Neutral Citation Number: [2018] EWCA Civ 1688

Case No: A4/2017/0142

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
LONDON MERCANTILE COURT
HIS HONOUR JUDGE BIRD (Sitting as a Deputy High Court Judge)
[2016] EWHC 3294 (QB)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17/07/2018

Before:

LORD JUSTICE LINDBLOM
and
LORD JUSTICE FLAUX

- -

Between:

ELITE PROPERTY HOLDINGS LIMITED **DECOLACE PROPERTIES LIMITED**	**Appellants**
- and -	
BARCLAYS BANK PLC	**Respondent**

- -
- -

Richard Slade QC and Malcolm Birdling (instructed by **Mishcon de Reya LLP**) for the **Appellants**
Patrick Goodall QC and Ian Bergson (instructed by **Dentons UKMEA LLP**) for the **Respondent**

Hearing date: 21 June 2018

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Approved Judgment

Lord Justice Flaux:

Introduction

1. The appellants seek permission to appeal against the Order of HHJ Bird, sitting in the London Mercantile Court, dated 16 December 2016 whereby, on the respondent bank's application for strike out and/or summary judgment, he dismissed the appellants' advisory claims and review claims and refused the appellants permission to amend their Particulars of Claim by, amongst other things, adding the so-called Review Agreement Claim.

2. On 25 May 2017, Sir Terence Etherton MR directed that there be an oral hearing of the appellants' application for permission to appeal before two LJs, with the hearing of the appeal to follow immediately if permission were given. That oral hearing was held before us on 21 June 2018. At the outset of the hearing we indicated that we would hear full argument on both sides so that, in effect, we heard the appeal.

Factual background

3. The claims made by the appellants relate to various interest rate hedging products (IRHPs) entered by the appellants with the respondent bank between 2006 and 2010. The appellants were associated companies incorporated in the British Virgin Islands engaged in the business of property investment and development. The appellants entered into three structured collars with the bank between October 2006 and July 2008 (two by Elite and one by Decolace) in connection with loan facilities granted by the bank totalling about £7.5 million.

4. In 2008, the appellants' cash flow came under serious strain and from December 2008 they were complaining to the bank that the structured collars had been mis-sold. Discussions ensued about restructuring and funding breakage costs. In August and September 2010, the appellants terminated the structured collars and the bank provided loan facilities to fund the break costs, £695,000 to Elite and £93,000 to Decolace. This restructuring also involved the appellants entering into swaps with the bank as replacement hedging in respect of the original loan facilities. Prior to finalising the restructuring, the bank required the appellants to sign a settlement agreement in respect of the structured collars ("the 2010 Settlement Agreement").

5. The 2010 Settlement Agreement provided, inter alia:

> "3. The issues Decolace and Elite have raised, or may raise, in respect of the Existing Hedges [the three structured collars] have been fully and finally resolved;
>
> 4. All complaints, claims and causes of action which arise directly or indirectly, or may arise, out of or are in any way connected with the Existing Hedges have been fully and finally settled;
>
> 5. Decolace and Elite waive irrevocably any such claims or rights of action."

It was accepted by the appellants before this Court that this Settlement Agreement barred all mis-selling claims in respect of the structured collars.

6. In June 2012, the bank agreed with the Financial Services Authority (now the Financial Conduct Authority, "the FCA") to carry out a review of its sale of IRHPs. This was conducted pursuant to a confidential agreement with the FCA ("the FCA Agreement") which expressly excluded third party rights under the Contracts (Rights of Third Parties) Act 1999 or otherwise. The agreement only came into the public domain when it was published by the Treasury Select Committee on 12 February 2015. The bank provided a written Undertaking annexed to the FCA Agreement to carry out the review in accordance with the terms set out in the Appendix.

7. Under the terms of the review set out in the Appendix, the bank agreed that it would provide appropriate redress to non-sophisticated customers, such as the appellants, who had been sold structured collars. Similarly, in the case of swaps, if the bank determined that they had been mis-sold, it was to provide fair and reasonable redress. The appropriate redress was what was fair and reasonable in the circumstances. Before any redress was provided an independent Skilled Person (in the case of this bank KPMG) had to agree the bank's assessment that the redress was fair and reasonable. The relevant terms provided, inter alia: "The Firm will not issue a provisional redress determination to a…Customer until the Skilled Person has agreed with the fair and reasonable nature of the Firm's redress proposal." Paragraph 4.1 of the terms provided that the bank would agree with the FCA in advance the content of all customer communications and other key documents used in connection with the review.

8. In June 2014, the bank wrote letters to each of the appellants making redress offers, in the case of Elite in the sum of £947,178.66 and in the case of Decolace in the sum of £200,107.43. Those letters were in a standard form approved by the FCA. Under the heading "Consequential Losses" each of the letters stated:

> "This redress offer includes interest at a rate of 8% simple per year on all refunded IRHP amounts. This is intended to compensate you for the fact that you lost the opportunity of using that money from the date of payment until the date of the refund (the "opportunity cost"). Specifically, it is intended to compensate you for: (i) any IRHP Borrowing Costs (as defined in Section 5.2.1 of the enclosed 'Customer Guidance on Consequential Losses'): and / or (ii) lost profits or opportunities incurred because you were required to make payments under missold IRHPs (see Section 5.2.2 of the enclosed 'Customer Guidance on Consequential Losses'.
>
> On 4 September 2013, the FCA published guidance on the assessment of consequential losses in this review…
>
> In addition to the FCA guidance on assessment of consequential losses, the Bank has produced the enclosed 'Customer Guidance on Consequential Losses' to provide further information to customers. We suggest you consider this carefully in order to decide which option to select."

9. The letters then went on to explain that the appellant in question had three options. Option 1 was to accept the redress offer including interest at 8% simple per year. If Option 1 was selected in the "Response" at the end of the letter and in the Redress Offer Acceptance Form, then the redress payment would be made. The letter stated that acceptance of the offer would be in full and final settlement of all claims and causes of action. Option 2 was to accept the redress offer, including interest at 8% simple per year and to submit a claim for consequential loss other than the opportunity cost of being deprived of money. Again, this would be achieved by selecting Option 2 in the response and the Acceptance Form. However, it was made clear that if Option 2 were selected, no redress would be paid until the bank had completed its assessment of the consequential losses claimed.

10. Option 3 was not accepting the redress offer. The appellant could then choose to submit a claim for any category of consequential loss as outlined in the 'Customer Guidance on Consequential Losses'. Once again the letter made clear that if Option 3 were selected, no redress would be paid until the bank had completed its assessment of the consequential losses claimed.

11. The letter stated:

> "Please note that under Option 3 the Bank will make an assessment of your claim which may result in you being awarded less than, more than or the same as the 8% simple interest offered by the Bank now. Please also note that any consequential loss claim will be assessed against the tests explained in detail in the 'Customer Guidance on Consequential Losses'… This assessment will mean that the confirmation or reissue of the offer of redress will necessarily take some time to complete.
>
> If you wish to make a claim for any or all of the categories of consequential loss, please tick Option 3 under the heading 'Response' on the last page of this letter and complete the relevant sections of the enclosed 'Consequential Loss Questionnaire'."

12. In the enclosed 'Customer Guidance on Consequential Losses' under Option 3 it was stated:

> "If you wish to reject the offer of 8% simple interest per year and instead want the Bank to conduct a detailed assessment of your consequential losses…please choose Option 3.
>
> Please note that choosing Option 3 means that you accept the risk that the redress offered, following the detailed assessment of your claim, may be less than the offer of 8% simple interest per year on your Basic Redress."

13. On 4 July 2014, solicitors then acting for the appellants emailed the bank saying that the appellants wished to proceed with Option 3 and enclosing signed acceptances to that effect. On that basis they had not completed the Redress Offer Acceptance Form

or the Consequential Loss Questionnaire. They asked for an extension of time of 28 days to submit their consequential loss claim which the bank granted. On 8 August 2014, the solicitors then emailed the detailed Consequential Loss Claim in the form of a witness statement of Mr Stavrinides who describes himself as the "driving force behind the development" of the appellant companies, together with an expert report from a forensic accountant.

14. On 19 September 2014, the solicitors wrote to the bank explaining the financial difficulties in which the appellants found themselves and asking the bank to pay the Basic Redress amounts (which, of course, under the terms of the offer letter set out above, the bank had said that it would not pay until it had completed its assessment of the consequential loss claim).

15. On 29 September 2014, the bank wrote letters to each of the appellants indicating a willingness to pay the Basic Redress amounts straightaway in view of the appellants' financial distress. In each case, the letter stated:

> "We have considered your request, and noting that you are in financial distress, in your case, we are prepared to pay you your redress amount on £586,058.75 (the "Redress Payment"). Please note that the Redress Payment does not include the compensatory interest previously offered to you at a rate of 8% simple per year as outlined in the Original Offer Letter.
>
> This letter represents your new redress offer (the "Revised Redress Offer").
>
> Acceptance of this Revised Redress Offer is in full and final settlement of all Claims (as defined below), including for costs, expenses or damages (excluding for consequential loss (as defined in the Bank's 'Customer Guide on Consequential Losses') and any court costs awarded in relation to any action to pursue damages for consequential loss), in any way connected to the sale of your IRHPs, however such Claims arise.
>
> …
>
> Upon acceptance, this Revised Redress Offer will supersede the terms upon which the Original Redress Payment was made to you in the Original Offer Letter. As such, this Revised Redress Offer sets out the revised basis upon which the Redress Payment will be paid to you, including when and how any compensatory interest at the rate of 8% simple that may be due to you will accrue on that Redress Payment. Your IRHP compliance assessment and redress decision as set out in the Original Offer will remain unaffected."

16. Each letter then set out the terms of acceptance for the Revised Redress Offer, which included at 1:

> "You acknowledge and agree that your acceptance of this Revised Redress Offer is in full and final settlement of all Claims including for costs, expenses or damages (excluding for consequential loss (as defined in the Bank's 'Customer Guide on Consequential Losses') and any court costs awarded in relation to any action to pursue damages for consequential loss), in any way connected to the sale of your IRHPs, however such claims arise."

17. It continued that:

> "KPMG as the Independent Reviewer has provided oversight of our assessment of your case in accordance with their obligations to the Financial Conduct Authority ("FCA"). As part of this oversight process, the Independent Reviewer has considered and confirmed the appropriateness of the Revised Redress Offer to you as set out in this letter and the enclosed documents."

18. Under the heading Consequential Losses, each letter stated:

> "We will complete a detailed assessment of all of your claims for consequential losses as set out in your CLQ and any supporting evidence you have submitted. Please note that any claim for consequential loss will be assessed against the tests explained in detail in the 'Customer Guidance on Consequential Losses' and the detailed assessment may result in you being awarded less than, more than or the same as our offer of compensatory interest at a rate of 8% simple per year on the amounts refunded in respect of your IRHPs)."

19. The appellant in question was then invited to complete the Revised Redress Offer Acceptance Form and return it to the bank, which Mr Stavrinides duly did on 29 November 2014. By signing the Revised Redress Offer Acceptance Form, the directors of the company agreed that the acceptance of the Revised Redress Offer was subject to certain terms, including that it was in full and final settlement of all claims and causes of action other than in respect of consequential losses and that "no further redress (if any) will be payable until the Bank's detailed assessment of the Company's claim for consequential losses as set out in your Consequential Loss Questionnaire ("CLQ") are completed".

20. The Revised Redress Offer letters and Acceptance Form were again in a form which was approved by the FCA.

21. On 19 December 2014, the bank promulgated its Consequential Loss Decision in the case of each appellant. At the outset, the Decision identified that as explained in the 'Customer Guidance on Consequential Losses' the appellant was required to show that the mis-sale of the IRHPs was a material cause of the loss (the so-called Factual Test or "causation"), that but for the mis-sale the loss would not have happened and that the type of loss claimed was a reasonably foreseeable outcome of the mis-sale (the so-called Legal Test or "remoteness"). The Decision then set out the relevant

Factual Background and the relevant consequential loss claims in some considerable detail before stating in relation to most of those claims that "You have not demonstrated that the Factual Test has been met in relation to these claims. Redress is therefore not payable for these claims". Other claims were also rejected on the grounds that they failed to satisfy the Legal Test, so that the bank only agreed to pay for consequential losses the amount of 8% simple interest per year on the Basic Redress which had been offered in the original Redress Offer letters.

22. Correspondence ensued and the appellants produced a detailed Response to the bank's Decision and invited the bank to reconsider the Decision rejecting the Consequential Loss claims. The bank wrote again on 31 March 2015 enclosing an updated Consequential Loss Decision incorporating in red the points raised by the appellants, but still rejecting the claims for consequential loss for the same reasons. Both the original Decision and the updated Decision stated that the Independent Reviewer had provided oversight of the bank's review in accordance with their obligations to the FCA and as part of that oversight had considered and confirmed the appropriateness of the bank's offer of redress as set out in the Decision and other documents.

23. On 20 November 2015, the present proceedings were issued and Particulars of Claim served on 22 April 2016 pursued three sets of claims: (i) mis-selling claims for breach of a duty of care in tort, negligent misstatement and misrepresentation in relation to the entering of the structured collars and swaps. £12.5 million damages was claimed; (ii) review claims alleging that the bank was in breach of a duty of care in tort which it owed the appellants in relation to its conduct of the review; (iii) conspiracy claims alleging that the foreclosure of the appellants' facilities and appointment of BDO as LPA receiver over Elite's properties involved a conspiracy to injure and unlawful interference.

24. The present application to strike out the mis-selling claims and review claims was issued on 17 June 2016. Before the application was heard, the appellants conceded that the mis-selling claims in respect of the structured collars were time-barred. Otherwise, the appellants sought to meet the bank's application by an application to amend the Particulars of Claim.

25. The original pleading contained under the heading "Causation and Loss: Consequential Losses: Advisory Duty and/or Misstatement and/or Misrepresentation" paragraph 44 which stated, inter alia:

> "The stress placed on the Group'[s] cash flow by the Claimants' payment obligations under Structured Collars 1-3 in 2009 and 2010, and the absence of available cash flow together with the likelihood that such substantial payment obligations would continue for the foreseeable future delayed, and in some instances frustrated altogether, the planned development of sites/properties acquired by the Claimants…"

26. Particulars of Losses allegedly resulting from delayed or frustrated development were then provided under this paragraph. Having considered that original pleading with care I am quite satisfied that the entire paragraph and the Particulars under it relate to losses alleged to have been caused by the entering into of the structured collars. There is no separate allegation of losses caused by the entering into of the swaps.

27. The proposed amended pleading included a new paragraph 23A which provided:

> "In the circumstances the swaps and break costs loans refinanced the Claimants' accrued liabilities under the structured collars and thereby merely repackaged and continued the Losses already caused by the mis-sold structured collars (hereinafter "the Legacy Losses"), including, amongst other things, the development losses in paragraph 44 hereinbelow."

28. Because a paragraph in the original pleading relating to the alleged misrepresentation and/or misstatement in relation to the structured collars was deleted in the draft amended pleading (it having been conceded that claim was time barred) the text which had been paragraph 44 which I quoted at [25] above now became paragraph 43. The draft then inserted a passage of new text as paragraph 44 reading:

> "The Claimants claim all development losses including the Legacy Losses which, at the Bank's insistence, were carried over as liabilities of the Claimants and continued under the mis-sold swaps and the break cost loans. In the alternative, the Claimants claim all development losses incurred after inception of the swaps and break costs loans".

However, the Particulars which then followed were precisely the same Particulars as had been given in respect of each of the property developments under the old paragraph 44 (now paragraph 43).

29. The appellants also sought permission to amend to allege a so-called "Review Agreement" of which the bank was in breach, in effect as an alternative to its case that the bank had been in breach of a duty of care in tort in relation to its conduct of the review. The Review Agreement was alleged to have been entered by each appellant when it accepted the Revised Redress Offer Acceptance Form. There were alleged to have been express terms of this Agreement, inter alia, that: (i) the Bank would carry out a detailed assessment of each Appellant's claim for consequential loss; and (ii) if the Appellants' consequential loss claims were "well founded in law and fact, the Bank would pay 'fair and reasonable' redress to the Claimants, provided such redress exceeded a sum equivalent to the compensatory interest cap at 8% flat". The appellants also alleged a whole series of implied terms, including that the Bank would carry out the detailed assessment of the Appellants' consequential losses "with reasonable care and skill", "in accordance with established legal principles", "accurately" and "in accordance with the terms agreed with the FCA including the Specification". On this appeal, the appellants did not contend that it was an express or implied term that the redress would exceed a sum equivalent to the 8% compensatory interest.

30. The draft pleading then went on to allege that the bank was in breach of those express and implied terms in its conduct of the review and in failing to offer the appellants any redress for their development losses and in failing to assess and pay "fair and reasonable" redress. The appellants then sought damages equivalent to such "fair and reasonable" redress as would have been payable if the bank had complied with its obligations under the Review Agreement.

The judgment below

31. The judge found first that all mis-selling claims in respect of the structured collars were barred by the 2010 Settlement Agreement and any attempt to contend otherwise by reference to some alleged "sharp practice" was hopeless. The appellants have not sought to appeal that finding. The judge also dismissed the mis-selling claims in respect of the swaps. He held at [39] that (as I have already found above) the loss pleaded at paragraph 44 of the original Particulars of Claim was all said to be attributable to or caused by breaches of duty owed in respect of the structured collars alone.

32. The judge went on to reject the appellants' new case by reference to the so-called Legacy Losses and the new text of what is now paragraph 44, saying at [43] that the pleading was making the point that: "the chain of causation which ends with the loss starts with the sale of the structured collars and the loans associated with them." He held:

> "The fact that the loss carried on after the swaps were entered into is nothing to the point. The Claimants seem to suggest that because loss was suffered (in the sense that it continued) after the swaps were entered into means that the loss was caused by the swaps. This is an example of the *propter hoc* fallacy; just because B follows A it does not mean that B is caused by A."

33. He concluded that there was no link between the loss pleaded and breach of duty in respect of the swaps, so that the cause of action in negligence in respect of mis-selling of the swaps was doomed to failure and must be struck out.

34. He held that the review claims were barred by the 2010 Settlement Agreement and by the releases given by the appellants in 2014 in accepting the Revised Redress Offer. The appellants accepted that the claims were so barred unless they could be said to fall within the definition of "consequential loss" as set out in the 'Customer Guidance on Consequential Losses' which is "the knock-on effect of the mis-sale". The judge held that the damages claimed in the pleading were not the knock-on effect of the mis-sale but the knock-on effect of the bank's failure to conduct the review properly, which was said to be in breach of a duty of care in tort.

35. In relation to the alleged Review Agreement, the judge noted at [55] and [56] that the bank accepted that acceptance of the Revised Redress Offer gave rise to a contractual relationship, the contract being one of compromise, the purpose of which was to draw a line under the issue of basic redress and allow an investigation by the bank of consequential loss. The judge accepted at [57] that the bank had an obligation to investigate that loss but held that the only source of that obligation was the FCA Agreement. The judge followed the line of earlier cases at first instance where judges had rejected arguments by customers, specifically of this bank, that the bank owed a duty to the customer in contract in relation to its conduct of the review. The judge referred to and applied what Phillips J said in *Marsden v Barclays Bank* [2016] EWHC 1601 (QB); [2016] 2 Lloyd's Rep 420 at [71]: "the bank undertook the review process as part of its regulatory obligations and agreement with FCA but did not intend to contract with the participants". The judge noted that the FCA Agreement expressly excluded third party rights to enforce its terms. He said:

> "In my judgment any finding that the bank had assumed a new contractual obligation to the Claimants to carry out the review with particular care and skill would require a clear expression of that intention before it could be considered at all. As Mr Goodall points out, the settlement agreement imposes no express obligation at all on the bank in respect of the consequential loss review and there is no room for implication."

36. In relation to the conspiracy claims, the judge held that these were inadequately pleaded but provided the appellants with an opportunity to re-plead their case. They did so but at a further hearing HHJ Waksman QC refused them permission to amend. Lewison LJ gave permission to appeal against his Order and that appeal is due to be heard in January 2019. It is of no relevance to the issues before us.

The Grounds of Appeal

37. Before setting out the Grounds which are pursued, I should mention what was Ground 2 which is no longer pursued. This concerned the judge's dismissal of the review claims which the appellants brought in tort. The appellants recognise that, following the decision of the Court of Appeal in *CGL Group Ltd v Royal Bank of Scotland plc* [2017] EWCA Civ 1073; [2018] 1 WLR 2137, that banks do not owe customers a duty of care in tort in respect of the conduct of the FCA review, Ground 2 was not sustainable.

38. The remaining Grounds are:

(1) that the judge was wrong to conclude that the claim in respect of the mis-sold swaps had no reasonable prospect of success because he wrongly concluded that the pleaded case did not link breach of duty and loss;

(2) that the judge was wrong to refuse the amendment to plead the Review Agreement which was properly arguable, given that as he had accepted, the acceptance of the Revised Redress Offer gave rise to a contractual relationship.

The swaps mis-selling claims

39. On behalf of the appellants, Mr Richard Slade QC submitted that the appellants had pleaded that they had been mis-sold the swaps. They had also set out at paragraph 23 of the Particulars of Claim the financial consequences of entering the swaps. Whilst they reduced the calls on the appellants' cash flow when compared with the structured collars, they still generated a call on cash flow. He submitted that interest was payable on the break cost loans and, unlike in the case of the structured collars, this was not a contingent liability but an actual liability on the appellants' books. The point that there was a continuing outlay because of the swaps was made clear by the new paragraph 23A, the second sentence of which clearly pleaded a claim for losses incurred after the inception of the swaps.

40. He then submitted that, although the Particulars under the new paragraph 44 were the same as under the original paragraph 44 (now 43) they did plead loss caused by the refinancing arrangement in 2010 (i.e. the break cost loans to finance breaking the

structured collars and the entering of the swaps). He gave the example of Particular (3) in relation to the Skylark Hotel which pleaded that but for the substantial break cost loan the appellants had to take out, the bank would have lent Elite an equivalent amount (£695,000) to redevelop the hotel. It is then pleaded that without the consequence of the IRHP obligations the hotel would have been completed to a high standard finish by January 2012. Mr Slade QC submitted that the reference to the IRHP obligations was to both the structured collars and the swaps.

41. On behalf of the bank, Mr Patrick Goodall QC submitted that the judge had been right to conclude that neither the original nor the proposed amended pleading established a causative link between the mis-selling of the swaps and the pleaded loss. The reference by Mr Slade QC to a "refinancing arrangement" in 2010, defined in the pleading as the exit from the structured collars, the entering of the swaps and the entering of the break cost loans, was a sleight of hand which lumped together all those matters in an attempt to establish a single causative event. However, no breach of contract or duty was pleaded against the bank in relation to the taking out of the break cost loans and they had been taken out in order to enable the appellants to finance exiting the structured collars. Accordingly, any loss attributable to the break cost loans was caused by the breach of duty pleaded in mis-selling the structured collars.

42. It was then necessary to identify separately what losses were pleaded which were attributable to or caused by the mis-sold structured collars and what losses were pleaded which were attributable to or caused by the mis-sold swaps. When that exercise was carried out in relation to what was pleaded at paragraph 44, it was evident that all the pleaded losses were caused by the mis-sold structured collars and none of them was alleged to be caused by the mis-sold swaps. It was no answer to say, as Mr Slade QC had done by reference to Skylark Hotel, that losses were pleaded which had occurred after the inception of the swaps, since what mattered in this analysis was not when the loss occurred but what caused it.

43. Valiantly though Mr Slade QC sought to persuade us that the pleading (both in its original and its amended form) did plead a causative link between the mis-selling of the swaps and the consequential loss allegedly suffered by the appellants, I consider that the judge was entirely correct when he concluded that the appellants had failed to plead any link between the breach of duty in mis-selling the swaps and the loss pleaded. I have already held that, in my judgment, the original pleading only pleaded loss said to be caused by the mis-selling of the structured collars alone. I do not consider that the proposed amendments improve the appellants' position.

44. On the contrary, the new pleas in relation to the Legacy Losses at paragraph 23A and new paragraph 44 do, as the judge held, make the bank's point for it. They speak of losses caused by the structured collars being "repackaged and continued" or "carried over…and continued" which seems to me to be an implicit recognition that the cause of the losses claimed was the mis-selling of the structured collars. Furthermore, the plea in the second sentence of paragraph 23A claiming all development losses "incurred" after inception of the swaps and the break cost loans does not assist the appellants because what matters in this context is not when the loss occurred but what caused it.

45. I consider that Mr Goodall QC is right that when one examines the Particulars under paragraph 44 (both the old paragraph and the new paragraph) whilst in places losses

are pleaded which occurred after 2010, on analysis in each case, the cause of the relevant loss was the entering of the mis-sold structured collars. Taking the Particulars in turn, the claim in relation to North Road is that but for the financial burden imposed on the appellants by the structured collars, that scheme would have been developed and implemented by September 2009. By definition, since the swaps were not entered into until August and September 2010, that plea can only relate to losses caused by the structured collars. It is no answer to say that the appellants plead that thereafter, up until sometime in 2014, they sought to mitigate the loss. The loss they were seeking to mitigate was still one caused by the structured collars.

46. The plea in relation to Grange Road is that as a consequence of the adverse impact of the collars, the appellants have lost the opportunity to complete the development into an income producing asset in August 2010. By definition that is an opportunity already lost when the swaps were entered, so that the loss pleaded is only attributable to the structured collars. As I have said, Mr Slade QC placed particular reliance on Skylark Hotel. It is pleaded that but for the substantial break costs loan, the bank would have lent an equivalent amount to finance the development. The break costs loan was necessary to finance exiting the structured collars because of the excessive financial burden they imposed on the appellants. Accordingly the break costs loan was caused by the mis-selling of the structured collars in the first place. It was taken out, in effect, to mitigate the loss caused by the structured collars. On any view, the break costs loan cannot be said to have been caused by the mis-selling of the swaps, nor is any such case pleaded. It is no answer for Mr Slade QC to assert that the reference to "the consequence of the IRHP obligations" is a reference to both the structured collars and the swaps when, on analysis of the pleading, it can only be a reference to the structured collars. What is being alleged is that, but for the structured collars and the substantial break costs loan required to exit them, the hotel development would have completed by January 2012. It is simply not pleaded that any delayed or frustrated development was caused by the mis-selling of the swaps.

47. A similar point can be made about the reference to the IRHPs generally in the Particulars in relation to Milton Road. It is pleaded that, without the burden of the IRHPs, Decolace would have developed the ground floor into a restaurant which would have operated from July 2010 and would have applied for planning permission for change of use of the first floor by April 2010 at the latest with that floor in profitable use by July 2011. This can only be a plea of a development frustrated by the mis-selling of the structured collars. In relation to Westborough Road it is alleged that Decolace would have made an application in the terms of its second planning application "immediately". No attempt is made to identify the date to which this refers and there is nothing in the pleading to link this to the mis-selling of the swaps, any more than in relation to any other allegation in the Particulars.

48. It follows that in my judgment the judge was correct to conclude that the appellants had not pleaded any causative link between the mis-selling of the swaps and the consequential losses pleaded. In those circumstances, he was right to refuse permission to amend and to strike out the relevant section of the original pleading which related only to the mis-selling claim in respect of the structured collars which he held was barred by the 2010 Settlement Agreement. I would refuse permission to appeal on Ground 1.

The so-called Review Agreement

49. Mr Slade QC submitted that, in circumstances where the judge had recorded that the bank accepted that the acceptance of the Revised Redress Offer gave rise to a contract and had accepted at [57] that the bank was under an obligation to investigate the consequential loss claim, he should have concluded that the contract in question encompassed the obligation to investigate the claim. The bank had said in the Revised Redress Offer letter that it would complete a detailed assessment of all the claims for consequential losses and that the assessment would be against the tests explained in detail in the 'Customer Guidance on Consequential Losses'. This was a contractual undertaking and it was clear from the Customer Guidance that the assessment would be in accordance with general legal principles. Mr Slade QC submitted that it was a necessary implication from that, that the assessment would be conducted with reasonable care and skill and not in an arbitrary and slapdash way.

50. As an alternative to his case on implication of the terms pleaded as being necessary, Mr Slade QC submitted that the implication that the assessment was to be made with due skill and care was to be made pursuant to section 13 of the Supply of Goods and Services Act 1982, the relevant "service" being the carrying out of the detailed assessment.

51. Mr Slade QC submitted that the words used in the documentation produced by the bank were redolent of offer and acceptance under a contract. There was no difficulty (unlike in some of the other cases at first instance where judges had rejected the claim against the bank in contract in relation to the conduct of the review) in finding consideration in this case. As part of the settlement agreement made when the appellants accepted the Revised Redress Offer, they were giving up the right to 8% simple interest per year.

52. Mr Goodall QC submitted that, at the time of the original Redress Offer in June 2014, the bank had referred to carrying out a detailed assessment of the consequential loss claim. That was undertaken pursuant to the obligations assumed by the bank to the FCA under the FCA Agreement, not pursuant to any contract with the appellants. The bank was not assuming any obligation to the appellants in conducting the review, as it was already under an obligation to the FCA to conduct the review. There was no consideration for any alleged contract.

53. This analysis was in accordance with the analysis of the various judges who had rejected similar claims in contract. In *Suremime Limited v Barclays Bank* [2015] EWHC 2277 (QB), HHJ Havelock-Allan QC in the Bristol Mercantile Court concluded that there was no consideration for the alleged contract, since the bank was already bound to conduct the review under its confidential agreement with the FCA. The same conclusion that there was no consideration was reached by HHJ Stephen Davies in the Manchester Mercantile Court in *Marshall v Barclays Bank* [2015] EWHC 2000 (QB). He held that the customer was simply the beneficiary of the review who did not give anything away or agree to do anything different.

54. That judgment was followed and applied by Phillips J in *Marsden v Barclays Bank* [2016] EWHC 1601 (QB); [2016] 2 Lloyd's Rep 420, who put the point succinctly at [71]:

> "On the basis of the evidence I have seen, in particular the letters from the Bank inviting participation in the review, I fully

> agree with the conclusion in *Marshall* that the Bank undertook the review process as part of its regulatory obligations and agreement with the FCA, but did not intend to contract with the participants. The review process was plainly required to be and was gratuitous, requiring nothing from the participant by way of agreeing to terms and conditions or agreeing to forbear from taking other action. That is all the more obviously the case where a participant such as Mr Marsden had already, at least on the face of matters, compromised his claims against the Bank."

55. Mr Goodall QC pointed out that these cases concerned failed attempts to spell out a contractual obligation on the bank in relation to its conduct of the review from standard form correspondence approved by the FCA in essentially the same language as used by the bank in the Redress Offer letter. Those cases had been correctly decided and, accordingly, there was no contractual obligation on the bank in June 2014.

56. The position did not change in September 2014 when the bank made the Revised Redress Offer when the appellants requested immediate payment of the basic redress. The only contract was the settlement or compromise and there was no more a contractual obligation in relation to the conduct of the review than there had been in June 2014. There was in any event a timing problem since the appellants did not accept the Revised Redress Offer until the end of November 2014, by which time the assessment of the consequential loss claim was under way. It would be odd to say the least if the bank was under no contractual obligation to the appellants in relation to the review as regards basic redress or for the first four months of the assessment of the consequential loss claim but then came under a contractual obligation for the last few months of the review.

57. In relation to the alleged express terms, Mr Goodall QC submitted that the judge had correctly concluded that the documentation did not impose any express obligation on the bank in relation to the conduct of the assessment. The case for the pleaded implied terms was no better. The appellants had not sought to demonstrate how these satisfied the test of necessity which the Supreme Court in *Marks & Spencer plc v BNP Paribas Securities* [2015] UKSC 72; [2016] AC 742 has recently restated has to be satisfied before a term will be implied (see per Lord Neuberger PSC at [17]-[18]).

58. He submitted that reliance on section 13 of the Supply of Goods and Services Act 1982 was entirely misplaced. The bank was not providing a service in conducting the review but performing an examination under the supervision of the Skilled Person of its own past wrongdoing and determining what redress should be given (see per Beatson LJ in *CGL* at [100]).

59. In my judgment, the appellants' claim that the bank came under a contractual obligation to them in relation to the conduct of the review when they accepted the Revised Redress Offer is unsustainable. There was plainly no such contract in June 2014 for all the reasons given by the judges who decided the earlier cases to which Mr Goodall QC referred, which I consider were correctly decided on this issue. The bank was always going to conduct the review anyway pursuant to its obligation to the FCA under the FCA Agreement which expressly excluded any rights of third parties such as the appellants and there was no consideration for any alleged contract at that time.

60. The position did not change in September or November 2014. The timing point made by Mr Goodall QC highlights that the bank was only conducting the review pursuant to its obligation to the FCA. The suggestion that the bank suddenly came under an additional contractual obligation to the appellants mid-way through the review process makes no sense. The only contract made upon the acceptance of the Revised Redress Offer was, as Mr Goodall QC submitted, the contract of settlement or compromise, under which the bank assumed no additional obligation in relation to its conduct of the review.

61. I consider that there was no consideration given by the appellants for the alleged contractual promise. Contrary to Mr Slade QC's submission, they had not foregone the 8% interest. They had already chosen Option 3 in their response to the original Redress Offer in July 2014, foregoing at that stage payment of the basic redress or any interest on it, as the terms of the correspondence from the bank made absolutely clear. The bank subsequently agreed to pay the appellants the basic redress, so when the appellants accepted the Revised Redress Offer they were not foregoing anything. Rather they were receiving a benefit to which they would not otherwise have been entitled, namely the payment of the basic redress.

62. I also agree with Mr Goodall QC that, although the Court of Appeal in *CGL* was dealing with why there was no duty of care in tort owed by the banks to customers in relation to the conduct of the review, the analysis of Beatson LJ is inconsistent with there being any basis for a claim in contract either, absent some clear expression of intention by the bank to assume a contractual obligation, which the judge correctly found was absent here.

63. At [94] Beatson LJ said:

> "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."

That reasoning militates strongly against there being a contract between the appellants and the bank in relation to the conduct of the review.

64. At [87] Beatson LJ considered that the imposition of a duty of care would cut across the regulatory regime, saying:

> "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."

65. Again, that reasoning seems to me to militate strongly against there being a contract of the kind alleged by the appellants. The bank did not intend to enter into a contract with its customers in relation to the review. Its only contract was with the FCA.

66. Given my conclusion that the appellants' case that there was a Review Agreement is unsustainable, it is not necessary to consider in detail the points made by Mr Goodall QC about the terms of the alleged contract beyond saying that I agree with him that reliance on the Supply of Goods and Services Act 1982 is misplaced for the reason he gives and that the appellants have failed to demonstrate that the implied terms for which they contend pass the necessity test. It is also difficult to see any basis for the implication of a term into this alleged contract with the appellants that the bank should conduct the assessment in accordance with the Specification agreed by the bank with the FCA, given that, at the time when the alleged contract was made, the FCA Agreement was confidential and the appellants could not possibly have known its terms.

67. In all the circumstances, I consider that the judge was right to refuse the application to amend to plead the Review Agreement and I would refuse permission to appeal on this Ground as well.

68. Although permission to appeal is being refused, given that this is the first occasion on which this Court has considered whether a bank owes a contractual duty to its customer in relation to its conduct of the Review, I would give permission for this judgment to be cited.

Lord Justice Lindblom

69. I agree.