Neutral Citation Number: [2017] EWCA Civ 1073

Cases Nos: A3/2016/0731 & A3/2016/2706 & A3/2016/1438

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM
(1) HHJ Bird, (2) HHJ Waksman QC, (3) HHJ Kaye QC
(1)[2016] EWHC 281 (QB), (2) [2016] EWHC 1360 (QB), (3) [2016] EWHC 378 (QB)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 24/07/2017

Before:

LORD JUSTICE McFARLANE
LORD JUSTICE LEWISON
and
LORD JUSTICE BEATSON

- -

Between:

(1) CGL Group Limited **(2) Jacqueline Bartels & Adrian Bartels** **(3) WW Property Investments Limited**	**Appellants**
- and -	
(1) The Royal Bank of Scotland plc & National Westminster Bank plc **(2) Barclays Bank plc** **(3) National Westminster Bank plc**	**Respondents**

Richard Edwards QC, Steven McGarry (instructed by Myerson Solicitors LLP) for CGL Group Limited,
Nicholas Vineall QC, James Hatt (directly instructed) for Mr and Mrs Bartels,
Julian Roberts (instructed by Duffy Fowler Gabbi Solicitors LLP) for WW Property Investments Limited
Andrew Mitchell QC, Tamara Oppenheimer (instructed by Dentons UKMEA LLP) for the Royal Bank of Scotland plc in the CGL appeal and National Westminster Bank plc in the WW appeal,
Patrick Goodall QC, Ian Bergson (instructed by Dentons UKMEA LLP) for Barclays Bank plc,
Andrew Mitchell QC, Adam Sher (instructed by Dentons UKMEA LLP) for the National Westminster Bank plc

Hearing dates: 20 – 21 June 2017

Approved Judgment

Lord Justice Beatson:

I. Overview:

1. The three linked appeals before the court concern interest rate hedging products that the appellants were required to buy as a condition of loans made to them by the respondent banks. The principal issue is whether reviews conducted pursuant to an agreement between the banks and their statutory regulator as part of a settlement to avoid enforcement proceedings by the regulator, which considered that there have been "serious failings" in the way the banks sold these products to small and medium sized businesses, gave rise to a duty of care by the banks to those businesses to carry out those reviews with reasonable care and skill.

2. The regulator in this case is now called the Financial Conduct Authority ("FCA"). Because of its concerns, it was considering whether to exercise its enforcement powers under the regulatory system contained in the Financial Services and Markets Act 2000, as amended by the Financial Services and Markets Act 2012 ("FSMA"). It entered into without prejudice settlement discussions with various banks including the respondents, and, in June 2012, made an agreement with the respondents and some other banks that each would review its sales of interest rate hedging products from 1 December 2001 to "non-sophisticated customers" and provide appropriate redress where mis-selling had occurred. On 29 June 2012, it announced the existence of the review ("the Review"), but not its terms which remained confidential until February 2015.

3. Interest rate hedging products are products designed to enable a borrower customer to manage fluctuations in interest rates and thus reduce the risk of changes in an otherwise variable rate of interest in their loans. There are many types of hedging products, and they vary from the relatively simple to the very complex. In the context of these appeals, it suffices to refer to three of the four broad categories identified by the FCA. "Swaps" enable borrowers to fix their interest rate. The bank and the borrower agree to exchange interest payments relating to a pre-arranged amount. "Collars" and "structured collars" enable borrowers to limit interest rate fluctuations to within a specified range. Under a "structured collar", if the reference interest rate falls below the bottom of the range, the interest rate payable by the borrower may increase above the bottom of the range. The effect of the collars is that if the bank's base rate for each calculation period exceeds a certain amount it will pay the borrower, but if the rate drops below a certain level the borrower will pay it. In both swaps and collars, the borrower gives up the right to benefit from any fall in market rate in return for the certainty of either a specified fixed rate (the swap) or a range of rates (the collar). The appellants in these cases were thus either unable to benefit from the significant fall in interest rates in 2008 and 2009, when the Bank of England sought to stimulate the economy, or faced significant increases in financing costs.

4. The claims made by the three appellants are described below. All three maintained that the banks had mis-sold them the hedging products they bought. One also claimed from the outset that the banks owed it a duty of care arising out of the Review. In the case of one of the appellants, the mis-selling claims ultimately failed on limitation grounds. In the case of another the claims were struck out on substantive grounds. In the third case while the mis-selling claim may have been within time under section

14A of the Limitation Act 1908, the claim had not been brought by the proper claimant, and the judge refused to permit joinder because the requirements of CPR Rule 19.5 were not satisfied. In the two cases which had not pleaded from the outset that the banks owed them a duty of care arising out of the Review, after the mis-selling claims had been struck out, applications were made for permission to amend the particulars of claim to enable such claims.

5. The appeals before the court are against these decisions. On the principal issue, at this stage it suffices to say that the reason the judges refused permission to amend was that the amendments would not pass the summary judgment test. In broad terms, this was for two reasons. First, a duty of care to conduct the Review with reasonable skill and care would be substantially inconsistent with the elaborate regulatory regime contained in FSMA.[1] Secondly, the other tests for determining whether a common law duty of care should be imposed were not satisfied. The judges below did not follow the decision in *Suremime Ltd v Barclays Bank plc* [2015] EWHC 2277 (QB) in which HHJ Havelock-Allan QC permitted an amendment to plead negligence by the bank in conducting the Review in similar circumstances.

6. The appellant in the first appeal is CGL Group Limited ("CGL"). Its claim relates to a collar and a swap it bought from the respondents, The Royal Bank of Scotland plc and National Westminster Bank plc in July 2006 and April 2007. The respondents were treated as a single respondent, which I shall refer to as "RBS". CGL appeals against the order of HHJ Bird dated 12 January 2016, following his judgment of the same date,[2] refusing it permission to amend its particulars of claim to plead a claim in negligence based on the bank's Review and under the principle in *White* v *Jones* [1995] 2 AC 207. Permission to appeal was granted by Floyd LJ in an order dated 19 April 2016.

7. The appellants in the second appeal are Mr and Mrs Bartels. Their claim related to a swap Barclays Bank plc ("Barclays") sold in 2006 to Gwenllian Court Hotel Ltd, a company which they set up to run a hotel business, the purchase of which was principally funded by borrowing from Barclays. They appeal against the order of HHJ Waksman QC dated 6 June 2016, following his judgment dated 19 May 2016,[3] striking out their claim against Barclays and refusing them permission to amend the particulars of claim. Limited permission to appeal was granted by Christopher Clarke LJ in an order dated 28 October 2016.

8. The appellant in the third appeal is WW Property Investments Ltd ("WW"). Its claim relates to three structured collars and a swap it bought from the respondents, National Westminster Bank plc ("NatWest") between 2004 and 2010. It appeals against parts of the order of HHJ Kaye QC dated 26 April 2016, following his judgment dated 1 March 2016,[4] striking out its claim against NatWest and refusing it permission to amend its Particulars of Claim. Permission to appeal in respect of the swap was

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1 See [13] and [21] below for rules, policy statements and guidance made by the FCA which provide that breaches of certain regulatory duties are not actionable at all and breaches of others are only actionable by individuals and not by companies.

2 [2016] EWHC 281 (QB).

3 [2016] EWHC 1360 (QB).

4 [2016] EWHC 378 (QB).

granted on 26 November 2016 following an oral hearing before Briggs and Christopher Clarke LJJ on 1 November 2016: [2016] EWCA Civ. 1142.

9. In the cases of Mr and Mrs Bartels and WW, as well as the principal issue of duty of care, there are also questions of breach of duty. Moreover, the way the claims that a duty of care arose from the review conducted by the banks are put on behalf of the appellants differs in the ways explained later in this judgment.

10. By an order dated 13 January 2017, Christopher Clarke LJ directed that these three appeals be linked on the basis that each of them raises the question of whether the relevant bank owed the relevant claimant a duty of care in carrying out the Review. Before us CGL was represented by Mr Richard Edwards QC and Mr Steven McGarry; Mr and Mrs Bartels by Mr Nicholas Vineall QC and Mr James Hatt; and WW by Mr Julian Roberts. RBS and NatWest were represented by Mr Andrew Mitchell QC, and, in CGL's appeal, Ms Tamara Oppenheimer, and, in WW's appeal, Mr Adam Sher. Barclays were represented by Mr Patrick Goodall QC and Mr Ian Bergson. I wish to acknowledge the thoroughness and care with which the respective arguments were advanced on behalf of all parties. I also reiterate the observation of my Lord, Lord Justice McFarlane, at the conclusion of the hearing that particular commendation is due to Mr Hatt, who took up the case from the Bar Pro Bono Unit at a time when Mr and Mrs Bartels were not represented in what are for them extremely important proceedings.

11. The remainder of this judgment is organised as follows. Part II provides a summary of the regulatory structure established under FSMA. Part III summarises the material provisions of the Review agreement made between certain banks and the FCA. Parts IV to VI respectively summarise the factual and procedural background in the three appeals, the decisions of the courts below on the matters material to the appeals, and the grounds of appeal in the three cases. Part VII contains my analysis of the law and a summary of the submissions made by the parties. It also gives the reasons for my overall conclusion that, whether analysed in terms of assumption of responsibility; the familiar threefold test derived from *Caparo Industries plc v Dickman* [1990] 2 AC 605 of reasonable foresight of loss to the claimant, sufficient proximity and fairness, justice and reasonableness; or the incremental approach, no duty of care arises in relation to the banks' conduct of the reviews. Accordingly, I would dismiss the appeals.

II. The Regulatory Structure under FSMA:

12. Unless otherwise stated, all references in this section are to provisions in the Financial Services and Markets Act 2000, "FSMA", as amended by the 2012 Act and regulations made pursuant to powers conferred in it. I also refer to the sections in the FCA Handbook containing the Conduct of Business Rules ("COB") (which were replaced by the Conduct if Business sourcebook, "COBS" from 1 November 2007), Principles for Business ("PRIN"), Rules on Dispute Resolution and Complaint Handling ("DISP"), and the Consumer Redress Schemes sourcebook ("CONRED").

13. Section 138D of FSMA enables certain categories of person to bring a statutory claim against a firm or bank for breaches of the relevant rules.[5] It provides:

> **"138D Actions for damages**
>
> (1) A rule made by the PRA may provide that contravention of the rule is actionable at the suit of a private person who suffers loss as a result of the contravention, subject to the defences and other incidents applying to actions for breach of statutory duty.
>
> (2) A contravention by an authorised person of a rule made by the FCA is actionable at the suit of a private person who suffers loss as a result of the contravention, subject to the defences and other incidents applying to actions for breach of statutory duty.
>
> (3) If rules made by the FCA so provide, subsection (2) does not apply to a contravention of a specified provision of the rules.
>
> (4) In prescribed cases, a contravention of a rule which by virtue of subsection (1) or (2) would be actionable at the suit of a private person is actionable at the suit of a person who is not a private person, subject to the defences and other incidents applying to actions for breach of statutory duty.
>
> (5) In subsections (1), (2) and (3) "rule" does not include—
>
> > (a) Part 6 rules;
> >
> > (b) rules under section 137O (threshold condition code);
> >
> > (c) rules under section 192J (provision of information by parent undertakings);
> >
> > (d) a rule requiring an authorised person to have or maintain financial resources.
>
> (6) "Private person" has such meaning as may be prescribed."

14. It is thus clear that some regulatory duties are only to be actionable by private persons. "Private persons" are defined in the Financial Services and Markets Act 2000 (Rights of Action) Regulations 2001 SI 2001, No. 2256 as:

> "(a) any individual, unless he suffers the loss in question in the course of carrying on—(i) any regulated activity; or...(b) any person who is not an individual, unless he suffers the loss in question in the course of carrying on business of any kind...".

15. Section 384 of FSMA empowers the FCA to require authorised persons, i.e. in this case the banks, to make restitution to those who have suffered loss or been otherwise affected by a breach of the rules. It provides:

> "**384 Power of Authority to require restitution**
>
> (1) The Authority may exercise the power in subsection (5) if it is satisfied that an authorised person ("the person concerned") has contravened a relevant

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[5] Before the amendments made by the 2012 Act, the provision was in section 150 of FSMA.

requirement, or been knowingly concerned in the contravention of such a requirement, and—

(a) that profits have accrued to him as a result of the contravention; or

(b) that one or more persons have suffered loss or been otherwise adversely affected as a result of the contravention.

(2) The Authority may exercise the power in subsection (5) if it is satisfied that a person ("the person concerned")—

(a) has engaged in market abuse, or

(b) by taking or refraining from taking any action has required or encouraged another person or persons to engage in behaviour which, if engaged in by the person concerned, would amount to market abuse,

and the condition mentioned in subsection (3) is fulfilled,

(3) The condition is—

(a) that profits have accrued to the person concerned as a result of the market abuse; or

(b) that one or more persons have suffered loss or been otherwise adversely affected as a result of the market abuse.

(4) But the Authority may not exercise that power as a result of subsection (2) if, having considered any representations made to it in response to a warning notice, there are reasonable grounds for it to be satisfied that—

(a) the person concerned believed, on reasonable grounds, that his behaviour did not fall within paragraph (a) or (b) of that subsection; or

(b) he took all reasonable precautions and exercised all due diligence to avoid behaving in a way which fell within paragraph (a) or (b) of that subsection.

(5) The power referred to in subsections (1) and (2) is a power to require the person concerned, in accordance with such arrangements as the Authority considers appropriate, to pay to the appropriate person or distribute among the appropriate persons such amount as appears to the Authority to be just having regard—

(a) in a case within paragraph (a) of subsection (1) or (3), to the profits appearing to the Authority to have accrued;

(b) in a case within paragraph (b) of subsection (1) or (3), to the extent of the loss or other adverse effect;

(c) in a case within paragraphs (a) and (b) of subsection (1) or (3), to the profits appearing to the Authority to have accrued and to the extent of the loss or other adverse effect."

16. Alternatively, section 382 enables the FCA to require the authorised person to apply to the Court to make a restitution order.

"…

(4) On an application under subsection (1) the court may require the person concerned to supply it with such accounts or other information as it may require for any one or more of the following purposes—

(a) establishing whether any and, if so, what profits have accrued to him as mentioned in paragraph (a) of that subsection;

(b) establishing whether any person or persons have suffered any loss or adverse effect as mentioned in paragraph (b) of that subsection and, if so, the extent of that loss or adverse effect; and

(c) determining how any amounts are to be paid or distributed under subsection (3).

…"

17. There is also provision in FSMA for the FCA to appoint a skilled person to report on or assist with production of documents with respect to any matter.

"**166 Reports by skilled persons**

(1) The Authority may, by notice in writing given to a person to whom subsection (2) applies, require him to provide the Authority with a report on any matter about which the Authority has required or could require the provision of information or production of documents under section 165."

18. Section 404 provides that the FCA may require a firm to set up a redress scheme for consumers.

"**404 Consumer redress schemes**

(1) This section applies if—

(a) it appears to the Authority that there may have been a widespread or regular failure by relevant firms to comply with requirements applicable to the carrying on by them of any activity;

(b) it appears to it that, as a result, consumers have suffered (or may suffer) loss or damage in respect of which, if they brought legal proceedings, a remedy or relief would be available in the proceedings; and
(c) it considers that it is desirable to make rules for the purpose of securing that redress is made to the consumers in respect of the failure (having regard to other ways in which consumers may obtain redress).

…

(4) A "consumer redress scheme" is a scheme under which the firm is required to take one or more of the following steps in relation to the activity.

(5) The firm must first investigate whether, on or after the specified date, it has failed to comply with the requirements mentioned in subsection (1)(a) that are applicable to the carrying on by it of the activity.

(6) The next step is for the firm to determine whether the failure has caused (or may cause) loss or damage to consumers.

(7) If the firm determines that the failure has caused (or may cause) loss or damage to consumers, it must then—

> (a) determine what the redress should be in respect of the failure; and
>
> (b) make the redress to the consumers.
>
> …"

Under section 404C, the enforcer of such schemes would have been the FCA.

19. As to dispute resolution and complaint handling, DISP 1.3.1 demands effective and transparent procedures for the reasonable and prompt handling of complaints to be established, implemented and maintained. DISP 1.3.6 provides for a formal redress scheme:

> "Where a firm identifies (from its complaints or otherwise) recurring or systemic problems in its provision of, or failure to provide, a financial service, it should (in accordance with Principle 6 (Customers' interests) and to the extent that it applies) consider whether it ought to act with regard to the position of customers who may have suffered detriment from, or been potentially disadvantaged by, such problems but who have not complained and, if so, take appropriate and proportionate measures to ensure that those customers are given appropriate redress or a proper opportunity to obtain it. In particular, the firm should:
>
> (1) ascertain the scope and severity of the consumer detriment that might have arisen; and
>
> (2) consider whether it is fair and reasonable for the firm to undertake proactively a redress or remediation exercise, which may include contacting customers who have not complained."

20. DISP 1.4.1 requires complaints to be investigated competently, diligently and impartially, and assessed fairly, consistently and promptly. DISP 1.6.1 provides that the complainant must be kept informed with a prompt written acknowledgement and notification of progress of measures taken. Schedule 5 of DISP makes clear that only private persons have a cause of action for breach of the DISP rules.

21. It is provided by PRIN 3.4.4 that:

> "A contravention of the rules in PRIN does not give rise to a right of action by a private person under section 138D of the Act (and each of those rules is specified under section 138D(3) of the Act as a provision giving rise to no such right of action)."

22. The Consumer Redress Schemes sourcebook makes it clear that a section 404 scheme does not provide a remedy in respect of breaches of the FCA's principles or guidance. CONRED 1.3.16 provides:

> "Consumer redress schemes can only be used to require redress in relation to those failures in respect of which a remedy or relief would be available in legal proceedings. A consumer redress scheme could not, therefore, be used to require redress for:
>
> (1) breaches of the Principles (FCA rules currently provide that breaches of the Principles do not give rise to a right of action in court under section 138D of the Act –

a change to this would be subject to the consultation requirements under the Act in the usual way); or

(2) breaches of any other FCA rules where the right of action under section 138D of the Act has been switched off in the rules (e.g. the rules in the SYSC sourcebook); or

(3) departure from FCA guidance; or

(4) non-compliance with any non-binding code of practice (e.g. industry guidance confirmed by the FCA)."

23. The FCA's Conduct of Business rules contained a number of provisions designed to protect customers. Where the COB rules applied, COB 2.1.3 provided that when a firm communicates information to a customer, the firm must take reasonable steps to communicate in a way which is clear, fair and not misleading. COB 2.5.3 provided that a firm must not seek to exclude or restrict any liability it may have to a customer under the regulatory system. COB 5.3.5 required a firm to take reasonable steps to ensure that if it makes any personal recommendation to a private customer to buy, sell, subscribe or underwrite a designated investment, the advice on investment is suitable for the client.

III. The Review Agreement:

24. I have referred to the concerns of the regulator, then called the Financial Services Authority, its finding of "serious failings" in the sale of interest rate hedging products to small and medium sized businesses by a number of banks, and the June 2012 announcement of the agreement by certain banks ("the Review Agreement") to carry out a review of sales of those products to "non-sophisticated" customers and provide appropriate redress where mis-selling has occurred. I have also stated that at that time only the existence of the Review was announced. In February 2015 the Treasury Select Committee published the Review Agreement.

25. The recitals to the Review Agreement record that the FSA: (a) found evidence of poor practices in the sale by the named bank of interest rate hedging products to retail clients or private customers; (b) was concerned that such practices combined with product complexity, customer sophistication, and sales incentives may lead to poor outcomes for customers; and (c) had conducted confidential settlement discussions with the bank in relation to the relevant business on a without prejudice basis.

26. The Review Agreement provides that the bank that is party to it is to provide a written undertaking in the form set out in Annex A. Annex A provides that the banks who entered into the agreement were to undertake to the FCA that the Review would be conducted in accordance with the terms set out in the Appendix and would apply to all eligible customers since 1 December 2001. The Appendix provides that customers are to be divided into three categories depending on the type of interest rate hedging product bought: category A (structured collars), category B (interest rate hedging products which are not structured collars or caps) and category C (caps). Customers who had bought category B and C products would need to decide whether they wished to participate in the Review. Customers who had bought category A products would automatically be included.

27. The bank in question was to assess whether its sales of interest rate hedging products to each customer complied with the regulatory requirements, defined as the principles, rules and guidance contained in the FCA's Handbook, and taking into account the sales standards (as defined in the Appendix to the Review Agreement). The exercise would be scrutinised by an independent reviewer and be overseen by the FCA (pursuant to its powers under section 166 of FSMA). The independent reviewer was to have the final say in any determinations about the redress offered to customers and was to monitor various other aspects of the process.

28. Clause 9 of the agreement provides that persons other than the FCA and the relevant bank were to have "no right under the Contracts (Rights of Third Parties) Act 1999 or otherwise to enforce any term" of the Review Agreement. Clause 11 provides that the terms of the agreement were not to be disclosed to third parties (including customers) without the consent of the FCA.

IV. The factual and procedural background to CGL's appeal:

Factual background

29. "CGL" is a property investment company. Its business was funded in part by loans provided by RBS, including a £1 million group overdraft facility, a 5 year interest only loan of £930,000, and a 20-year loan of £1.5 million. The facility and the loan were at a variable rate of interest, and it was a condition of the loans that CGL purchased an interest rate hedging agreement acceptable to RBS.

30. On 19 July 2006, CGL purchased a base rate collar for a term of 5 years, with a cap rate of 6.00%, a floor rate of 4.50%, referencing RBS's base rate on a notional amount of £1,000,000 ("the collar"). On 16 April 2007, CGL purchased an amortising interest rate swap with a term of ten years (from 15 May 2007 to 15 May 2017), referencing RBS's base rate on a notional amount of £1,500,000 and a fixed rate of 5.79% ("the swap"). CGL's ability to benefit by the fall in interest rates was limited by the collar and swap, under which substantial quarterly payments were required.

31. In November 2009, CGL complained to RBS that the products were mis-sold, and the judge below found that the three-year period under section 14A of the Limitation Act 1980 started running.[6] On 12 July 2010 CGL "broke", i.e. terminated, the collar, incurring a breakage charge of £53,500. On 4 August 2010, it "broke" 50% of the notional value of the swap, incurring a breakage charge of £142,000.

32. On 1 August 2013 RBS wrote to CGL about the Review. The letter stated:

> "after carefully considering your circumstances we have assessed you as a non-Sophisticated customer, at the time you were sold a Vanilla Collar and a Vanilla Swap. Consequently, you are entitled to have this (sic) sales reviewed. If the review team finds that we did not meet all of our regulatory requirements, you may be entitled to redress."

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6 See [2016] EWHC 281 (QB) at [32].

In the section "What will happen Next?" it is stated:

> "If you choose to have the sales included in the review, we will thoroughly examine the circumstances surrounding the transactions taking into account all the records we have at the bank along with any additional information you supply that you feel may be relevant. We will then write to let you know our proposed outcome."

33. The letter then states that, in order to have the sales reviewed, CGL will need to opt-in to the review by completing and returning a form. It is also stated that it is important that the bank hear from CGL about its interest rate hedging product sales so that it can take full account of CGL's individual circumstances at the time. The letter states that a review team member will collect the information from CGL and pass it on the reviewer. It states that at any meetings CGL may request the presence of the independent reviewer whose role is "to ensure that your reviews are carried out following the agreed guidelines and that you will receive fair and reasonable redress where appropriate". The fact that the presence of the independent reviewer can be requested is repeated later in the letter. It is also stated that CGL can request the presence of third-party advisors but states:

    > "please note we expect the circumstances where it will be appropriate to pay third-party advisor costs will be the exception rather than the rule. However, we will consider this on a case by case basis in consultation with the independent reviewer and following FCA guidance."

    The letter also states that the review process has been approved by the FCA, "is not complicated and the review will be overseen by an independent reviewer, so you will not need to pay for specialist advice in order to achieve a fair and reasonable outcome". It quotes an FCA statement about claims management companies: viz. "Customers do not need to use a claims management company because the process is straightforward". The letter states that, if at the end of the review, CGL is dissatisfied, it had the right to register a formal complaint and, if eligible, to take the complaint to the Financial Ombudsman Service.

34. On 16 August 2013, CGL opted into the Review. Various letters were sent between RBS and CGL exchanging documents and confirming the appointment of the independent reviewer. On 20 August 2014, RBS wrote to CGL informing it of the outcome of the Review. RBS offered CGL the difference between the cost of the collar and the cost of a vanilla interest rate cap, which was said to amount to £139,651.29 including interest, on the basis that such a cap "might have better fitted [CGL's] requirements". At that time RBS made no offer of redress in relation to the swap on the basis that CGL "would have purchased the same IHRP even where any sales standards were not fully complied with". On 30 October 2014 and 26 November 2014, RBS sent reminders to CGL in relation to the offer with respect to the collar.

35. On 5 January 2015, CGL brought a claim in negligence arising out of the sales of the collar and the swap alleging that RBS had breached alleged advisory duties and also duties with respect to the provision of information. An application to strike the claim out on limitation grounds was made on 19 October 2015. On 17 December 2015, CGL applied to amend its Particulars of Claim to contend that RBS owed it a common law duty of care to conduct the Review in accordance with the undertakings given by it to the FCA and in accordance with the agreed methodology, and that the Review was negligently carried out by RBS, as a result of which RBS failed to offer CGL the redress to which it would otherwise have been entitled.

The decision below

36. As I have stated at [6] above, on 12 January 2016, HHJ Bird QC struck out CGL's claim as originally pleaded and dismissed the application to amend the pleadings.

37. He considered (at [28]) that the essence of the claim as originally pleaded was for mis-selling in the light of the failures to provide certain advice and certain information. He held that the primary limitation periods for a tort claim in respect of the collar and the swap expired on 18 July 2012 and 15 April 2013 respectively. As to the period under section 14A of the Limitation Act 1980, he concluded that CGL's sole director knew he had a "complaint of a serious nature" against the bank by 17 November 2009 [31] and it was therefore just and proper to strike the claim out because the time outside the primary limitation period began to run against the claimant in mid-November 2009, which was more than three years prior to issue [32]. That part of his decision is not being appealed.

38. As to the application to amend, the judge stated (at [33]) that the only issue was whether the amendment would pass the summary judgment test. He noted (at [41]) three relevant features of the Review: (1) the FCA was to serve on each bank a notice under section 166 of FSMA requiring the bank to appoint a "skilled person" to monitor and report on the Review; (2) the Review was to include an assessment of compliance with regulatory requirements; and (3) the Review was limited to "non-sophisticated" customers. He had earlier observed (at [40]) that, by clause 9 of the settlement agreement between the FCA and the bank, the parties agreed that a person who was not a party to the agreement, for example a bank customer who was a victim of mis-selling, would have no right to enforce the agreement whether in contract or otherwise.

39. The judge considered (at [45]) that the imposition of a duty of care would fly in the face of the stated intentions of the bank. It had expressly disavowed responsibility to a customer for faults in the Review and it was not the ultimate controller of the process because it was at every stage subject to review by the skilled person. Accordingly, in all the circumstances, it would not be fair, just and reasonable to impose a duty of care. It would also (see [46] – [47]) undermine the clear regulatory scheme that is in place. Parliament's clearly expressed will would be circumvented if a duty were found here, which is outside the circumstances, limited by statute, in which a customer may rely upon the obligations the bank owes to the regulator.

40. He distinguished *White v Jones*, on which CGL had relied. In that case, 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 no claim. In CGL's case, the customer has in the general run of matters a cause of action against the bank [49]. He also (at [50]) accepted the submission on behalf of RBS that allowing the amendment to plead a duty of care in relation to the Review would also have the effect of circumventing the limitation period in practice because all or most of the issues which he had decided were statute barred would have to be litigated.

41. The judge concluded that the bank cannot be treated as having taken on a duty of care when it expressly excluded the possibility of it doing so, and 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 [52].

42. As to the decision of *Suremime Ltd v Barclays Bank plc,* the judge stated (at [53]) that there was no need to treat that decision as wrong because the absence of the full regulatory background was sufficient to justify the judge's conclusion. But, had it been necessary to decide if *Suremime* was to be followed, he would have declined to do so.

The grounds of appeal

43. The three grounds are that the judge erred:

    (1) in not following the decision in *Suremime Ltd v Barclays Bank plc* despite the principle of judicial comity or precedent;
    (2) in finding that there was no real prospect of success that CGL would establish that RBS owed it a duty of care to conduct the FCA Review with reasonable skill and care; and
    (3) in finding that there was no real prospect of success that CGL would establish a duty of care in accordance with the principle identified in *White v Jones.*

Mr Edwards QC on behalf of CGL accepted that the status of *Suremime Ltd v Barclays Bank plc* as a precedent was unlikely to be an issue of great moment in this court. His written submissions invited the court to go further than that case by finding that the duty of care contended for is not merely arguable but is fully made out.

V. Factual and procedural background to the Bartels' Appeal:

Factual background

44. Mr and Mrs Bartels set up a company in 2006 called Gwenllian Court Hotel Ltd (the "Company") to be the vehicle for the purchase and running of a hotel business. The Company's purchase of the Gwenllian Court Hotel was principally financed by borrowing £680,000 from Barclays. Barclays also sold the Company a swap for a notional amount of £700,000, amortising over a term of seven years at a fixed rate of 5.5%.

45. The Bartels' case is that the failure of the Company, which entered administration on 9 March 2010 and was dissolved on 12 October 2012, is attributable to the sale of the interest rate hedging product. Barclays served a formal demand for the amount due

under the loan, about £882,000, and terminated the swap, giving rise to break costs of about £78,000. The Company owed creditors in excess of £1.4 million and its outstanding debt to Barclays was about £723,000.

46. The Bartels complained to the FCA and Barclays in June or July 2012. One of their complaints was that the swap had been mis-sold. The failure of the Company left the Bartels homeless and out of work. The principal limitation period for a claim in negligence expired in June 2012.

47. The Company's swap made it a "Category B" business within the terms of the Review Agreement. Following a meeting between the bank and the Bartels on 3 December 2013, in a letter dated 10 January 2014 the bank stated that their complaint had been the subject of extensive investigation and discussion at senior levels within the bank. The letter referred to the discussion at the December meeting and stated that the concerns of the Bartels were subject to the consideration within the Review in accordance with the terms agreed with the FCA. The letter stated that:

> "The sale of the swap will be reviewed by Barclays, under the scrutiny of an independent reviewer, through the review process. A decision will be reached as to whether or not the swap was mis-sold to the company, and if so, the type of redress which should be offered."

The letter also referred to the conclusion of the bank during the complaints process that the entry of the Company into administration was not the result of the sale of the swap but it could be that the Review determined otherwise.

48. Later in 2014, various letters were exchanged between Barclays and the Bartels about the Review. In a letter dated 12 August 2014, Barclays wrote to them enclosing a formal redress offer for the Company. Barclays calculated that the Company had suffered a loss on the swap of £110,142.46. Against that, Barclays set off the total indebtedness of the Company to Barclays, which it calculated at £723,237.43, leaving a net offer of £0. Barclays' redress offer gave the Bartels 3 options: (1) accept £0; (2) accept £0 but submit a claim for consequential loss other than loss in respect of the opportunity cost of being deprived of the money; (3) reject £0 and present a claim for all the Company's consequential losses. Choosing options 2 or 3 would require providing a consequential loss questionnaire and supporting evidence within 40 days.

49. On 28 August 2014, there was a meeting between the Bartels, Barclays and the independent reviewer. The Bartels were at some stage referred to the Bar Pro Bono Unit by their MP. In a letter dated 18 September 2014 to Barclays, Mr and Mrs Bartels asked that the bank "keep our Review File Open while we examine the legal routes and options open to us to bring our case to a satisfactory resolve". By a letter dated 3 October 2014, Barclays responded by stating that since the Bartels had not submitted the required information within 40 days, Barclays' redress offer (£0) was now final. Barclays also refused the extension sought by Mr & Mrs Bartels. The Company was restored to the Register on 16 April 2015.

50. The Bartels issued proceedings against Barclays on 23 June 2015. The Company was not named as a claimant on the claim form because the issue fee would have been £10,000 and neither the Bartels nor the company had the money. Four categories of claims were advanced at the time the proceedings were issued or were sought to be introduced by way of amendment. They were: (1) personal claims for alleged mis-selling; (2) claims by the Company for alleged mis-selling; (3) personal claims in respect of the Review; and (4) claims by the Company in respect of the Review. The fourth category included claims in negligence based on Barclays' conduct of its investigation of their complaints, including carrying out a Review of the kind it agreed with the FCA to carry out in respect of complaints that the swap had been mis-sold.

51. On 27 October 2015, the Bartels applied to amend the Particulars of Claim and to add the Company as Third Claimant. The Bank responded by applying for summary judgment and that the claim be struck out. At the hearing on 17 and 18 May 2016, the Bank took a realistic position in the light of Floyd LJ's grant of permission to appeal in the *CGL* case and accepted that, for the purposes of the hearing at first instance only, it was arguable that it was under a tortious duty of care to the Company equivalent to its contractual duty to the FCA under the Review Agreement. At the hearing before this court, however, the Bank submitted that it is not arguable that such a duty of care arose.

The decision below and the ground of appeal

52. As I have stated at [7] above, HHJ Waksman QC struck out the claim as originally pleaded and refused permission to amend the Particulars of Claim. On 5 November 2016, Christopher Clarke LJ granted permission to appeal on a single ground. This was that the judge had erred in law in holding that Mr and Mrs Bartels had no real prospect of showing that the Bank was in breach of duties it owed arising out of its conduct of the FCA Review process (the arguability of such duty having been conceded by the Bank at first instance: see [51]). The question whether a duty of care is owed accordingly arises on the Bank's Respondent's notice. The judge also (at [64] – [65]) rejected the application to join the Company because the decision to bring the proceedings in the names of Mr and Mrs Bartels with the intention of joining the Company afterwards was a "device" to avoid paying the appropriate issue fee, which amounted to an abuse of process.

VI. Factual and procedural background to WW Appeal:

Factual background

53. Between 2004 and 2010 WW entered into three structured interest rate collars ("the collars") and a vanilla interest rate swap ("the swap") with NatWest. It did so to hedge its exposure to interest rate rises under various loans. Under the swap, NatWest paid a floating rate of 1 month GBP LIBOR and WW paid a fixed rate of 5.4% on a notional of £4 million. The swap was part of a wider restructuring of WW's finances in January 2010 at which time the collars were terminated early, with the resulting break costs absorbed by the swap.

54. The collars, as category A business for the purpose of the Review, were automatically considered. In a letter dated 13 May 2013, the bank informed WW of this and stated that WW would go onto the next stage of the Review and may be entitled to redress. The letter states that, as agreed with the FCA, the intention of the Review is to achieve a fair and reasonable outcome for customers and that any redress due will be based on returning customers to the position they would had been in if the bank had met its regulatory requirements in full. The letter refers to the FCA website and the role of the independent reviewer in similar terms to that in the letters to the other appellants. It states that the bank will "thoroughly examine the circumstances surrounding the sale taking into account all the records" the bank has and any additional information supplied by WW. It states that it is important for WW to provide it with information about the sales so it could take account of the company's individual circumstances. It also refers to the right to register a complaint if dissatisfied with the outcome proposed, and for eligible complaints to be referred to the Financial Ombudsman Service. It also states that WW did not need to use a claims management company to submit a complaint to the bank or the Financial Ombudsman Service "because the process, which has been agreed with the FCA, is straightforward and is overseen by an independent reviewer". In a letter dated 27 November 2013, the bank asked WW whether it wished the swap transaction to be included in the Review. That letter was in similar terms to the others.

55. NatWest wrote to WW about the outcome of its reviews in letters dated 15 and 21 August 2014. The letter dated 15 August offered WW over £420,000 in respect of the collars. The letter dated 21 August stated that NatWest found the sale of the swap met the FCA's standards, and that no redress was due. On 9 January 2015, WW completed and sent acceptance forms for the offer in respect of the collars, whilst reserving the right to claim for further additional losses. WW's later claim for consequential losses was rejected by NatWest in a letter dated 30 June 2015.

56. On 6 March 2015, WW issued proceedings claiming that the interest rate hedging contracts were wagers and were voidable or void due to a breach by NatWest of an alleged implied term of "equal uncertainty". An application by NatWest dated 1 September 2015 to strike out the claim was met with an application by WW to amend its Particulars of Claim to add further claims concerning LIBOR manipulation and the conduct by NatWest of the Review. On 22 October 2015, WW served another draft Amended Particulars of Claim.

The decision below

57. As I have stated at [8] above, after a hearing on 11-12 January 2016, in an order dated 26 April 2016, HHJ Kaye QC struck out WW's entire claim and refused permission to amend. The judge observed (at [43]) that the case relating to the existence of a duty of care was not properly pleaded. He stated that, in principle, WW could seek to file fresh proceedings bringing a separate claim against the defendant bank based on alleged deficiencies in conducting the Review, but the Bank would be free to argue no duty of care was owed.

58. WW filed an Amended Appellant's Notice on 29 March 2016 along with Amended Grounds of Appeal on 18 August 2016. As I have stated, Briggs and Christopher Clarke LJJ granted permission to appeal in respect of only one of three grounds upon

which permission was sought. This (see permission judgment, [2016] EWCA Civ. 1142 at [81] - [84]) was that the judge erred in finding that it was not arguable that NatWest owed WW a duty of care in respect of its conduct of the Review in respect of the swap. They found there was no properly pleaded case in respect of the collars.

VII. Discussion:

59. *(i) Introduction:* The difficulties of determining when a duty of care arises in respect of economic loss are well known. The general approach of the courts has been to identify organising concepts to express value judgments about whether a duty exists in the circumstances of an individual case. Adapting what Deane J stated in the High Court of Australia in *Sutherland Shire Council v Heyman* [1985] HCA 41 at [4], (1984-5) 157 CLR 424, at 497, while the general approach does not provide a criterion or criteria of liability, it seeks to identify unifying rationales. In *Playboy Club London Ltd v Banca Nazionale del Lavoro SpA* [2016] EWCA Civ. 457, [2016] 1 WLR 3169 Longmore LJ at [17] stated that it has become customary to consider three tests or approaches which usually lead to the same answer and can be used as cross-checks on each other. These are: (1) whether the defendant assumed responsibility to the claimant; (2) the threefold test in *Caparo Industries plc v Dickman* [1990] 2 AC 605[7] which asks whether (a) loss was a foreseeable consequence of the defendant's actions or inactions, (b) the relationship of the parties was sufficiently proximate, and (c) it would be fair, just and reasonable to impose a duty of care on the defendant towards the claimant; and (3) whether the addition to existing categories of duty would be incremental rather than indefinable.

60. The three tests or approaches referred to by Longmore LJ had been considered in *Customs and Excise Commissioners v Barclays Bank plc* [2006] UKHL 28, [2007] 1 AC 181 ("*Customs and Excise Commissioners v Barclays"*). In that case, the House of Lords unanimously held that a bank which had been notified of a freezing order against one of its customers owed no duty of care to the party which had obtained the order. It was stated that there is no single test or touchstone that may be used to determine whether a defendant owes a duty of care in respect of pure economic loss: see Lord Bingham at [4] - [8], Lord Hoffmann at [35], Lord Rodger at [51] - [53], Lord Walker at [69] and Lord Mance at [93]. Lord Bingham also stated (at [8]) that, regardless of the test applied, he considered it important to "concentrate attention on the detailed circumstances of the particular case and the particular relationship between the parties in the context of their legal and factual situation as a whole".

61. Approaches or tests which take so many factors into account set a broad and relatively open-textured framework within which to assess the detailed factual circumstances and context of the particular case. The need to cross-check and the fact that the courts have often used the three tests interchangeably, means that there is some overlap between them, they are complementary, and they should not be considered in isolation from each other: see *Patchett v Swimming Pool & Allied Trades Association Ltd.* [2009] EWCA Civ. 717, [2010] 2 All ER (Comm) 138 at [18] *per* Lord Clarke MR. Accordingly, I first consider the propositions in the authorities under each test that are relevant to the principal question for decision in these appeals bearing this in mind. I

[7] See Lord Bridge at 617-618 and Lord Oliver at 633. This test was applied in *Spring v Guardian Assurance Plc* [1995] 2 AC 296, at 325-6, 334-6 and 342. See *Jackson & Powell on Professional Liability,* 8th ed., §§2-042 – 2-046.

then summarise in broad terms the battleground between the appellants and the banks on duty of care, and then give my conclusions on the application of those tests to the facts of the three appeals before the court.

62. *(ii) Assumption of responsibility*: In *Henderson v Merrett Syndicates Ltd (No 1)* [1995] 2 AC 145 the principle enunciated in *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465 in relation to negligent misstatements was extended to the negligent performance of services. Lord Goff stated (at 180) that the principle underlying *Hedley Byrne* was an assumption of responsibility by the defendant which "rests upon a relationship between the parties which may be general or specific to the particular transaction, and which may or may not be contractual in nature". Accordingly, a person who assumes responsibility to another person to perform a service and fails to do so with reasonable care may be liable for the loss suffered by that other person in relying on the assumption of responsibility. As Lord Rodger stated in *Customs and Excise Commissioners v Barclays* at [49], "assumption of responsibility" has had a chequered history, apparently falling out of favour in *Smith v Eric S Bush* [1990] 1 AC 831, 862, 864-5 and *Caparo Industries plc v Dickman* [1990] 2 AC 605, 628 and 637, but revived, largely by Lord Goff, in *Henderson v Merrett Syndicates, White v Jones* [1995] 2 AC 207 and in *Spring v Guardian Assurance Plc* [1995] 2 AC 296.

63. In *Henderson v Merrett Syndicates* Lord Goff (at 181) defended the concept for situations "equivalent to contract". He stated that it provided its own explanation as to why there is no problem in such cases about liability for pure economic loss and indicated why in some circumstances an undertaking to furnish the relevant service may not involve an assumption of responsibility (the example he gave was an informal occasion) or it may be negatived by an appropriate disclaimer. Lord Goff also stated that "especially in a context concerned with a liability which may arise under a contract or in a situation 'equivalent to contract', it must be expected that an objective test will be applied in asking whether, in a particular case, responsibility should be held to have been assumed by the defendant to the plaintiff".

64. Although, in *Customs and Excise Commissioners v Barclays,* Lord Mance (at [83]) considered that "assumption of responsibility" is "a core area of liability for economic loss", it is clear from that case and the earlier criticisms that the concept is one that should be used with care and be kept within proper bounds. It does not provide a complete "answer" to all cases of pure economic loss: see *Customs and Excise Commissioners v Barclays, per* Lord Bingham at [4], Lord Rodger at [52], Lord Hoffmann at [35]-[38], and Lord Mance at [87]. In that case Lord Bingham stated (at [4]) that the "paradigm situation [is] a relationship having all the indicia of contract save consideration". He also stated (at [4]) that he thought it correct to regard "an assumption of responsibility as a sufficient but not a necessary condition of liability, a first test which, if answered positively, may obviate the need for further inquiry": see also Lord Rodger at [50] and Lord Walker at [73]. But that statement preceded his emphasis (see [60] above) on the importance of concentrating on the detailed circumstances of the particular case and relationship between the parties in the context of their legal and factual situation as a whole. Bearing these matters in mind, I turn to the other elements considered in determining whether a duty of care has arisen because of an assumption of responsibility.

65. It is now clear that in determining whether, in a particular case, responsibility has been assumed by a defendant, an objective test is applied: see *Customs and Excise Commissioners v Barclays* at [5], [35] - [36], and [86] *per* Lord Bingham, Lord Hoffmann and Lord Mance (although Lord Hoffmann did not use the word "objective"). As Lord Steyn stated in *Williams v Natural Life Foods Ltd* [1998] 1 WLR 830, at 835F-G:

> "An objective test means that the primary focus must be on things said or done by the defendant or on his behalf in dealings with the plaintiff. Obviously, the impact of what a defendant says or does must be judged in the light of the relevant contextual scene. Subject to this qualification the primary focus must be on exchanges (in which term I include statements and conduct) which cross the line between the defendant and the plaintiff."

66. As to reliance, in *Caparo Industries plc v Dickman*, in the context of statements in a company's certified accounts, Lord Bridge stated (at 619E) that the inquiry into whether a duty of care exists concerns a duty owed by one party to another "to ensure that the accuracy of any statement which the one party makes and on which the other party <u>may foreseeably rely to his economic detriment</u>" (emphasis added). He had earlier referred to the damage being confined to the loss sustained by those who rely on the accuracy of the information or advice they receive as a basis for action. See also Lord Oliver at 635F and 638. In *White v Jones* [1995] 2 AC 207, at 274G Lord Browne-Wilkinson identified the need for reliance: "where the defendant has voluntarily answered a question or tenders skilled advice or services in circumstances where he knows or ought to know that an identified plaintiff will rely on his answers or advice". It must also be established that it was reasonable for the claimant to rely on the defendant's alleged assumption of responsibility: *Williams Natural Life Foods* at 837B. In *Henderson v Merrett Syndicates,* Lord Goff stated (at 180) that "reliance upon [the assumption of responsibility] by the other party will be necessary to establish a cause of action (because otherwise the negligence will have no causative effect) …" and that the necessary reliance on a defendant to exercise due skill and care may arise where a person entrusts the defendant with the conduct of his affairs, in general or in particular.

67. Lord Goff in *Henderson v Merrett* also stated (at 195 and 196C-D) that in a situation involving more than two parties, although in principle a party may assume responsibility to more than one person in respect of the same activity, the way the parties have structured their relationships may be inconsistent with an assumption of responsibility and that will make the existence of a duty less likely. *Pacific Associates Inc v Baxter* [1990] 1 QB 993 and *Briscoe v Lubrizol Ltd* [2000] ICR 694 are examples of such inconsistency.

68. In *Pacific Associates v Baxter* it was held that engineers acting for an employer to supervise the work of a dredging contractor were not under a duty of care to the contractor. They were not required by the terms of their contract with the employer to exercise due care to the contractors, were held to be acting solely for the employer and not to have voluntarily accepted any responsibility to the contractors in the way they performed their duties. Purchas LJ stated (at 1023) that the conclusion depended

on the circumstances of that case, where there was an avenue enabling the contractor to recover from the employer. In those circumstances, he saw "no justification for superimposing on [the] contractual structure an additional liability in tort as between the engineer and the contractor".

69. In *Briscoe v Lubrizol* it was held that insurers underwriting an employer's permanent health scheme did not owe a duty of care to an employee where his employer declined to pay the employee because the insurer had rejected the claim. Their obligations were owed to the employer only. Roch LJ (at 705C-D) stated that a contractual regime setting out the parties' responsibilities is "not necessarily fatal" to the imposition of a duty of care, but is "nevertheless a powerful indication against the existence of a duty".

70. *Pacific Associates v Baxter* also shows that, where a contract forms part of the matrix of fact which is said to give rise to a duty of care owed to a third party, the court may be able to take account of exclusion clauses in that contract. Purchas LJ stated (at 1022):

> "The presence of such an exclusion clause whilst not being directly binding between the parties, cannot be excluded from a general consideration of the contractual structure against which the contractor demonstrates reliance on, and the engineer accepts responsibility for, a duty in tort, if any, arising out of the proximity established between them by the existence of that very contract."

71. In *White v Jones*, Lord Goff (at 268) stated that an "assumption of responsibility will of course be subject to any term of the contract between the solicitor and the testator which may exclude or restrict the solicitor's liability to the testator under the principle in *Hedley Byrne".* See also the many statements (see e.g. Lord Bingham's set out at [60] above) about the need to concentrate attention on the detailed circumstances of the particular case, the particular relationship, and the context.

72. In *Precis (521) Plc* v *William M Mercer Ltd* [2005] EWCA Civ. 114, [2005] P.N.L.R. 28 Arden LJ stated (at [26]) that "[t]he question of the assumption of responsibility cannot … depend on the terms of a private transaction between the claimant and a third party which is unknown to the defendant and which forms no part of the matrix of fact said to give rise to an assumption of responsibility". She had previously stated (at [25]) that in *Pacific Associates v Baxter* it was clear that the claimant and the defendants knew of the exclusion clause before work commenced. Since it was found that the detailed facts militated against an express or implied assumption of responsibility, what was stated about the exclusion clause was not necessary for the decision. It is, moreover, difficult to reconcile with Lord Goff's statement in *White v Jones* because that was not limited to situations in which the disappointed intended beneficiary knew of the terms of the contract between the solicitor and the testator. The intended beneficiary may not even know that he or she was an intended beneficiary.

73. *(iii) The threefold test:* The threefold test in *Caparo Industries plc v Dickman* at 617-618, 633, and 658 asks whether: (a) loss to the claimant was a reasonably foreseeable

consequence of what the defendant did or failed to do; (b) the relationship between the parties was one of sufficient proximity; and (c) in all the circumstances it would be fair, just and reasonable to impose a duty of care on the defendant towards the claimant. The test is well established and has been applied in many cases.

74. As to proximity, a relationship is akin to contract where two parties "are in contact with one another either directly or through their agents, and where, but for the lack of payment, a contract would have existed between them": Lord Jauncey in *Smith v Eric S Bush* [1990] 1 AC 831. This is distinct from a "tripartite situation" where the defendant owes contractual duties to a third party; in such a case Lord Jauncey considered (at 871) that there will be no room for a contract between the claimant and the defendant, and hence no room for an analogous tortious duty.

75. In the disappointed testamentary beneficiary case of *White v Jones*, it was important (see Lord Goff at 259) that if a duty were not recognised, the only person who might have a valid claim (the testator) suffered no loss, and the only person who suffered a loss (the intended beneficiary) had no claim. Lord Goff considered it to be a "point of cardinal importance" that a lacuna in the law would exist if recovery were not permitted: 260A, 265 and 268. See also Sir Donald Nicholls V.-C at 224. Lord Goff emphasised (at 268B) that the *Hedley Byrne* principle "cannot, in the absence of special circumstances, give rise on ordinary principles to an assumption of responsibility". He had earlier stated (at 260) that the duty was imposed to give effect to the "strong impulse for practical justice" … "to repair the injustice to the disappointed beneficiary".

76. *(iv) The incremental test*: The source of this test is the observation of Brennan J in the High Court of Australia in *Sutherland Shire Council v Heyman* [1985] HCA 41, at [14] (1985) 60 ALR 1 at 43-44, (1984-5) 157 CLR 424, approved by Lord Bridge, Lord Roskill and Lord Oliver in *Caparo Industries plc v Dickman* at 618, 629 and 634. The formulation of Phillips LJ in *Reeman v Department of Transport* [1997] 2 Lloyd's Rep. 648, 677, [1997] PNLR 618, 625 is that:

> "When confronted by a novel situation the court does not … consider [the stages of the three-fold test] in isolation. It does so by comparison with established categories of negligence to see whether the facts amount to no more than a small extension of a situation already covered by authority, or whether a finding of the existence of a duty of care would effect a significant extension to the law of negligence".

In *Customs and Excise Commissioners v Barclays* at [4] Lord Bingham stated that "the incremental test is of little value as a test in itself and is only helpful when used in combination with a test or principle which identifies the legally significant features of a situation".[8] The focus of the appellants in the appeals before the court was not on the incremental approach.

77. *(v) An overview of the parties' cases:* I intend no disrespect to the detailed and skilful arguments if I drastically summarise them here. In a nutshell, the appellants' primary case is that the banks voluntarily assumed responsibility to their customers for

8 He stated that he agreed with the views of P Mitchell and C Mitchell, (2005) 121 LQR 194, 199.

performing the task they had undertaken (to the FCA) to perform the Review carefully. Accordingly, applying standard *Hedley Byrne* principles, they owed their customers a duty of care in doing so. The assumption of responsibility was voluntary in the sense that it was conscious, considered and deliberate (see Lord Walker in *Customs and Excise Commissioners v Barclays* at [73]) rather than in the sense of being gratuitous or altruistic. The relationship was akin to contract minus consideration; and the banks were not acting under compulsion.

78. The source of the assumption of duty was the letter to the relevant appellant.[9] This stated that the relevant bank had assessed the relevant appellant as a non-sophisticated customer and entitled to have the sale reviewed on opting in, and that, if the bank found that it had not met its regulatory obligations, the relevant appellant may be entitled to redress. Mr and Mrs Bartels' primary case was that Barclays had voluntarily assumed responsibility by entering the Review Agreement with the FCA, rather than by communications crossing the line. The fact that the object of the Review was, in Mr Edwards' words, "to make amends for past misconduct" which caused the appellants and others to lose substantial sums was an additional reason for recognising a duty of care. By opting into the Review, CGL and WW relied on the banks to do competently what they had undertaken. In the case of the Bartels, they relied on Barclays to accommodate their timetable.

79. The other tests were also satisfied. It was fair just and reasonable for there to be a duty because that promoted the object of the Review to ensure that non-sophisticated victims of the mis-selling were put into the position they would have been in had there been no breach of the banks' regulatory obligations. On behalf of WW, it was submitted that the objective content of the Review went beyond the standards in the FCA Handbook given the complexity of the hedging products sold.

80. The banks' case is that no assumption of responsibility arose from the letters to the appellants and the fact that they had opted into the Review. The purpose of the letters was to communicate the basis of the Review and the fact that in conducting the Review the banks were discharging regulatory duties to the FCA. The letters invited the appellants to rely on the FCA and the independent reviewers, and not on the banks. The terms of the agreement and the scope of the obligations assumed by the banks to the FCA were unknown to the customers at the time they opted in to the Review, and the letters made it clear that existing rights to complain and to litigate were not taken away. The fact that the Review was being undertaken pursuant to an agreement with the FCA exercising its regulatory powers was a powerful indication against the existence of a duty of care. The provision in clause 9 that persons other than the FCA and the relevant bank were to have no right to enforce any term of the Review agreement, and the role of the independent reviewer also strongly pointed against a duty of care. The imposition of a duty of care would also undermine the law of limitation.

81. *(vi) Analysis and conclusions:* The appellants' primary case was that the banks owed them a duty of care because they had voluntarily assumed responsibility to them. In my view, the submissions overstated the importance of the "assumption of responsibility" test in effectively elevating it to the sole test to be applied. I have

[9] See [32] – [34] above (CGL); [47] – [49] (Mr and Mrs Bartels) and [54] (WW).

described its somewhat chequered history. Although it was revived by Lord Goff, sight should not be lost of Lord Oliver's statement in *Caparo Industries plc v Dickman* (at 637) that "assumption of responsibility" is "a convenient phrase" but "means no more than that the act of the defendant … was voluntary" and "tells us nothing about the circumstances from which such attribution arises". Lord Hoffmann in *Customs and Excise Commissioners v Barclays* at [35] observed that there is a tendency for it (and phrases like "proximate" and "fair, just and reasonable") to be used as slogans rather than practical guides to whether a duty should exist or not. He stated that "these phrases are often illuminating but discrimination is needed to identify the factual situations in which they provide useful guidance". Lord Bingham's speech also (see [60] above) emphasised the need to concentrate on the particular circumstances and context. It is therefore necessary carefully to analyse the various factors relevant to ascertaining whether a duty exists under all the tests, rather than focussing exclusively on "assumption of responsibility".

82. In this case, I consider that the factors relied on in the authorities to which I have referred, taken together and in the round rather than applied in a linear fashion, mean that assumption of responsibility is not the most appropriate test. While no single factor is determinative, in my judgment, cumulatively they clearly point away from a duty of care. That is confirmed by cross-checking with the other tests, in particular the threefold test. I turn to those factors.

83. The first is the regulatory context. I consider that this clearly weighs against imposition of a duty of care in these cases. It would be unusual for the common law to impose a common law duty on a statutory regulatory framework. In *Yuen Kun Yeu v Attorney-General of Hong Kong* [1988] AC 175, at 195D, Lord Keith said it would be "strange" if the common law were to impose on a commissioner tortious duties additional to those which he had under the relevant statutory framework. In *Deloitte Haskins & Sells v National Mutual Life Nominees Ltd* [1993] AC 774 at 786, Lord Jauncey stated that it would be "even stranger that a common law duty of greater scope should be superimposed upon the statutory duty".

84. There are statements to the same effect in *Caparo Industries plc v Dickman* at 632B-C, and 662C-D by Lord Oliver and Lord Jauncey about the statutory requirement to file documents (including the audited accounts) with the Registrar of Companies. In *Customs and Excise Commissioners v Barclays,* Lord Hoffmann stated (at [39]) that, although conduct undertaken pursuant to a statutory duty may generate a duty of care in the same way as the same conduct undertaken voluntarily, "you cannot derive a common law duty of care directly from a statutory duty". As Lord Browne-Wilkinson observed in *X (Minors) v Bedfordshire County Council* [1995] 2 AC 633 at 739: "The question whether there is such a common law duty and if so its ambit, must be profoundly influenced by the statutory framework within which the acts complained of were done". The present context is a highly regulated environment in which Parliament has carefully prescribed the circumstances in which particular individuals may be able to institute proceedings and take other action within a framework in which the FCA has been given a wide range of powers.

85. As to the actionability of breaches of regulatory duties, Parliament has decided that some breaches of the banks' regulatory duties are not to be actionable at all by customers, and others are only to be actionable by private persons: see section 138D

of FSMA at [13] above and see [21] and [22] above. I reject the submission that because the Review included some private persons and some who were not this is not a factor pointing away from the recognition of a common law duty of care. The ability to sue depends upon the statutory duties decided by Parliament rather than the separate, independent Review conducted as part of the settlement by the banks with the FCA. The borrowers in these cases were CGL, WW, and (in the Bartels case) Gwenllian Court Hotel Ltd which did not have rights of action under FSMA.

86. In *Green & Rowley v Royal Bank of Scotland plc* [2013] EWCA Civ. 1197, [2014] Bus. LR 168, the only considered judgment of the Court of Appeal was that of Tomlinson LJ. Richards and Hallett LJJ agreed with him. Tomlinson LJ (at [15]) rejected the argument that a cause of action at common law should be recognised for individuals who did not have a statutory claim under section 150 of FSMA, the statutory predecessor to section 138D of FSMA, in that case for limitation reasons. It did so because, in Tomlinson LJ's words (at [30]), to recognise a cause of action at common law would drive "a coach and horses through the intention of Parliament to confer a private law cause of action upon a limited class". The recognition of a common law duty of care to CGL, WW and Gwenllian Court Hotel Ltd would have the same effect. It would undermine a regulatory scheme which has carefully identified which class of customers are to have remedies for which kind of breach. I reject the argument that imposing a duty of care in respect of the Review in the circumstances of these cases does not have this effect because the Review was a voluntary agreement which is entirely separate from the scheme. The FCA entered into the Review agreement with the banks in its role as regulator and as an alternative to enforcement proceedings. In these circumstances, it is artificial to suggest that the Review was entirely separate from the regulatory scheme.

87. More broadly, I consider that the overall regulatory regime is a clear pointer against the imposition of a duty of care, and suggests that to recognise a common law duty of care in the present case would circumvent the intention of Parliament. The FCA has a wide range of powers as regulator, including to make or require a section 404 scheme or restitution under section 384. It was the deliberate intention of Parliament that only the FCA was to have the power to require the banks to comply with these schemes, and that no individual customer could enforce them or sue for breach. Accordingly, the effect of the regime is that a non-private customer cannot sue in relation to a complaint or a complaint handling issue. Nor can a non-private customer complain about a redress determination if a bank proactively sets up a redress scheme. If a bank fails to comply with the terms of the Review agreement, it is the responsibility of the FCA to bring enforcement proceedings. I reject the submission of Mr Vineall on behalf of Mr and Mrs Bartels that imposing a duty of care complies with and is not inconsistent with the overall statutory regime because the objective of the statutory regime is to ensure fairness to the consumer. In my judgment, his submission ignores the specific architecture of the scheme by arguing for a more general duty which would circumvent or override the restrictions and qualifications enacted by Parliament.

88. I turn to the second factor; the dealings between the parties and the context of those dealings. The appellants placed considerable weight on communications that "crossed the line" between the bank and them. They did not rely on the agreement between the FCA and the banks, the terms of which were not disclosed to the appellants at the

time, and which indeed did not become known until February 2015, after the completion of the reviews of the sales to them in the cases of Mr and Mrs Bartels and WW in August 2014, and in the case of CGL between August and November 2014. That agreement was, however, an important part of the overall legal and factual context.

89. In this context, the banks placed significant weight on clause 9 of the Review agreement. Mr Mitchell and Mr Goodall submitted that clause 9 runs entirely counter to the proposition that the banks owe any duties to anyone except the FCA. There is force in this submission because the terms of the Review agreement, including clause 9, are part of legal and factual situation which is relevant in determining whether a duty has arisen in the circumstances of these cases, and it is well established that any structuring of the parties' relationships in a way that is inconsistent with an assumption of responsibility will make it less likely that a duty of care has arisen. But clause 9 is a clause that disavows a contractual duty to third parties. It is not a clause which purports to exclude or limit liability for negligence, as at least RBS and NatWest accepted. Accordingly, clause 9 is not in itself inconsistent with an assumption of a responsibility by the banks which would in turn (see e.g. Lord Goff in *Henderson v Merritt,* referred to at [67] above) preclude the existence of a duty of care actionable in tort.

90. The core of the appellants' cases on "assumption of responsibility" was the importance of the letters they received, in WW's case that dated November 2013, in CGL's case that dated 1 August 2013, and in the case of Mr and Mrs Bartels, the communications in December 2013 and January 2014 offering to do something,[10] and the reliance by the appellants by opting into the Reviews. The appellants (in particular CGL) relied on the use of the terms "entitled" and "due" and to "redress" in the letters in relation to the Review. They submitted that the letters and communications amounted to a straightforward offer to assume responsibility for "thoroughly" reviewing all the evidence to determine whether the appellants were "entitled" to redress, on which the appellants relied. I first deal with the letters and communications sent by the banks to the appellants. I deal with reliance at [98] below.

91. The letters about the Review and the banks' communications in general must be considered in context. The letters explain the role of the FCA, the independent reviewer, the methods of complaining about the Review, and gave web links to the FCA website. They were plainly designed to reassure the customer in writing that their complaints would be dealt with properly. They state that the Review was agreed with the FCA and that the criteria for the assessment are those laid down by the FCA, and that the Review will be overseen by the independent reviewer. The banks were obliged to allow the appellants to participate in the Reviews by virtue of a contractual duty owed only to the FCA, and the letters were drafted in the way required by the FCA.

92. Although the decisions of the banks to conduct the Reviews were, in a sense, in Lord Walker's words "conscious, considered and deliberate", the reason they agreed to do so is an important factor in assessing whether they assumed a duty of care to the appellants. It is relevant that the banks' agreement to undertake the Reviews was in

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[10] See above at [32] – [34] (CGL); [47] – [49] (Mr and Mrs Bartels) and [54] (WW).

practical terms thrust on them by the FCA rather than truly voluntary, and this is a pointer against the recognition of a duty of care. The recognition of a duty in the circumstances of these cases is tantamount to saying that the banks assumed a duty to do what they had agreed with the FCA. The test for determining whether a defendant has assumed a duty of care is an objective one but as Lord Bingham stated in *Customs and Excise Commissioners v Barclays* (at [5]) "the further this test is removed from the actions and intentions of the actual defendant, and the more notional the assumption of responsibility becomes, the less difference there is between this test and the threefold test". In my judgment, viewing them in the overall context, the letters and communications to the appellants do not suggest a voluntary assumption of responsibility towards the customer.

93. The role of the independent reviewer, the "skilled person" appointed pursuant to the power in section 166 of FSMA (see [17] above), is also relevant to determining whether there is a duty of care. In the letters to the appellants, it was emphasised that the Review by each bank would be scrutinized by the independent reviewer appointed under the FCA's powers. It is therefore difficult to argue that the banks "assumed responsibility" when they expressly indicated that an independent skilled person would be examining the decisions. As the independent reviewer could not have owed a duty of care to the customers, it would be surprising if the bank owed a duty, where it had less control than the independent reviewer over the conduct of the Review. While this may not of itself, preclude the imposition of a duty of care,[11] in my judgment, the central role of the independent reviewer militates against the imposition of the alleged duty of care.

94. I turn to the three-fold and incremental tests. The analysis of the relationship between the banks and the appellants as "akin to contract" has to be assessed in the light of the fact that the situation is a "tri-part situation" where the banks owe contractual duties to the FCA and, as Lord Jauncey stated in *Smith* v *Eric S Bush* (see [74] above) there is generally no room for either a contract or an analogous tortious duty. The nature of the Review and the limitations on the remedies available to customers who are not private persons under the regulatory system or (see below) whose claims are time-barred are, in my judgment, factors that mean that it is not "fair, just and reasonable" to impose a duty of care on the banks. Nor is there a lacuna which justice requires should incrementally be filled by a duty of care.

95. I deal first with limitation. In the case of CGL and the Bartels, the alleged breaches of duty are in substance no more than a restatement or recasting of the original allegations, now accepted to be time-barred. Imposing a duty of care in such circumstances, as well as in effect allowing customers to sue the banks for breach of their regulatory duties by the back door, would circumvent the limitation period for the original mis-selling. It is noteworthy that the damages are also identical to those originally claimed in the underlying mis-selling claim. That this factor weighs against imposing a duty is seen from the decision of this court in *Green & Rowley v Royal Bank of Scotland plc.* Tomlinson LJ stated (at [15]) that it was:

[11] See for example the statement in an analogous situation by Lord Hoffmann in *Customs and Excise Commissioners v Barclays* at [39] to which I referred at [84] above.

> "a distinctly unpromising start to [the Appellants'] quest to persuade the court that there exist at common law duties of care co-extensive with those prescribed by the COB Rules, since one justification for the finding of such co-extensive, or as it is sometimes put by the Appellants, concurrent duties, the one rooted in statute and the other rooted in the common law, is said to be the more generous limitation period available in respect of the latter."

I accept the submission on behalf of the banks that imposing a duty would mean that the banks, having assumed voluntary duties to the FCA to consider complaints about the selling of interest rate hedging products which would otherwise be time-barred under the Limitation Act 1980, had thereby re-started the limitation clock from the date of the Review.

96. I am also not persuaded that the analogy of *White v Jones* assists the appellants. Because the banks' customers have remedies even if there is no duty of care, there is no "lacuna" and therefore no need for a common law duty of care to rectify it. The attempts to identify a "lacuna" by the appellants amount to no more than identifying the limits of the regulatory regime enacted by Parliament and, pursuant to the powers conferred in FSMA, by the FCA. It is no answer to say, for example, that the appellants are not private persons and therefore have no cause of action under section 138D and that leaves a lacuna, because any gap in the remedial framework resulting from that reflects the considered decision of Parliament.

97. Similarly, it would be wrong to regard the position if the Review is conducted badly but the FCA decides not to bring enforcement proceedings as a lacuna. It is the FCA as the regulator with whom the bank has entered into a contractual agreement, and it is the FCA that is empowered by the regulatory scheme to carry out investigations. The appellants' inability to bring a claim in tort is an entirely separate question. Save for the narrow class of private persons, the customer is always in the hands of the FCA in relation to enforcement. There is therefore no anomaly in relation to this agreement. Accordingly, in the present case there are no "special circumstances" that justify imposing a *White v Jones* duty of care beyond ordinary *Hedley Byrne* principles. In any event, the existence of the alternative remedies under the regulatory regime are in themselves factors that weigh against imposing a duty of care: see for example, *Briscoe v Lubrizol Ltd* referred to at [69] above where the ability of a member of a health scheme to sue his employer was a factor against imposing a duty of care on the employer's insurer. Such alternative remedies may not be a factor where they are not true alternatives, for example (see Lord Mance in *Customs and Excise Commissioners v Barclays* at [101]) because of a different standard of proof or the fact that the remedy is not directed primarily at compensation, but that is not the position in these cases.

98. The existence of a conflict of interest also points away from imposing a duty of care. In *Chapman v Barclays Bank* [1998] P.N.L.R. 14 at [20] Otton LJ (with whom Leggatt LJ and Mance J agreed) stated that a conflict of interest between the bank's duty to its shareholders as a commercial lender and the claimant's interest in securing the loan precluded the existence of a duty of care. In the cases before the court, the alleged duty of care has the potential to put the banks in a position of actual or potential conflict with their customers. At the heart of the Review there was a conflict

of interest between the banks and their customers because the banks were being asked to assess whether they had acted in breach of their regulatory duties and whether to provide redress. It was because of that very conflict that the FCA insisted upon the appointment of an independent reviewer.

99. I turn to reliance, to which I referred at [66] above. It is an important aspect of the assumption of responsibility test, and also relevant to the three-fold test. In *Customs and Excise Commissioners v Barclays* at [14] Lord Bingham observed that "reliance in the law is usually taken to mean that if A had not relied on B he would have acted differently". A major difficulty with the appellants' position as to reliance is that it is unclear what they would have done differently. As the terms of the Review agreement between the banks and the FCA were generally unknown until February 2015 at the earliest, as the appellants in substance accepted by the way they put their cases, it is difficult to argue that they relied on the Review. As to the letters the appellants received inviting them to opt in to the Review, the appellants did not act or refrain from acting on the basis of what the banks said. The Review did not change their position in terms of their original mis-selling claims. Rather than relying on the Review for the purposes of future conduct, they simply had to wait for the outcome of the Review. The Review did not affect their rights as customers and they could never have been worse off. It would in principle have remained open to them and any eligible customer to pursue a claim in mis-selling.

100. In considering whether to recognise a duty of care in these circumstances, it is also important to take into account that the appellants' complaints are not about the provision of banking services. They are complaints about how the banks dealt with their complaints about banking services. It is possible to imagine a number of similar customer complaints schemes which are designed to confer benefits and which have some formality and structure. The imposition of a duty of care in respect of a complaint system could therefore have far-reaching consequences and, in my judgment, it would not be fair, just and reasonable to do so in the circumstances of these cases.

101. While it is not necessary to determine this point, there are two further difficulties in the case of Mr and Mrs Bartels. The first is that no duty of care can have been owed to them personally and the Company which was the borrower is not joined as a party to these proceedings and (because it had been dissolved in October 2012) was not in existence at the material times. Those were December 2013 and January 2014 when Barclays stated that their concerns would be considered within the Review and August 2014 when the Review of their transactions was completed. The company was only restored to the Register on 16 April 2015. Accordingly, the relationship between Barclays and the Company at the material times cannot be described as "akin to contract".

102. The second difficulty is that the attempt to join the Company as a Third Claimant was struck out as an abuse and permission to appeal was refused on that matter by Sales LJ following an oral renewal hearing. The matter is not before us and, in the light of my conclusion that the Reviews did not give rise to a duty of care or an arguable duty of care, the point raised by Mr Goodall in his respondent's notice, that the judge was correct to refuse the application does not arise. A different conclusion

might have meant that it would be possible for the Company to make a fresh application to be joined. In the light of my conclusion, I express no view on this.

103. For the reasons given above, in my judgment a duty of care does not arise in the circumstances of the Reviews conducted by the respondent banks in respect of the interest rate hedging products they sold to these appellants. I add that in *Suremime Ltd v Barclays Bank plc* where HHJ Havelock-Allen QC permitted the amendment to the pleadings, he stated (at [33]) that he could not be confident that all the relevant facts had been deployed which would be relevant to determining whether a duty of care arose, and the judgment does not refer to *Green & Rowley v. Royal Bank of Scotland plc,* perhaps because it was not cited to him.

104. In the light of my conclusion on duty, it is not necessary to consider the arguments on behalf of Mr and Mrs Bartels and their Company and those on behalf of WW on breach of duty. I observe only that the position taken by Barclays in relation to the request by Mr and Mrs Bartels for an extension of time is not particularly attractive, particularly in the light of the real difficulties they and their Company faced.

105. I summarised my conclusions at [11] above. Accordingly, if my Lords agree, these appeals will be dismissed.

Lord Justice Lewison:

106. I agree.

Lord Justice McFarlane:

107. I also agree.