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CGL Group Limited v. Royal Bank of Scotland PLC
A3/2016/0731
WW Property Investments Ltd v. National Westminster Bank PLC
A3/2016/1438
Bartels v. Barclays Bank PLC
A3/2016/2706

Article by David Bowden

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Executive speed read summary

The Court of Appeal has heard an appeal in these 3 cases against 3 different banks. The banks' customers were all sold interest rate hedging products ('IRHPs'). In June 2012 the FSA (as it was then) announced the outcome of a review of IRHP sales stating that it had found shortcomings in over 90% of sales. To avoid enforcement action most banks entered into agreements with the FSA and gave it written undertakings. The banks agreed to appoint a '*skilled person'* under section 166 of the Financial Services and Markets Act 2000 ('FiSMA'). The skilled person (here it was accountancy firm KPMG LLP) was required to review the IRHP sales, approved all communications from the banks and report weekly to the FCA on progress. Most banks dragged their heels. In the 3 cases here redress was either eventually offered several years later or refused. In some of the sales, the primary limitation period of 6 years from the date of sale had expired. The customers claimed that the banks owed them an additional duty of care to conduct the past business review with sufficient care and skill. They claimed the banks had failed in that duty. The customers claimed that a new duty of care arose from either the date the bank agreed to carry out the past business review or the date of the redress letter. In 3 separate cases in the courts below, Judge Bird, Judge Roger Kaye QC and Judge Waksman QC respectively all struck out claims for compensation and consequential loss on the basis that the claims were time barred. The customers appealed and the 3 cases were ordered to be heard together. The Court of Appeal has now heard argument over 3 days as to why applying the prior case law it is right to extend the common law of negligence to impose an additional duty of care on banks to carry out FCA mandated past business reviews with a sufficient degree of skill and care. It has also heard submissions that the customers fall within a category of persons to whom that duty is owed and there is a lacuna in the scheme such that only by imposing this duty can the court ensure that banks actually do what they agreed to do with the FCA. The 3 judges made a number of interventions over the course of the 3 day hearing which, on the whole, were hostile to the banks and receptive to the bank customers. Judgement was reserved. It is unlikely to appear until after the new term starts in October 2017.

CGL Group Limited v. Royal Bank of Scotland PLC and National Westminster Bank PLC
WW Property Investments Limited v. National Westminster Bank PLC
Jacqueline and Adrian Bartels v. Barclays Bank PLC
A3/2016/0731, A3/2016/1438 and *A3/2016/2706* *20 - 22 June 2017*
Court of Appeal, Civil Division (Lords Justices McFarlane, Lewison and Beatson)

What are the interest rate hedging products (IRHPs) and their main features?
There are these 3 main IRHPs:

- **Cap**,
- **Colla**r, and
- **Swap**.

Cap
A customer pays a fee (often a set-up fee plus a periodic quarterly/monthly one too) to a bank for a cap. In return, the customer was meant to benefit from the security of knowing that the interest rate on their borrowing(s) would never rise above a certain level (the cap). If base rates fell, the customer benefitted from that lower variable rate. For caps taken out in 2004-7 for long term loans, and with the benefit of hindsight, the caps have proven to be a complete waste of money since Bank of England Base rates fell to 0.5% and beyond. These are often referred to as '*vanilla*' IRHPs.

Collar
Again a customer pays a fee to a bank for a collar. These products would set a floor rate of say 4%. Customers benefit from the security of knowing that fluctuations in the interest rate on their variable rate interest borrowing(s) would only vary in a simple range. Customers who bought a collar with a very low floor rate of say 1% have, with the benefit of hindsight, entered into a very good deal. There was a more complex variant called a structured collar which allowed a customer to limit interest rate fluctuations to within a specified range but leaving the customer vulnerable to interest rate rises. Often (but not always) a collar would be combined with a cap.

Swap
This product allowed a customer to 'swap' the variable rate payable on their borrowings in the market with a counterparty with similar borrowings but who was paying a fixed interest rate. Again a fee was payable. Customers who swapped in 2004-7, will have swapped for a fixed interest rate which would be at a

premium to the then prevailing bank base rate or LIBOR. When bank base interest rates fell to 0.5%, these customers would still be paying that higher fixed interest rate. These have proved to be the most toxic.

LIBOR

Some of the IRHPs are further tainted because the rate charged on the loan was linked to LIBOR (London Interbank Offered Rate) which it now seems to be conceded was rigged.

What is MiFID? When did it come into force?

The Markets in Financial Instruments Directive **2004/39/EC** ('MiFID') is an EU wide piece of legislation that came into force on 30 April 2004 and had to be implemented by the UK by 1 November 2007. MiFID required banks to:

- **Categorise** clients as '*eligible counterparties*', '*professional clients*' or '*retail clients*',
- **Handle** client orders in a certain way including ensuring
  - it has captured information on clients when accepting orders,
  - that a firm is acting in a client's best interests,
  - orders from different clients are aggregated correctly
- **Pre-trade transparency.** It requires that operators of continuous order-matching systems must, for quote-driven markets, make the best bids and offers of market makers available.
- **Post-trade transparency.** It requires firms to publish the price, volume and time of all trades in listed shares, even if executed outside of a regulated market (unless certain requirements are met to allow for deferred publication)
- **Best execution**. It requires that firms take all reasonable steps to obtain the best possible result in the execution of an order for a client. This best possible result is not limited to execution price but also includes:
  - cost,
  - speed,
  - likelihood of execution,
  - likelihood of settlement, and
  - any other factors deemed relevant.

Why is MiFID relevant to these claims?

Most of the sales in these 3 cases were covered by the MiFID requirements. In addition to a general common law duty of care on a bank when advising clients to buy IRHPs, the bank has specific duties under MiFID. Where these MiFID duties are not fulfilled to the correct standard, customers can claim in addition for breach of statutory duty. Many customers sold IRHPs claim a bank did not categorise them as retail clients but wrongly classified them as professional clients to which a lighter touch regime applied.

What happened after the financial crash?

By February 2004, the Bank of England Base Rate was 4%. It then rose and peaked at 5.75% on 5 July 2007. A series of rate cuts followed and on 5 March 2009 base rate was cut to an unprecedented low of 0.5% where it remained for over 7 years. On 4 August 2016 the rate was slashed even further to 0.25%. Before this the previous lowest bank base rate in the UK had been 2% in 1939 when war was declared.

Barclays Bank turned to a Qatari sovereign wealth fund in June and November 2008 to raise additional capital. The Royal Bank of Scotland (which included National Westminster Bank) was bailed out by the UK tax payer and came into public ownership on 13 October 2008 in whose ownership it still remains to this day. Customers holding caps and swaps were left paying interest rates far in excess of base rates. Banks called in the loans and/or sought to close them out charging breakage fees where notional values of caps, collars or swaps were broken.

What reviews did the FSA carry out?

The FCA's predecessor in title (the FSA) carried out a review into the sale by regulated firms of IRHPs. On 29 June 2012 the FSA announced **FSA/PN/071/2012** that it had found '*serious failings*' in the sale of IRPHs to small and medium sized businesses by banks. The FSA also found a number of '*poor sales practices*' such as:

- poor disclosure of exit costs,
- failure to ascertain a customer's understanding of risks,
- non-advised sales straying into advice,

- '*over hedging'* where the amounts and/or duration did not match the underlying loans, and
- IRHP sales practices being driven by a bank's reward and incentive remuneration to its front line sales staff.

The FSA found that 90% of the sample of the sales that it looked at were non-compliant.

What did the banks agree with the FSA in relation to reviewing past Swaps sales?
At the same time as announcing this review outcome, the FSA stated it had reached agreement with most (but not all) banks that they would each review sales of IRHPs to '*non sophisticated'* customers made after 1 December 2001 (being the date the FSA assumed its powers under the Financial Services and Markets Act 2000). The FSA said that banks would '*provide appropriate redress where mis-selling has occurred*' and that each bank's review would be '*scrutinised by an independent reviewer and be overseen by the FSA*'.

The FSA had the option of taking formal enforcement action against banks (which would, if successful, result in a substantial financial penalty) but where a bank agreed with the FCA to conduct an IRHP review, then it was implicit that no such enforcement action would be taken.

Each bank had to give the FSA an undertaking too confirming that the IRHP review would be conducted in accordance with the terms set out in the annex to its 29 June 2012 document. The banks agreed to review past sales from 1 December 2001 (being the date the FSA obtained its new/extended powers under FiSMA). The FSA set out these categories of '*non-sophisticated'* IRHP customers:

- **Category A** – customers sold structured collars,
- **Category B** – customers who had been sold neither structured collars nor caps, and
- **Category C** – customers sold caps

What agreements did the banks enter into with the FSA?
To achieve the aims of the review, the FCA drew up terms of a draft agreement that it proposed that each firm who wished to take part in the IRHP review and avoid enforcement needed to sign. At the hearing Lord Justice Lewison asked whether it was assumed that all banks entered into this agreement and counsel for CGL said it was not suggested otherwise.

What is a '*skilled person'*? What role are they meant to play?
Under section 166 of FiSMA 2000 ('*Reports by skilled persons'*) the FSA (now FCA) may by written notice to a firm, require it to provide the FSA with a report on any matter about which the FSA '*has required or could require the provision of information or production of documents under section 165'*. Section 165 gives the FSA power to require a regulated firm to provide '*provide specified information or information of a specified description*' or '*produce specified documents or documents of a specified description'* and that these documents or information are to be provided '*before the end of such reasonable period as may be specified'*.

What criticisms have been made of '*skilled persons'*?
All 3 banks here appointed the accountancy firm KPMG as their skilled person. At the hearing it was said KPMG had 400 staff working on IRHPs reviews. Pausing there, it has to be asked whether an accountancy firm is an appropriate skilled person at all. These IRHPs would need to examine interest rate figures or projections as well as loan payments and an accountancy firm is well placed to do this. However the IRHP needs to examine sales practices and this would need someone skilled in banking sales practice and/or those with specialist compliance knowledge of the FCA Handbook, MiFID and the Conduct of Business Rules.

KPMG currently audits the accounts of Barclays and until 2015 audited HSBC's accounts. Other accountancy firms such as PWC, EY and Deloittes have audited the accounts of major banks in the past. Some have expressed concern that when undertaking their regular annual audits these accountancy firms appeared not to have picked up on any issues on IRHPs prior to the FSA review. This had led to a loss of confidence in KPMG, for example, for those affected by IRHP mis-selling. It may have been better for the FCA to have selected as a skilled person a firm which came to this with a fresh pair of eyes who can have applied an independence of mind and was free from any hint of a conflict of interest.

The skilled person here was meant to approve every communication the firm sent out about IRHPs. It was also said at the hearing that KPMG had to report weekly on progress to the FCA but in what format, in what detail or whether that is achieved is not clear. It is not clear what the FCA does with these skilled persons reports or whether they are simply filed away unread with no active oversight taken on them at all.

The overarching criticism made of '*skilled person'* reports in these IRHP cases is that their scope is so narrow being limited to an oversight of the process adopted by the bank. It is said that the skilled person has not really scratched the surface and made any or any proper investigation. It is also said that although the skilled person report is prepared in the name of a prestigious firm such as KPMG, in reality any investigation and report is conducted by a junior and/or unqualified person to render such a report effectively worthless.

Finally at the hearing it was conceded how worthless the skilled person's oversight had been. Although an employee at the skilled person had conducted an IRHP and drafted a recommendation including a redress figure that was predominantly on the basis of a paper sift of the firm's records in a manner that the Financial Ombudsman Service ('FOS') does when investigating a complaint. For example in *O'Hare v. Coutts* **[2016] EWHC 2224 (QB)** (which did not concern IRHPs) it was clear that the bank's paper records in that case only provided half the picture with frequent off-site meetings (which do not appear to have been documented) taking place at a customer's premises or hotel or golf course in which sales '*persuasion*' techniques were applied in order to get a customer to '*buy*' a financial product. However what had often happened was the reverse with customers having been '*sold*' a product sometimes following a hard sell process.

Although the FSA said that a customer should have access to a skilled person, in practice this has been thwarted by access limited to both telephone access and/or to a very junior or unqualified member of the skilled person's firm. A customer receiving a decision letter can challenge the outcome but it is only at that point that a skilled person has to produce reasons (said to be detailed) justifying both the outcome and the amount of any redress. In a nutshell affected customers say the skilled person review is all upside down.

What is the connection between these 3 cases and *Holmcroft Properties*?
The common thread is that the '*skilled person'* in both court cases is KPMG. At first instance, Lord Justice Elias and Mr Justice Mitting J on 24th February 2016 sitting in the Divisional Court **[2016] EWHC 323 (Admin)** dismissed an application for judicial review by Holmcroft Properties. Holmcroft said that although KPMG was a private company, in producing a '*skilled person'* report it was exercising a FCA delegated function under s166 of FiSMA. The Divisional Court disagreed but it said it that it had '*<u>not found this question to be easy to resolve</u> but ultimately we consider that KPMG's duties do not have sufficient public law flavour to render it amenable to judicial review*'.

Holmcroft Properties is under appeal and will be heard by the Court of Appeal over 2 days on 19/20 December 2017.

What recommendations did the skilled person make on the sales in these 3 cases?

<u>CGL</u>

- **Collar** – the bank offered redress of £139,651.29 being a sum representing the difference between the cost of the collar bought and a 'vanilla' interest rate cap, and
- **Swap -** no redress offered

<u>WW Properties</u>

For the 3 collars and the swap, redress of £424,152.06 was offered.

<u>Mr & Mrs Bartels</u>

No redress was offered at all.

What did the bank customers do when the received their decision letters on redress?

<u>CGL</u>

It did not push back with either the bank or skilled person but issued proceedings instead

<u>WW Properties</u>

It challenged the redress offer in respect of 1 of the collars which was then re-assessed by the skilled person. It then accepted the redress offer of £424,152.06

Mr & Mrs Bartels

Although they sought to push back with the bank and skilled person, this was to no avail and they then issued proceedings

What causes of action do customers who were mis-sold these products have against the banks?

The customers have these potential claims against the bank:

- Common law negligence in selling the IRHPs,
- Breach of contract,
- Misrepresentation,
- Breach of statutory duty under FiSMA, MiFID or the FCA's Conduct of Business rules.

When did these causes of action expire?

On the basis that these claims are brought in contract ordinarily causes of action will expire (unless an exemption applies) after 6 years. On this basis the primary causes of action expired as follows:

CGL

- 19 July 2012 for the collar, and
- 16 April 2013 for the swap.

WW Properties

4 separate dates for each product between 2010 and 2017 respectively.

Mr & Mrs Bartels

A date in 2012.

It should be noted that the Bartels' loan was made to their business – Gwenllian Court Hotel Limited – which went into administration in 2010 and was dissolved in October 2012. The company was however restored to the register in April 2015 on the application of Mr & Mrs Bartels to enable them to pursue a mis-selling claim against the bank.

Can customers claim more time on the basis they have suffered latent damage?

The Law Reform Committee issued its 24th Report on '*Latent Damage'* in 1984 (**Cmnd 9390**). The Committee was invited to prepare a report in the wake of judicial concerns at the operation of the limitation period in cases where the tort of negligence gives rise to damage which becomes apparent or discernible many years after the breach of duty involved. In cases of negligence this specifies a limitation period of 6 years beginning with the date of accrual of the cause of action. These recommendations were swiftly accepted by the Westminster Parliament when the Latent Damage Act 1986 received Royal Assent. This inserts a new section 14A into the Limitation Act 1980 which allows a claim to be brought within 3 years of the date of discovery of facts relevant to a cause of action which were not known at date of accrual subject to an overall longstop limitation period of 15 years.

What are standstill agreements? Did any customers enter into these?

In professional negligence cases, for example, those advising surveyors who are facing a claim that they overvalued a property in a valuation report on which a lender relied before advancing money on the basis that a property offered adequate security often enter into stand still agreements. In these cases a lender will need to bring a negligence claim within 6 years of the date of the report. However the lender may not know if it has suffered a loss or, if so, what is the amount of that loss. To that end the lender and valuer enter into a standstill agreement under which the lender agrees to waive reliance on a 6 year limitation period in any future negligence claim.

It does not appear that any of the 3 claimants here entered into standstill agreements. They all agreed to an IRHP review by a skilled person not knowing how long it would take even though they knew the limitation clock was ticking. It seems that the banks further exploited the naïvety or vulnerability of these customers. Perhaps the banks could not believe their luck and knew it had these customers over a barrel knowing they would be forced to accept any offer (even a low ball one) as the customers then had no other redress route open to them.

How do the customers say a further cause of action arises? From what date does this run?
The customers submit on this appeal that the bank in conducting the IRHP review owed them a duty of care to carry out such a review exercising appropriate care and skill as would be expected from a bank and/or expert professional accountants. They submit the banks have failed in this duty. There is some ambiguity about the date it being either the date the bank agreed with the FSA to carry out a review or (if later) the date of any decision letter offering or refusing redress.

What are the facts of the CGL case?
CGL bought 2 financial products from the bank in July 2006 and April 2007:

- a base rate collar trade, and
- an amortising base rate swap,

Both of these products had since been closed out after a steep fall in bank base rates.

The FSA later conducted a review into the sale of IRHPs and in 2012 set up a redress scheme to compensate certain qualifying customers to who has been mis-sold these products. The FSA and the bank entered into a settlement agreement entered by which the bank agreed to conduct a past business review. This agreement stated that a person who was not a party to the agreement (for example, a bank customer) would have no right to enforce it whether in contract or otherwise. The bank informed CGL in 2013 that it fell within the parameters of the review and that it qualified for redress in respect of the collar product but not in respect of the swap product.

The aim of the agreement was to ensure that redress was provided to affected customers. The claimant commenced the substantive proceedings alleging that there had been mis-selling in that the bank had failed to provide the required advice in breach of a duty of care to do so.

What are the facts of the WW Property case?
Between 2004 and 2010 WW Property borrowed money from NatWest, with interest to be paid at a percentage above NatWest's base rate. It was a term of the loans that they should be hedged and the parties entered into 4 interest rate hedging contracts:

- The first 3 were '*collars*' whereby if NatWest's weighted average sterling base rate for each calculation period exceeded a certain amount NatWest would pay WW Property under the instrument but if the rate dropped below a certain level WW Property would pay NatWest, and
- The 4th was a '*swap*' agreement under which WW Property had a fixed rate of 4.4% and NatWest had a floating rate of one month sterling LIBOR.

Rates dropped in 2008, so that the agreements were disadvantageous to WW Property. In 2013, following the FSA's intervention, NatWest carried out an IRHP review. In 2014 both sides entered into a compromise agreement in respect of the collars under which WW Property received compensation of £424,152.06 from NatWest. The settlement provided that it was full and final subject to WW Property being able to claim consequential losses.

What are the facts in the Bartels case?
The Bartels were the directors and shareholders in a company which owned a hotel acquired in 2006 with a mortgage from the bank. One of the conditions of the loan was that the company should obtain interest rate protection on the full loan amount. The company arranged an interest rate hedging product. The company went into administration. The bank agreed with the FSA to review its past swap sales and to provide redress to customers where mis-selling had occurred. It accepted that there had been mis-selling and made an offer of redress which it intended to apply in reduction of the company's indebtedness.

What relief did the CGL borrowers seek in the court case?
In January 2015 CGL issued proceedings against the bank claiming that both products had been mis-sold. The bank applied to strike out the claim and for summary judgment in the alternative on the grounds that the claims were made too late. CGL then applied to amend its particulars of claim to include a claim for:

- breach of a duty of care by the bank to conduct the sales review in accordance with the undertakings given by it to the FSA,
- breach by the bank to conduct the sales review in accordance with the methodology agreed with the FSA,

- failure to provide CGL with appropriate, fair and reasonable redress, and
- failure to conduct the review with reasonable care and skill

The bank submitted that all these allegations were statute-barred under the Limitation Act 1980 as they were over 6 years old. The bank submitted that CGL had been fully aware of the facts behind the claim by November 2009 before the publication of the review. The claimant, conceded that the limitation period had expired, but instead relied on the '*date of knowledge'* provisions in section 14A of the Limitation Act 1980 and submitted that it did not acquire the relevant knowledge until June 2012 when the media published reports of the FSA's review.

What relief did WW Property seek in the court case?
WW Property sought compensation for consequential loss arguing that the collars and swap were wagering contracts at common law and were invalid because NatWest had greater knowledge than WW Property of the prospects for the hedge and more favourable chances. WW Property also claimed that it was an implied term that NatWest had not and would not manipulate any LIBOR index.

What relief did Bartels seek in the court case?
The Bartels brought proceedings in their own name against the bank for:

- misrepresentation,
- negligence, and
- breach of statutory duty.

They also alleged breach of a duty of care owed to them and the company under the swap review. It was common ground that the limitation period of all the claims had expired. The bank argued that the existing and proposed claims had no real prospect of success so that the existing claim should be struck out and the proposed claim should not be added by way of amendments since it would be pointless.

What did HHJ Bird rule below in CGL?
In a short judgment dated 12 January 2016 Judge Bird refused to grant the borrowers permission to amend their pleadings **[2016] EWHC 281 (QB).** Judge Bird granted the bank's application to strike out CGL's claim. Judge Bird ruled that CGL's claim as presently drafted form was statute-barred. He ruled that the only issue was whether the amendment would pass the summary judgment test and that the factual context in which the duty was said to arise was of central importance.

Judge Bird ruled there was no dispute as to the factual background because the evidence was not contradicted and no point in submission was made against any part of it. He said that he had the benefit of the full regulatory picture before him and there were no factual gaps. Judge Bird ruled that no duty of care could arguably be said to arise against the bank. He said the bank could not be treated as having taken on a duty of care when it had expressly excluded the possibility of it doing so. Further it was not just or reasonable to impose a duty of care in circumstances where such imposition would undermine a clearly defined statutory scheme.

What did HHJ Roger Kaye QC rule below in WW Property?
On 1 March 2016 HHJ Roger Kaye QC struck out WW Property's claims in respect of the collars by reason of the compromise agreement and held that the swap claims had no reasonable prospect of success **[2016] EWHC 378 (QB)**. He also refused to allow an amendment to the pleadings by WW Property introducing a claim for breach of duty of care.

What did HHJ Waksman QC rule below in Bartels?
On 19 May 2016 HHJ Waksman QC struck out all of the Bartels' claim against the bank **[2016] EWHC 1360 (QB)**. He ruled that there was no real prospect of a successful waiver argument and as a result the Bartels were refused permission to join the company to make misrepresentation and breach of statutory duty claims. Although the failure of the waiver point also affected the intended claim in negligence by the company, Judge Waksman ruled that this would not have prevented it from being a viable claim and then being joined if there was a viable extension of limitation pursuant to the section 14A of the Limitation Act 1980 at the date of issue and the company could satisfy the requirements of CPR rule 19.5.

On what basis was permission granted for an appeal?
Following an oral permission hearing, on 29 November 2016 Lords Justices Briggs and Christopher Clarke granted WW Properties permission to appeal **[2016] EWCA Civ 1142.** They also ordered the WW Property appeal to be listed at the same time as the CGL appeal. In a lengthy judgement they refused permission to appeal on the basis that the swaps were illegal wagering contracts with Briggs LJ noting that having '*heard (and read) submissions on the wager issue of at least the length which would ordinarily have been permitted on the hearing of a full appeal, albeit only from one side'* that the judgement would '*finally lay to rest this ingenious but misguided heresy, so that no further time or money will be wasted on it*.'

However Christopher Clarke LJ granted permission to appeal to WW Properties to amend its claim to allege that NatWest owed it a duty of care to carry out the IRHP review '*diligently, and to take proper account of all the evidence affecting WW's entitlement to redress as provided for by the terms of the Review, taking account of NatWest's compliance with the Sales Standards'*. He noted that WW Properties alleged that NatWest failed '*to consider adequately or at all evidence as to its own breaches of its Sale Standards*.' He ruled that there was in his '*view a reasonable prospect of establishing that NatWest owed WW a duty of care of the type relied on'*.

Who acted in this case in the Court of Appeal?
Dentons UKMEA LLP is the instructing solicitors for all 3 banks in all 3 cases and they turned to counsel exclusively from Fountain Court chambers in London for representation.

Below Mr Steven McGarry of St Johns Buildings in Manchester acted for the CGL borrowers instructed by Myerson Solicitors LLP of Altrincham. He was led in the Court of Appeal by Mr Richard Edwards QC of specialist banking chambers 3 Verulam Buildings in Gray's Inn, London. Below Ms Tamara Oppenheimer acted for RBS but for the appeal she was led by Mr Andrew Mitchell QC.

Both below and for the appeal Professor Julian Roberts of 10 Old Square, Lincoln's Inn acted for WW Property instructed by Duffi Fowler Gabbi, Solicitors, in Hebden Bridge, West Yorkshire. Mr Andrew Mitchell QC and Mr Adam Sher appeared for Nat West.

Below Mr James Hatt of 4 Pump Court, Temple, London acted for Mr & Mrs Bartels. He was led in the Court of Appeal by Mr Nicholas Vineall QC also of 4 Pump Court. Mr Patrick Goodall QC led Mr Ian Bergson for Barclays.

What were the grounds of appeal?
These are the grounds of appeal:

<u>CGL</u>

- In applying the principle of judicial comity or precedent, Judge Bird erred in not following the decision of HHJ Havelock-Allan in *Suremine Ltd v. Barclays Bank PLC* **[2015] EWHC 2277 (QB),**
- Judge Bird erred in finding that there was no real prospect of success that CGL would establish the bank owed it a duty of care to conduct the IRHP review with reasonable skill and care,
- Judge Bird erred in finding that there was no real prospect of success that CGL would establish a duty of care in accordance with the principle in *White v. Jones*,

<u>WW Property</u>

- The bank owed it a duty of care in conducting the IRHP review, it breached that duty and thereby caused WW Property loss and damage

<u>Mr & Mrs Bartels</u>

- Whether the bank owes them a duty of care in carrying out the IRHP review,
- Whether that duty was breached, and
- Whether their restored company (Gwenllian Court Hotel Limited) should be allowed to be joined to their claim.

What does the Limitation Act 1980 say?
This was amended by the Latent Damage Act 1986 and now provides as follows:

'**Section14A Special time limit for negligence actions where facts relevant to cause of action are not known at date of accrual.**

(1) This section applies to any action for damages for negligence, other than one to which section 11 of this Act applies, where the starting date for reckoning the period of limitation under subsection (4)(b) below falls after the date on which the cause of action accrued.

(2) Section 2 of this Act shall not apply to an action to which this section applies.

(3) An action to which this section applies shall not be brought after the expiration of the period applicable in accordance with subsection (4) below.

(4) That period is either—

(a) six years from the date on which the cause of action accrued; or

(b) three years from the starting date as defined by subsection (5) below, if that period expires later than the period mentioned in paragraph (a) above.

(5) For the purposes of this section, the starting date for reckoning the period of limitation under subsection (4)(b) above is the earliest date on which the plaintiff or any person in whom the cause of action was vested before him first had both the knowledge required for bringing an action for damages in respect of the relevant damage and a right to bring such an action.

(6) In subsection (5) above "the knowledge required for bringing an action for damages in respect of the relevant damage" means knowledge both—

(a) of the material facts about the damage in respect of which damages are claimed; and

(b) of the other facts relevant to the current action mentioned in subsection (8) below.

(7) For the purposes of subsection (6)(a) above, the material facts about the damage are such facts about the damage as would lead a reasonable person who had suffered such damage to consider it sufficiently serious to justify his instituting proceedings for damages against a defendant who did not dispute liability and was able to satisfy a judgment.

(8) The other facts referred to in subsection (6)(b) above are—

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

(b) the identity of the defendant; and

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

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

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

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

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

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

What submissions did CGL Limited as appellant make?
CGL took the court firstly to the IRHP products, then to a history of the FSA review and the skilled person's reports. Sensibly the leader for the appeal took a couple of steps back from the way the case was presented below. Below the focus had been on whether the claims were time-barred or not. However the logically prior issue to determine is whether there is a new cause of action that arises in relation to the manner in which the bank with its skilled person carried out the IRHP review. So the focus at the hearing was on the scope of this claimed duty as well as submissions to the effect that the bank had breached that duty.

Its written submissions can be summarized as:

- The Court of Appeal should endorse the *Suremine* approach that the cause of action in relation to the conduct of the IRHP review is at least arguable,
- The bank voluntarily assumed responsibility to CGL in carrying out review such that the relationship between them was 'akin to contract' so that the duty of care the House of Lords found existed in *Customs* applied here,
- Customers were encouraged by the bank to opt-in to the IRHP review and discouraged from involving independent advisers,
- It is 'fair just and reasonable' to impose an additional duty of care on the bank that it would carry out the IRHP review to a requisite standard of care,

- The IRHP review was intended to confer a benefit on customers where the standards in that review were set at a higher level than in the FCA's COBs rules made under FiSMA 2000,
- Clause 9 in the bank's IRHP review agreement which ousts any liability in contract to CGL under the Contracts (Rights of Third Parties) Act 1999 is irrelevant to a claim in tort,
- The situation is analogous to *Smith v. Bush* where a staff valuer was held to owe a duty of care in tort to a mortgage customer who had paid for the valuation report,
- Imposing a duty of care would not subvert the contractual structure between the bank and CGL on the one hand, the bank and the FCA on the 2nd hand and the bank and its skilled person on the 3rd hand,
- The FSA had powers under FiSMA 2000 to compel the banks to pay compensation (either by a consumer redress scheme under section 404 or a restitution scheme under sections 382/384) but these were not apt to achieve the desired result. The FSA instead chose to extract an undertaking to carry out an IRHP review instead and in lieu of enforcement action,
- In engaging in the IRHP review the bank was not engaged in an enforced regulatory process but rather was fulfilling the terms of a voluntary and bespoke agreement it had chosen to give to the FSA,
- The recognition of this new duty of care is not inconsistent with Parliament's view that only 'private persons' should have a right of action to bring a damages claim arising out of a firm's breach of the FCA rules,
- It is right to lay the duty on the bank and not its skilled person because:
  - the skilled person was expected to spend less time on a review than a bank,
  - on the facts there had been a low level of engagement by the skilled person given the inconsistency between the determinations and absence of reasons to justify them,
  - the skilled person had no direct relationship with the customer, and
  - as the FSA's section 166 notice makes express reference to the bank's 'responsibilities to customers', it would be surprising if its effect was to relieve the bank of those responsibilities.
- Even though a claim for a product sale may be time barred this is entirely irrelevant to a claim in negligence for a bank which has failed to carry out the IRHP review.

What additional submissions were made on behalf of WW Properties?
Of the 3 appellants, these submissions were the weakest and least detailed. Their counsel had been assisting under the Bar's pro bono scheme but it would have benefited from input from a leader for the appeal. The additional points made were:

- Whether the *Caparo* or *Hedley Byrne* tests are applied the bank assumed a responsibility to these customers in the IRHP review,
- The customer is not a party to the agreement on the IRHP Review made between the bank and the FSA, and
- The situation is analogous to the disappointed beneficiary in *White v. Jones*.

WW Properties also put in a supplementary skeleton argument and this was amplified in oral submissions although McFarlane LJ was frustrated to the long factual outline and where it was heading. McFarlane LJ was also skeptical about some of the submissions regarding them as a device to try and argue by the back door issues on which permission had been refused. These submissions focused on swaps highlighting:

- a swap is a contract for differences being a bet on the future course of a market index,
- a fixed rate in a swap is not actually fixed but rather it is netted so that only 1 payment is made,
- a swap has an 'infinite risk' because there is no limit to the amount of money that might be won or lost and the market rate on any due date could in principle be infinite,
- the interest of a bank and customer are diametrically opposed.
- a swap introduces its own free-standing risk so that where there is a mis-match this will lead to an overhang,
- the conditions for WW Properties to terminate its loan did not (exactly) correspond to the conditions for terminating the swap,
- the covenants on the loan could be breach allowing the bank to terminate or restructure the loan without giving rise to a corresponding obligation by WW Properties to withdraw from its hedge,

- there is no material difference to 'vanilla' swaps and 'exotic' derivatives such as collars. A customer such as WW Property does not have access to all the market data from Bloombergs, Reuters and the like to be able to assess the risk,
- instead of mitigating the effect of commercial turbulence, a hedge increased the risks to WW Properties instead,
- *caveat emptor* should not apply because there had been no delivery of anything by the bank to WW Properties,
- the bank had breached various of the FCA sales standards set out in COBs especially in relation to:
    - ➢ break costs,
    - ➢ term mismatch, and
    - ➢ providing alternative solutions
- it was the bank's duty to ensure that WW Properties properly understood what it was entering into, and
- the bank's disclosure of costs – either initial or break costs – was entirely inadequate.

What additional submissions were made on behalf of Mr & Mrs Bartels?
Although the skeleton argument was settled by Mr Hatt, Mr Vineall QC saved up some excellent material for his oral submissions which he deployed to very efficient effect during the course of his concise but brutal and damaging submissions. The written submissions make these additional points:

- In rejecting the claim, the bank only gave the Bartels 40 days to submit documents or evidence in support of a consequential loss claim even though it procrastinate for 2 years before it made any offer at all,
- The Bartels asked for more time from the bank but this was refused but this too breached the terms of the bank's agreement with the FSA by which it had agreed to allow:
    - ➢ appropriate time to consider redress proposals and to take advice,
    - ➢ seek to accommodate its customer's timetable
- Stage 7 of the methodology agreed by the bank with the FSA states that once a skilled person has agreed a redress proposal, a client engagement team '*will seek an opportunity to meet with the client and discuss & present the proposal*' but this did not happen with the Bartels,
- The bank's wrongful acts pushed the Bartels' business into insolvency, and
- In the general run of matters a customer (by applying the *White v. Jones* principle) has a cause of action against a bank.

Mr Vineall's oral submissions made these points:

- Because of the agreements the bank made and the undertakings it gave to the FSA, it owes a duty of care to the Bartels' business,
- The obligation on the bank in carrying out the IRHP review was to
    - ➢ carry out the review to determine sum of money due, and
    - ➢ pay that sum to the customer
- This is not a negligent mistake case like *White v. Jones*,
- The bank's submissions in its skeleton argument are inconsistent with those it made to the court in *Holmcroft Properties* where its counsel (Dinah Rose QC) accepted that the bank owed a duty to provide sufficient reasons as to why a claim had been rejected,
- The situation in *Green v. Rowley* can be wholly distinguished,
- FOS has a '*strange*' jurisdiction where it is limited to complaints either from private individuals or micro-enterprises (with less than 10 employees and an annual turnover under £2million) and it can only order redress of up to £150k. This FOS scheme causes real problems for small businesses such as the one owned by the Bartels,
- Under FiSMA 2000 the FSA could have:
    - ➢ imposed a financial penalty on the lender under section 206,
    - ➢ ordered restitution under sections 382/384, or
    - ➢ made a consumer redress scheme under section 404.

  However these were all '*lesser alternatives'* which is why the FSA made the agreements it did with the banks in relation to the IRHP reviews,
- Where an IRHP review scheme goes wrong:
    - ➢ if *Mazarona Properties* is correctly decided, a customer cannot complain to FOS,

  - it is unrealistic for a firm's customer to go back to the FCA to complain about the review,
  - it is very difficult for that customer to compel the FCA to do something
- As to *Holmcroft Properties* there is a real lacuna here because where the terms of the IRHP are breached by a bank, and there is a public law challenge to the skilled person's review, it remains open to the FCA to say it is not *Wednesbury* unreasonable to take no steps against a bank,
- When Barclays entered into its IRHP agreement with the FSA, this agreement was both voluntary and calculated for its own selfish benefit,
- When the bank entered into such an agreement it voluntarily assumed responsibility to its IRHP customers,
- On the *Caparo* test:
  - it could hardly be more proximate,
  - it is a 'no brainer' and 'easy tick' to say it is foreseeable customers would suffer loss if the review is not carried out properly, and
  - it is 'fair just and reasonable' to impose a duty because:
    - imposing a duty will **never** lead to a bank paying more that it envisaged it would pay – there is no question of imposing indefinite liabilities, and
    - **only** by imposing a duty of care will there be **effective enforcement** of the bank's agreement with the FSA
- The tripartite analysis in *White v. Jones* is both useful and applicable here. Applying it here will '*do practical justice'*.
- There would be a real injustice if customers had suffered loss in a IRHP review but had no claim,
- *White v. Jones* recognized the important role solicitors play in society but banks have important roles in society too in providing finance to SMEs,
- There is a strong public interest in ensuring that banks should do what they have agreed with their regulator that they will do,
- A customer does not need to show reliance for a duty of care to exist (*Hedley Byrne*),
- This is a bipartite situation (unlike *White v. Jones*) and there is no 'doubling up' of claims (as the solicitor could have with disappointed beneficiaries),
- The skilled person used by the bank is irrelevant to the question of a bank's tortious liability to its customer (*Anns v. Merton* and *Murphy v. Brentwood*),
- Although a skilled person ought to make it less likely that a bank will not comply with its duties in a IRHP review, there is a conflict of interest where customers sign up agreeing to participate in the review. The bank wants to '*have its cake and eat it'*,
- Nobody other than the FCA can enforce the agreement made between it and the bank but the bank provided the FCA with an undertaking. What has gone wrong here is that the banks have not complied with the terms of these undertakings,
- The bank's assertion to its customers about only having 40 days to respond to its offer was 'false'.
- The bank had to behave reasonably and:
  - perform the IRHP review with reasonable skill and care,
  - comply with the undertakings it gave to the FCA, and
  - this had to be seen within the prism of '*treating customers fairly'*
- The bank gave its IRHP review the name Project Violet. It agreed a methodology for the review with the FCA. The bank has to behave reasonably and comply with this.

What submissions did the RBS as respondents make?
The main skeleton argument was submitted on behalf of RBS in CGL. A shorter one was submitted on behalf of National Westminster Bank on WW Properties. These 2 banks are in the same corporate group. The WW Properties' skeleton makes a number of points about the facts of that case which are not set out here. The main RBS skeleton deals with the wider issues as to a duty of care. It has to be noted that the language in these skeleton arguments is slanted referring frequently to the customers having bought or purchased IRHPS. This is of course not the case at all as these customers were sold (often following a hard sale) these products. This language betrays the fact that the banks have not yet grasped what they have done wrong.

Its written submissions can be summarized as:
- There was no assumption of responsibility,

- The bank's redress offer letter dated 1 August 2013 is insufficient to found a duty of care,
- The statements it that letter that the bank had 'carefully considered' CGL's circumstances and will 'thoroughly examine circumstances surrounding the transactions' are irrelevant to voluntary assumption of responsibility,
- The analogy with *Smith v. Bush* is misconceived because the only entity there who could protect the customer's interest was the lender but here the FCA is a regulator with an array of enforcement powers which regularly intervenes to protect consumers but on its own terms,
- Parliament has decided that the FCA's Principles and Guidance are not to be actionable at all and that its regulatory duties are only to be actionable by private persons,
- *Green v. Rowley* applies and what CGL is seeking is to try and impose a co-extensive or concurrent liability to that imposed by FiSMA which is not permitted,
- The skilled person provides a first line of protection to CGL,
- Imposing the claimed duty of care would render the skilled person's role '*superfluous*',
- The relationship on the IRHP review is not 'akin to contract' and *Smith v. Bush* prevents a duty of care arising,
- The claim to a new duty of care is a device to circumvent a claim about the sale being now barred by limitation,
- There is no gap or lacuna that the common law needs to fill here,
- *Suremine* is incorrectly decided and should be over-ruled as it is inconsistent with *Green v. Rowley*.

What additional submissions were made on behalf of Barclays Bank as respondent?
It submits that Mr & Mrs Bartels have no real prospect of showing the bank is liable in negligence to them as a result of its past business review of IRHP sales. It makes submissions as to why Gwenllian Court Hotel Limited should not be joined into the claim as a 3rd claimant. Those submissions being fact specific are not summarized here. On the main issue, this bank makes these additional points:

- As to whether a duty of care arises at all requires consideration of all the circumstances,
- The decision below on *CGL* should be approved by the Court of Appeal and that in *Suremine* should not,
- The bank did not assume (further) responsibilities to its customers when agreeing to carry out the IRHP review,
- Gwenllian Court Hotel Limited was not aware of the terms of the agreement between the bank and the FSA at the time it was made,
- Gwenllian Court Hotel Limited had been dissolved for 2½ years (during the IRHP review) and this undermines a claim that the relationship was akin to contract,
- The new claimed duty of care is consistent with the FCA's regulatory scheme,
- The role of a skilled person militates against imposing a further duty of care,
- The bank did not assume a quasi-advisory role to Gwenllian Court Hotel Limited in carrying out the IRHP,
- The claimed duty of care would put the bank in a position of conflict with its customers,
- If this new duty of care is recognized it would have startling consequences by restarting a limitation clock when a bank agrees to conduct a IRHP, and
- Even if there were a new duty of care, the bank has not breached it.

Was there a Respondent's Notice?
Yes.

Barclays Bank put in a Respondent's Notice on the Bartels' appeal seeking to affirm the decision of Judge Waksman QC below on these 2 additional grounds:

- There is no real prospect of showing that the bank owed a duty of care to Gwenllian Court Hotel Limited in relation to the IRHP review, and
- Gwenllian Court Hotel Limited should not be added as claimant as a matter of judicial discretion.

What authorities were referred to in oral argument?
These authorities (listed chronologically) are relevant in this case and are referred to in either the oral and/or written submissions:

Smith v. Bush **[1990] 1 AC 831** (House of Lords – Lords Keith, Brandon, Templeman, Griffiths and Jauncey of Tullichettle)
The valuers had owed duties of care to the homebuyers. Their disclaimers had been subject to the requirement of reasonableness imposed by the Unfair Contract Terms Act 197. Having regard in particular to (1) the parties' bargaining power, (2) whether it was practicable to obtain the advice from an alternative source, (3) the difficulty of the task being undertaken, and (4) the practical consequences of the decision on the question of reasonableness, the disclaimers had not satisfied the requirement of reasonableness and had accordingly been ineffective.

Caparo v. Dickman **[1990] 2 AC 605** (House of Lords – Lords Jauncey, Oliver, Roskill, Ackner and Bridge of Harwich)
No duty of care was owed either to existing shareholders or to potential investors because for such a duty to arise, these 3 factors had to exist: (1) a sufficient degree of proximity in the relationship between the parties, (2) the knowledge that the report would be communicated to the shareholder or investor in connection with a particular transaction in the contemplation of the parties, and (3) the shareholder or investor would place reliance on the report when deciding whether to enter into the relevant transaction. It was necessary to impose some limit on liability for economic loss arising in the absence of a contractual relationship between the parties.

White v Jones **[1995] 2 AC 207** (House of Lords – Lords Keith, Goff, Browne-Wilkinson, Mustill and Nolan)
The assumption of responsibility by a solicitor to his client, who had given instructions for the drawing up of a will for execution, extended to an intended beneficiary under the proposed will where it was reasonably foreseeable by the solicitor that a consequence of his negligence might result in the loss of the intended legacy without either the testator or his estate having a remedy against him.

Customs & Excise Commissioners v. Barclays Bank PLC **[2007] 1 AC 181** (House of Lords - Lords Bingham, Hoffmann, Rodger of Earlsferry, Walker and Mance)
The presence or absence of a voluntary assumption of responsibility did not necessarily provide the answer in all cases although it might be decisive in many situations. In the absence of any single touchstone of liability and where a court was faced with a novel situation, the court had to apply the 3-fold test in Caparo **[1990] 2 AC 605.** *When the court granted Customs' applications for freezing injunctions, their purpose was to protect Customs by preventing 2 named companies from parting with their assets. The bank would be in contempt of court only if it <u>knowingly</u> failed to freeze customer accounts subject to these freezing injunctions and authorised transfers of sums from the accounts after being notified of the court orders. The failure to operate a system for freezing accounts did not mean that the bank was liable to Customs who had obtained the orders. Notification imposed a duty on the bank to respect the order of the court but it did not of itself generate a duty of care to Customs. Having obtained a freezing order and notified the bank, Customs could expect that any responsible bank would respect the order but it could not <u>rely</u> on the bank doing so. There was nothing that could be regarded as a <u>voluntary assumption of responsibility</u> by the bank for the way in which it would go about freezing the companies' accounts and there was nothing that involved the bank in entering into any kind of relationship with Customs that required it to exercise such care as the circumstances required. <u>The bank and Customs were about as far from being in a relationship equivalent to contract as they could be.</u> The parties were not in a relationship of proximity and it would not be fair, just and reasonable to hold that the bank owed a duty of care to Customs.*

Titan Steel Wheels v. RBS **[2010] 2 Lloyd's Rep 92** (High Court, QBD, Commercial Court, David Steel J)
The bank's terms of business formed part of the contractual terms in respect of the transactions here (or if necessary, by reason of the parties' previous course of dealing based on the same documentary structure). These terms taken as a whole were only consistent with the conclusion that the 2 sides were agreeing to conduct their dealings on the basis that the bank was not acting as an adviser nor undertaking any duty of care regardless of what recommendations, suggestions or advice were tendered. Such a duty could be excluded where the bank or investment adviser had been expressly retained to furnish advice but only on terms which excluded responsibility. Where the parties had purported to allocate by contract their respective roles and the risks involved in their relationship, that would in the normal run preclude any wider obligation arising from a common law duty of care. The terms made clear that the bank was not giving advice, but if it did so the terms protected it. The bank did not owe a common law duty of care in respect of advice in relation to the products sold.

Green & Rowley v. Royal Bank of Scotland **[2013] EWCA Civ 1197** (Court of Appeal – Lords Justice Richards & Tomlinson and Lady Justice Hallett)
Section 150 of FiSMA2000 provides a remedy for contravention of FSA COB rule 5.4.3 by way of an action for breach of statutory duty. There was nothing to justify imposing a common law duty of care to advise as to the nature of the risks inherent in the regulated transaction. The bank did not <u>cross the line</u> which separated the activity of, on the one hand, giving information about and selling a product and, on the other, the activity of giving advice. Absent that feature, there was neither justification nor need for the imposition of a common law duty independent of, but co-extensive with, the statutory remedy provided. The existence of the action for breach of statutory duty consequent on contravention of a rule did not compel the finding that a firm owed a common law duty of care to ensure that a customer understood the nature of the risks involved in entering into a swap transaction. <u>The existence of a statutory duty might have given rise to a common law duty of care in circumstances where breach of the statutory duty was not actionable in private law.</u>

Kays Hotels v. Barclays **[2014] EWHC 1927 (Comm)** (High Court, QBD, Hamblen J)
The principles relevant to the knowledge required for the purposes of section 14A of the Limitation Act 1980 were set out in the authorities. The test was whether the claimant had been alerted to the <u>factual rudiments</u> of his claim sufficient for him to take advice and put proceedings in train. What he had to know to set time running was the essence of the act or omission to which his damage was attributable and the substance of what ultimately came to be pleaded as his case in negligence. Where a claimant acted on professional advice he must have had some reason to question the advice and to think that something must have gone wrong with it. <u>The determinative moment was when he had reason to begin to investigate</u>. In this mis-selling claim it was said that the bank had (1) not explained adequately how the product worked, (2) the risks involved over the whole life of the product, (3) the bank had not considered its suitability for its customer, and (4) the customer had been required to take out the product. The customer knew that there would be some risk but its complaint was of excessive risk. The fact that there had been some loss because the customer had been required to make payments did not indicate a lack of suitability. The issue of suitability was not limited to the risk of having to make payments. <u>The bank's approach to the requisite knowledge was too narrow. The customer had a real prospect of establishing that it could rely on s.14A and its claim could not be summarily dismissed as bound to fail on limitation grounds. The issue of constructive knowledge was particularly fact-dependent and required a full consideration of all the circumstances of the person whose knowledge was in issue and that full factual picture would emerge at trial</u>.

Suremime Ltd v. Barclays Bank plc **[2015] EWHC 2277 (QB)** (High Court, QBD, Bristol Mercantile Court – HHJ Havelock-Allan QC)
Permission to introduce a new claim in contract was refused because it faced an insuperable hurdle of <u>lack of consideration</u>. The bank made it clear that it was going to include the claimant's swap in the process of the review - there was no conditionality. There was no real prospect of the claimant successfully arguing that a contract could be implied from correspondence between the claimant and the bank's IRHP resolution team or the claimant's meeting with the bank's solicitors in September 2013. The fact that there could be public law remedies with which to challenge the way in which the FCA review had been implemented was not necessarily a bar to a private law duty of care being owed. It had yet to be decided whether public law remedies were available. If they were not, the case for implying a duty on the banks towards customers whose swaps sales were being reviewed was arguably stronger. Nor was the fact that the claimant could sue for the original mis-selling a sufficient answer to the proposed new claims in tort. The FCA review was intended to provide a route to fair and reasonable compensation without customers having to sue for mis-selling. <u>Those who stayed their hand and had not sued for mis-selling in the hope of deriving a satisfactory result from the review process, but then alleged that the specification of the review had not been faithfully applied, could be left without any remedy</u> if they did not agree a standstill or moratorium with the bank which sold the swap and the mis-selling had since become statute-barred. While that was not the situation here it was a relevant consideration as it was part of the wider landscape in which the court would have to assess whether the banks should owe a duty of care to customers in their conduct of the FCA review. It was arguable that the fact that a customer who was a 'private person' might have a statutory right of action under the section 138D of FiSMA 2000 to claim for a breach of DISP 1.4.1R if the specification of the review had not been applied militated in favour of allowing a private law right of action for corporate customers where the review did not distinguish between 'non-sophisticated' customers who were individuals or corporate entities. <u>The approach in White v Jones</u> **[1995] 2 AC 207** *<u>had a potential application here because the FCA could enforce compliance with the principles of the FCA review through its independent reviewer</u>.*

Mazarona Properties Ltd v. Financial Ombudsman Service **[2017] EWHC 1135 (Admin)** (High Court, QBD, Administrative Court, Mitting J)
The key here was the definition of 'compulsory jurisdiction rules' *in sections 226(3) & (4) of FiSMA 2000. FOS could only consider a complaint as defined in the Glossary of the FCA's* 'General Provisions' *document. A complaint had to be about* 'the provision of or failure to provide a financial service or a redress determination' *and the meaning of* 'redress determination' *was set out in the Glossary. The complaint about*

> *the withdrawal of an offer had not been a complaint about a redress determination because the bank's scheme was not a consumer redress scheme as defined in section 404 of FiSMA. The claimants' complaint could only have succeeded if it was about '*the provision of or failure to provide a financial service'*. However 'financial service' is not defined in FiSMA. Dispute resolution was something which might arise as a result of the provision of a financial service but it was not itself a financial service. The FCA had deliberately provided for redress determination under section 404 to come within FOS's but not any other form of redress determination. A financial service was commonly and rightly understood to mean the provision of a service of a financial nature to a customer in connection with his or her personal or business affairs not the payment of compensation for the manner in which that service was provided. As a matter of ordinary language, the claimants' complaint to FOS about the bank's handling of their complaint was not about the provision of or failure to provide a financial service. The bank's review of the redress offered regarding the claimants' swaps did not fall within the compulsory jurisdiction rules for those reasons and because dispute resolution was not a regulated activity specified in the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001.*

What interventions did the judges make? What points seemed to be troubling them?
Overall the judges started and remained more sympathetic to the claimants than any of the 3 judges in the courts below. They listed in silence when the features of the various IRHPs were explained to them. Both the press and public gallery for the court was packed for all 3 days. Although the cases had been joined and given an overall time estimate of 2 days, at the request of the Lord Chief Justice a number of appeal court judges who are privy counsellors attended the state opening of Parliament. This meant that the appeal started late on the 2nd day with oral arguments continuing to a 3rd day.

Lord Justice McFarlane was the presiding judge. Although his background is in family law, he pressed a number of points starting with an observation that unless the rates were '*bang on'* for a swap a customer would have to pay a premium. He then intervened to observe that from the initial 4 banks in the FSA June 2012 announcement that this had grown to 11 banks and was concerned at the scale of the problem. In relation to over 90% of IRHPs sales not being compliant, he wanted to know the sample size and was told that the FSA had audited 173 banks in total. McFarlane commented that the 8 sales standards highlighted by the FSA were the '*yardsticks*' by which the sales should be gauged. He also wanted to know which of the 8 standards had not been trialled beforehand. As to the IRHP review, McFarlane noted that customers were aware in general terms about it and whilst they might not have known the specifics they had '*expectations*' as to what would happen. McFarlane LJ then stressed the word '*entitled*' in one of the bank's redress letters which told a customer they were '*entitled*' to go to FOS. McFarlane LJ was scathing about the length of time the banks had taken with these IRHP reviews saying that there should be a standard for the review with banks meeting the affected clients. McFarlane LJ was critical of the way the judge below in Bartels dealt with the fact that they had waited a long time for a review outcome letter saying that Judge Waksman had '*not engaged with this'*.

Lord Justice Lewison asked the most pertinent questions which inevitably had a contractual basis to them. He started by asking counsel for CGL what exactly was provided to a firm's customer in relation to the IRHP review. Lewison then moved on to probe the draft agreement that the FSA had produced and wanted to know if the court was to assume that each bank had entered into that agreement as drafted. He then noted that the banks had given undertakings to the FSA under s166 when appointing skilled persons. As to *White v. Jones*, Lewison LJ said that a solicitor had assumed a responsibility to a beneficiary and that this was the same here where the bank and the FSA under clause 9 of the agreement had agreed to conduct the review of past IRHP sales. He then went on to observe that the past business review '*was supposed to produce a fair outcome'*. Lewison LJ also noted that the standards the FSA agreed with participating banks went beyond what was in the FCA Handbook or COBs. On the 2nd day Lewison LJ pointed out to counsel for RBS that although the FCA had consulted as to whether FOS should have jurisdiction over complaints about the way a past business review was conducted, the simple fact remained was that this simply '*wasn't done'*. Lewison also observed that in his view the structure of the review as '*akin to contract'*. Lewison took the example of a response letter to a complaint to a law firm or engineer's firm saying it would be '*surprising if you get a new cause of action'* from the date of that letter.

Lord Justice Beatson started very badly by asking '*What is MiFID?*' but he seemed to catch up and his later interventions had better focus. Beatson LJ too was concerned about the scale of the problem expressing alarm that 173 banks had been reviewed by the FSA and saying the '*scale was large in this case'*. He then said he found it '*intriguing*' that the people responsible were not in front of the court.

Beatson observed that the House of Lords had taken over a year to decide *White v. Jones* and wondered why this was. Beatson LJ put it to RBS's counsel whether the customers had '*missed their bus'* but also said it was incumbent on the bank to handle the redress review '*with care'*. Beatson questioned counsel for RBS about the redress letter noting it said '*we*' and had not, for example, said the '*skilled person'*. Beatson LJ sought to bang the nail on the head by noting that the banks' communications were designed to make customers sit back '*hoping to get something'* from the IRHP review, that this induced them into '*not taking steps to take legal proceedings'* hoping that in the end the banks would to the '*decent thing'* and those customer may have '*stood down their lawyers'*.

What did the Court say about judgment in this case?
As there are 3 connected but separate appeals, and the issues on duty of care are not straightforward, the likelihood is that the reserved judgment will be handed down in the new term after October 2017.

McFarlane LJ is a family lawyer but he has presided over other financial services appeals recently such as *Personal Touch Financial Services v. Simply Sure* **[2016] EWCA Civ 461.** It is unlikely therefore that he will write the judgment. Both Lords Justices Lewison and Beatson during one intervention conceded that they had each already marked up certain passages in the bundles. It is not clear which of the 2 judges will write the judgement. Lewison LJ is highly likely to approach this from a purely contractual point of view. Beatson LJ, on the other hand, is more maverick and unpredictable with his interventions sometimes concealing the direction of his ultimate thinking. He is a former Cambridge law professor and Law Commissioner where he worked on contract & commercial law, civil evidence, damages, administrative law, and financial services. He will be attracted to the intellectual submissions in relation to the scope of a duty of care. For this reason Beatson LJ is more likely to produce a judgment which is sympathetic to the claimants.

The Court of Appeal will be bound by its previous decisions. It will be able to over-rule or disapprove of any prior High Court decisions. As any decision will need to be framed by reference to the House of Lords decisions in *Customs*, *Caparo*, *White* and *Bush* it is highly likely that whichever side loses will seek permission for a final appeal to the Supreme Court of the United Kingdom. It will be highly tempting for the Supreme Court to take this and provide finality in a definitive ruling.

Comment
This has been a case that has been contested with equal vigour on both sides. The arguments both for and against imposing this additional duty of care are, all things being equal, quite finely balanced. However Mr Vineall QC for the Bartels' claimants made some exceptionally powerful submissions which were well received. In contrast the performance of counsel for the banks (especially Barclays's counsel) at the hearing was lacklustre. On the face of it, this could be enough to tip the scales on this in favour of claimants. However it is dangerous to second guess the senior judiciary. The interventions in court may not necessarily be a reliable guide to their ultimate thinking.

The banks have compensated some customers. These 3 cases were not at first blush the best ones for claimants but they had to deal the hand they were dealt. The cases have been argued on high level principles. It is clear that the judges below were far too brisk to strike these cases out on limitation. From what has emerged neither the banks nor their skilled persons have covered themselves in glory on this. The banks have compounded things by both the manner and slow pace of the review.

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