Case No: LM-2015-000133

[2016] EWCH 281 (QB)

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

The Rolls Building
Fetter Lane
London EC4A 1NL

Tuesday, 12 January 2016

BEFORE:

HIS HONOUR JUDGE BIRD
(Sitting as a Judge of the High Court)

BETWEEN:

CGL GROUP LIMITED

Claimant

- and -

ROYAL BANK OF SCOTLAND

Defendant

MR MCGARRY appeared on behalf of the Claimant

MS OPPENHEIMER appeared on behalf of the Defendant

Judgment
(As Approved)

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JUDGE BIRD:

1. In this judgment I will refer to CGL Group Ltd as the "claimant" and the two defendants RBS and NatWest as "the bank" or the "defendant" as the context requires.
2. The claimant purchased two financial products from the bank the first in July 2006 and the second in April 2007. It is not necessary to describe the transactions in any great detail, save to say that the first was a base rate collar trade, the second an amortising base rate swap. The collar was closed out on 12 July 2010 and half of the swap was closed out on 4 August 2010. The due termination date of the swap was 15 May 2017.
3. Complaints in general terms about the products and the circumstances in which they were sold to the claimants were first made in or about the middle of 2009.
4. On 29 June 2012 the FCA (as it now is) announced findings following a small scale review into the sale of interest rate hedging products and announced its agreement with a number of banks, including the defendant, that a redress scheme would be set up to compensate certain qualifying customers to whom such products had been miss-sold. I will refer towards the end of this judgment in greater detail to that scheme.
5. On 17 November 2013 the defendant confirmed to the claimant that it would fall within the parameters of the sales review and on 20 August 2014 the claimant was informed that it qualified for redress in respect of the collar trade, but not in respect of the swap.
6. On 5 January 2015 the claimant issued proceedings. Again I need not set out the basis of the claim at this stage in detail, but for the purposes of this application I proceed on the basis that the allegations are made out; this application being an application to strike out.
7. Ms Oppenheimer during the course of her submissions characterised the claim as a claim for miss-selling in the light of failure to provide advice and information. Mr McGarry who appears on behalf of the claimant did not raise any substantive objection to that broad description and I adopt it and agree with it. In its defence the bank asserts that all claims based on breaches of duty which arose more than six years before issue (that is before 5 January 2009) are statute barred.
8. I now turn to deal with the applications before me. By an application notice dated 19 October 2015 the defendant banks apply to strike out the claimant's claim or, alternatively, for summary judgment in respect of the same. In each case the defendant says the claims are statute barred. The claimant denies that the claims are statute barred and it pleads that it had the requisite knowledge to bring the claim only when the media first published reports about the miss-selling review to be conducted by the FCA in June 2012. The strike out application is supported by the witness statement of Felicity Ewing. The bank's position in short is that the issue of limitation is suitable for early determination without a trial because "the relevant dates are clear and the central questions are legal ones that can and should be determined at this preliminary stage". It is important to note that the claimant, rightly in my view, does not draw any distinction between the two products to which I have referred. It seems to me (and I understand the Claimant to accept this) that the claims in respect of the 2 products stand or fall together.
9. As to the evidence before me Ms Ewing deals with limitation at paragraph 15 and onwards of her statement. It is conceded by the claimants, again in my judgment rightly, that I should proceed on the basis that primary limitation has expired. The argument therefore has centred solely on the application and meaning of section 14A of the Limitation Act 1980.
10. The evidence shows the payments due in respect of the various products increased markedly from 16 February 2009 because the defendants' base interest rates had fallen to an unprecedented level by that date. From 19 July 2006 to January 2009 applicable

rates in respect of the collar fell between the cap rate and the floor rate. As a result the claimant consistently made large payments to the defendant. In May 2009 the claimant asked for a settlement figure and in July 2009 the claimant contacted the bank to discuss restructuring. The contact was by email through the claimant's accountant. The email is in the application bundle in tab 8 at page 124 and stands as a note of a conversation had between the claimant's accountants and a member of the bank's staff; it reads as follows:

> "Cos [or Cosmo; that is the director of the claimant] wants to talk with someone at RBS please about the hedging products – as I understand it there are two – a £1m cap and collar and a swap for £1.5m pegged to a long term loan arrangement amortised – it's the latter that cos wants to talk about because this was set out with the retention of chirk properties in mind which of course is now not happening – I've had difficulty tracking down the original chirk wip facility papers which might clear up quickly as they may have referred the hedge as a condition – can we include amongst other things for the next meet please?"

I am told and accept that reference to the "Chirk" properties is simply to a collection of properties known by that name. The word has no special meaning and is not a term of art.

11. On 17 July 2009 the claimant, through its director Mr Lloyd, complained by email directly. The complaint centred on "miss-selling". The email is at page 125 of the bundle. It was submitted via a general enquiries or complaint portal on the defendant's web site. It provides as follows:

> "This complaint is of a serious nature: reference to hedging funds mis-sold to me. After numerous attempts to speak with someone in relation to this fund I now feel my only option is to log a complaint. This fund means a make or break to the company. Please contact me on…"

A mobile telephone number was supplied. The bank's position is that this clearly shows that the claimant was fully aware of the facts that lie behind the claim.

12. In accordance with the invitation extended in the email there was contact between the bank and the claimant on 19 November. Reference again was made to the products being miss-sold and there was discussion about breakage costs put at £280,000. I have seen a transcript of the conversation and listened to a recording of it. In the transcript Mr Lloyd, the claimant's director, says this, "I feel that I've been misled and miss-sold this policy." Nothing, it seems to me, turns on the description of the products as a policy. When he asked how he feels the miss-selling came about, he replies in this way:

> "Mis-sold it because I didn't want it and they pestered me and pestered me and it was just put in front of me to sign, and you know it wasn't really explained."

He goes on to say:

> "I never knew that it actually had 10 years to run, you know? We didn't notice it when we were selling off the property."

13. Thereafter, as I have referred to briefly, the collar was closed out on 12 July at a cost of some £53,500 and half of the swap was closed out in August at a cost then of £142,000.
14. In opposition to the strike out application Mr Lloyd of the claimant has submitted a short witness statement. It comprises only 14 paragraphs and as the bank put it during

the course of submissions it was submitted "very late". The claimant accepts through Mr Lloyd that before 29 June 2012, the date when the FCA announced its review, that the claimant was aware that it had needed to make increased payments to the defendant and that it was aware of the extent of breakage costs. It accepts the extent of the contact which I have described between it and the bank in July 2009 and November 2009. The key provision within the claimant's evidence is set out at paragraph 10; there Mr Lloyd says this:

> "Until June or July 2012, the Claimant was not aware of the nature and/or scope of the Defendant's regulatory and/or common law duties and did not have the requisite knowledge (constructively or otherwise) to attribute such loss/damage to the Bank's negligence, until after that time."

15. The claimant's position then is that in June or July 2012 its accountants told it that there may be a claim against the bank. It is said that the November communication, albeit referring to miss-selling should be seen against the background of earlier communications. It is said that the complaints made to the bank were complaints in truth about a lack of flexibility.
16. The application to strike out was met by an application to amend. The application sets out allegations that the defendant owed to the claimant a common law duty of care having agreed to review the sale of products to the claimant to, first, conduct the sales review in accordance with the undertakings given by the bank to the FCA and in accordance with the agreed methodology; secondly to provide the claimant with appropriate fair and reasonable redress and, finally, to conduct the review with reasonable care and skill.
17. The claimant pleads a breach of duty in respect of that proposed amendment in that the defendant concluded that at the end of the review the bank might have "done more" because the sales process was non-compliant with agreed sales standards. The application to amend is supported by a witness statement prepared by Mr Hassall, the claimant's solicitor. The claimant relies on a decision of His Honour Judge Havelock-Allan QC in Suremime Ltd v Barclays Bank plc [2015] EWHC 2277 (QB). The application is opposed by a second lengthy comprehensive and detailed witness statement of Ms Ewing.
18. I deal first of all with the application to strike out on the grounds of limitation. The claimant submits that the claim is not statute barred. It submits that its date of knowledge for the purpose of section 14(8) was within the requisite three year period. It submits that the very earliest dates at which it might have been able to be in possession of the relevant knowledge was 29 June 2012. The claimant refers to the decision of Hamblen J in Kays Hotels v Barclays reported in 2014. The claimant submits that there are facts which are outstanding which require investigation with the consequence that it would be wrong to bring this claim to a premature end.
19. The defendant on the other hand submits that the claim should be struck out and, indeed, the amendment not allowed. It submits that by 19 November 2009 the claimant had all requisite knowledge. Alternatively, it had the requisite knowledge that broke the collar in July 2010 and when it partially broke the swap in August 2010. Further, the defendant says in any event that the claimant had actual knowledge by 19 November 2009 or had constructive knowledge by that date and, in any event, before 5 January 2012.
20. I deal with the law. The test for summary judgment and strike out is set out in the claimant's skeleton at paragraphs 28-33. It seems to me that there is no substantive

dispute as to that test and I need not rehearse it here. I must refer to the Limitation Act 1980. Section 2 provides that:

> "An action founded on tort shall not be brought after the expiration of six years from the date on which the cause of action accrued."

Section 5 lays down a similar period in relation to actions founded on tort.

21. I now set out section 14A of the Limitation Act:

> " (1)This section applies to any action for damages for negligence, other than one to which section 11 of this Act applies, where the starting date for reckoning the period of limitation under subsection (4)(b) below falls after the date on which the cause of action accrued.
>
> (2)Section 2 of this Act shall not apply to an action to which this section applies.
>
> (3)An action to which this section applies shall not be brought after the expiration of the period applicable in accordance with subsection (4) below.
>
> (4)That period is either—
>
> (a)six years from the date on which the cause of action accrued; or
>
> (b)three years from the starting date as defined by subsection (5) below, if that period expires later than the period mentioned in paragraph (a) above.
>
> (5)For the purposes of this section, the starting date for reckoning the period of limitation under subsection (4)(b) above is the earliest date on which the plaintiff or any person in whom the cause of action was vested before him first had both the knowledge required for bringing an action for damages in respect of the relevant damage and a right to bring such an action.
>
> (6)In subsection (5) above "the knowledge required for bringing an action for damages in respect of the relevant damage" means knowledge both—
>
> (a)of the material facts about the damage in respect of which damages are claimed; and
>
> (b)of the other facts relevant to the current action mentioned in subsection (8) below.
>
> (7)For the purposes of subsection (6)(a) above, the material facts about the damage are such facts about the damage as would lead a reasonable person who had suffered such damage to consider it sufficiently serious to justify his instituting proceedings for damages against a defendant who did not dispute liability and was able to satisfy a judgment.
>
> (8)The other facts referred to in subsection (6)(b) above are—

(a)that the damage was attributable in whole or in part to the act or omission which is alleged to constitute negligence; and

(b)the identity of the defendant; and

(c)if it is alleged that the act or omission was that of a person other than the defendant, the identity of that person and the additional facts supporting the bringing of an action against the defendant.

(9)Knowledge that any acts or omissions did or did not, as a matter of law, involve negligence is irrelevant for the purposes of subsection (5) above.

(10)For the purposes of this section a person's knowledge includes knowledge which he might reasonably have been expected to acquire—

(a)from facts observable or ascertainable by him; or

(b)from facts ascertainable by him with the help of appropriate expert advice which it is reasonable for him to seek;

but a person shall not be taken by virtue of this subsection to have knowledge of a fact ascertainable only with the help of expert advice so long as he has taken all reasonable steps to obtain (and, where appropriate, to act on) that advice."

22. It follows that the issue at large is as set at section 14A(5): what is "the earliest date on which the claimant first had both the knowledge required for bringing an action for damages in respect of the relevant damage and a right to bring such action". In other words, when did the claimant have knowledge of both the material facts about the damage in respect of which the damages are claimed; and of other facts relevant to the current action mentioned in subsection (8)? Subsection (8)(a) provides that part of the relevant knowledge is that damage was attributable in whole or in part to the act or omission which is alleged to constitute negligence.
23. I turn now to deal with the authorities. I was referred to Haward v Fawcetts [2006] 1 WLR at page 682, a decision of the House of Lords. Lord Nicholls at paragraph 7 reminds the reader that section 14A sets out the extent of knowledge that a claimant must be shown to have before time can fairly run against that claimant. In interpreting section 14A it is important, as Lord Nicholls points out, that the court should have this clear statutory purpose at the forefront of its mind. Lord Nicholls dealt both with the degree of confidence a claimant must have in the relevant information and with the level of detail of the knowledge.
24. As to the degree of confidence required reference was made to the judgment of Lord Donaldson in Halford v Brookes [1991] 1 WLR 428 at page 443. It is clear that the claimant need not know for certain; he need only have sufficient confidence to justify his embarking on the preliminaries to the issue of a claim, such as taking advice. This, of course, cannot be taken too far. Suspicion without more is not enough, but reasonable belief will suffice.
25. As to the level of detail required Lord Nicholls adopted the remarks of Slade LJ in Wilkinson v Ancliff [1986] 1 WLR 1352. To summarise, it is not necessary for the claimant to have knowledge sufficient to enable his legal advisor to draft a full and

comprehensive particulars of claim. The extent of necessary knowledge has, as Lord Nicholls pointed out, been expressed in different ways in different cases. In a clinical negligence case a patient's knowledge "in general terms" that her problem was capable of being attributed to an operation was enough. In other cases knowledge of the "essence of the act or omission to which the injury is attributable" was enough.

26. These standards, if they vary at all, were brought together by Hoffman LJ (as he then was) in Broadley v Guy Clapham [1994] 4 AER 439. He puts it in this way:

> "one should look at the way the plaintiff puts his case, distil what he is complaining about and ask whether he had, in broad terms, knowledge of the facts on which that complaint is based."

27. Lord Scott at paragraph 45 expressed agreement with Hoffman LJ in Hallam-Eames v Merrett Syndicates Ltd [2001] Lloyd's Rep PN 178 where he explained that section 14A(8)(a) sets out the requirement actual knowledge of causal relevance. Lord Scott summarised the requisite knowledge as "knowledge of the facts constituting the essence of the complaint of negligence". I need not refer to any of the other opinions handed down in that case.
28. For my part I do not see that any difficulties here arise in any perceived differences between section 14A(8) and (9). The essence of the complaint in the present case is what I must concentrate upon. In my judgment the essence of the claim is precisely as Ms Oppenheimer for the bank put it; this is a claim for miss-selling in the light of failures to provide certain advice and certain information. Mr McGarry for the claimant realising that the formulation of the claim is of central importance referred me to the case of Kays Hotel v Barclays [2014] EWHC 1927 (Commercial). The bank applied to strike out or have summary judgment awarded in its favour on a claim such as this based on miss-selling a hedge product. The only evidence before the court of knowledge appears to have been that the claimant was aware that payments under the collar were being made to the bank. The claimant's evidence in opposition to the strike out included the following assertions from a director of the claimant:

> "... there was nothing in the payments out to alert me to the fact I had been sold a product that I should not have been sold. Barclays did not sell me a product on the basis that I would never have to pay monies...
>
> ... My expectation was also that the product would prove itself to my advantage over its entire life...
>
> ... The payments out, therefore, to my mind, were a result of short term extreme interest rate drops, which had nothing to do with my advice that Barclays (who were not even my current bankers) had given us..."

29. Hamblen J refers at paragraph 11 of the decision to the need for a claimant to know the "factual rudiments of a claim" and there emphasises the need to approach the analysis of that question in a broad common sense way. In that case the bank submitted that the essence of the claim was that the customer had been told that interest rates would rise throughout the life of the product and was not advised about the risk of rates falling below the floor. One can see why, given the information and the knowledge that the claimants had, that the bank sought to summarise its claim in

that way. The learned judge, however, concluded that that was not an apt summary. He concluded that the claim there (like the claim here) was in fact properly summarised in short as a miss-selling claim. He found that the bank's classification was too narrow. The conclusion was, having that classification as found by the judge in mind, that no sufficient knowledge was present. The case simply represents the application of clear principles as I have set them out to the facts.

30. I turn then to my decision on the strike out. I remind myself as I have briefly set out for the purposes of the strike out, I treat the facts and matters pleaded against the bank for the sole purpose for determining the strike out as proved. I therefore proceed on the basis for this application alone that there was miss-selling. I need hardly say should the matter proceed to trial that may not be shown to be the case. Bearing in mind the evidence before me and the test that I must apply, I am entirely satisfied that by mid-November 2009 and certainly before January 2012 the claimant was in possession of the knowledge required for bringing an action for damages in respect of the relevant damage. I find that by mid-November 2009 and certainly before January 2012 that the claimant had knowledge that the damage was attributable in whole or in part to the act or omission which now is alleged to constitute negligence. From the emails and transcripts I have seen, it is plain that the claimant had more than a mere suspicion that it had been the victim of miss-selling in light of the bank's failure to provide advice and information.
31. The claimant's sole director whose knowledge of course must be attributable to the claimant knew that he had what was described as a "complaint of a serious nature" against the bank as long ago as 17 November 2009. He knew also that the complaint was about miss-selling. Lest it be thought that too much emphasis is placed on the use of the word "miss-selling" the same is repeated in the telephone conversation which arose as a result of the initial complaint. It is abundantly clear that the claimant felt he had been misled and misadvised and that the products had been miss-sold to him and that the responsibility for that lay firmly in the lap of the bank. He refers in the clearest terms to a failure to explain the products.
32. In my judgment there is no need for any further investigation of the facts, given that the nature of the telephone conversation and the emails is not disputed. Bearing in mind the statutory purpose behind section 14A I have come to the conclusion, therefore, that it is entirely just and proper that the time outside of the primary limitation period began to run against the claimant in mid-November 2009. I therefore conclude as that date is more than three years prior to issue that the claim in its presently drafted form is statute barred and I strike it out.
33. I turn now to deal with the application to amend. In my judgment the only issue for me in considering the application to amend is whether the amendment would pass the summary judgment test. If it would, then I should grant permission; if it would not, then I should refuse it. If allowed, given the findings that I have made the amendment will be the sole surviving part of the claim. The amendment is set out in the proposed amended particulars of claim at paragraphs 28.1 to 28.3. Paragraph 28.1 pleads that the defendant owed a duty of care to conduct the sales review in accordance with undertakings given and in the manner that I have already explained. At paragraph 28.2 it is pleaded that because the defendants' takings to and agreement with the FCA conferred a benefit on the claimant that the defendant owed the claimant a duty in like terms. Paragraph 28.3 sets out particulars in short form of the breach.
34. There are further subsidiary parts of the application to amend. One deals with the factual background which is necessary; the other deals with limitation points. I decline for the reasons that I have already given to permit an amendment in relation to

limitation points. Each of the points pleaded has been fully argued. As to those parts of the amendment which set out the relevant facts and matters relied upon, they stand and fall with paragraph 28.

35. I deal briefly with the main points of the submissions. For the claimant Mr McGarry submits that I should follow the decision of His Honour Judge Havelock-Allan QC in Surmime. If I am against him on that and decline to follow that case, he submits that in any event a duty arises either because the bank assumed responsibility for the outcome of a review (see Hedley Byrne) or because the three-stage test set out in Caparo v Dickman is met or, thirdly, as Lord Bridge puts it in Caparo "the imposition of a duty in these circumstances is a permissible small incremental development in the law of negligence". He submits, as set out in the pleading, that if wrong on those points then a duty of care arises under White v Jones.
36. Ms Oppenheimer submits and sets out at paragraph 53 of her skeleton by reference to case of Customs & Excise v Barclays [2006] UKHL 28 that whichever route one takes to discover whether or not a duty of care is to be imposed, the end result should be the same. For the defendant Ms Oppenheimer submits that I should not follow Surmime because it was wrongly decided and that, in any event, no duty of care on the facts of this case as accepted by all parties could possibly arise.
37. The factual context in which the duty is said to arise is of central importance. I note that in Surmime His Honour Judge Havelock-Allan QC at paragraph 33 expressed the view that he was not confident that all of the relevant facts necessary to determine whether or not a duty of care existed were known and indeed had been deployed before him. However, in this case there is no substantial or, indeed, any dispute as to that factual background. The background is very helpfully and comprehensively set out in Ms Ewing's second witness statement. The evidence, in short, is not contradicted and no point in submission is made against any part of it.
38. The background to the setting up of the relevant review is to be found in a report published by the FCA in March 2013. The report reveals that in 2012 the FCA had itself carried out a review of the sale of IRHPs to small businesses. The review had brought to light some serious concerns. The initial review led 11 banks, including the defendant, to agree to a review of some 40,000 sales of those products to non-sophisticated customers, which sales had arisen from 1 December 2001. The FCA report deals with the finding of "pilot" or initial reviews conducted by those banks into a sample of what are described as "typically more complex" cases. The pilot reviews conducted by those banks confirmed the FCA's initial findings that there were significant miss-selling issues.
39. Ms Oppenheimer during the course of her submissions reminds me that bank operations are highly regulated. The statutory regulator is the FCA. Based on the findings of the FCA and of those initial or pilot reviews the FCA in furtherance of its statutory regulatory obligations was obliged and did consider what action it was to take. It appears that it discussed matters with the banks and that a compromise agreement was reached; compromise that is of the action that the FCA would otherwise take against the banks for breaches of the regulatory code. To record the compromise that was reached the FCA and each bank entered into a compromise agreement. In short, the FCA and the bank settled the matter by the banks agreeing to carry out a review.
40. At clause 9 of the settlement agreement the FCA and the bank agreed that "a person who is not a party to this agreement has no right under the Contract (Rights of Third Parties) Act 1999 or otherwise to enforce any term of this agreement". The words "or otherwise" are emphasised by the bank. In my judgment the meaning of the words

used in clause 9 is entirely clear. The parties agreed that a person who was not a party to the agreement, for example a bank customer who was a victim of miss-selling, would have no right to enforce the agreement whether in contract or otherwise.

41. The mechanism of the review that was to take place was set out in an undertaking and its appendix. The undertaking with the appendix was offered by each relevant bank to the FCA and accepted by them at the same time that the compromise agreement was entered into. Three particularly relevant features of the review need to be highlighted. First, the FCA was to serve on each bank a notice under section 166 of the Financial Services and Markets Act 2000. The notice would require the bank to appoint a "skilled person" to report to the FCA on the bank's conduct of the review. The reviewer was from time to time to produce written reports to the FCA and generally to monitor the review on behalf of the FCA. The skilled person was to review each final determination made by the bank and no offer would be made until that review had been completed. The service of a section 166 notice is part of the FCA's armoury of regulatory tools to supervise and monitor authorised persons, including banks. The power clearly arises solely under the statute. Secondly, the review was to include an assessment of compliance with regulatory requirements defined as the principles, rules and guidance contained in the FSA's handbook and as set out at paragraph 3.10 of the appendix to the undertaking to take into account certain sales standards. Thirdly, the review was to be limited to only a certain class of customer described, somewhat unflatteringly, as "non-sophisticated".
42. Against that background, which it seems to me is uncontroversial, Ms Oppenheimer for the bank makes seven points in support of her argument that no duty of care could arguably be said to arise. First, the review is limited to non-sophisticated customers. Secondly, the rationale of the scheme was to arrive at a speedy and straightforward resolution of customers' complaints. So much arises from contemporary documentation issued by the FCA. Thirdly, the review was long in range and touched upon all sales made after 1 December 2001. Fourthly, the review looked at matters which were not directly actionable by customers. Fifthly, the bank by clause 9 expressly made it clear that it was not willing to accept and, indeed, expressly rejected the possibility of any liability to customers in the manner in which it carried out the review. Sixthly, the customers' protection within the review against the unreasonable or improper conduct of the bank in conducting the review lay in the statutory duty of the skilled person to oversee the process; such duty arising under the notice served on that skilled person under section 166 of FSMA. Finally, the FCA monitored the progress of the reviews, had the power to and in fact did require changes to it and acted in reality at all times, as one might expect given the compromise agreement, as the overseer of the review.
43. Ms Oppenheimer then turned to consider the routes by which the claimant submits a duty of care could arise. First and dealing with the assumption of responsibility argument, she submits shortly that the bank assumed a responsibility only to the FCA; no responsibility, she submits, was assumed to the claimant or indeed to any customer. She points out that the settlement terms which set the structure of the review were at the time they were created intended to be confidential and not therefore communicated to customers. She points out that those confidential terms which have now come to light expressly in any event exclude the assumption of any responsibility to a customer. Against that background the imposition of a duty of care would, she submits, subvert the contractual arrangements made for a statutory purpose between the bank and the FCA and quite simply should not be permitted.

44. I was referred to the words of Oliver J (as he then was) in the Midland Bank Trust Company case. The words were approved by Lord Goff in Henderson v Merritt Syndicates [1995] 2 AC 145, 191C. There Lord Goff approved Oliver J's words as follows:

> "A concurrent or alternative liability in tort will not be admitted if its effect would be to permit the plaintiff to circumvent or escape a contractual exclusion or limitation of liability for the act or omission that would constitute the tort."

45. I remind myself that the customer in this case was not a party to the contract between the bank and the FCA and that this case was not a case where there is an argument as to concurrent liability in contract and tort. However, the fact remains that the express exclusion of a duty or the express imposition of a duty of care would fly in the face of the stated intentions of the bank. To put it another way, how can it be said that the bank should be treated as if it had assumed liability to a customer for faults in the review when (a) it had expressly disavowed such a responsibility; and (b) it in any event was not the ultimate controller of the process and was at every stage subject to review by the skilled person.
46. Turning to the Caparo formulation, Ms Oppenheimer submits that in all the circumstances of the case against the background which has been set out, it would not be just and reasonable to impose a duty of care on the bank owed to its customer. She submits that the imposition of a duty would undermine the clear regulatory scheme that is in place. The bank's review concerned regulated matters in respect of which, she submits, the claimant would have no direct right of action; rather the review was concerned with obligations owed by the bank to the FCA rather than with obligations owed by the bank to its customers. So much again appears from the terms of the settlement agreement and the fact that the settlement agreement was entered into at all.
47. The limited circumstances in which a customer may rely upon the obligations the bank owes to a regulator as a cause of action do not arise in this case. Those circumstances have been limited not by the parties but by statute and Parliament has named a specific and limited class of person who may sue. To find here that a duty of care arises would, so she submits, be to drive a coach and horses through Parliament's clearly expressed will. Ms Oppenheimer reminds me that Green v Rowley [2013] EWCA Civ 1197 makes it clear, if clarity is required, that the fact that a bank owes a duty to the FCA does not mean that a similar duty is owed to a customer, notwithstanding the possibility that a customer may lose out in the event of a breach.
48. Again in summary Ms Oppenheimer submits that to impose a duty of care at common law on the bank in the circumstances of this case would be to circumvent the scheme. She submits that it would be wrong as a matter of principle to impose such a duty when none was contemplated and indeed expressly excluded.
49. Dealing with White v Jones Ms Oppenheimer's submission is that there is no requirement for the law in the circumstances of this case to impose a duty of care. In White v Jones a duty of care was imposed because there was a mismatch between the position of the estate which had a claim but no loss, and the beneficiary who had suffered loss but had no claim. Here the customer has in the general run of matters a cause of action against the bank. There in White v Jones the beneficiary had none. The bank will be responsible for any miss-selling which causes loss, thus each customer has right to complain and to obtain adequate redress. Here in the

circumstances of this case that right has been lost by limitation, but that is nothing to the point.

50. Still further, Ms Oppenheimer submits that if the duty of care is here pleaded it would have the effect of circumventing the limitation period. That would be the effect, she submits, because it would mean that in practice all or most of the issues which I have decided are statute barred would have to be litigated. She says that as a matter of principle the court should not easily be persuaded to let through the back door that which it has expelled through the front.
51. Against those submissions which might properly be classified as formidable Mr McGarry submits that I should follow Surmime. He submits that in that case the judge was right and he points out that the judge referred to clause 9 in the settlement agreement which applied in that case as it does in this. He submits that when the court considers the imposition of a duty of care it is entitled to consider the statutory framework and he considers that the circumstances of the case are such that a duty of care ought to be imposed and that it is, in short, clearly too early to shut out the claim.
52. I then come to my conclusion. I am satisfied for the reasons advanced by Ms Oppenheimer that no duty of care can arguably be said to arise for the reasons which she sets out. I therefore decline to permit the amendment. It seems to me that it is right to say that the bank cannot be treated as having taken on a duty of care when it has expressly excluded the possibility of it doing so and I am further persuaded that it is not just or reasonable to impose a duty of care in circumstances where such imposition would ride a coach and horses through a clearly defined statutory scheme.
53. As to Suremime, it seems to me in short that the learned judge there did not have the benefit which I have enjoyed of having the full regulatory picture painted before him. Ms Oppenheimer submits that I should treat the decision as wrong. In my judgment there is no strict need for me to do so. I am satisfied here that the absence of the full factual background was sufficient to justify the judge's conclusion. The case with which I deal is different; there are no factual gaps and all matters are before me.
54. In the event that it is necessary to decide if Suremime is to be followed then I would decline to do so. It seems to me with the benefit of the submissions that I have heard that were it necessary so to conclude and if another court were to conclude that His Honour Judge Havelock-Allan QC had before him all necessary matters, then I would respectfully conclude that the decision was wrong and one which I should not follow.
55. For those reasons I decline to permit the amendment sought.