no cash market and no liquidity and LIBOR being broken and responded that it was broken in comparison with how it used to be but that it still reflected "an average between what was going on between the 16 panel banks." He was also asked about the position when there was no market in particular tenors and stated that the panel bank had to submit a full set of rates. Therefore, it was necessary to construct a curve by making adjustments from where the particular tenor last traded relative to how he felt the market was moving. Further in response to a request for comments from the BBA about queries raised about the levels at which rates were setting, Mr Walker responded on 29 November 2007: "They are asking the wrong bank!" His response in cross-examination was that he thought they should have been asking the very low setters.

351. PAG also relies upon a mindalign conversation between Mr Walker and Simon Green, an RBS USD derivatives trader, which took place on 16 June 2008 at around 10 am as follows:

> "GREEN: morning captain, if you've got nothing in it I need high 3s, 6s, 9s and 1 yr please. Got 1.6 bio 1yr today so thats probably the most important one out of em all.
>
> WALKER: im pretty neutral i will do my best!
>
> GREEN: cheers mate."

It is admitted that Mr Green was making an inappropriate request but it is denied that Mr Walker acceded to the request. In cross-examination Mr Walker explained that his answer had been non-committal and that he was trying to move the conversation on. Mr Walker also suggested in his witness statement that he had been shown data which supported his evidence that he had not acceded to the request. However, no data was appended. In fact, RBS's USD submissions on 16 June 2008 for the 3, 6 and 9 month tenors remained unchanged from the previous day, whilst its 1 yr submission was 1 basis point lower. However, Mr Lord points out that 16 June 2008 was a Monday and so RBS had not made any LIBOR submissions since 13 June 2008. It also ignores the

fact that RBS's USD LIBOR submissions all decreased the following day (i.e. on 17 August 2008) and its 1yr submission decreased by 9 basis points.

352. On 21 October 2008, Mr Neil Smith of RBS in Connecticut emailed Mr Walker in the following terms:

> "Thursday [23 October 2008] is a HUGE fixing for all NY banks as it's the mortgage date. People are going to get short the stub massively and will need to buy even more Dec Euros. Would suit all US banks to get libor as low as possible on Thursday. Just an fyi. We'd all appreciate it if you guys put your setting down too obviously but i'll leave you to decide where it should be"

Once again it is admitted that an inappropriate request was made but denied that it was acceded to. In cross-examination, Mr Walker was unable to explain the reference to "libor low as possible".

353. In relation to the "gold medal spot" conversation, Mr Walker was asked in cross-examination to confirm that he was talking about "the LIBOR rates that RBS submits to the BBA which appear on the Thomson Reuters screen." He responded:

> "A: We are talking about market rates. So people use – people throw around the [word] "LIBOR" to cover the market, you know, and so he's talking about LIBOR. To me, he's talking about the rates. When we talk about Peter Nielsen, Peter Nielsen was talking about the rates I was paying and being even more competitive with my peer group.
>
> So using the word "LIBOR" doesn't – you know, it doesn't tell the full story. You are actually talking about where RBS's position is in the funding markets, you know, which is driven by where we get in our funding, which is driven by where the interbank market and the passive market is for us."

He also explained that it was a competitive market and if he wanted more money he had to raise his rates and pay higher rates in the passive and the inter bank market, "And if I pay higher rates, bank lenders will raise their rates to me because I'm taking more and more of the capacity out the market. It's supply and demand." Mr Walker was also asked whether this was the conversation which in his appeal against his dismissal he had initially described as an example of being asked to lowball. He accepted that this was the conversation in question but pointed out that he had amended his submission because the first version had been inaccurately compiled by his solicitor. He also stated that the exchange revealed that RBS wanted to compete effectively with Barclays for funding.

354. RBS submits that the subject of the conversation was RBS's pricing, and the rates that it was paying for money in the market. It is said that that is clear from the reference, both in this conversation and the prior conversation, earlier that morning, between Mr Walker and Mr Nygaard, in relation to Mr Nielsen's view that RBS's pricing should be higher, namely the reference to the gold medal spot. RBS submits therefore, if the

conversation was about moving LIBOR submissions independently from its pricing this would be an example of highballing rather than lowballing.

355. PAG points out that Mr Thomasson acted as a substitute submitter for US$ LIBOR when Mr Walker was away, that he was involved in misconduct in relation to US$ LIBOR and therefore, it was more likely that he was also involved in GBP LIBOR Trader Manipulation. Mr Thomasson was acting as the substitute USD LIBOR submitter in March 2010. During this period, Scott Payseur (the then Chief Trader and Senior Vice President of RBS US Money Markets) emailed Mr Walker on 8 March 2010 and informed him of a new policy whereby the RBS "IRD" (interest rate derivatives) business in New York could borrow USD cash from the money market desk at "LIBOR + 3" (LIBOR plus 3 basis points). Mr Walker responded the same day saying that it "[m]aybe worth sticking libors up!" Mr Payseur replied to Mr Walker later the same day and explained that "Mark and I talked about it and he said he wanted to keep them down because of some fixes." Mr Walker then responded (copying in Mr Thomasson) and confirmed that "[w]e do have some big fixes in London so suits for low libors ..." Mr Thomasson admitted in cross-examination that he would have been the "Mark" with whom Mr Payseur had spoken and that the "them" which he would have wanted to "keep ... down" would have been RBS's USD LIBOR submissions. He also acknowledged that the references to "some fixes" and "big fixes in London" would have been to the fixing or re-fixing of interest rates on transactions that had been entered into by RBS.

356. Mr Thomasson refuted the suggestion that the email exchange evidenced any inappropriate conduct on his part despite it having been identified by the FSA in its Final Notice as an instance of "inappropriate submissions by Money Market Traders" and his acceptance that he was the anonymised "Primary Submitter D" referred to at [74] of the Final Notice and that the FSA had found that "... between 9 March 2010 and 18 March 2010, Primary Submitter D made USD submissions which took into account the pricing of large forthcoming floating rate USD transactions" and was an example of engaging in (or endorsing the making of) "inappropriate submissions" on behalf of RBS.

357. RBS submits that the FSA's conclusion was wrong and turned on the assumption that the discussions related to taking account of trading positions rather than the funding position of the bank which is how Mr Thomasson explained it in cross-examination. He distinguished between taking account of "fixings" which would affect the bank's funding and liquidity positions in the sense of its requirement for funds because the trade would or would not "roll over" and taking account of trades in the sense of creating a profit on them. RBS submits therefore, that it was Mr Thomasson's unchallenged evidence that "fixings" in this context referred to funding; PAG has pursued a case in cross-examination that RBS' submissions process was wrong; and PAG has expressly disavowed any case that anyone at RBS knew that its process was wrong. Therefore, it is said that it cannot pursue any case in dishonesty based on the communication.

358. Lastly, reliance is also placed on an instant messenger conversation of 28 January 2010 between Mr Walker and Mr Green during which Mr Green asked Mr Walker to "put your 6s slightly higher", Mr Walker responded "i do need a low one, you got much init?" and after a discussion, Mr Walker replied, "keep you posted." In his witness statement he says that he was merely trying to move the discussion on.

LIBOR Experts

359. Dr Álvaro Cartea, a lecturer in Mathematical Finance at Oxford University, on behalf of PAG and Mr Chris Osborne FCA, Senior Managing Director of FTI Consulting LLP, on behalf of RBS each conducted an analysis of trading data in respect of some five million transactions from RBS' Wall Street Systems of its money market trading in agreed relevant tenors in USD and GBP over the period from 1 January 2007 to 7 June 2011. They did so in order to compare RBS' actual LIBOR submissions against a reconstructed model of its actual borrowing transactions.

360. Although both experts did their best to assist the court, I found that Dr Cartea was prone to make lengthy speeches which at times were only partially relevant to the question asked, had a tendency to seek to "correct" the question and then answer it and at times appeared partisan. He also sought to defend matters raised rather than accept that any error had been made, an approach which led him to make contradictory statements. For example, after lengthy cross-examination on the point he eventually accepted that the analysis contained in appendix 5 to his report excluded all trades on a Friday after 11am which had not been explained in the Joint Statement, having asserted the contrary shortly beforehand. Dr Cartea was also prone to flamboyant and sweeping statements for which there was no evidence before the court.

361. Unfortunately, although Mr Osborne gave his evidence in a measured and cautious way, he had not carried out any of the work which led to the conclusions in his report himself and appeared uncertain and detached from the results and the process by which they had been arrived at. He also appeared to have no understanding of the difference between offer and bid prices which he accepted may have affected the results of his analysis.

362. Both experts filtered the data in order to isolate what they considered relevant in relation to the BBA Definition and the setting of LIBOR, Dr Cartea ending up with a dataset of 91,978 transactions and Mr Osborne with 46,000 odd. Each expert then produced a Weighted Average Rate (a 'WAR') which represented the average of the rate at which RBS borrowed on the day in question and compared it with RBS' LIBOR submissions. The days on which the LIBOR submission was below the WAR were described as "negative variance days." In the case of each negative variance day Mr Osborne examined the specific day to see whether any conclusions could be drawn as to the likelihood of lowballing. By contrast, Dr Cartea had not inspected any of his results and had taken a strictly mathematical approach. Although he referred to each negative variance day in his report as "under reporting", in cross-examination Dr Cartea stated that he was merely comparing borrowing costs to submissions and that he was not taking a view "as to whether they are lowballing or not" and added ". . . it is very difficult for me and I could not say and stand here and say that they are lowballing."

363. In any event, Dr Cartea calculated the WAR on the basis of a number of thresholds for the minimum size of transaction which could have qualified as being of "reasonable market size". In particular, he analysed the data on the basis of thresholds of £/$100million and £/$200million. If the £/$100million is used, he concluded that: RBS's 3m GBP WAR was higher than its 3m GBP LIBOR submission on 22.7% of the days on which it was possible for him to calculate a WAR figure and, on such

days, the average extent of the discrepancy between RBS's WAR and its LIBOR submission was 23.9 basis points; and RBS's 3m USD WAR was higher than its 3m USD LIBOR submission on 19.73% of the days on which it was possible for him to calculate a WAR figure and, on such days, the average extent of the discrepancy between RBS's WAR and its LIBOR submission was 43.93 basis points.

364. Mr Osborne, on the other hand, did not impose any minimum threshold on the size of transactions which he included for the purposes of his calculation of RBS's WAR. He concluded that: RBS's 3m GBP WAR was higher than its 3m GBP LIBOR submission on 0.6% of the days on which it was possible for him to calculate a WAR figure; and RBS's 3m USD WAR was higher than its 3m USD LIBOR submission on 5% of the days on which it was possible for him to calculate a WAR figure.

365. The number of days on which a WAR could be calculated and the number of negative variance days as calculated by the experts for 3 month GBP LIBOR are as follows: if no limit as to transaction size is set, Mr Osborne found there to be 1013 days upon which a computation was possible, 5 of which were negative variance days being 0.5%. If a £100m threshold is applied, Dr Cartea found 352 computable days of which 80 were negative variance days, being 22.7% and if £200m was used, he found 204 computable days of which 60 were negative variance days, being 29.41%.

366. The 80 negative variance days identified by Dr Cartea using the £100m threshold were agreed by the experts. It appears from a further analysis conducted by Mr Osborne as to the trades which "tipped" the day in question into being a negative variance day (which Dr Cartea did not dispute) that: 60 are eliminated if the Central Treasury City Code transactions are not included; a further 18 are eliminated if CUST_TYPE INTL or RDRC (i.e. other internal RBS Group trades within the LONCITY code) are excluded; and therefore 78 of 80 negative variance days, being 97.5% of all of the negative variance days identified by Dr Cartea, are due exclusively to the inclusion of internal transactions the pricing of which were not taken into account by RBS submitters, it being PAG's own case that it would be wrong (and contrary to the BBA Definition) to take into account non-interbank trades in this way.

367. Of the two remaining days, Dr Cartea accepted that 21 October 2008 was not a safe basis for concluding that there was lowballing, leaving only a single day of under-reporting being 0.29% of the days in question. The same result is arrived at if one excludes trades with a CTCITY code and other internal trades.

368. In cross-examination, Mr Osborne accepted that he was not familiar with the concept of a passive bid rate and an active offer rate and therefore had not considered this when compiling his filtered data set. On the basis of Mr Walker's evidence that it was often the case that RBS would be able to secure most of its funding at the bid level, Mr Lord submits that Mr Osborne would have needed to adjust his WAR figures to determine what RBS' offer rate would have been and that the factual witnesses had stated that "a reliable proxy" for the offered rate could be derived by adding 8 basis points to the prevailing bid rate. In cross-examination, Mr Osborne accepted that a higher number of negative variance days would have been identified had such an approach been taken. In closing, therefore, Mr Lord sought to draw a line across one of Mr Osborne's graphs at a level said to reflect an additional 8 basis points, the effect of which was to increase significantly the number of negative variance days which would have been identified from Mr Osborne's data.

369. It is common ground that the differences between the findings of the experts is driven to a large extent by their differing approaches to the filtering of the data in four main respects being: the identification of trades as belonging to a particular tenor; the day on which the WAR was calculated; the size of the transaction used; and the type of transaction used, including its geographical location and whether it was "external" or "internal". As to days on which the WAR is calculated, Mr Osborne compared the LIBOR submission on a particular day with his WAR on that day whereas Dr Cartea compared the WAR with the LIBOR submission on the previous day. It is said on behalf of RBS that Dr Cartea's approach creates anomalies including ignoring all trading on Fridays and therefore, precludes analysis on a Monday.

370. As to the size of transaction used, Mr Lord says that not only does Mr Osborne's inclusion of all trades however small, fail to comply with the BBA Definition which refers to "offers in reasonable market size" but also has the overall effect of reducing the interest rate at which sums can be borrowed and therefore depresses Mr Osborne's WAR. Mr Osborne accepted the proposition in relation to the effect on interest rates and also accepted that before the financial crisis, reasonably sized transactions were in the region of £100m. RBS on the other hand, submit that Dr Cartea based his benchmarks for "reasonable market size" upon RBS' market capitalisation in 2008, which RBS says is both incorrect and irrelevant, and an article by a Mr Ellis referring to a reasonable market size of a "few hundred million" for which there was no evidence. In cross-examination, Mr Thomasson stated that before the financial crisis reasonable market size might have been £50m or £100m and afterwards £10-15m. RBS submits that in any event, changing the size of the transaction makes little difference to the results and refers to Appendix 7 to the Joint Statement in which Mr Osborne's team plotted his WAR against LIBOR submissions using different thresholds.

371. As to the type of transaction, it is also not in dispute that Mr Osborne was given precise instructions as to the geographical codes applicable to the transactions which were relevant and also excluded internal trades. Dr Cartea on the other hand included transactions bearing codes which are indicative of geographical locations other than London and also included both external and internal trades, despite PAG's case that to include internal trades is contrary to the BBA Definition.

372. It was Mr Thomasson's unchallenged evidence that: all trades which occurred within his money market book had the CITY_CODE LONCITY and AREA_CODE LNSTMM; he "never" took into account the rates of transactions from the CTCITY book when making submissions, because those trades were done by Central Treasury and primarily related to "internal allocation of funds within RBS"; in the vast majority of cases, he would not have been aware of transactions which took place through the Central Treasury function and even when he was (because they were large and might affect RBS's overall funding position) he was not aware of the details and would never take into account the rate at which such transactions were transacted; he never took into account the rates of internal RBS transactions when making LIBOR submissions because he did not think they reflected RBS's cost of funds in the market and were irrelevant to the BBA Definition of LIBOR.

373. It seems to me that, given Mr Thomasson's evidence as to codes, that Mr Osborne's approach in relation to the transactions he took into account on a geographical basis must be correct. The same applies to the exclusion of internal trades – although there

was no evidence before the court as to whether they were conducted on the same basis and at the same interest rates as prevailed for external trades or not.

374. I should add that Mr Walker's reaction to Dr Cartea's conclusion that 3m USD LIBOR was being under-reported by 43 to 45 basis points was that there was no way that any of the money market trades ever went through at spreads like that.

LIBOR Misrepresentation Claim

375. There are five representations which it is said can be implied from RBS' conduct in proposing and entering into each of the LIBOR referenced Swaps. They are as follows:

(a) On any given date up to and including the date of each of the Swaps: LIBOR represented the interest rate as defined by the BBA, being the average rate at which an individual contributor panel bank could borrow funds by asking for and accepting interbank offers in reasonable market size just prior to 11am on that date (LIBOR Representation 1);

(b) RBS had no reason to believe that on any given date LIBOR has represented anything other than the interest rate defined by the BBA, being the average rate at which an individual contributory panel bank could borrow funds by asking for and accepting interbank offers in reasonable market size just prior to 11am on that date ("LIBOR Representation 2");

(c) RBS had not made false or misleading LIBOR submissions to the BBA and/or had not engaged in the practice of attempting to manipulate LIBOR such that it represented a different rate from that defined by the BBA (viz a rate measured at least in part by reference to choices made by panel banks as to the rate that would best suit them in their dealings with third parties) ("LIBOR Representation 3");

(d) RBS did not intend in the future and would not in the future: make false or misleading LIBOR submissions to the BBA; and/or engage in the practice of attempting to manipulate LIBOR such that it represented a different rate from that defined by the BBA (viz a rate measured at least in part by reference to choices made by panel banks as to the rate that would best suit them in their dealings with third parties) ("LIBOR Representation 4"); and

(e) LIBOR was a rate which represented or was a proxy for the cost of funds on the interbank market for panel banks such as RBS ("LIBOR Representation 5").

376. In addition, it is alleged that LIBOR Representation 5 was made expressly by RBS acting through Mr Goldrick and Mr Jones in the context of the discussions which led up to the Fourth Swap and in connection with the policy which required PAG to convert a large part of its borrowings from Base Rate to LIBOR in early March 2008.

Legal principles

377. There is a large measure of agreement about the test to be applied in relation to implied representations. The starting point is to be found in ***IFE Fund SA v Goldman Sachs International*** [2007] 1 Lloyds Rep 264 in which the relevant principles were summarised succinctly by Toulson J (as he then was) at [50]:

> "50. In determining whether there has been an express representation, and to what effect, the court has to consider what a reasonable person would have understood from the words used in the context in which they were used. In determining what, if any, implied representation has been made, the court has to perform a similar task, except that it has to consider what a reasonable person would have inferred was being implicitly represented by the representor's words and conduct in their context."

378. Secondly, the existence and nature of any representation "... must be judged objectively according to the impact that whatever is said may be expected to have on a reasonable representee in the position and with the known characteristics of the actual representee": ***MCI WorldCom International Inc v Primus Telecommunications Inc*** [2004] 2 All ER 833 at [30] per Mance LJ (as he then was). Mr Lord also referred me to what has been termed "a helpful test" as to whether an implied representation has been made, enunciated in ***Geest v Fyffes*** [1999] 1 All ER (Comm) 672 at 683d per Colman J. One should ask whether, having regard to the conduct of one party, a reasonable person in the position of the other party "would naturally assume that the true state of facts did not exist and that, had it existed, he would in all the circumstances necessarily have been informed of it".

379. Mr Lord also emphasises that honesty is or should be at the heart of all contractual dealings: ***HIH Casualty & General Insurance Ltd v Chase Manhattan Bank*** [2003] 2 Lloyd's Rep 61, per Lord Hoffmann at [68] where he observed that it went without saying that underlying the contractual arrangements of the parties was a common assumption that the persons involved would behave honestly. Mr Lord also reminded me of the ***Yam Seng*** case at [135] and [137] where Leggatt J referred to the expectation of honesty in contractual relationships.

380. Mr Lord submits therefore, that RBS cannot hide behind silence. He says that the implied representations arise from proposing and transacting LIBOR referenced Swaps, expressly representing that they would be referenced to LIBOR in circumstances where RBS was intimately involved in the operation of the LIBOR mechanism and had the ability to affect the rate. He submits that Colman J's reference to assumptions made by the representee highlights that matters may be implicitly communicated by conduct and sub-consciously understood, even if they were not consciously considered at the time. He also relies upon ***Spice Girls Ltd v Aprilia World Service BV*** [2002] EMLR 27 in which it was held that when making an agreement to publicise a product, a band had impliedly represented that they had no reason to believe that one of their number had an existing intention to leave the band during the term of the agreement.

381. In PAG's submission, reasonable persons being told that: (1) X was proposing a derivative instrument to Y; (2) fundamental to the operation of that instrument was a reference rate (LIBOR); (3) X had an intimate knowledge of the operation of that reference rate and was intimately involved in its functioning, being among a panel of institutions which together set the rate; and (4) Y knew and understood (1) – (3) but otherwise had no material knowledge of the working of, or involvement in, the reference rate, could hardly conclude other than that X was making the representations outlined above. Put another way, any honest person told the facts above would conclude that it went without saying that if X knew that the reference rate was not what it was supposed to be, or had reason to believe that it was broken or being manipulated, or was itself manipulating the rate, then it would be obliged to speak. Further, pursuant to the "helpful test" in ***Geest v Fyffes*** – would a reasonable representee naturally assume that, in circumstances where RBS was proposing and transacting derivative products referable to LIBOR, the true state of facts did not exist and that, had it existed he would in all circumstances necessarily have been informed of it? PAG submits that the answer is "yes".

382. Mr Lord also places reliance upon the ***KWL*** case in which UBS had arranged a CDO transaction with KWL through a firm of advisers called Value Partners. UBS had originally planned to enter into the transaction directly with KWL but in fact, invited Depfa to 'intermediate', so that Depfa and KWL, and Depfa and UBS entered into back-to-back arrangements. Unknown to Depfa, the transaction with KWL was tainted because there had been bribery involving Value Partners and one of KWL's managing directors, Mr Heininger. The Court found that the UBS relationships contact for Value Partners (Mr Bracy) knew that Value Partners and Mr Heiniger were dishonest. Depfa sought to rescind the contracts with UBS on the basis of a number of implied representations which included representations that the opportunity being presented to Depfa was proper and viable, that UBS believed Value Partners and Mr Heininger to be honest and that UBS did not have any "significant concerns" about their honesty. Having cited the relevant legal principles on implied representations summarised by Christopher Clarke J in ***Raiffeisen*** at [740], Males J concluded that UBS had impliedly represented its belief as to the honesty of the counterparty to the transaction:

> "Applying these principles, I have no doubt that UBS did impliedly represent that it believed Value Partners and Mr Heininger to be honest, and did not have any significant doubts as to their honesty. I shall refer to this as the "no knowledge of dishonesty" representation. No reputable or honest banker would have proposed such a transaction to another bank in which it knew or believed the counterparty or its agent to be dishonest or in circumstances where it had significant doubts about this".

383. Males J did not accept that the first and second representations relied on by Depfa that the proposed transaction was "proper and viable" and that UBS "did not have any significant concerns as to [its] validity and enforceability" were made in the terms in which they had been pleaded. However, he went on to at [747], nevertheless, to say that:

> "... I do accept that an implied representation was made to the effect that UBS did not know that the transaction opportunity which it was presenting was tainted as a result of the bribery of Mr Heininger or the conflict of interest to which Value Partners was subject. I shall refer to this as the "no knowledge of taint" representation. Although these are not the precise terms in which Depfa pleaded its case, they reflect the case put to the UBS witnesses and agreed by them, so there is no injustice to UBS in allowing the case to be put in this way."

Further evidence and submissions

384. Mr Lord submits that RBS's contention that the LIBOR Representations are a lawyer's construct cannot survive the evidence of its own witnesses who accepted that a party in PAG's position would readily have assumed and understood RBS to have been making representations the same or substantially similar to the LIBOR Representations. As to PAG's understanding, he reminds me that: Mr Russell explained in his witness statement that by the time PAG entered into the Swaps, his understanding was that LIBOR "was just another interest rate, . . . that it generally floated higher than Bank of England base rate and that it was meant to be more of a commercial rate as it was based on the rate at which banks were able to lend to each other." His evidence was that it had seemed "obvious" to him that:

> "When RBS were selling us the Swaps, and proposing that we enter into transactions that were based on LIBOR ... they were also representing that LIBOR was in fact what it was supposed to be – i.e. an interest rate that genuinely reflected the rate at which banks were able to borrow from each other – and that it was a true or proper or honest interest rate that had not been and was not capable of being manipulated by RBS or other banks for their own benefit."

385. He also stated that he appreciated that it was the "top few banks" which set LIBOR and which he considered would have included RBS. He also accepted that he had no idea about whether LIBOR was a proxy rate, or the BBA Definition and needed to refresh his memory by reading the alleged representations set out in the pleading.

386. Mr Wyse thought that it was set by "each of the High Street banks, the main banks in the UK" and that he would have understood at the time that "the main banks in the UK will have given rates out." Mr Wyse also explained in his witness statement that he had: "... thought that LIBOR was just an alternative interest rate and that RBS had begun to prefer LIBOR to Base Rate, presumably due to the size of the borrowings that we had with them at the time. However, I understood what the acronym stood for (based on other banking documents that I had seen) and that LIBOR was supposed to be more of a commercial rate that was based on the rates at which banks actually lent to each other or believed that they could lend to each other. I was also aware that LIBOR was set at 11am each day." Mr Wyse's evidence was that it "goes without saying" that: "When RBS were selling us the Swaps, and proposing that we enter into transactions that were based on LIBOR ... they were also representing (and I certainly understood them to be representing) that each of the Swaps would in fact be tied to LIBOR . . . and that LIBOR was what it was supposed to be - i.e. an interest rate that

genuinely reflected the rate at which banks were able to borrow from each other or at which they believed that they could borrow from each other. I think it also goes without saying (and again, I certainly understood) that RBS was also representing that neither it nor any other bank had sought or would seek to manipulate LIBOR for their own benefit and that LIBOR had not previously been, and was not capable of being, manipulated by RBS or other banks."

387. However, in cross-examination, he accepted that he may have picked up on his understanding of LIBOR since the litigation had commenced. He accepted that he did not know about panel banks, how many there were or their identity, the submission of rates each day in numerous tenors and currencies and that the prospect of manipulation of the rate was not a prospect which he considered. He stated that he assumed nevertheless that it was a true and correct rate. Mr Lord submits therefore that the evidence meets the "helpful test" in ***Geest,*** and that the pleaded representations capture the substance of what was being represented.

388. As to LIBOR Representation 2 Mr Lord submits that "no reason to believe" is used in many statutory contexts and cannot be said to be vague. He says that it is significantly more certain than the "no knowledge of dishonesty" representation which Males J had no doubt had been impliedly made in the ***KWL*** case. Mr Lord describes LIBOR Representation 3 as a representation that RBS had not previously engaged in actual or attempted manipulation of LIBOR in the sense that it had not behaved dishonestly and the LIBOR Representation 4 is essentially the same. Lastly, he says that in proposing and transacting the LIBOR based Swaps, RBS was impliedly making LIBOR Representation 5. This accorded with what Mr Russell and Mr Wyse understood LIBOR to be. In addition, he relies upon certain express representations to this effect contained in the email of 6 March 2008 from Mr Jones to Mr Wyse copied to Mr Goldrick in which it was explained why PAG's borrowing needed to be switched from Base Rate to LIBOR.

389. Although it is not in dispute that the governing principles in relation to implied representations are to be found in the judgments in the ***Goldman Sachs*** and ***MCI WorldCom*** cases, Mr Handyside places particular weight upon the need for the representation or communication to have been made and submits that, in fact, PAG is running a "duty to speak" case and trying to shoehorn it into a different legal category. He says that assuming a state of affairs is not enough. There must be words or conduct from which a representation can be inferred and the representor must (objectively) have communicated the relevant information to the representee. He says that in this case RBS was merely willing to contract upon the terms which it put forward and the reference to LIBOR was no more than a reference to a rate which appears on a screen. The inclusion of reference to the rate was not an implied representation as to how the rate is set or its legitimacy. He reminded me of the underlying question in ***Geest v Fyffes*** which was described at 680d as "whether a creditor owes to a guarantor or to a party providing an indemnity in the nature of a surety a duty voluntarily to disclose facts material to the decision whether to provide the guarantee or indemnity which is higher than that duty to avoid making implied misrepresentations which arises in respect of any ordinary contract" and drew my attention to the entire passage at 683a-e which is as follows:

> "In my judgment, the law in England and other common law jurisdictions can now be fairly stated to have settled at the point

> of the following propositions. (i) The potential beneficiary of a guarantee or indemnity, as distinct from a contract of insurance, has no general duty to disclose to the party about to give the guarantee or indemnity all facts material to that party's decision whether to enter into that contract. (ii) Where, however, in the course of inviting or negotiating the guarantee or indemnity the beneficiary makes express or implied misrepresentations of material facts, the representee will be entitled to rely on the defence to a claim on the guarantee that he was thereby induced to enter into the contract. (iii) Where there is no express misrepresentation, the first question to ask is whether there has been any implied misrepresentation at all and, as with any other type of contract, the essential issue is whether in all the circumstances relating to the entering into of the contract of guarantee or indemnity, including in particular (a) the nature of the contract between the beneficiary and the principal debtor, (b) the conduct of the beneficiary and (c) express representations made by him to the surety, it has been impliedly represented to the surety that there exists some state of facts different from the truth. In evaluating the effect of the beneficiary's conduct a helpful test is whether, having regard to the beneficiary's conduct in such circumstances, a reasonable potential surety would naturally assume that the true state of facts did not exist and that, had it existed, he would in all the circumstances necessarily have been informed of it. (iv) If there has been such a misrepresentation, the next question is whether it induced the person giving the guarantee or indemnity to do so in the sense of its having at least materially influenced his decision, although it may not have been the sole cause of that decision (see Edgington v Fitzmaurice (1885) 29 Ch D 459 at 481, [1881–5] All ER Rep 856 at 860, per Cotton LJ)."

390. He emphasises that assumption is not enough and that neither the ***HIH*** case nor the ***Yam Seng*** case are about representations. Finally, he says that reliance upon the ***Spice Girls*** case is also misplaced. In that case, the Court of Appeal found that a fax had contained express representations about the commitment of each Spice Girl to the future implementation of all of the terms of the heads of agreement which were false and that the representations had been continued and affirmed during the course of negotiations. Mr Handyside seeks to distinguish the case therefore, on the basis that there were express representations as well as representations by conduct. He also says that it is no authority for the proposition that a party makes an implied representation merely by offering or proposing to enter into a contract. At paragraph [59] of the judgment of Sir Andrew Morritt VC, who gave the judgment of the court, the Court of Appeal considered continued conduct including the re-issue of a draft agreement containing the phrase "currently comprising" in relation to the band. It was held that: "in the context of the surrounding circumstances, it was concerned with an agreement which would continue into the future, in much the same sense as the conduct of SGL in approving the promotional material or of the Spice Girls in participating in the commercial shoot, in each case, for future use. In these two latter senses there was implicit in the representation derived from the conduct of SGL in circulating the draft

agreement with the phrase "currently comprising" the representation for which AWS contends. It follows that, in that context, to say that the Spice Girls currently comprised the five named individuals without going on to say that one of them was going to leave within the period of the Agreement was false when made. What was omitted rendered that which was actually stated false or misleading in the context in which it was made: see Chitty on Contracts (1999, 28th ed.), Volume 1, paragraph 6–016."

391. Equally, Mr Handyside says that the ***KWL*** case is not one in which an implied representation was held to have arisen from the mere presentation or proffering of a transaction. The representations on which Depfa relied were: that the opportunity being presented to Depfa was a proper and viable one; that UBS did not have any significant concerns as to the validity and enforceability of the Front Swaps; that UBS was not aware that the managing directors of KWL were acting in abuse of their power of representation in entering into the Front Swaps; and that UBS believed Value Partners and Mr Heininger to be honest, and did not have any significant doubts as to their honesty: see [733]. Males J went on at [738]:

> "It is common ground between UBS and Depfa that when the transaction was first presented to Depfa, UBS informed it that the reason why an intermediary was required was because UBS's internal credit lines were full, and that it was therefore unable to conclude the transaction directly with KWL itself. It follows, as is also common ground, that UBS impliedly represented that if it had had sufficient credit lines, it would have contracted with KWL directly. This was true. The need for intermediary banks arose from CRC's unwillingness to accept full credit exposure to KWL on all four STCDOs and was the solution devised by UBS's senior management to resolve that problem. Depfa contends, however, that it was implicit in what it was told about this by UBS, in the fact that UBS told Depfa that it had done due diligence on KWL, and in the fact that the transaction was presented to Depfa at all, that UBS was also impliedly making the further representations set out at [733] above. In essence, it says that if those matters had not represented UBS's state of mind, it could not as a reputable bank have presented this transaction to Depfa, and that Depfa was therefore entitled to understand that these representations were being made to it."

Mr Handyside says, therefore, that Depfa's case relied on the email in which the reasons for an intermediary were set out, the contents of which were literally true but misleading and is not authority for an implied representation based merely upon the presentation of a transaction.

392. In relation to LIBOR Representation 1, first Mr Handyside says that it assumes incorrectly that the process of applying the BBA Definition could only objectively lead to one LIBOR submission. In RBS' submission, the BBA Definition involved an inherent and significant degree of judgment, and accordingly, there was no single objectively "true" submission for a particular bank, currency and tenor on a particular day. Further, he says that it purports to describe the quality of every single LIBOR

rate published prior to the representation being made. It relates to the whole system and the part of every bank within it which Cooke J described in *Deutsche Bank v Unitech* (supra), as "unrealistic". Mr Handyside adopts that approach and submits that it is not realistic to suggest that merely using the term "LIBOR" conveys impliedly a statement or guarantee as to the quality of the LIBOR setting process at all times in the past and in respect of each and every bank. He submits that this is all the more so in the light of the context. RBS was not acting as advisor, but was an arm's length counterparty, which had carefully circumscribed through the use of contractual documentation the limited role it played and the information provided; there was no express representation; and the alleged implied representation is long, detailed and convoluted and involves matters of judgement or opinion which are wholly unsuitable for an implied representation of this kind. Furthermore, he points out that LIBOR Representation 1 assumes that the reasonable representee, unlike PAG, knew of the BBA definition and its contents. Lack of such knowledge is fatal it is said.

393. In addition, in relation to LIBOR Representation 2, Mr Handyside says that rather than addressing the existence of an alleged state of affairs, it refers to RBS's alleged knowledge and includes an implied representation that RBS had no reason to believe that LIBOR might represent something other than that defined by the BBA at any time in the future. He also says that it encompasses all RBS employees at all time periods which he says is absurd and impossibly vague.

394. Mr Handyside submits that LIBOR Representation 3 is essentially the same as LIBOR Representation 1, save that instead it is concerned 'only' with the perfect accuracy of every single one of RBS' 150 daily LIBOR submissions on every day in the past. Mr Handyside raises the same objections as he did in relation to LIBOR Representation 1.

395. In so far as LIBOR Representation 4 amounts to a promise as to future conduct, Mr Handyside says it cannot be a representation of fact. Secondly, he points out that it does not identify whose intention is being referred to. He submits that no reasonable representee would understand that merely by saying the word "LIBOR", Mr Bescoby was making a representation as to the (possibly unspoken) intentions of 10,000s of colleagues within RBS, which is a most unlikely matter to be conveyed in an unspoken manner.

396. As to LIBOR Representation 5 Mr Handyside submits that neither Mr Wyse nor Mr Russell confirmed that they understood the representation to have been made which is a good indicator that neither would the reasonable representee. Mr Handyside also emphasises that: it is important to focus on the specific pleaded representations and not whether any representation may be implied: ***Foster v Action Aviation*** [2013] EWHC 2349 (Comm) per Hamblen J; but for LIBOR Representation 5, none of the LIBOR Representations is said to arise from any express statements which is said to put PAG's contentions outside the bounds of existing authority; each of the LIBOR Representations is too detailed for a reasonable representee to have impliedly understood and Mr Wyse could not describe any of them without seeing them on paper; the breadth of the implications for English law are said to be profound for example, because RBS did not tell PAG that it was a panel bank and PAG did not know that there was a panel of banks and on PAG's case, every bank which has ever proposed a transaction linked to LIBOR has made the alleged LIBOR Representations; in order to obtain the remedy it desires, PAG seeks to undermine the distinction between implied terms and implied representations; and if PAG's case

were correct it would have momentous implications in relation to trillions dollars of transactions. He also points out that LIBOR Representation 5 purports to be an implied representation as to something which (in benign credit conditions), it happened to be, namely a proxy rate. As such, it is said to be hopelessly vague it being impossible, for example, for a reasonable representee to say how close all panel banks' submissions would need to be to remain a proxy rate.

397. Mr Handyside submits that this alleged implied representation is even less credible than LIBOR Representations 1-4 because it is an alleged representation about LIBOR's compliance with something LIBOR happened to be during liquid credit conditions, namely a proxy rate and applied to every panel bank. He says that it is hopelessly unclear as to be meaningless. As to the alleged express making of LIBOR Representation 5, it is denied that the email contains the representation alleged. Nothing in Mr Jones' email of 6 March 2008 contains any reference to any Panel Bank other than RBS at all, let alone to such Panel Banks' cost of funds, the spread between them, or how close a reflection BBA LIBOR was of each individual submission.

398. As to the claim that there was also an express representation, Mr Handyside reminded me that when it was put to Mr Russell that the 6 March 2008 email contained a representation about LIBOR being a "proxy for the cost of funds of LIBOR Panel Banks", he did not even understand the question although he did volunteer that there was "nothing in the email about that". When the same question was put to Mr Wyse, his response was "It is not something that would have ever occurred to me" and when it was later put to Mr Wyse in terms that the representation was a "lawyer's construct" he admitted that "It is true that this part – the LIBOR part of the case is not something I would be too involved in, I don't think". Mr Handyside submits therefore that the reasonable representee would also not have understood the 6 March 2008 email to contain LIBOR Representation 5 and the express representation case must also fail on the grounds that no representation was made.

399. In conclusion, Mr Handside submits that the LIBOR Representations are a "lawyer's construct"; their complexity and (not least) frequently changing-nature reflect the fact that they are not a genuine reflection of what either Mr Wyse or Mr Russell thought at the time. Further, as to the distinction between an implied term and implied representations, Mr Handyside submits that PAG's case rests solely upon assumptions rather than having been told something and for a representation to be implied it is necessary to focus on the whether the conduct is such that a reasonable representee would consider that he had been told what amounts to the representation. By contrast, for a term to be implied it is only necessary that it "goes without saying". There is no need to be told anything. Mr Handyside submits therefore, that if PAG's case that the mere act of offering a product or service is enough to give rise to wide ranging representation were accepted, it would drive a coach and horses through the distinction with serious adverse consequences for certainty of contract. He concluded by submitting that the terms of the Swaps were no more than a bargain calculated at the rate which appeared on the relevant LIBOR screen.

Alternative Implied Terms claim

400. In the alternative to the LIBOR Misrepresentation claim, PAG claims damages as a result of alleged breaches of implied terms in the Swaps and Facilities. The alleged implied terms are:

(1) The floating rate payable by or to RBS under each of the Swaps would be calculated by reference to LIBOR as defined by the BBA i.e. the interest rate as defined by the BBA namely the average rate at which an individual contributor panel bank could borrow funds by asking for and accepting interbank offers in reasonable market size just prior to 11am on that date (**"LIBOR Implied Term 1"**);

(2) If RBS had reason to believe that on a given date LIBOR represented or might represent anything other than the interest rate defined by the BBA (i.e. the average rate at which an individual contributor panel bank could borrow funds by asking for and accepting interbank offers in reasonable market size just prior to 11am on that date), it would not withhold or conceal that information from PAG (**"LIBOR Implied Term 2"**); and

(3) RBS would not make false or misleading LIBOR submissions to the BBA and/or engage in any practice of attempting to manipulate LIBOR such that it deviated from the rate as defined by the BBA (viz a rate measured at least in part by reference to choices made by panel banks as to the rate that would best suit them in their dealings with third parties) (**"LIBOR Implied Term 3"**).

The same matters are relied on in this regard as in relation to the alleged implied representations.

401. It is submitted that the terms fall to be implied on the basis that such implications are obvious and/or necessary in order to give business efficacy to the Swaps and Facilities. They give effect to the idea which it is said should go without saying that RBS would act honestly in the performance of its contracts with PAG and would not dishonestly seek to manipulate the payment terms under those contracts. Mr Lord relies in this regard upon ***Yam Seng*** per Leggatt J at [137]:

> "As a matter of construction, it is hard to envisage any contract which would not reasonably be understood as requiring honesty in its performance. The same conclusion is reached if the traditional tests for the implication of a term are used. In particular the requirement that parties will behave honestly is so obvious that it goes without saying. Such a requirement is also necessary to give business efficacy to commercial transactions."

402. Mr Lord also points out that for the purposes of granting permission to amend in the ***Graiseley*** case, Flaux J (as he then was) considered the issue and concluded at [28] – [29] that it was well arguable that terms in a materially identical form should be implied into equivalent transactions. He also submits that each of the terms which he contends should be implied were breached because: there were occasions on which the floating rate payable by or to RBS under the Swaps was calculated other than in

accordance with the BBA Definition; RBS failed to inform PAG that it had reason to believe that LIBOR represented or might represent something other than the rate defined by the BBA; and RBS made false and misleading submissions to the BBA and attempted to manipulate LIBOR so that it deviated from the rate defined by the BBA.

403. Mr Handyside on behalf of RBS submits that the terms which PAG contend should be implied go way beyond what is necessary to give business efficacy to the Facilities and Swaps or to reflect the obvious intentions of the parties. First, the only rate referenced in the Swaps is the 3M sterling LIBOR rate whereas each of the three alleged implied terms relate to LIBOR generally which accordingly, is not necessary. Secondly, LIBOR Implied Term 1 is sufficiently widely drawn that it includes the conduct of any of the Panel Banks, something which cannot have reflected the obvious intentions of the parties. Thirdly, Mr Handyside says that it is not credible to suggest that the LIBOR Implied Term 2 should be implied given that it amounts to a duty to speak. Lastly, in relation to LIBOR Implied Term 3, Mr Handyside submits that it is much too wide to be implied. It is not currency specific and includes reference to "attempting" which is both wide and vague. In fact, RBS would accept that there was an implied term in the Swaps and the Facilities that RBS would not dishonestly manipulate 3M GBP LIBOR so as to cause loss to PAG. However, such a term is not pleaded and relied upon.

Conclusion: – Is this a case of implied representations? Were the representations made?

404. Were the alleged representations impliedly made? In order to answer that question, I have to consider what a reasonable person in the position and with the known characteristics of PAG would have inferred was being implicitly represented by RBS' words and conduct, taken in context.

405. First, I should say that it is well established and goes without saying that there is a common assumption that the parties to contractual arrangements will behave honestly. The implication of such a contractual term, which is not part of the pleaded implied terms claim, should not be intertwined with the question of whether the five alleged LIBOR Representations which are detailed and specific should be implied. Secondly, in my judgment, it is also necessary to avoid blurring the line between assumption and representation and between the implication of terms and implied representations. Mr Lord's reliance upon the "helpful test" in ***Geest v Fyffes*** was just that. In that case, Colman J was considering a contract of guarantee or indemnity and stated that as with any other contract:

> "the essential issue is whether in all the circumstances relating to the entering into of the contract of guarantee or indemnity, including in particular (a) the nature of the contract between the beneficiary and the principal debtor, (b) the conduct of the beneficiary and (c) express representations made by him to the surety, it has been impliedly represented to the surety that there exists some state of facts different from the truth. In evaluating the effect of the beneficiary's conduct a helpful test is whether, having regard to the beneficiary's conduct in such circumstances, a reasonable potential surety would naturally assume that the true state of facts did not exist and that, had it

> existed, he would in all the circumstances necessarily have been informed of it." [683c-e]

In my judgment, the reference to what the reasonable potential surety might "assume" should not be construed as a shortcut. It seems to me to be clear both in principle and from the passage in Colman J's judgment, that in order for the assumption to have arisen in the mind of the reasonable representee, there must have been conduct on the part of the representor upon which the assumption is based. The test applicable for implying terms in the sense of the term being "obvious" or "going without saying" on the other hand is more apt to be described in terms of assumption alone. In the case of implied representations, an assumption arises in the mind of the reasonable representee as a result of conduct viewed in context. I agree therefore, with Mr Handyside that there must be words or conduct on the part of RBS from which the representations can be inferred.

406. Was the presentation of draft Swaps agreements tied to LIBOR sufficient to amount to conduct from which, in the context, the reasonable representee would have inferred/assumed that the LIBOR Representations were being made? I agree with Mr Handyside that the position was substantially different both in the ***Spice Girls*** case and in ***KWL***. Neither case was based purely upon proffering of a draft transaction as conduct from which representations could be inferred. In the ***Spice Girls*** case, Sir Andrew Morritt VC at [54] – [60] considered a range of conduct including a fax which was held to contain an express assurance that each of the group was committed to the terms of the heads of agreement and the draft agreement which was circulating at the time. It was in this context that he held at [59] that it was implicit in the representation derived from the conduct in circulating the draft agreement with the phrase "currently comprising" that all members of the group would continue to be so throughout the term of the contract. In ***KWL*** the implication arose from the fact that when the transaction had first been presented, UBS had informed Depfa that the reason why an intermediary was necessary was because its internal credit lines were full and therefore it was unable to contract directly and that it had done due diligence: [738]. It was in this context that Males J held at [740] that UBS impliedly represented that it believed the proposed counterparties to be honest, and did not have any significant doubts as to their honesty.

407. In my judgment, therefore, although a term would be implied in each of the Swaps that the parties to it would conduct themselves honestly when performing the contract, I do not consider that in the relevant factual context of this case, the mere proferring of the draft Swaps referable to the 3 month GBP LIBOR rate was in itself sufficient conduct from which the LIBOR Representations could be inferred by the reasonable representee. I agree with Mr Handyside therefore, that there was no relevant conduct from which an inference could be drawn. I come to this conclusion despite the fact that RBS and PAG had a lengthy banking relationship and that the Facilities contained the Hedging Requirement.

408. If I am wrong and the proffering of the Swap transactions against the background of the relationship was sufficient conduct to found an implied representation, would the reasonable representee have drawn the inferences contained in the five LIBOR Representations? As to LIBOR Representation 1, in my judgment, it is much too widely drawn and technical to have been what a reasonable representee would have inferred from the use of LIBOR as the benchmark in the Swaps. As Mr Handyside

points out, it amounts to a guarantee as to the quality of the entirety of the LIBOR setting process in each tenor and currency at all times in the past. It seems to me that a reasonable representee would not have drawn such a wide inference. Had there been sufficient conduct from which an inference could have been drawn, I would have found, however, that a reasonable representee would have inferred from the use of LIBOR as a benchmark that LIBOR in relation to the tenor and currency to which the transaction related was set at the date of the transaction and would be set throughout its term in accordance with the relevant definition, being the BBA definition.

409. I come to the same conclusion in relation to LIBOR Representation 2. It too is drawn in a way which encompasses all dates in the past and all tenors and currencies to which LIBOR is applied. It seems to me that a reasonable representee would not have inferred so much. However, I do not accept Mr Handyside's criticism of the use of the phrase "reason to believe" or "RBS" rather than named individuals. Had there been conduct from which an inference could have been drawn, I would have found that a reasonable representee would have inferred that RBS had no reason to believe that LIBOR in relation to the tenor and currency to which each Swap related would be other than the interest rate as defined by the BBA during the life of each Swap.

410. I agree with Mr Handyside that LIBOR Representation 3 is essentially the same as Representation 1 and suffers from the same defects. It is much too wide to have been inferred by the reasonable representee. However, in my judgment, a more limited representation tailored in a similar way to LIBOR Representation 1 would have been inferred.

411. LIBOR Representation 4 is concerned with the future. I agree with Mr Handyside that it amounts to a promise as to future conduct and is not a statement of fact. In any event, it seems to me that it would not have been inferred, particularly in the light of the inference to which I have referred under LIBOR Representation 1.

412. What of LIBOR Representation 5? This was allegedly made both expressly and impliedly. First as to the alleged express representation, nothing in the email of March 2008 can be described as containing an express representation in the form of LIBOR Representation 5. I do not consider that a reasonable person would have understood what is alleged from the words used in context. Secondly, it seems to me that even if there had been conduct from which to draw an inference, a reasonable representee with the characteristics of PAG would not have assumed or inferred that LIBOR was a proxy for the cost of funds on the interbank market for panel banks. It seems to me that the alleged inference is highly technical and not necessarily accurate.

413. Therefore, although I do not agree with Mr Handyside that the use of a LIBOR benchmark was no more than a reference to a number on a screen and I do consider that it was capable of giving rise to much more limited and less technical representations, had there been conduct from which they could have been inferred, I reject the Swaps Misrepresentations as formulated in this case for the reasons I have given.

Conclusion: Implied Terms Claim

414. What of the pleaded implied terms? Applying the test in the recent ***Marks & Spencer*** case it seems to me that a term in the form of LIBOR Implied Term 1 would be

implied into each of the Swaps if and to the extent that it was restricted to the conduct of RBS. It is necessary to give business efficacy to each of the transactions and it seems to me that it goes without saying. I agree with Mr Handyside that the conduct of unknown Panel Banks would not have been within the contemplation of the parties. I reject however Mr Handyside's criticism of the term based upon the fact that it is not expressly tied to the 3M GBP LIBOR which was the benchmark adopted in the Swaps themselves. It seems to me that that is what the term is referring to. It is expressly concerned with the "floating rate payable by or to RBS" and therefore, is by its very terms a reference to the rate applicable to the Swaps themselves. LIBOR Implied Term 2 is more difficult. It seems to me that it is crafted from the conclusions reached in ***Geest v Fyffes*** which is concerned with representations rather than terms. In my judgment, it is not necessary to imply such a term to give business efficacy to the Swaps and each of them. As to LIBOR Implied Term 3, I agree that it is very widely framed and that it is vague and therefore, fails the test for implication. Had it been formulated in the way suggested by Mr Handyside I would have taken a different view.

If they were made, were the LIBOR Representations relied upon by PAG when entering the Swaps?

415. If I am wrong and the representations were, in fact, made, it is necessary to consider whether they were relied upon by PAG. In this regard, reference is made to a "presumption of inducement" where a representation has been made that is material in the sense that it would have induced a reasonable person to enter into the contract: ***Chitty on Contracts*** §7-040 and to the judgment of Lord Clarke in ***Hayward v Zurich Insurance Company plc*** [2016] UKSC 48 at [37] at which he observed that:

> ". . . the authorities seem to me to support the conclusion that it is very difficult to rebut the presumption. As it seems to me, the orthodox view is contained in Sharland v Sharland [2015] 3 WLR 1070. In Smith v Kay (1859) 7 HLC 750, 759 Lord Chelmsford LC asked this question in a rescission case based on an allegation of fraudulent misrepresentation:
>
> > "can it be permitted to a party who has practised a deception, with a view to a particular end, which has been attained by it, to speculate upon what might have been the result if there had been a full communication of the truth?"
>
> In Sharland v Sharland Baroness Hale observed of Smith v Kay that it indeed held that a party who has practised deception with a view to a particular end, which has been attained by it, cannot be allowed to deny its materiality or that it actually played a causative part in inducement."

I was also referred to ***Raiffeisen Zentralbank Osterreich AG v RBS*** [2011] 1 Lloyd's Rep. 123 per Christopher Clarke J (as he then was) and in particular, on the passage at [181] – [187]:

"181. Counsel defending claims for misrepresentation habitually ask claimants what they would have done if they had been told the truth and judges use their answers (or the judge's own conclusion on the question) to decide whether inducement has been established. Thus in Assicurazioni Clarke LJ allowed the appeal on the ground that it was:

> "open to the judge to hold that ARIG had not shown that, if it had known that Munich Re was participating only in section A, it would not have entered into the contracts or would have taken some other share."

182. There is, however, authority that, at any rate where fraud is shown, the question — what would you have done if you had been told the truth? — is not the relevant (or possibly even a permitted) question: see Smith v Kay (1859) 7 HL Cas 750, page 759 ("Can it be permitted to a party who has procured a deception with a view to a particular end which has been attained by it to speculate on what might have been the result if there had been full communication of the facts?" — Lord Chelmsford); Re Imperial Mercantile Credit Association (1869) LR 9 Eq 225n, page 226n ("I do not think a Court of Equity is in the habit of considering that a falsehood is not to be looked at because, if the truth had been told, the same thing might have resulted"); Downs v Chappell [1997] 1 WLR 426, page 433C ("The judge was wrong to ask how [the plaintiffs] would have acted if they had been told the Truth") — Hobhouse LJ.

183. In my judgment the relevance of the question — what would you have done if you had been told the truth? — depends on the circumstances and on who is asking the question and for what purpose.

184. A claimant who gives credible evidence that, if he had been told the truth (there is no celebrity next door), he would not have entered into the contract is likely to establish that if the misrepresentation had not been made he would not have contracted and that it was thus an effective cause of his doing so, since such evidence is likely to establish both the importance to him of what he was told and its effect on his mind: see Assicurazioni; Dadourian Group International Inc v Simms [2006] EWHC 2973 (Ch), para 546; and Parabola Investments Ltd v Browallia CAL Ltd [2009] EWHC 901 (Comm), paras 104 to 107. In the latter case Flaux J observed that Hobhouse LJ's dictum in Downs v Chappell did not mean that if the claimant demonstrated that he would not have acted as he did if he had known the true position (namely that the profits were not as stated), he could not have relied on that as evidence of inducement. In Dadourian Warren J described such

> a question as "strictly irrelevant although it may be of some assistance in testing whether there was inducement or not".
>
> 185. Per contra, a claimant who says that even if he had been told the whole truth it would have made no difference to his readiness to enter into the contract will be likely to fail to establish that he was induced to enter into the contract by the misrepresentation in question. There is an inherent contradiction in someone saying that a representation was an inducing cause and accepting that, if the truth had been told, he would have contracted on the same terms anyway.
>
> 186. If, however, it is clear that, unless the representation had been made to him, the claimant would not have entered into the contract it is irrelevant to ask what would have happened if he had been told the truth. In those circumstances, the court will not speculate on what might have happened in that event: see Spencer Bower, op cit, para 122. In Downs v Chappell [1997] 1 WLR 426 the trial judge accepted Mr Downs' evidence that he would not have contracted to buy the business if he had not received verification of certain profit figures which were fraudulently misrepresented to him. This conclusion was not surprising since an earlier set of figures had shown insufficient profits to persuade him to buy. So inducement had been established. That being so, it was not then material to consider what he would have done if he had been given the true profit figures — a situation which had never arisen and to which he would not have given thought (except in the context of the subsequent litigation).
>
> 187. It is not, therefore, necessary for the representee to establish that he would have acted differently if he had known the truth. And it may not be sufficient either. If it were, a claimant who gave no thought to any representation, or did not understand it to have been made, might be entitled to recover."

416. Mr Lord submits that it is clear that PAG relied upon the LIBOR Representations. He says that Mr Wyse's evidence that he was induced to enter into the Swaps as a result of the LIBOR Representations was never challenged squarely in cross-examination and Mr Russell's evidence that if he had been informed of the true position he would have refused to enter into any financial product referenced to LIBOR was also unchallenged. He was asked however, what he would have done if nothing had been said at all about LIBOR to which the answer was that it was an impossible hypothetical question. Mr Lord submits that this underscores the unreality of asking what a representee would have done if no representation had been made in the context of an implied representation. Mr Handyside on the other hand places reliance upon the passage in Christopher Clarke J's judgment in the ***Raiffeisen*** case at [187].

Conclusion:

417. I agree with Mr Handyside that the evidence of Mr Wyse and Mr Russell in cross-examination does not support the contention that they entered into the Swaps in reliance upon the LIBOR Representations. Mr Russell accepted in evidence that at the relevant time he knew nothing of the BBA Definition or the way in which submissions were made by Panel Banks, whether RBS was a panel bank or how LIBOR was calculated and that it had never occurred to him that it was capable of manipulation. He was able to say however, that he had "complete trust and faith that RBS were setting correct and qualified rates . . ." In Mr Wyse's case, he could not recall any of the LIBOR Representations without seeing them and also accepted that it had not crossed his mind that submissions could be manipulated. He added in cross-examination that he knew that LIBOR was an average and that "the High Street banks" were involved in making submissions. He stated, however, that he had assumed that LIBOR was the true and correct rate.

418. Equally when asked about the email from Matthew Jones of 6 March 2008, and whether it said anything about LIBOR being a proxy for the cost of funds of LIBOR panel banks, Mr Russell said that he was not sure that he had seen the email at the time and that he did not understand the point. Mr Wyse said that it was something which never occurred to him and that he had no reason to believe that the rates quoted were other than genuine. Mr Russell also agreed that in the email Mr Jones was saying that LIBOR better reflected RBS's cost of funding than base rate and that if PAG's loans were kept on base rate, there would be additional costs for the bank related to its capital requirements and the bank would therefore have to increase the margin charged over base rate to reflect that.

419. It seems to me therefore, that there was no understanding of what are extremely complex and intricate pleaded representations meant and for the most part, the matters which were pleaded did not cross Mr Russell and Mr Wyse's minds. On that basis, in my judgment, they could not have understood the implied representations to have been made and therefore, did not rely upon them. In the circumstances, it is not necessary to consider whether it is appropriate to ask what they would have done if told the alleged truth as against if nothing had been said. It was accepted the form of the implied representations had been "borrowed" from the ***Graiseley*** case and it seems to me that the pleading was not led by the evidence. At best, it seems to me that both Mr Russell and Mr Wyse assumed that LIBOR, which they understood to be a commercial rate of interest, would be set in a straightforward and proper manner. In my judgment, therefore, they gave no thought to the LIBOR Representations in the form pleaded and did not rely upon them.

If they had been made, and were relied upon, were the representations false?

420. Despite what I have already decided, for the sake of completeness, I will go on to consider the considerable amount of evidence and submissions made in relation to the alleged falsity of the representations. RBS has admitted the content of the US Department of Justice Statement of Facts which involved admissions of trader manipulation of JPY and CHF LIBOR and that the LIBOR submitters in those currencies engaged in a deceptive course of conduct to gain advantage over counterparties by making false submissions in circumstances where they knew that counterparties who entered into transactions with RBS were unaware of the

manipulation. It accepts therefore, that if LIBOR Representations 1-4 were made, they were false. Depending upon its meaning, it also accepts that as a result of the effects of the Financial Crisis Dislocation, if made, LIBOR Representation 5 would also be false.

Relevance of US$ LIBOR?

421. However, it denies any wrongdoing in relation to GBP and US $ LIBOR and submits that in the light of its admissions, the only further conduct which is of any relevance relates to GBP LIBOR. This is because the Swaps themselves were referable to 3M GBP LIBOR and therefore conduct in relation to that currency is relevant for the purposes of determining whether there was a breach of any alleged implied term. PAG contends, however, that a reasonable counterparty would have "run a mile" if it had been told that RBS was manipulating LIBOR in any currency, that the LIBOR Representations are widely drawn and that US$ LIBOR is potentially relevant to whether the LIBOR Representations were made fraudulently.

422. Mr Handyside emphasises, however, that conduct in relation to US$ LIBOR takes the matter no further forward if it is necessary merely to show that had the RBS employee in question thought about it he would have assumed that a counterparty to RBS would also have assumed that LIBOR was not being manipulated. If, however, as RBS alleges it is necessary to prove that each individual knew that the LIBOR Representations were being made, it is submitted that the claim fails because Messrs Bescoby, Thomasson, Walker and Nygaard gave evidence that it never occurred to them that the LIBOR Representations were being made. Mr Handyside also adds that the "scale of falsity" is irrelevant, PAG's case being that any falsity in relation to any Representation in any currency would have meant that it would not have entered into any of the Swaps.

423. I agree with Mr Handyside that the scale of any falsity is irrelevant for the purposes of determining the necessary elements of this matter and that conduct in relation to US$ LIBOR is also irrelevant in relation to the falsity of the LIBOR Representations, (falsity having been admitted) and as to the breach of the alleged implied terms which relate to 3M GBP LIBOR. I also agree with Mr Handyside that it is irrelevant in relation to inducement, the admissions having been made. However, had the LIBOR Representations been made and relied upon, it seems to me that in principle, the position in relation to US$ LIBOR may have had relevance in relation to the knowledge of the relevant RBS employees and therefore as to whether the LIBOR Representations were made fraudulently. In the circumstances, I will turn to the requirements for the claim in deceit and the relevance of the US$ LIBOR under that heading and set out the matters relied upon for the sake of completeness.

General points

424. In any event, PAG concentrated upon what it described as a selection of the most notable examples of misconduct in relation to the setting of LIBOR which it grouped under three headings: trader manipulation; lowballing; and financial crisis manipulation. Although I have adopted those headings for the sake of order, I bear in mind that conduct should be looked at in the round. PAG also emphasised, that it cannot be assumed that it has been able to identify all of the occasions on which RBS engaged in misconduct in connection with its LIBOR submissions and that it was

more likely than not that they had not done so and that the instances identified were only illustrative examples of misconduct which it alleges was pervasive within RBS from at least 2006 onwards until about November 2011. In this regard, Mr Lord also draws attention to RBS's disclosure in relation to LIBOR which he says has been seriously deficient and can give the Court no confidence that it has seen all of the relevant adverse documents. In particular, he pointed to numerous transcripts of interviews with the FSA which were only disclosed after the close of evidence and to the data underpinning the RBS Master Curve which it was said could not be produced.

425. He also asks me to take into account that: Mr Thomasson and Mr Walker are likely to have avoided recorded means of communication when engaging in such misconduct or discussing it with others; the FSA found that, at least in relation to JPY and CHF LIBOR, derivatives traders frequently made inappropriate requests in-person as well as in writing; from about October 2006 until April 2008 money markets and derivatives traders were 'co-seated' enabling face to face requests to be made more easily and in his interview with the FSA Mr Davies accepted that this is what he did; RBS operated an open dealing room; as Mr Thomasson and Mr Walker were making inappropriate LIBOR submissions by reference to their own money market trading positions (as the FSA found that they did) as opposed to requests from derivatives traders, there would generally have been no need for them to have communicated with anyone at all; and that it is apparent from the tone and content of the exchanges identified that the traders in question viewed the manipulation of LIBOR and requests to do so as an unremarkable and familiar part of their daily routine.

426. Mr Handyside says that the disclosure has been voluminous, more than 84,000 LIBOR related documents having been disclosed, and that the failure to disclose transcripts of FSA interviews until a very late stage, was due to a mistake about control over documents not in RBS' immediate possession. He also submits that there is no scope for any adverse inference to be drawn. There was no destruction of documents, still less deliberately so and the outstanding transcripts were provided.

(a) *Trader Manipulation*

427. PAG alleges that from at least 2006 until about November 2011, RBS engaged in Trader Manipulation by which it means the making of LIBOR submissions which inappropriately took account of, and sought to benefit, transactions that had been entered into by RBS money market and derivatives traders. As I have already mentioned, the FSA have already found that RBS was engaged in such conduct in relation to JPY and CHF LIBOR. However, it is alleged that misconduct extended to and/or infected its GBP and USD LIBOR submissions.

428. Mr Lord submitted that the evidence of Mr Thomasson that he was unaware of any LIBOR related misconduct at RBS and that he never received any inappropriate requests in relation to setting GBP LIBOR submissions is entirely implausible. It is pointed out that Mr Thomasson: worked in an open plan dealing room, in which the FSA found in its Final Notice against Paul White (who dealt in JPY and CHF) of 8 April 2016 that such requests were "widespread", from October 2006 until April 2008; had been seated with GBP derivatives traders; had also sat in close proximity to individuals including Brent Davies who regularly discussed such manipulation; and his evidence in cross-examination that he would have daily discussions with

derivatives traders "in a general sense" including "the overall path of the published LIBOR rate." He added:

> "It was not unheard of for a trader to express an opinion or preference one way or another in relation to BBA LIBOR. Moreover, it was often evident from discussions with traders what their respective positions were ..."

429. RBS submits that such discussions were a legitimate part of Mr Thomasson's job from which nothing can be gleaned or implied. Mr Handyside also relies upon the paucity of evidence in relation to alleged GBP LIBOR manipulation despite the disclosure of tens of thousands of documents. He points out that if GBP LIBOR manipulation was widespread as PAG alleges, there is no documentary evidence of it. Mr Thomasson and Mr Walker's evidence was that the majority of communications were by recorded means and that there were staff based outside London. Furthermore, the change of seating applied to JPY and CHF as much as to GBP. Further, those who were involved with JPY and CHF misconduct were based in London and left documentary evidence of their wrongdoing. In addition, Mr Handyside points out that the intercom system was available to all and therefore, does not provide a solution for why there is such a disparity of documentary evidence in relation to GBP in comparison with JPY and CHF. He says therefore, that the only proper conclusion is that there is no documentary evidence because no improper manipulation occurred.

430. PAG also relies on three specific matters in relation to GBP LIBOR. The first is the digital calendar/diary entries made by Mr Thomasson which Mr Lord says are clear evidence of Mr Thomasson having engaged in Trader Manipulation in relation to GBP LIBOR. Mr Lord submits that it is obvious what the entries were about. They were to remind Mr Thomasson to make his GBP LIBOR submissions on particular days in a manner which took into account transactions that were due to fix or refix their interest rates on the days in question. It is also said that the submissions made on those dates were consistent with him having done so. Mr Lord says that Mr Thomasson's attempts to justify and explain the entries, which he says he cannot recollect, both in his witness statement and in cross-examination do not bear too much scrutiny. As to the suggestion that they were a reminder of a query about something in the market at the time, Mr Lord points out that there is no suggestion or evidence of what the query might have been. As to the suggestion that he might have been informed that RBS was expecting a large amount of money on a particular date, once again there is no evidence to support it. The suggestion in cross-examination that they might have been reminders for the purposes of setting the pricing curve is also said to be unlikely.

431. The second specific matter is the Bloomberg chat of Mr Thomasson's colleague Mr Foo and the third is the conduct of Mr Brent Davies. It is said that Mr Thomasson's evidence that Mr Foo had misunderstood the situation was unconvincing. Mr Lord stated that in Mr Brent Davies' evidence to the FSA given on 4 September 2012, the transcript of which was only disclosed on 8 August 2016 after the evidence had closed, he explained that the submitter had regularly taken into account the position of his own money markets transactions as well as those of other derivatives traders in the course of determining the GPB LIBOR submissions and went on specifically to identify Mr Thomasson. Once again it is said that Mr Thomasson's attempt to

discredit Mr Davies as a disaffected employee is unconvincing given that he accepted that he remained in touch with him after he left RBS.

432. Mr Lord also points out that RBS chose not to call either Mr Foo or Mr Davies as witnesses despite a compromise agreement containing a "co-operation clause" with Mr Davies. It is said that the inevitable inference is that neither Mr Foo nor Mr Davis would have supported Mr Thomasson's evidence. In addition, it is said that the distinction which Mr Thomasson sought to draw between express and implicit requests from derivative traders in his interview with the FSA was artificial.

433. In relation to the calendar entries, RBS submits that there is no evidence to connect them to taking account of inappropriate factors when making LIBOR submissions and that Mr Thomasson's emphatic denial that he took into account the positions of derivative traders when making submissions should be accepted. It was also made clear that the only pleaded allegation in this regard is concerned with whether the entries coincided with requests made by other derivative traders, rather than with Mr Thomasson's own money market book. RBS submits therefore, that there is no evidential basis upon which the court could properly conclude that these calendar entries are evidence of dishonest and fraudulent conduct on the part of Mr Thomasson and that there is no connection, as in the case of the FSA's findings against Barclays Bank plc in relation to calendar entries, of a request by a derivatives trader which matched the entry itself. Nor, as in the Barclays case, were the calendar entries timed for around 11am when LIBOR submissions were to be made. They were timed for 8.30 -9am and 9.30 to 10am. Mr Handyside also reminded me that it is surprising that it was suggested tangentially at least that Mr Thomasson might have sought dishonestly to make movements in the RBS LIBOR submissions which would not trigger the alarm referred to in Mr Ewan's email of 17 July 2009, when it was Mr Thomasson himself who had triggered the email correspondence because he was concerned about movements in submissions.

434. Reliance is also placed on Mr Osborne's evidence which was unchallenged either in cross-examination or by Dr Cartea who did not conduct an analysis in relation to the specific dates, that on both dates in relation to the relevant LIBOR tenors, RBS's submissions were well above its WAR (as calculated by Mr Osborne) and that its WAR fell by 4 basis points on 21 August 2009 and 7 basis points on 16 September that year.

435. In relation to Messrs Foo and Davies, RBS first puts emphasis on Mr Thomasson's explanation of his discussions with derivative traders about LIBOR and his denial that he ever received requests from traders to take their positions into account. He explained that the discussions were about the general market environment and the extent that they concerned individual positions or preferences, would relate to the path of BBA LIBOR over a period of time. It is submitted therefore, that employees who were very junior such as Mr Foo or who had limited experience on the money market side like Mr Davies might misunderstand. In its written closing, RBS also states that only a small passage from Mr Davies' transcript was put to Mr Thomasson in his FSA interview, and other passages are important in order to put those comments in context. In particular:

a) when Mr Davies was asked directly whether he was aware "of people other than the…sterling submitter, attempting to influence the LIBOR submission" he answered "no";

b) when he was asked whether he ever saw an occasion where the "traders proactively said, "These are my positions. These are my fixings. I think this should happen to LIBOR today"?", he said "It's not something I observed";

c) when asked whether he understood how the LIBOR rate was set and answered: "Specifically, I would say no. I ... from my time working on the sterling desk, the cash LIBOR setter would take into account what he'd learned from the market, I guess via brokers. He'd take into account his fixings both on and off balance sheet on the day. He would also take into account the positions of close-by colleagues on the swaps desk"; and

d) in addition he was asked: "Okay, let's start with your time at RBS. Were you aware of people other than the LIBOR submitters, the sterling submitter, attempting to influence the LIBOR submission?" and answered "No, not on the sterling side, no." The exchange went on: "Well would you consider the reporting of fixes and positions an attempt to influence the LIBOR submission?" and answered, "You know, to me it looked like this ... the policy was that the LIBOR setter was gleaning the overall position, so how he used that, I'm not so sure. Um. They were responding to his inquiry."

It is also said that Mr Davies' evidence was based upon assumption and in this regard reference was made to his answers to the FSA that it was his "guess" and "to me it looked like this" and his acceptance that LIBOR was not really part of his role.

US$ LIBOR

436. In this regard, I am reminded of the telephone call between Mr Walker and Mr Giardino on 16 August 2007 following which RBS made a 1m USD LIBOR submission that was two basis points lower than the rate that it had submitted on 16 August 2007 and seven basis points lower than the rate that it had submitted on 15 August 2007. On 20 August 2007, the date of its next submission, RBS's 1m USD LIBOR submission went back up by two basis points. RBS made the lowest submissions of any panel bank on 16 and 17 August 2007, before moving back up into the middle of the pack on 20 August 2007 which was referred to at [73] of the FSA Final Notice as an example of misconduct.

437. Secondly, I am reminded of the conversation between Mr Walker and Mr Robin Milne, a money markets broker from ICAP on 20 August 2007; the Brevan Howard conversations including Mr Nygaard's discussion with Jimmy Tan; the transcript of Mr Nygaard's interview with the FSA, in which he recognised that ". . . this looks really bad" and Mr Nygaard's "Go Neil" comment. Mr Lord also referred me to the exchange of emails between Mr Walker and Neil Smith, a derivatives trader based in RBS's office in Connecticut on 13 November 2007 and the mindalign conversation between Mr Walker and Simon Green, on 16 June 2008. Mr Lord says that Mr Walker's explanation in cross-examination that his answer was non-committal is not credible. Mr Lord submits, that the empirical data is consistent with Mr Walker having accommodated Mr Green's request by maintaining RBS's US$ LIBOR

submissions at an artificially high level before dropping them back down to a more realistic level the next day.

438. Next my attention is drawn to the email from Mr Smith to Mr Walker of 21 October 2008 which is admitted to have been an inappropriate request but denied that it was acceded to. It is submitted, nevertheless, that it was made because it was thought likely that Mr Walker would act on it. RBS has suggested that Mr Walker cannot have accommodated the request because "on 23 October 2008 Mr Walker moved his USD LIBOR submissions higher (i.e. the opposite of Mr Smith's request)." However, this was only the case in the longer tenors (i.e. 3m - 1yr). RBS's USD LIBOR submissions in the shorter tenors (i.e. 1m and 2m) were unchanged and, even on the calculations of RBS's own expert (as to which, see further below), RBS's 3m USD submission was around 25 basis points below the WAR of its costs of borrowing. PAG also relies upon the instant messenger conversation of 28 January 2010 between Mr Walker and Mr Green. Mr Lord submits that Mr Walker's explanation that he was merely trying to move the discussion on is unsustainable.

439. Lastly, reliance is placed upon the email exchange between Mr Walker and Mr Payseur on 8 and 9 March 2010. It is submitted that Mr Walker would not have suggested that it might be worth "sticking libors up" if he did not countenance the possibility that RBS had previously made LIBOR submissions according to its own self-interest or that it might do so again in the future and attention is drawn to the conclusion of the FSA in its Final Notice, that the exchange was an example of inappropriate submissions. PAG points out that Mr Thomasson also acted as a substitute submitter for US$ LIBOR when Mr Walker was away, that he was involved in misconduct in relation to US$ LIBOR and therefore, it was more likely that he was also involved in GBP LIBOR Trader Manipulation.

440. RBS denies any involvement by its employees in attempted or actual manipulation of the USD LIBOR save that it admits three improper requests made by two USD Traders, Mr Simon Green and Mr Neil Smith. However, it is denied that Mr Walker took them into account and Mr Walker's evidence that he did not do so was not challenged.

(b) *Lowballing*

441. It is also alleged that from around August 2007, RBS engaged in "lowballing" which is described as the making of LIBOR submissions which were lower than they should otherwise have been and/or lower relative to those of other panel banks in order to signal that the bank is stronger than it might otherwise appear.

442. The first occasion relied upon was Mr Walker's mindalign chat room discussion with Messrs Thomasson, Green, Smith and Payseur amongst others on 28 November 2007 during which Mr Walker stated that he was "fixing usd 2 3 months at 5.15 way above expectations . . ." PAG submits that the attempts of Mr Thomasson and Mr Walker to explain the remarks were hopeless. Mr Lord submits that Mr Walker was plainly referring to the rates at which RBS could borrow and not "the broader market outside of RBS's name at 5.20". Mr Walker also sought to suggest in his witness statement that his LIBOR submissions on 28 November 2007 could be supported by underlying trading data but it was not provided. In cross-examination, Mr Walker explained that

what he was describing was that the only trade by a lesser bank was at the level of 5.20 but that that was not the rate at which RBS was funding.

443. Mr Lord also relies upon the discussion between Mr Nygaard and Mr Walker and Mr Walker and Mr Cummins on 2 October 2008 in which the "gold medal spot' was discussed. Mr Nygaard when questioned about how there could have been scope for any "elasticity or flexibility" in terms of where RBS was setting its rates relative to those of other panel banks, he replied that "I believe you are kind of hitting the nail on the head there ..." and went on to acknowledge that the "bronze medal spot" exchanges could be "interpreted negatively" as evidence of Lowballing. Mr Lord reminds me that he also drew a comparison between those exchanges and the directives that had been given by Bob Diamond, the then CEO of Barclays Bank plc, which were found to have been lowballing by a panel bank. He also points out that Mr Cummins was questioned by the FSA at length about the "bronze medal spot" exchanges and that the transcript of that interview includes the following exchange:

> "REILLY: ... I just have one more question on this call. Urm, when Paul Walker says at that he is getting pressure to put them "up and up and up", at the time of this call would you consider it appropriate for Paul Walker to be getting pressured by anyone with respect to RBS' LIBOR submissions? [10 seconds of silence]
>
> CUMMINS: I don't think it would be appropriate for him to get pressured, but you are talking about a very difficult time for everyone, so I can understand why people would."

Mr Cummins sought to defend his conduct during his FSA interview by suggesting that he had merely been expressing an opinion to Mr Walker as opposed to giving him an instruction, but Mr Lord submits that as the FSA pointed out, this was unreal. Mr Cummins was and remains the Treasurer of the RBS Group and the discussion would have been understood as an implicit instruction about what Mr Walker should do.

444. Mr Lord also reminded me of an exchange on 21 November 2008, when Mr Walker sent an email to Mr Nygaard with the subject "Tale of the term" in which he explained that RBS had been unable to obtain USD funding in any tenor beyond 1m from any bank and that it had been turned down for funds in a variety of currencies and tenors by a number of different banks. Mr Nygaard then forwarded this on to Mr Cummins and Mr Nielsen under cover of a separate email in which he informed them that:

> "I would suggest that we continue to monitor this and keep the distribution to a minimum. I will include this in a separate note to the BoE tonight and cc you both.
>
> Our approach in the markets needs to be carefully orchestrated. I have asked Paul to begin moving our Libor settings higher - top quartile. . . ."

He says that the FSA clearly took the view that this was an example of misconduct and referred me to part of the transcript of Mr Nygaard's interview as follows:

> "MEANEY: ... it looks to be another example of you using LIBOR settings or LIBOR submissions as a tool to support another sort of strategy you're running within the bank, erm, which is inconsistent I guess with LIBOR -- the BBA LIBOR definition and submission process which should simply reflect what, you know, the rate at which on a particular day you can borrow money in the inter-bank market."

445. RBS submits that PAG's case on GBP Lowballing must fail where the pleaded communications were not put to any of Messrs Nygaard, Thomasson and Walker as evidence of Lowballing by RBS in GBP and it is said that there is no coherent case on how RBS is said to have "lowballed". Although PAG contends that the way in which RBS made its submissions was itself flawed, it is not suggested that the RBS LIBOR witnesses were acting dishonestly when following the submission process and this is fatal to the Lowballing claim. Furthermore, it was not put to Mr Thomasson that he had lowballed by manual manipulation of the submissions and PAG did not challenge his evidence that he did not carry out manual amendments often. In fact, his evidence was that it was carried out rarely. Mr Handyside submits therefore, that the Lowballing case relies solely upon the evidence of Dr Cartea whose evidence was put to the witnesses.

446. As to lowballing by the wholesale manipulation of RBS' entire pricing, which is the effect of Dr Cartea's hypothesis that submissions were substantially different from the correct rate, Mr Handyside submits that it makes no sense for a money market trader to manipulate the bank's entire pricing. In this regard, he referred me to a passage in the cross-examination of Mr Thomasson as follows:

> "…To come back to the concept of being 19 to 26 basis points away from the correct rate [i.e. Dr Cartea's hypothesis], I was funding the bank in the unsecured wholesale market. That was my role and that was my primary objective, particularly during this time. If RBS was submitting rates that were that far away from the market we wouldn't have been able to fund ourselves. And there's just no incentive for me to have been submitting RBS's LIBOR rates at levels that were anything other than where I would actually do the funding of that book. That was my primary objective."

447. Mr Handyside also draws attention to the fact that for the purposes of his calculations, contrary to PAG's case, Dr Cartea assumed that panel banks had to make submissions every day even if there was no interbank market and also included all borrowing transactions whether on the interbank market or not and including internal transactions, both of which PAG says are contrary to the BBA Definition.

(c) *Financial Crisis manipulation*

448. It is not in dispute that during the financial crisis, there were periods during which panel banks including RBS were unwilling to lend to each other, other than overnight. In fact, there was no dispute as to the effects of the financial crisis upon BBA LIBOR which were described by Mr Thomasson during his cross-examination. When faced

with the question of whether he knew that BBA LIBOR by the time the financial crisis came in August 2007, was not a faithful or accurate benchmark, he replied:

> "A: It was different in construction in terms of the distribution of panel banks was wider, the market was less liquid, there were less trades on which to base one's perception of their own borrowing costs, and reasonable market size has reduced.
>
> There were also dislocations in other markets that created a spectrum of different prices through FX arbitrage and the scarcity of USD in other markets, as in not in the US market, but in Asia and in London."

The dispute is in relation to how market conditions should have affected LIBOR submissions. On PAG's construction of the BBA Definition, if there were no offers in the interbank market because no banks were willing to lend to each other, there was no rational or reasonable basis upon which panel banks could make genuine or proper LIBOR submissions and in such circumstances, a panel bank: ought not to have made submissions; ought to have informed the BBA; and should not have made submissions giving the misleading impression that it could borrow funds. PAG describes "Financial Crisis Manipulation", as: "the making of LIBOR submissions when, as a result of the worldwide financial crisis and an increasing shortage of liquidity, RBS was either (i) unable to borrow funds at all on the interbank market or (ii) unable to borrow funds at the rate that it was submitting to the BBA".

449. Mr Handyside points out that this allegation turns upon a construction of the BBA Definition which he says is contrary to its proper interpretation in accordance with explicit guidance from the BBA. He submits that the BBA Definition and the BBA Guidelines at [1] expressly required panel banks to make submissions in each currency and tenor every working day and directed banks to use their judgment to supply a rate based on a range of permissible factors including activity in other markets, where there was no market offer in the interbank market. RBS submits that a lack of interbank trading made the LIBOR submitter's job more difficult, and required him to take greater account of a wide range of factors in the absence of interbank trading, but that provided he did so honestly and submitted his genuine view, that was what the BBA Definition required and was not dishonest, no matter how dislocated (or "broken") the market was.

450. Mr Handyside referred me to the BBA Guidelines and the BBA Terms of Reference which stated that "in the event that a given period has no market offer" a Panel Bank was "required to use its market knowledge to supply an appropriate rate that is, as far as is possible, a fair and accurate reflection of that bank's opinion of cost of funds". The full text of the Guidelines and the Terms of Reference are set out in the Annexe to this judgment.

451. Mr Handyside also submits that the lack of liquidity was very widely known and if PAG is right, every single Panel Bank was dishonestly submitting LIBOR and the BBA, the Bank of England, the FSA and others knew about it and tolerated the dishonesty and furthermore, when regulators have issued findings they have ignored this most widespread dishonest conduct. Mr Handyside also points out that in order to

succeed in fraudulent misrepresentation, PAG would have to show not only that its interpretation of the BBA Definition is correct but also that each of the individuals against whom the allegations are made knew that the BBA Definition should be interpreted in the way in which PAG alleges. Each of the relevant RBS witnesses stated that they did not understand the definition in that way, evidence which has not been challenged.

452. It is also submitted that LIBOR was only ever a proxy rate at times of high liquidity and ceased to be so during the financial crisis.

Conclusions:

(a) *Trader Manipulation*

453. It will be apparent from my conclusions about the BBA LIBOR Definition that I accept RBS' evidence that discussions with derivatives traders in a general sense was a legitimate tool for the LIBOR submitter. I also do not consider it appropriate to draw adverse inferences from the fact that the submitters were seated on the same trading floor with derivatives traders at the time and could contact those traders in numerous ways, including it would seem, by way of an unrecorded intercom. In this regard, I take account of the fact that although it is possible that improper communications were made in this way, it cannot be safe to assume it or draw some kind of adverse inference particularly in the light of the fact that despite the fact that the same means of communication was available to submitters and traders in other currencies, there is plenty of documentary evidence of their conduct. I also do not consider it appropriate to draw inferences from conduct in one currency in relation to what may have been conduct in another.

454. Had it been necessary to decide, what then of the evidence in relation to GBP LIBOR? First, as I have already mentioned, I accept Mr Thomasson's evidence that his discussions about LIBOR with the derivatives and money market traders were of a general nature in the sense of discussing likely rate moves and funding needs. As I have already stated, I also do not consider that the Bloomberg chat between two graduate trainees, Mr Foo and Ms Hong is evidence of trader manipulation by Mr Thomasson. Mr Foo's later conversation contradicts the first. Accordingly, I accept Mr Thomasson's explanation that Mr Foo was confused. To put the matter another way, it seems to me that Mr Foo's communications to the FSA, taken as a whole, is insufficient from which to conclude on the balance of probabilities that trader positions were taken into account in the GBP LIBOR submissions. I take this view despite Mr Foo not having been called as a witness. I do so in the light of the fact that there was no evidence before the court as to whether RBS could have called Mr Foo as a result of any continuing obligation in a severance agreement.

455. I also take the same view in relation to the evidence given by Mr Brent Davies to the FSA which was only disclosed after evidence had closed. It seems to me that when the extracts from the transcript of the interview by the FSA are taken in the round, Mr Davies' explanations were consistent with the general and legitimate assimilation of information which Mr Thomasson described. He stated that he had not seen people attempting to influence the GBP LIBOR submissions and had not observed traders proactively describing their fixings and seeking to influence LIBOR. Therefore, in my

judgment, Mr Davies' evidence does not support the conclusion that Mr Thomasson took account of traders' positions when setting LIBOR.

456. What of the diary/electronic calendar entries made by Mr Thomasson? Unlike the similar entries considered by the FSA in relation to misconduct by Barclays Bank plc, there is no evidence to connect them to requests made by traders to take their positions into account. This is particularly relevant in the light of the pleaded case, which is concerned with third party trader manipulation rather than an allegation that Mr Thomasson took account of his own money book when making GBP LIBOR submissions. It is also relevant to note Mr Osborne's unchallenged evidence that RBS' submissions were well above its WAR on the dates of the entries and fell on 21 August and 16 September 2009, the days on which the reminders were intended to take effect. In the absence of data to support them, I do not place great weight upon Mr Thomasson's possible explanations of the entries, which he says he cannot specifically recall, as being reminders of something specific in the market at the time. It seems to me that they were no more than speculation on his part. Having taken account of all the matters to which I have referred, including Mr Thomasson's refutation of wrongdoing, on the balance of probabilities, I am not satisfied that the entries are evidence of account having been taken of trader positions when making GBP LIBOR submissions.

457. In the light of my conclusion that it is insufficient in order to prove trader manipulation in GBP LIBOR to seek to rely upon an inference drawn from conduct in relation to CHF LIBOR or JPY LIBOR, or for that matter, US$ LIBOR, I will not set out my conclusions in relation to each of the alleged examples of improper conduct in relation to those currencies in detail here. However, I should add that I accept Mr Walker's explanation of his use of the phrase "to suit their books" in various communications. It seems to me that if that phrase was intended to refer to trader manipulation it would be reflected in a constantly changing LIBOR submissions, which it is accepted did not materialise. As to the conversations which occurred before the conference call with Brevan Howard, I take the same view as regards the US $ conduct. Even if the Brevan Howard conversations were sufficient evidence from which to decide on the balance of probabilities that improper manipulation had taken place in JPY LIBOR to the knowledge of Mr Nygaard, which I do not consider to be the case, it seems to me that it is not appropriate nor safe to conclude by way of inference on the balance of probabilities that Mr Nygaard engaged in or was aware of trader manipulation in relation to GBP LIBOR. However, if it were relevant I would have found that Nygaard's explanation of the "Go Neil" comment which related to JPY LIBOR, was most unconvincing and I would have been unable to accept it.

(b) Lowballing

458. As to lowballing, before turning to the factual evidence, I should say that despite their lengthy and detailed reports and the considerable amount of time spent in cross-examination, I found the expert evidence of little assistance. The experts had taken approaches which were substantially different and arrived at conclusions which diverged considerably. Through no fault of their own, they had also undertaken a relatively academic exercise in the light of the fact that they had to create their own data set to establish a WAR which in itself was an artificial concept. Furthermore, Dr Cartea's failure to take account of dealings prior to 11am on the same day as the transactions in question and to include both internal trades and trades from locations

other than London, seem to me to render his conclusions unreliable. In any event, I take account of the fact that he stated that he could not say that lowballing had taken place. I also take account of the effect on Dr Cartea's 80 negative variance days of removing trades with codes which had not been taken into account in reality. It left only 2 negative variance days which results in there being barely any days of what Dr Cartea described as "under reporting".

459. I am also unable to accept Mr Lord's gloss on Mr Osborne's evidence which he added in closing and illustrated by adding a line to one of Mr Osborne's graphs and which he submitted, would have led to Mr Osborne having found a significantly greater number of negative variance days. It is far from clear to me what the effect upon Mr Osborne's conclusions would necessarily have been if there had been an opportunity for a more careful analysis. The attempt to re-interpret his results by the overlay of a line on his graph does not seem to me necessarily to be sound. It is neither expert evidence which has been properly tested nor is it necessarily consistent with the exercise in which the experts were engaged. It seems that a bid rate was imposed on top of Mr Osborne's WAR calculation despite the fact that neither expert made an adjustment for bid or offer rates having merely processed data relating to transactions. In the circumstances, I am unable to draw any conclusions from Mr Lord's submission or his change to Mr Osborne's graph.

460. What of the factual evidence? I agree that the communications such as "bronze medal spot" appear on the face of them to reflect a flexibility in the minds of Messrs Cummins and Nielsen in relation to the setting of GBP LIBOR which had the potential were it carried through, to be inconsistent with the requirements of the BBA Definition. I also accept Mr Walker's explanation that the discussion was "all about funding". However, although that may well have been the case, it seems to me that the level of LIBOR submissions is intrinsically linked to funding and vice versa. In my judgment, the exchange is evidence only of discussion and opposing opinions amongst senior executives. It is far from a request and there is no evidence to suggest that it was acted upon. On the contrary, Mr Walker's recorded responses were to the effect that his LIBOR submissions were consistent with the business and that he applied the same 8 basis points spread as he had done before. It seems to me therefore, that at worst, the exchange evidences consideration of the possibility of what might have been low or highballing which was met by Mr Walker's explanation.

461. In this regard, I am also asked to draw an adverse inference from the fact that none of the RBS senior executives involved were called to give evidence. In a different context, I was referred to ***Wiszniewski v Central Manchester Health Authority*** to which I refer below. In the light of my conclusion that the exchanges reveal a flexibility of mind which might if implemented have led to high or lowballing, the evidence of senior executives would not have taken the matter further forward and as a result, I do not draw an adverse inference. However, I do consider that whilst the overriding objective would not have been served had all the Relevant Individuals been called to give evidence, it does not reflect well on RBS that Mr Cummins and Mr Nielsen (who was also involved in the discussion) were not called.

462. I also take account of the fact that it was not put to Mr Thomasson how it is alleged that he effected GBP lowballing. It was submitted that lowballing could have occurred in two different ways: first by following the standard process of basing the submission on the Standard Offer curve where to do so was to the submitter's

knowledge flawed or non-compliant with the BBA Definition; or secondly, by manual amendment of the LIBOR curve after it had been frozen. I agree with Mr Handyside that in the light of the fact that it is not alleged that RBS employees were dishonest in following its procedures in relation to LIBOR setting at the time, PAG's case rests on manual amendment and the evidence of Dr Cartea. It was not put to Mr Thomasson that he had "lowballed" and his evidence that manual amendment to the curve was rare was not challenged. Furthermore, I accept Mr Thomasson's evidence that it would make no sense to set RBS' LIBOR rates at levels which were other than in accordance with where he was actually funding his book because his primary objective was to fund the bank in the unsecured wholesale market and if it was submitting rates far away from the market, it would not have been able to fund itself. In this regard, I also accept Mr Walker's very similar evidence in relation to the allegation of US lowballing.

463. Accordingly, in the light of the factual evidence and the unreliable nature of Dr Cartea's expert evidence coupled, in any event, with the effect upon Dr Cartea's 80 negative variance days of removing irrelevant trades, in my judgment, the Lowballing case fails.

(c) Financial Crisis Manipulation

464. In my judgment, to the extent that the alleged LIBOR Misrepresentations are built on what has become known as Financial Crisis Manipulation, they must also fail for two reasons. First, on a proper construction of the BBA LIBOR Definition, viewed against the relevant factual matrix, in my judgment, it is not necessary for a Panel Bank to have been able to borrow money of the particular tenor and currency in order to make a submission at 11am on a particular day. Secondly, the evidence does not support the conclusion that each of the Relevant Individuals knew that the BBA Definition should be interpreted in the way in which PAG alleges. The evidence in relation to Messrs Thomasson, Walker and Nygaard is all in the other direction and it was never put to them that they knew that it was contrary to the BBA Definition to make submissions when there were no transactions.

465. As to the construction of the BBA Definition, it seems to me that the definition itself is based upon the hypothetical rather than the actual. To put it another way, it is not a purely transactional benchmark. It refers to the rate at which a Panel bank "could" borrow "were it do so". Such a conclusion is supported by the amplification of the definition found in the BBA Guidelines, albeit that they were produced in 2008, the first of which refers expressly to that bank's "perception of its cost of unsecured funds in the interbank market." The same phrases are used in the BBA Terms of Reference at paragraph 2 and the BBA Guidelines both of which were produced in 2009.

466. I also consider PAG's interpretation based upon the phrase "so far as is possible" in paragraph 2 of the BBA Guidelines to be misplaced. First, in this regard, it is important not to lose sight of the fact that it is necessary to construe the Definition itself in the light of the relevant context. Both the Guidelines and the Terms of Reference post-date the Definition and therefore, are not contemporaneous context for the purposes of construing the Definition itself. However, on the basis that it is not suggested that the Definition changed in any way, they are nevertheless, useful benchmarks against which to measure any construction placed upon the Definition. Secondly, and in any event, in my judgment, when the phrase "so far as is possible" in

paragraph 2 of the BBA Terms of Reference is construed in the context of the paragraph as a whole, it is obvious that it refers to the phrase "a fair and accurate reflection of that bank's opinion" as to the appropriate rate and not as to whether it is possible to submit a rate.

467. On a proper construction therefore, it seems to me to be clear that LIBOR is not a "transaction based" benchmark but requires professional judgment to be exercised in order to arrive at the perception of a particular bank's costs of unsecured funds. The bank is required to put forward its genuine assessment of the rate at which it could borrow. It requires a statement of professional judgment or opinion having taken account of all relevant factors including most recent trading. As the BBA Guidelines state expressly:

> "... the rates submitted into the process are a bank's own view of its cost of funds, based on the totality of the information available to a bank from both internal and external sources."

468. What is the position therefore, if there is no market at all? It appeared at one point as if PAG went as far as to contend that in such circumstances, during the financial crisis no submission should have been made and that all of the Panel banks together with the Bank of England and the relevant regulatory bodies (referred to as the Club of the Cognoscenti) connived together to manipulate rates. In my judgment, such a conclusion is not only highly unlikely but also is inconsistent with the BBA Definition itself, the way in which it was amplified to which I have referred and the Terms of Reference and Guidelines (neither of which are alleged to have changed the definition.) The Terms of Reference provide at paragraph 1 that the Panel Bank "must" make a submission each day in all currencies and tenors and at paragraph 2 addresses the situation in which the Panel Bank has no market offer. In such circumstances it states that it is "required to use its market knowledge to supply an appropriate rate that is, so far as is possible, a fair and accurate reflection of that bank's opinion of its cost of funds. . .".

469. I come to this conclusion despite the numerous discussions in evidence both between RBS employees and third parties to the effect that LIBOR was "broken." In my judgment, they amount to no more than an acknowledgement of the difficulty in forming a professional judgment for the purposes of LIBOR submissions in such an illiquid market. I agree with RBS therefore, that the phrase was shorthand for the state of affairs and had no further significance, in particular in the light of my decision as to the meaning of the BBA Definition. My conclusion is consistent with the description of the situation in the FSA Internal Audit Report:

> "One of the implications of tiering is that LIBOR fixings became a poorer predictor of the rate at which a particular bank might be able to borrow. For example, a less creditworthy bank might only be able to borrow at substantially above the LIBOR fixing, whilst a more creditworthy bank might be able to borrow at substantially below."

470. It is also consistent with Mr Thomasson's evidence in cross-examination in this regard which I accept:

> "Q: Now, Mr Thomasson, that is a pretty clear observation about what has happened to the London Interbank Offered Rate at this time, isn't it?"
>
> A: The observation would be that the LIBOR rate was an average of 16 banks with the upper and lower four taken out, in that panel of banks were some very highly rated banks. That was a benchmark rate. It was not a rate that was applicable to all people operating in the money markets, so cash would be trading higher than the BBA LIBOR fix, which was a rate available to the better-rated banks. A lot of other banks would have been trading at levels away from LIBOR.
>
> Q: He's describing isn't he, the concern that the LIBOR rate for USD and GBP was not reflecting where those currencies were actually trading in interbank trading; that is right, isn't it?
>
> A: Well, he's referring to the dislocation between the BBA average rate, which is a benchmark and where there was activity going on in the cash markets, not necessarily with panel banks from the BBA.
>
> Q: He's talking about where cash is trading in the interbank market, isn't he?
>
> A: Yes. I'm referring to the interbank market. It's a much broader market than the banks that were on the LIBOR panel."

471. Further, following this explanation, counsel for PAG put PAG's "LIBOR as a Proxy Rate" case to Mr Thomasson:

> "Q: He's not telling you that, actually, LIBOR has ceased to reflect the rate at which banks are lending to each other in the interbank market? That isn't how you interpret that; is that right?
>
> A: LIBOR has never been the rate at which all banks transact with each other in the interbank market.
>
> Q: Mr Thomasson, it was always designed to reflect, to be a proxy, wasn't it, for that rate? It was always designed to be an average reflecting the rate at which you could get money in the interbank market. That is what it was meant to be, wasn't it?
>
> A: We spoke about this earlier on and LIBOR, if we go back before the crisis, to 2005/2006, when the markets were much more active, the range of contributions was fairly narrow, so LIBOR at that point was a benchmark, but because of the nature of the submissions, all were fairly similar so the benchmark would roughly have represented where most people were submitting their own LIBOR rates.

> As we went into this more dislocated market, the individual submissions started to widen out… "

472. This was also clear from the following passages in Mr Thomasson's and Mr Walker's evidence. When asked to confirm that he understood the London interbank market to be broken in December 2007 the exchange between Mr Thomasson and counsel was as follows:

> "A: "Broken" being perhaps a term I had taken I think from other commentary that had been in the press, but it wasn't operating in the way that it had previously operated in terms of its liquidity. It didn't mean it wasn't operating at all.
>
> Q: "Broken" is something stronger than that, isn't it? "Broken" implies that the interbank market has broken down completely, just not functioning; that is right, isn't it?
>
> A: No, I think you are adding words, saying broken down completely. I'm saying it's broken; it's not as efficient as it was.
>
> Q: That means that it's not actually generating the benchmark that it was meant to generate; that is right, isn't it?
>
> A: No, it was still generating the same benchmark made up in the same way. It was just more difficult to do it in the difficult market we were operating in."

Later, he was asked whether LIBOR had become meaningless as a benchmark and answered:

> "A: Not in its actual purpose as the benchmark of this panel of banks, but in some of the comparisons to where individual banks could fund themselves it was less meaning in that respect.
>
> Q: It was more than that. It had ceased to be a reliable barometer of the rate at which banks were lending to each other on the London interbank market?
>
> A: It was a case of banks trading both above and below what was an average benchmark rate, so it was still effectively that average rate, just that there was a much broader range of contributions to it."

It was also suggested that Mr Thomasson was aware from the start of the financial crisis in August 2007 that the BBA LIBOR rates had ceased to reflect the average

market offers to panel banks for funds and that it had ceased to reflect what it was meant to under its definition. He replied:

> "A: No, I don't agree. The BBA LIBOR rate as is set out is a benchmark of those panel banks who contribute to it. So it did reflect what it was supposed to reflect."

473. Mr Walker's evidence was to the same effect:

> "It was broken in respect that in 2005 it reflected all 16 banks within a basis point. In the crisis, the spread – the peak of the crisis, that spread between the contributing banks was 150 points for purely technical reasons. So BBA LIBOR as a benchmark for all those banks. It didn't tell you that, it didn't tell you that the 16 banks have actually 150 basis points between them. So it's broken trying to benchmark yourself against the BBA. You might be a long way below it or you might be a long way above it, so that's the reason it was broken. It still formulated the same way and still gave you the right rate. It just got to it with a lot wider input than it had ever before."

474. To the extent that PAG continued to run a subsidiary Financial Crisis Manipulation case to the effect that even if a panel bank was obliged to make a submission when it was unable to borrow at all in the interbank market it was nevertheless obliged not to make submissions at a "relatively low rate" or "at such a low rate that its LIBOR submission could not reasonably or rationally be said to give any fair or accurate indication of the true cost to the panel bank of the relevant funds on the interbank market", I must also address it. First, it seems to me that this aspect of the case is in such vague terms that it is all but meaningless. Even if that were not the case, it suffers from a fatal flaw. It seems to me that it is based upon the premise that LIBOR submissions are transaction based, a premise which I have already rejected.

475. I should add that a great deal of time was spent in cross-examination and has been spent in written submissions on whether the way in which LIBOR submissions were made was correct in the sense of whether it was consistent with the requirements of the BBA Definition. However, it was clarified in oral submissions during the trial that it was not suggested that the matter went to any claims in fraudulent misrepresentation nor was it pleaded in that way. In the circumstances, I made clear that the line of questioning was a matter of context only. In the circumstances, it is not necessary to conduct a detailed analysis of that evidence.

If the representations were made, were relied upon and were false, were they made fraudulently?

476. Despite having decided that the LIBOR Representations are not to be implied, for the sake of completeness I will consider whether there would have been evidence that they were made fraudulently. It is not in dispute that in order to prove fraud, in respect of each Relevant Individual PAG must establish: he knew that the LIBOR Representations were being made; he knew that the LIBOR Representations were being understood in the sense alleged, and thereby relied upon, by PAG; that it was

intended that the LIBOR Representations be understood in that sense; and that he knew that the LIBOR Representations were false: ***CRSM v Barclays*** at [221].

477. The authorities are clear, therefore, that it is necessary to establish that the representor appreciated that he was making the representation and that it bore the implications which are alleged and knew that the representations were false or were reckless as to it. PAG submits that the position is straightforward: RBS senior executives knew that RBS was proposing to customers that they enter into derivatives contracts referenced to LIBOR and knew that the LIBOR Representations were false.

478. In this regard, Mr Lord submits that the decision not to call the majority of the Relevant Individuals was indefensible. He drew particular attention to an internal email from Mr Cameron dated 30 April 2008 to other senior executives (such as Mr Cummins, Mr Whittaker, Mr Nielsen, Mr Niblock and Fred Goodwin) which he described as a good example. In it, Mr Cameron explained that he had recently attended a "CEOs Meeting" at the Bank of England on 25 April 2008 at which the Bank of England had informed the attendees at the meeting that it "wanted Banks to play $ libor very "straight". He also draws attention to the fact that although the email was forwarded to Messrs Thomasson and Nygaard by Mr Nielsen who stated: "FYI – Best not to forward this on ... just verbally update the troops please if you feel the info is useful," Mr Nielsen was not called to give evidence and Mr Nygaard was left to speculate on what it might have meant.

479. Mr Lord asks me to draw the inference that US$ LIBOR had not been 'played straight' in the past whether by way of lowballing or trader manipulation, particularly in the light of the fact that Mr Cameron was not called as a witness and relies upon ***Wiszniewski v Central Manchester Health Authority*** [1998] PIQR 324 per Brooke LJ at 340:

> "(1) In certain circumstances a court may be entitled to draw adverse inferences from the absence or silence of a witness who might be expected to have material evidence to give on an issue in an action.
>
> (2) If a court is willing to draw such inferences, they may go to strengthen the evidence adduced on that issue by the other party or to weaken the evidence, if any, adduced by the party who might reasonably have been expected to call the witness.
>
> (3) There must, however, have been some evidence, however weak, adduced by the former on the matter in question before the court is entitled to draw the desired inference: in other words, there must be a case to answer on that issue.
>
> (4) If the reason for the witness's absence or silence satisfies the court, then no such adverse inference may be drawn. If, on the other hand, there is some credible explanation given, even if it is not wholly satisfactory, the potentially detrimental effect of his/her absence or silence may be reduced or nullified."

480. Mr Lord submits that PAG has established an ample prima facie case of fraud against the eight absent Relevant Individuals; there are documents which strongly suggest that many of them were aware that RBS or other panel banks were engaging in Trader Manipulation or Lowballing and that all of them were aware of Financial Crisis Manipulation; there is no good reason for the failure to call them, Messrs Cummins and Nielsen at least being current employees and therefore, the inferences should be drawn.

481. Further as to knowledge, Mr Lord submits that Mr Thomasson knew that each of the LIBOR Representations was false as a result of his own involvement in GBP and USD Trader Manipulation, Financial Crisis Manipulation and his awareness of the misconduct on the part of other panel banks; Mr Walker knew that each of the LIBOR Representations was false as a result of his own involvement in USD Trader Manipulation, Lowballing and Financial Crisis Manipulation as well as his awareness of misconduct on the part of other panel banks; and Mr Nygaard knew that each of the LIBOR Representations was false as a result of his own complicity in JPY and USD Trader Manipulation, Lowballing and Financial Crisis Manipulation as well as his awareness of misconduct on the part of other panel banks.

482. For the purposes of a claim in deceit it is also necessary to prove that a misrepresentation was made with the intention that it should be relied upon. Christopher Clarke J (as he then was) explained the requirement where the representation is implied in ***Raiffeisen***(at [222] as follows:

> "The rule is less easy to apply in respect of implied rather than express statements because the representor may not appreciate what a court later holds to be the implications of what he said. Nevertheless if he intended what he said to be relied on by the representee in deciding whether to contract he must be taken to have intended that the representee should rely on the objective meaning of what he said."

Mr Lord submits that it is clear the Relevant Individuals intended PAG and others to rely upon the LIBOR Representations and Messrs Thomasson, Walker and Nygaard accepted that it would have been assumed by a counterparty that the LIBOR Representations were being made.

483. However, Mr Handyside submits that the cross-examination of each of Messrs Thomasson, Nygaard and Walker missed the point. In cross-examination, each of the witnesses was asked whether, for example, it was right that a counterparty would assume that LIBOR was what the BBA says it should be. None of the alleged LIBOR Representations were put to the witnesses in the terms pleaded as is required: see ***Raiffeisen*** at [339]. Furthermore, the alleged express LIBOR Representation 5 was not put to any of the witnesses. Nor was it put to any of the witnesses that they intended that counterparties would rely on what was allegedly being represented to them.

484. He also submits that it is clear from the ***Wiszniewski*** case that adverse inferences can only be drawn if the witness has material evidence on an issue and there must be a case to answer on the evidence adduced and that the effect of the inference is to strengthen the evidence given. He submits that there is no allegation that any of the

Relevant Individuals was aware of the misconduct that RBS has admitted took place in relation to JPY and CHF LIBOR, there is also no allegation that any of those individuals (save for Mr Walker, who was called to give evidence) was aware of the three improper requests that RBS admits were made in relation to USD LIBOR, PAG's allegations of fraud against the "senior executives" are confined to what is properly to be regarded as Financial Crisis Dislocation; RBS does not dispute that senior RBS individuals knew at the time of the Financial Crisis that there was a liquidity crisis in the money markets, and that that market stress was having knock-on effects on LIBOR; this knowledge was not only known to personnel at RBS: it was also known to every participant in the money markets (every bank, broker and building society); it was also known to the Bank of England, the US Federal Reserve (and other central banks); and it was also known to the FSA and other regulators; the issue is not whether RBS (including at senior levels) knew about Financial Crisis Dislocation which is admitted. It is about the significance of that knowledge, and in particular whether it amounts to knowledge that LIBOR was being manipulated. The answer to that issue depends upon the meaning of the BBA Definition. Lastly, Mr Thomasson was called and it all turns on the state of his knowledge.

Conclusion:

485. First, I agree with Mr Handyside that it was not established in cross-examination that Messrs Nygaard, Thomasson and Walker intended PAG to rely upon the alleged LIBOR Representations. They were only asked to accept that a counterparty would assume the LIBOR Representations were being made which is insufficient for the purposes of a claim in fraud or deceit. Further, although I accept Mr Handyside's submission that it is not disputed that senior executives at RBS including Mr Cummins, Mr Nielsen and Mr Cameron were aware of the effects of financial crisis dislocation, as I have already mentioned, it seems to me that the failure to call any of them in addition to Messrs Walker and Nygaard to explain the "gold medal spot" and "play it straight" conversations is surprising. In the circumstances of this case, however, it seems to me that it is not possible to apply the formula described by Brooke LJ in the ***Wiszniewski*** case directly. In my judgment, neither email was direct evidence of lowballing or trader manipulation and I have decided that the financial crisis manipulation case is based upon a false construction of the BBA Definition. In the circumstances, therefore, although as I have already mentioned, the failure of Messrs Cameron and Nielsen to give evidence reflects no credit on RBS, I do not consider that the circumstances fall within the formula described by Brooke LJ and in any event, in all the circumstances, I would not have considered it appropriate to draw adverse inferences.

486. In the light of my conclusion in relation to Messrs Walker, Nygaard and Thomasson and the fact that there is no evidence to connect the remaining senior executives to knowledge of alleged trader manipulation in relation to US$ LIBOR, or to establish that they knew that the specific LIBOR Representations were allegedly being made, it is not necessary or appropriate to set out my conclusions in relation to the numerous alleged instances of US $ LIBOR trader manipulation which are relied upon. Had I done so, I would have concluded that it was clear that Mr Walker was aware of three improper requests but there was no evidence that he acted upon them. In any event, it is sufficient to add that for the reasons already mentioned, it seems to me that the claim in fraud fails.

Negligent Misrepresentation

487. In the alternative, it is pleaded that the LIBOR Representations were made negligently in breach of a common law duty of care and/or section 2(1) Misrepresentation Act 1967. It is said that through the Relevant Individuals RBS: knew or ought reasonably to have known that the LIBOR Representations were being made to counterparties like PAG; and failed to exercise reasonable care to ensure that they were true and/or had no reasonable grounds to believe that they were true. It is said that this is evident from the fact that RBS (acting through the Relevant Individuals): (i) failed to investigate and took no steps to ascertain whether the LIBOR Representations were true or false; (ii) knew or ought reasonably to have known that the LIBOR Representations were untrue or that they were likely to have been untrue as a result of their own misconduct in connection with LIBOR or through their awareness of the misconduct of other RBS employees or those of other panel banks; and (iii) in the case of the more senior executives identified in the RRAPoC who exercised supervisory responsibilities in relation to RBS's money market traders and LIBOR submitters, failed to identify that RBS had no policies, systems or controls which would have prevented misconduct in connection with LIBOR and/or failed to take any steps to implement such policies prior to execution of each of the Swaps.

488. In fact, as Mr Handyside points out point (iii) is not part of PAG's pleaded case and therefore, is not open to it. As to (i) and (ii), on the basis of the conclusion which I have reached, there is no scope for a claim in negligence.

Was LIBOR Implied Term 1 breached?

489. It will be apparent from everything which has gone before that I have found that the LIBOR Implied Term 1 which related to 3m GBP LIBOR and the conduct or RBS was not breached by RBS.

Relief/Loss

Rescission – acquiescence?

490. In the circumstances, no questions of relief or loss arise. However, as with every other aspect of the complex case, it seems to me that it is important to set out the evidence and what would have been my conclusions. First, PAG seeks rescission of the Swaps and restitution of all net sums paid under them amounting to approximately £13.18m. It is common ground that this figure is made up of £4,919,370.67 being the net sums paid under the Swaps and £8,261,000 being the sums paid upon termination of the Swaps. In addition it seeks damages totalling approximately £19.5m in respect of consequential losses.

491. Before turning to the evidence in relation to both the sums paid under the Swaps and the consequential losses, I should mention that RBS advances two initial objections to rescission/restitution. First, it is alleged that PAG affirmed the Swaps by acquiescence in late 2010-11 and therefore, although rescission is available in principle for misrepresentation whether fraudulent, negligent or innocent, it was lost. It is common ground that in order for there to be acquiescence, that a representee must expressly declare his intention to proceed with the contract or do some act inconsistent with the intention to rescind. It is also common ground that in order to be bound, at the time of

the declaration or conduct, the representee must have knowledge not only of the fact of the representation but also knowledge of the right to rescind itself: ***Sharpley v Louth and East Coast Railway Co*** (1876) 2 Ch D 663 and ***Peyman v Lanjami*** [1985] Ch 457.

492. RBS contends that PAG had knowledge of the falsity of the alleged representation and their alleged right to rescind by at the latest, 15 September 2010 but continued to make payments under the Swaps and agreed to close them out on 7 June 2011 as part of the entry into the 2011 Facility. It is said that PAG was, no doubt, biding its time and had there been a surge in interest rates prior to June 2011, would have chosen to keep the Swaps alive. In relation to knowledge, RBS relies upon: Mr Russell's acceptance in cross-examination that by January 2010, he had already started consulting lawyers about the situation; his evidence that by March 2010 he had been to see counsel; the reference in Mr Priest's email to a Robert Palache of 15 September 2010 in which he states that much of the day had been spent with counsel; the fact that by October 2010, Mr Russell had written to George Osborne MP setting out PAG's complaints about RBS in broad terms; on 7 December 2010 Mr Priest informed RBS that PAG had received legal advice on the hedging arrangements; and in January 2011, confirmed that it had "consulted counsel in Manchester and in leading chambers in London". RBS submits therefore, that PAG was aware of the facts giving rise to its current claims and of its alleged right to rescind by September 2010 at the latest.

493. Mr Lord submits that that argument fails because RBS cannot show that PAG was aware of its right to rescind at the time and in any event, failed (quite properly) to put the point to PAG's witnesses. In any event, he says that it is hard to see how breaking the Swaps could represent an unequivocal statement of PAG's intention to continue them. Furthermore, he says that describing breaking the Swaps as an unequivocal statement of PAG's intention to proceed with them is novel and that making payments under them cannot be an unequivocal statement.

Conclusion:

494. Had it been relevant, I would have agreed with Mr Lord that RBS' acquiescence argument is hopeless. There is no evidence that PAG was aware of its right to rescind, as opposed to having received advice and ventilated its complaints when it continued to make payments under the Swaps in late 2010 and then broke them in 2011. Furthermore, as Mr Lord points out it is very difficult to conclude that the act of breaking the Swaps should be construed as affirming them.

Exercise of Discretion

495. Further, I am reminded that even if the Swaps were not affirmed, save in cases of fraudulent misrepresentation, the court has the discretion not to allow rescission, and I was referred in particular, to section 2(2) Misrepresentation Act 1967. If PAG fails in its claim in fraud, RBS submits that it would be equitable to award damages rather than rescission and in this regard, it is submitted that: rescission is a blunt instrument which would fail to take into account the costs which PAG would have incurred were it to have entered into other purportedly more appropriate hedging instruments; and that it chose not to rescind when it had sufficient knowledge to do so. Secondly, RBS submits that PAG would have entered into the Swaps in any event. This too was not

put to PAG's witnesses and therefore, Mr Lord says that it cannot be relied upon by RBS. In this regard, I agree.

496. Had this issue arisen, I would have decided that it was not appropriate to exercise the Court's discretion in order to rescind the Swaps. As Mr Handyside points out, such a remedy would fail to take into account the costs which would have been incurred had PAG entered into other swaps which were considered more appropriate.

Sums allegedly paid under the Swaps

497. PAG claims a total of £13.18m in relation to the Swaps, made up of £4.919m payments under the Swaps themselves and £8.261m in respect of break costs paid to terminate the contracts. As I understand it, these figures are not in dispute. In this regard, it seems to me that it would also have been necessary to have given credit for the sums which would have been paid by PAG in relation to other interest rate products.

Alleged consequential losses

498. As to consequential loss, PAG relies upon what are said to be three missed opportunities to invest and two forced sales of assets which but for the funding constraints allegedly created by the Swaps, PAG would otherwise have continued to hold. The total amount claimed under this head was lost, it is said, as a result of the inability to invest arising out of the Swaps and the need to maintain PAG's cash reserves in the light of its treatment in GRG. A further sum of £0.915m of miscellaneous charges resulting from alleged additional interest and bank charges under the Swaps and PAG's treatment in GRG is also claimed.

499. Before turning to the specific transactions, Mr Lord submits that PAG is entitled to have any reasonable doubt resolved in its favour: ***Armory v Delamirie*** (1722) 1 Str. 505. He also points out that it may not be possible to provide an exact calculation for the consequential loss. He relies in this regard upon the passage in the judgment of Toulson LJ as he then was in ***Parabola Investments Ltd v Browallia Cal Ltd*** [2009] 2 All E.R. (Comm) 589, at [22]:

> "Some claims for consequential loss are capable of being established with precision (for example, expenses incurred prior to the date of trial). Other forms of consequential loss are not capable of similarly precise calculation because they involve the attempted measurement of things which would or might have happened (or might not have happened) but for the defendant's wrongful conduct, as distinct from things which have happened. In such a situation the law does not require a claimant to perform the impossible, nor does it apply the balance of probability test to the measurement of the loss.''

500. He also submits that all of the claims arise outside the terms of the exclusion clauses found in the pre and post-MiFID Terms of Business. Clause 12.5 of the pre-MiFID version provided that except to the extent that the same resulted from RBS's gross negligence, wilful default or fraud, RBS would not be liable for:

i) "any loss of opportunity whereby the value of Investments purchased, held or sold might have been increased; or

ii) loss ... resulting from any act or omission made under or in relation to or in connection with the Terms of Business or services provided hereunder or as contemplated herein; or

iii) acting or omitting to act as provided or contemplated herein; or

iv) any decline in the value of Investments purchased or held by us on your behalf . . . ; or

v) any errors of fact or judgment . . . ."

The MiFID Terms of Business provided (inter alia) by clause 21 that (save that nothing in the Terms of Business would exclude or restrict liability under the FSA rules) except to the extent that the same resulted from RBS's gross negligence, wilful default or fraud, RBS:

> "shall not be liable for any loss resulting from any act or omission made under or in relation to or in connection with these Terms or the solvency, acts or omissions of any third party with whom we deal or transact business or who is appointed by us in good faith. . . ."

501. In my judgment, the loss which PAG seeks to recover falls outside the terms of the exclusion clauses. It would all have fallen within the carve out for "fraud, wilful default or gross negligence".

Consequential loss- missed opportunities

502. The "missed opportunities" for which PAG claims are: the Towers Business Park: £6.10m; Royal Mail Sorting Office, Stockport: £3.02m; and Yotel Hotel, Manchester: £1.26m. A claim in relation to a site referred to as the Premier Inn is not pursued. The divestment of assets described as "forced sales" in respect of which PAG also claims are Russells: £3.97m; and Dumers Lane: £3.00m.

503. With regard to the alleged consequential loss, Mr Geoff Mesher, a partner in Tempest Forensic Accounting UK LLP gave evidence on behalf of PAG and Mr David Lawler FICA, a member of the Academy of Experts, a certified Fraud Examiner, the Managing Director of the London Forensic Investigations group of Navigant an international firm of forensic accountants and consultants, gave evidence on behalf of RBS. Mr David Roper BSc FRICS and a Registered Valuer gave expert evidence as to property valuation on behalf of PAG and Mr Graham Coulter BSc FRICS did so on behalf of RBS.

504. Messrs Mesher and Lawler agreed that the summaries that they had produced were all reasonable summaries of PAG's income statements and balance sheets. They also agreed that it was very difficult to assess whether, and to what extent, PAG would have been able to fund projects based on the information in the financial statements, particularly when trying to consider multiple overlapping projects.

Towers Business Park

505. The first alleged missed opportunity related to the Towers Business Park in Didsbury. It arose from a joint venture between PAG and Moorfields in 2009 under which it was agreed to look for and co-invest in commercial real estate developments. The Heads of Terms provided that a separate special purpose vehicle would be created for each project and that PAG would participate itself, through a subsidiary or a company controlled by Mr Russell. In August 2011, an exclusive right to purchase the site in order to redevelop and sell it, was acquired. The total cost was estimated to be £49.6m of which equity would need to be £26.1m. Under the proposed joint venture, it was necessary to provide at least £2.61m being 10% of the equity capital but there was an option to provide 25% being £6.525m. In fact, the entire equity amount was put forward by Moorfield. However, PAG Ventures Ltd entered into an asset and property management agreement with Moorfield under which it was entitled to a management and a success fee on the development of the project. As a result, in December 2014, PAG Ventures Ltd received £0.529 million by way of management fee and £1.791 million by way of success fee.

506. The experts agreed that PAG made a profit on this project of £2.32m. In his report, Mr Mesher gave two figures for loss arising from this project being £3.97m and £6.1m respectively depending upon the equity contribution. It is submitted that but for the Swaps, PAG would have been able to afford the 25% stake and therefore, the loss suffered is the greater figure. Mr Mesher took the actual sale proceeds and assessed the return if the investment had been made, plus a £0.519m management fee, an approach which is not challenged by Mr Lawler. Mr Mesher accepted in the experts' joint statement that PAG may have been able to make funds available to invest in the project even with the Swaps in place, if the project had been carried out in isolation.

507. RBS submits that the claim fails for four reasons, the first of which being that the project was pursued by PAG Ventures Ltd. It is common ground that PAG Ventures is 70% owned by members of Mr Russell's family and has no connection with PAG other than the fact that it was for practical purposes under the control of Mr Russell. Mr Wyse explained in cross-examination that PAG Ventures had been set up on the advice of PAG's accountants and that it was the trading arm of the business, PAG being the property investment business. It is submitted that PAG Ventures only became involved when the deal changed and it became necessary to take a management role more suited to a trading company. Had the original equity investment taken place it would have been undertaken by PAG.

508. Secondly, it said that PAG Ventures made a profit on the deal which would not have been made if PAG had invested and therefore, PAG cannot maintain that the project was a proposed investment for PAG and on the other hand refuse to give credit for the profit made. Mr Lord's response is that no credit needs to be given because PAG Ventures is indeed a separate company.

509. Thirdly, RBS submits that the failure to invest was not caused by the Swaps because PAG could have afforded to invest in any event. When asked in cross-examination why when PAG had £3.138m in cash reserves on 30 June 2011 and £2.727m in 2012 it had not completed the investment, Mr Wyse stated that it would have drained the company of its cash resources. Mr Lord submits that in any event, such a suggestion is absurd because it would have left PAG with only £90,000 odd cash reserves.

510. The fourth reason for the failure to invest is said to be that PAG was in the middle of a capital raising exercise which turned out to be unsuccessful. In a draft email sent by Mr Priest to Mr Wyse on 19 September 2011, he stated:

> "We are not in a position to invest cash equity up front in the Towers as you acknowledge; we are working on capital raising to enable us to co-invest with Moorfield in future transactions."

In this regard, PAG submits that the email is consistent with its case and not contrary to it. The proposition was roundly denied by Mr Wyse in cross-examination and he explained that PAG had been exploring raising capital for a number of years.

Royal Mail

511. The second lost opportunity is said to have occurred in relation to the substantial site at Royal Mail Sorting Office which was intended to be redeveloped into a supermarket, call centre, gym and office space. PAG's offer for the site was accepted at £1.75m in April 2010, and Mr Wyse explained that it was intended to develop it and keep it as an investment. Total development costs were estimated at £7.85m. Barclays Bank agreed to provide indicative finance on the basis that it was 100% let or £4.3m on the basis that it was 50% let. In fact, it was not possible to pre-let the entire building although heads of terms had been agreed with two tenants and negotiations were in train with two more. Mr Wyse accepted that there was a £3.5m shortfall in funding. PAG was not able to make good the shortfall and withdrew from the project. It was Mr Mesher's view that PAG had suffered a £3.02m loss based on its own contemporaneous project proposals. The experts also agreed that funding of £2.7m would have been required by PAG if the project was not fully pre-let.

512. RBS submits that it is not credible that PAG would have proceeded with the project but for the Swaps for three main reasons. The first is that it was inconsistent with PAG's business model of concentrating on pre-let and pre-funded development opportunities and therefore, PAG would not have invested in the Royal Mail site without it being fully pre-let. Reliance was placed on a presentation for potential investors produced in late 2010 in which reference is made to PAG having "restarted development activity, but only where the property is at a minimum substantially pre-let." Mr Handyside reminds me that Mr Wyse accepted in cross-examination that "we would have preferred pre-lets." He went on to add that "we may well have started it if it was substantially pre-let." The second alleged reason which is linked to the first, is that it was Mr Coulter's evidence that no prudent developer would have proceeded with the project with only two floors pre-let, especially as in this case, if they were the middle two floors.

513. Secondly, RBS contends that the potential profit was too low for the risk which the project entailed. Mr Coulter calculated the potential profit at £643,000 which Mr Wyse accepted would probably not be enough to warrant the investment. PAG's own estimate of rent and yield percentage had revealed a greater figure. However, there was no expert evidence in support. In fact, the differences in the figures are not that great. In relation to the supermarket, Mr Coulter took a rental figure of £55,000 instead of the £80,000 per annum figure which was being used in discussions with Tesco and Sainsburys which he viewed as mere discussions. In relation to the gym space, the real difference was as to yield. PAG used 7.55% and Mr Coulter 8%.

However, none of Mr Coulter's comparables resulted in a percentage as high as 8% and he accepted that each of them were in very different locations. Further the national average yield at the time was 7.6%. Mr Coulter suggested in cross-examination that the Stockport economy was weaker and therefore the higher yield percentage was justified. As to the call centre, Mr Coulter had adopted a lower rent per annum than PAG but accepted that he had not taken into consideration the fact that it was intended to provide a car park on the site. He also adopted a higher yield percentage and gave as his comparable a smaller property in Nottingham. In cross-examination he said that it was too crude an indicator purely to rely upon the size of property and that the kind of rent which was being suggested was very substantial for space in Stockport. Lastly, in relation to the office space, there was disagreement both in relation to rental value and yield, the former being explained in part by Mr Coulter having taken a smaller square footage into account. PAG factored in a greater area on the basis that it intended to extend the floor in question. In relation to the yield, Mr Coulter stated that he had taken into account the location and the mixture of tenants in the building.

514. Finally, RBS submits that the inability to invest was not caused by the Swaps. However, it was Mr Mesher's view that PAG would have been able to fund the project (in isolation), if it had not entered into the Swaps and Mr Lawler agreed with him. However, it was Mr Lawler's evidence that it would have been "more challenging" to have funded the £3.58m needed for the partially let project, and he was unable to confirm that it could have funded this from its own resources. However, given PAG's expected rate of return, he considered that it would have been to its advantage to dispose of a less profitable investment in order to invest in the Royal Mail site. In cross-examination, Mr Lawler suggested that PAG might have funded the additional £500,000 over and above its cash reserves of £3m from cash flow but accepted that he had not conducted the necessary analysis. The cumulative payments it had made under the Swaps by 16 April 2010 totalled £2.298m and the required investment was £3.5m. It submits that together with the £3m cash reserves it would clearly have had sufficient monies to have made the investment.

Yotel

515. The last alleged missed opportunity was a project to build a Yotel hotel in Manchester. It was intended to be pursued as a joint venture and the PAG entity which appeared in the draft documentation including the Heads of Terms was PAG Ventures. In fact, in re-examination Mr Wyse explained that a subsidiary of PAG Ventures had been inserted in the execution version of the partnership deed and that it was intended that an SPV named Piccadilly 1216 Ltd would be used for the transaction and then transferred to PAG. However, the transfer did not take place. It was intended that £400,000 be invested for a 1.98% equity stake. In relation to the Yotel project, however, the experts agreed that PAG made a profit of £396,000. Mr Mesher considered however, that PAG had suffered a loss of £1.26 million whereas in Mr Lawler's opinion, PAG had not demonstrated any loss because PAG appears to have had adequate cash available to invest in the project notwithstanding its liability under the Swaps. Further, Mr Mesher relied on the contemporaneous project appraisals produced by PAG to arrive at his view of loss whereas Mr Lawler took account of the fact that Mr Coulter, the property expert instructed on behalf of RBS, considered the project was unlikely to have been viable. The experts agreed

nevertheless that the evidence suggests that funds of approximately £400,000 were required to fund the minimum investment by PAG and that PAG would have been likely to be able to make these funds available even with the Swaps in place.

516. RBS puts forward three objections. The first is the involvement of PAG Ventures to which I have referred. The second is that it contends that the project was affordable in any event. The consolidated cash flow showed £2.7m available at the relevant time. In cross-examination, Mr Wyse explained that PAG was keeping hold of as much cash as possible and that PAG was looking at a number of transactions and could not complete them all if they all took £400,000.

517. Thirdly, it was suggested to Mr Wyse in cross-examination that the true reason that the project foundered in the end was because the joint venture partner was struggling to find the finance for the last part of the fit out costs. An email from Mr Russell to a D. Roscoe at Manchester City Council of 8 April 2014 in reply to an email of the same date stating that D. Roscoe had not been told that "Yotel had fallen through" stated:

> "our joint venture partners and funders were struggling to finance the last piece of the construction costs which with Yotel complicated fit out took the final costs out by £1.2m, the yeild went up in Jan and our Jv was tight, in my e-mail last month I confirmed Toyoko hotels are confirmed and Sir Howard confirmed an urgent meeting with their Japanese president who is personally flying in, they want us on site asap, its fully funded in cash by them, we are 100% on board David, ..."

518. Having had the part of the email relating to the struggle to finance the fit out costs read to him, Mr Wyse answered "Yeah" and when asked whether it was the real reason why the project did not go ahead he responded that it "also coincided with an offer that we had had to sell the site as well."

519. Finally, Mr Coulter's evidence is that the project was not viable and he noted that it remained undeveloped to this day. PAG's property expert did not express a view. Mr Coulter estimated the gross development value at £21.4m whereas PAG had taken a figure of £28.769m. PAG points out its figures were arrived at with its joint venture partner, Mansford which is said to be a £2.4bn real estate fund and therefore a powerful independent assessment of the figures.

Double Counting?

520. RBS also submits that PAG could only have entered into more than one of the projects by using the funds borrowed from RBS to pay the break costs on the Swaps. However, RBS would not have provided those funds but for the dispute in relation to the Swaps. However, it was Mr Wyse's unchallenged evidence that but for the Swaps, PAG would have been able to obtain further finance in order to engage in more investment projects and would have been more attractive to equity and joint venture partners.

Alleged Forced sales - Dumers Lane and shares in Russells Ltd

521. The first of the two alleged forced sales is that of the Dumers Lane site in respect of which damages of £3m are claimed. £4.97m is claimed in respect of the sale of a third of the shares in Russells Ltd. The experts agree that both assets were sold at market price. However, they approach the quantification of loss differently. PAG's expert, Mr Mesher, assumed that the asset would have been retained and then notionally sold at the date of trial whereas Mr Lawler, on behalf of RBS compared the value at the date of sale and assessed loss as the difference between the actual sale price and the asset's then market value.

522. It is alleged that PAG was forced to sell the residential portion of the land at Dumers Lane in two tranches between August 2013 and August 2014. In cross-examination, Mr Wyse explained that PAG was not in the habit of selling for the sake of it and getting into cash but that it tried always to realise the highest value possible. RBS submits on the other hand that there was no need to sell in the light of the fact that PAG had £3m cash reserves in 2013 and £16m in 2014. Based on Mr Roper's report, Mr Mesher calculates a loss of £1.76m being the value of the site at the date of sale as £8.52m less the actual proceeds of sale being £6.76m, whereas Mr Coulter considers that the site has increased in value by less than £500,000. The real differences arise from two factors. First, Mr Roper proceeded on the basis that all necessary remedial work on the site had already been carried out and that there were two reports including warranties to that effect, whereas Mr Coulter had made a "prudent allocation" in that regard. In cross-examination he stated that he had allowed for the potential need for further compaction. Secondly, Mr Roper had allowed an 18 month period for construction requiring 6 months of bank financing rather than a three year period requiring 18 months of finance. However, in cross-examination Mr Coulter maintained that although it was "to some degree crystal ball gazing" that three years had been a sensible build period to adopt, despite the fact that it had actually taken less time.

523. RBS raise what they term "flaws" in Mr Roper's approach. He accepted that he had not exhibited the recent house sale figures from which he had derived the calculations in his report. Further, his evidence was that the lowest actual Land Registry figure for a sale was £71,245, and yet the lowest figure which he used in his hypothetical calculations was £99,688. Further, one of the principal differences between Mr Coulter's and Mr Roper's calculations was the site preparation cost, Mr Roper having adopted a figure of £2,500 against Mr Coulter's figure of £5,000. Mr Roper's figure is based on an assumption that there were "no special foundation/groundworks required". He subsequently claimed to have considered the matter and decided that, in the light of two REC reports, there was in fact no remediation cost and stated in cross-examination that he had "seen videos" of the remediation work. The REC reports for 2013 in fact make recommendations for special care to be taken for future work. Mr Coulter on the other hand, has obtained evidence from knowledgeable experts and given the question proper consideration.

524. Secondly, it is submitted that Mr Roper's estimate of an 18 month build period was excessively optimistic. Thirdly, there was an error in Mr Roper's spreadsheet which fed into the figure of Residual Land Value, which Mr Roper was unable to explain. Lastly, it is said that the comparative analysis between Dumers Lane and York Street also supported Mr Coulter's analysis over Mr Roper's. The York Street site had planning permission for 22.5 units per acre compared to Dumers Lane's 16.5 units per

acre. Prima facie it would be expected that York Street would be more valuable than Dumers Lane; this is the result of Mr Coulter's analysis but not Mr Roper's

Shares in Russells Ltd

525. It is alleged that Russells was forced to sell 33.3% of its 50% stake in Russells Ltd in August 2013 to boost its cash reserves and was proved necessary later that year when RBS levied its demand to £2m to remedy PAG's alleged LTV covenant breach. 250 shares were sold for £1.375m. Was it the conduct of RBS which caused the sale? In his statement, Mr Wyse explained that it was pressure created by the Swaps and PAG's treatment in GRG which had necessitated the sale. PAG had £3m cash reserves at the time and it is said therefore, had no need to sell. In cross-examination, Mr Wyse's response was that PAG was seeking to generate additional cash which it thought it would need. The decision to sell came in July 2013 and PAG submits that it is to be noted that this was shortly after GRG had indicated that there would be a valuation of PAG's portfolio and that it would have to re-finance its borrowing with another bank on the expiry of the facilities in June 2014.

526. RBS on the other hand, submits that the real reason was a falling out in the Russell family. I was referred to emails passing between Mr Russell and his nephew, Andrew on 12 August 2013 in which a difficulty with a site was raised. Mr Russell's response was:

> ".. Not for obvious reasons Andy, I object to that! And we agreed to draw a line under the past with the share transfers etc, ..."

The emails were not put to Mr Russell. It was put to Mr Wyse who accepted that the relationship between Mr Russell and his nephews who were primarily involved with Russells Ltd was "very volatile" but they seemed to "make up and get on with business." PAG submits that RBS' theory is irrational given that PAG did not divest itself of all its shares in Russells. Furthermore, a subsequent email of the same date, which was not put in cross-examination, sent by Andrew Russell states that the office and roadway in dispute had nothing to do with the share transfer.

527. Mr Wyse accepted that the deal had been done on a 'net asset' basis. If that is adopted for the purposes of calculating any loss, there are number of factors which cause the principal differences between Mr Lawler and Mr Mesher's calculations:

(1) Whether a weighted average approach to assessing the EBITDA should be used (per Mr Lawler) or a single year (as per Mr Mesher);

(2) How to calculate the multiplier: Mr Mesher compared the multipliers for a small number of construction and engineering companies. Although the detail of the particular transactions was not included in the report, Mr Mesher accepted that the average EBITDA of the companies and the average deal size were around double those of Russells and that "broadly" larger deals gave rise to larger multipliers. Mr Lawler's evidence was that Russells would be likely to be valued at lower multiples than public companies in a similar sector for various reasons with which Mr Mesher agreed; and

(3) Whether a minority discount should be applied. Mr Mesher agreed that in principle a minority discount of 45% would apply but did not do so when calculating the hypothetical analysis of the sale of a minority holding in Russell by PAG at the trial date.

528. RBS submits that in any event, any alleged loss is doubtful because the shares are unlikely to be saleable to a third party because Russells is a family company and if it is possible to value them, the value is no different than in 2013. PAG submits that an earnings multiple methodology is to be preferred particularly in the light of the nature of the business of Russells Ltd and Mr Mesher's figure of £4.8m is commended to the court which is calculated on the basis of a multiplier of 10.5x and assumes no minority discount.

Losses in respect of the alternative claim for breach of implied terms

529. On the basis that Messrs Russell and Wyse stated that they would not have entered into the Swaps at all if they had known the truth or alternatively, would have entered non-LIBOR linked hedging such as an interest rate caps proposed by Mr Virji, it is submitted that the loss arising from the breach of LIBOR Implied Term 2 is equivalent to that arising under the misrepresentations, being the direct costs of having entered the Swaps and the consequential losses. The quantification of alleged loss in relation to LIBOR Implied Terms 1 and 3 is more difficult. It requires a comparison between what was paid under the Swaps and what allegedly ought to have been paid if 3M GBP LIBOR had represented what it is said it ought to have done. Mr Osborne accepted that if LIBOR submissions should have been made to reflect accurately Dr Cartea's WAR, then there would have been some effect on the ultimate LIBOR rate on the days on which those understatements occurred. On the basis of his expert evidence, however, it would have made no difference.

530. Dr Cartea accepts however, that it is almost impossible to determine the extent of such an effect precisely and he accepted that no one can say what the rate should have been where all the banks behaved properly. Dr Cartea has therefore necessarily been forced to make some assumptions in order to determine what the 'true' 3 month GBP LIBOR rate should have been in the absence of any manipulation by RBS and, as he put it, "to give some indication of the losses that have been suffered by PAG." He has therefore assumed, for the purposes of his analysis, that: the extent of the under-reporting by RBS which he identified on days on which it was possible to calculate a WAR figure to compare against RBS's actual LIBOR submission (i.e. where there were transactions of "reasonable market size") also applied as a minimum on days on which it was not possible to calculate a WAR (i.e. where there were no transactions of "reasonable market size"); that one could arrive at a level of "mean under reporting" for his 80 negative variance days which he stated to be 24 basis points which was rounded up from 23.5, itself being the combination of the average of the negative spread between the WAR and LIBOR submission on the 80 days and the average of the positive spread on the days when Dr Cartea identified no under reporting; that there was under reporting whenever he could not calculate a WAR and that it was of 30 basis point; and that under-reporting by other panel banks was similar to (and certainly not less than) that of RBS.

531. He also put forward another basis for his conclusions in cross-examination which did not appear in his report. He stated that as a result of lowballing the market had been

misled for a long time as to the real borrowing cost of the banks and therefore, the issue was not about a single day but about the LIBOR curve as a whole. He accepted however that he had not conducted any analysis in relation to the other panel banks.

532. In any event, Dr Cartea estimates, on this basis, that "a reasonable proxy for the true 3 month GBP LIBOR rate during the Relevant Period would therefore be the historical published Libor rate plus 30-50 basis points," and that PAG had suffered losses of between £587,282 and £932,935. Ultimately, Dr Cartea concluded in the Joint Report that the "true" BBA LIBOR was either 20, 30, 40 or 50 basis points higher than the published BBA Rate, giving a loss range of £386,755.09 to £932,934.45.

533. RBS characterises all of this as no more than a guess and that Dr Cartea agreed in cross-examination that the exercise he had carried out was a tentative one based on questionable assumptions. He also accepted that it was "extremely difficult to measure" and "just an assumption". RBS submits that the point is emphasised by Dr Cartea's statement in cross-examination that the right figure "could be 60, it could be 70, I don't know". RBS also points out that no credit is given for what would have been the very substantial reductions in PAG's payments under the loans, if his conclusions are correct.

534. RBS also points to what it says are a series of unreliable assumptions, the first of which is that it was necessary to make some assumption about what happened on the 70% of days when it was not possible to calculate a WAR. It was also pointed out that such an assumption turns on it being necessary to make a LIBOR submission every day which is contrary to the remainder of PAG's case. Secondly, Dr Cartea had rounded up the number of basis points by which there was allegedly under-reporting on the 80 negative variance days. Thirdly, the use of an average under-reporting figure is said to be unsound where under-reporting can only have an effect on specific reset days under the Swaps. Fourthly, the same average was even applied on days when under-reporting had been found by Dr Cartea but at a different rate. Fifthly, he assumed that all banks were lowballing by the same average amount.

Additional sums in respect of the GRG Claims

535. PAG claims the £35,000 plus VAT in respect of the valuation fee for the LSH valuation it alleges should not have taken place and repayment of the default interest paid under the compromise of a dispute about breach of the LTV covenant and amounts to £50,000.

Conclusions:

536. Had it been necessary, in relation to consequential loss allegedly arising from the Swaps claims I would have decided as follows:

(i) Towers Business Park project: it was intended that the project be progressed by an SPV of PAG; PAG Ventures Ltd became involved because of PAG's failure to invest and that it was not necessary to give credit for its profit because it is an independent company; PAG's cash reserves would have been drained almost entirely if they had been used to fund the project and therefore, it cannot be said that the failure to invest was not caused by the Swaps; and I would have accepted Mr Wyse's evidence in relation to raising capital.

Therefore, in this regard, the consequential loss would have been £2.61m, there being no evidence of a willingness or ability to invest the greater sum. I would have come to this last conclusion rather than loss on the basis of a 25% equity stake despite Mr Wyse's evidence that it would have been able to raise further borrowings, the evidence being that RBS would not have lent more.

(ii) Royal Mail project: the project was inconsistent with PAG's business model of concentrating on pre-let development opportunities; and in addition, the profit element was too low which Mr Wyse accepted and therefore, the project was not viable and would not have been pursued. Therefore, a consequential loss did not arise in this regard.

(iii) Yotel project: the project was intended to be transferred to an SPV and thereafter to PAG and therefore, the initial insertion of PAG Ventures Ltd in the draft documentation was not relevant; the experts agreed that PAG would have been likely to have been able to make £400,000 available even if the Swaps had been in place and therefore, there is no causation in relation to the alleged loss; on the basis of Mr Coulter's evidence the project was not viable and remains undeveloped; and Mr Wyse accepted that the joint venture partner had struggled to finance the fit out costs. Therefore, for all the reasons to which I have referred, a consequential loss did not arise.

(iv) Dumers Lane: the sales in 2013 and 2014 arose at a time when PAG had £3m and £16m in cash reserves respectively. The first sale came at a time when a valuation of the PAG portfolio had been required and £2m demanded to bring PAG's LTV covenant into line. Therefore, it seems to me that the first sale was to raise cash and was caused by the Swaps whereas the second was at a time when cash reserves were £16m and therefore, the sale was not caused by the Swaps; the expert evidence of Mr Coulter is to be preferred as to remedial work and the construction period; remedial work costs and recent house sale prices; and in the light of the forced sale, it is wrong to conclude that a sale at market value results in no loss.

(v) Shares in Russells Ltd: the sale of the shares was to raise cash when it appeared that a new valuation of the PAG portfolio was to take place and a demand had been made by RBS for £2m. On the balance of probabilities, it was not as a result of a family feud. Had the latter been the case, it is more likely than not that all the shares would have been sold; in the light of the forced sale it is wrong to assume that a sale at market value caused no loss; and Mr Mesher's calculation should be preferred but subject to the 45% minority discount.

537. Had it been necessary to determine the loss in respect of an alleged breach of the alleged implied terms in relation to GRG, I would have decided that the sum in relation to the valuation was recoverable but not the additional interest payment. There was no attempt to show that such a payment was caused by a breach of any implied term.

538. Lastly, had it been necessary to determine the loss in respect of the alleged breach of LIBOR Implied Term 1, I would have decided that given the inherently difficult nature of the task, it would not have been right to put too great an emphasis upon Dr Cartea's diffidence in relation to his assumptions although it would have led to a

cautious approach when determining loss towards the bottom end of Dr Cartea's scale. However, I have already decided that the assumptions upon which his WAR was based were unreliable and therefore, I would have preferred Mr Osborne's conclusion. Mr Osborne's evidence was there would have been no change to 3M GBP LIBOR and therefore, no loss.

539. For all the reasons set out above, the claims fail.

ANNEXE

i) **Relevant BBA materials**

1. BBA Consultation Paper – 10 June 2008 - extract

"…

12.2 Currently the definition is "the rate at which an individual Contributor Panel bank could borrow funds, were it to do so by asking for and then accepting inter-bank offers in reasonable market size, just prior to 11.00 London time." This definition is amplified as follows:-

- The rate at which each bank submits must be formed from that bank's perception of its cost of funds in the interbank market.
- Panel banks are asked for their own rates, rather than the rate at which a hypothetical bank could borrow, which is the definition used by some other fixes.
- Until 1998 BBA LIBOR used such a methodology, referring to the rate at which "prime banks" lent to one another. The reason for changing this is that it is not possible to define what a prime bank is and all other definitions using unnamed subjects will suffer from this same problem
- The fixings must represent rates formed in London and not elsewhere.
- They must also be for the currency concerned, not the cost of producing one currency by borrowing in another currency and accessing the required currency via the foreign exchange markets. (As is stated earlier in the section on foreign exchange arbitrage and BBA LIBOR rates.)
- The rates must be submitted by members of staff at a bank with primary responsibility for management of a bank's cash, rather than a bank's derivative book."

2. Terms of Reference for LIBOR Contributor Banks

1. Each contributor bank must provide the Designated Distributor (currently Thomson Reuters) by 11.00 each London Business day with rates in all those currencies and periods to which it has agreed to contribute.

2. The rate at which each contributor submits must be formed from that bank's perception of its cost of funds in the interbank market. In the event that a given period has no market offer then the contributing Bank is required to use its market knowledge to supply an appropriate rate that is, as far as is possible, a fair and accurate reflection of that bank's opinion of its cost of funds.

The definition of "funds" is: unsecured interbank cash or cash raised through primary issuance of interbank Certificates of Deposit.

The area of the contributing bank that has the primary responsibility for managing that bank's cash will be solely responsible for the calculation and accuracy of the rate submitted

3. The submitted cost of funds must reflect the following criteria:

I) market rates available around 11.00 London time

II) Offers provided through the London market (i.e. through London-based intermediaries)

III) Be reflective of reasonable size

IV) Funds available on an unsecured basis

4. Each contributor bank must supply the Designated Distributor and the BBA with the name, job title, telephone number, email and mobile telephone number of the appropriate person(s) to contribute rates (see 2, above), and provide the same details for an alternate. Should the contributing individual change roles so that they are no longer the appropriate person to contribute, the contributing bank must supply details of their replacement to the BBA and Designated Distributor.

5. For those banks that contribute to more than one LIBOR currency or have more than one individual responsible for setting BBA LIBOR rates, up to date details of all contributors as described above must be sent to the BBA and Designated Distributor.

6. Contributor banks must undertake to provide rates on every London business day. The exception to this shall be for BBA Euro LIBOR contributors, who must undertake to provide rates on every TARGET business day, including those that fall on London bank holidays.

7. Rates shall be submitted to five decimal places.

8. In the event that a contributed rate is queried by the BBA or FX & MM Committee, the contributor bank agrees to provide its rationale for that contributed rate in an informal or formal manner, as appropriate.

9. Contributor banks understand and accept that membership of each BBA LIBOR currency panel is at the sole discretion of the FX & MM Committee. By signing this document, each contributor bank agrees that should it be deselected from a panel, the FX & MM Committee decision is final and neither the bank nor its agents shall attempt any action, legal or otherwise, to influence or overturn that decision. By

signing this document, the individuals so doing assert their ability to commit their institutions in this manner.

10. Contributors undertake to have their internal processes for submitting rates audited as part of their firm's annual compliance procedures and provide written confirmation to the FX & MM Committee that this audit has been completed.

11. The LIBOR manager will visit all contributors regularly, at least once a year, in order to discuss the LIBOR process and get the contributor's views on market conditions and any areas of concern. These comments will be fed back to the FX & MM Committee.

12. Contributors agree that the LIBOR manager may visit their office on an ad hoc basis to discuss a bank's rate submissions with individual contributors, if these are queried by the FX & MM Committee or subcommittees thereof. These discussions may involve a request for the bank to provide evidence to support its quotes. Any such evidence which includes sensitive information will be held in absolute confidence by the LIBOR manager.

Appendix I - Definition BBA LIBOR

(correct as at July 15th 2009).

"The rate at which an individual Contributor Panel bank could borrow funds, were it to do so by asking for and then accepting inter-bank offers in reasonable market size, just prior to 11.00 London time."

This definition is amplified as follows:-

- The rate at which each bank submits must be formed from that bank's perception of its cost of unsecured funds in the interbank market. This will be based on the cost of funds not covered by any governmental guarantee scheme.

- Contributions must represent rates at which a bank would be offered funds in the London Money Market.

- Contributions must be for the currency concerned, not the cost of producing one currency by borrowing in another currency and accessing the required currency via the foreign exchange markets.

- The rates must be submitted by members of staff at a bank with primary responsibility for management of a bank's cash, rather than a bank's derivative book.

- The definition of "funds" is: unsecured interbank cash or cash raised through primary issuance of interbank Certificates of Deposit."

3. Guidelines for contributing BBA LIBOR rates

Introduction

This document is not meant to be exhaustive, and should be read in conjunction with the definition of BBA LIBOR, as found on the BBA LIBOR website. BBA LIBOR reflects the cost of funds in London and offers banks' views on future central bank interest rate movement.

The strength of the system is that the rates submitted into the process are a bank's own view of its cost of funds, based on the totality of the information available to a bank from both internal and external sources.

This document is intended to provide a reference for contributing banks to ensure that when calculating their LIBOR rates all contributors consider factors influencing rates in the same manner.

"Guidelines

1. Availability of funds.

There have been times recently when there has been extremely restricted liquidity, and even no market offer for some tenors and currencies for which a LIBOR fixing is produced. Nevertheless contributor banks are asked to provide the full suite of rates out to twelve months each London business day. In the event that a given period has no market offer then the contributing Bank is required to use its market knowledge to supply an appropriate rate that is, as far as is possible, a fair and accurate reflection of that bank's opinion of its cost of funds.

This should include, inter alia, the following:

i) Interpolation or extension from known points

If a bank has taken money or been given a firm quote at two different tenors it should be able to use this, with the addition of its internal view on where markets and rates are headed, to form a view on its cost of funds at points between or beyond where it has traded.

ii) Internal consistency of rates.

A LIBOR contribution should be comparable in different tenors of the same currency. Unless there are atypical circumstances that justify it, a bank should not move one point on its curve for a particular currency, without giving consideration to the other rates it submits.

iii) Market intelligence.

Whilst a bank's LIBOR submissions are its own perception of where it could take funds, this is shaped by a wide number of factors. Contributor banks will be constantly in touch with clients and intermediaries and the information that they receive from them will naturally contribute to a bank's perception of its cost of funds. However, contributors should not ask intermediaries where they believe LIBOR rates will set on a given day and use this as a basis for submissions. This misses the point of the benchmark, and is a circular process that would rapidly lead to inaccurate rates.

2. Consistency of Basis

Under certain circumstances, contributor banks will take funds at levels above or below LIBOR, for example when dealing in particularly large or particularly small size. However, that does not necessarily mean that they should raise or drop their rates to these levels. LIBOR is the rate at which an individual Contributor Panel bank could borrow funds, were it to do so by asking for and then accepting inter-bank offers in reasonable market size, just prior to 11.00 London time. That is, it is the rate a bank could take funds at an arbitrary time in the market, not the rate that one institution will show money to a contributor whose name they are specifically looking for at a particular moment.

3. Use of External data.

There are a number of metrics that attempt to define a bank's creditworthiness, or example credit ratings. None of these are a perfect proxy for a bank's risk, because they lag, or are not accurate, or are mis-applied as measures of the cost of funds to a bank. Nevertheless, in the event of a significant event, such as an upgrade or downgrade from a major credit rating agency, contributing banks should be comfortable that they are able to justify their contributions in the light of any such change.

Contributors should consider external indicators when forming LIBOR rates but ultimately they must derive from a bank's own view.

Adopted by the Foreign Exchange and Money Markets Committee, 19th October 2009."

ii) **Details of the Swaps**

Swap	Notional	Rates	Max. duration	RBS cancellation/ extension options
1st Swap	£10m	Upper cap: 6.25% Lower cap: 5.25% Floor: 5.25% Lower floor: 3.30%	10 years	Years 6 – 10: cancellation every quarter
2nd Swap	£15m rising to £30m	5.00%	10 years	Years 5 – 10: cancellation annually
3rd Swap	£20m	Cap: 5.25% Floor (if variable >2.55% and ≤3.90%): 7.80% Floor (if variable ≤2.55%): 5.25%	5 years	From end of year 3: extension for 2 years
4th Swap	£15m	Fixed: 4.80%	5 years	Years 2 – 5: cancellation every quarter. If RBS cancels: PAG pays base rate; RBS pays 3m GBP LIBOR