IN THE HIGH COURT OF JUSTICE **Claim No A40BS029**

QUEEN'S BENCH DIVISION

BRISTOL DISTRICT REGISTRY

MERCANTILE COURT

[2017] EWHC 314 (QB)

2 March 2017

BEFORE HIS HONOUR JUDGE HAVELOCK-ALLAN Q.C.

BETWEEN:

(1) PHILIP THOMAS

(2) HELEN THOMAS

Claimants

- and -

TRIODOS BANK NV

Defendant

James Counsell (instructed by **Roythornes Ltd**) appeared for the claimants

Olivier Kalfon (instructed by **TLT LLP**) appeared for the defendant

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Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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HIS HONOUR JUDGE HAVELOCK-ALLAN Q.C.

Introduction

1. This case raises once again the question of the extent of the duty of care which a bank owes to a retail customer to whom commercial borrowing facilities have been extended. There was no hedge sold to the claimants in the present case. The transactions in question simply involved switching borrowing from a variable rate to a fixed rate for a term of 10 years.

2. The circumstances of the present case are most unfortunate. This judgment chronicles the breakdown of a flourishing banker-customer relationship which could and probably would have continued to prosper if it had not been for the unprecedented fall in the Bank of England base rate following the collapse of Lehman Brothers in September 2008.

3. The claimants, Mr and Mrs Thomas, are partners in an award-winning organic farming business which they have built up from scratch. They transferred their borrowing to the defendant, Triodos Bank, in 2006 because the bank had a reputation for supporting businesses with strong green credentials. The bank was delighted to win the claimants' custom. It regarded their business as a "flagship enterprise" which was a "valuable addition" to its portfolio.

4. The dispute arises from the fact that in the summer of 2008 the claimants decided that they wanted to switch a sizeable proportion of their borrowing from a variable rate to a fixed rate. Like others who fixed the rate of their borrowing before September 2008, the claimants found themselves tied to a far higher rate of interest than the current market rate, once base rate reached 0.5% in March 2009. No one foresaw that base rate would fall so low and so fast. More importantly, no one foresaw that base rate would remain at that level for more than 8 years. For many the pain was short-lived. In the mortgage market, fixed rate loans lasting more than 5 years were then rare. Most fixed-rate mortgages were for 2 or 3 years' duration. However commercial borrowing at fixed rates for longer periods was more common. The claimants switched the greater part of their borrowing to a fixed rate in June 2008. They did so in two tranches, at 6.71% and 7.52% per annum respectively. In each case the fix was for a term of 10 years.

5. The claimants maintain that they are not blaming the bank for not predicting that interest rates would fall. But they do blame the bank for not explaining the financial consequences which would flow if they tried to get out of the fixed rate before the expiration of the 10 years. They go further and say that the bank positively misrepresented what the financial consequences would be.

The chronology of events

6. The claimants began farming in partnership at Linscombe Farm in Devon in 1996, trading under the name of Linscombe Organic Vegetables. Linscombe Farm consisted of about 70 acres of land, of which 25 acres was useful for growing organic vegetables, a farmhouse and two 10,000 sq ft barns. The claimants grew the business by selling vegetable boxes of organic produce to subscribing customers and through having a stall at farmers' markets. In 2001 they won The Soil Association's "Box Scheme of the Year" Award. In 2003, they expanded the acreage under production by renting two other parcels of land a few miles away. But they wanted to expand further. By 2006 the claimants had substantially restored the farmhouse at Linscombe and were looking for a new challenge.

7. The claimants found Bidwell Barton in 2006. It was a farm of around 120 acres about 10 miles from Linscombe but closer to Exeter so better positioned for the Exeter market. The soil was more fertile and there was a larger (5 bedroomed) farmhouse in need of renovation. They decided to try to buy Bidwell Barton. Bidwell Barton was not organic. The process of conversion to organic status takes two years. So the claimants planned to operate their business from both sites to begin with.

8. The purchase of Bidwell Barton, whilst retaining Linscombe, was going to involve a substantial increase in borrowing. The claimants were banking with NatWest. They felt that now was the time to switch banks. They chose the defendant for its green credentials. It had a reputation for supporting businesses with a good ecological profile. As organic farmers the claimants thought that the defendant would lend them a sympathetic ear – and they were right. They had already been in contact with the defendant when they were considering buying another farm in the autumn of

2005. At the suggestion of The Soil Association they had spoken to Ian Price, who was a Senior Manager in the bank's food, farming and trade team. They got in touch with Mr Price again in March 2006. The bank agreed to lend them £300,000 with which to repay their borrowing with NatWest and £1,150,000 to fund the purchase of Bidwell Barton.

9. The claimants transferred their banking from NatWest to the defendant in April 2006. Mr Price became, in effect, their Relationship Manager. They initially entered into two loan agreements with the defendant. The first was for the sum of £300,000 (Loan 06/3057 on Loan A/C 20072007) for a term of 20 years at a variable rate of interest of 1.25% over base rate. I shall refer to this as "Loan 1". The loan agreement was signed on or about 15 June 2006 and the loan was drawn down around 26 June. It was used to repay NatWest and provide an overdraft for the farming business. The second loan was for the sum of £1,150,000 (Loan 06/3064 on Loan Account 20077009) for a term of 25 years at a variable rate of interest 1.75% over base rate. I shall refer to this loan as "Loan 2". The loan agreement was signed on or about 20 June 2006. It was used for the purchase of Bidwell Barton. The purchase was completed on 13 September 2006 for a price of £1,050,000.

10. Loan 1 was to be repaid in 240 monthly payments of interest and capital, starting with drawdown. Loan 2 provided for an initial interest-only payment period of 36 months, followed by 264 monthly payments of interest and capital. Both loans were secured by mortgages of the land and buildings at Linscombe Farm and at Bidwell Barton. The loan agreements incorporated the defendant's standard conditions, to which I will return presently. Both also contained an express clause stating as follows:

> "If all or part of the Loan is repaid early as a result of refinancing through another lender or through a sale of Property forming the Bank's security or a sale of a Property purchased with the loan a fee is payable equivalent to the amount of interest indicated, at the Rate of Interest then prevailing, on the amount repaid early."

The amount indicated as the early repayment fee was 3 months' interest. However, the bank agreed to waive the early repayment fee altogether in the case of Loan 1 and agreed to waive it in respect of Loan 2 if the early repayment was made out of the proceeds of sale of any part of Linscombe Farm. The reason for this latter concession was that the claimants had conceded from the outset that they would probably have to sell the farmhouse at Linscombe, and perhaps the land, in order to reduce the level of their borrowing.

11. This is in fact what happened. The farmhouse at Linscombe was sold in November 2007 for £695,000 and £600,000 out of the net sale proceeds were used to reduce Loan 2. At that point the claimants' thinking was that the land at Linscombe Farm could be sold to pay off the rest of Loan 2 as and when they were ready to give it up. However they were now facing a period of uncertainty due to the fact that, in January 2007, Mr Thomas had been diagnosed with viral hepatitis. This is a degenerative disease which can permanently damage the liver if left untreated. The only known treatment is long-term chemotherapy combined with an anti-viral drug. Mr Thomas had been told that if the virus was not eliminated by this treatment, his chances of survival were no more than 40%. He embarked on an 11 month course of chemotherapy in October 2007. It ended in September 2008. Subsequent tests suggested that it had worked; but Mr Thomas was told that he would not know for certain whether he had been cured for 5-6 months. He was eventually given the "all clear" in February 2009.

12. The significance of Mr Thomas' illness is two fold. First, it placed a question-mark over long-term plans for the farming business. The claimants could not be sure that they would be able to keep Bidwell Barton, or the land at Linscombe for as long as they would like, until they were confident that Mr Thomas was cured. They stuck to their immediate strategy of developing Bidwell Barton so that it became organic and was capable of operating profitably on its own but made no definite decisions about the future. Second, it affected their status as borrowers. The bank was likely to regard them as less of a good risk if it knew that Mr Thomas had a life-threatening condition. The question is what Mr Price knew about the illness. The issue is said to be relevant to his credibility and that of Mr Thomas and I will return to it.

13. The claimants restructured their borrowing from the defendant in February 2008. The balance of Loan 2 (£550,000), plus an additional advance of £15,000, was

re-packaged as a loan of £565,000 (Loan Agreement No. 08/3489 on Loan Account 20124341) for a term of 24 years at the same variable rate of interest of 1.75% over base rate. I will call this "Loan 3". The capital repayment holiday was extended in Loan 3 so that it ran for a further 24 months.

14. On or about 13 May 2008, the claimants borrowed a further sum of £150,000 from the defendant (Loan Agreement No. 08/3536 on Loan Account 20133758). This additional loan ("Loan 4") was intended to speed-up improvements at Bidwell Barton, such as a new packing station and the installation of polytunnels. It was a short-term loan repayable in monthly instalments over 2 years and, like Loans 2 and 3, carried interest at 1.75% over base rate.

15. The claimants were now quite heavily borrowed and were becoming worried about the cost of servicing their debt if interest rates rose. They inquired of Mr Price about fixing the rate on some or all of their borrowing. I shall come back to the oral exchanges which are alleged to have influenced the claimants' decision to switch to fixed rates. I simply set out here the sequence of events which is confirmed by the contemporaneous documentation.

16. The first fix was on 29 May 2008. Helen Thomas emailed Mr Price on the afternoon of 28 May asking to know "*what the various potential scenarios would be for fixing the interest rate on all/part of our loans for between 2-5 years for example*". Mr Price replied by email the same afternoon saying:

> "*1 year – cost of money i.e. equivalent of base – 6%, 2 – 5.90%, 3 – 5.85%, 4 – 5.78% and 5 – 5.70% rates volatile and over during day.*
> *Hope this helps – you add the margin to the rate above to get actual rate paid.*
> *Can change some/all of loan to fixed but there is some admin, so small cost.*
> *If you repaid the fixed before maturity then there is a penalty.*"

17. On the evening of 28 May, Philip Thomas spoke to Mr Price on the telephone about the implications of switching to a fixed rate. The next day Helen Thomas sent a letter to Mr Price, which was received by the bank on 1 June, instructing him to fix the rate on Loan 1 for 10 years. The amount outstanding on Loan 1 was £289,132.55. Following the claimants' instructions the bank fixed the interest rate on this sum on

10 June 2008 at 5.46%. It gave the new fixed loan, which I shall refer to as “Loan 5”, a new loan agreement number and new loan account (Loan Agreement No. 06/3057 on Loan Account 20134991). The same margin of 1.25% applied to Loan 5 as had applied to Loan 1. So the fixed rate payable under Loan 5 was 6.71%.

18. Although the new loan agreement was never signed by the claimants, nor the new loan agreement for the second fix, there is no dispute that the defendant’s standard terms and conditions applied to both. Those terms, which applied also to the claimants’ variable rate lending, provided that an “early repayment fee” was payable in the event of early repayment of the principal amount of the loan and in addition provided that an “extra repayment premium” was payable if the loan repaid early was at a fixed rate. The early repayment fee was governed by clause 2.10. The extra repayment premium, referred to at the trial as the “redemption penalty”, was governed by clause 2.11. Although not a penalty in the legal sense, I shall refer to the extra repayment fee as the “redemption penalty” to distinguish it clearly from the early repayment fee. The similarity in the terminology used to describe the two charges is otherwise apt to cause confusion, and may in fact have done so in this case.

19. Clauses 2.10 and 2.11 provided as follows:

> “2.10 EARLY REPAYMENT
> The loan may be repaid in full or in part at any time subject to the Bank's agreement and subject to subsequent repayments, if any, being rescheduled under a new loan agreement between the Bank and the Borrower, if so required by the Bank. The Bank will not be obliged to re-lend to the borrower any sums which the Borrower has paid to the Bank (“the early repayment fee”). If all or part of the loan is repaid earlier than stated in this Agreement under the headings “Repayment of Loan” or “Term of Loan”, the Borrower agrees to pay the Bank all interest accrued on the amount then repaid, and the early repayment fee.
>
> 2.11 EARLY REPAYMENT OF LOANS WITH FIXED INTEREST
> For loans with a fixed interest rate an extra repayment premium may apply if the Borrower wishes to repay all or part of the loan before the expiry of the Fixed Term. If the standard fixed rate, for the same term of years as the loan was higher at the time the loan was drawn down, than the standard fixed rate for a period equivalent to the unexpired term of the loan at the time the Borrower makes the extra repayment, a redemption charge will be levied. This redemption charge will be calculated based on the Present Value of the

difference between the two rates over the balance of the remaining loan and the Early Repayment Fee ("the redemption charge").

20. On 5 June 2008, after the instructions had been given for the first fix but before those instructions had been implemented (so it was not too late to reverse them without financial consequences), Mr Thomas says that he had a further telephone conversation with Mr Price, which Mr Price does not recall taking place. Instructions for the second fix followed 5 days later. The process began on 10 June 2008 when Mrs Thomas telephoned Ted Roylance, the bank's Loans Administrator, who had rung the claimants the previous day and left a message asking them to call back. They discussed interest rates for a fixed rate. It is common ground that Mr Roylance told Mrs Thomas that the longer the period of the fix the lower the interest rate was likely to be. He guided her to the Financial Times website where the "Swap Ask Rates" at the previous day's close were listed. Within the bank this was known as "the ICAP rate". Mr Roylance did not explain to Mrs Thomas what a "Swap Ask Rate" or "ICAP rate" was, nor did Mrs Thomas know. But she understood that these were the rates at which the borrowing rate could be fixed for future periods. Mrs Thomas saw that the 10 year rate being quoted that day was 5.46%. She asked Mr Roylance about the trend in interest rates. He said that they were currently moving upwards (which was true) but that it was hard to know what they would do in the future. She asked if he could fix the rate on more of their borrowing and he said that she would need to put any instruction in writing to Mr Price.

21. The claimants discussed what Mr Price and Mr Roylance had said before giving instructions for the second fix. They made a manuscript note of the matters they discussed, which was in the form of jottings by both of them on a single sheet of paper. The bank accepts that the note is roughly contemporaneous with the two fixes. It was almost certainly made after the telephone conversation with Mr Price on 5 June. Whether it was made after the telephone conversation with Mr Roylance on 10 June is less obvious but it does not greatly matter. There is a calculation in Mrs Thomas' handwriting which estimated that the interest rate payable on a 10 year fix would be 7.55% and that the interest payable would be £75,000 per annum on borrowing of £1 million. According to Mrs Thomas, this was a worst case scenario. She assumed for this purpose a market rate for 10 year money of 5.4% to 5.8%. There

is an annotation next to this calculation saying "*14k less*" then underneath on the next line: "*27*" and "*potential loss £34k*". I will come back to her explanation of this entry.

22. The instructions for the second fix were given in a letter to Mr Price dated 10 June 2008, which was signed by both claimants. It reached the bank on 12 June. The letter asked for £300,000 of the outstanding amount of Loan 3 to be fixed for 10 years. The letter went on to say:

> "*This sum leaves the balance of unfixed portion of loans/borrowings at a level that could possibly be paid off should we sell Linscombe Farm in the near future, thus reducing any penalty for early repayments that may be incurred. Please can you confirm that these loans could be converted to capital repayment loans from their present interest only status, should we require in future.*"

The claimants asked the defendant to let them know the exact rate of interest for the second fix prior to going ahead with it so that the rate could be given their "final agreement".

23. On 11 June 2008, the claimants received a letter from the defendant confirming that the first fix had been concluded the previous day, but they heard nothing about the likely rate of the second fix for several days thereafter. This appears to have prompted Mrs Thomas to telephone Mr Roylance on 17 June to inquire about the second fix. The content of this conversation is controversial save that it is agreed that the rate for the second fix was discussed, that Mr Roylance took Mrs Thomas back to the FT website, while she was still on the phone, from which she saw that the ICAP rate for 10 years had jumped since 10 June from 5.46% to 5.77%, and that in consequence she asked Mr Roylance if they could increase the second fix from £300,000 to £500,000 without the need for a fresh written instruction.

24. Mr Roylance then questioned the claimants about their stated intention, in the letter of 10 June, of making capital repayments of their borrowing from the sale of the rest of Linscombe Farm. Loan 3 was still enjoying a capital repayment holiday but was set to revert to monthly repayments of interest and capital in about 20 months' time. Mr Roylance confirmed that the same would happen to any part of Loan 3 for which the interest rate was fixed and that the capital repayment element in the

monthly repayments would not attract a redemption penalty. Mrs Thomas then asked if the claimants could make lump sum repayments of any of the fixed rate borrowing. Mr Roylance said that they could but that there would be a penalty to pay for early repayment in a lump sum. There is a difference of recollection about the discussion of that penalty.

25. The upshot of the conversation was that the amount of the second fix was increased to £500,000. Mrs Thomas endorsed on her copy of the instruction of 10 June "*£500k instead of £300k. Discussion with Ted [Roylance] on 17/6*". The bank's records show that the second fix was implemented at 1447 hours on 17 June at a rate of 5.77% for 10 years. With the premium on Loan 3 of 1.75% this made a payable rate of 7.52% which, as Mrs Thomas privately noted, was still within the 7.55% rate which the claimants had used in their worst case scenario calculation.

26. Mr Roylance wrote a letter to the claimants on 17 June confirming the second fix. The fixed rate element of Loan 3 was given a new loan agreement number and loan account (Loan Agreement No. 08/3489 on Loan Account No. 20135394). I will call it "Loan 6". Like the letter of 10 June confirming the first fix, the letter of 17 June expressed the rate of interest as being the "Cost of Funds" plus the bank's margin. It expressly defined the "Cost of Funds" as being "the 10 year Sterling Swap Ask Rate as published by ICAP plc or its successors." The letter went on to quote verbatim in the middle of the first page the wording of clause 2.11 concerning redemption penalties.

27. Meanwhile, there was an exchange of emails between Mr Price and the claimants on the afternoon of 17 June. Mr Price sent a message to the claimants at 1448 hours saying:

> *"… Ted has confirmed to me your letter asking for all loans to be fixed which he has actioned today. This, given the current climate, looks sensible but it is your decision.*
> *One thing to consider and as discussed with Phil, is that if all borrowings fixed this assumes Linscombe land/buildings won't be sold as if it is, you will have to pay an early payment fee on the fixed element.*
> *Assume you have considered this as I mentioned it to Phil …."*

28. Mrs Thomas replied later the same evening:

> "*We thought sensible to fix loans (lag time between decision and actual fixing frustrating, but further £500k fixed today) and indeed, take Linscombe off the market for the time being – as you noted, the two are related.. Yes, we took early repayment into consideration, but Ted did say repaying capital of loans instead of just interest only shouldn't be a problem if we want to do this in future. …*"

29. Following the second fix, the claimants were left with borrowing at a variable rate of interest (at that time 6.75%) of about £65,000 under Loan 3 and £150,000 under Loan 4. All of Loan 1 had been fixed (now Loan 5) and £500,000 of Loan 3 (now Loan 6). The claimants' total borrowing from the defendant was just in excess of £1 million, and there was an overdraft on the farm account. On any view the claimants' finances were very stretched.

30. As base rate started to fall in the autumn of 2008, the claimants had second thoughts about their decision to fix. Mr Thomas emailed Mr Price on 30 October 2008 asking: "*What (if any) penalties would we incur to end the current fixed rate so that we can re-fix at the new rates (if this is appropriate)?*" Mr Price emailed back the same day by copying the letter of 17 June confirming the second fix with the Rate of Interest definition and wording of clause 2.11 highlighted in red. He did not give a figure for the likely redemption penalty but simply added the following remarks: "*Yesterday's rate for 10 year fixed for comparison was 4.73% (you fixed at 5.77%) so with your margin it would be 6.48%. If you work it (the penalty) out its quite a large amount. So what you propose may be too expensive. Call me if you want to discuss.*" Mr Thomas responded: "*Thanks. Will read, absorb and cogitate*."

31. The New Year (2009) brought good news and not so good news. It was beginning to look as though the treatment Mr Thomas had received for the hepatitis had done the trick, and he received a clean bill of health in February. However, the business and financial outlook was not so rosy. The claimants were anxious to complete the move from Linscombe to Bidwell Barton but the land at Bidwell Barton was not yet fully productive. They still needed produce from the polytunnels at Linscombe but the level of bank borrowing made it increasingly unlikely that they

would be able to hold on to Linscombe for long. Meanwhile base rate continued to fall, making the fixed rates which the claimants were paying increasingly expensive.

32. The claimants held a meeting with Mr Price at Bidwell Barton on 27 January 2009 to take stock. Mr Price cannot recall whether he was pressed on this occasion to come up with a figure for the redemption penalty if the fixed loans were repaid. I think it likely that the claimants did raise the topic because they were increasingly worried about the high fixed rates and there was discussion about putting the Linscombe land and farm buildings back on the market. They were worth more than the amount of the variable rate borrowing, so inevitably the question arose of what the penalty would be if some or all of the proceeds were used to repay the borrowing on a fixed rate. Whatever was said, the defendant did not get an idea of what the break cost would be until March.

33. Base rate fell to 0.5% on 5 March 2009. Around this time Mr Thomas decided to ring Mr Roylance to get more clarity about redemption penalties. He may have rung Mr Roylance before 5 March because an internal email was sent on 3 March from the defendant's Loan Administration Team Leader (Ken Senior) to the defendant's Head of Finance (Kit Beazley) to which a draft of the bank's current guidance on how to calculate a fixed rate redemption penalty was attached. Nothing was said in the email directly linking it to the claimants' case but the probability is that it was the claimants' desire to break their fixed rates which prompted it. It became clear at the trial, and I will come back to this point, that the bank had had very little recent experience of a customer wanting to break a fixed rate on borrowing and that only a few senior personnel (who did not include Mr Price) really understood how clause 2.11 was supposed to work.

34. As a result of Mr Thomas' call, Mr Roylance sent him an email on 11 March 2009 telling him that the current redemption penalty in respect of Loan 6 was £96,205.47. The email is worth quoting in full because it was the first explanation the claimants had received of how the redemption penalty was calculated:

> "*Further to our telephone conversation, perhaps we need a plain english revisit to the wording of our break costs clause!*

Essentially we look at the rate from today until the end of the fixed rate period and compare to original rate. If today's rate is lower the cost is the difference between the two. There is no early repayment fee applicable if the borrowing is being switched back to base rate, that would only apply if the loan was being repaid. This loan was originally fixed at 5.77 (+ margin of 1.75 to give the all in of 7.52). Today's indication fixed rate for the remaining period is 3.5075 a difference of 2.2625. So calculated on the net loan amount outstanding over the remaining fixed rate period the cost is £96,205.47. Hope this helps."

35. The figure came as a shock to the claimants. Following their meeting with Mr Price in January they had come to realise that it was inevitable that the remainder of Linscombe would have to be sold just as soon as they could manage to run the business from Bidwell Barton without the facilities at Linscombe (the packing station, the crop producing land and the polytunnels). But they did not have £96,000 or anything like that sum with which to pay the redemption penalty and faced the prospect of only being able to apply the Linscombe sale proceeds against their variable rate borrowing which, by this time, was costing them very much less.

36. The issue of breaking the fixes came to a head again in May 2009 when Mr Price stepped down as their Relationship Manager and was replaced by Simon Crichton. Mr Price took Mr Crichton to a meeting with the claimants on 19 May so that he could introduce him. It is common ground that there was discussion of the redemption penalty that would be payable if any part of the fixed rate loans was repaid from the sale proceeds of Linscombe Farm but Mr Crichton is fairly sure that no figures were mentioned. Mrs Thomas recalls that when she showed Mr Crichton spreadsheets setting out the projected costs of completing the transfer of the business to Bidwell Barton in which she had included a potential reduction in borrowing of £130,400 from the sale of Linscombe, he remarked that this was no longer relevant because selling Linscombe would be difficult now that most of the borrowing was on a fixed rate.

37. Mr Thomas followed up this part of the discussion in an email to Mr Price on 20 May 2009, saying:

"*Following on from our conversation yesterday, I would like to clarify our position regarding the early repayment penalty on the fixed part of our loan.*

From memory …. the relevant clause on the loan document says that any repayment penalty would be "based on the difference between the interest rate at the time the loan was taken out and the interest rate at the point the loan was paid back". We took this to mean that the penalty would be some proportion of the difference but we now understand that it actually means the entire amount i.e. if we pay back £1 then we are penalized £1. This has obviously made it impossible for us to use the drop in interest rates to buffer the impact of the unprecedented and unforeseen economic situation.

As you know, in order to attempt to keep up with the payments following this decline in business, we now have Linscombe Farm on the market in its entirety. However we are aware that, if we do manage to secure a sale, the same rate of penalty would apply i.e. for every £1 we pay back, we would be penalized £1 (or something close). …

As you can see from the above, we are somewhat anxious to receive some clarification on the situation. It is possible that we are misunderstanding the situation entirely as my understanding of the normal situation amongst mainstream lenders is that penalties are more usually in the order of 10p in the £1."

38. Mr Price copied this message to Mr Crichton. He also asked Mr Roylance if he could send Mr Crichton a copy of the message of 11 March in which the break cost of £96,205.47 had been quoted. Mr Crichton told the claimants that he would look into the figure for the redemption penalty. But the claimants say that they heard nothing about it. So Mr Thomas emailed Mr Price early on 19 July 2009 and complained:

"*We do not appear to have received a reply to our requests to clarify the breakage penalty that would be due should we manage to sell all or part of Linscombe Farm.*
…
We have made several attempts to communicate with you on this matter over the last year and, short of my direct approach to Ted Roylance, have not yet arrived at a definitive, written conclusion other than the vaguely worded section in the loan contract that we signed. We would therefore appreciate some contact regarding this matter as soon ass possible."

39. He received no answer because the message should, of course, have gone to Mr Crichton. In frustration he sent another message, this time to Mr Roylance, on 20 July 2009 which said:

> “*as your email of 11 March, could we please instigate the process that will take our loans back onto base rate + cost of funds. Please could you let me know how long this will take and what the process comprises.*”

40. Mr Thomas hoped that this message would provoke a response which provided an update on break costs, and he was right because it did. But the message was also carefully worded to pick up on something Mr Roylance had said in his message of 11 March: “*There is no early repayment fee applicable if the borrowing is being switched back to base rate, that would only apply if the loan was being repaid.*”

41. If Mr Thomas ever seriously thought that that remark might mean that there would be no redemption penalty if none of the fixed rate borrowing was repaid and the fixed rate loans were simply switched back to being a variable rate, he was quickly disabused. On 22 July 2009, Mr Crichton rang to say that the current break cost on Loan 6 was around £54,000 and on Loan 5 was around £23,000. The next day Mr Roylance confirmed in an email that the figures exact figures were £54,691.59 on Loan 6 and £23,349.60. There was an internal exchange of emails between Mr Roylance and Mr Crichton on 23 July in which Mr Roylance conceded that his reference in the email of 11 March to there being no early repayment fee for switching the borrowing back to a variable rate might have been confusing. He had been intending there to refer to the early repayment fee under clause 2.10 rather than to the redemption penalty under clause 2.11. He might also have admitted that the rider in his March email (“*… that would only apply if the loan was being repaid*”) should have been more explicit. The bank had agreed to apply to the fixed rate lending the concession in Loans 1 and 2 that an early repayment fee would only be payable if the claimants were repaying the loans in order to refinance with another lender and/or were doing so using the proceeds of sale of a security other than Linscombe Farm (see paragraph 10 above).

42. The reason it took the bank so long to come up with the revised break cost figures was in truth that it had very few large fixed rate loans and even the loan department was not used to calculating redemption penalties. Mr Price emailed Mr Senior on 20 May to say, on behalf of himself and Mr Crichton: “*We would be really grateful if you could give us the benefit of your vast experience on how the Triodos breakage fee was originally set up – did we have our own, was it pinched from*

another bank etc.? We need to look at question as part of the credit aspect but the starting point is what policy we have … but more importantly where it comes from".

43. It had already struck Mr Roylance that the figure he had given on 11 March was wrong, even by reference to the interest rate differential at that time, because no discount had been applied to it for accelerated payment. He raised this with Mr Beazley on 21 May 2009. Applying the discount reduced the figure of £96,205.47 for Loan 6 given on 11 March to around £82,000. Also since March, the swap ask rates for 9 year money had risen and the rate differential had narrowed. This trend continued from the end of May 2009 into July. Re-running the calculation around the end of May 2009 produced a redemption penalty of £66,345 for Loan 6. But the Loan Administration Team was not confident that it had got the methodology absolutely right until they came up with the figures of £54,691.59 for Loan 6 and £23,349.60 for Loan 5 on or about 22 July 2009.

44. These sums were still well beyond what the claimants could afford. But they were caught between two stools. Reducing the overall level of their borrowing was an imperative, since, by the end of 2008, they were having to service the fixed rate loans out of Loan 4 (the development loan) and their overdraft. The 64 acres of land and buildings at Linscombe Farm had been back on the market since February 2009 in four separate lots for a total asking price of £495,000. These were the only assets which the claimants had available for capital repayments. On the other hand, the claimants still needed the facilities at Linscombe to satisfy their customers, because Bidwell Barton was not yet operating at full capacity. The first crops had been planted at Bidwell Barton in the autumn of 2008, and the property obtained organic status from The Soil Association in May 2009: but not all of the land there was ready for production.

45. The bank was well aware of the claimants' predicament and that the redemption penalties on the fixed rate borrowing were exacerbating the problem. By the end of July 2009 Mr Crichton was planning to suggest to his colleagues in Loan Administration that the bank consider offering the claimants a deal which would mitigate their impact. The claimants' borrowing came up for annual review by the Credit Committee in September 2009. They needed an increase in their overdraft

facility from £50,000 to £80,000 if the business was to stay afloat. Mr Crichton recommended that this be approved, but on certain conditions. In his report to the Credit Committee he said this:

> "**Fixed rate penalties**
>
> *I have been through the numbers with Kit* [Beazley] *and Loans Admin. They are accurate and definitive as the Net Present Value (NPV) between the loan rate at payout and the rates currently available on the term remaining. Although the bank does not directly match fund the agreements obviously the income forms part of the overall projections going forward and it was the customers who pursued the fixing of the rates, now known to be at a peak. They also have the benefit of lower margins than we would currently offer and no MLR* [Minimum Lending Rate] *on their remaining variable rate borrowing.*
>
> *Having said all of that in terms of masking their sale decision/calculations easier I would have liked to have assisted in giving a firmer indication in return for introducing MLR to the overdraft and raising the margin over Base to +2%. May I suggest that unless circumstances change dramatically that we limit the redemption fee to 120% of the capital repaid or the NPV whichever is lower. As it stands today this would "cost" the bank £15,000 if they were to settle the main fixed £500k loan but accelerate our income stream with much needed income for 2009. I would also confirm with them now that all other variable rate borrowing will have an MLR of 3.5% once Linscombe is sold.*"

46. The increase in the overdraft limit was approved, but for a limited period until 31 March 2010. The introduction of an MLR of 3.5% was also approved, so that the interest rate payable on the overdraft rose from base rate + 1.5% (2% in total) to 3.5%. When the news was conveyed by Mr Crichton, Mr Thomas messaged back to say: "*Good to know the bank is so fully behind us in these very difficult tim*es". This may have been intended sarcastically, but it could equally well have been genuine. In truth the bank was being indulgent in supporting the claimants with further lending when their financial circumstances hardly justified the risk.

47. The claimants signed the new overdraft facility agreement on 13 January 2010. They heard nothing of the proposal to mitigate break costs until early in March 2010. The claimants had received an offer for Lots 1 and 4 of Linscombe Farm in January 2010 and further expressions of interest in February. This prompted them to ask Mr Crichton on 2 March 2010 for an updated calculation of redemption penalties. He replied on 4 March with revised figures. The amount outstanding on Loan 5 was

now £277,927.19 and the break cost was £29,607.39. For Loan 6 the respective figures were £500,000 (because the claimants were still in the capital repayment holiday) and £66,729.49. However in the same email Mr Crichton told the claimants that the bank was willing to accept a maximum redemption penalty of 10% of the capital sum repaid.

48. The offer for Lots 1 and 4 did not result in a sale. However, in October 2010, the claimants managed to sell the buildings at Linscombe Farm for £150,000. They used £140,000 of the net sale proceeds to repay most of the development loan (Loan 4). Then in January 2011 the claimants accepted an offer from a neighbour to buy 40 acres of Linscombe. The sale was completed in June. The whole of the net sale proceeds, amounting to £248,250, was used to pay down the claimants' overdraft (which was now over £200,000) and to repay the part of Loan 3 which had remained on a variable rate.

49. On 28 February 2011, Mr Crichton had emailed the claimants to say that, once the sale of the 40 acres had gone through and the variable rate borrowing had been cleared, leaving a working overdraft of £50,000, the bank would allow repayment of up to £200,000 of the fixed rate loans for a redemption penalty of only 3% i.e. a sum of £6,000, provided that the repayment was derived from selling what was left of Linscombe. What was left of Linscombe was some land and a quarry, amounting in total to about 20 acres.

50. Mr Crichton put the two discounts being offered by the bank into a letter to the claimants dated 18 July 2011, in which he also set out revised figures for the redemption penalties as at 12 July 2011. The rate differential had widened since March 2010, so the penalties had increased. The amount outstanding on Loan 5 was £266,365 and the redemption penalty was £43,572; but the bank was prepared to accept 10% of the outstanding balance or a maximum penalty of £26,636.50. The capital repayment holiday under Loan 6 had come to an end and the amount outstanding on this loan was £487,495. The redemption penalty was £84,536, but the bank agreed to accept a penalty of £48,749.50. In respect of both loans the letter made clear that up to £200,000 of the capital could be repaid for a penalty of only 3% "*subject to an ongoing business at Bidwell Barton*".

51. The claimants regarded even these figures as far in excess of what they thought they had been led to believe would be the level of penalty when they entered into the fixed rates. In September 2011 Mr Thomas had a telephone conversation with Mr Crichton in which he complained about the way he felt he had been treated by the bank over the redemption penalty. Mr Crichton felt that he should register this as a formal complaint within the bank's complaints system. The result was that the claimants unexpectedly received a letter dated 5 September 2011 from Dr Bevis Watts, the Head of Business Banking, in the following terms:

> "***Re: Fixed Rate Loan Agreements 20134991 and 20135394***
> *Following your recent conversation with Simon, we have reviewed your request for enhanced settlement rates on the above fixed rate loans. I have reviewed the matter as a complaint.*
> *You will understand that when you requested to convert the loan agreements to a fixed rate you were accepting that interest rates could rise or fall, in return benefitting from a fixed repayment schedule over 10 years and that Triodos Bank was accepting the business risk that the cost of funds could increase over the duration.*
> *The Triodos Bank method of settlement calculation, as previously discussed with Simon, compares the actual cash flow at the agreed rate with the current rate for the remaining term brought back to the net present value. By doing this we properly reflect the commitment made by the borrower and, equally important, the Bank's commitment to the deposit holders, this is a methodology adopted by many other banks.*
> *That said, given the difficulties within the sector and your commitment to improve the financial performance of the business, I am willing to give a further discount to that stated in Simon's letter of the 18th July. I agree that we will cap the settlement cost for each loan at 8% of the capital repaid, this does not replace the additional agreement that £200,000 can be repaid at a rate of 3% settlement cost following the sale of the remaining land at the Linscombe site.*
> *I feel this is an exceptional discount on the repayments that are due under the terms of your loan agreements and I do not believe such support would be available from other banks.*
> *I hope that this is to your satisfaction given all the circumstances and that the Bank can continue to work with you in a positive direction.*"

52. The claimants were not in a position to take up the offer of an 8% penalty, or the 3% of £200,000, unless and until they sold the remainder of Linscombe. They were also concerned not to be thought to be agreeing that any higher redemption penalties were properly chargeable. Nevertheless, when they managed to sell a very small piece of the remaining land at Linscombe and some water rights at the end of

2011, they put the net proceeds of £24,250 towards repaying part of Loan 6 and benefitted from a reduced redemption penalty of £750. The 3% offer meant that they could still sell £175,000 worth of the rest of Linscombe for a penalty capped at £5,250.

53. In January 2012 the bank agreed to restore the claimants' overdraft limit to £100,000, but at an increased rate of interest of 6% over base rate rather than the margin of 1.5% which had applied hitherto, and with an MLR of 4.5% rather than 3.5%. In the autumn of 2012 the claimants requested a further increase in their overdraft limit from £100,000 to £135,000 in order to cover the cost of buying in produce to fulfil their veg. box sales, and purchasing a strip of land at the entrance to Bidwell Barton so as to improve access. The increase was approved and the claimants signed a new overdraft facility on 31 October 2012 to run until 30 September 2013. The purchase of the strip of land was not completed until May 2013. By May 2013, however, the claimants were asking for another increase in their overdraft limit to £205,000. The bank approved this increase as well, but only until 30 September 2013, and on condition that the remainder of Linscombe was valued at not less than £200,000 and was sold and the net proceeds paid to the bank before 30 June 2014.

54. In December 2013, the bank extended the overdraft facility to 31 March 2014. By this time, however, the relationship between the claimants and the bank, although still outwardly cordial with Mr Crichton, had begun to break down. The claimants had made a formal complaint to the bank's Managing Director on 14 November 2012. The complaint was investigated and rejected in a letter dated 21 December 2012. On 14 June 2013, the claimants made a complaint to the Financial Ombudsman Service ("FOS"). That complaint was referred to adjudication on 28 June 2014 before an adjudicator who made a provisional assessment. He concluded that the bank had not given sufficient information to the claimants about the risks involved in taking 10-year fixed rate loans, in particular as to the potential magnitude of the break costs. He found that, if the claimants had been properly advised, they would probably have fixed the interest rate for no more than 2 years. The adjudicator recommended that Loans 5 and 6 should be reconstructed as variable rate borrowing after 2 years, but he was not persuaded that the claimants had suffered consequential losses by being unable to sell Linscombe Farm sooner. The claimants made further representations

and the adjudicator reconsidered. In his final adjudication, published on 14 August 2014, he ruled that the claimants would never have entered into any fix and recommended that the claimants' accounts should be reconstructed as if variable rate loans were taken at the outset instead of the 10 year fixed rate loans. Without prejudice discussions continued between the claimants and the bank into 2015. They failed to resolve the complaint on terms acceptable to the claimants and the claimants decided to pursue the present action.

55. Meanwhile, in December 2013 the claimants stopped paying interest on all their borrowing from the bank. The consequence was that when their overdraft facility expired on 31 March 2014, it was not renewed and a default rate of interest of 20.5% was applied to the debit balance from that date. The same default rate was applied to the debit balance on the claimants' current account when it went into the red because there was no agreed overdraft on that account.

56. The claimant's overall indebtedness began to rise. On 15 April 2015, the bank served a demand for repayment of all the outstanding borrowing, which at that point totalled £1,003,071.01. The total comprised sums of £14,262.61 overdrawn on the current account, £249,590.01 on the overdraft account (Loan 4), £261,432.82 under Loan 5 and £477,785.57 under Loan 6. This indebtedness forms the basis of the bank's counterclaim in the action.

What duty did the bank owe to the claimants?

57. The claimants' primary case is that they were persuaded to enter into the two fixes as a result of misrepresentations made by Mr Price and Mr Roylance. There is no dispute that the defendant owed the claimants a duty of the ***Hedley Byrne*** variety to take reasonable care not to misstate any facts on which the claimants could be expected to rely. So if it is found that some or all of the misrepresentations were made, and that the claimants relied on them in deciding to fix the rates, liability will follow. However, broader allegations of breach of duty are made in the particulars of claim. So it is necessary to consider whether the duty of care which the bank owed to the claimants went further than simply a duty not to misstate.

58. Fixed rate lending per se is not a regulated activity: thus the regulatory regime under the Financial Services and Markets Act 2000 (FSMA) 2000 does not apply as a matter of statute. Even if it did, it is doubtful that the claimants would qualify as private persons, because they were in business as a farming partnership. So they would not have a right of direct enforcement of the COBS Rules under section 138D of FSMA.

59. Nevertheless it is contended that the bank owed the claimants a common law duty of care which was co-terminous with COBS Rule 2.1.1R (to act fairly and professionally in accordance with the best interests of the claimants), COBS Rule 2.2.1R (to provide appropriate information to the claimants in a comprehensible form, including appropriate warnings of the risks), COBS Rule 4.2.1R (to communicate with the claimants in a way which was clear fair and not misleading), COBS Rule 9.2.1R (to take reasonable steps to ensure that any recommendation made to the claimants was suitable for them), and COBS Rule 14.3.2 (to explain the risks of the fixed rate loans being recommended in sufficient detail to allow the claimants to make an informed decision). It is further said that the bank was obliged to comply with The Principles of Business in the FSA Handbook, and in particular the Treating Customers Fairly Rules ("TCF Rules"), which cover much the same ground. Reliance is also placed on the fact that the bank subscribed to the Business Banking Code ("BBC"). This was advertised in the bank's literature and in the letters which it sent to the claimants confirming the two fixes.

60. The BBC, as its accompanying Guidance makes clear, is "… a voluntary code which sets standards of good banking practice for banks to follow when they are dealing with business customers in the United Kingdom". It does not have contractual force between banker and customer: it simply provides a benchmark as to how banks should behave. The edition of the BBC in force when the claimants fixed their rates was the revision of 1 March 2008. It contained, in Section 2, a "Fairness commitment" in the following terms:

> "We promise we will treat you fairly and reasonably when providing you with products and services covered in this Code. We will keep this promise by meeting all of the key commitments shown below.
> …
> - We will make sure that our advertising and promotional literature is clear and not misleading and that you are given clear information about our products and services.
> - We will give you clear information about accounts and services, how they work, their terms and conditions and the interest rates which may apply."

61. The Guidance explained that this promise included:

- Giving the customer information about them in plain English;
- Explaining their financial implications
- Helping customer choose the one(s) that meets their needs

62. The Guidance went on to say, in respect of Section 2, that:

> "The information given to customers must be clear and transparent. This commitment applies whether the information is given in writing, on screen, orally etc. Information must be sufficiently clear and easily comprehensible so that customers can make an informed choice about products.
> Subscribers are required to provide assistance to customers but not specific advice. … Customers should be given a balanced view of products so that they have an accurate understanding of the financial implications. This is especially important for long-term financial commitments (for example, the costs of withdrawing early from a fixed-term loan … where this is allowed). …"

63. The experts called by the parties to give evidence of banking practice, Patrick Tomlinson for the claimants and David Griffiths for the defendant, were in agreement that the defendant should have followed the BBC. Mr Price accepted that he was probably given the BBC and the Guidance to read and that he was encouraged by the bank to observe it. Mr Griffiths also accepted that the TCF Rules applied to the defendant. It is against that background that the question arises whether the defendant owed the claimants a greater duty of care than a ***Hedley Byrne*** duty, and, if it did, how far that duty went.

64. Recent cases on the sale of financial products by banks and lending institutions have drawn a clear distinction between the duty owed when advice is given about whether to purchase a product and the duty owed when all that is

provided is information about a product. The dividing line between information and advice is a matter of objective assessment. It lies in the element of recommendation. In *__Rubenstein v HSBC Bank plc__* [2011] EWHC 2304 (QB) [2011] 2 CLC 459, this Court held (at para. 81) that:

> "The key to the giving of advice is that the information is either accompanied by a comment or value judgment on the relevance of that information to the client's investment decision or is itself the product of a process of selection involving a value judgment so that the information will tend to influence the decision of the recipient …"

There was no challenge on appeal to the finding that advice had been given.

65. The chapter of the FCA's Perimeter Guidance Manual dealing with financial promotion puts it this way:

> "8.28.1G In the FCA's view, advice requires an element of opinion on the part of the adviser. In effect, it is a recommendation as to a course of action. Information, on the other hand, involves a statement of fact or figures.
>
> 8.28.2G In general terms, simply giving information without making any comment or value judgement on its relevance to decisions which an investor may make is not advice.
>
> 8.28.3G Information may often involve:
>
> …
>
> (3) an explanation of the terms and conditions of an investment; or
>
> (4) a comparison of the benefits and risks of one investment as compared to another; or
>
> (5) league tables showing the performance of investments of a particular kind against set published criteria; …
>
> 8.28.4G In the FCA's opinion, however, such information may take on the nature of advice if the circumstances in which it is provided give it the force of a recommendation. For example … (3) a person may provide information on a selected, rather than a balanced, basis which would tend to influence the decision of the recipient."

66. It has been held that, where a bank or financial adviser gives advice about a product in circumstances where it may be concluded that it or he assumed responsibility to the customer for that advice, there is a duty to ensure that the advice is full and accurate. Full advice is advice that covers the available options and the pros

and cons of any product or products being recommended and enables the customer to make an informed decision. A judgment frequently cited in this context is that of Mance J in *Bankers' Trust International v PT Dharmala Sakti Sejahtera* [1996] CLC 518 where he said (at 533-534):

> "In short, a bank negotiating and contracting with another party owes in the first instance no duty to explain the nature or effect of the proposed arrangement to that other party. However, if the bank does give an explanation or tender advice, then it owes a duty to give that explanation or tender that advice fully, accurately and properly. How far that duty goes must once again depend on the precise nature of the circumstances and of the explanation or advice which is tendered."

67. Where the bank or financial adviser is subject to a regulatory regime, the advisory duty may go further and require compliance with the provisions of that regime which govern the transaction in question (see Tomlinson LJ in *Green & Rowley v Royal Bank of Scotland* [2013] EWCA Civ 1197, [2014] 1 Bus LR 168 at para. 18 and the cases there referred to).

68. I am satisfied, however, that the relationship in the present case was not an advisory one and that no advice was in fact given. The experts agree that the bank was under no obligation to give advice. Mr Price said that giving advice to the claimants as to what they should do was beyond his remit. There is disagreement as to whether what he is alleged to have said amounted to advice. It is not suggested that Mr Price gave the claimants the idea of fixing the rates. Mr Thomas admits that he was the first to think of it and that he had done some internet research about fixed rates before first raising the matter with Mr Price. The only communication from the bank which is pleaded as advice is Mr Price's email of 17 June 2008. I do not regard Mr Price's remark "*looks sensible but it is your decision*" as the giving of advice. It was a comment which emphasised that the decision was one for the claimants and not one which the bank was recommending. Moreover it was a comment after the event. The email was sent 7 days after instructions for the second fix had been given and did not, as Mr Thomas admitted, influence the decision to fix on the first occasion or the second. It had no causative effect save that, if Mr Price had expressed the opposite opinion in his email, the claimants might have sought to back track and reverse their instructions. But, by the time Mrs Thomas read and replied to Mr Price's email after

business hours on 17 June, it was too late to undo either transaction. It was far too late to undo the first fix. It was also too late to get out of the second fix. The trade had already been done before Mr Price even sent his email. There was no evidence that it could have been cancelled the next day without incurring a redemption penalty.

69. The claimants do plead (in para. 28.15 of the particulars of claim) that the bank was in breach of duty in failing to correct the advice that Mr Price had given on 17 June before the disparity between the fixed rate and the swap ask rate became so great that the break cost was too expensive for the claimants to afford. I reject this argument because I do not consider that what was said by Mr Price amounted to advice. Whether advice, information or comment, I also do not accept that the bank came under a duty to monitor the swap asks rate after 17 June 2008 and warn the claimants when the break cost looked like exceeding the figure of £10,000 to £20,000 which the claimants say they were prepared if necessary to pay.

70. The only other statement which Mr Price is alleged to have made which could arguably qualify as advice is the statement that the claimants might as well fix the rate for 10 years rather than for 2 or 5 because the 10 year rate was lower. Assuming this was said (my findings on that issue are in the next section of the judgment), it was not in my view enough to amount to a recommendation that the claimants should fix for the longer period. It was merely pointing out the rate advantage in doing so.

71. It was held by Judge Waksman QC in ***Green & Rowley*** [2012] EWHC 3661 (QB) [2013] AER (D) 36 that when a bank gives information about a product and does not advise or recommend it, the only duty of care owed is a ***Hedley Byrne*** duty. He said (para. 82 of the judgment):

> "The duty to take care not to mis-state is much narrower than the advisory duty where one would expect that relevant professional standards would form part of the assessment as to whether it has been broken. In particular, as to [COB] Rule 2.1.3, insofar as it refers to a duty not to mislead, this is present in the common-law duty in any event but the duties to take reasonable steps to communicate clearly or fairly are or may be wider and concern matters other than the accuracy of what is said. To the extent that lack of clarity or unfairness in the statement rendered it a half-truth in the sense referred to above, it will be actionable in any event. The *Hedley Byrne* duty does not include any duty to give information unless without it the statement is

> misleading. Equally the duty under [COB] Rule 5.4.3 [of COB] to take reasonable steps to ensure that the counterparty to a transaction understands the nature of its risks is well outside any notion of a duty not to misstate. Accordingly I reject the suggestion that either of these COB rules are encompassed within the *Hedley Byrne* duty …"

72. That analysis was expressly approved by Tomlinson LJ at para. 17 of his leading judgment in the Court of Appeal. He rejected the argument of counsel for the customer-appellants that, where a bank undertakes a regulated activity in circumstances where failure to comply with the statutorily imposed regulation is likely to damage the customer and rob him of his informed choice, a duty of care at common law arises which is co-extensive with the obligations imposed by the regulatory regime. He concluded (at para. 30) by rejecting "… the suggestion that the bank here owed to [the claimants] a common law duty of care which involved taking reasonable care to ensure that they understood the nature of the risks involved in entering into the swap transaction".

73. HH Judge Moulder adopted a similar approach in ***Thornbridge Ltd v Barclays Bank*** [2015] EWHC 3430 (QB). She held (at paras. 118-131) that, in the absence of an advisory relationship, a bank selling a swap transaction owes no higher duty to the customer than a *Hedley Byrne* duty to take reasonable steps not to mislead. Thus a positive duty to explain or to provide information would exist only in the context of an advisory relationship or if silence would render inaccurate or unreasonable information already given. As she put it (para. 128): "… in the absence of an advisory relationship, a salesman has no obligation to explain fully the products which it is trying to sell". On the facts found in *Thornbridge*, there was no breach of the *Hedley Byrne* duty (see paras. 142-202).

74. *Crestsign Ltd v National Westminster Bank* [2014] EWHC 3043 (Ch), [2015] 2 AER (Comm) 133 was decided after the judgment of the Court of Appeal in *Green and Rowley* but before the judgment in *Thornbridge* by Timothy Kerr QC (now Kerr J) sitting as a Deputy Judge of the Chancery Division. It was another alleged mis-sale of a swap. In *Crestsign* it was argued: (1) that the bank gave advice and made recommendations and in doing so owed a common law duty to use reasonable skill and care to ensure that the advice/recommendations were suitable, and (2) that in

providing information the bank owed a common law duty to take reasonable care that the information was "both accurate and fit for the purpose for which it was provided, namely to enable [Crestsign] to make a decision on an informed basis". The Deputy Judge found (at paras. 84-134) that advice was given and the recommendations were not suitable but that there was no liability because of a contractual estoppel arising out of a disclaimer in the bank's terms and conditions which stipulated that the relationship was non-advisory. As to the duty which the bank owed when giving information about the swap, the Deputy Judge accepted (paras. 135-153) that the bank's representative owed a duty (which Crestsign's counsel described as a "mezzanine duty") to explain fully and accurately the nature and effect of the products in respect of which he chose to volunteer an explanation. However the Deputy Judge held (para. 154) that the duty did not extend "as far as a "duty to educate" in the sense of giving a comprehensive "tutorial" and satisfying himself that [Crestsign's representative] understood every aspect of each product, including a detailed account of the risks associated with each". The Deputy Judge regarded that as straying into the territory of advice-giving.

75. The Deputy Judge took, as the juridical basis for this intermediate duty (less onerous than the duty in an advisory relationship but more onerous than a <u>*Hedley Byrne*</u> duty not to misstate), the passage I have already quoted from the judgment of Mance J in the <u>*Bankers' Trust*</u> case where he said (my underlining):

> "In short, a bank negotiating and contracting with another party owes in the first instance no duty to explain the nature or effect of the proposed arrangement to that other party. However, <u>if the bank does give an explanation</u> or tender advice, <u>then it owes a duty to give that explanation</u> or tender that advice <u>fully, accurately and properly</u>. How far that duty goes must once again depend on the precise nature of the circumstances and of the explanation or advice which is tendered."

76. It was urged on Judge Moulder in <u>*Thornbridge*</u> that the bank in that case had owed a similar intermediate duty: but she disagreed (paras. 118-131). In her view, Mance J's reference to the need for any explanation to be full and accurate was obiter and was not an endorsement of any intermediate duty. She concluded (at para. 128): "… it seems to me that the dictum of Mance J relied on by the Deputy Judge is not as extensive as it might appear taken in isolation. Each case must depend on its facts but

to the extent that the Deputy Judge was making a point of more general application, it seems to me that the Deputy Judge would in effect have elevated the duty of a salesman to that of an adviser". Asplin J endorsed that view in _*Property Alliance Group Limited v The Royal Bank of Scotland*_ [2016] EWHC 3342 (Ch) at para.196 but accepted that a duty wider than the duty not to misstate could arise on particular facts albeit that it would be a duty "falling on the advisory spectrum". Thus it seems to me that there is a difference of view among judges at first instance as to whether, in the light of the decision of the Court of Appeal in _*Green & Rowley*_, there is any and if so what scope for imposing on a bank which provides information about a financial product but does not give advice or recommend it, a duty which is more extensive than a _*Hedley Byrne*_ duty.

77. I agree with Judge Moulder (see paras. 129 to 130 of her judgment in _*Thornbridge*_) that what Tomlinson LJ says in paragraph 17 of his judgment in _*Green & Rowley*_ is that a _*Hedley Byrne*_ duty does not extend beyond a duty to take reasonable steps not to mislead. I do not think that his judgment precludes the imposition at common law of an intermediate duty of care outside the context of an advisory relationship. Mr Kerr QC was right to point out (para. 147 of his judgment) that it was not argued in _*Green & Rowley*_ that a common law duty of care in relation to the provision of information could arise independently of, and irrespective of, a relevant regulatory regime. The Court of Appeal was focussing on a different question, namely, whether the common law duty of care owed by a bank to private persons to whom statutory duties were also owed under the FSMA regulatory regime was co-extensive with those statutory duties. Mr Green and Mr Rowley had to run that argument because their rights to enforce the statutory duties under section 150 (now section 138D) of FSMA were conceded to be time-barred.

78. The existence of a duty of care, and the level of that duty, will depend on the particular facts and whether, as a matter of policy, it is thought appropriate to impose such a duty in the circumstances. There are policy arguments for and against the imposition of an intermediate duty in a case where a bank or equivalent financial institution provides information to a customer about a product it sells and has not issued a disclaimer. The arguments in favour in the present case are that: (1) it is reasonable for a customer dealing with a bank which is subject to the TCF Rules and

which has also advertised that it is a subscriber to the BBC to expect that the bank will adhere to those principles in its dealings with him; (2) it is not onerous to impose on a bank a legal duty of care that is commensurate with the principles enshrined in the TCF Rules and the BBC when it dealings are already governed by those principles; and (3) the fact that the precise limits of the duty may vary from case to case should be no bar to imposing it because a degree of uncertainty as to the extent of the duty is a feature of the duty owed in advisory relationships as well (as the dictum of Mance J in the ***Bankers' Trust*** case recognises). Arguments against are: (1) that on the present state of the authorities (saving ***Crestsign***) there is a clear distinction between the duty that is owed in an advisory relationship and the ***Hedley Byrne*** duty which is owed when only information is provided: that distinction risks being blurred if the Courts hold that an intermediate duty applies in some information cases; and (2) that if the common law was to imply an intermediate duty co-extensive with the COB/COBS Rules applying in non-advised transactions, on a bank dealing with a customer who was not a private person, it would circumvent the statutory distinction between those who can enforce the regulatory regime as a statutory duty under section 138D of FSMA and those who cannot.

79. The Deputy Judge's conclusion in ***Crestsign*** was that the intermediate duty which he had held to exist had not in fact been breached. So it was Crestsign and not the bank who launched an appeal. The appeal was compromised before it was heard. But there was no cross-appeal by the bank against the Deputy Judge's finding that there was an intermediate duty which applied to information about the product which the bank wished to sell to Crestsign. In fact Sir Colin Rimer gave Crestsign permission to appeal against the Deputy Judge's conclusion that the duty did not extend to providing an explanation of other different types of hedging products, which the bank could have provided (see [2015] EWCA Civ 986). I respectfully agree with the way in which the Deputy Judge's approached the question of the intermediate duty. His perspective was not constrained by the argument advanced in ***Green and Rowley*** that the common law duty of care should mirror the statutory duty under FSMA. Crestsign was not a private person, so no statutory duty was owed Crestsign. Nor did he start by assuming that the limit of the common law duty on a bank providing information to a customer was the duty not to misstate. His finding, on the

facts of the *Crestsign* case, that an intermediate duty of care was owed to Crestsign is not inconsistent with the reasoning in *Green & Rowley*.

80. An argument not addressed in *Green & Rowley* (or in relation to the intermediate duty found in *Crestsign*) is whether a duty any higher than a *Hedley Byrne* duty would satisfy the assumption of responsibility test. The assumption of responsibility test must be met even in a case where advice is given (see Hamblen J in *Standard Chartered Bank v Ceylon Petroleum Corporation* [2011] EWHC 1785 (Comm) at para. 508 and *Crestsign* at para. 110). Where a bank is subject to a regulatory regime by law rather than by agreement, it could be argued that the case for inferring that the bank has assumed responsibility to the customer for compliance with the regime is less strong because the bank has had no option but to comply with the regime: compliance is compulsory. It makes no difference to this argument whether compliance can be enforced as a statutory duty under section 138D of FSMA or not. But where a bank has voluntarily undertaken to adhere to certain principles, the position in my view is different. The Court should be more ready to infer that the bank has assumed responsibility to the customer for adhering to those principles, where there are no relevant disclaimers, "basis" clauses or contractual exclusions to contradict that inference.

81. The significant feature of the present case is that the bank had advertised to the claimants that it subscribed to the BBC. The Fairness Commitment in the BBC included a promise, directed to the customer, that if the bank was asked about a product, it would give the customer a balanced view of the product in plain English, with an explanation of its financial implications. There were no disclaimers, "basis" clauses or exclusions in the terms and conditions which applied between the claimants and the bank which would lead to the conclusion that the bank was not willing to assume responsibility for honouring that promise. In the circumstances, I find that, when the claimants inquired about fixing the rate on Loan 1 and Loan 3, the bank owed them more than a duty not to mislead or misstate. The duty of care which the bank owed was to explain the financial implications of fixing the rate. It was a duty owed only in response to the claimants' inquiries because that is what the bank had signed up to in the BBC. It was not a duty to volunteer information if not asked. Like the Deputy Judge in *Crestsign*, I do not think that a comprehensive tutorial was

required. What was required was an explanation in plain English of what fixing the rate entailed and the consequences. Essential components of the explanation were: (1) that the rate could be fixed for a period (whether in months or years, and whether any minimum or maximum length of time), (2) where the available fixed rates could be found (e.g. on the internet), (3) what those rates represented (the forward cost of money), (4) the effective rate that would be payable (i.e. the current swap ask rate for the period of the fix plus the bank's margin, if any) and (5) the financial consequences of terminating the fixed rate before the end of the period. As to this last point, the bank was obliged, in my opinion, to provide an accurate description of how clauses 2.10 and 2.11 would operate in the event of an early repayment. A worked example was not necessary, but the ingredients of the calculation under each clause should have been made clear in terms which gave a balanced picture and brought home to the claimants that even if the fixing rate was lower for a longer period ahead, the longer the period left to run if there was early repayment, the higher the redemption penalty would be if there was a difference in rates which meant that a redemption penalty was chargeable. For shorthand I will refer to this duty in the remainder of this judgment as "the information duty". It was a duty which obliged the bank to do no more than follow the best practice set out in the BBC.

Did the bank act in breach of that duty?

82. The nub of the claimants' case in misrepresentation is that Mr Price told Mr Thomas: (1) that if the claimants decided to switch to a fixed rate they might as well fix for 10 years than 2 or 5 years because the 10 year interest rate was lower; (2) that if the rates were fixed there would be "*no charges*" if the loans were later switched back to a variable rate, although a further facility fee might be payable; (3) that whilst a fee would be payable under clause 2.11 if capital was repaid early, the words "*based on the Present Value*" in clause 2.11 meant that the fee would only be a proportion of the difference between the fixed rate and whatever fixed rate might apply at the time of the repayment; and (4) that the redemption charge under clause 2.11 would not be more than £10,000 to £20,000 at most if all the fixed rate borrowing was repaid early, and was likely to be much less. The pleaded case is that all of these misrepresentations were made in the telephone conversation on 28 May 2008. But the

claimants' case at the trial was that the second of them (no charges when switching back to a variable rate) was made in the telephone conversation on 5 June.

83. The claimants also blame Mr Roylance for not having corrected or contradicted (and therefore by implication for having confirmed) the £10,000 to £20,000 figure as being the likely range of the redemption charge, when those figures were allegedly put to him by Mrs Thomas in the telephone conversation on 17 June 2008.

84. It is further alleged that Mr Price misrepresented the position in his email of 17 June 2008 ("*looks sensible but it is your decision*"). For the reasons I have already given, I do not accept that this was the giving of advice. It was not a misrepresentation of fact either. It was an expression of opinion. Mr Price may have honestly believed it to be true but, objectively, it is hard to see how that view can be justified. Fixing for 10 years made no sense in the context of the claimants plan to move their business wholly to Bidwell Barton and to sell Linscombe Farm as soon as possible. However, the timing of the email meant that it did not influence the decision to fix.

85. Mr Price went on in the email of 17 June to say that the claimants would have to pay "*an early repayment fee on the fixed element*". Mr Price should have said "*an early redemption charge*", but he was otherwise quite right. His use of the wrong terminology was, however, confusing. So was Mr Roylance's reference to the early payment fee in his email of 11 March 2009. Neither caused the claimants to fix the rates: but they are relied on as illustrations of a broader complaint which is that the bank was in breach of its information duty because the explanations which it gave in response to the claimants' inquiries about fixing the rates and how the redemption penalty would work, were not only confusing but incomplete. It is also alleged that the bank ought to have provided a calculation of the redemption penalty much sooner than it did.

86. Before considering whether the decision to fix was caused by misrepresentation or breach of the information duty, I make a few preliminary observations.

87. The first is that it is important to keep in mind the distinction between "an error that was so blatant as to amount to negligence and an exercise of judgment which, though in the event it turned out to have been mistaken, was not outside the range of possible courses of action that in the circumstances reasonably competent members of the profession might have chosen to take" (see Lord Diplock in *Saif Ali v Sydney Mitchell & Co.* [1980] AC 198 at 221A).

88. Lord Diplock's formulation employs the yardstick of the *Bolam* test (see *Bolam v Friern Barnet Hospital Management Committee* [1957] 1 WLR 582 where McNair J directed the jury in a medical negligence case to consider whether the defendants, in acting in the way they did, were acting in accordance with a practice of competent respected professional opinion" that is to say "in accordance with a practice accepted as proper by a responsible body of men skilled in that particular art". The *Bolam* test has been applied as the appropriate yardstick in cases of advice given by solicitors (see e.g. *Matrix Securities v Theodore Goddard (a firm)* [1998] PNLR 290 and *Barker v Baxendale Walker Solicitors* [2016] EWHC 664 (Ch)). Recently it has been held by the Supreme Court not to be the right test to use where the duty in question is one of explaining risks to a patient. In *Montgomery v Lanarkshire Health Board* [2015] AC 1430 (at para. 82) the duty was described as being: "to take reasonable care to ensure that the patient is aware of any material risks involved in any recommended treatment, and of any reasonable alternative or variant treatments". The test of materiality in this context was held to be "whether, in the circumstances of the particular case, a reasonable person in the patient's position would be likely to attach significance to the risk, or the doctor is or should be aware that the particular patient would be likely to attach significance to it".

89. Kerr J (as he now is) had regard to the test of materiality or, as he described it, "*the Montgomery formulation*" in *O'Hare v Coutts & Co.* [2016] EWHC 2224 (QB) at paras. 199-214. That was an advisory case in which the banker/customer relationship was governed by the COBS rules. He found the materiality test helpful in circumstances where the expert evidence tended to indicate; "*that there is little consensus in the financial services industry about how the treatment of risk appetite should be managed by an adviser*" (see para. 206) and therefore the *Bolam* test did not assist. The present case is different from the *O'Hare* case in two respects. First it is

not an advisory one. The duty on the bank was to respond to the claimants' inquiries by providing a clear explanation of the financial implications of fixing the rate and how clause 2.11 worked. Second, and fortunately, there is a measure of agreement between the two banking experts, Mr Tomlinson and Mr Griffiths. They agree that if the customer was to ask questions in relation to the calculation of any redemption charge or early repayment fee then the relationship manager would be expected to explain the principles and variable factors behind the calculation of such fee or charge. They agree that the Relationship Manager should look to the Loans Administrator for more answers to more specific questions if he is in doubt. They agree that the BBC provides the guidance as to the content of the information. Here it seems to me that the phrase: "a balanced view of products so that they have an accurate understanding of the financial implications" is key. However, in case of doubt as to how far a bank should go in providing information in response to questions from the customer about a product in a non-advised transaction, I would resort to the test of materiality in the ***Montgomery*** case. The question to be asked is: would a reasonable person, in the position of the customer, be likely to attach significance to that piece of information?"

90. Mr Tomlinson, whose experience as a Relationship Manager in the agricultural sector of banking was greater than that of Mr Griffiths, was of the view that the bank should be proactive and volunteer the information because it could not be assumed that the customer would know the right question to ask. Mr Griffiths did not accept that proposition. I do not need to decide it in the present case because the claimants asked for the information. The information duty I have accepted in this case is a responsive one, not a proactive one.

91. My second preliminary observation is that the misrepresentation case rests largely on what is alleged to have been said by the bank's personnel in telephone conversations. The critical conversations are those between Mr Thomas and Mr Price on 28 May 2008 and 5 June 2008 and between Mrs Thomas and Mr Roylance on 17 June 2008. It is salutary to bear in mind what Leggatt J recently had to say about the reliability of the recollection of witnesses of what was said in conversations (see *Gestmin SGPS S.A. v Credit Suisse (UK) Ltd* [2013] EWHC 3560 (Comm) at paras. 15-22). His view was that "… the best approach for a judge to adopt in the trial of a

commercial case is, in my view, to place little if any reliance at all on witnesses' recollection of what was said … and to base factual findings on inferences drawn from the documentary evidence and known probable facts". It is not altogether easy to adopt that approach in this case because the bank kept no log or notes of its conversations with the claimants. The contemporaneous written record from the bank's side consists of the emails and periodical Credit Reports written by Mr Price when he was the claimants' Relationship Manager. These Reports were based on his understanding of information he had gleaned from the claimants at meetings with them. They contain a narrative history of the claimants' business, their future plans, present borrowing and future borrowing requirements. They do not address the decision to fix the rates. Moreover, when updating the narrative in later Reports, Mr Price did not always delete earlier history which was no longer relevant because it had been overtaken by subsequent events. The result is that the Credit Reports need to be read with some care, because they were not always a wholly accurate reflection of the claimants' current thinking. On the claimants' side it has to be said that none of the misrepresentations now alleged, in particular that they were given to understand that any redemption penalty would not be more than £10,000 to £20,000, is referred to in any of their emails or letters to the bank before the formal complaint was written in November 2012. The manuscript note which the claimants made sometime after the phone call on 5 June 2008 is therefore an important document.

92. Against this background it is inevitable that I will have to place some weight on the oral evidence. This leads me to say something, briefly, about the fact witnesses. Mr and Mrs Thomas are both industrious and immensely hard working individuals who are dedicated, in the best sense of that word, to the business of organic farming. They deserve admiration for what they have achieved at Linscombe Farm and Bidwell Barton. I am in no doubt that both were trying to be as honest as they could in giving their recollection at the trial of events of more than 8 years ago but I take into account that there will have been a tendency for their memory to have polarised over time and in the preparation of this case. I also have in mind that a very great deal hangs on the outcome of this case for the claimants. The stress caused Mrs Thomas to become emotional at several points during her cross-examination. I do not, however, think that this was a factor which distorted or coloured the evidence which she or her husband gave. Mrs Thomas was an entirely straightforward witness. Mr Thomas was inclined

to be more careful in his answers and to answer at greater length but I do not find that his evidence was less reliable on that account. Mrs Thomas kept the books of the business and produced the cashflow spreadsheets. These displayed a good deal of financial sophistication. But I am satisfied that Mrs Thomas had no grasp of the implications of fixed rate borrowing beyond the fact that the rate was fixed for the chosen period unless the capital was repaid early. Mr Thomas' understanding was a little greater only because he had done some internet research about fixed rates before raising the question of fixing with Mr Price. He had gathered from that research that there was usually a redemption charge or penalty for early repayment of a fixed rate loan, but the examples he had seen on the internet led him to believe that the charge was a fixed percentage of the amount being repaid which was calculable up front. This is indeed how some high street lenders levy a redemption charge: but it is far from being the general practice. Both Mr and Mrs Thomas wanted to understand how clause 2.11 of the bank's terms and conditions worked. Their level of sophistication was such that I have no difficulty accepting that, if they were not given a clear explanation, they would be likely to misunderstand.

93. Mr Price, Mr Roylance and Mr Crichton gave evidence for the bank. Their integrity is not in question. There is one significant difference between Mrs Thomas and Mr Roylance about the telephone conversation on 17 June and some differences of recollection between the claimants and Mr Crichton about events after May 2009 which are of less importance. It is not suggested that Mr Roylance and Mr Crichton were being anything other than genuine in giving their version of events. The same is true of Mr Price, who was, or ought to have been, the bank's essential witness. It was not difficult to form a good opinion of him. He was patently honest. He had never before suffered a complaint about his conduct in a long career in banking. He developed a warm relationship with the claimants and their family and stuck his neck out on their behalf when he wrote his Reports to the Credit Committee. The claimants later included in their complaint to the bank that they could not afford the borrowing for which he secured approval. This part of the complaint has a hollow ring. It is true that by May 2008 the claimants' level of borrowing was not affordable even at the bank's variable rate: but they were not misled into it. The claimants could do (and did do) the calculations for themselves. There is no valid criticism to be made of Mr Price or of the bank for the fact that the claimants were able to borrow as much as they did.

It is simply a relevant part of the background to fixing of the rates and the claimants' desire to know the potential break costs. Mr Price must have been an engaging character to have as Relationship Manager (he once described one of his Credit Reports, urging the bank's support for the claimants, as "*funky and tight*"). But the man in the witness box was not the man who the claimants knew as their Relationship Manager. Mr Price is now retired and is suffering from significant memory loss which is physical in cause and most certainly not a case of diplomatic amnesia. When he came to give oral evidence, it was soon apparent that he could remember nothing of the critical conversations or of the sequence of events between May 2008 and May 2009. Even the contemporaneous documents did not jog his memory.

94. A suggested litmus test of the credibility of Mr Price was whether he knew about Mr Thomas' viral hepatitis. Mr Price denied in his witness statement ever being aware that Mr Thomas had undergone chemotherapy. In cross-examination he said that he could not recall either of the two occasions on which the claimants say that the illness was discussed. According to the claimants the first of those was when Mr Price phoned Mr Thomas in February or early March 2007. Mr Thomas says that he remembers the call because he took it on his mobile standing in a supermarket car park while the children were sitting in the car. He says that he told Mr Price about the diagnosis and gave him enough detail to convey how potentially serious it was. According to Mr Thomas, Mr Price's response was that he should "keep it under his hat" because news of the illness might prompt the bank's Credit Committee to call in the loans. Mrs Thomas then says that when Mr Price came to the farm for a meeting on 3 September 2008, he remarked to her that Mr Thomas did not look well to which she responded by saying: "*You do know Phil's been ill?*" to which IP replied "*Yes*". Mr Price had no recollection of either of these encounters.

95. The overwhelming probability is that Mr Price did know about the illness and has just forgotten about it. Given his serious memory problem, I do not find this surprising. Mr Price did not, for example, remember that Mrs Thomas was heavily pregnant when the decisions were made to fix the rates: the claimants' son, Sam, was born in July 2008. It is probable that he knew for two reasons. The first is that the claimants were quite open about it. They told their accountants, Robinson Stopford, and discussed it with Mr David Robinson at a meeting on 12 May 2008, which was

still some 4 months before Mr Thomas started treatment. It might be said that telling their accountants was very different from telling their bank. But I do not think that the claimants had the guile to realise that they might be better advised to keep it quiet from their bank in case it decided that the illness adversely affected their credit risk. In any case Mr Price was keen to stress in cross-examination that no responsible bank would use the illness of one of its customers as a pretext for calling in loans. The second reason is that 12 months of chemotherapy was bound to have taken its toll on Mr Thomas. It is quite possible that Mr Price did not know that Mr Thomas was having chemotherapy. But when he saw him on 3 September 2008 he cannot have failed to notice the change in his appearance. He looked haggard and pallid. Mrs Thomas' evidence that Mr Price remarked on that and that she told him that Mr Thomas had been ill is convincing.

96. The credibility aspect of what Mr Price knew of the illness has two facets. The first is that, if Mr Price did know about it and that it was serious, he should have informed his superiors at the bank and telling Mr Thomas to keep quiet about it was a breach of the duty he owed his employers. The second is that this is the real reason why Mr Price says that he can remember nothing about it. I acquit Mr Price of the second charge and find the first not proven. I am in no doubt that his evidence about Mr Thomas' illness was not a case of diplomatic amnesia. He genuinely does not recall what he knew. Whether he should have told the Credit Committee if he did know, all depends on how much he knew of the diagnosis and prognosis. Mr Thomas said he gave him details: but since he was able to delay treatment for nearly 9 months it may not have seemed to Mr Price to be all that grave in February 2007. At any rate I can see that it might have been sensible advice and perfectly proper for him to have told Mr Thomas at that early stage not to go advertising his morbidity. There is no evidence as to whether Mr Price asked for updates on Mr Thomas' progress through treatment or whether he was given any. In summary, I do not find that what Mr Price knew about Mr Thomas' illness should cause me to doubt his veracity or regard him as a selectively truthful witness. I can place only limited weight on Mr Price's evidence because, in truth, he simply does not remember.

97. The third preliminary observation is that any assessment of the evidence of what was said in the critical conversations must be made against the background in

which those conversations took place. Context is almost always of considerable importance. One must not examine evidence of conversations given in the cold analytical atmosphere of a trial, without having regard to the situation in which the parties found themselves when those conversations occurred. I have already mentioned some of this context, namely, that Mr Thomas had been diagnosed with a potentially life-threatening illness, that Mrs Thomas was expecting another child in a couple of months, that the claimants' borrowing was already at unaffordable levels and that they were facing a huge task in transferring the business from Linscombe Farm to Bidwell Barton. Three other matters are part of the relevant background.

98. The first is what the claimants planned to do about Linscombe Farm at the time they were deciding to fix the rates. They had received an offer of £520,000 for the whole of the remaining land and buildings at Linscombe Farm from a neighbour, Chris Lee, in April 2008. He was prepared, as a term of the sale, to allow the claimants to continue to use the land at Linscombe until they had harvested the crop for 2008 which they had already planted. It is the claimants' case that, right up to the time they decided to fix the rates on Loans 1 and 3, their plan was to accept Mr Lee's offer and proceed with the sale and use it to pay off Loan 3 and possibly some of the borrowing on Loan 1, and that the conclusion of the fixes frustrated this strategy. What the claimants would have done, if the bank had not misled them or breached its information duty as alleged, is the counterfactual about which I shall express my conclusion in the Quantum section of this judgment. However I do not accept that when they fixed the rates in Loans 5 and 6 the claimants were planning to dispose of the remainder of Linscombe before the 2009 season. There is some doubt as to whether Mr Lee could afford to proceed with the purchase. Giving the claimants the benefit of that doubt and assuming that he could, it is plain to me that the terms of his offer did not guarantee the claimants the use of the land at Linscombe for as long as they wanted. They could harvest the summer/autumn crop in 2008: but they needed the polytunnels at Linscombe for growing produce over the winter because not all the land at Bidwell Barton was ready even if the polytunnels were moved. In their letter of complaint to the bank in November 2012 the claimants said this about Mr Lee's offer:

> *"... this offer was dependant on early and complete vacation of Linscombe Farm by the Thomases: due to the inadequate facilities at their new farm, the*

Thomases were unable to meet the purchaser's requirements. They would need to create suitable facilities at the new farm before they could sell Linscombe Farm."

99. That was the reality. By the time they came to fix the rates, the claimants had come to realise that the sale of the land and buildings at Linscombe would have to be postponed until at least the end of the harvest in 2009. A combination of factors (the chemotherapy, the arrival of the new baby and the amount of work needed to be done to get Bidwell Barton ready) meant that they could not be confident of being able to complete the transfer of all operations to Bidwell Barton until mid- 2009. They wanted to retain the Linscombe land for at least another year when they fixed the rate.

100. The second part of the background is that, as I have already indicated, the bank had little or no experience of how to calculate a redemption penalty on early repayment of a fixed rate loan, and the wording of clause 2.11 was, at best, obscure as to how it should be done. In an internal email to Dr Watts in March 2010, Mr Crichton supported offering the claimants a discount on the redemption charge for a number of reasons, one of which was that in his view the penalties were "*not completely clear or transparent*". When he eventually gave the claimants an explanation in his email of 28 February 2011 of how the redemption charge was arrived at, he told them that:

"*... basically the settlement figure is calculated as the present net value of the difference between the existing cashflow and the cashflow using the settlement day cost of funds for the remaining term of the loan.*"

The guidance which Mr Senior sent to Mr Beazley in the internal email on 3 March 2009 put it more simply:

"*get swap ask rate for the remaining period from breakage date until the expiry date of the fixed period. If lower than the original rate the difference between this and the original rate is the rate cost. Multiply by amount being broken and time left to end of fixed period to give break cost.*"

101. Only the second of these explanations is in terms which an intelligent layperson might be expected to grasp without further clarification. Neither explanation was given to the claimants before they decided to fix the rates. Both are

incomplete because there is a discount to be applied for accelerated payment. Aside from the discount, neither explanation is one which can be extracted from the wording of clause 2.11 of the bank's terms and conditions.

102. The drafting of clause 2.11 was in my judgment seriously deficient. On this point I disagree profoundly with Mr Griffiths. In the text of the clause below I have inserted corrections in italics to more accurately reflect what it was intended to mean:

> "For loans with a fixed interest rate an extra repayment premium may apply if the Borrower wishes to repay all or part of the loan before the expiry of the Fixed Term. If the standard fixed rate, for the same term of years as the loan was higher at the time the loan was drawn down, than the standard fixed rate for a period equivalent to the unexpired term of the loan at the time the Borrower makes the ~~extra~~ *early* repayment, a redemption charge will be levied. This redemption charge will be *applied to the amount being repaid early and will be* calculated ~~based~~ on the Present Value of the difference between the two rates over the balance of the remaining *period of the* loan and *is payable in addition to* the Early Repayment Fee ("the redemption charge")."

103. Mr Roylance was right when he said in his email on 11 March 2009: "*we need a plain english revisit to the wording of our break costs clause!*" He understood better than anyone else within the bank's Loan Administration team the shortcomings of clause 2.11. He was a stickler for process. Shortly after joining the bank in November 2007 he had pointed out that there was no glossary of the terms with capital letters in the bank's standard terms and conditions, such as "Present Value". "Present Value" is intended to embrace the discount for accelerated payment of the difference between the two rates. If it had been defined in a glossary or Definitions Clause in the terms and conditions that would have become clear. Even Mr Roylance was slow to pick this up, since the discount was omitted from his initial break cost calculation of £96,205.47. As for Mr Price, it is quite plain from the evidence he gave and from his conduct at the time that he had no more than a very basic understanding of how clause 2.11 operated. He knew that a redemption charge would be payable if, at the point of early repayment, the current interest rate was lower than the fixed rate. He believed that the charge was to cover the cost to the bank of having fixed the funds - "the cost of money" as he put it. I am not at all sure that he knew exactly which rate would be used as the current interest rate, or where a customer could find it. I am quite sure that he did not know all the other ingredients of the calculation, in

particular the discount for accelerated payment. He could not have done the calculation himself, even by way of illustration.

104. This, therefore, is the background against which findings have to be made about what the claimants were and were not told about break costs. A factor which was not in play in May and June 2008 was the economic downturn and collapse of interest rates which followed the demise of Lehman Brothers in September of that year. The claimants say that they are not blaming the bank for not predicting that interest rates would fall as they did. They only blame the bank for misrepresenting, or, at the lowest, for not adequately explaining the financial consequences which would flow if they tried to get out of the fixed rate before the expiration of the 10 years. The truth, however, is that this action is unlikely to have been brought if interest rates had not fallen and then remained low as they have.

105. The telephone conversation between Mr Thomas and Mr Price on 28 May followed the exchange of emails between Mrs Thomas and Mr Price the previous day when she had asked for potential scenarios for fixing the rate for between 2 and 5 years by way of example and he had quoted back rates for 1, 2, 3, 4 and 5 years. He had said that a penalty would be payable for repayment of the fix before maturity. Strictly speaking that was wrong because the penalty would only be payable if the current rate was lower than the fixed rate and, even if that was not the case, there may have been circumstances where the penalty would be waived. Nothing turns on this, however. The claimants do not complain that they were misled into thinking that they would have to pay a penalty even if they used the sale proceeds from Linscombe Farm to repay the fix when the variable rate was higher, and even if they were, that scenario did not influence their decision making.

106. The forward rates quoted in Mr Price's email of 28 May were lower the longer the period. It would not have been surprising if Mr Thomas had asked Mr Price during the phone call for the 10 year rate in order to see if the descending rate trend continued. He does not say that he did, but his evidence, which I accept, is that he decided on a 10 year fix rather than a shorter period because the rate was lower. So he must have asked Mr Price what the 10 year rate was and although Mr Price says that it was his practice to get rates from Loans Administration, he must either have had the

10 year rate or have known that it was below the 5 year rate and said so. Saying that and no more was not a misrepresentation. It was the provision of information. However, Mr Thomas' evidence is that he told Mr Price that it seemed prudent to fix for 10 years and that in response Mr Price agreed. I have some sympathy for Mr Price in this situation because Mr Thomas was inviting endorsement of his view. Mr Price was adamant that it was not his function to give advice, and the evidence of the two experts, Mr Tomlinson and Mr Griffiths, agree with him on this. But unless he said something to the effect that the decision was for the claimants to make, he was running into dangerous territory. I have come to the conclusion that Mr Price probably did say something which conveyed to Mr Thomas that he was sensible to think of fixing for 10 years rather than 5 years or 2 because the 10 year rate was lower. I have already held (paragraph 70 above) that responding in that way did not cross the line between information on the one hand and an advice or recommendation on the other. But it would have been misleading and would have amounted to a misrepresentation because it only told half the story. The critical factors to balance against the rate advantage was that the longer the period of the fix, the greater was the likelihood of the claimants wanting to repay capital before maturity, and the longer the unexpired term at the point of repayment, the greater any redemption charge would be even if the current rate had only moved against the claimants to a modest extent. If I am wrong that Mr Price's response amounted to a misrepresentation, I am in no doubt that it amounted to a breach of the information duty which the bank owed to the claimants. Mr Price did not give the full picture by explaining the potential downside to fixing for a longer period. He did not explain the financial implications for redemption penalties of a longer term fix.

107. The 10 year period is the one incomprehensible feature of the two fixes. There is no good reason why the claimants would take on an interest rate burden slightly higher than their current variable rate for a 10 year term, when they could only afford to service the rate for a much shorter period and were likely to want to repay a good deal of the capital within at most 3 years. The only explanation is that they were attracted by the lower rate and did not appreciate the redemption charge implications because these were not explained to them. The attraction of the lower rate for the longer period was reinforced when Mr Roylance introduced Mrs Thomas to the FT website during the telephone call on 10 June 2008 and she could see the rates for

herself. There is no criticism of Mr Roylance for not having pointed out to her the implications of a longer fixed rate period on any redemption charge liability because she was not asking how clause 2.11 operated and redemption charges were not discussed.

108. The second alleged misrepresentation is that Mr Price said that if the interest rate was fixed, there would be "no charges" if the claimants later switched the borrowing back to a variable rate, although a further facility fee might be payable. Mr Thomas' evidence is that in the call on 28 May 2008 he asked Mr Price what the situation would be if the claimants wanted to switch some or all of the borrowing back to a variable interest rate whilst possibly repaying part. He replied (accurately) that it could be done, probably on payment of a further administration or arrangement fee. He said that he would check what other costs there might be and get back to Mr Thomas. Mr Price has no recollection of this part of the conversation on 28 May either but I accept the evidence of Mr Thomas that it occurred. I have no reason to think that he is mistaken in recollecting that he raised the topic of switching back on 28 May and that Mr Price replied along these lines.

109. Mr Thomas says that he raised the issue again in the conversation on 5 June, which is when he was told that there would be "no charges". Mr Price has no memory of a conversation with Mr Thomas on 5 June 2008, but I accept Mr Thomas' evidence that one took place. There is a log of the claimants' telephone calls which confirms it. I also accept that Mr Thomas raised again the question of charges for switching back to a variable rate: he wanted to know the answer. Mr Thomas says that his understanding by this stage was that if the interest rate was fixed, the redemption penalty provisions in clause 2.11 superseded the early repayment charge in clause 2.10. There is no evidence that he made this clear to Mr Price and Mr Thomas' understanding was wrong. Clause 2.10 continued to apply even in the case of a fixed interest rate. However, in the case of the claimants, the bank had waived the early repayment fee entirely under Loan 1, which became Loan 5, and had waived it in respect of any repayment of Loan 2, which became Loan 3 and then Loan 6, if the repayment was made from sale proceeds of Linscombe Farm. Potentially, therefore, an early repayment fee under clause 2.10 was payable if the claimants wanted simply to repay part of Loan 6 with money not derived from a sale of part of Linscombe

Farm, but this was not in contemplation by the claimants or Mr Price. A fee might also have been payable under clause 2.10 if Loan 6 was simply switched back to a variable rate without any of the capital being reduced. This was because the switch would notionally entail a repayment of the fixed rate borrowing and the issuing of a new facility under which the same sum was lent at a variable rate. It was a grey area and a legitimate question for Mr Thomas to ask, albeit that that was not what he was getting at because he thought that only clause 2.11 applied. Here, I think, lies the confusion.

110. Mr Price says that he always understood that if fixed rate borrowing was switched back to variable rate borrowing, a redemption cost would be incurred. Factually that is correct, and if he did have that understanding, it is hard to believe that he would ever have told Mr Thomas that there would be no charges for a switch. Assuming that Mr Thomas is right that Mr Price did say on 5 June that there would be no charges for a switch, I find that Mr Price could only have been talking about the early repayment fee under clause 2.10 rather than the penalty under clause 2.11. My reasons for this conclusion are twofold. The first is that, in his "*looks sensible*" email to Mrs Thomas on 17 June 2008 Mr Price included the following comment: "*as it is, you will have to pay an early payment fee on the fixed element. Assume you have considered this as I mentioned it to Phil*". This comment was referring to a penalty under clause 2.11 not a fee under clause 2.10. It referred back to Mr Price's email of 27 June which had warned about penalties for early repayment of fixed rate lending before the maturity date. It may also have referred back to the discussion of redemption penalties in the telephone call on 28 May. It is flatly inconsistent with Mr Price having said on 5 June that there would be no charges at all or no charges under clause 2.11. The second reason is that Mr Thomas gave evidence that he had forgotten about Mr Price's statement in the 5 June telephone conversation that there would be "no charges" until he received Mr Roylance's email of 11 March 2009 which said:
"*There is no early repayment fee applicable if the borrowing is being switched back to base rate, that would only apply if the loan was being repaid.*" That was a reference to the fee under clause 2.10 not the fee under clause 2.11. I agree that slipping this sentence into the middle of an email about the redemption penalty was apt to cause confusion between clause 2.10 and clause 2.11. But I find that Mr Thomas never truly believed that Mr Roylance meant to say that there would be no

redemption penalty on a switch back to variable rate. His inquiry based on Mr Roylance' email was at best wishful thinking, which is why I phrased the first sentence of paragraph 41 of this judgment in the way I did.

111. I reject the claim based on the alleged "no charges" misrepresentation in the telephone conversation on 5 June 2008. I accept that there was confusion between the fee under clause 2.10 and the penalty under clause 2.11 and that Mr Price and Mr Roylance contributed to this confusion (by, respectively, using the term "early payment fee" in the email of 17 June to refer to the clause 2.11 penalty, and by referring to the early repayment fee under clause 2.10 in the middle of the email of 11 March 2009 which otherwise dealt with the penalty). But Mr Thomas was also confused by his own assumption (not obviously attributable to anything Mr Price had said) that clause 2.11 superseded clause 2.10, once the interest rate had been fixed. I find that he did not make this misunderstanding clear to Mr Price or make clear that what he was talking about when he asked about charges for switching back to a variable rate was the penalty under clause 2.11.

112. Furthermore, if, as Mr Thomas says, he forgot about what Mr Price had said on 5 June until he was reminded of it by Mr Roylance's email of 11 March 2009, the alleged misrepresentation did not influence the decision to enter into the second fix.

113. I am in any case not persuaded that Mr Thomas was misled by anything said on 5 June about there being "no charges". It is to be noted that when the claimants asked to switch back to "*base rate + cost of funds*" on 20 July 2009 and were told that the redemption penalties for doing so were about £23,000 under Loan 5 and £54,000 under Loan 6, their reaction was not to say: "*But you said there would be no charges*". The alleged "no charges" misrepresentation did not feature in the lengthy narrative enclosed with the letter of complaint sent in November 2012.

114. The third alleged misrepresentation about the phrase "*based on the Present Value*" in clause 2.11 meaning that only the redemption charge was levied on only a proportion of the difference between the fixed rate and the current rate, is said to have been made in the conversation on 28 May 2008. Mr Price's denial that he said anything to explain what "*based on the Present Value*" meant is derived from his

belief that he would not have discussed clause 2.11 at all, let alone any of its wording. But he simply cannot remember the conversation. I cannot accept that, if he was specifically asked by a customer what clause 2.11 meant or how it worked, that he would have declined to answer. Absent a glossary to define "*Present Value*", the phrase "*based on the Present Value*" cried out for an explanation and the probability is that Mr Thomas asked for one. What was said in response may have got lost in translation but on balance I find that Mr Price did say something which conveyed the impression that the charge reflected only a proportion of the rate differential. There are a number of possible explanations as to how this came about. The phrase "*based on the Present Value*" is an appropriate way of referring to the fact that, in calculating the redemption charge, a discount is applied to allow for accelerated payment of the rate differential. One way of describing the effect of the discount would have been to say that the charge was only a proportion, rather than 100%, of the difference in rate. However I do not think that this is what Mr Price had in mind because I am fairly certain that he knew nothing about the discount. Another possibility is that Mr Price might have said that the redemption charge was only payable on the proportion of the loan which was being repaid. A third possibility is that he used the word proportion to explain that the charge only applied to the period of the fixed term that remained until maturity. Whatever the explanation, the claimants were left with the impression that "*the penalty would be some proportion of the difference*" (see Mr Thomas' email of 20 May 2009).

115. I am unable to categorise what happened here as a misrepresentation because I am not confident that whatever Mr Price said was false or misleading rather than being true but misinterpreted by Mr Thomas. I do, however, find that this is another instance of Mr Price's failure to discharge the information duty on the bank. Mr Thomas was asking what clause 2.11 meant and how it operated. Mr Price was obliged in response to give an explanation which made it clear that the words "*based on the Present Value of the difference between the two rates*" meant that the redemption charge was calculated by applying the rate differential to the whole of the amount being repaid over the remainder of the term to maturity less a discount for the fact that payment of the charge represents accelerated payment to the bank of that interest differential. It is plain that he did not do so.

116. The last of the alleged misrepresentations, and the one on which most stress was laid in the presentation of the claimants' case, is that Mr Price told Mr Thomas in the conversation on 28 May 2008 that on a worst case scenario the redemption charge would at most be in the range £10,000 to £20,000 if all of the fixed rate borrowing was repaid early. I am quite satisfied that Mr Price said no such thing: but he may have agreed with that proposition put to him by Mr Thomas. That could equally well qualify as a misrepresentation. The following are my findings on this issue.

117. The contemporaneous manuscript note of the claimants' jottings confirms that they had in mind a figure of £20,000 for the redemption charge sometime after the phone call with Mr Price on 5 June 2008. I accept the explanation which the claimants gave of the figures in the note: "*14k less*" then underneath on the next line "*27*" and "*potential loss £34k*". They record that they were currently paying £14,000 less in interest per annum at the variable rate than they would be if they fixed the interest rate on £1 million of their borrowing at a rate of 7.55%, and that the potential maximum additional cost of fixing the rate at that level over one year would be £14,000 plus a break cost of £20,000, or £34,000. The figure of "*27*" represents a net loss of £27,000 if the land at Linscombe Farm was retained for that year and earned an income of £7,000.

118. The note gives no clue where the figure of £20,000 came from. Mr Thomas is adamant that the £10,000 to £20,000 came from Mr Price. Mr Price cannot remember anything about the discussion of the level of redemption charge in the conversation on 28 May. I put that down to his loss of memory. But he says that he would not have suggested any figures. There is a straight conflict of evidence here and on this point I prefer the evidence of Mr Price for 3 reasons. The first is that I think it inherently improbable that he would have volunteered a figure or range of figures for the redemption penalty. There were too many variables and he did not understand enough of how the calculation was done to come up with figures himself. But that does not mean that, from his knowledge of the bank's view of how base rate was likely to move in the near term (upwards), he was not able to comment on any ballpark figure or range of figures which Mr Thomas suggested. Second, the narrative history enclosed with the letter of complaint stated, in paragraph 61, that the £10-20,000 figure "*correlated with the Thomases' research of High Street lenders offering similar*

products and also correlated with the figures arising from early repayment of their previous loan agreements with Triodos". One must be careful not to read too much into this. The narrative firmly states elsewhere that it was Mr Price who produced the £10-20,000 figure. Furthermore, the claimants had never previously had a fixed rate loan agreement with the bank, so previous early repayment sums could only have been under clause 2.10 and were no guide. Also Mr Thomas said in his email of 20 May 2009 that his internet research had suggested that redemption penalties were "*usually in the order of 10p in the £1*". That would mean a penalty of around £100,000 on early repayment of £1 million – a far cry from £10-20,000. Nevertheless the complaint letter suggests that £10-20,000 was a figure which struck the claimants as about right. The third reason for concluding that the figure first came from Mr Thomas is that, in a draft response which he prepared to the letter of 5 September 2011 from Dr Bevis Watts (the draft was never sent), Mr Thomas said this:

> "*... we did of course discuss early repayment with Ian* [Price] *and were told by him that we would be charged some penalty in the event we repaid some or all of the loan early. Ian said that he would need to work it out exactly but did not refute the guess that we aired of £20,000 or so for complete repayment. This amount was in line with what we understood was normal in the industry at the time and we received no further communication on the matter so assumed that the figures we had discussed were more or less accurate.*"

In the witness box Mr Thomas insisted that the word "*we*" in "*the guess that we aired*" referred to himself and Mr Price rather than to himself and Mrs Thomas and that the draft was not inconsistent with his case that Mr Price came up with the £10-20,000 figure. This part of his evidence was not convincing. The more natural interpretation of the draft is that he suggested the £10-20,000 figure, speaking for himself and his wife.

119. I think that what happened in the telephone conversation on 28 May 2008 is that, having said that they were thinking of fixing the rate on all of their borrowing for 10 years, Mr Thomas tried to get an idea from Mr Price of the size of any likely redemption penalty so that he could have a figure to work with. He said to Mr Price something along the following lines: "*Are we talking a figure of between £10,000 and £20,000?*" Mr Price is accused of not having disabused him either by contradicting the figure as quite possibly too low or by saying that it was impossible to come up

with any figure. On this point, I accept the evidence of Mr Thomas. The £10-20,000 figure was not refuted as it should have been, and so it became entrenched in the mind of both claimants as roughly representing the maximum redemption penalty they were likely to face if they fixed the rate on almost all their borrowing.

120. It is possible, but not in my view probable, that Mr Price thought that Mr Thomas was talking about early repayment fees rather than the redemption charge (3 months' interest at 7.55% on £1 million would be £18,875). If so, he had forgotten that there had been a waiver of the early repayment fee for Loan 1 and, for Loan 3 insofar as any repayment repaid was from the proceeds of sale of any part of Linscombe Farm. If Mr Price realised that Mr Thomas was talking about the redemption charge, his instinct should have told him that it was impossible to agree with any figures and he should have challenged the £10-20,000 figure in the strongest possible terms. I have come to the conclusion that he failed to do so.

121. It is the claimants' case that Mr Roylance also failed to do so during his telephone conversation on 17 June 2008 with Mrs Thomas. The evidence here is not so clear cut. The call was made to increase the instruction for the second fix from £300,000 to £500,000. The difference of recollection when the conversation turned to redemption penalties (see paragraph 24 above) is that Mrs Thomas says that she told Mr Roylance that Mr Price had said that the maximum penalty would be £10-20,000 and Mr Roylance had replied that Mr Price could not possibly have given that figure because the penalty would vary and it was impossible to give an estimate of the figure at that stage. She then responded that since this was the figure that their Relationship Manager had given them, they were going to rely on it. Mr Roylance remembers a good deal of the conversation on 17 June but not the figure of £10-20,000 being mentioned. His evidence is that if Mrs Thomas had quoted the £10-20,000 figure as a maximum potential redemption charge: (1) it would have been so out of the ordinary that he would have remembered it, and (2) he would not have allowed the claimants to proceed to the second fix on such a serious misunderstanding because the figure in question was far removed from any realistic estimate of the redemption charge in a worst case scenario.

122. Mr Roylance was a good witness but I think his recollection is faulty on the first point. I accept the evidence of Mrs Thomas that she did mention the £10-20,000 figure. However I believe Mr Roylance when he says that he would have strongly disputed its validity. I think he did, and that Mrs Thomas, unwittingly, has downplayed the force with which he contradicted it. She does clearly remember Mr Roylance saying that Mr Price could not have given a reliable or any figure. The question, therefore, is whether the claimants acted reasonably in continuing to rely on Mr Price's reaction to the £10-20,000 figure (since I have held that he did not produce it in the first place) rather than on Mr Roylance's rejection of it. In my judgment they did not. I realise that Mrs Thomas might have been rather thrown by hearing that Mr Roylance did not agree with Mr Price but Mr Roylance was the Loans Administrator who was closest to the rate fixing process. Once she heard that he disputed that it was possible to estimate the maximum likely redemption charge and did not think that the £10-20,000 figure was reliable, she should not have gone ahead with the second fix.

123. It is puzzling that the claimants did not put in writing to the bank their allegation that they had been misled into believing that the maximum likely redemption charge was £10-20,000 until the letter of complaint was sent in November 2012. Other than in the manuscript jottings (which did not emerge until disclosure in this action) the first written reference to the £20,000 figure is in the draft letter to Dr Watts, which Mr Thomas prepared in September 2011. But the letter was never sent. Both claimants gave evidence that if they had been told on 11 March 2009 or on 20 July 2009 that the total redemption penalty was not more than about £20,000 they would have been content. Why, then, did they not protest about the £10-20,000 figure when the figures they were given were so much higher? The only explanation they gave at the trial is that they had an ongoing relationship with the bank and did not want to "rock the boat". Given their parlous finances there is some substance to that response: but they did raise other criticism in their emails and Mr Thomas says that he got quite exercised about the level of the redemption penalty in conversations with Mr Price and Mr Crichton in 2009 and 2010. I am driven to conclude that the £10-20,000 figure has assumed a greater significance in the minds of the claimants than it had at the time. The lower headline rate for the longer fix was the dominant factor when the decision to fix the rates was made.

124. My conclusion is that Mr Price's failure on 28 May 2008 to disabuse Mr Thomas when he asked whether the maximum likely redemption penalty was in the range £10-20,000 gave rise to a misrepresentation which did influence the decision to enter into the first fix. If that is wrong, it was an instance of the breach of the information duty because even asking the question should have alerted Mr Price to the fact that the claimants simply did not understand how clause 2.11 worked. I am not persuaded that the misrepresentation caused the second fix because in my judgment Mr Roylance gave sufficient warning on 17 June 2008 that the £10-20,000 figure was wrong. But the lack of adequate explanation of clause 2.11, and therefore the breach of the information duty, persisted because there is no evidence that he gave Mrs Thomas the balanced picture of the consequences of fixing the rate which Mr Price had not.

125. I have expressed my conclusions on the misrepresentation claim and on breach of the information duty in the preceding paragraphs, from which it will be apparent that I find for the claimants on liability, although not on every point. A further limb of the claimants' case is that they say that the bank should have quoted precise figures for the breakage costs as soon as they asked for them at the end of October 2008. I agree. I see no excuse for the fact that the bank did not give an accurate quotation of the breakage costs until July 2009. But this was not an independent cause of loss. There is no evidence that if the bank had provided a quotation promptly, it would have been lower than the figures eventually quoted or that the claimants would have been able to pay the charges and would have paid them, such that it could be said that the delay in providing the quotation "locked them into" the fixed rates for longer than would otherwise have been the case. There is a legitimate complaint but it gives rise to no liability.

Quantum issues – causation and loss of a chance

126. The claimants claim four heads of loss: (1) the difference between the interest they paid under Loans 5 and 6 and on their business overdraft and the much lower interest they would have paid if the rates had never been fixed or only fixed for a shorter term; (2) the profit which their farming business would have earned and the

losses which it would have avoided if they had not entered into Loans 5 and 6 and suffered the high interest rates which severely affected the business' cashflow; (3) the loss resulting from their inability, through lack of funds and manpower, to develop the business and renovate the farmhouse at Bidwell Barton between 2009 and the present time as they would have done if they had not entered into Loans 5 and 6; and (4) the increased tax liability which will result from any award of compensation in damages being paid in one tax year.

127. The defendant counterclaims for possession of the land owned by the claimants (principally Bidwell Barton and the remaining 20 acres and buildings at Linscombe) which is mortgaged to the bank, and for the sums outstanding on the claimants' various accounts following the demand for repayment which has not been met.

128. It is agreed that the fourth head of claim (increased tax liability on the damages), and the counterclaim, must be reserved for determination after the handing down of this judgment. I shall deal only with the first three heads of loss.

The counterfactual

129. Two counterfactual issues underpin the first three heads of loss. They are: (1) whether the claimants would have fixed the interest rate on any of their borrowing, and if so how much of it and for how long, and (2) when would they have sold Linscombe Farm? The two are plainly linked. They assume that there were no misrepresentations and/or that the claimants were given a sufficient explanation of what fixing the interest rate entails and of its financial implications.

130. The claimants maintain that they would have stuck with variable rate lending and would have completed the sale of the whole of the land and farm buildings at Linscombe Farm to Mr Lee in the autumn of 2008 at or about his offer price of £520,000. This would have left them with net sale proceeds, with which to develop the business and improve Bidwell Barton, of between £415,000 and £500,000 (depending on the impact of CGT).

131. It should be obvious from what I have already said in paragraphs 98 and 99 above that I am quite unable to accept this scenario. The claimants had been worried about interest rates for some time prior to May 2008. The factors which impelled them to guard against a rise in base rate by entering into an interest rate fix would still have pertained. The obstacle was the redemption penalty, which would not have been a problem if they had fixed for a much shorter period. I would add the following observations to what I have already said about the factors in play. First, the health of Mr Thomas was not seen as a reason not to fix rates: quite the contrary. He was not due to complete the chemotherapy until the autumn of 2008 and it was not expected that he would receive a reliable prognosis until well into 2009. Neither of the claimants seriously believed that they were likely to have to take the catastrophic decision of selling up the whole business in less than 2 years if the chemotherapy was found not to have worked. It was an outside possibility more than offset by having the reassurance of a fixed borrowing cost in the near term. Second, the need to keep the land and buildings at Linscombe until at least the autumn of 2009 was more pressing for the fact that in May 2008 the claimants were about to lose some farmland they had rented nearby at Hollocombe, because of a dispute with the landlord over a rent increase. They managed to negotiate a deal with the landlord that they could stay until the 2008 summer crop was harvested, but they had to agree to give possession in the autumn. Without the Hollacombe land and the Linscombe land and polytunnels, the claimants had no prospect of being able to satisfy their customers and retain their market share in 2009 because only a small proportion of the land at Bidwell Barton was ready for planting and it lacked adequate facilities such as a properly appointed packing house. The quarry at Linscombe was also a useful source of stone which was needed for the development of Bidwell Barton. Third, the evidence strongly suggests, and I find, that Mr Lee would not have been able to proceed with his offer to buy the land and buildings at Linscombe, because he did not have the money unless and until he sold his existing property.

132. In his oral evidence Mr Thomas said that he would have fixed for a period of one year or possibly not at all if he had been given correct information about the financial implications of fixing and how clause 2.11 worked. But he also said that Mr Price had told him that fixing for one year was not worth the administrative cost. My conclusion is that the claimants would have fixed the rate as they did for a period of 2

years rather than 10 years. In other words, they would have fixed the rate on £289,000 under Loan 1 until June 2010 and on £500,000 from Loan 3 until July 2010. The swap ask rate for two years on 28 May 2008 was 5.9%, so the rate payable under Loan 5 would have been 7.15% and the rate payable under Loan 6 would have been a bit over 7.65%, assuming the 2 year cost of money rose between 28 May and 17 June as did the 10 year rate. Two years was slightly longer than the period of stability which the claimants needed to cover completion of the move to Bidwell Barton and developing Bidwell Barton to the point where the business could achieve the level of production formerly achieved across 3 sites: but one year was too short.

133. Viewed at May/June 2008, the break cost implications of a 2 year fix would have been affordable. The claimants were most unlikely to need to repay the fixed rate borrowing within one year because they needed the land at facilities at Linscombe until at least the autumn of 2009. They might have wanted to break the fix in the second year if an attractive offer for Linscombe materialised. However, the breakage cost for repaying the entire fix one year early would have been within the £10-20,000 figure which the claimants were prepared if necessary to afford.

134. In both his opening and closing submission, Mr Kalfon, the bank's counsel, referred to the passage in the speech of Lord Hoffman in the SAAMCO case (*South Australia Asset Management Corp. v York Montague Ltd* [1997] AC 191 at p. 214C-F) where he drew a distinction, based on the scope of the duty, between liability for the consequences of breach of an obligation to provide advice and liability for the consequences of breach of an obligation to provide information. In the former case, the defendant is liable for all the foreseeable loss which results from the course of action which was adopted in reliance on the negligent advice. In the latter case, the defendant is liable only for the foreseeable loss which results from the information being wrong. This is an information case. But it was in my judgment plainly foreseeable that if the claimants had been told of the implications for breakage costs of fixing for 10 years rather than 5 or 2, they would have chosen the shortest period of fix which met their needs. I have found that to be a period of 2 years.

135. As for when Linscombe Farm would have been sold, Mr Kalfon submits that the consequence of the claimants having fixed for a further 8 years was not that they

were locked into keeping Linscombe Farm. This submission is aimed at Head of Loss 2 and 3. The effect of the misrepresentation and/or breach of duty was that the claimants were locked into the fixed rates because they could not afford the breakage costs. The claimants would have liked to break the fixes as soon as base rate began to fall in the autumn of 2008. They would have liked to switch back to a variable rate without repaying any of the capital. If they had been in a position to repay some of the borrowing at a fixed rate using the proceeds of sale of the land at buildings at Linscombe Farm they would no doubt have done so. However: (1) the offer from Mr Lee would not have resulted in a sale in 2008, (2) it did not suit the claimants' farming arrangements to sell all of the remainder of Linscombe Farm before, at the earliest, the autumn of 2009 and (3) even after that time there is no evidence that the claimants received good offers which they turned down, save one, which was the offer from Mr Attenburrow of £200,000 for the remaining 20 acres in October 2012. The claimants' response to that offer and their evidence at the trial does not support the inference that the real reason why they turned the offer down was a concern about breakage costs. However I recognise that, as Mr Thomas put it in cross-examination, the claimants' lives were by that time completely different from what they would have been if they had not still been subject to the fixed rate borrowing. I find that if there had been no breach of duty, the land and buildings at Linscombe Farm would not have been sold any faster than they were in fact sold with the exception of the last 20 acres and the quarry. This parcel probably would have been sold at the end of 2012 for the £200,000 at which it was valued by Chesterton Humberts in June 2013. Mr Attenburrow's offer was a fair price.

136. The bank contends that the claimants' failure to accept Mr Attenburrow's offer was a failure to mitigate their loss. It says that the remainder of Linscombe should have been sold to him because £175,000 of the sale proceeds would have qualified for the 3% concessionary redemption charge, so the breakage cost would have been small. I have thought very carefully about this submission. The claimants had sold the slither of land and water rights at Linscombe the previous year and applied the net proceeds of that transaction in reduction of Loan 6. Why could they not have done the same at the end of 2012 with the remaining 20 acres, including the quarry? Not without some hesitation I have come to the conclusion that the bank's submission must be rejected. The bank has the burden of proving that there was a

failure to mitigate which precludes the claimants recovering damages in respect of any interest paid on £200,000 worth of the capital of Loan 6 (or whatever the net sale proceeds would probably have amounted to), precludes that interest being taken into account as depressing the cashflow of the claimants' business under Head of Loss 2, and confines the claimants' claim to the amount of the breakage cost (likely to have been between £5,000 and £10,000). The "duty" in mitigation is not a heavy one. The bank has not persuaded me that the claimants were obliged to incur even this level of breakage cost in order to mitigate the consequences of the breach. I sympathise with Mrs Thomas' evidence that, by 2012, the claimants had come to feel that accepting the bank's offer of a discounted redemption charge would in some way signify that they accepted the status quo. I do not think that the claimants acted unreasonably in not getting legal advice at that juncture.

The first head of loss: additional interest costs

137. The two accountant experts who gave evidence about Head of Loss 1 and Head of Loss 2 were Mr Tomlinson for the claimants and Fred Brown of Grant Thornton for the bank. They were almost agreed on Head of Loss 1: but were poles apart on Head of Loss 2. Mr Brown was criticised by Mr Counsell, who appeared for the claimants, for not having as much experience as Mr Tomlinson and for having produced a report in respect of Head of Loss 2 which was reactive to Mr Tomlinson's figures without putting forward figures of his own. Mr Tomlinson was criticised by Mr Kalfon for being too close to the claimants. Nothing turns on these criticisms so far as Head of Loss 1 is concerned. I deal with them under Head of Loss 2.

138. It is agreed, that in respect of all three Heads of Loss, I should decide the points of principle on which there is disagreement, leaving it to the experts to do the consequential arithmetic. If disputes remain at that point, I will determine them after the handing down of this judgment.

139. The counterfactual in respect of Head of Loss 1 is that the claimants would have entered into a 2 year fix of the same amounts and that the Linscombe land would not have been sold any earlier than it was in fact sold. So the calculation of extra

payments of overdraft interest begin on 23 June 2010 in respect of Loan 5 and on 11 July 2010 in respect of Loan 6.

140. Mr Tomlinson and Mr Brown produced tables or spreadsheets to demonstrate their calculations of additional interest costs. Mr Brown considered a wider range of scenarios than Mr Tomlinson, who assumed, as his counterfactual, that the claimants would have borrowed at a variable rate throughout. The counterfactual I have upheld comes closest to Mr Brown's scenario 4b. The two experts were able to agree in the joint statement that the direct extra interest cost of Loans 5 and 6 down to 31 March 2015 was approximately £240,000.

141. The differences between Mr Tomlinson and Mr Brown on Head of Loss 1 relate to the treatment of interest on the claimants' overdraft. As to that question, two issues of principle remain: (1) should the rate of interest attributed to the overdraft as from 4 January 2012 be 6.5% (to take account of the 6.0% margin over base rate which the bank applied from that date) or 3.5% (to represent 3% over base rate which is the claimants' case) or 4.5% (equal to the MLR applied by the bank to the claimant's account on 4 January 2012)? (2) would the bank have continued to provide an overdraft facility to the claimants if it had not been for the financial difficulties they experienced in servicing the fixed rates or would the claimants still have been liable for an unauthorised overdraft interest rate of 20% above base rate at some point in the chronology?

142. On the first issue, Mr Tomlinson infers the hike in the overdraft interest rate which the claimants suffered in January 2012 (from an MLR of 3.5% to a rate of 6% over base rate) was a consequence of their poor credit rating by the bank, which was itself a direct result of the financial difficulties they were facing in trying to service the fixed rates on Loans 5 and 6. His calculation claims all borrowing costs above 3.5% on the footing that a doubling of the margin over base rate from 1.5% to 3% is the maximum the claimants would have experienced if it had not been for the servicing of the fixed rates. There is no support for Mr Tomlinson's inference in the Credit Report which Mr Crichton signed in November 2011 recommending an increase in the overdraft limit from £50,000 to £100,000 but at the higher margin of 6% over base. The claimants' credit status remained the same (4A) and they

continued to be classified as Medium Risk. The claimants' risk rating changed from Low to Medium between March 2010 and August 2010 and their credit status was altered from 3A to 4A sometime between August 2010 and March 2011. All this while their overdraft rate was 1.5% over base but with an MLR of 3.5%. On the other hand, the bank's general policy as to margin over base for overdrafts was a minimum of 5% from 5 September 2011. Thus the 6% margin must have been a bespoke rate for the claimants, which took account of their financial circumstances. This was undoubtedly worse than if the two fixed rate loans had expired in the summer of 2010. I am persuaded, therefore, that Mr Tomlinson is right that the claimants would not have been charged a margin of 6% over base as from 4 January 2012 if it had not been for the burden of servicing Loans 5 and 6. I do not, however, accept that they would have been charged no more than 3.5% throughout. 3.5% was the level of MLR which the claimants had been given as a term of their overdraft facility, but the bank's general policy from 5 September 2011 was an MLR of 4% and a minimum margin above base rate of 5%. This was the first time since 2006 that the bank's general policy margin above base rate was higher than the general policy MLR. It was suggested that agricultural customers were treated more generously by banks than other classes of customer. Mr Tomlinson said that it was not common practice at the time for mainstream banks to apply MLR to customers with agricultural portfolios. But he recognised that this was not a universal approach and that the range of margins above base rate rose after 2009 as high as 6%, even in the agricultural sector. I believe that there would have been a re-think at the beginning of January 2012 of the rate being paid by the claimants on their overdraft even if they had only fixed Loans 5 and 6 for 2 years. The claimants had hitherto been treated more leniently than the bank's general policy on MLR and minimum margin. Their financial position in the counterfactual would have been better. But their level of borrowing was still high and the business had seen a marked decline in sales between 2009 and 2011. My conclusion is that the claimants would not have avoided paying the MLR of 4% but would have escaped the minimum margin above base rate of 5%. In my judgment, the counterfactual should be a rate of 4% as from 4 January 2012.

143. On the second issue, I am in no doubt that the answer is in the affirmative. If the fixed interest term of Loans 5 and 6 had ended in the summer of 2010, the claimants' borrowing costs would have fallen back to base rate plus the agreed

margins of 1.25% and 1.75% respectively. I see no reason not to assume that the bank would have continued the claimants' overdraft facility at the MLR of 4.5% beyond March 2014 and, if required, up to the present time. Mr Tomlinson's counterfactual also assumes, rightly in my view, that the claimants would have been able to service Loans 5 and 6 at the variable rate after the summer of 2010 and would have made capital repayments as well as interest payments each month during that period. The assumption presupposes that all saving from not having to pay the fixed rates would have been applied first in servicing the debt represented by Loans 5 and 6 and the overdraft and any debit balances on the current account and would not have been utilised to develop the business or the infrastructure at Bidwell Barton. This is an important point when coming to consider what financial resources would have been freed up for business and infrastructure development under Heads of Loss 2 and 3.

144. Mr Tomlinson's calculation of Head of Loss 1 includes also (1) an amount representing the difference between the amount of Loans 5 and 6 which is in fact outstanding and the (lesser) amount which would have been outstanding on the counter-factual, and (2) the cost of borrowing at the unauthorised borrowing rate of 20.5% after the overdraft facility expired in March 2014. The difference in the amount outstanding is in part a function of the fact that the claimants stopped servicing Loans 5 and 6 in, respectively, December 2013 and February 2014. The claimants have suffered no loss by not continuing with the monthly payments on Loans 5 and 6. If the calculation of Head of Loss 1 is continued to the date on which this judgment is handed down, as a comparison between the fixed rates on Loans 5 and 6 and the counterfactual of the same fixed rates to 23 June and 11 July 2010 and a variable rate thereafter, the bank is entitled to credit against the resulting claim of an amount equivalent to all the monthly payments which the claimants have missed.

145. The unauthorised rate has continued to be charged until the present time and the balance outstanding on the claimants' overdraft and current accounts has risen because the claimants have continued to refuse to service the interest on any of the borrowing. The bank's refusal to extend the overdraft facility beyond March 2014 was plainly a consequence of the stance which the claimants adopted in refusing to continue with the monthly payments under Loans 5 and 6. I do not think it is possible to conclude that the claimants' behaviour broke the chain of causation between the

breach which tied them into the fixed rate borrowing and the unauthorised borrowing rate being charged on the overdraft and current accounts. If the claimants had not had to service Loans 5 and 6 until they did, there would have been no question of their breaching the limit of their overdraft or of the overdraft facility not being continued. By the end of 2013 they were constantly robbing Peter to pay Paul i.e. using headroom in the overdraft facility to finance the fixed rate borrowing. It was not a sustainable solution. It is true that they eased their situation when they stopped the monthly payments, and this is reflected in a reduction in their interest overhead. But this made withdrawal of the overdraft facility inevitable. If (as I have held they should) the claimants are to give credit for the missed monthly payments, it is legitimate that the interest differential should take account of the unauthorised borrowing rate.

146. A moot point is the date at which the calculation of Head of Loss 1 should end. It is not right to say that the claimants' loss under Head of Loss 1 ceased when they stopped paying the bank. The two fixed rate loans remain in place and the claimants acknowledge that they are liable to repay the capital borrowed by the end of the original term. My view is that the right solution is to run the calculation of factual against counterfactual at least down to the date of this judgment, that the two fixes (which each have about a year to run) should be terminated at no cost to the claimants as soon as possible after this judgment has been handed down and switched back to a variable rate. The Head of Loss calculation can then be adjusted to the date of termination of the fixes. The overdraft account and current account can be reconstituted on the correct basis by setting the total of the claim under Head of Loss 1 against the overall indebtedness which the bank (had it succeeded on liability) would have been awarded on the counterclaim. There will remain an indebtedness on the two Loan accounts and on the overdraft and current accounts which is not attributable to any fault on the part of the bank and which the claimants must service and repay in due time or refinance with another lender. When re-calculating Head of Loss 1 to 24 February 2017, account must also be taken in the counterfactual of the drop in base rate to 0.25 % from 4 August 2016.

The second head of loss: impact of cashflow on farming business

147. Head of Loss 2 is expressed as a loss of profit. It is a claim which is intended to reflect the cashflow effect which has resulted from the claimants being locked into the fixed rate and how, in consequence, they lost the chance of increasing profits by as much as they would have done if they had not entered into the fixed rates.

148. It will help to begin by explaining how, through Mr Tomlinson, the claimants put their case and the criticisms which the bank, through Mr Brown, makes of it. What follows is no more than a broad outline.

149. Mr Tomlinson has taken the year ended 31 March 2009 as the base year in which the adverse effects of the fixed rates would first have been felt. He has then looked at how comparable organic farming businesses performed in subsequent years and what growth in sales the claimants achieved in previous years in order to arrive at an estimate of how the claimants' sales could be expected to have increased after March 2009 if they had borrowed only at a variable rate. In his opinion growth in sales is best expressed as an annual compound percentage uplift on sales in the base year. His view at the conclusion of the trial, based on a comparison between the historic growth in sales of the claimants' business and data published by The Soil Association for sales of organic vegetables from 2010 to 2016, was that the year-on-year increase in the claimants' sales would have been in the region of 7% to 8%. Mr Tomlinson invites a comparison between sales growing at that rate and actual sales between March 2009 and March 2016 and calculates that, but for the fixed rate loans, the claimants would have made a profit of £201,716 in that period rather than the cumulative loss they actually made of £588,537. Part of the loss is accounted for by the overhead of higher interest rates than would have been paid if there had been no fixing of the rates. Credit is given in Head of Loss 2 for this overhead since the additional interest paid is claimed under Head of Loss 1. The net loss figure to 31 March 2016 is £397,000. In arriving at this figure Mr Tomlinson has made a great number of assumptions which are to be found in the Tables at pages 306-307 of trial bundle E1. Chief among them are: (1) that Linscombe Farm would have been sold in its entirety in December 2008 for £520,000, (2) that the claimants would have increased their direct labour at Bidwell Barton by engaging two new employees, and (3) that the claimants would have achieved an increase in their gross profit margin of

1% per annum. Mr Tomlinson is of the view that the it will take the business 3 years from the receipt of an award of damages to eliminate the difference between the actual loss in the year ended 31 March 2016 and the projected profit in that year in his calculations. Accordingly, he adds to the claim the amount of that difference on the footing that the effects of the breach will last until the year ended 31 March 2019.

150. Mr Brown did not quantify Head of Loss 2 in his first report. His approach was reactive to Mr Tomlinson's calculations. In the joint statement he disagreed with most of Mr Tomlinson's methodology. Mr Brown's starting point is to consider the cashflow effect on the claimants' business of entering into the two fixed rates. In other words, he begins by considering what additional cash would have been available for promoting and increasing sales if the claimants had remained borrowing at a variable rate. He challenges Mr Tomlinson's market data as providing a reliable benchmark for his assumed and questions whether, in the light of rising overheads, any increase in gross margin would have been achieved even if the claimants had succeeded in running the business more efficiently in the counterfactual scenario. Mr Brown produced a supplementary report following the joint statement in which, for the first time, he put forward figures of his own for Head of Loss 2. In an accompanying spreadsheet, he calculated that if it was assumed that the claimants had achieved, between the year ended 31 March 2010 and the year ended 31 March 2016, a 4% per annum compound growth in the actual sales figure for the year ended 31 March 2009, the business would have made an overall loss because profits from 2013 to 2016 would not have been sufficient to cover losses in the earlier years. A growth of 4% on actual sales in 2008-2009 was the most he was prepared to concede.

151. The experts will have to run their calculations afresh on the counterfactual found in this judgment. The points of principle under Head of Loss 2 which I must decide in order to assist that process are the following: (1) what growth rate for sales should be assumed and on what basis? (2) what year should be chosen as the base year from which to calculate any sales increase? (3) would the claimants have achieved an improvement in their gross margin in the relevant period and, if so, by how much? (4) over how long a period should Head of Loss 2 be calculated?

152. Before addressing these four points, I must say something about the attacks made by each side on the competence of the other's expert. Mr Tomlinson only qualified as an accountant in January 2016 but until 2010 he had built up 16 years of experience working in the agricultural sector of retail banking, initially as a Relationship Manager and latterly as Head of Agriculture at Barclays (2007-2008) and HSBC (2008-2010). The main criticism of him was that his independence was suspect because he had been working with the claimants on the present case since 2012, had met them frequently and visited Bidwell Barton, and had attended Court since the outset of the trial seemingly in the role of mentor. I do not think Mr Tomlinson's impartiality was compromised and his familiarity with the claimants' business and their farm was a positive advantage. I do, however, think that his evidence on Head of Loss 2 presented a best case scenario and in a number of respects was over-optimistic. Mr Brown had none of the advantage of knowing the claimants or of experiencing first-hand how they ran Bidwell Barton. He was not even present in Court when they gave their evidence. His reports were in the nature of a desk-top exercise. But what he lacked on that account was largely compensated for by his considerable experience as a forensic accountant who specialised in business loss claims. The range of disputes in which he had advised was prodigious. True, his knowledge of the organic farming sector was minimal: but the approach adopted by Mr Tomlinson in his two reports was founded on historical data of past performance of the claimant's business and published data from The Soil Association for sector performance after 2010. Mr Brown was able to deal with these. His difficulty was the absence of an explanation in Mr Tomlinson's first report of the factors particular to the claimants which led him to believe that his predictions of growth and increased profit margin were realistic. On balance Mr Tomlinson's experience of a business such as the claimants' was greater. But this is a case where the financial outcome will depend on what the Court has learned of the claimants, their situation at the time and the sector in which they were operating rather on the background of the experts and the way they presented their evidence.

153. Before turning to the 4 points of principle, I remind myself that Head of Loss 2 is an assessment of the effect on the business in cash terms of the factual against the counterfactual. The counterfactual must now include a two year fix on Loans 5 and 6. So the adverse impact of the breach would only have begun to be felt after June/July

2010. The adverse cash flow is represented by the amount of the claim under Head of Loss 1. Looking just at Loans 5 and 6, and ignoring overdraft interest, the experts' agreement that the extra interest costs down to 31 March 2015 was £240,000 means that the extra cost of the fixes roughly equated to £34,250 per year. The actual figure to March 2017 will be slightly less by reason of the counterfactual in this judgment of a two year fix. Another point well made by Mr Brown is that the adverse impact of having to pay the fixed rates was only felt by the claimants up to the point at which they stopped servicing their debt. After December 2013 (Loan 5) and February 2014 (Loan 6), the claimants' cashflow was unaffected. They retained the money they would otherwise have used for monthly payments to the bank. By this time, of course, a great deal of the damage caused by fixed rates extending beyond two years had already been done. But the claimants' cashflow position improved at that point. In his supplemental report, (**E1/320**) Mr Brown ran calculations for the cash flow impact of Loans 5 and 6 to 31 March 2016 by reference to his various scenarios for Head of Loss 1, taking account of the fact that the claimants made no further payments after December 2013/February 2014. His calculations suggested that the cashflow position improved by £20,000 when comparing scenario 4b (a 2 year fix counterfactual) against scenario 1 (no fixed rates at all).

154. Mr Brown and Mr Tomlinson will have to revisit their calculations to take account of the new counterfactual (including as to when Linscombe Farm would have been sold and that the claimants would not have had to pay the £750 breakage fee on the sale of the slither of land at the end of 2011). However the value of concentrating on the cash impact is that it puts Head of Loss 2 into perspective. It is principally a claim for the negative effect on sales of having to pay the higher fixed rates on Loans 5 and 6 between mid-2010 and early 2014. Averaged over the whole period between 2010 and 2017, I suspect that the loss of cash per annum was in the region of £28,000 to £35,000 per year. Assuming all the money was spent on trying to improve sales (and not, for example, on improving the farmhouse – see Head of Loss 3), this was enough to employ or continue employing a marketing assistant and to pay for a better website and some manual labour or relatively inexpensive items of equipment, but not much more.

155. Mr Tomlinson's growth rate of 8% is derived from a comparison between the actual past performance of the claimants' business and the performance of other businesses in the organic farming sector between 2009 and 2016. His aim was to identify a pattern justifying an average growth rate of 8%. I do not think that there is a clear and reliable pattern. The focus on historic average performance over several years is an endeavour to get away from years tainted by the consequences of the fixed rates and to avoid giving any single year disproportionate influence in arriving at a likely annual sales growth going forward. Taking 2001 as the base year, the average annual sales growth to the end of 2008 was 28.8%. Using 2004 as the base year, it was 23.7% and using 2005 as the base year, it was 17.1%. Mr Tomlinson adopted the middle of these spreads (2004-2008) to give 23.7% as a starting point. Successful businesses tend to experience high growth in the early years. As the business reaches maturity, the growth rate slows. The problem here is twofold. First, the years 2004-2008 were early years in the claimants' business. As Mr Tomlinson recognises, the average sales performance over that time is not representative of what would have followed if there had been no fix. Second, the years 2009-2012 were unusual because the business was in the process of moving. Mr Tomlinson has assumed that Linscombe Farm would have been sold in one lot in the autumn of 2008, but I have rejected that part of the counterfactual. Furthermore, after 2009 the business was facing the consequences of the economic recession. There was an actual decline in sales between 2009 and 2015 and the claimants made a loss in each of those years of a sum in excess of the likely cash flow impact of the fixed rates (save possibly in 2012). Mr Tomlinson puts this down to the interest burden. However, the comparables derived from The Soil Association's data for sales within its vegetable box scheme show an even more dramatic decline from 2008 to 2010 and sales failing to recover to more than two thirds of their 2007 level as at 2016. The average annual increase in box scheme sales from 2009 to 2016 was 5.6%. Vegetable box sales account for about 50% of the claimants' business. The rest is made up of sales through farmers' markets.

156. In his first report, Mr Tomlinson used as his comparable for sales performance between 2009 and 2016 the results of a Devon company called Riverford Organic Farms Limited. These suggested that an annual increase of 3% above the Soil Association's box scheme figures was achievable. By the time of the joint statement,

Mr Tomlinson had retreated from relying on Riverford and was instead basing his view on The Soil Association figures, which he believed that the claimants could have exceeded at Bidwell Barton by more than 3% per annum on average. At the trial he accepted that The Soil Association data was helpful in showing trends within the organic vegetable industry but was not statistically reliable as a benchmark. However, he stuck to his 8% (actually 8.6%) average annual growth figure, which, coincidentally or not, is 3% above the average derived from The Soil Association data.

157. I am not persuaded that there is any merit in starting the search for an annual growth rate by looking at an average from past performance when the years in question were early years of the business. In my judgment the approach in Mr Brown's supplementary report of applying a percentage increase to actual sales figures in a single base year and deriving that percentage from evidence likely to reveal the future prospects of the business rather than its past performance has more to commend it. The base year ought to be one in which sales were not depressed by the compact of the fixed rates only if the counterfactual is that there would never have been any fixed rates. Since the counterfactual is that there would have been a two year fix, lasting until June/July 2010, I see no reason not to take the year ended 31 March 2010 as the base year since the following year was the first year in which the actual was different from the counterfactual.

158. Exactly how the additional cash which the claimants should have had in that year and subsequent years translates into greater sales is not easy to demonstrate other than by pointing to steps which the claimants could be expected to have taken to boost sales which in actual fact they could not afford to take. I accept that the following factors suggest that the claimants would probably have increased their sales after March 2010 if the fixed rates had come to an end in June/July 2010: (1) The claimants would have been able to afford a better website for the business, which should have made a significant difference to box sales. They economised in their choice of software developer. The result was a website which in their view was second-rate and incomplete. They could not afford to improve on it. (2) The claimants would have been able to continue to afford the salary of a Business Development Administrator or would have been able to re-engage someone in that role after the fixed rates expired in

June/July 2010. They engaged such a person early in 2009, but, for financial reasons, had to let him/her go later that year. (3) The claimants would have been able to afford a new Office Administrator. Their Office Administrator resigned early in 2011 after 5 years' service and the claimants were unable to afford a replacement. A new Office Administrator would have relieved the administrative burden on Mrs Thomas and freed her up to do other tasks around the farm. (4) The claimants would have been able to retain the services of their handyman, John Lewin, who, for financial reasons, they had to let go in mid-Jan 2010. A handyman would have helped with tasks around the farm and in particular with the works which are the subject-matter of Head of Loss 3. (5) They could have accelerated the transfer of the remaining polytunnels at Linscombe and/or erected new polytunnels at Bidwell Barton because the single improvement most likely to increase sales and profit was to increase the volume of the higher margin crops grown in polytunnels.

159. However, it is not clear to me whether the greater cashflow resulting from the expiration of the counterfactual fixes in June/July 2010 would have enabled the claimants to do all of these things. Mr Tomlinson has factored into his calculations two additional staff being engaged, a Business Development Administrator from April 2008 at an annual cost of £20,800, and a handyman from April 2009 at an annual cost of £15,600. He has assumed a 3% annual growth in salary for both. On the counterfactual of a two year fix, I find that, if they could have been afforded, the claimants would not have engaged either of them until some point in the year ended 31 March 2011. No allowance is made by the claimants for the cost of labour in Head of Loss 3 because it has been included by Mr Tomlinson in Head of Loss 2. However, it is doubtful how much the Business Development Administrator would have contributed to carrying out the works which are the subject matter of Head of Loss 3, or an Office Administrator, although he/she would have given Mrs Thomas more time to participate in the works. Only the handyman or a labourer would have made a meaningful contribution to the works in Head of Loss 3.

160. With regard to increasing the number of polytunnels a further point to note is that, although Mr Thomas had sufficient spare time to do works at Bidwell Barton in 2011 and 2012, he concentrated on landscaping and opening up ponds on the unproductive land rather than on erecting more polytunnels on the productive land.

Only 4 new polytunnels had been put up by early 2013. This calls into question how likely it is that the claimants would or could have boosted sales by increasing polytunnel crops in the growing season which followed the expiration of the fixed rates.

161. There are other factors which weigh against Mr Tomlinson's 8% average annual sales growth figure. One is that he has assumed that the claimants would have had the advantages of operating only from one site throughout the period of the claim. I have found that this would not have happened before the end of 2012. A more significant obstacle was the economic recession. Buying organic vegetables, whether through a box scheme or at farmers' markets, is discretionary spending which declined sharply after 2008. The rapid growth in the vegetable box market had already slowed in 2008. In the claimants' "Strategic plan 2009" they acknowledged that new customers were proving hard to find and that the rapid growth over the first 8/9 years of the business had dwindled and had started to reverse. The recession exacerbated this trend and would have depressed the claimants' sales in 2009 to 2011 regardless of the move to Bidwell Barton and the fixed rates. The organic vegetable market began to recover in 2012 but if The Soil Association data is any guide, it has still not recovered to the level it was at in 2007. The move to Bidwell Barton undoubtedly brought the benefits of a richer soil and a better location which was closer to the farmers' markets of Exeter. But these factors, and the claimants' industry and resourcefulness, which I do not question, would not entirely have overcome the economic headwinds which were blowing strongly in the organic vegetable market between 2009 and 2012.

162. Taking account of all these factors and the revised counterfactual, I think that Mr Tomlinson's 8.6% average annual growth in sales (equivalent to a compound rate of about 7% per annum) is an over-estimate. Both experts ended up being cautious about The Soil Association data because it is derived from telephone surveys of a limited number of the larger businesses in the organic vegetable market. The larger businesses, such as Abel & Cole, have a broader customer base and by and large are better equipped to weather a recession. Nevertheless the experts were agreed that The Soil Association data, with the caveats I have mentioned, was the best starting point available. The data shows a compound annual return for box scheme sales between

2009 and 2016 of 4.05%. Up to 2008, the claimants' business underperformed The Soil Association data but only slightly. I am unable to accept that it would have done nearly twice as well from 2009 onwards, aside from the counterfactual. With the counterfactual, the business would have performed as it did perform in the years ended 31 March 2009 and 31 March 2010. From that low point, there would have been a growth in sales in the year ended 31 March 2011, as the burden of the fixed rates came to an end in June/July 2010. In my judgment the figure which should be taken for the average annual growth in sales between 2011 and 2016 is 4%, which is equivalent to an annual compound rate of around 3.7%. This is close to, but not based on quite the same parameters as, the calculation in the spreadsheet produced by Mr Brown in the course of the trial and included in trial bundle E1 at page 308.

163. The next point of principle is the base year. I have already indicated that in my judgment the base year for calculating growth in sales should be the year ended 31 March 2010. The first year of claim under Head of Loss 2 will be the year ended 31 March 2011 because it is the year in which the counterfactual diverges from the actual.

164. The third point of principle is increase in gross profit margin. Mr Tomlinson accepted that his 1% annual increase was an arbitrary figure but was in his opinion justified, even conservative, if the claimants had concentrated on making their business more efficient. The actual gross profit margin between 2009 and 2016 fluctuated and overall was lower in 2016 than a 1% year on year increase. I agree with Mr Brown that the fluctuation in the margin was attributable to factors other than the fixed rates, such as competitive pricing, the cost of buying in produce to supplement a shortfall in home-grown crops due to the weather and changes in input costs such as fuel. Moreover the cost of additional staff increases overheads and depresses the profit margin even if those staff make the business more efficient and boost sales. Weighing up these competing factors, I am inclined to give the claimants the benefit of the doubt. I believe that they would have achieved on average a 1% improvement in their gross profit margin in each year after the year ended 31 March 2010.

165. The final point of principle arises from paragraph 30.3 of the Amended Particulars of Claim in which it is alleged that because the claimants' business will

continue to suffer an annual loss of profit until the maturity of the fixed rates, it is reasonable to assume that it will take the business 3 years to recover from the point at which the fixed rates come to an end. A claim is made for the annual loss of cashflow by reason of servicing the fixed rates (put at a figure of £212,000) spread over 3 years from 31 March 2016. I take this to be a claim which runs from the date at which the fixed rates are terminated as a consequence of this judgment. Neither counsel addressed this aspect of the claim in his closing submissions. For that reason I am reluctant to decide it, if indeed it is still a live issue. I accept that, if the fixed rates were still being paid, the loss of growth in sales would not evaporate immediately the fixed rates were terminated and damages were paid, although I question whether the recovery process would be as long as 3 years. However, the claimants have not been paying the fixed rates since December 2013 (Loan 5) and February 2014 (Loan 6). Over the past 3 years they have been in a position to start undoing the damage alleged to have been caused by the fixed rates running beyond the summer of 2010. I remain to be persuaded that there is any justification for awarding compensation under Head of Loss 2 beyond the date of this judgment or, at latest, beyond the conclusion of the current financial year ending on 31 March 2017. I will, however, reserve this question for further argument should it be necessary.

The third head of loss: inability to develop Bidwell Barton

166. The claimants have produced a specification of the works they say that they would have carried out between 2008 and 2015 ("the Specification"). The Specification has been costed by a quantity surveyor, Ms Sue Kim of Gleeds Dispute Advisory Ltd, who was appointed as a single joint expert. Ms Kim was not called as a witness. She produced four reports. After her first report the parties asked questions of her which she answered in her first supplemental report. Further questions where then asked, and answered, in Ms Kim's second supplemental report. This process was repeated, leading to the third supplemental report.

167. The claimants say that they would have completed all of the works in the Specification in three phases, doing most of the work themselves or with farm labour.

The only external costs which they acknowledge they would have had to incur are: (1) materials, (2) plant hire and (3) specialist trades such as plastering, plumbing and electrical works. But the claimants now say that they cannot carry out the work themselves. They say that they have slimmed down their workforce to keep overheads to a minimum so they have no capacity within their own workforce to do the work and their own time is fully committed to sustaining the business. If the work is to be done now, the claimants maintain that they will have to use outside contractors for everything.

168. The claim under Head of Loss 3 is for the difference in cost between doing the work between 2008 and 2015, using their own and farm labour, and doing the work in 2017, using outside contractors. It comprises: (1) a sum of £119,627 for the additional cost of materials, (2) a sum of £22,632 for the higher cost of plant hire, (3) a sum of £662,845 for labour from outside contractors.

169. There is an obvious overlap between Head of Loss 2 and Head of Loss 3. If the interest rates had only been fixed for two years and the cash effect of servicing Loans 5 and 6 confined to that period, the financial resources available to the claimants from June/July 2010 would have had to have been shared between, on the one hand, ensuring the farming business survived and expanded and, on the other hand, improving the property and renovating the farmhouse. Choices would have had to be made because the cash released by expiration of the fixed rates was not enough to do both. My overall impression of the claim under Head of Loss 3 is that it is over-ambitious when pursued in conjunction with Head of Loss 2. It over-states what, in reality, the claimants would have achieved.

170. It seems to me that the issues to be decided are: (1) how much of the work would the claimants have had (a) the financial resources and (b) the time to carry out between 2008 and 2015? (2) can the claimants claim the increase in cost of doing the work, if the original cost of the works would not have been reflected in a commensurate increase in the market value of Bidwell Barton? and (3) are the claimants entitled to claim the cost of getting outside contractors to do all the work in 2017 rather than doing the work themselves?

The work that would have been done

171. There is no doubting the claimants' capacity for hard work or their ability not only to maintain and improve the farm facilities (outbuildings, polytunnels, driveways, drainage, landscaping and soil) but also to manage the project of renovating and extending the farmhouse itself. They succeeded in renovating and extending the farmhouse at Linscombe but, unlike the farmhouse at Bidwell Barton, it was not Grade II Listed and they did engage outside contractors. They used contractors long before Mr Thomas' illness was diagnosed in January 2007, and spent over £70,000 on their services.

172. However, skills are not the main bone of contention. The question is whether the claimants could have afforded the cost, which is largely a materials issue, and could have spared the time. These two are linked inasmuch as, if they could not have spared the time, the only alternative was to engage outside labour and the cost of doing so might have made the work unaffordable.

173. The costings in Ms Kim's second and third supplemental reports are not challenged by either side. In her second supplemental report, Ms Kim reached the following conclusions. The cost of materials in 2008-2015 was £752,053 and would rise to £871,681 if the work was done in the second quarter of 2017. Taking account of various savings identified by the claimants in their evidence by way of change of scope of the works and/or re-using materials already available on site, the figure of £752,053 might be reduced to between £661,047 and £724,400 and the figure of £871,681 might fall to between £771,706 and £845,664. The labour cost in 2008-2015 was £598,363 and would rise to £693,412 if the work was done in the second quarter of 2017. Again, there were various potential savings for which Ms Kim was prepared to make allowance. The claimants suggested savings of labour cost by not carrying out certain works. They also gave examples of savings which could be made by carrying out the work themselves. Ms Kim applied her assessment of both these possibilities to the 2008-2015 labour cost figure, potentially bringing it down to between £572,342 and £586,603. She applied only the former to the 2017 figure because the claimants' case is that they cannot do any of the work themselves in 2017. This potentially brought the 2017 labour cost figure down to between £668,152 and

£684,800. Ms Kim assessed plant hire these as being £21,704 in 2008-2015 and £25,132 in the second quarter of 2017. The claimants claim a deduction of £2,500 from the latter sum for plant and equipment they say they would supply themselves.

174. The total of Ms Kim's costings (with potential reductions in brackets) is £1,526,289 (£1,385,926 to £1,482,874) in 2008-2015 and £1,760,989 (£1,631,176 to £1,730,687) for the second quarter of 2017. The two totals do not exactly equate to the sum of her figures for materials, labour and plant hire because she has also included in the totals an amount for professional fees and expenses and fees charged in connection with planning permissions and compliance with Building Regulations. The figures are £154,169 in 2008-2015 and £170,764 in 2017.

175. It is self evident from these figures that the claimants could not even have afforded the materials required for their Specification, let alone the labour to implement it. Their financial position would not have begun to improve from the burden of the fixed rates until the second half of 2010. Their financial position even then would have ruled out any real prospect of their being able to borrow on the scale required to cover the cost of all the materials and the improved cash flow from Loans 5 and 6 reverting to a variable rate would largely have been needed to sustain the business and avoid the losses and make the profits which are the subject matter of Head of Loss 2. If there was spare cash to fund any part of the Specification between 2008 and 2015, the recalculation of Head of Loss 2 is likely to show that it would not have been available before the end of 2012, when I have held that the remaining 20 acres of Linscombe would probably have been sold. In my judgment the works on which the claimants would have concentrated thereafter were those designed to improve the buildings and the infrastructure around the farm at Bidwell Barton, rather than those required to renovate the farmhouse.

176. Ms Kim remained sceptical in her reports that the claimants could have carried out the lion's share of the Specification between 2008 and 2015 by themselves and using farm labour. Her concern was as much about skills as capacity. The claimants initially conceded only that they would have incurred £30,608 of outside labour costs, all of them on specialist trades. The figure of £30,608, which the claimants have deducted from the 2017 labour cost figure of £693,412, as being a cost which they

would inevitably have incurred, is comprised of £13,639 for electrical works, £8,423 for plumbing and £8,546 for plastering. Most of this would have been for work done on the farmhouse. I regard the figure of £30,608 as an underestimate. Whilst I respect the claimants' undoubted abilities, I think the sum they would have spent on specialist trades between 2012 and 2015, if the cash was available, would have been nearer three times that figure. The farmhouse at Bidwell Barton is Grade II Listed and is a bigger project than the farmhouse at Linscombe.

177. The other aspect of the cost of labour is the time to spare. Mr Tomlinson's calculations in Head of Loss 2 assumed the employment of 2 additional staff who would be available for construction work. I have already said that I do not accept that either of the two office staff under consideration would have contributed to the building works. Subject to the recalculation of Head of Loss 2 proving otherwise, I do not believe that the counterfactual I have found would have allowed for the employment of more than one additional full time farm labourer in the period 2012 to 2015. Mrs Thomas produced a spreadsheet (Table 5) with her supplemental witness statement which purported to show how she and her husband, two horticultural workers and a maintenance man would have had available over 39,448 hours to devote to the works at Bidwell Barton in the 8 years between 2008-09 and 2015-16. Ms Kim makes a number of criticisms of Table 5 in her second supplementary report. I mention just two. The first is that the Table lists hours available, which is not the same as hours worked, which would tend to be less due to the efficiency and skill of the labour, logistics of the works and weather changes. An additional factor is that the earliest the counterfactual cuts in is June/July 2010 rather than 2008-2009 and, as I have already held, in practice it would not have been until the end of 2012 that the claimants would have had any spare financial or labour capacity for most of the works. The hours available would therefore have been far fewer. The second point made by Ms Kim is that the claimants acknowledge that the 39,448 hours would have cost the business at least £157,785 at pay rates for the maintenance worker and the two horticultural workers of between £8.69 per hour in 2008-09 to £10.38 per hour in 2014-15 (Mr and Mrs Thomas do not attribute a charge to their own labour). If one applied a labour cost of £15 per hour, which was about the rate for building labour in the period outside of specialist trades, the cost of the 39,448 hours becomes £591,720 which is very close to the external labour cost of £598,363 in Ms Kims' second

supplementary report. This strongly suggests that about 40,000 hours of labour would have been needed to accomplish the works in the Specification. I am not persuaded that the claimants had anything like that number of hours to spare themselves or within their workforce in the relevant period (2012-2015).

178. The claimants have failed to convince me that they could have completed the works in the Specification in the period of the counterfactual using no outside labour except for specialist trades. At the trial, Head of Loss 3 was presented on an “all or nothing” basis. There was no breakdown of the works into categories, some of which might have been done even if others could not. Mrs Thomas addressed the priorities in paragraphs 37 to 49 of her supplemental witness statement but these were not correlated to costs and time required. Some of the landscaping works in Phase 3 have in fact been done, whereas, as I understand the position, the polytunnel work in Phase 1 had not been completed by 2015. The burden of proof rests on the claimants to show that, with only fixed rates for two years rather than 10, there were works which they could have done at Bidwell Barton using their own labour which they were in fact unable to do because of lack of funds caused by the cash impact of servicing the fixed interest debt. They have not as yet discharged that burden, but they may yet be able to do so once Head of Loss 2 is recalculated and the findings in this judgment as to the counterfactual are taken into account. Since quantum was left at the conclusion of the trial on the basis that I would decide such points as I could and leave the parties and the experts to work out the consequences, I think it would be too harsh to dismiss Head of Loss 3 in its entirety. At best only a modest proportion of it has any chance of success. I will hear further argument about what that proportion might be if the parties cannot reach agreement.

<u>Market value</u>

179. Valuation evidence was prepared for the trial in the form of reports from Charles Huntington-Whiteley of Strutt & Parker for the claimants and from Mark Webb of WebbPaton for the bank. In the event neither valuer was called as a witness. The claimant’s report was dated 15 April 2015 while the bank’s report was dated 7 March 2016. It is unfortunate that there was so large a gap in time when current values of Bidwell Barton were being sought, but Mr Huntington-Whiteley had the

opportunity to bring his figures up to date in the joint statement, which followed the joint meeting on 25 April 2016.

180. The experts were instructed to provide a current market value of Bidwell Barton (1) in its existing state and (2) condition in which it would now be if specification of work had been carried out. They were also asked to provide a value of the whole of Linscombe Farm in October 2008 and a current value of the 20 or so acres which remain in the claimants' ownership. Their conclusions were as follows. Mr Huntington-Whiteley valued Bidwell Barton in its current (April 2016) state at £1,400,000. Mr Webb gave it a current value of £1,280,000. If the works in the Specification had been carried out, Mr Huntington-Whiteley's value increased by £850,000 to £2,250,000. Mr Webb's valuation increased by £670,000 to £1,950,000. Both assumed for these purposes that the farmhouse would be in a condition for someone to move in without further repairs and improvements being necessary, which is a rather higher standard than the works specified. Although not strictly relevant here, Mr Webb valued Linscombe Farm in October 2008 at £400,000, whereas Mr Huntington-Whiteley thought the offer from Mr Lee of £520,000 was a fair reflection of the market value. Mr Huntington-Whiteley put a current value of £175,000 on the remaining 20 acres. In this respect only Mr Webb's value was higher. He thought the remaining 20 acres was worth £195,000.

181. It will be seen that Ms Kim's total cost of implementing the Specification between 2008 and 2015 (£1,526,289) is almost double the increase in the market value of the property advised by Mr Huntington-Whiteley (£850,000) for a higher standard of finish than the Specification and that the amount claimed under Head of Loss 3 (£805,063) comfortably exceeds the increase in value put on the property by Mr Webb (£670,000) for that higher standard of finish. The bank says that it is not surprising in those circumstances that the claimants did not rely on their valuer's report at the trial and that Mr Webb's difference in value should be the maximum sum recoverable under Head of Loss 3 if all other objections to this Head of Loss are rejected. The claimants dispute that the difference in market value should represent a cap on their recovery because, they say, if the money had been available and not committed to servicing the fixed rates, it would have been spent on the works.

182. This is not a sufficient answer to the point that the bank is making. It is certainly true that property owners often spend more on their properties than the work adds to the property’s market value and that, when they decided to do the work in the counterfactual scenario, the claimants could not have known with precision how much it was going to increase the property’s value. The question is whether the claimants should be compensated for not having been able to do work which would not have added to the value of their property. I do not see why not if the necessity for the work can be justified. The same is true in the case of the repair of a defective or damaged property. The difference in market value of the property between its sound and defective state is not a limit on the cost of repairs where there is justification for the repairs being done. Work to improve the infrastructure of the farm was plainly justified because it would improve the efficiency of the business, increase the gross profit margin and boost sales. The increase in cost of doing that work at a later date should not be limited by consideration of property values. However the increase in cost of renovating the farmhouse, insofar as the original cost of the renovations would exceed any improvement in the value of the property is in my view not a cost which is the consequence of the misrepresentation or the breach of the information duty and not one for which the bank should be liable.

183. I am not sure at this juncture that the above conclusion has any practical impact in the present case for two reasons. The first is that I have heard no argument as to which of the two valuations is to be preferred. It is only Mr Webb’s valuation which affords the basis for a cap. Second, the claim under Head of Loss 3 is as high as it is only because the claimants are comparing the cost of the works in 2008-2015 using in-house labour with the cost of the works in 2017 using outside contractors. I am not persuaded that this is a fair comparison.

<u>Outside contractors</u>

184. On Ms Kim’s figures the difference in cost between 2008-2015 and second quarter 2017 is £234,700. The claim under Head of Loss 3 is £805,063 solely because the claimants concede very little for the cost of labour if the work had been done between 2008 and 2015 and insist that the work must now be done entirely by outside contractors. In my judgment this approach is open to a number of valid criticisms.

First, the comparison is distorted by the fact that a nil cost is attributed to the labour of farm workers because their salaries are taken into account as an overhead in Head of Loss 2. It should not be forgotten that even on the claimants' case their notional labour cost is £157,785. Second, it is not legitimate to claim the cost in 2017 of doing work which could not have been achieved in the counterfactual. Third, an award of damages is designed to place the claimants in the position they would have been in if the bank had not misrepresented how the fixed rates worked and/or had given adequate information about the financial implications of fixing and how clause 2.11 worked. The only reason why it is said that all of the work which has not been done must be done in 2017 by outside contractors is that the business has been slimmed down and the workforce on the farm cannot cope. But the business had slimmed down by the summer of 2010. In the counterfactual it is envisaged that new staff would have been recruited. It is only legitimate to claim the cost of the works in 2017 using outside contractors if the fact that the claimants will not have the spare capacity to do the job themselves is wholly due to the fault of the bank. Four years after the claimants stopped paying the fixed rates and well into the economic recovery from the recession, I am not persuaded that it is. The bank may be partly to blame for the present shape of the business but not entirely. In any case the shape of the business will change with the payment of damages under Heads of Loss 1 and 2 and will be in much the position, financially, that it would have been from the second half of 2010 to the end of 2015 in the counterfactual. In the circumstances I do not see why the claim under Head of Loss 3 should not be a claim for doing in house between 2017 and 2021 using their own labour to the extent possible what the claimants would have done in the counterfactual between 2012 and 2015.

Conclusion

185. I find the bank liable in misrepresentation and for breach of its information duty to the extent set out in this judgment. I do so with regret because the relationship between the claimants and the bank until the fixed rate loans were concluded, was a paradigm of how the relationship between a bank and a business customer should be. This is also not a case where the bank could be accused of trying to sell a product of doubtful suitability. There is no question of the bank having tried to profit from

switching the claimants' borrowing from a variable rate to a fixed rate. It was the claimants who wanted to fix their rates. They ended up doing so for far too long because the bank failed adequately to explain the financial implications of fixing and how the redemption charge worked. If, as may well be the case, this litigation has irrevocably soured the relationship between the claimants' "flagship enterprise" and the bank, that is a misfortune for them both.

186. I am conscious that I may not have answered all the points on quantum which the parties wanted me to. I therefore reserve all aspects of quantum not decided in this judgment for such further submissions as may be necessary following the handing down.