Neutral Citation Number: [2024] EWHC 1044 (Ch)

Case No: BL-2019-000866

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

Rolls Building
7 Rolls Building
Fetter Lane
London EC4A 1NL

Date: 08/05/2024

Before :

THE HONOURABLE MR JUSTICE ZACAROLI

- -

Between:

(1) FAROL HOLDINGS LIMITED

(2) JANHILL LIMITED

(3) MR AND MRS TPW UGLOW (a firm)

Claimants

and

(1) CLYDESDALE BANK PLC

(2) NATIONAL AUSTRALIA BANK LIMITED

Defendants

And Between: **Claim No. BL-2020-001989**

IVOR GASTON & SON (a firm)

Claimant

and

(1) CLYDESDALE BANK PLC

(2) NATIONAL AUSTRALIA BANK LIMITED

Defendants

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- -

Andrew Onslow KC, Benjamin Williams KC, Lisa Lacob and Liisa Lahti (instructed by **Fladgate LLP**) for the **Claimants**
Ian Wilson KC and Richard Hanke (instructed by **DLA Piper UK LLP**) for the **First Defendant**
Patrick Goodall KC and Francesca Ruddy (instructed by **Herbert Smith Freehills LLP**) for the **Second Defendant**

Hearing date: 23 April 2024
- -

JUDGMENT

Mr Justice Zacaroli

1. On 19 March 2024 I handed down judgment in this action (the "Judgment"). In an order of the same date, agreed between the parties, the claimants were ordered to pay the defendants' costs, and the hand-down hearing was adjourned in order to consider other consequential matters.

2. This further ruling addresses the following matters:

   1) Whether the costs payable by the claimants should be on the standard or indemnity basis;

   2) What interim payment should be paid by the claimants on account of costs;

   3) From what date interest should run on costs at the Judgments Act rate;

   4) The issue left undecided (see §227 of the Judgment) as to NAB's liability in misrepresentation in respect of the Break Costs Representations (if it is later found that any of them were false); and

   5) Permission to appeal.

<u>(1) Costs: standard or indemnity basis.</u>

3. As the claimants point out, an award of costs on an indemnity basis is different from a standard basis costs order for three reasons: costs management orders are disapplied; there is no proportionality requirement; and the burden of proof on the question of reasonableness is reversed. The first point is irrelevant in this case: proportionality is likely to play a lesser role given that (as the parties were agreed) it is to be assessed in the context not merely of the four claims addressed at trial, but in the context of over 900 further claims that have been stayed pending the outcome of the four claims. The third difference is the key one.

4. The parties are agreed on the test to be applied, which I take from *Three Rivers DC v The Governor and Company of the Bank of England* [2006] EWHC 816 (Comm), per Tomlinson J at §25:

   > "(1) The court should have regard to all the circumstances of the case and the discretion to award indemnity costs is extremely wide.
   >
   > (2) The critical requirement before an indemnity order can be made in the successful defendant's favour is that there must be some conduct or some circumstance which takes the case out of the norm.
   >
   > (3) Insofar as the conduct of the unsuccessful claimant is relied on as a ground for ordering indemnity costs, the test is not conduct attracting moral condemnation, which is an a fortiori ground, but rather unreasonableness.
   >
   > (4) The court can and should have regard to the conduct of an unsuccessful claimant during the proceedings, both before and during the trial, as well as whether it was reasonable for the claimant to raise

and pursue particular allegations and the manner in which the claimant pursued its case and its allegations.

(5) Where a claim is speculative, weak, opportunistic or thin, a claimant who chooses to pursue it is taking a high risk and can expect to pay indemnity costs if it fails.

(6) A fortiori, where the claim includes allegations of dishonesty, let alone allegations of conduct meriting an award to the claimant of exemplary damages, and those allegations are pursued aggressively inter alia by hostile cross examination.

(7) Where the unsuccessful allegations are the subject of extensive publicity, especially where it has been courted by the unsuccessful claimant, that is a further ground.

(8) The following circumstances take a case out of the norm and justify an order for indemnity costs, particularly when taken in combination with the fact that a defendant has discontinued only at a very late stage in proceedings;

(a) Where the claimant advances and aggressively pursues serious and wide ranging allegations of dishonesty or impropriety over an extended period of time;

(b) Where the claimant advances and aggressively pursues such allegations, despite the lack of any foundation in the documentary evidence for those allegations, and maintains the allegations, without apology, to the bitter end;

(c) Where the claimant actively seeks to court publicity for its serious allegations both before and during the trial in the international, national and local media;

(d) Where the claimant, by its conduct, turns a case into an unprecedented factual enquiry by the pursuit of an unjustified case;

(e) Where the claimant pursues a claim which is, to put it most charitably, thin and, in some respects, far-fetched;

(f) Where the claimant pursues a claim which is irreconcilable with the contemporaneous documents;

(g) Where a claimant commences and pursues large-scale and expensive litigation in circumstances calculated to exert commercial pressure on a defendant, and during the course of the trial of the action, the claimant resorts to advancing a constantly changing case in order to justify the allegations which it has made, only then to suffer a resounding defeat."

5. The claimants referred me to Sir Anthony Colman's comment on this in *National Westminster Bank v Rabobank Nederland* [2007] EWHC 1742 (Comm), at §28:

> "Where one is dealing with the losing party's conduct, the minimum nature of that conduct required to engage the court's discretion would seem, except in very rare cases, to be a significant level of unreasonableness or otherwise inappropriate conduct in its widest sense in relation to that party's pre-litigation dealings with the winning party or in relation to the commencement or conduct of the litigation itself. It is important to distinguish in Tomlinson J's formulation of relevant considerations between that underlying concept and his identification of examples of more specific patterns of conduct capable of rendering a party's overall conduct relevantly unreasonable or inappropriate. Grounds (4) to (8) inclusive are specific examples of conduct which, taken alone, or in combination, may in all the surrounding circumstances often be capable of giving rise to a conclusion that the losing party's conduct has been so unreasonable or inappropriate overall as to justify an order which gives him a more effective costs indemnity than would be the case under the standard order. But in each case in which the costs of the whole litigation are under consideration, the conduct adversely criticised must be looked at in the context of the entire litigation and a view taken as to whether the level of unreasonableness or inappropriateness is in all the circumstances high enough to engage such an order."

6. In considering the approach in this case, an important feature is that the claimants put fraud at the front and centre of their case, both in respect of the break costs claims and the fixed rate claims.

7. Mr Onslow KC, for the claimants, strongly resisted an award of indemnity costs, on the over-arching basis that all the allegations that were made and pursued to trial were properly made and pursued. He supported this with five points. First, he warned against the use of hindsight: the claimants' conduct of the litigation at each stage must be considered in light of matters as they then stood. Second, matters should not be looked at through the findings in the Judgment. Third, while speculative claims may attract indemnity costs, when the extensive submissions made by the claimants – particularly in their oral and written closing submissions at trial – are considered, it is clear that the allegations were supported by available material. Fourth, the claims were pleaded by experienced and responsible counsel. Fifth, there were numerous aspects to the case other than the claim in fraud (and the claims that there were no contractually binding CNHs, another aspect of the claim relied on by the defendants in seeking indemnity costs), on some of which the claimants were successful.

8. I accept that the case was advanced by experienced and responsible counsel. I also accept that they adopted a measured approach throughout the trial, and I do not suggest (nor did the defendants) that there was anything improper in the claimants' legal representatives' behaviour in pleading and pursuing the claims in deceit.

9. That is not an answer, however, to the claim for indemnity costs. For reasons which are set out at length in the Judgment, I consider that the allegations of deceit were weak and subject to inherent flaws, but were nevertheless pursued to the bitter end.

10. The allegation of fraud at the heart of the break costs claims was one which I described in the Judgment as facing insurmountable hurdles, requiring inherently

improbable conclusions to be made against four senior executives with otherwise good reputations and no obvious (or suggested) motive for deceiving customers. I found that there was no evidence that any of them ever had cause to consider the true interpretation of clause 8.2 (save in one minor respect which led nowhere): see §247-253.

11. As I noted at §258 of the Judgment, those allegations were pursued on a basis which was acknowledged – at an earlier stage in the litigation – to be one which was not sustainable: namely that the four senior executives had known that the construction of clause 8.2 on which the Banks relied to charge break costs was wrong, or at least arguably wrong, and nevertheless pressed on regardless. As I found in the Judgment, there were substantial flaws in this case. The absence of logical cohesion (see in particular §261-263 of the Judgment), and of any credible motive, added to the lack of foundation for these claims.

12. As to the alternative basis of the claim – that the CNHs did not give rise to legally binding obligations – two points arise. First, once it was acknowledged that there were CNHs and that the purpose of these was to transfer interest rate risk from CB to NAB, it necessarily followed (see §75-77 of the Judgment) that they gave rise to legally binding obligations, including to make payments upon termination. Second, and of particular relevance to the fraud claim, as I noted at §250, there was nothing to support the view that anyone within the Banks thought that the CNHs were not binding.

13. Similarly, I found that there was no real foundation for the allegations of deceit in connection with the Fixed Rate Representations, as against numerous former employees who had only peripheral involvement in passing on terms of fixed rate loans to customers. Having heard evidence from all the relevant witnesses, I asked what allegations of fraud were being pursued. The claimants confirmed that everything was pursued. While the claimants stressed that they did not allege that any of the persons making the representations was a "bad person" or had a "bad motive", because it is not necessary to do so, nevertheless an allegation that someone deliberately or recklessly made a false statement is in itself serious and potentially damaging.

14. In relation to the break costs allegations, it was and remains unclear to me why the case was framed in fraud, when alternative bases of claim – in restitution, or breach of contract/breach of mandate – were not themselves time-barred so far as the principal claim (recovery of break costs paid) was concerned. I infer that it was necessary to claim deceit because the much more substantial claims in consequential loss (by Farol and Janhill – and presumably by others among the stayed claims) were dependent on the misrepresentation claims, and there were perceived limitation problems without establishing fraud.

15. It is well established that conduct of this sort can in itself take a case sufficiently out of the norm so as to justify indemnity costs: see – for example – Sir Anthony Colman's comments in *Rabobank* on the *Three Rivers* list of matters. The making of widespread allegations of a lack of good faith without any proper foundation was held, in and of itself, to be 'out of the norm' so to justify indemnity costs, particularly where they are levelled at professionals who stand to lose considerably if found to

have been dishonest, in *Essex County Council v UBB Waste (Essex) Ltd* [2020] EWHC 2387 (TCC) at §62 and §63.

16. An additional factor which points towards an award of indemnity costs is where large-scale and expensive litigation is pursued in circumstances calculated to exert commercial pressure on the defendants. That accurately describes the circumstances here. While this does not apply to the four individual claimants themselves, their claims must be seen in the context that they were identified as "lead" claims, informally representing over 900 others.

17. All these claims have been managed by a claims management group – RGL Management Limited ("RGL"). RGL has conducted a concerted publicity effort, with its own dedicated website (sueclydesdale.com) and extensive use of social media posts and press releases. There is nothing intrinsically wrong with this, but the manner in which it has done so has undoubtedly raised the stakes and – in my judgment – is something which supports an award of indemnity costs.

18. Importantly, the publicity generated by RGL has not been merely for its own sake, but was part of a concerted effort to put pressure on the Banks to settle. That strategy was outlined in a comment from RGL's CEO, James Hayward:

> "We create the case, we develop it into something that is commercially and legally robust enough for people to want to invest in it – it becomes an investible asset … Then we get it funded, we get the lawyers involved, and we manage it… You look for things that are so heinous that the bank is going to want to settle quickly. A quick settlement is one of the main criteria we look at. Even if the legal merits look good, if it's five years and then an appeal, then forget it."

19. The strategy of courting publicity to place pressure on the defendants can also be seen in the FAQ section of the website sueclydesdale.com, which stated:

> "Also, we have contracted with an on-line e-book publisher to write the stories of victims of Clydesdale Bank and Yorkshire Bank. We are keen to build a library of these stories, telling the full extent of the personal and corporate damage inflicted upon people by the Banks. These stories will take the form of short stories dealing with the key salient points of what happened. In each case a skilled writer will meet with and interview the potential claimant. As the library is developed and published we will syndicate and release the stories through the national press, which will greatly assist in placing pressure on the Banks. If you would be interested in taking part in this initiative, please let us know by using our contact page."

20. Part of that strategy was widely publicising the serious allegations, including of fraud, against the Banks in order to attract more customers or former customers of CB to join the litigation. This included press releases leading on allegations of the Banks "falsely and unlawfully demanding break costs from borrowers"; claiming that there is "an overwhelming body of evidence" or "irrefutable evidence" to prove the Banks' unlawful treatment of their fixed rate loan business customers. It has also included telling customers – in an effort to get them to join the litigation – that the Banks were

guilty of "systemic unlawfulness" such that "any customer" who was sold a TBL was eligible to join "this compensation scheme".

21. This reinforces a point made in the Judgment in relation to the Fixed Rate Representations, about putting the cart before the horse: namely identifying generic implied representations without reference to the critical question whether any alleged representee understood and relied upon such implied representation at the time.

22. Having regard to the above matters overall, I consider that they take this case out of the norm so as to justify an indemnity costs order.

23. I have considered whether I should nevertheless limit such an order to the issue of deceit, leaving the remainder of the defendants' costs to be assessed on the standard basis.

24. Neither side favoured this approach, pointing to the undesirable complications to which such an order would give rise. In my judgment, it would be inappropriate in this case to make a partial, issues based, order.

25. Although the case involved issues other than deceit, the allegations of deceit lay at the heart of and pervaded the entire claim. They also featured prominently in the publicity designed to recruit claimants and exert pressure on the Banks. So far as the break costs claims are concerned, although other legal bases were advanced which were not dependent on fraud, comparatively very little time at trial was spent on these. Most of the witness evidence went to the substance of the fraud claims. The same is true of the fixed rate representations claims: they were also put on the basis of negligent mis-statement (apart from Janhill, where the claim had to be put in fraud because of limitation issues), but little if anything was added to the case because of that. Although deceit was not a necessary part of the unfair relationship claim, it was nevertheless relied on in support of it. Moreover, that claim was founded on essentially the same factual matters as the fixed rate claims.

26. The Banks' response to the claim overall was no doubt influenced by the prominence of the fraud allegations within it. I consider it is appropriate to require the claimants to have the burden of showing that the Banks' costs in responding to the claim were unreasonable, without distinguishing between different parts of the claim.

27. Finally on this point, I reject the suggestion, to the extent that it was made by the Banks, that there was anything improper in junior counsel instructed on behalf of the claimants attending a meeting of claimants or potential claimants at which the litigation was explained. In fact, junior counsel's role was to explain matters of procedure in relation to group litigation. There was nothing improper, or even questionable, in that.

<u>(2) Interim payment on account of costs</u>

28. The court is required to order a reasonable sum on account of costs, unless there is good reason not to do so: CPR 44.2(8).

29. A "reasonable sum" was explained by Christopher Clarke LJ in *Excalibur Ventures LLC v Texas Keystone Inc* [2015] EWHC 566 (Comm) at [23]-[24]:

> "What is a reasonable amount will depend on the circumstances, the chief of which is that there will, by definition, have been no detailed assessment and thus an element of uncertainty, the extent of which may differ widely from case to case as to what will be allowed on detailed assessment. Any sum will have to be an estimate. A reasonable sum would often be one that was an estimate of the likely level of recovery subject, as the costs claimants accept, to an appropriate margin to allow for error in the estimation. This can be done by taking the lowest figure in a likely range or making a deduction from a single estimated figure or perhaps from the lowest figure in the range if the range itself is not very broad.
>
> In determining whether to order any payment and its amount, account needs to be taken of all relevant factors including the likelihood (if it can be assessed) of the claimants being awarded the costs that they seek or a lesser and if so what proportion of them; the difficulty, if any, that may be faced in recovering those costs; the likelihood of a successful appeal; the means of the parties; the imminence of any assessment; any relevant delay and whether the paying party will have any difficulty in recovery in the case of any overpayment."

30. Costs management was dispensed with in this case, but the parties were required to provide updated budgets for the third CMC which took place in March 2023.

31. The claimants budgeted for a total of £11,263,500. They have in fact spent less, their total outlay being £10,062,379.

32. CB's budgeted costs were £13,604,311. It has since updated that (both to cater for adjustments during the trial preparation and trial phases, and for post-judgment costs) to £14,697,335.

33. NAB's budgeted costs were £16,892,983, since updated (for similar reasons to CB) to £18,778,060.

34. The defendants seek payments on account of 70% (if – as I have indicated – costs are to be assessed on the indemnity basis), resulting in £10,288,134.26 for CB and £13,144,642 for NAB.

35. The claimants contend that the starting point should be their own budgeted costs (which, taking account of the fact that the trial ran slightly longer than anticipated, should be rounded up to £11.5 million). They contend that each defendant should be entitled to 50% of that sum on account of their own costs, resulting in £6.875 million for CB (on the basis that CB's figures include VAT) and £5.75 million for NAB. Alternatively, if based on the defendants' figures, the interim payment should be 40% of their budgeted costs (i.e. £6.508 million for CB and £6.757 million for NAB).

36. In my judgment, the appropriate starting point is the costs actually incurred by the defendants. Since costs management was dispensed with, that will be the starting point upon detailed assessment.

37. The most striking feature of the costs incurred in this case is that the defendants' total costs (£33.46 million) are significantly more than double those of the claimants. I accept, as the defendants submitted, that, the claimants having chosen to sue NAB in addition to CB, each bank was entitled to separate representation in defending itself from these serious claims. I also accept that in relation to major aspects of this case, notably disclosure and preparation of witness evidence, the defendants had the greater burden of the work. The defendants submitted that the objections raised by the claimants to the amount of their costs are adequately catered for by applying a discount of 30% for the purposes of arriving at an interim payment.

38. Such a discount would be well within the normal range for cases of this type. There are in my judgment, however, two factors which set this case apart from the norm, and which justify some reduction in the overall figure before applying the normal level of discount.

39. The first relates to counsel's fees. The fees of CB's first leading counsel at trial (not leading counsel appearing at the hearing to consider consequential matters) were approximately £1.5 million greater than those of leading counsel for the claimants and for NAB. As Mr Williams KC submitted, CB was perfectly entitled to choose to instruct counsel whose pre-eminence in the field enabled him to charge premium rates, but in considering what is reasonable to be paid by one party to another, the court should envisage "an hypothetical counsel capable of conducting the particular case effectively but unable to or unwilling to insist on the particularly high fee sometimes demanded by counsel of pre-eminent reputation": see *Simpsons Motor Sales v Hendon Corporation* [1965] 1 WLR 112, per Pennycuick J at p.118. Accordingly, before applying a "normal" discount, CB's overall costs should be reduced by £1.5 million.

40. The second relates to the risk of duplication, where notwithstanding (as noted above) the additional burden on the defendants, the discrepancy in the figures remains enormous. The Banks had common cause in defending the claim, and there does not appear to have been any conflict between them. That enabled them to co-operate throughout the trial, providing joint written submissions, sharing the workload so far as cross-examination was concerned and avoiding duplication in oral submissions. The main observable benefit of that, however, was to avoid increasing the workload for the claimants (and the court) at trial. There remains a significant risk of duplication of work and costs as between the Banks, both behind the scenes throughout the course of the litigation, and by the fact that their separate teams of solicitors and counsel were present throughout the trial. I consider that in assessing the sums likely to be awarded on detailed assessment, and before applying the "normal" discount, a small but significant discount (of 15%) should be factored in to cater for such duplication.

41. Accordingly, I calculate the payments on account (rounded up) as follows:

    (1) For CB: £7.9 million ([£14,697,335 - £1,500,000] x 85%, x 70%).

    (2) For NAB: £11.2 million (£18,778,060 x 85%, x 70%).

42. This is, as it happens, slightly less than the total amount of the claimants' ATE insurance. I need not, therefore, consider the claimants' contention that the interim

payment should not be greater than the ATE insurance, because they reasonably relied on the defendants' costs budgets in determining the amount of that insurance.

(3) Interest on costs

43. The claimants accept that the defendants are entitled to interest on their costs under CPR 44.2(6)(g) at the Bank of England Base Rate + 1% from the date of the payment by the relevant defendant of each invoice for costs.

44. This should be replaced, however, by interest at the rate under the Judgments Act 1838, following the making of an order requiring costs to be paid. I see no reason why the Judgments Act rate should not apply from the date of the order for an interim payment on account, so far as the amount of such interim payment is concerned.

45. The debate between the parties relates to the date from which interest should run at the Judgments Act rate in respect of the remainder of the costs ordered.

46. In *Involnert Management Inc v Aprilgrange Ltd* [2015] 2 CLC 405, Leggatt J said, at §23:

> "I do not think it just to make an order under which interest begins to run at the rate appropriate for unpaid judgment debts before the paying party could reasonably be expected to pay the debt; and, in a case where the court has ordered a suitable interim payment to be made on account of costs, I do not think it reasonable to expect the party liable for costs to pay the balance of the debt until it knows exactly what sums are being claimed by the party awarded costs and has had a fair opportunity to decide what sums it accepts are properly payable."

47. He went on, however, to say that in translating this principle into practice, it was important to set a date by reference to an objective benchmark, because:

> "certainty and clarity are important in this context. It will do no favours to litigants – particularly as the amount of money at stake, while not negligible, is never likely to be large – if the date from which Judgments Act interest will be ordered to run is unpredictable, thus encouraging argument on the issue in every case. With this in mind it seems to me that a reasonable objective benchmark to take is the period prescribed by the rules of court for commencing detailed assessment proceedings. Pursuant to CPR 47.7 where an order is made for payment of costs which are to be the subject of a detailed assessment if not agreed, the time by which detailed assessment proceedings must be commenced (unless otherwise agreed or ordered) is three months after the date of the costs order. In order to commence such proceedings, the receiving party must serve on the paying party a bill of costs giving particulars of the costs claimed. It is then for the paying party to decide which items in the bill of costs it wishes to dispute. Postponing the date from which Judgments Act interest begins to run by three months will therefore generally serve to ensure that the party liable for costs has received the information needed to make a realistic assessment of the amount of its liability before it begins to

incur interest at the rate applicable to judgment debts for failing to pay that amount."

48. If that caused hardship in a particular case, because the receiving party commenced detailed assessment proceedings after the expiry of the specified period, that was mitigated by the fact that any injustice could be remedied by the court disallowing, under CPR 47.8(3), all or any part of the interest otherwise payable to the receiving party.

49. The defendants contend that, on this basis, interest at the Judgments Act rate should run from 19 June 2024, being three months after the date of the costs order. They submit that in a case such as this it is usual to delay preparing and serving a bill of costs while negotiations take place.

50. In this case, the sums at stake are very large indeed (the difference between the Banks' combined total incurred costs and the payment on account is in the region of £14 million). I consider that the underlying principle identified by Leggatt J is best reflected in this case by an order that requires interest at the Judgments Act rate to apply from the earliest of: (1) 28 days after service by the defendants of their respective bills of costs or (2) 19 September 2024 (being six months after the date of the costs order). That remains sufficiently certain, while providing incentives to both parties so far as negotiations are concerned.

(4) NAB's liability in misrepresentation in relation to the Break Costs Representations

51. At paragraph 227 of the Judgment, I left open the question of whether NAB would have been liable in negligent misrepresentation if the break costs had in fact been charged on an improper basis. As I noted there, the foundation of such liability is the making of a statement and I considered it doubtful that NAB had made any Break Costs Representations to the claimants.

52. For the reasons which follow, I have concluded that a claim in negligent misrepresentation against NAB in respect of the Break Costs Representations was neither properly pleaded nor made out.

53. I refer to the claimants' pleading in respect of the claim by Farol as an example. The pleading in respect of the other claimants is materially the same.

54. At paragraph 83 of the re-re-re-amended particulars of claim, the following facts and matters are said to give rise to the Break Costs Representations:

> "83.1. In an email dated 16 March 2011, Mr Pike stated that the indicative Break Cost for the Farol FRL was then £246,820. At the meeting on 24 March 2011, Mr Pike stated that the Break Cost was then £300,000. This figure was determined, and communicated to Mr Pike, by Claire Thomas, an employee of NAB.
>
> 83.2. In an email dated 22 March 2013, Mr Poole stated that the Break Cost was £300,000. This figure is likely to have been (and, it is inferred, was) determined, and communicated to Mr Poole, by Mark Coulam, an employee of NAB.

83.3. On 7 November 2013, Mr Poole stated that the indicative Break Cost was then £239,126. This figure was determined, and communicated to Mr Poole, by respectively, Mark Weir and Peter Brooke, employees of NAB.

83.4. The Bank debited Farol's bank account with £242,400 in respect of the Break Cost on 25 November 2013."

55. At paragraph 84, these words and conduct are pleaded as having given rise to the Break Costs Representations by CB "… and NAB (as to which, see paragraphs 124-125 below), as follows…:

85.1. By the email dated 16 March 2011, that:

85.1.1. the Break Cost (or likely Break Cost) was then £246,820;

85.1.2. the Bank had a contractual entitlement to charge Farol the sum of £246,820 (or a substantially similar sum) as a Break Cost in the event of the Farol FRL being terminated on that date.

85.2. By the oral statement on 24 March 2011, that:

85.2.1. the Break Cost (or likely Break Cost) was then approximately £300,000;

85.2.2. the Bank had a contractual entitlement to charge Farol the sum of £300,000 (or a substantially similar sum) as a Break Cost in the event of the Farol FRL being terminated on that date;

85.3. By the email dated 22 March 2013, that:

85.3.1. the Break Cost (or likely Break Cost) was then £300,000;

85.3.2. the Bank had a contractual entitlement to charge Farol the sum of £300,000 (or a substantially similar sum) as a Break Cost in the event of the Farol FRL being terminated on that date.

85.4. By the email dated 7 November 2013, that:

85.4.1. the Break Cost (or likely Break Cost) was then £239,126;

85.4.2. the Bank had a contractual entitlement to charge Farol the sum of £239,126 (or a substantially similar sum) as a Break Cost in the event of the Farol FRL being terminated on that date."

56. Paragraphs 124 and 125 (insofar as they are relied on to establish how a claim against NAB is made out) are as follows:

"124. Where an employee of the Bank made false Break Cost Representations on which the relevant Claimant relied:

124.1 …

> 124.2 As pleaded below, NAB authorised or permitted, or did not intervene to prevent, the statement being made by the relevant Bank employee and NAB is liable for the false Break Cost Representation.
>
> 125. Where an employee of NAB made false Break Cost Representations on which the relevant Claimant relied:
>
> 125.1 the NAB employee was acting as the agent of the Bank in making the Break Cost Representation and the Bank is liable for the false Break Cost Representation;
>
> and/or
>
> 125.2 the Break Cost Representation was made by the NAB employee within the scope of his or her employment by NAB and NAB is vicariously liable to the relevant Claimant for the false Break Cost Representation."

57. The foundation of any claim in misrepresentation is an actionable statement, made by the defendant to the claimant.

58. The claimants' case as advanced in argument at trial was that NAB made *indirect* representations to the claimants. The legal basis of such a claim is found, for example, in the following passage from Page Wood V-C's judgment in *Barry v Croskey* (1861) 70 EW 945 at p.954:

> "Every man must be held responsible for the consequences of a false representation made by him to another, upon which a third person acts, and so acting, is injured or damnified – provided it appear that such false representation was made with the intent that it should be acted upon by such third person in the manner that occasions the injury or loss".

59. Accordingly, in order to succeed as against NAB, the claimants would need to have pleaded, and proved, that NAB itself made the Break Costs Representations to CB, intending that they should be passed on to and relied on by the claimants. In my judgment, such a claim was neither pleaded nor established at trial.

60. So far as the pleading is concerned, the actual representations pleaded at paragraph 85 were all said to be contained in communications from CB to Farol. The communication of the amount of indicative break costs from CB to Farol constituted a representation, when made in the context of the contractual framework between them, for the reasons set out in the Judgment at §228 to §234.

61. The only conduct of NAB relied on is that certain of its employees provided "the figure" (i.e. the amount of break costs) to CB. There is no pleading that this amounted to a statement by NAB to CB, intended to be passed on to and relied on by Farol.

62. The cross-reference to §124 to §125 of the particulars of claim, said to be relevant to establishing NAB's liability, does not take the matter any further. The claimants

confirmed in closing submissions that they do not contend that CB or any of its employees was acting as agent of NAB in making the Break Costs Representations. That leaves the averment that the NAB employees who provided the calculation of break costs to CB were acting in the course of their employment with NAB, such that NAB is vicariously liable for their actions. The claimants accepted at trial that, since none of NAB's employees were said themselves to be liable in negligent misrepresentation, no case could be made out against NAB in vicarious liability.

63. Even if, as Mr Onslow KC contended, the reference to "vicarious liability" could be ignored as an unnecessary addition, that does not address the failure to plead a representation made by NAB.

64. The lack of pleading is not a mere technicality. In the absence of the pleading of a statement made by NAB to CB with the intention that it be passed on to and relied on by customers, there was no investigation made of the NAB employees who provided the figures to CB, and no evidence from them as to their intentions when doing so.

65. In any event, the fact that an NAB employee provided the figure to CB is not sufficient to constitute an actionable representation by NAB to Farol. There was a separate contractual relationship between CB and NAB comprised of the CNH. The natural inference is that the figure provided by NAB to CB was the amount which NAB calculated as being due upon termination of the CNH. That does not amount to any statement by NAB as to CB's contractual entitlement to recover break costs from its customers.

66. Even if the NAB employee was aware that CB would charge its customer the same amount as the termination payment due under the CNH, and intended that the figure provided to CB would be passed on directly to the customer, the reasonable customer to whom the information was provided would not in my judgment think that *NAB* was making any statement at all to it about the contractual entitlement as between CB and its customers. Accordingly, irrespective of the lack of pleading, the claimants have not established that the supply of the figure by NAB to CB constituted an actionable representation by NAB, intended to be relied on by Farol (or the other claimants).

67. Insofar as the claimants rely on occasions when an employee of NAB provided break costs figures *directly* to a claimant (the claimants refer to occasions involving Gaston and Janhill), then I find that a reasonable person in the position of the relevant claimant would have understood that the information was being provided to them by someone acting on behalf of CB, i.e. that the statement was made *by* CB. The representations related solely to the entitlement to charge break costs under the contract with customers. CB was the contracting party, being the lender on the face of the facility agreement, and so was the entity that was entitled to charge break costs. From the customers' perspective, whether they interacted with an employee of CB or of NAB, this was information coming to them from their contracting counterparty, CB. That is not undermined, in my view, by the close involvement of NAB and its employees in the marketing and sale process for the FRTBLs, including such matters as the use of NAB "group" email signatures or the fact that some Bank employees and claimants did not draw a clear distinction between the two Banks.

68. I note that this reflects the claimants' pleaded case at §125.1 of the particulars of claim (see above). Their alternative case (at §125.2), that NAB was also liable in

respect of the statement, is based upon the allegation that the relevant employee was acting in the course of his or her employment with NAB, so that NAB is vicariously liable for the statement. That contention founders, however, on the concession that since the employee is not liable in tort, there can be no question of NAB being vicariously liable. The claimants did not advance any argument that the position was different in respect of Break Costs Representations made to Janhill after the Morph Transaction (when the break costs recovered by CB were held on trust for NAB).

(5) Permission to Appeal

69. The claimants seek permission to appeal on five grounds. Grounds 1 and 2 relate to my conclusion that the break costs charged by CB were properly chargeable as a matter of construction of clause 8.2 of the Standard Conditions. The claimants' overarching point is that these are questions of law on which reasonable judges may reasonably disagree.

70. I agree with Mr Goodall KC that certain of the sub-grounds or reasons given in support do not have any real prospect of success. In particular, I do not think there is a real prospect of showing (see sub-grounds 1.1 and 1.8) that I was wrongly influenced by the conclusion that the calculation in fact carried out by CB was a reasonable or appropriate proxy for CB's loss. This is a mischaracterisation of the Judgment. My conclusion was not based on what CB in fact did, but on the general point that the calculation of the termination sum under a CNH is based on the same NPV calculation as would be undertaken in assessing CB's loss on early termination of a FRTBL even if there had been no CNH. Nor is there a real prospect in relation to sub-ground 1.2 where it is contended that there was nothing in the wording of clause 8 to support a conclusion that CB was entitled to recover as loss amounts which were "close to" or which "approximate" its loss. That again mischaracterises the judgment: I did not make such findings. I also do not think there is a real prospect of successfully showing (as contended by sub-ground 1.9) that my construction is uncommercial or leads to absurd consequences.

71. As to the remaining sub-grounds, it is true to say that they repeat arguments that were advanced, addressed and rejected in the Judgment. I remain unpersuaded by them, but in view of the low threshold for permission to appeal, I am satisfied that it is appropriate to give permission to appeal on grounds 1 and 2.

72. I refuse permission on ground 3. By this it is contended that "if" the finding at §188 of the Judgment is a finding that sums paid to NAB are within the scope of clause 8 because they were paid under a "hedging arrangement" (i.e. the non-capitalised term) then it is wrong for the reasons given in the claimants' opening submissions at trial. §188 of the Judgment does not, however, contain such a finding. The paragraph is merely explaining why I did not think the conclusion I had reached was uncommercial.

73. By ground 4, the claimants seek to appeal my conclusion that the core matters relied on by the claimants (to establish that the Fixed Rate Representations were made) would not have caused a reasonable person to believe that they were made. I refuse permission on this ground. It is a conclusion heavily bound up in the facts relating to each claim, and I do not think there is a real prospect of it successfully being interfered with. Moreover, the claimants do not also seek to appeal my other findings

to the effect that the individual claimants did not understand the Fixed Rate Representations to have been made and did not rely on them. Nor do they seek permission to appeal the finding that on all the facts and matters relied on (i.e. not merely the core matters) separately in relation to each of Farol, Janhill and Uglow, there was objectively no actionable representation made. Any appeal on the issue raised by ground 4 would therefore be academic, at least in the context of the fixed rate claims.

74. Mr Onslow KC submitted that an appeal would not be academic, as it may be relevant to some of the claimants whose claims are stayed. The four claims were chosen to proceed, however, on the basis that they raised fact patterns that were – albeit informally – representative of those to be found in relation to the remaining claimants. He also submitted that an appeal would not be academic because of its impact on the unfair relationship claim: I address that aspect below.

75. Ground 5 relates to the unfair relationship claim. I refuse permission on this ground. The decision is based on an evaluative judgment and a multi-factorial assessment of all the circumstances. The grounds on which it is sought to appeal this part of the decision essentially challenge the weight which I gave to various factors, or repeat arguments addressed and dealt with in the Judgment (e.g., as to whether the size of AV should be compared with the Margin or the total cost of borrowing). Insofar as the claimants rely on ground 4 (relating to the Fixed Rate Representations) under this head, I repeat the principal reason given above for refusing permission on that ground.

76. As to the contention that there was procedural unfairness in relation to the question whether other banks would likely charge additional income, the principal basis for this conclusion was the logical inference to be drawn from the facts that (1) a FRTBL was a product which gave customers an added benefit, and which required any bank that provided it to assume additional burdens and responsibilities, and (2) no reasonable customer would expect a bank to do so for nothing. It was not based on the expert evidence to which objection had been made by the claimants.

77. Accordingly, I give permission to appeal on grounds 1 and 2, but refuse it in relation to grounds 3, 4 and 5.