Neutral Citation Number: [2020] EWHC 1264 (Ch)

Case No: BL-2019-000382

**IN THE HIGH COURT OF JUSTICE**
**BUSINESS AND PROPERTY COURTS**
**OF ENGLAND AND WALES**
**BUSINESS LIST (ChD)**

Rolls Building, Fetter Lane,
London EC4A 1NL

Date: 27/05/2020

**Before**:

**CHIEF MASTER MARSH**

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**Between:**

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| **BOYSE (INTERNATIONAL) LIMITED** | **Claimant** |
| **- and -** | |
| **(1) NATWEST MARKETS PLC** | |
| **(2) THE ROYAL BANK OF SCOTLAND PLC** | **Defendants** |

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**Stephen Auld QC and Simon Oakes** (instructed by **Withers LLP**) for the **Claimant**
**Laura John** (instructed by **DLA Piper UK LLP**) for the **Defendants**

Hearing date: 11 March 2020

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# 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.

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CHIEF MASTER MARSH

**Chief Master Marsh:**

1. In this judgment I will refer to the claimant as Boyse and the defendants as the Bank. The second defendant (RBS) at all material times acted as agent for the first defendant (NatWest) and there is no need to distinguish between them.

2. There were three applications before me on 11 March 2020:

   (1) An application by the Bank dated 4 October 2019 to strike out the entirety of Boyse's case pursuant to CPR 3.4(2)(a), (b) and (c).

   (2) An application by Boyse dated 24 January 2020 seeking permission to amend its particulars of claim.

   (3) An application by the Bank dated 10 March 2020 applying to amend the application notice dated 4 October 2019 to include an application for summary judgment under CPR 24.2 and waiver of the notice requirement under CPR PD 24 paragraph 2.

3. Stephen Auld QC and Simon Oakes appeared for Boyce and Laura John appeared for the Bank.

4. Boyse's claim relates to two interest rate hedging products (IRHPs), a swap dated 10 August 2007 and a collar dated 27 November 2008, which Boyse says it was induced to enter into by the Bank's fraudulent misrepresentations. Boyse's claim was issued on 19 February 2019 and amended on 30 July 2019. The principal issues for determination on the Bank's application to strike out the claim are (i) whether the claims in deceit are barred by limitation and (ii) whether the claims alleging fraud meet the minimum pleadings requirements for such a claim. The first issue principally engages CPR 3.4(2)(a). The second issue concerns all three limbs of CPR 3.4(2).

5. It was common ground between the parties that the court should approach the strike out application on the basis that:

   (1) The court should assume that the facts pleaded by Boyse in its draft amended claim are true.

   (2) The claim as it is set out in the draft amended particulars of claim is to be treated as Boyse's claim, albeit that permission to amend has not been granted and the application for permission to amend is opposed.

   (3) The test the court should adopt under CPR 3.4(2)(a) is whether the claim is bound to fail.

6. Boyse also invites the court to have regard to two further principles:

   (1) Where a statement of case is found to be defective, the court should consider whether the defect may be cured by amendment and, if it might be, the court should not strike it out without first giving the party concerned an opportunity to amend it; *Soo Kim v Park* [2011] EWHC 1781 [38]-[41].

(2) The principle that derives from the decision of the Court of Appeal in *Partco v Wragg* [2002] EWCA Civ 594 that the court should consider carefully before dealing summarily with single issues if the claim will in any event, go to trial. If the Bank is right, the claim will not proceed to trial and therefore *Partco* does not assist Boyse.

7. I will consider later in this judgment whether the Bank's application for summary judgment was a necessary addition to the hearing. It was issued in response to a suggestion made by Boyse that the court cannot strike out a claim based on limitation where the claimant relies on section 32(1)(a) of the Limitation Act 1980.

8. The court has been provided with two statements made by Paul McNamee, who is a solicitor with DLA Piper UK LLP, the Bank's solicitors, and one statement made by Andrew Wass who is a partner with Withers LLP, Boyse's solicitors. There are for the purposes of this application no facts of significance that are in dispute, although the conclusions to be drawn from those facts are contentious, and I will refer to the statements only where it is necessary to do so.

**Background**

9. Boyse is a trust company registered in Gibraltar and is managed by M&M Management Services Limited, a professional trust manager. Its business is to hold commercial property investments for the ultimate benefit of Mr and Mrs Sharma. They are experienced in business and the owners of a successful luxury travel specialist called Best At Travel plc. Mr and Mrs Sharma are not directors of Boyse. They make recommendations to Boyse's directors who in turn manage its investments. Boyse purchased commercial properties for investment. Mr and Mrs Sharma, particularly Mr Sharma, had extensive direct dealings with the Bank over the relevant period.

10. Boyse had a relationship with the Bank from the early 2000s. The following summary provides the key dealings between Boyse and the Bank:

(1) Boyse entered a loan facility with the Bank in 2004 to enable it to acquire a property at 22 Stephenson Way London SW1 2HD for £4 million. The facility was for £3.5 million. The relevant interest rate was referenced to the Bank's base lending rate.

(2) In August 2007 Boyse purchased a property at 79 Fortress Road London NW5 1AG for £3.5 million and concluded a further facility agreement with the Bank for £6.5 million that refinanced the earlier facility. The Bank proposed that interest on the facility should be 1% over LIBOR. Mr Sharma objected and requested that the floating interest rate should be Base Rate. This was agreed to by the Bank.

(3) The 2007 facility contained a condition that the Bank would not be obliged to make the loan until Boyse had entered into an IRHP that was acceptable to the Bank.

(4) On 10 August 2007 Boyse concluded a Swap with the Bank with a notional value of £6.5 million at fixed rate of 6.23%. The Bank agreed to pay Boyse a floating rate of 3 month BBA GBP LIBOR.

(5) On 27 November 2008 Boyse concluded an amortising interest rate Collar with the Bank that involved Boyse purchasing an interest rate cap from the Bank at the rate of 5.5% and selling an interest rate floor to the Bank at 3.2%. The Bank agreed to pay Boyse a floating rate of 3 month BBA GBP LIBOR.

11. The following subsequent events are relevant to the claim and the Bank's application:

(1) Boyse was forced to sell both properties as a result of the cost of the IRHPs and their effect on its cash flow and profitability. Stephenson Way was sold for £5,052,000 on 25 February 2011 and Fortress Road for £1,693,000 on 17 January 2012. In both cases it is said the sales were at a significant undervalue.

(2) On 29 June 2012 the Financial Services Authority (FSA) announced that it had identified serious failings in the sale of IRHPs to small and medium sized businesses by a number of financial institutions including the Bank.

(3) On 6 February 2013 the FSA issued a Final Notice detailing a fine imposed on the Bank for misconduct in relation to JPY, CHF and USD LIBOR (but not GBP LIBOR). Similar findings were published by other regulators including the US Department of Justice and the Commodities Futures Trading Commission. The findings received widespread publicity in the mainstream and financial press.

(4) The FSA undertook a review of the sales of IRHP products and on 10 October 2014 the Bank offered Boyse redress of £1,482,462.55 which amounted to repayment of sums paid by Boyse to the Bank under the IRHPs but did not include any consequential loss. The offer was made without admission of liability. The offer was accepted by Boyse on 15 October 2014.

(5) In mid-2015, in further correspondence with the Bank, Boyse's claim for consequential loss was rejected. The last letter in this sequence of exchanges took place on 26 August 2015.

(6) On 17 December 2018, Boyse's solicitors, Withers LLP, sent a lengthy letter of claim.

(7) The Bank's solicitors, DLA Piper UK LLP, replied on 11 January 2019 rejecting the claim.

(8) Boyse's claim form was issued on 19 February 2019. The date of issue was just outside a 6 year limitation period if the date of the Final Notice issued on 6 February 2013 is taken as the starting point for the limitation period.

**The claim**

12. The claim form issued on 19 February 2019 sought damages for negligent misrepresentation, negligence, breach of contract and breach of statutory duty. It did

not include a claim in deceit. The claim form was amended immediately, before the particulars of claim were served, to remove the claims for negligence, negligent misrepresentation and breach of statutory duty and to add a claim for "intentional or reckless misrepresentation".

13. Notwithstanding the amendment to the claim form, the particulars of claim at this stage had as their main focus liability based on a contractual and/or tortious duty on the Bank to advise Boyse about the suitability of the IRHPs. Paragraph 9 (which I do not need to set out in this judgment) provided a summary of the COBS duties from the Conduct of Business Source Book and pleaded contractual and tortious duties alleged to be owed by the Bank. In addition, it pleaded three LIBOR related implied terms.

14. Paragraph 10 set out the IRHP suitability representation[1]:

> "10.1 At all relevant times, Boyse was entirely reliant upon the Bank's advice as to the appropriate level and terms of Facilities and the IRHPs. Boyse concluded the 2007 Facility, the SWAP and the Collar on the basis that the IRHPs were related and collateral to the 2007 Facility and that the IRHPs were suitable for Boyse's business and financial needs and that Boyse could afford the costs of the IRHPs from within its existing and future cash flow.
>
> 10.2 In the premises, the Bank represented to Boyse that the IRHPs were suitable for Boyse's needs. Further, the Bank impliedly represented that it had reasonable grounds for making those statements, that it acted in good faith in making them and that it honestly believed and intended them to be true. This representation will be referred to hereinafter as the "IRHP representation".

15. Falsity of the suitability representation was dealt with briefly in paragraph 12:

> "The IRHP representation referred to in paragraph 10 above was false. In particular, the IRHPs were not suitable for Boyse's needs."

16. The LIBOR representations were pleaded in a little more detail. At paragraph 11 an express representation is pleaded that:

> "LIBOR as an independent and benchmark interest rate in accordance with the BBA definition of LIBOR … was the appropriate interest rate for the relevant facilities and IRHPs in preference to, for example, the Bank's own base rate"

17. This was followed in paragraph 11.3 by three implied representations:

> "In the premises (and in particular when the Bank advised and/or insisted upon the use of LIBOR rather than the Bank's base rate) the Bank impliedly represented to Boyse *inter alia* as follows ("the LIBOR representations"):

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[1] The heading to paragraph uses the plural (representations) whereas the heading and the text in paragraph refers to representation (singular).

(1) That on any given date up to and including the date of the Facilities and the IRHPs, LIBOR represented the interest rate as defined by the BBA (and the Bank had no reason to believe that on any given date LIBOR represented, or might in the future represent anything else) being the average rate at which an individual contributor bank could borrow funds by asking for and accepting inter-bank offers in reasonable market size just prior to 11 a.m. on that date.

(2) That the Bank had not, on any given date up to and including the date of the Facilities and the IRHPs, made false or misleading LIBOR submissions to the BBA or indulged in the practice of attempting to manipulate LIBOR (for example so that in fact it represented a rate arrived at by reference to the Bank's or other panel bank's trading positions).

(3) That the Bank did not intend in the future to act as set out in (1) and/or (2) above."

18. Falsity was dealt with at paragraph 12.2 first at a high level of generality in 12.2.1 by providing the following particulars:

"In relation to the LIBOR representations set out above, these were false. In particular,

(1) LIBOR did not represent the rate as defined by the BBA and the Bank did not believe that it did.

(2) At the date of the Facilities and IRHPs, false submissions in relation to LIBOR had been made.

(3) Those making the false submissions intended to continue acting as (1) and (2) above."

19. The particulars in paragraph 12.2.2 refer in detail to the findings of regulators, including the FSA, dated 6 February 2013. They also refer to the Bank's conduct having been the subject of "considerable adverse press comment and widespread concern, including as to the reliability of reported LIBOR rates and go on:

"For example, on 9 March 2012, Reuters described LIBOR as "*a system many now regard as outdated and discredited".*"

20. This was followed by a very brief paragraph at 12.3 under the heading: "Nature of Representations":

"The IRHP representations and the LIBOR representations were all false. The Bank had no reasonable grounds for making the statements. They were made either: (1) intentionally/ recklessly; or (2) without due care."

21. The breach of duty claims were wrapped up briefly in paragraph 12.4:

> "In making the false representations and in advising Boyse to enter into the IRHPs which were unsuitable products for the needs of Boyse, the Bank was in breach of its contractual and/or tortious duty of care to advise Boyse."

22. It is not controversial to say that the particulars of claim were at this stage in an unhappy state.

    (1) They included claims in negligence and negligent misrepresentation despite the claim form having been amended to remove those claims from the ambit of the proceedings. A claim for breach of statutory duty in relation to the COBS is also included despite the deletion of the breach of statutory duty claim from the claim form.

    (2) The claim in deceit relating to the IRHP representations was put forward in a very general way.

    (3) There was an almost complete failure to identify dishonesty and the plea of dishonesty in paragraph 12.3 was equivocal because it included, as an alternative, a failure to take due care.

23. Mr Wass says in paragraph 19 of his witness statement that Boyse had in its draft amended particulars of claim deleted its claims for breach of duty of care. However, despite substantial changes having been made in the amended particulars of claim, further alterations would be essential if the claim were to go forward and, at the hearing Mr Auld QC, accepted that if the claim is not struck out some further pruning will be required to remove, as a minimum, the residual breach of duty claims which are referred to in paragraphs 2.1, 2.2 and 2.4. Additionally, paragraph 9, which sets out alleged COBS, contractual and tortious duties at length, remains in the pleading although it serves no purpose.

24. It is convenient to deal at this stage with the claim in contract for breach of the LIBOR implied terms. This element of the claim remains essentially unchanged other than by the addition of a term that the Bank would act honestly. At paragraph 14, which is in the same form as the original particulars, Boyse pleads:

> "For the reasons set out above the Bank was also in breach of the LIBOR implied terms set out in paragraph 8.1 above (and each of them)."

25. There is a claim for damages and a new claim for a declaration that the Bank has breached the implied terms. The difficulty for Boyse (disregarding the claim having been pleaded in a somewhat spare fashion and it being unclear what the "reasons above" are) is that the normal limitation period must have expired because the alleged breaches dated back considerably more than 6 years before the claim was issued. The claim for a declaration does not assist for two reasons. First, the declaration serves no purpose. Secondly, Boyse cannot say that the claim for a declaration is not subject to a limitation period – see *Woodeson v Credit Suisse (UK) Limited* EWCA Civ 1103 at [21] – [24].

26. At the hearing Mr Auld QC did not press a case for retention of the LIBOR implied terms claim.

### IRHP claim

27. The amended particulars of claim contain a substantial volume of new material in relation to this part of the claim. Paragraph 5A, under the heading "Background to the sale of the IRHPs", sets out material that is relevant to both the IRHP claim and the LIBOR claim. Paragraph 7 refers in more detail to the IRHP review and paragraph 7A pleads material concerning the suitability of the IRHPs. These paragraphs are set out in an appendix to this judgment.

28. The allegation as to falsity in paragraph 12.1 has been amended to reference the lack of suitability for Boyse's needs "as set out in paragraph 7A above".

29. The particulars as they relate to the "nature of the representations" remain unchanged as set out earlier in this judgment. Paragraph 12.4 which alleged a breach of the Bank's contractual and tortious duties has been deleted. New paragraph 12.3B is headed "IRHP deceit" followed by:

> "12.3B.1 Paragraph 7A.1 above is repeated."

30. Paragraph 7A.1 (which is set out in the appendix to this judgment) states that the Bank and its staff "knew, ought to have known or were reckless … the IRHPs were not suitable for the Claimant …". This is followed by four sub-paragraphs providing particulars about the lack of suitability. However, Ms John is right to observe that Boyse only provides a 'rolled up' rather than an unequivocal allegation of falsity.

### LIBOR Fixing

31. The Final Notice published by the FSA on 6 February 2013 runs to 35 pages but is not a particularly complex document. It commences with a summary of the FSA's reasons for its decision to impose a £87.5 million financial penalty on RBS. It is clear from the first page that the financial penalty was imposed because "… RBS sought to manipulate LIBOR in connection with its own submission of rates that formed part of the calculation of Japanese yen ("JPY") and Swiss franc ("CHF") LIBOR and also sought to influence other banks' JPY and CHF LIBOR submissions." Over the next three pages the manipulation and collusion by RBS is summarised and at paragraph 14 the impact of RBS' misconduct is explained:

> "RBS' breaches of Principle 5 were extremely serious. Its misconduct gave rise to a risk that the published JPY, CHF and USD LIBOR rates would be manipulated and undermined the integrity of those rates. RBS' misconduct could have caused harm to institutional counterparties and other market participants. Where RBS, alone or acting in concert with panel Banks and Broker Firms, sought to influence Panel Banks' LIBOR submissions, the risk that LIBOR would be manipulated increased materially."

32. The Final Notice received widespread publicity in the press and Mr McNamee's second statement exhibits some examples from mainstream newspapers on that date. In addition, he exhibits extracts from the Telegraph and Guardian newspapers some months earlier in July and September 2012 that refer to the LIBOR rate-rigging scandal.

33. Four further points about the timing of the issue of the Final Notice and its relationship to this claim can be made:

    (1) At paragraph 4.3 of the particulars of claim Boyse pleads: "At all relevant times, Mr and Mrs Sharma and, through them Boyse, were aware of LIBOR and its supposed and proper purpose as an independent benchmark interest rate and were aware in general terms as to the way in which LIBOR was set and the involvement of the Bank in that process." This is followed by what is said to be an "illustrative example" namely an email from Mr Sharma to the Bank dated 11 July 2007 querying whether the 2007 Facility should be set by reference to base rate rather than LIBOR.

    (2) At paragraph 12.2.2(2) of the particulars of claim Boyse relies on the "considerable adverse press comment and widespread concern" about the reliability of reported LIBOR rates and goes on to instance as one example of this concern a report by Reuters on 9 March 2012 describing LIBOR as "a system many now regard as outdated and discredited." This was some 11 months before the Final Notice was published.

    (3) The particulars of claim do not distinguish between LIBOR currencies. The allegations about LIBOR fixing are made generically. The point is reinforced in Mr Wass' statement at paragraph 42 where in defining the LIBOR fraud he does not distinguish between LIBOR currencies. It follows that the Final Notice that dealt with three currencies, but not sterling, may be notice of the LIBOR fraud that is relied on.

    (4) Boyse had been forced to sell its two investment properties in February 2011 and January 2012 due to the high costs it incurred to the Bank.

**Boyse's case on limitation**

34. The draft amended particulars of claim advances a case on limitation in the following terms:

    "17 LIMITATION

    17.1 On 21 October 2013, Boyse was invited to participate an FCA-agreed review of the sales of IRHPs, including the SWAP and the Collar. The Bank informed Boyse that if the Bank "did not meet all of our regulatory requirements, you may be entitled to redress". It was not until 10 October 2014 that the Bank provided Boyse with the outcome of the review, which contained the conclusion that the IRHPs had not complied with the standards agreed with the FCA, and that it would be fair and reasonable to cancel the IRHPs and replace them with a vanilla cap.

    17.2. On 6 February 2013 the FSA, DOJ and CFTC published their LIBOR fixing findings.

    17.3. It was not until around May 2017 that Boyse became actually aware of the Bank's LIBOR deceit. Further, Boyse could not with reasonable diligence have discovered the Bank's LIBOR deceit for a reasonable period after 6 February

2013, being at the very least two weeks after the publication of the LIBOR fixing findings. Pursuant to s.32 Limitation Act 1980, Boyse's claims in respect of the Bank's LIBOR deceit have therefore been brought in time.

17.3.1. Similarly, it was not until 10 October 2014 that Boyse was actually aware of the essence of its claim in relation to IRHP deceit: that the IRHPs were not suitable for Boyse, and that the Bank must have deliberately missold and misrepresented the IRHPs to Boyse. Further, Boyse could not with reasonable diligence have discovered the Bank's IRHP deceit for a reasonable period after 21 October 2013, at the earliest.

17.4. In the event that a plea to the contrary is contained in the Defence, Boyse will advance further particulars, if required, in the Reply."

**Law relating to pleading deceit and fraud**

35. The necessary constituents of plea in deceit are not in doubt. I was referred to the summary contained in the judgment of Asplin J in *Property Alliance Group Ltd v the Royal Bank of Scotland PLC* [2016] EWHC 3342 (Ch) at [476] where she refers to Hamblen J's judgment in *Cassa di Risparmio della Repubblica di San Marino SpA v Barclays Bank Ltd* [2011] EWHC 484 (Comm) at [221]. She says:

> "… 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."

36. It is a truism that the claimant alleging deceit is unlikely to be in possession of all the facts that will be relied on at trial when seeking to prove its case.[2] It will often be the case that until disclosure has taken place the claimant will not have all the facts it requires to prove its claim. It has been said, particularly in relation to anti-competitive arrangements, that the court will adopt a generous approach to pleadings.[3] There is an important distinction, however, between whether the facts that are pleaded justify the plea of fraud and whether the evidence at trial would establish fraud. Only the former is required. The distinction has been pointed out in a number of authorities. One such authority is *JSC Bank Moscow v Kekhman and others* [2015] EWHC 3073 (Comm) per Flaux J at [20].

37. Further well-established principles include that:

(1) A mere assertion of fraud will never suffice.

(2) The claimant must address each element of the cause of action.

[2] Mr Wass points to what he describes as the Knowledge/Disclosure Gap at [22]-[23] in his witness statement.

[3] See the authorities discussed by Stuart-Smith J in *Portland Stone Firms Ltd v Barclays Bank plc* [2018] EWHC 2341 (QB) at [27]-[28].

(3) The claimant must plead the full particulars of any allegation of fraud and where any inference of fraud is alleged the facts on the basis of which the inference is alleged must be pleaded in full – CPR PD16 para. 8.2(1).

(4) It does not suffice to provide particulars of fraud that are equally consistent with negligence. There must be something which tilts the balance and justifies an inference of fraud as opposed to merely negligence: see *JSC Bank Moscow v Kekhman* at [20].

**Law relating to section 32**

38. Under section 32(1)(a) where a claim is based on the alleged fraud of the defendant the period of limitation does not begin to run until a claimant has either discovered the fraud or could with reasonable diligence have discovered it. For the purposes of the Bank's application, I am only concerned with the latter. I do not need to consider Boyse's actual state of knowledge which inevitably would involve dealing with disputed facts. Boyse does not allege deliberate concealment.

39. In *Granville Technology Group Limited (in Liquidation) v Infineon Technologies AG* [2020] EWHC 415 (Comm) Foxton J sets out at [24] to [38] a detailed review of the authorities that deal with what "discovery" for the purposes of section 32(1) means. He went on at [39] to [53] to discuss the meaning of "reasonable diligence". The case before him concerned section 32(1)(b) LA 1980 but the test is the same whether the case falls under section 32(1)(a) or (b). In an effort to avoid this judgment becoming unnecessarily long, I gratefully adopt his summary of the law which, save for one point, raises no matters of controversy so far as Mr Auld QC and Ms John are concerned.

40. The essential points that arise under section 32(1) are:

(1) Discovery of the alleged fraud means knowledge of the "essential facts constituting the alleged fraud" is required – *Cunningham v Ellis* [2018] EWHC 3188 Comm at [87] per Teare J. The test for discovery of the fraud was put slightly differently by Waller LJ (with whom Moore-Bick and Moses LJJ agreed) in *Barnstable Boat Co Ltd v Jones* [2008] EWCA Civ 727 [34] as being knowledge of the precise deceit which the claimant alleges has been perpetrated on him. However, I do not see there is a difference of substance between these two formulations as long as it is borne in mind that knowledge of fraud in a general sense is not enough to start the limitation period running: see *Allison v Horner* [2014] EWCA Civ 117 at [14] per Aikens LJ.

(2) As to the meaning of reasonable diligence:

> "The question is not whether the claimants should have discovered the fraud sooner; but whether they could with reasonable diligence have done so. The burden of proof is on them. They must establish that they could not have discovered the fraud without exceptional measures which they could not reasonably have been expected to take … In the course of argument May LJ observed that reasonable diligence must be measured against some standard, but that the six-year limitation period did not provide the relevant standard. He suggested that the test was how a person carrying on a

business of the relevant kind would act if he had adequate but not unlimited staff and resources and was motivated by a reasonable but not excessive sense of urgency. I respectfully agree."

Millett LJ in *Paragon Finance v Thakerar* [1999] 1 All ER 400 at 418

(3) An assumption is made for the purposes of assessing what the claimant could have discovered with reasonable diligence that the claimant desires to discover whether or not there has been a fraud: *Law Society v Sephton* [2004] EWCA Civ 1627 at [116] per Neuberger LJ.

(4) The context may be relevant to what the claimant could with reasonable diligence have discovered but the alleged or actual naivety or inexperience of a claimant are not relevant factors: see *Hussain v Mukhtar* [2016] EWHC 424 (QB) at [43].

(5) "… knowledge of the deceit alleged on the part of a claimant's agent will be insufficient to start the limitation period running under section 32(1). Similarly, the fact that the claimant's agent could with reasonable diligence have discovered the alleged deceit does not start the limitation period running.": per Aikens LJ in *Allison v Horner* at [15]

41. The point of controversy in the authorities concerns what the claimant's notional desire to know whether there has been a fraud means. In *Gresport Finance Ltd v Battaglia* [2018] EWCA Civ 540 at [46] Henderson LJ referred to the judgment of Neuberger LJ in *Sephton* in which he discussed the need for there to be an assumption that the claimant desires to know that there has been a fraud. Henderson LJ observed:

> "Another way to make the same point … might be that the 'assumption' referred to by Neuberger LJ is an assumption on the part of the draftsman of section 32(1), because the concept of reasonable diligence only makes sense if there has been something to put the claimant on notice of the need to investigate whether there has been a fraud, concealment or mistake (as the case may be".

42. This observation was interpreted by the Competition Appeal Tribunal in the judgment delivered by Roth J in *DSG Retail Ltd v Mastercard Inc* [2019] CAT 5 as meaning that "… the concept of reasonable diligence is to be applied on the assumption that the claimant is on notice of the need to investigate".

43. In *Granville Technology Group Ltd v Infineon Technologies AG* Foxton J reached a different conclusion. He observed at [45] that: "If section 32(1) involved a statutory assumption that the claimant was on notice of something meriting investigation, it would make it very difficult for many claimants to satisfy the s.32(1) test."

44. Foxton J concluded that the approach indicated by Henderson LJ in *Gresport Finance v Battaglia* was to be understood on the basis that:

> "… the drafters of s.32(1) were assuming that there would in fact be something which (objectively) had put the claimant on notice as to the need to investigate, to which the statutory reasonable diligence requirement would then attach (and

> which involved an assumption that the claimant desired to investigate the matter as to which it was or ought to have been put on enquiry)."

45. He goes on to suggest at [46] that the approach he had summarised is consistent with the views of other judges. And at [48] he addresses what may amount to a 'trigger' and observes that:

> "There will be many claims when it will be objectively apparent that "something has gone wrong" – where the claimant has lost property, failed to receive something it expected to receive, or suffered injury of some kind – which event ought itself to prompt the claimant to ask "why" and investigate accordingly."

46. It seems to me that the right approach to adopt on this application is to apply the law as it has been interpreted by Foxton J in *Granville* rather than following the approach suggested by Roth J in *DSG Retail*. I do so with all due respect to the decision of Roth J because:

    (1) I am faced with two conflicting approaches by first instance High Court judges and it open for me to adopt the approach which I consider best reflects the authorities.

    (2) The analysis of Foxton J follows from a detailed consideration of the authorities.

    (3) I consider, respectfully, that the view he expresses is firmly based on the approach indicated by Henderson LJ in *Gresport Finance v Battaglia*.

47. It can be seen from Henderson LJ's remarks in *Gresport Finance v Battaglia* that there must have been "something to put the claimant on notice" and that must be determined on an objective basis. Foxton J puts the same point as there being "something that has gone wrong". I would only add that to my mind there is a danger of further distilling a legal analysis of this type into one word. To say that a "trigger" is required might suggest that the court must look for a single event. To speak of a trigger may mask the fact that objective discovery for the purposes of section 32(1) may be the culmination of a series of events.

**CPR 3.4(2)(a) and CPR 24.2**

48. It is necessary to deal with the procedural point raised by Boyse namely whether it is open to the court to strike out a claim under CPR 3.4(2)(a) on limitation grounds or whether it is necessary for the defendant to apply for summary judgment under CPR 24.2 and, if the application must be made under CPR 24.2 whether the court should permit the Bank to amend its application notice.

49. It is not in dispute that there is some overlap between CPR 3.4(2)(a) and CPR 24.2; indeed, this is clear from Practice Direction 3A. Both powers enable the court to dispose of a claim on a summary basis and will normally, although not invariably, be considered at an early stage of the claim. It is commonly the case that the court will be asked to apply the powers in the alternative. In the case of CPR 3.4(2)(a), Practice Direction 3A states that the court may exercise the power to strike out of its own

volition. Clearly this will only be appropriate where the court has no need to refer to any evidence.

50. The extent of the overlap between the two rules was discussed in *Saeed v Ibrahim* [2018] EWHC 3 (Ch), a case that involved very different circumstances to this case. It is important for the court to bear in mind that the test under the two rules is different. As CPR 3.4(2)(a) has been interpreted, the court must be satisfied the claim is 'bound to fail' and even then there is the possibility of the claim going to trial based on the principle set out in *Hughes v Colin Richards & Co* [2004] EWCA Civ 266. In practice, this limitation on the exercise of the power to strike out bears similarities with the second limb of CPR 24.2. Although on an application under CPR 3.4(2)(a) the focus is primarily on the statement of case, this does not preclude the court from having regard to evidence: see PD3A paragraph 5.2.

51. The logic of Boyse's position is that it is for the defendant to take a limitation point. It is trite to say that limitation does not extinguish the cause of action; it provides a procedural bar to the claim being pursued, but only if the defendant wishes to take the point. It may follow that unless a defence has been filed pleading limitation, if the court reviews the particulars of claim in isolation, there is no limitation point to be taken.

52. There is a danger, however, of the court being faced with a triumph of form over substance. In this case, Boyse was made aware by the service of the application with evidence in support that the limitation point was being taken and, furthermore, Boyse has provided a draft amendment to its particulars of claim to put forward its case on limitation. Boyse has not been taken by surprise. And it is always in a suitable case open to the court to treat an application to strike out a claim as an application under CPR 24.2.

53. I consider that it will normally be appropriate for summary judgment to be pursued on a limitation point by an application made under CPR 24.2 and preferably after the claimant has had an opportunity to plead its case. That is no more than a statement of good practice. It is desirable that the court should be able to consider evidence that is relevant to knowledge, whether objective or subjective, and it will generally be preferable for the court to be evaluating the application by applying the well established jurisprudence about CPR 24.2 rather than focussing on the statement of case.

54. In the circumstances of this application, I consider there is no prejudice to Boyse by permitting the Bank to amend the application.

**LIBOR claim**

55. The Bank's case on limitation, put at a high level, is simple. The claim was issued on 19 February 2019 which was more than 6 years after Boyse could with reasonable diligence have discovered the alleged fraud because of the information contained in the FSA's Final Notice published on 6 February 2013. The Bank also points to the widespread publicity about LIBOR over a period of months before the publication of the Final Notice.

56. The starting point is to consider what information was provided in the Final Notice as it relates to Boyse's case. Unsurprisingly, there is much overlap between the two albeit that the Final Notice only related to the Japanese yen, the Swiss franc and the US dollar. It is clear however, as I have indicated, that Boyse's case is based on the manipulation of LIBOR, not a specific LIBOR currency. The finding that there was a risk that three LIBOR currency rates had been "manipulated and undermined" is a precise reflection of the case Boyse wishes to pursue. Boyse's case is that:

    (1) LIBOR was not an independent and benchmark rate (paragraph 11.2.1);

    (2) LIBOR did not represent the interest rate as defined by the BBA (paragraph 11.3.1(1)); and

    (3) the Bank had made false or misleading submissions to the BBA or attempted to manipulate LIBOR (paragraph 11.3.1(2)).

57. Paragraphs 44 and 45 of Mr Wass' statement contain a section with the heading "Relevant Facts". It is unnecessary to set out those paragraphs in full. He says Boyse was not aware of the findings of the FCA published on 6 February 2013 "for a significant time thereafter" and the factual summary that follows appears to relate to the period around that date. I observe however that the two investment properties held by Boyse had been sold in 2011 and 2012 (the second property being sold on 17 January 2012) and it is not clear whether Boyse held other properties in February 2013. If it is the case, as it would appear to be, that Boyse did not hold any properties by February 2013, Mr Wass' evidence is confused and confusing. Nevertheless, I summarise what he says.

58. The principal facts that Boyse relies on are:

    (1) The claimant's business was the management of two commercial properties and "at that time" retained a professional property agent, managed by professional trustees in Gibraltar and had a bookkeeper. Mr and Mrs Sharma made recommendations to Boyse.

    (2) The property agents who managed the two properties would have had no knowledge of Boyse's financial dealings or any reason to monitor the financial press[4] for news about LIBOR manipulation by RBS. A similar observation is made about the trustee and the bookkeeper.

    (3) Mr and Mrs Sharma did not follow the financial press although Mr Sharma knew what LIBOR was.

    (4) He says; "… there was nobody within the Claimant's organisation who could reasonably have been expected to read or look out for the FCA, DoJ and CFTC findings when they were published or in the following two weeks."

    (5) Boyse had no reason to suspect that the Bank had been involved in dishonest activities.

[4] It is clear that the publicity about LIBOR manipulation was much wider than just the financial press.

(6) "In the context of this business, it would therefore have required exceptional measures – which the Claimant could not reasonably have been expected to take – for the Claimant to have discovered the FCA, DoJ and CFTC findings…" for a reasonable period after 6 February 2013 and this reasonable period was at least two weeks.

59. Boyse's case on limitation falls into two main strands. The first concerns whose knowledge is relevant. The second concerns the character of the knowledge that could have been obtained and whether it could it only have been obtained by exceptional measures.

60. As to the first strand, Mr Auld QC submitted that the focus should be on Boyse and not on Mr and Mrs Sharma. Boyse is a Gibraltar based trust company with local directors that had been managing two commercial properties. However, the professional trustees were not involved in the sales process of the IRHP's to Boyse. Boyse could call on the services of a property agent, a part-time bookkeeper and advice from the beneficiaries of the trust, Mr and Mrs Sharma. Mr Wass' statement made on behalf of Boyse states in clear terms that: "Mr and Mrs Sharma are entitled to give directions to Boyse (and its trustees … who managed Boyse) in relation to the management of Boyse's properties."

61. However, the fact that an agent of Boyse could with reasonable diligence have discovered the fraud does not set time running. It is suggested that the directors of Boyse could not reasonably have been expected to read, or read about, the Final Notice or to have known about the LIBOR scandal from reports in the press.

62. If the knowledge of Mr and Mrs Sharma were attributed to Boyse for the purposes of section 32(1), Mr Auld submits:

(1) They were not directors of Boyse.

(2) They trusted the Bank.

(3) They would have had to follow and/or monitor the financial press and this would have involved them taking exceptional measures.

63. The second strand concerns what knowledge means in the context of this claim. Mr Auld QC submitted that Boyse can easily bridge the short gap of some 13 days between the date of publication of the Final Notice by a need to obtain expert advice on the information that had been published. The news articles were not detailed and advice would have been needed to discover the Bank's fraud. There was a reasonable need to obtain expert advice about the information that had been published in order to transform the information into knowledge. He submits that it is necessary for the claimant to have a sufficient understanding of the information that becomes available for it to become knowledge for the purposes of section 32(1). Another way of putting the same point is that Boyse had to take exceptional measures in order to discover what is alleged to be the LIBOR fraud. Mr Auld QC points out that it was not until after *PAG v RBS* that the formulation of implied LIBOR representations became widely understood.

64. It seems to me that the first line of submission concerning the identity of the person who is relevant for the purposes of section 32(1) needs to be looked at by reference to Boyse's pleaded case without conflating Mr and Mrs Sharma with Boyse. Boyse's case is that Boyse had a customer banker relationship with the Bank as a result of Mr and Mrs Sharma dealing with the Bank, that Boyse's investments were held for Mr and Mrs Sharma, they made recommendations to Boyse on the basis of which the directors of Boyse made decisions and they placed trust and confidence in the Bank (paragraph 4.1). The Bank's knowledge of Boyse's business was obtained through its dealings in particular with Mr Sharma (paragraph 4.2) and that Mr and Mrs Sharma, and through them Boyse, were aware of LIBOR and its purpose (paragraph 4.3). The background to the sale of the IRHPs involved dealings between Mr Sharma and the Bank (paragraph 5A). The express LIBOR representation was made to Mr Sharma.

65. Whether Mr and Mrs Sharma are seen as the directing minds of Boyse, it seems to me that it is quite impossible for Boyse, for the purposes of section 32(1) to treat them as a mere agent of the company whose knowledge is not attributable to the company in the way that Aikens LJ had in mind in *Allison v Horner.* In any event, for the purposes of an objective test, the distinction between the directors of Boyse and Mr and Mrs Sharma is of limited significance.

66. As to the second strand of Mr Auld's submissions, I accept that for the purposes of deemed discovery under section 32(1) the discovery has not taken place (the essential knowledge has not been acquired) unless there is some understanding of what the knowledge means. But it does not follow that the person who is deemed to have knowledge of the essential facts needs to know how to plead express and implied representations that are said later to have been made dishonestly. In this case the language used in the FCA Final Notice is not technical and any person of reasonable sophistication could not fail to understand what LIBOR rates being manipulated and undermined could mean.

67. It is clear that Boyse did not need to have developed its case or obtained advice before time started to run. A claimant has 6 years from the date on which it could with reasonable diligence have discovered the fraud and issue the claim.

68. The LIBOR fraud that is based upon what are alleged to be dishonest representations was apparent from the FCA Final Notice and the other findings. Boyse was clearly aware that the IRHPs used LIBOR and upon widespread publicity being given to the findings of the manipulation of LIBOR and the undermining of its integrity, that something had gone wrong. Boyse had sold both properties long before 6 February 2013 and had therefore suffered loss. Objectively, Boyse was on notice that something had gone wrong. It is pleaded that sale was necessary because of the cost of the IRHPs and their effect upon Boyse's cash flow and profitability. A reasonably diligent person in Boyse's shoes would have been alert to the widespread publicity about LIBOR even before 6 February 2013. The Final Notice was a trigger that started time running.

69. The uncomfortable truth for Boyse is that the claim form was issued just 13 days too late. Its attempts to bridge that short period are artificial because the 6 year period of limitation provides ample time to obtain advice and formulate a claim.

**IRHP claim**

70. In the course of submissions, Ms John described the IRHP claim as being "a poorly disguised negligence claim" which is inadequately pleaded. I agree.

71. In the original claim, the IRHP claim was put forward in paragraphs 10, 12 and 12.3. In summary:

    (1) At 10.2 Boyse said there was a representation about suitability.

    (2) At 12.1 the representation was said to be false. No particulars of falsity were given.

    (3) At 12.3 it was said the IRHP representations were false and that Bank had no reasonable grounds for making the statements and then: "They were made either: (1) intentionally/recklessly; or (2) without due care."

72. In the draft amended particulars of claim, paragraph 10.2 remains unchanged. In paragraph 10.1 a reference back to paragraph 5A has been added. Paragraph 5A provides background to the sale of the IRHPs and contains a good deal of material that is irrelevant to the claim.

73. Paragraph 7A has been added which is headed "Suitability of the IRHPs" but it does not provide adequate particulars of a case that the Bank knew the IRHPs were unsuitable. The high point of the paragraph is 7A.1 where it is said:

> "As the Bank and/or its servants, agents or employees – and in particular David Macmillan – knew, or ought to have known or were reckless (given, in particular, their knowledge of both the Claimant and its business, and the nature of the IRHPs) the IRHPs were not suitable for the Claimant …".

74. This is a rolled up plea that includes an allegation of negligence and fails to identify who, other than Mr Macmillan, is said to have known the IRHPs were unsuitable.

75. Paragraph 12.1 fails to provide particulars of fraud. The only change made to it is to refer back to paragraph 7A and this circularity does not improve what is clearly an inadequate claim. There is no distinct pleading of primary facts from which the inference of fraud may be drawn. There is nothing that tilts the balance in the direction of fraud. It also seems to me there is no reason to believe that Boyse, given a further opportunity, will be able to cure these defects.

76. The inadequate pleading of the case in fraud has a knock-on effect in relation to limitation. It is impossible to discern from the claim what Boyse could reasonably have discovered because there is an absence of primary fact. It is asserted in paragraph 17.3.1 that it was not until 10 October 2014 that Boyse was actually aware of the essence of the IRHP deceit claim and it could not with reasonable diligence have discovered the alleged fraud for a reasonable period after 21 October 2013 at the earliest. However, these assertions are not particularised or explained.

**Conclusions**

77. The claim arising from the LIBOR implied terms is clearly time barred. The device of seeking a declaration does not assist for the reasons already given.

78. There is nothing in the claim that can be salvaged. The particulars of claim and the claim form will be struck out, or judgment will be entered in favour of the Bank under CPR 24.2, and the application for permission to amend will be dismissed.

## APPENDIX

### Paragraphs 5A, 7 and 7A of the draft amended particulars of claim

5A. **BACKGROUND TO THE SALE OF THE IRHPS**

5A.1 Between around May and August 2007 the Bank acting through those individuals detailed at paragraph 3.2.6 above – and principally through David Macmillan and Chris McHale - proposed and promoted selected complex interest rate hedging products, in particular interest rate swaps and collars, to Boyse in (*inter alia*) emails, presentations and telephone calls. The Bank further pressured Boyse to fix the interest rate payable under the 2007 Facility. Relying upon this advice, and as a result of the Bank's pressure, Boyse agreed to enter into the IRHPs as set out below.

5A.4 By way of examples only of the Bank's representations in relation to LIBOR and the suitability of the IRHPs, and prior to entry into the SWAP:

5A.4.1 On 31 May 2007 at 12:40 David Macmillan of RBS emailed Mr Sharma explaining the current LIBOR rates (and thereby implying that LIBOR was a genuinely set rate determined by economic forces), stating that "*Current 3 month LIBOR = 5.81%* […] *Please be aware that these are current market levels and therefore are liable to move higher or lower as you move towards completion*". Mr McMillan, having compared the two approaches, endorsed a hedged solution and implying that it was suitable for Boyse, stating "*Given the tightness of the rental cover in the first year, the discounted idea may look favourable albeit at the expense of higher rates in the back end 4 years*"; Mr Sharma responded at 13:30 stating *inter alia* that "*I will be guided by you guys*" and asking about "*any penalties if we* [re]*pay a lump sum in say year 2 by £500k to reduce amount borrowed for example*". Mr Macmillan replied stating, *inter alia*, that he would explain how this worked at their next meeting;

5A.4.2 Similarly, on 14 June 2007, David Macmillan stated in relation to swap rates (and thereby LIBOR) pricing, and thereby suggesting that LIBOR was a genuinely set rate determined by economic forces: "*Current 5 year fixing = 6.28%. Rates continue to move higher but they will hopefully start to correct lower again*";

5A.4.3 On 18 June 2007, Mr Sharma emailed David Macmillan seeking a swap rate of less than 6% if possible. Mr Marmillan replied stating in relation to swap rates (and thereby in relation to LIBOR), and thus implying that LIBOR was a genuinely set rate determined by economic forces: "*sadly not where the money market is currently... around 6.27% for 5 years. Fingers crossed that the levels start to move lower.*";

5A.4.4 On 16 July 2007 David Macmillan emailed Mr Sharma stating in relation to swap rates (and thereby LIBOR) pricing, and thereby suggesting that LIBOR was a genuinely set rate determined by economic forces: "*update for you as we move towards completion next week. Current 5 year swap = 6.38% + lending margin*". Similarly, on 19 July 2007 David Macmillan emailed Mr Sharma about "*the swap profile that we are going to use for your transaction*" stating that the current fixed rate was 6.38% plus margin and that "*hopefully this rate continues to move a lower over the next few days*";

5A.4.5 On 30 July 2007, Chris Ashcroft of the Bank emailed Mr Sharma with an RBS market commentary on swap rates (and thereby LIBOR), and thereby suggested that LIBOR was a genuinely set rate determined by economic forces. *Inter alia*, the commentary stated that "*The momentum behind GBP/USD remained negative during the final hours of US trade on Friday* […] *The credit market story could drag gilt yields lower across the curve, but questions will be asked about the sustainability of the fall in swap rates given the rapid worsening in perceived credit quality.* ***We believe that sooner or later we will see swap rates start to increase again,*** *since the underlying fundamental picture (higher inflation and strong global growth) means the MPC are likely to continue to tighten the monetary stance. For this week though there may still be enough momentum left to drive swap rates down a further 5-6 basis points*" [emphasis in original];

5A.4.6 Similarly, a "*Sterling Strategy"* paper authored by RBS and dated 30 July 2007 was sent to Mr Sharma, and included commentary on swap rates (and thereby LIBOR), and LIBOR itself, and thereby suggested that LIBOR was a genuinely set rate determined by economic forces. *Inter alia*, the commentary referred to the relationship between rates and economic events: for instance "*UK interest rates have dropped across the swap curve. The deepening crisis in global credit markets has prompted a flight-to-quality into safe havens, including government bonds. Whilst swap spreads have widened, this has been more than compensated for by the drop in gilt yields*." The commentary included graphs providing forecasts of Sterling, Dollar, Yen and Euro 3-month LIBOR. Further, the document included a table comparing and providing forecasts in respect of Sterling LIBOR and swap rates, by reference to UK Base Rate (and similarly in respect of Dollar and Euro LIBOR) and a table of forthcoming key economic events that could impact upon rates;

5A.4.7 Prior to entry into the SWAP, in around late July or early August 2007, David Macmillan advised Mr Sharma via telephone that the SWAP was "*the best thing for them* [i.e. Boyse]".

5A.5 The Bank made further representations to Boyse about the suitability of the IRHPs, and about LIBOR, prior to Boyse's entry into the Collar. By way of examples only:

5A.5.1 Prior to the entry into the Collar, the Bank had still not properly explained to Boyse how the SWAP, and in particular how the costs of exiting it, worked: on 22 January 2008, Mr Sharma emailed David Macmillan stating that "*as interest rates are coming down can we make some money by getting out of the 5 year swap?*". In subsequent correspondence, Mr Macmillan explained that it would cost Boyse in the region of £360,000 to exit the SWAP, that "*the point of the fixing was to make sure the funding could sustain itself in a rate rising environment*" and that "*it is likely that rate will move up and down over the life of the funding*". On 11 February 2008, Mr Sharma stated that he would "*be guided by you guys because I was not happy about the hedge*

*in the first place especially as I already had a loan on Stephenson way at variable rates*";

5A.5.2 On 12 February 2008 David Macmillan emailed Mr Sharma, reminding him that the Bank had required Boyse to take interest rate hedging and providing an explanation of LIBOR and a forecast as to LIBOR movements, thereby suggested that LIBOR was a genuinely set rate determined by economic forces: "*Base Rate has dropped to 5.25% but* ***3 Month LIBOR which is the floating wholesale interest rate*** *is still at 5.61875%. It is the bank's current view that we will see another 0.25% cut in base rate over the next few months although with UK factory input inflation released yesterday at 19.1% and output inflation was registered at 5.7%* […] *multiple rate cuts are not a certainty* […]". He continued, in relation to break costs under the SWAP "*Please be assured that there is no money being made here by the bank due to rates dropping and Boyse having a fixed rate in place. Simply put, RBS purchased the fixed rate from the wholesale money markets at the time of the transaction completing. The break cost represents the cost to RBS to unwind the fixed rate hedge that it has on with the money market*"; [emphasis added]

## 7 THE IRHP REVIEW

7.1 In 2013, the Bank entered into a Review Agreement, as did other banks, with the FSA whereby the Bank agreed to carry out an interest rate hedging product review ("the Review") involving an independent firm of reviewing accountants. Amongst other things, the Review considered whether IRHPs were suitable for customers such as Boyse, whether the Bank had complied with requisite "Sales Standards" (as agreed with the FSA) and regulatory requirements, whether customers were provided with sufficient information to enable them to understand the features and risks of particular IRHPs, and whether the sale of an IRHP was a legitimate condition of lending.

7.1A The Sales Standards (which will be relied upon in full by Boyse) included requirements that the Bank:

(1) Provide customers with clear, fair and not misleading information about the features, benefits and risks of IRHPs, including break costs;

(2) Take reasonable steps to ensure that personal recommendations were suitable for customers;

(3) Ensure that any IRHP did not exceed the term or value of any lending arrangement without a legitimate reason, and that if it had, the potential consequences thereof had been disclosed to the customer in comprehensible, fair, clear and not misleading way.

7.2 The IRHPs were made the subject matter of the review and by letter dated 10 October 2014, to Boyse, NatWest stated that it had assessed the IRHPs in accordance with the standards agreed with the FCA and stated:

7.2.1 In relation to the Collar that in accordance with those standards "*the fair and reasonable redress is to cancel the product*" … with "*a full refund of payments by [Boyse] including early exi~~s~~t costs less any amounts paid to [Boyse]*" …

7.2.2 In relation to the SWAP that "*the sale may not have fully complied with the standards agreed with the FCA*" and that "*it is reasonable to conclude that redress is owed to you" ...* and

> *"as [the SWAP] was terminated early, subject to your agreement our offer is to refund the difference between the net payments made on the original IRHP and those that [Boyse] would have made had [Boyse] purchased a vanilla cap"*

7.2A The Review determined that Boyse was a non-sophisticated customer, and concluded *inter alia* and by implication that the IRHPs sold by the Bank were not appropriate for Boyse and that an "*appropriate*" alternative IRHP would have been a Cap, as set out in further detail at paragraph 12.1A below. The Review further found that:

> *The explanation provided to you in respect of the features, benefits or risks of alternative products did not comply with the standards agreed with the FCA. Had the features, benefits and risks of alternative products been explained to you in accordance with the standards agreed with the FC, we concluded that you would have chosen a vanilla cap* […] *Potential early exit costs associated with your IRHP were not explained to you in accordance with the standards agreed with the FCA.*

7.3 As a result, the Bank offered the sum of £1,482,462.55 in settlement which Boyse subsequently accepted on 15 October 2014 without prejudice to its entitlement to further consequential losses ("the Review Settlement"). For the avoidance of doubt, the Review Settlement did not include consequential losses, claims involving intentional/reckless misrepresentation or claims relating to LIBOR as more particularly set out herein.

## 7A. THE SUITABILITY OF THE IRHPS

7A.1 As the Bank and/or its servants, agents or employees – and in particular David Macmillan - knew, ought to have known or were reckless (given, in particular, their knowledge of both the Claimant and its business, and the nature of the IRHPs) the IRHPs were not suitable for the Claimant in that *inter alia* and pending permission for expert evidence:

7A.1.1 The IRHPs had the potential to result in Boyse breaching the Gross Rental Income : Income covenant as detailed at paragraph 5.4 above;

7A.1.2 The IRHPs, being linked to LIBOR, failed to match the rate of interest payable under the 2007 Facility (being linked the Bank's Base Rate) and thereby increased rather than reduced Boyse's exposure to interest rate fluctuations, and created an interest basis risk for Boyse;

7A.1.3 The IRHPs imposed upon Boyse – which the Bank did not disclose or explain – a contingent liability exposure ("CLU") of around £204,000 on the first day of the Swap being sold, and similarly around £518,000 in respect of the Collar;

7A.1.4 The IRHPs necessarily prevented Boyse from participating in and benefiting from falling interest rates;

7A.2 The FCA Review concluded that an "*appropriate*" alternative IRHP (in contradistinction to the inappropriate IRHPs sold by the Bank) would have been a 5 year vanilla Cap with a cap rate of 7.51%, pending permission for expert evidence. The best particulars that Boyse can currently advance as to suitable alternative hedging is that a Cap (at a rate of 7.51% until 10 February 2009 (i.e. the original maturity date)) would have been appropriate instead of the Swap; such a Cap would have cost Boyse around £1,000. As for the collar, an appropriate alternative would have been a 3.5 year Cap at 5.50%., which would have cost Boyse around £43,000.