Neutral Citation Number: [2023] EWHC 3185 (Ch)

Case No: BL-2020-001075

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
BUSINESS LIST (ChD)

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date:19/12/2023

Before:

MASTER CLARK

- -

Between:

(1) MARK WILLIAM TAYLOR **(2) RACHEL CAROLINE TAYLOR**	**Claimants**
- and -	
BANK OF SCOTLAND PLC	**Defendant**

- -
- -

John Virgo (instructed by **Clyde & Co LLP**) for the **Claimants**
Giles Wheeler KC (instructed by **DLA Piper UK LLP**) for the **Defendant**

Hearing date: 9 November 2023

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Approved Judgment

Remote hand-down: This judgment was handed down remotely at 10am on 19 December 2023 by circulation to the parties or their representatives by email and by release to The National Archives.

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Master Clark:

1. This is my judgment on
   (1) the claimants' application dated 22 June 2022 seeking permission to amend the particulars of claim;
   (2) the defendant's application dated 25 August 2022 seeking summary judgment on parts of the claim.

Parties and the claim

2. The claimants, Mark and Rachel Taylor, are former shareholders in Taylor Hotels Limited ("**the company**"); and Mr Taylor is a former director.

3. The company was incorporated on 22 October 2007, placed into administration on 1 March 2013, and, eventually, into liquidation on 19 February 2016.

4. The claimants sue pursuant to an assignment dated 21 February 2013 from the company, and an assignment dated 24 July 2020 from Mr Taylor's trustee in bankruptcy.[1]

5. The company was at all relevant times a retail client of the defendant bank, and entered into the following transactions with it:
   (1) an interest hedging agreement dated 27 June 2008 ("**the First Collar**"): with a 5 year term and an initial notional principal of £5,252,000;
   (2) an agreement entered into on or around 4 July 2008 ("**the Loan Agreement**") for a loan facility for £5,252,000, repayable over 20 years;
   (3) a second interest hedging agreement dated 22 May 2009 ("**the Second Collar**"), which replaced the First Collar.

6. The purpose of the loan was to enable the company to buy shares in another company, Taylor Hotels (Grasmere) Limited ("**THGL**") which owned and ran the Red Lion Hotel, Grasmere, Cumbria ("**the hotel**").

7. The claim is for misrepresentation. The particulars of claim (before amendment) allege that the company was induced to enter into both of the Collars by the following misrepresentations:
   (1) 2 express representations that the LIBOR rate was a genuine rate and not subject to manipulation; and 9 implied representations relating to LIBOR ("**the LIBOR representations**");
   (2) that it was in the company's interest to fix the interest rate on the loan because interest rates were expected to rise and could return to 14% or 16% levels ("**the**

[1] although none of the claims are made in Mr Taylor's personal capacity

interest rate rise representation") – made in January 2008 and repeated in May 2008;

(3) that it was a "requirement of the facility that the loan be fully hedged for a period of 7 years before the funds can be drawn" ("**the hedging requirement representation**").

8. The interest rate rise representation claim is made on the basis that the interest rate rise representation, being a prediction, was not itself a representation of fact, but an implied factual representation that the maker had a reasonable basis for making it.

9. Each of the above representations is alleged to be false, and the bank is alleged either to have known of the falsity or to have been reckless as to the truth of the representations.

10. The claimants' case as to the hedging requirement representation is developed and expanded in their proposed amended particulars of claim to allege three separate hedging requirement representations ("**the hedging requirement representations**"):

(1) "the initial hedging requirement representation" made on 18 December 2007;

(2) "the second hedging requirement representation" made on 20 May 2008;

(3) "the third hedging requirement representation" made on 22 May 2008.

11. The bank does not seek summary judgment in respect of the LIBOR representations claim, and accordingly it is not necessary to consider that claim further.

Interest rate representation claim

12. As to the falsity of the interest rate rise representation, the claimants rely upon four Bank of England Inflation Reports ("the BoE Reports"), which in each case included forward interest rate prediction tables for the following 3 years. The tables in the February 2008 and May 2008 Reports predicted that rates would settle at below 4.75%, so that the floor rate of 6% in the First Collar (applicable once rates fell below 4.75%) would apply.

13. The tables in the February 2009 and May 2009 Reports predicted that interest rates would settle at below 4% in the following 3 years, so that, again, the floor rate of the Second Collar would become applicable.

14. As to the knowledge of the bank employee who made the interest rate rise representation (Gordon Ray, an assistant director of the bank employed in its Treasury division), the claimants allege (in their proposed amended PoC) that the data set out in the BoE Reports are a very common information resource relied on by persons such as Mr Ray, and it is to be inferred he was well aware of those reports.

Hedging requirement representations claim

15. The factual basis of this claim is largely derived from the bank's internal documents, which are considered in more detail in paragraphs 60 to 68 below.

16. This claim is predicated on a distinction between decisions taken by each of two divisions of the bank:
    (1) the credit sanctioning division, at which the relevant employee was a director, John Craig;
    (2) the Treasury division, at which the relevant employee was a director, Richard Smith, who was the company's relationship manager.

17. The claimants' skeleton argument sets out that distinction as being:
    (1) formal credit sanctioning division conditions for loan approval - non-negotiable;
    (2) terms otherwise proposed by the relationship manager seeking to arrange the facility - of a lower order, and susceptible to negotiation by the prospective borrower.

    This is not, however, a distinction articulated in the proposed amended PoC.

18. The substance of this claim is that Mr Smith represented to the company that the First Collar, and, later, the Second Collar were imposed by the credit sanctioning division as conditions precedent of the loan being granted or continued; and that that was untrue to Mr Smith's knowledge.

Limitation

19. The claimants rely on s.32 of the Limitation Act 1980 ("**the 1980 Act**") to postpone the date on which the limitation period began to run until 28 July 2014. This was the date on which the Financial Conduct Authority published details of a regulatory sanction imposed on the bank in relation to the bank's conduct in relation to LIBOR.

20. Before then, the claimants say, the company had no reason to contemplate that the bank had set out to mislead it, and assumed that it had simply experienced normal market movements in rates.

21. In addition, although not pleaded, the claimants' evidence sets out that until they received the bank's internal documents relating to its credit approval process, they were not (and could not with reasonable diligence have been) aware of the falsity of the hedging requirement representations.

Summary judgment application

22. As to the interest rate rise representation claim, the only ground on which summary judgment is sought is that that claim is time-barred; and, in particular, that the claimants have no real prospect of showing that they could not have with reasonable diligence discovered the frauds on which that claim is based.

23. As to the hedging requirements representations claim, summary judgment is sought on the grounds that the claimants have no real prospect of succeeding:
    (1) on the merits of the claim; or
    (2) under s.32 of the 1980 Act.

Background to the claim

24. The following account is derived from the claimants' witness statements, the factual allegations, which I treat for present purposes (only) as true, since they are unsuitable for summary determination.

25. Mr Taylor's evidence is that when interest rates fell, and the company's payments increased to high levels, he realised that "the bank had been wrong." He was contacted by a group called Bully Banks, who were a group of small businesses in a similar position, and joined them in 2009. That organisation gave advice on the mis-selling by banks of interest rate hedging products, by giving wrong information as to how they worked and not explaining that they were not suitable for retail customers. Mr Taylor did not know (or, he says, have any reason to believe) that the interest rate rise representation was untrue; and was not alerted to this possibility by Bully Banks.

26. In 2012 Mr Taylor, on behalf of the company, instructed Taylors Solicitors to obtain information from the bank to investigate whether it had a claim. At this stage he believed that the company had a claim for having been mis-sold the Collars because they were unsuitable, and it had not been explained to him that there was a risk of paying more if interest rates fell or that there was a break fee. On 25 October 2012 Taylors wrote to the bank requesting information about and documents evidencing the selling process. Mr Taylor did not at this stage know that Mr Ray had had access to the BoE Reports. The bank did not provide the information or documents requested.

27. In late 2012, when the company was experiencing the financial difficulties which ultimately led to it going into administration, Mr Taylor instructed a financial adviser, John Stokes, who wrote to the bank on 2 November 2012 seeking to re-finance the loan. This sets out that the company has a SWAPS claim, namely that the Collars were wholly unsuitable for the company and were mis-sold to it by reason of the bank's failure:
    (1) to advise the company as to the product most suitable for it as a retail customer;

(2) to explain that the consequence of base rate dropping substantially below the prevailing rate of 5% at June 2008 would be an obligation to pay interest to the bank at a substantially higher rate than under a conventional collar.

28. On 24 June 2013, Taylors submitted to the bank's Independent Reviewer submissions as to the mis-selling of the Collars. That submission recorded that the bank had not provided internal documentation such as internal emails, telephone attendance notes or meeting notes on the basis that it was not its policy to do so. The documents submitted included (as item 2) a document described as "Bank of Scotland Corporate Terms and Conditions" ("**the draft T&Cs**"). This appears to be a draft with manuscript amendments of part (only 2 pages) of the credit application referred to in paragraph 60 below – the final and complete version of that document is relied upon by the claimants in the hedging requirement representations claim.

29. In 2014 the claimants instructed JMW solicitors, who negotiated a standstill agreement dated 26 June 2014, in which "the Claims" for the purposes of that agreement are defined as "potential legal claims against the Bank arising out of and in relation to the [Collars] and/or the circumstances in which the [Collars] were entered into."

30. In about July 2014 Mr Taylor became aware that the FCA had imposed a financial penalty on the bank as a result of dishonest conduct. This was the first time that he considered whether the bank had acted dishonestly towards him when selling the Collars. However, at this stage, he still did not know that the bank had had access to the BoE Reports.

31. On 1 February 2016, the standstill agreement was varied so as to suspend the running of time for limitation purposes for 674 days until 29 April 2016.

32. The claimants instructed their current solicitors in March 2020. The claim was commenced on 24 July 2020. The effect of the standstill agreement (as varied) is that unless the claimants are entitled to rely upon s.32, any cause of action arising before 19 September 2012 (674 days before 25 July 2014) is time-barred.

Legal principles

Summary judgment

33. CPR 24.2 provides, so far as relevant:

> "The court may give summary judgment against a claimant or defendant on the whole of a claim or on a particular issue if –
> (a) it considers that –
> …

(ii) that defendant has no real prospect of successfully defending the claim or issue; and

(b) there is no other compelling reason why the case or issue should be disposed of at a trial."

34. The principles to be applied on applications for summary judgment are well established. They were summarised by Lewison J (as he was) in *Easyair Ltd v Opal Telecom Limited* [2009] EWHC 339 (Ch). It is unnecessary to set them out here. The burden of proof is on the applicant to show that the conditions in CPR 24.2 are satisfied.

Amendment

35. The test for whether an amendment should be permitted is the same test as for summary judgment: whether the amendment has a real prospect of success (see the 2023 White Book at para 17.3.6; *Kawasaki Kisen Kaisha Ltd v James Kemball Ltd* [2021] EWCA Civ 33, [2021] 3 All E.R. 978, [2021] 1 C.L.C. 284, at [17], [18]).

36. The practical upshot of the above is that the court must consider:

(1) whether the challenged claims in the proposed amended particulars of claim have a real prospect of success; or

(2) whether there is any compelling reason why the claim should go to trial.

Limitation

37. Section 32 of the 1980 Act provides, so far as relevant:

"**Postponement of limitation period in case of fraud, concealment or mistake.**

(1) … where in the case of any action for which a period of limitation is prescribed by this Act, either—

(a) the action is based upon the fraud of the defendant; or

(b) any fact relevant to the plaintiff's right of action has been deliberately concealed from him by the defendant; or

…

the period of limitation shall not begin to run until the plaintiff has discovered the fraud, concealment or mistake (as the case may be) or could with reasonable diligence have discovered it.

References in this subsection to the defendant include references to the defendant's agent and to any person through whom the defendant claims and his agent.

(2) For the purposes of subsection (1) above, deliberate commission of a breach of duty in circumstances in which it is unlikely to be discovered for some time amounts to deliberate concealment of the facts involved in that breach of duty."

38. The relevant law is helpfully summarised in *Bilta v SVS Securities plc* [2022] EWHC 723 (Ch); [2022] BCC 833 at [31], from which the following principles can be distilled:

(1) The burden of proof is on the claimant seeking to rely on s.32: *Paragon Finance v Thakerar*, [1999] 1 All ER 400 at 418.

(2) The claimant must establish that they could not have discovered the fraud without exceptional measures which they could not reasonably have been expected to take. The test is how a person carrying on a business of the relevant kind would act if he had adequate but not unlimited staff and resources and were motivated by a reasonable but not excessive sense of urgency: *Gresport Finance v Battalagia* [2018] EWCA Civ 540 at [41 approving Millett LJ's statement in *Paragon Finance v Thakerar* [1999] 1 All ER 400 at 418.

(3) Section 32 assumes that the claimant desires to discover whether or not a fraud has been committed, and that there must therefore be an anterior "something" to put a claimant on notice of the need to investigate if there has been a fraud, concealment or mistake: *Law Society v Sephton*, [2004] EWCA Civ 1627, [2005] Q.B. 1013 at [116]; *Gresport Finance v Battalagia*, [2018] EWCA Civ 540 at [41].

(4) Although the question what reasonable diligence requires may have to be asked at two distinct stages:
   (i) whether there is anything to put the claimant on notice of a need to investigate, and
   (ii) what a reasonably diligent investigation would then reveal,

there is a single statutory issue, which is whether the claimant could with reasonable diligence have discovered (in this case) the fraud.

At the first stage the claimant must be reasonably attentive so that he becomes aware (or is treated as becoming aware) of the things which a reasonably attentive person in his position would learn. At the second stage, he is taken to know those things which a reasonably diligent investigation would then reveal. Both questions are questions of fact and will depend on the evidence. To that extent, an element of uncertainty is inherent in the section: *OT Computers v Infineon Technologies AG*, [2021] EWCA Civ 501 at [47].

(5) The words "could with reasonable diligence" refer to an objective standard (i.e. what the claimant could have learned/done, not merely what he or she in fact did learn/do). That objective standard is informed by the position of the actual claimant, and not by reference to some hypothetical claimant: *OT Computers v Infineon Technologies AG*, [2021] EWCA Civ 501 at [48].

(6) Reasonable diligence can require a claimant to undertake investigatory measures, including instituting legal proceedings to obtain disclosure: *Chodiev v Stein* [2015] EWHC 1428 (Comm), at [49]; *Libyan Investment Authority v JP Morgan Markets* [2019] EWHC 1452 (Comm) at [53] and [57].

(7) The test as to when the claimant has discovered the fraud, concealment or mistake (as the case may be) or could with reasonable diligence have discovered the same must be referable to what is needed properly to plead out the claim: *Peconic*

Industrial Development Ltd v Lau Kwok Fai [2009] WTLR 999 at [56]; *FII Group Test Claimants v HMRC* [2020] UKSC 47 at [184] to [192].

(8) What is required is an ability in the claimant to plead a complete cause of action: *Arcadia Group Brands v Visa* [2015] EWCA Civ 883 at [48] to [49]. By this is meant an ability to plead a viable claim, that is, one that will not be struck out because a necessary element of the cause of action cannot be asserted or because the necessary particularity cannot be pleaded. A viable claim does not require the claimant to need to know or have been able to discover all of the evidence which it later decides to plead. But it does require the putative claimant to be able to plead the precise case that is ultimately alleged: *Barnstaple Boat Co v Jones* [2007] EWCA Civ 727. In a case of fraud, discovery of the alleged fraud means knowledge of the "essential facts constituting the alleged fraud": *Cunningham v Ellis* [2018] EWHC 3188 Comm at [87].

39. This test, the "statement of claim" test, whilst contrasted in *Bilta* with the "worthwhile claim" test i.e. that time begins to run when the putative claimant is in a position to recognise that he or she "has a worthwhile case…to pursue a claim" (see, e.g., *FII Group Test Claimants v HMRC* [2020] UKSC 47 at [185]), has been held by the Court of Appeal to be "little more than a gloss on the FII [worthwhile claim] test": *Gemalto Holdings BV v Infineon Technologies AG* [2022] EWCA Civ 782, [2023] Ch 169 at [45]. However, in a fraud case, the "statement of claim" test applies: *Seedo v El Gamal* [2023] 3 WLR 505 at [48].

40. The fact-sensitive nature of the inquiry under s.32 was emphasised in *OT Computers* [27]:

> "… there will be cases… where discovery of the relevant facts involves a process over a period of time as pieces of information become available. In such cases it may be difficult to identify the precise point of time at which a claimant exercising reasonable diligence could have discovered enough, either to plead a claim or (as the case may be) to begin embarking on the preliminaries to the issue of proceedings. In some cases identification of that point of time may be critical. In others, such as the present, it may be unnecessary to identify it with precision. Nevertheless the uncertainty to which this exercise may give rise is inherent in the section."

41. In this case, the bank relies upon the fact that the BoE Reports are publicly available documents of which, it contends, the company could, with reasonable diligence been aware. As to this, the Court of Appeal in *DSG Retail Ltd v Mastercard* [2020] EWCA Civ 671; [2020] Bus LR 1360 said:

> "[69] … The question of whether there was something to put the claimants on notice had to be determined on an objective basis, but as Lord Hoffmann explained in *Peconic* that "leaves open to argument the extent to which the personal characteristics of the plaintiff are to be taken into account in

> deciding what diligence he could reasonably have been expected to have shown". As Henderson LJ agreed in *Gresport Finance*, whether the claimant could with reasonable diligence have discovered the relevant concealment is a question of fact in each case.
>
> [70] In this case, the Tribunal considered some of the things that the claimants might have known about the alleged infringement, but did not ask itself what precisely had put the claimants on notice of the need to investigate a potential claim against Mastercard. … The Tribunal wrongly assumed that the claimants were aware of important press articles as I have already explained. As it seems to me, the question of whether or not the claimants in this case had reason to investigate and whether they could with reasonable diligence have discovered the relevant concealment requires disclosure and factual evidence to be fairly determined. In particular, I think Mr Pickford was right to point out that, in an internet age, huge numbers of documents are in the public domain; it does not follow that, even objectively judged, a potential claimant was on notice of a particular claim, or that it could with reasonable diligence have seen particular documents."

42. The fact sensitive nature of the inquiry is illustrated by the fact that the majority of the authorities cited by the parties on section 32 were decisions made following a trial (*FII Group*, *Bilta*, *Seedo*, *DSG Retail*), a trial of a preliminary issue (*OT Computers*, *Gemalto*, *Law Society v Sephton*) or where summary judgment was refused (*Barnstaple Boat*).

43. As to the other authorities:
C v Mirror Group Newspapers [1997] 1 WLR 131 (a strike out application) was decided on the narrow point that the claimant was unable to rely on concealment of facts which were relevant to rebutting a defence to her libel claim, as opposed to establishing a *prima facie* case.

Paragon Finance v Thakerar decided (on appeal) that the judge determining an application for permission to amend to include a claim otherwise time-barred was wrong to conclude, in summary proceedings in the absence of disclosure and without the benefit of cross examination, that the claimants could not with reasonable diligence discovered the fraud before the relevant date – so affirms the fact-sensitive nature of the decision.

In *Libyan Investment Authority*, where the issue was whether the claimant had a reasonable prospect of success (for permission to serve the claim form out of the jurisdiction), the claimant had already brought a claim in respect of a similar fraudulent scheme, and, with this background, the court was in a position to carry out a detailed analysis of what was known to the claimant, and what it could with reasonable diligence have discovered by reference both to the facts in the earlier claim and the inferences from those facts which the claimant had made.

44. Finally, as a matter of the construction of section 32, the acts or omissions of an agent of the claimant are not to be attributed to the claimant: *Peco Arts Inc v Hazlitt Gallery* [1983] 1 WLR 1315. The fact that the section provides that references to the defendant are to its agent means that references to the claimant are not to their agent.

Interest rate rise representation claim

45. The key elements to this claim are

(1) the bank's representation;

(2) the company's reliance on it;

(3) its falsity;

(4) the bank's knowledge or reckless indifference to its truth.

46. It was plainly within the company's actual knowledge at the time that the representation was made, and that it relied upon it. The issues which arise for determination in the claim are whether the company could with reasonable diligence have discovered:

(1) the falsity of the representation; and

(2) that the bank made it with full knowledge of or recklessness as to its falsity.

The issues in these applications are of course whether the claimants have a real prospect of showing that they could not have done.

47. Mr Taylor's evidence is that he was aware of interest rates falling, and that the bank had been "wrong". It does not however follow that he knew that the bank had no reasonable basis for making the representation, or, of course, that the bank knew or was reckless as to its falsity.

48. As to whether he could with reasonable diligence have discovered these things, I have reached the following conclusions.

Fact sensitive inquiry

49. First, as set out above, the inquiry is a fact-sensitive one in two important respects. It will involve consideration of:

(1) the actual position and resources of the company to carry out investigations, and following the assignment by the company, the claimants;

(2) the steps that could have been taken to obtain the information needed to bring the claim, and, in particular, to identify as relevant and obtain the BoE Reports, notwithstanding that they are publicly available documents.

Neither of these are apt for summary determination. In particular, it cannot be assumed simply from the fact that the BoE Reports are publicly available documents that Mr Taylor could with reasonable diligence become aware of them: see [70] in *DSG Retail* set out at paragraph 41 above.

The claimants' actual efforts as evidence of "reasonable diligence"

50. Secondly, the evidence as to what Mr Taylor in fact did is relevant to deciding what they reasonably could have done. He sought help and support from Bully Banks, Taylors and JMW Solicitors, but none of them alerted him to the possibility of the dishonesty he now claims in respect of.

51. The bank's counsel asked rhetorically: why, if the claimant's solicitors were able to investigate and find the Reports in 2020, Taylors could not have done so in 2012. He referred me to a webpage of Taylors' website in 2012, where it is stated:

> "Some banks encouraged SME's to sign up to interest swaps during a period of predicted financial instability, allowing customers to believe that interest rates were likely to go up, as they had in previous recessions. In fact the banks' internal predictions suggested that interest rates would decrease sharply."

52. As to this, first, the webpage falls short of identifying a possible deliberate misrepresentation claim. Secondly, Mr Taylor's evidence is that he was unaware of this webpage; and he was not advised about that possibility. Even if it could be said that Taylors and JMW Solicitors could with reasonable diligence identified the claim, as set out above, Mr Taylor is not to be identified with them. Thirdly, neither firm were instructed on the same basis as Mr Taylor's current solicitors, namely, to investigate the possibility of dishonesty by the bank. The bank's submission suffers, in my judgment, from the rosy glow of hindsight.

The FCA LIBOR investigation report

53. Thirdly, the claimants have identified the publication of the results of the FCA investigation as a "trigger" – it prompted them for the first time to consider whether the bank had been dishonest. In my judgment, it cannot be said that the claimants have no real prospect of showing that it was reasonable of them to assume that the bank and its employees were honest until evidence suggested otherwise.

54. The bank submitted that the claimants were not entitled to rely upon the LIBOR investigation, because the facts revealed in that investigation were wholly unrelated to the interest rate rise representation claim. Its counsel referred me *Seedo* in support of that submission. In *Seedo* it was held (on a second appeal) that knowledge of one instance of dishonesty did not start time running in respect of another instance of dishonesty giving rise to a different cause of action. However, the claimants do not rely on the LIBOR investigation as providing them with knowledge of facts which they needed to plead as essential parts of their cause of action. Rather, they rely upon it as changing the factual circumstances in which they viewed the facts already known to them. With the

possibility of dishonesty in mind, they and their solicitors then carried out the investigations which revealed the facts now pleaded.

55. For these reasons, I am not satisfied that the claimants have no real prospect of showing that they could not with reasonable diligence have discovered the falsity of the interest rate rise representation namely, that Mr Ray had no reasonable grounds for believing it or that it was made dishonestly.

Hedging requirement representations claim

Factual basis

56. The factual basis of this claim is largely derived from the bank's internal documents.

57. The representations are alleged to have been made by Mr Smith, either directly, or via Mr Ray; and to be representations as to conditions required by the bank's credit sanctioning division for the Loan Agreement to be entered into.

58. It is necessary therefore to set out the factual circumstances, including relevant communications within the bank and to Mr Taylor from the bank.

59. In the summer of 2007, the company began discussions with Mr Smith about the bank lending it £5.2m to facilitate its intended share purchase of THGL. The bank expressed its willingness to do so at a meeting at the Preston Marriott Hotel attended by Mr Taylor and his accountant, Roger Bessent, and Mr Smith.

60. On 19 November 2007, Mr Smith submitted a credit application ("**the credit application**") to the credit sanctioning division, seeking its approval of a loan to the company of £5.498 million, to be used to buy the property and to be secured on it.

61. This set out:

"**Interest Rate Hedging:**

Hedging Agreed:	Yes	Amount(000s):2,500,000	Term(mths):84 mths
Instrument:	Fixed Rate"		

62. Mr Taylor's evidence is that this was incorrect. At that time, he says, Mr Smith and Mr Ray had not even introduced the idea of an interest rate hedging product, and he had no idea what one was.

63. The credit application also listed a number of "Conditions Precedent/Conditions Subsequent" relating to evidence of the company's financial position and the valuation of the property it was buying using the loan. They did not include a hedging requirement.

64. The application listed a detailed summary of the factors relevant to whether the bank should approve it, including:

> "Interest rate hedge limit £225K which allows for £2500K to be hedged for 7 years on fixed rate is included along with Business visa limit £10K resulting in total BOS Approval limit £5498K."

under the heading "Risk Assessment"

> "Interest Rates — level of debt and tight cash position makes this a key risk and as such **condition of sanction is that £2.5M to be hedged for a minimum of 5 years** i.e. to when deferred consideration repaid though initial discussions suggests longer tenor and term may be taken"
>
> (emphasis added)

and under the heading "Pricing & Cross Sales"

> "Treasury income as condition of sanction but may well increase wallet here"

65. The credit sanctioning department replied on 20 November 2007, granting "Highly Conditional Approval" of the application. The letter listed "Conditions" - a requirement to take out a hedging product is not listed in those conditions.

66. The bank then obtained valuations of the hotel, which were lower than it expected. On 18 December 2007, Mr Smith wrote to Mr Taylor about this, identifying some points of risk in the proposed transaction and suggesting ways to manage them. These included:

> "* Fix interest rates, which can be done on part of the loan amount and term. **A pre condition of our credit is presently £2.5m fix for five years**. The rationale behind this being to provide protection against adverse movements until the deferred consideration is repaid when cash should become more comfortable."
>
> (emphasis added – this is the initial hedging requirement representation)
>
> and continuing,
>
> "I know you would like us to remove this precondition but I would ask that you reconsider the point with the benefit of the valuation diligence."

67. On a date which is unclear from the document itself, but would appear to be 10 March 2008, Mr Smith sent a Pre-completion report to Mr Craig. This included under the heading "Group Cross Selling Opportunities/Handover Process":

> "We have also agreed a hedge for the full amount of the loan for at least 5 years as opposed to 50% of the loan as detailed in the original sanction."

and under the heading "Conclusion and Recommendation"

> "The deal structure has been amended slightly but Mr Taylor is to inject monies to largely offset this and we have the benefit of a fix for the full amount rather than 50% as originally proposed."

68. Mr Craig responded by letter 2 days later, on 12 March 2008. The status of the application was now "Conditional Approval", on the basis of the Pre-Completion Report. Again, the conditions listed in the letter itself do not include a requirement to take out a hedging product.

69. Shortly before 15 May 2008, a draft of the bank's facility letter was sent to the company's solicitors. Schedule 1 to the letter is headed "Conditions Precedent". Condition 3 read:

> "The Hedging Documents providing for a hedging facility for £5,200,000 for a term of 84 months signed by the Borrower."

Helen Johnston of the company's then solicitors marked it up in manuscript before returning it to the bank's solicitors on 15 May 2008. In her marked up version, condition 3 was deleted, with a manuscript note added: "[Mr Bessent] is speaking to [Mr Smith] about this as it is not agreed."

70. On 20 May 2008, Mr Ray emailed Mr Bessent:

> "I have spoken again to Richard Smith this morning who has confirmed that **it is a requirement of the facility that the loan be fully hedged for a period of 7 years** before the funds can be drawn"
>
> (emphasis added – the second hedging requirement representation)

71. Finally, on 22 May 2008, Mr Smith emailed Mr Bessent and the company's solicitors:

> "**The credit sanction we have is for the full amount of the loan for at least 5 years.** The facility letter can be amended accordingly."
>
> (emphasis added – the third hedging requirement representation)

Merits of the Hedging requirement representations claim - analysis and conclusion

Meaning of the Hedging requirement representations

72. Although the PoC does not set out in terms the meanings of the hedging requirement representations, it is apparent from the pleading as to its falsity that their meaning is, in

each case, alleged to be that the company's entering into the hedging product then proposed was a condition precedent of the credit sanctioning division approving the loan.

73. The issues which arise therefore are:
   (1) whether the claimants have a real prospect of showing that in each case the representation had the meaning they give to it; and, if so
   (2) whether it was false.

Initial representation: "A pre condition of our credit is presently £2.5m fix for five years."

74. The bank did not challenge that the meaning of the initial representation was that the credit sanctioning division had imposed a hedging requirement as a condition of its approval. However, the credit application submitted to that division included the imposition of such a condition (see paragraph 64 above), and this is what it approved. The fact that it also imposed further conditions do not, in my judgment, affect that.

75. In my judgment, no principled distinction is to be drawn between conditions proposed by Treasury division and accepted by the credit sanctioning division, and conditions imposed on the credit sanctioning division's own initiative. Both were conditions which the bank required to be met for the Loan Agreement to be entered into. In my judgment, the claimants have no real prospect of arguing the contrary.

Second representation: "it is a requirement of the facility that the loan be fully hedged for a period of 7 years"

76. As to the second representation, this does not refer to the credit sanctioning division, its approval or any conditions imposed or approved by it. It referred to a requirement of "the facility" which, in its natural meaning, referred to the facility letter being put forward by the bank at that time. As set out in paragraph 68 above, the facility letter did impose that requirement. In my judgment, the claimants have no real prospect of showing that the second representation has the meaning contended for, and, therefore, that it was untrue.

77. In addition, to the extent that the second representation misstated the position as to the length of the period of hedging required, then it was corrected by the third representation which stated the position as finally agreed between the parties. The claimants have no real prospect of showing that the company entered into the First Collar in reliance on a representation that the bank required hedging for a period of 7 years.

Third representation: "*The credit sanction we have is for the full amount of the loan for at least 5 years"*

78. Again, the bank do not challenge the meaning alleged by the claimants. However, the claimants' allegation of falsity rests on the same premise as put forward in relation to the

first misrepresentation: namely because the credit sanction division's approval of the credit application did not refer in terms to hedging, hedging was not a condition of the Bank's credit sanction.

79. The conditions on which the revised application for approval was made were set out in the Pre-Completion report, and, when the credit sanctioning division approved the application, it approved those conditions. In my judgment, the claimants have no real prospect of showing otherwise.

Whether the hedging requirement representations claim is barred by limitation

80. In the light of the conclusions reached as to the merits of the hedging requirement representations claim, it is unnecessary to consider whether it is barred by limitation. In case, however, I am wrong on those conclusions, I briefly consider the position.

81. The internal bank documents referred to and relied upon in the particulars of claim (in its proposed amended form) in support of this part of the claim (and set out in paragraphs 61 to 69 above) were provided to the claimants by the bank either in 2015 following inquiries prompted by the regulatory findings; or, following commencement of the claim, in April, August and December 2021, and January 2022. These documents included the full and final version of the credit application. The claimants cannot be treated as having knowledge of the contents of these documents before they were provided; and insofar as they are the basis of the claim, I am not satisfied that the claimants have no real prospect of showing that they could not with reasonable diligence have discovered the misrepresentations relied upon.

82. The bank, however, relies upon the claimants having been provided with the draft T&Cs referred to in paragraph 28 above before 24 June 2013. Mr Taylor's evidence is that at the time this document was provided, he and his solicitors believed that it was a condition of the loan that the company agree to interest rate hedging; and did not know that hedging was not a condition of sanction.

83. The bank submitted that this document was sufficient to enable the claimants to plead this part of the claim. I reject that submission. The document is a part of a draft document with manuscript amendments, it is unclear on its face at what role it played in the bank's internal processes of application and approval, and there is no evidence that at the time that the bank provided it, it gave any explanation as to what it was and its significance. Even its description (presumably provided by the bank) is unilluminating.

84. I am not therefore satisfied that the claimants would have no real prospect of success in showing that they could not with reasonable diligence have discovered the hedging

requirement misrepresentations they rely upon before the expiry of the primary limitation period.