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IN THE SUPREME COURT OF NEW ZEALAND
I TE KŌTI MANA NUI

SC 64/2019
[2020] NZSC Trans 7

BETWEEN **ANZ BANK NEW ZEALAND LIMITED**
Appellant

AND **BUSHLINE TRUSTEES LIMITED AND STEPHEN DANIEL COOMEY AS TRUSTEES OF BUSHLINE TRUST ONE,**
AND BUSHLINE TRUSTEES LIMITED AND SHARON LOUISE COOMEY AS TRUSTEES OF BUSHLINE TRUST TWO
Respondents

ROBERT LEWIS ENGLAND
Third Party

Hearing: 12 March 2020

Coram: Winkelmann CJ
Glazebrook J
O'Regan J
Ellen France J
Williams J

Appearances: S M Hunter QC, M C Sumpter and D T Street for the Appellant
M D Branch and K F Shaw for the Respondents
A C Challis and D P Turnbull for the Third Party

CIVIL APPEAL

MR HUNTER QC:
Tēnā koutou, e te Kaiwhakawā, ko Hunter tōku ingoa, mātou ko Sumpter, ko Street, e tū nei mō ANZ.

WINKELMANN CJ:
Tēnā koutou.

MR BRANCH:
May it please the Court. Counsel's name is Branch and I appear with Ms Shaw for the respondents and I'd also like to inform the Court that Mr and Mrs Coomey are in the back of the court.

WINKELMANN CJ:
Tēnā korua.

MS CHALLIS:
May it please Your Honours, Ms Challis and Mr Turnbull appearing for Mr England.

WINKELMANN CJ:
Tēnā korua. Mr Hunter. A couple of preliminary matters. First, in the interest of transparency I should mention, I think, that some members of the Court have banking arrangements with ANZ. We say it's only in the interest of transparency because we don't see it as relevant in terms of our ability to hear the matter. Secondly, this matter was originally a much more complex appeal, so our expectation is that it will be dealt with within the span of today.

MR HUNTER QC:
Thank you Your Honour. Can I just say, Your Honour, on the first point, the issue of Judges having banking relationships with ANZ was raised in both the

High Court and the Court of Appeal, and no one has ever thought – none of counsel have ever thought that that was an issue.

Your Honour, two other matters before I begin. Just in terms of timing, as Your Honour says, the scope of the appeal has narrowed considerably and I don't imagine that timing will be an issue but we have agreed between counsel that I wouldn't go for more than two hours, so beyond 12.15, with the balance of the day for the respondents and a short time, 15 minutes or so, for reply.

The second matter, can I just identify the people who are here with me today, which is Ms Hedley, with the glasses on, who is in-house counsel at ANZ, and Ms Jones, who is another lawyer of Chapman Tripp working on the case.

Your Honour, I filed last night a short outline of oral argument. Can I just check whether Your Honours have received it? If not the registrar has copies. Yes, it's only three pages. The other document which Your Honours are receiving I realised last night that Your Honours had only been given an extract of the 1978 report of the Contracts and Commercial Law Reform Committee. The small bound volume is the full report if Your Honours want to see it. In fact the substantive part of the report is quite short but there's a draft Bill and an explanatory note which is also in the bound volume.

So Your Honours if I can begin by going to my outline of oral argument and start by framing the issue, as the Chief Justice said the issues on this appeal have narrowed considerably and it is important, I begin by distinguishing what is in dispute and what is not in dispute. The remaining point of contention between the parties concerns the terms of their $19.5 million loan agreement or agreements, I should say, as I will come to and particularly whether those written loan agreements or the terms as set out in those written loan agreements or do they include an oral term or oral agreement as to the interest rate margin.

The other matters which are no longer in dispute between the parties; those are the respondents' allegations concerning the sale of interest rate swaps. That is both ANZ's marketing of interest rate swaps and its advice on the swaps in the period leading up to the global financial crisis and the respondents' claims under the Fair Trading Act 1986 and the Credit Contracts and Consumer Finance Act 2003. I just wanted to be clear that the issues under the swaps contracts are resolved because I noticed, in particular, Mr England's submissions are directed almost exclusively on whether or not the solicitor was capable and did advise on the swaps arrangements, whereas the focus of the appeal that has been agreed as between the appellant and the respondents, is very much on the loan agreements. And the fact that the parties have been able to narrow the issues in this way and my submission allows the Court to focus on an important area of law and policy, that is whether, as we would have it, there is a powerful inference in favour of the parties' final written agreement where parties have chosen to record their arrangements in writing, or as the Court of Appeal would have it, that such presumptions are from – we say the Court of Appeal judgment treats such presumptions as being from a bygone era.

GLAZEBROOK J:

Can I just check this. Is this just related to on the section 4 where there is an expressed exclusion or is that a more general submission because if it was a more general submission, I don't think you could sustain it, could you? Just recording it in writing would seem to go totally against the view that if you make a representation that induces entry into the agreement, it is a term of the contract. I can't see how you could have a presumption that it wasn't, but I can understand it because there is a term in the written contract itself that excludes prior representations.

MR HUNTER QC:

Your Honour we say two things on that. On the question, just parking for one moment the no-representations clause and section 4 and Your Honour's section 50 of the new Act.

GLAZEBROOK J:

I thought it was 60 but I was not going to –

MR HUNTER QC:

But we have talked in terms of section 4 so I will continue to do so. So parking for a moment section 4. In our submission there remains in the common law, sometimes referred to as the parol evidence rule in the Court of Appeal's judgment in *Newfoundworld*, which is one of the supplementary submissions, it is referred to at paragraph 53, as a powerful presumption and that is, Your Honour, that where a party seeks to introduce a term and just to emphasise, the Court of Appeal treated the margin undertaking, not as a representation which induced entry into the contract, and was therefore treated as a term under section 6 of the Contractual Remedies Act, the Court of Appeal, contrary to the factual findings of the trial Judge, found that there was an actual agreement objectively.

GLAZEBROOK J:

I understand the distinction you are making, thank you.

MR HUNTER QC:

Thank you and of course on the actual agreements, we say consistently with *Newfoundworld*, *Krukziner v Hanover Finance Ltd* (2008) 19 PRNZ 162 (CA) and so on and so forth, that there remains a powerful presumption in favour of the final written agreement and we also Your Honour will make submissions on section 4 and the application of the fair and all the circumstances test under section 4. So just so that you Your Honours know where I am going. The outline of oral argument is divided into four principal arguments. The first, as Her Honour Justice Glazebrook and I have just discussed, the inference in favour of the parties' final written agreement. Secondly, in our submission Parliament did not intend, by section 4 of the Contractual Remedies Act, to alter that presumption. We say that the Court of Appeal went too far in treating the Contractual Remedies Act as a radical break with the past. Thirdly, we say that on the facts of this case the Court applying the statutory criteria ought to uphold the parties' agreement excluding oral representations

and finally, just on the facts of this case we say the Judge was right, the trial Judge was correct to find that the representation or oral agreement did not occur and that the Court of Appeal erred in failing to respect the advantages that Her Honour Justice Edwards enjoyed at the trial.

WINKELMANN CJ:
Are you going to address the limitation?

MR HUNTER QC:
Yes Your Honour. I will address that as well at the end. Turning firstly to my first argument regarding the written agreements, I should say at the outset that I've used the term agreements in plural because we're not only talking about the written loan agreement which the parties signed in April 2008. Your Honours will recall that agreement is only ever for a 12 month term. Now that initial loan agreement, which is in volume 2 of the exhibits at page 619, that is certainly one of the agreements which are relevant, but there are many others in the bundle, and if I could just take Your Honours to one of them by way of example. It's in bundle 5, it's document 305.2331, it's volume 5 of the exhibits. It's the numbers in the bottom right hand corner.

So what happened between the parties in this case is that in 2008 they signed a loan agreement for a 12 month term but throughout the five year period we're concerned with, they signed a whole number of loan agreements for different amounts, different terms, different interest rates, and I've just given this one by way of example. It's signed by all of the trustees, including the two professional trustees. You will see, Your Honours, it's dated 20 October 2011, and if we look at clause 5 we'll see that this deals with the applicable interest rate over the $8 million of borrowing that is covered by this particular loan agreement, and this $8 million falls within the original $19 million of lending. This is simply a documentation in 2011 of part of the lending and Your Honours will see at paragraph 5, the parties have agreed on a floating interest rate of, well it is 8% at the time that the agreement was entered into, and as I'll come to in a moment the consequence of the Court of Appeal's judgment, when the Court of Appeal says that the parties orally agreed on an

interest rate margin for a period of five years, 70 basis points over floating, that requires setting aside not merely the original 12 month loan agreement, but all of these many agreements that the parties entered into during the period. So the effect of the Court of Appeal's judgment is that this agreement, which the parties entered into in 2011, and many of the other agreements in the bundle, are simply disregarded and the applicable interest rate is the one which the Court of Appeal found was agreed orally in March 2008. Just to illustrate why, in my respectful submission, that analysis cannot be correct, if I could refer Your Honours to the Court of Appeal's judgment at paragraph 166(a), it's in page 101.0129. Tab 7, paragraph 166(a). Your Honours will see the way in which the Court of Appeal has characterised the parties oral agreement is to say that they should be treated as an undertaking by ANZ that it will, "Not exercise what would otherwise have been its contractual entitlement under the," loan agreement, "…to increase the margin." Now that is true that in the original 2008 agreement which subsisted for a period of 12 months, there was a right of review in respect of the margin but subsequently, including in the 2011 agreement which I've just taken the Court too, the parties made all sorts of other arrangements in respect of interest rates. They agreed sometimes a floating rate, as illustrated in 2011, 8%, so the suggestion that ANZ was undertaking not to exercise a review right for five years in my respectful submission just can't be correct because it didn't have such a review right for five years, or indeed beyond the term of the initial 12 month loan agreement and so in order to succeed we would need to set aside a great many agreements subsequently entered into by the parties.

WILLIAMS J:

Presumably the other side would say these were all agreements that were entered into because they had no choice. It was that or die. So these aren't bargains.

MR HUNTER QC:

Just responding to that point Your Honour, the plaintiffs as they were, now the respondents, throughout this period, 2008 to 2011, in none of the negotiations did they say, we don't want to enter into this agreement because we already

have a binding agreement as to margin. There was discussion about the margin on the lending covered by the swaps, so Your Honour might recall the parties entered into the swaps contract for one, two and three year periods over portions of the lending, and when the margins went up on the lending covered by the swaps, there was discussion about that, but those margins only went up to a very small extent. They went from 70 basis points to 85 basis points to 97 basis points, but were otherwise held, and the –

WILLIAMS J:
But they were complained about, weren't they? Every time they went up they were complained about?

MR HUNTER QC:
Yes Your Honour, there was a complaint about that, but the sum total involved in those increases is $75,000. The far larger claim, effectively a $3.8 million claim, that relates to interest rates on other lending, on the original 19.5 but which is subsequently documented under other arrangements, such as the one that I've just taken Your Honour too, and nowhere, we say, was this notion of there having been an agreement as to interest rates for a five year term, nowhere was it raised, and in fact Your Honours will see the trustee, Mr England, who was also Bushline's lawyer, wrote to ANZ and said, look, we can accept margins are going up because floating rates are going down. That's at page 304.1827 of the bundle and that's a letter written in 2009, Mr England said, "We note that the margin is somewhat higher than previous. We would consider this to be tolerable in circumstances while the BKBM rate remains as low as it is," and so on, and nowhere in that correspondence did the respondents ever say, this is contrary to the oral agreement we entered into in March 2008 and Your Honours might recall from the cross-examination of the two professional trustees, that's the lawyer Mr England and the accountant, Mr Schurr, both of them said we were never aware of this. We were never told by our fellow trustees that there was an agreement as to margins in place covering the five year period and that is a factor Your Honour that Justice Edwards found to be significant when Her Honour found that no such agreement was made because in her key factual findings which are from

about paragraph 72 of the judgment, Justice Edwards said that she found it implausible that there would have been this agreement on an important term that is never mentioned, only a few weeks later, to the lawyer when he is giving legal advice on the loan agreement and is never mentioned throughout the period to the fellow trustees. And in fact both Mr England and Mr Schurr said that they had never ever heard of it.

O'REGAN J:
The eight percent in this document you have just taken us to. How did that relate to the BKBM rate at that time?

MR HUNTER QC:
It would have been substantially higher Your Honour because effectively floating interest rates and the BKBM is just a three-month fluctuating rate, BKBM is simply the Reuters screen where it is displayed. That went down following the global financial crisis in late 2008 and has never recovered and just listening to the news this morning, may well keep going down.

O'REGAN J:
So what date was this agreement?

MR HUNTER QC:
2011.

O'REGAN J:
So this would have been well over 0.7 above the BKBM rate.

MR HUNTER QC:
Yes. Take a guess but let's say it was 4%. On the plaintiff's quantum or the respondents' quantum calculation, they say we are entitled to an interest rate of that 4% BKBM plus the 70 points margins. So, in other words, 4.7%. They in fact by this agreement, agreed to pay eight percent so the 3.3% differential, that is what makes up the $3.8 million claim in simple terms but of course what was happening in the market is that whilst BKBM or whilst

floating rates were falling, banks' cost of funds was going up because of the global credit crunch and so margins were generally increasing and floating rates were not necessarily tracking, floating rates available to customers were not necessarily tracking down with the OCR or the BKBM rate and in fact at trial a witness's, or his brief went in by consent, but a witness from ASB and another witness who did appear from BNZ, said that the notion of fixing a margin over a floating rate for a five year period was just not a product that the banking industry offered at the time and that was also ANZ's position, that it simply wasn't a product offered at the time. So we say the effect of the Court of Appeal's judgment was to make an agreement for the parties, that what wasn't one.

I mean no one is suggesting that ANZ said expressly we agree to five years, an interest rate for five years. All that the Court of Appeal finds is that one can take that objectively from the circumstances and Mr Branch will no doubt submit that that is what his clients wanted. They hoped to achieve a five year fixed rate and against all the background, objectively that, in his submission, will be what was agreed to but there is no evidence that it was actually agreed to in the sense that the parties discussed five years or at least that ANZ said we will make a rate for five years. One of the ANZ witnesses, Mr Harvey, said that he was 100% sure that that was not discussed and the other ANZ witness who attended the relevant meeting, Mr Simcic, he accepted in cross-examination that that was what Mr Coomey was looking for but he certainly didn't say and that is what ANZ agreed to.

WINKELMANN CJ:

Was it put to him that that was what ANZ agreed to?

MR HUNTER QC:

Your Honour my recollection of the relevant part of the transcript is that he was asked whether that was what Mr Coomey was looking for and it didn't go further than that.

WILLIAMS J:

Didn't – was it Mr Harvey who said, but I do accept it was expected that ongoing meant for the length of the swaps, which is a substantial time longer than 12 months.

MR HUNTER QC:

Your Honour both Mr Harvey and Mr Simcic were asked about that point. The handwritten note, the word ongoing, that had been written by Mr Harvey and no, he, Mr Harvey said that 70 basis points was a low margin and that at the time, the banking industry, some customers had been given margins which would automatically reset at a higher rate. They were caught IRC rates, interest rate catalyst. So the idea was that you agreed to a low rate but after a specified period, it would automatically jump up and Mr Harvey said that he wrote ongoing to distinguish it from an automatic reset rate. In other words, that it was ongoing until review. Now Mr Simcic, as Your Honour Justice Williams says, he did say that he thought – I mean he wasn't the one that had written ongoing, but he said that he thought a fair sort of interpretation of that or apprehension that people could have had from that was that that would be ongoing for the period of the swaps. But Your Honour can I just point out that the ongoing for the period of the swaps, that leads back to the $75,000 claim because the lending covered by the swaps, the margin only went up by that small amount, from 70 to 85 to 97 and the quantum of that difference is the $75,000.

WINKELMANN CJ:

Because the swaps were three different time periods weren't they?

MR HUNTER QC:

Yes, Your Honour. We have talked very loosely in terms of it being a third, a third, a third, one year, two year and three year. So again this sort of illustrates the difference between the $75,000 claim and the $3.8 million claim so if ongoing means for the period of the swaps. Let's take, for example, the third that was only covered by a swap for a one year period, so roughly $6 million. After one year, that third was renegotiated. It wasn't covered by a

swap. It might have been a floating rate or what have you. The $75,000 claim says, to the extent that you put up the margin during that one year period, over that amount and covered by the swaps, that was the breach of the promise that swaps would operate like a fixed rate loan but the much larger claim, which is the consequence of the Court of Appeal's judgment, is that for the balance of the five year period, over that $6 million. In other words, after the swap has rolled off, on the Court of Appeal's findings, the respondents remain entitled to BKBM plus 70 basis points for the next four years, even though the swap has come to an end, or after three years in the case of the two year swap and so on.

O'REGAN J:

Presumably that meant the bank was required to refinance it; the 12 month term also was set aside by the oral agreement and that the bank was required to keep financing for five years. Was that how it would have worked?

MR HUNTER QC:

Yes, so the Court of Appeal says the parties had previously had various loan terms and, on their analysis,, five year margin had been discussed. So if there is a promise to hold the margin at 70 basis points over BKBM for five years, it follows that you must find a promise to continue financing for that period and of course in the evidence of the solicitor Mr England, he says that he took the parties specifically to the various terms of the loan agreement including the term that it was only a 12 month loan and he himself says, this is in the cross-examination transcript, he himself says that wearing his trustee hat, rather than his solicitor hat, he understood perfectly well the terms of the agreement he was signing and never thought that he was signing up to anything more than 12 months.

ELLEN FRANCE J:

What is the reference for that?

MR HUNTER QC:

I will just give it to you Your Honour. It is in my oral outline. There is a reference to Mr England's cross-examination. It is in the bundle at 203 approximately page 1165 and if I just go to it the evidence at volume 3, 1165.

WINKELMANN CJ:

Is that 303 then, not 203.

MR HUNTER QC:

203.

GLAZEBROOK J:

Sorry it is really difficult to read any of these.

MR HUNTER QC:

It is the green evidence, bundle volume 3. It is tab 78. And Your Honour will see that the passage I was just referring Her Honour Justice France to, it is at 1166, it is about from line 10 or line 15 and as the cross-examiner said, "Taking off your solicitor hat for a moment and putting on your trustee hat, as trustee you must have been satisfied that this loan agreement" and that's the 23 April 2008 agreement, accurately recorded the parties' agreement and Mr England says, "I would have been satisfied that was the intended arrangement at that time."

WINKELMANN CJ:

So is the bank's position is that it accepts it was bound by the .7 margin through the course of the periods it swaps.

MR HUNTER QC:

It isn't Your Honour. The bank's position has been that – well just taking a step back. In proceedings brought by the Commerce Commission, which led to effectively a consent judgment from Justice Venning, the bank accepted and this is a matter of public record, that misstatements had been made in

relation to the selling of interest rate swaps. Now through that process, managed by the Commerce Commission, ANZ made an offer and again this is a matter of public record and the offer is in the bundle, an offer which covered that $75,000 sum and also an additional sum to reflect a notional break fee. The Fair Trading Act claim is a matter which has otherwise subsequently resolved between the parties, in this particular case, as a matter of pure contract law analysis, no, ANZ's position is that the written terms of the loan agreement provided for the margin to be reviewable at any time. The solicitor gave evidence, I mean there's his certificate but there's also his oral evidence…

WINKELMANN CJ:
Okay can I find another way of asking the question.

MR HUNTER QC:
Yes.

WINKELMANN CJ:
What does the ANZ accept was said about the margin at that meeting because the evidence is very unclear.

MR HUNTER QC:
Yes, so at the meeting which occurred on 18 and 19 March, the respondents' position has always been that swaps were never discussed at that meeting, that that was a meeting to talk about the loan agreement and that the presentation that they received on swaps was something that came later. So ANZ's position has been and this is consistent with its evidence, is that any fixing of the margin for any period of time, was not discussed at that meeting. That's what Mr Harvey said, "I am 100% sure that we didn't talk about."

Now, separately, in relation to the marketing of swaps, one of the issues was that swaps were marketed like a fixed rate loan with an acceptance through that Commerce Commission process that statements of that nature had been

made, and so that gives rise to other claims, for example, under the Fair Trading Act.

WINKELMANN CJ:

Sorry, what does that – here's another way of asking the question. What does the ANZ accept was being represented when there was a statement being made about .7 going forward?

MR HUNTER QC:

ANZ's position is that no time period it was – Your Honour might recall in Justice Edwards' judgment Her Honour says that the margin was, and she italicises the word "set" rather than "fixed" so Her Honour found, and this was ANZ's position, that the parties agreed to set the margin at 70 basis points, but that it always remained subject to review. Reviewable at any time. That's around paragraph 74 of Her Honour's judgment, so Justice Edwards' factual finding is that there was no agreement as to time period at that meeting. Now Her Honour does separately say that she effectively accepted the idea that "ongoing" could mean ongoing for the period of the swaps, but then says that that was overtaken by the solicitor general advice and the fact that the contracting parties attention was drawn to that clause and effectively that they signed the loan agreement on the 23rd of April on the basis that the margin was reviewable at any time.

WILLIAMS J:

So is the point you're making that the only setting occurred in the swaps discussion and not in the loans discussion?

MR HUNTER QC:

Yes, the swaps discussion was a more general, and I suppose, I wouldn't want to – any impression that this would provide a fixed rate for a given period of time only occurred in the swaps, in the context of swaps, yes.

Your Honours, I think in the discussion I have largely covered point 1 of my oral outline. Your Honours will see I've highlighted in the bullet points the

judgments in *Newfoundworld* and *Krukziener*. Now both of those judgments, it's the paragraphs that I've marked there, say words to the effect that where, not only to the effect, they actually say in terms that where parties have taken care to document their agreement in writing, there's a powerful inference that it recorded the terms which they agreed to be bound to, and in the *Krukziener* judgment the Court says that evidence of what is said in negotiations is not normally admissible to contradict the terms of a written contract. Now what my friends the respondents do, and effectively what the Court of Appeal did in the paragraph 166 that I took Your Honours to, is the idea that somehow the oral agreement can sit alongside the written agreement because you might have a written agreement that the margin is reviewable at any time, but that you have an oral agreement not to exercise that right. Now as I've explained that doesn't work on the facts because, of course, there was no review right, it was only in that 12 month agreement. There were other agreements that didn't contain a review right but also just that nature of alleged oral agreement was exactly that raised in *Krukziener*. The facts of *Krukziener* was that the loan was callable at the discretion of the lender, and the borrower alleged that there had been an oral promise not to call it up other than in particular circumstances and the Court of Appeal had no difficulty actually on a summary judgment basis saying well that didn't work, you entered into an agreement which says it's callable at any time. The oral agreement which you're alleging is directly inconsistent with that and we won't permit you to make that argument.

WINKELMANN CJ:

That was a different kind of case, wasn't it?

MR HUNTER QC:

Your Honour, it was different in the sense – well, it's an important point. I'm not seeking to read Your Honour's mind, but I assume that Your Honour is saying that because the borrower in that case was a well-known business man, perhaps someone accustomed to that kind of dealing. Now it's not the exactly the issue I'm talking about but of course the bargaining strength of the

parties, or the position of the parties is one of the factors which we'll come to in relation to section 4 of the Contractual Remedies Act.

WINKELMANN CJ:

Yes, well don't let me take you out of order.

MR HUNTER QC:

Perhaps Your Honour if I could just say something about the parties in this case though. In many areas of the law the Courts are very careful to distinguish between trusts and other entities and to emphasise that the contracting party is the trustees, and then obviously they owe their duties to the beneficiaries of the trust. The contracting parties in this case was two trusts trading in partnership. Each of the two trusts had a majority of professional trustees, so in the Court of Appeal's judgment the very first line of the judgment describes the two individuals, Mr and Mrs Coomey, and then says that the other party is Bushline Trustees Limited, which of course is the party before this Court, but that's something that's occurred after the event. At the time period that we're concerned with the trustees were of each of the two trusts were one of Mr and Mrs Coomey, Mr Schurr, who is an experienced accountant, and Mr England who is a partner in a law firm. So the party that was agreeing to be bound to the loan agreement was obviously the trustees and at least two of the three in the case of each trust said in their evidence that they understood perfectly well what they were signing. As far as they were aware the written terms reflected the agreement and they weren't aware of anything to the contrary, so I suppose Your Honour Justice Winkelmann it's inevitably in the case where you're dealing with a large bank and a borrower, one can say well there is a disparity between the parties. We're not really talking about a case such as that between Mr Krukziener and Hanover, and plainly there's a spectrum, but we would say in circumstances where you've got two professional trustees, legal advice, it's a very large loan, the evidence is that Mr Coomey's a good negotiator, so on, we are more down the *Krukziener v Hanover* end of the spectrum than we are down the consumer end of the spectrum.

WILLIAMS J:

What do you say to the possible point that the relationship was really between the bank and the Coomeys and that these were handshake deals, the paper came later? In fact there was an unconditional agreement to purchase Waverley without any documentation from the bank to fund it.

MR HUNTER QC:

Yes, just taking those points, Your Honour, the agreement to purchase Waverley came in February 2008 and at that point the respondents hadn't committed to going with ANZ. The evidence is that they were thinking about other banks, so on and so forth.

WILLIAMS J:

Well he was being the good negotiator.

MR HUNTER QC:

Yes. They then have the meeting in March 2008. What occurs after that is that the bank insists that the parties take legal advice on the loan agreement, and no one becomes bound until 23 April 2008 when the loan agreement is signed following the legal advice.

WILLIAMS J:

When you say “no one” who do you mean?

MR HUNTER QC:

Neither party becomes bound to the loan agreement.

WILLIAMS J:

But what’s the state of the land purchase?

MR HUNTER QC:

It is unconditional.

WILLIAMS J:

It’s unconditional.

MR HUNTER QC:

They have chosen to enter into an unconditional purchase prior to arranging finance but -

WILLIAMS J:

They say this was really on the basis that in those days the National Bank was Uncle National Bank and handshakes were good enough. I think all the ANZ staff said, yes, that was really the way we did business.

MR HUNTER QC:

Your Honour, the main evidence about the handshake deal came from an expert, a lawyer actually called as an expert legal witness, Mr Darlow, called on behalf of Mr England, and Mr Coomey himself also gave evidence about things being done on a handshake. Now Her Honour Justice Edwards who saw all of these witnesses give evidence, and obviously the witnesses from ANZ, Her Honour said that it's implausible, or Her Honour found it implausible that there would be an oral agreement over a term of this nature. That's at paragraph 153 of Justice Edwards' judgment. So Justice Edwards, there is a line in her judgment, Your Honour, which says these were different times, although I mean it was only 2008, it's not the Dark Ages, and –

WILLIAMS J:

I think they were the Dark Ages, I was there.

MR HUNTER QC:

Well we would say that this wasn't the case of people doing business on a handshake. What the bank actually did is insisted that the parties obtained legal advice before they became bound and one of the passages in the cross-examination of the banking expert called by the respondents, it was Mr Dillon, so he had said that in an earlier case, the *Cygnet Farms Ltd v ANZ Bank New Zealand Limited* [2016] NZHC 2838, [2017] 2 NZLR 538 case, that it is not enough for a bank just to say you should get legal advice but it's a matter for you as to whether you do. One often sees these clauses which says we suggest you get legal advice but over to you whether you in fact do

so and he had said that what a bank ought to do is insist that parties obtain legal advice before signing the loan agreement, and that is exactly what ANZ did in this case. The loan agreement did not take effect until the legal advice had been obtained, and we don't accept that in such an important agreement, $19 and half million, professional trustees, that one can simply say, well, I'm not bound to what I signed. That rather our relationship should be governed by what I now say was a handshake over the table, and Justice Williams just to emphasise that, that is not a handshake deal that the plaintiffs themselves recalled when they initially filed the proceedings. It didn't feature in the first statement of claim, the second statement of claim, or the third statement of claim. It was only in the fourth amended statement of claim that the allegation that there had been an agreement to hold margins for five years was first made, and – sorry, going off track here, but just as a policy matter this is a point which the UK Supreme Court makes in the *MWB Business Exchange Centres Ltd v Rock Advertising Ltd* [2018] UKSC 24, [2019] AC 119 case, which is in our bundle, and also which the Court of Appeal made in *Krukziener*, as a policy matter where parties themselves have agreed that they have set the terms of their agreement out in writing, it's undesirable that one goes searching through the back story, or as it's put by its effectively unanimous UK Supreme Court, it's Lord Sumption writing for himself, Baroness Hale and two of the other Justices, and then there's a separate opinion by Lord Briggs which agrees with the result, it's not desirable, the catchphrase is, threshing through the undergrowth to try and find some sort of chance remark. Now in this case we're even further from a chance remark because no one is suggesting that ANZ said we will give you five years, 70 basis points for five years. Rather what the Court of Appeal says is objectively that is what one could take from the exchange.

WINKELMANN CJ:

Where would the five years come, that would come from the ASB's offer?

MR HUNTER QC:

Your Honour, that was the, the respondents' case was that the five years came from the ASB offer, but ASB itself, the witness from ASB and he wasn't,

his brief went in by consent so he wasn't challenged on this, he said well we may have offered a five year fixed rate, and can I just emphasise a five year fixed rate would have been disastrous because when interest rates went down if you were fixed at let's say 9% I think it was for five years, you would have continued to pay that rate throughout. They would have, the plaintiffs would have been no better off. The witness from ASB said very clearly that five year fixed over BKBM, or fixed over floating, was not a product that ASB had ever offered. Mr Coomey certainly said –

GLAZEBROOK J:
You just said they may offered that, and then you just said it's not a product.

WINKELMANN CJ:
We're not understanding the difference between offering a five year fixed rate and offering…

O'REGAN J:
The fixed rate is the whole interest rate –

WINKELMANN CJ:
I know, it includes the margin. The margin goes up and down.

GLAZEBROOK J:
You just say it's the margin that wasn't offered, is that right?

MR HUNTER QC:
Yes, what happened with the ASB, I'll find the reference for Your Honours. There is a photograph in the evidence of the rates sheet that the ASB offered, and that has fixed rates for one, two, three, four and five year terms, and swap rates for those terms. They are all up rates, as Justice O'Regan says, their rates including a margin, and they're in the vicinity of I think 8 or 9%.

WINKELMANN CJ:

And that's very different from offering a fixed margin, isn't it, because that would mean that the bank would always be doing, going down, even if its cost of funds went up it would be fixed at .7.

MR HUNTER QC:

Absolutely Your Honour and, yes, that is the difference, there is a handwritten reference to 65 basis points on that ASB document, and I'm just going to give Your Honours the reference. It's 302.0543 and 302.0545. There is a handwritten reference to 65 basis points, but that was simply saying this is what is included within the fixed rate. The witness from ASB said, we did not, in fact, and we would never, offer a fixed margin for five years above a floating rate because, as Your Honour Justice Winkelmann says, that if the banks costs of funds go up, as it did during the global financial crisis, it's stuck with that margin which could well be, and in fact would have been, below its cost of funds. So in our submission one of the objectionable aspects of this case, or one of the criticisms that we make with respect to the Court of Appeal's judgment, is that the plaintiffs, or respondents, are left with a bargain that, or the true bargain as the Court of Appeal found it, but one that was never available to them in the marketplace. No bank offered a product of this nature and ASB, which is what we're comparing with, the unchallenged evidence was that it did not, in fact, and ANZ did not in fact.

GLAZEBROOK J:

Can you just give those references again please?

MR HUNTER QC:

Yes Your Honour, 302.0543.

WINKELMANN CJ:

You don't have the volume numbers?

MR HUNTER QC:

Sorry, there's a method to the madness. The 302, the "3" means it's an exhibit and the "2" means it's the second volume of the exhibits.

WILLIAMS J:

So are these the photos are they?

MR HUNTER QC:

Yes.

WILLIAMS J:

You didn't find any technology to sharpen them up?

MR HUNTER QC:

My understanding is that we did our very best.

WILLIAMS J:

This was your best?

MR HUNTER QC:

I don't want to buy into Your Honour's comment about the Dark Ages, but I think it was one of those Nokia sort of – it certainly wasn't an iPhone camera.

ELLEN FRANCE J:

Can you just remind me Mr Hunter, when Mr Harvey talks about in his note about BNZ offering 60 points on ongoing. Was he asked about what he thought that meant? I just can't remember.

MR HUNTER QC:

Yes so Mr Harvey, who had made the handwritten note talking about ongoing, he's the one who said he made it to distinguish it from the interest rate catalyst, so he said that he was concerned that people within the bank would think, because it was low, that the 70 basis points was in the nature of a rate that would automatically go up after a period of time, and that he wrote

"ongoing" to emphasise that it was set at that rate, and was subject to review, but was not something that would automatically reset at any point in time.

WINKELMANN CJ:
So have you got the reference to that?

MR HUNTER QC:
To Mr Harvey's cross-examination?

WINKELMANN CJ:
I was trying to find the cross-examination. So it wasn't an automatic reset?

MR HUNTER QC:
Yes, bear with me one second Your Honour. It's at 202, so that's the evidence volumes, volume 2, around 0648.

WINKELMANN CJ:
So that's tab 50?

ELLEN FRANCE J:
Oh that's where he says "not fixed". He doesn't agree with the fixed for five years.

WINKELMANN CJ:
0648 did you say?

MR HUNTER QC:
It's tab 39, it's Mr Harvey's cross-examination, and it's at page 0650, and it's down the bottom of that page. Mr Harvey says, "The writing on my notes in the meeting," and so on, when I said, "…they were ongoing it really comes down to internally, the rate was so low I think…" and it says there "internationally", it's presumably meant to be internally, "…would have been viewed as what we would call an IRC," and he explains separately that's interest rate catalyst, "… at the time, so effectively we would provide a

sweetener for customers for a short period of time and then the margin would lift…" and so on.

Then over the page he explains what interest rate catalyst means and so at the end of that passage, it's around line 7 on page 202.0651 he says, "… that is why I have written 'ongoing'," which was to distinguish it from that sort of catalyst or sweetener.

WILLIAMS J:
So is that a reference to his email or to the note, because he uses "ongoing" twice doesn't he? Once in respect to the BNZ rate, is it?

MR HUNTER QC:
No Your Honour, I think Mr Harvey only ever uses the word "ongoing" in his handwritten diary note.

WILLIAMS J:
Well if you look at paragraph 32 of his evidence-in-chief he says, "BNZ offering 60 points ongoing."

MR HUNTER QC:
Yes. I mean of course he's ANZ. This is talking about what –

WILLIAMS J:
I understand that. So he's referring to what the competitors are putting up.

MR HUNTER QC:
Yes.

WILLIAMS J:
So what I'm interested in is, obviously he's been told that perhaps BNZ is offering a BKBM plus margin, is that what was being represented as having been offered?

MR HUNTER QC:

Yes, and then we know as a matter of fact BNZ never did offer that. There was never any offer from BNZ. There was perhaps a discussion with BNZ but certainly nothing in writing. Mr Harvey only ever uses the word "ongoing" to mean not subject to automatic reset.

WINKELMANN CJ:

Well does he say that because…

WILLIAMS J:

He says that in his cross-examination.

MR HUNTER QC:

He was specifically cross-examined in relation to the point we were just discussing. I don't think my learned friend specifically cross-examined him on his use of that term in relation to the BNZ or any discussion with the BNZ. I mean there was not a document to cross-examine on in the sense that there wasn't a BNZ, there was not actually a BNZ offer of that nature.

WINKELMANN CJ:

So what was unusual about this offer which caused him to have to go to a phone to ring Mr Graham? That it was not going to be on that automatic reset. What was unusual about it?

MR HUNTER QC:

The reason for, as I understand it Your Honour, is it was low, so 70 basis points was a good deal. Now of course it's reviewable but the setting it rather than fixing it at that level, it was being set at a low level.

WINKELMANN CJ:

The bank's evidence on this point is quite unclear. So we've got Mr Simcic's brief but he doesn't really, he's not exactly square on that point, is he. He doesn't say, this is why I was ringing him up.

MR HUNTER QC:

Your Honour, the thing about the word “ongoing” is that that was not a word that was ever used in the meeting with Mr and Mrs Coomey at the time. That is a word that has purely come into the conversation because it was written in Mr Harvey’s handwritten note.

WINKELMANN CJ:

So no one said the word was used?

MR HUNTER QC:

No and Mr and Mrs Coomey specifically said that it wasn’t.

WILLIAMS J:

So was there a BNZ witness who said no offer was made?

MR HUNTER QC:

No Your Honour. There was a BNZ witness, Mr Purvis, who said that, he wasn’t involved in the particular events, but he had worked at the BNZ at the relevant time, and he said that that wasn’t a product that the BNZ offered. The reference to BNZ never having made a written offer, that was in the cross-examination of Mr Coomey. It’s put to him there never was an offer from BNZ, and he says, well, I knew the chap, his name was Marcus McLeod. I had seen him and we’d talked about it, and he makes a reference to handshakes, but there is no suggestion that there was anything in writing from BNZ.

WILLIAMS J:

Okay.

GLAZEBROOK J:

I'm just having a slight difficulty following this, can you just give the references that you’re talking about so we can have a look afterwards? I'm not sure that it’s worth spending time on BNZ but if you could give us the references, all of

those things you were talking about, Mr Coomey and also what was supposedly meant by it and what was the product and the market.

MR HUNTER QC:

Yes Your Honour. So in, there's a summary of evidence with evidence references in the written submissions, the full written submissions at paragraph 60, and the document references are in the footnotes there. So the discussion with Mr Harvey, that is at 202.0648 and following. The reference to the BNZ witness Mr Purvis, that is just in his brief of evidence rather than his cross-examination, and his brief of evidence is in the evidence volume at tab 60, it's 202.0957. Perhaps if I could give Your Honour, after the morning tea break, the page reference for Mr Purvis.

GLAZEBROOK J:

That's fine.

ELLEN FRANCE J:

He does say at 202.0976, "My experience at BNZ is that we would not have offered a product with that particular feature."

MR HUNTER QC:

That was what I was referring to Your Honour, and Your Honour Justice Glazebrook I will also get you the reference to Mr Coomey's cross-examination where he talks about the handshake with Mr McLeod from BNZ.

WINKELMANN CJ:

And where he says ongoing was never mentioned.

MR HUNTER QC:

Yes. If, with permission Your Honours, if I go now to the second point in my outline of oral submissions, and this is the question which assumed great prominence in the Court of Appeal's judgment, which is what did Parliament intend to do when enacting the Contractual Remedies Act, and the

Court of Appeal says at paragraph 243 of its judgment that what the Contracts and Commercial Law Reform Committee sought was a radical break from the past, and by that radical break what the Court of Appeal says is that the Court should have greater leeway than before, not merely in terms of no representations clauses, but generally to find what the Court of Appeal refers to as the parties true bargain contrary, we would say, to the principles set out in *Newfoundworld*, *Krukziener* and so on, which is that as a matter of common law there is a strong presumption that where parties have recorded their agreement in writing, that those terms should prevail.

Just running through the bullet points in my oral outline, I pointed out there, and this is in the materials handed up this morning, the explanatory note to the draft Bill on page 6, that says that section 4 of the Contractual Remedies Act isn't otherwise intended to affect the operation of the parol evidence rule.

WILLIAMS J:
Sorry, can you give me that reference again please?

MR HUNTER QC:
It's page 6, Your Honour, of the spiral bound…

GLAZEBROOK J:
I'm not totally sure that the parol evidence rule, as it's now understood, actually has anything to do with this, but shall we take it as a sort of shorthand for saying the bargain is assumed to be what's written down, subject to there being a separate oral agreement found which, of course, is possible in terms of variations of contracts.

WINKELMANN CJ:
I think it's on page 5.

MR HUNTER QC:
I'm sorry, it's in discussion of section 4. Page 5 sorry.

O'REGAN J:

This is the explanatory note to the Committee's Bill, not the one that was actually introduced into the House?

MR HUNTER QC:

Yes, that's right. Your Honour, Justice O'Regan, I'll come back in a moment to the point about the distinguishing between the Parliamentary intent and the drafters of the contracts and Commercial Law Reform Committee's report, but Your Honour Justice Glazebrook if I could just pick up on that point, because that, in our submission, is at the heart of it, that there are two issues. There are what is the effect of entire agreement clauses, and/or no representations clauses, but there is the broader and more fundamental point is what do we do when we have an alleged oral term which is directly contradicted by –

GLAZEBROOK J:

I was just saying to you that it's not necessarily anything, or it probably is not anything to do with the parol evidence rule, that broader proposition, not – I understand what you're saying, but I don't think it's anything to do now with the parol evidence rule.

MR HUNTER QC:

Your Honour, it might be better described as relating to what I had described as the powerful presumption in favour of the final written agreement.

So just returning to Justice O'Regan's question, Your Honours will have seen that the Court of Appeal sets out various passages from the Committee's report. Some of those passages simply records the views of some of the participants, not necessarily those of the whole Committee. In terms of what was the view of the whole Committee, I have put in the bullet points. We have the Committee's explanatory note to the draft Bill, as Your Honour has just referred to, and we have also put in the materials, a chapter from Professor Coote's book. Now Professor Coote was, of course, loomed large in the Contracts and Commercial Law Reform Committee, and he says in his

book that it was never our intention to, he uses the word “revolutionary”, it wasn’t intended to be revolutionary, no desire to undermine basic contract principles or create any significant threat to the security of contract, and that’s in his text at page 26.

WILLIAMS J:
Sorry, in what context? In what particular context is that statement made?

MR HUNTER QC:
Professor Coote is talking about the background to the Contractual Remedies Act, so it’s as I said page 26, paragraph 1.6, and he says given the relatively conservative membership of the Committee, it was never, I think he says not plausible, to suggest that there would be any desire to create revolutionary change to the law of contract. Perhaps it’s easier if I go to the passage.

WILLIAMS J:
It was obviously meant to create some change. I'm not sure whether the epithet revolutionary helps us.

MR HUNTER QC:
It was certainly intended to work change to contractual remedies, section 4 works for change it did to the way one approaches entire agreement clauses, but I'm just seeking to make the broader point, this is Professor Coote says, uses the word revolutionary, “No desire to undermine basic contract principles or create any significant threat to the security of contract.”

WINKELMANN CJ:
Perhaps it might help to frame this point that you’re dealing with, if you tell us what you say is revolutionary in what the Court of Appeal did.

MR HUNTER QC:
Yes so the Court of Appeal says that the Contractual Remedies Act was designed to represent, it uses the word “radical” rather than “revolutionary” a break from the past, and I say that it is, with respect –

WINKELMANN CJ:

Yes, well we understand that. But what do you say, I mean it may say that, it doesn't really matter if it has no implications for its approach, but what was revolutionary about its approach?

MR HUNTER QC:

That it moves away from the inference, and where parties have recorded their agreements in writing, moves away from the inference that the parties will be bound to the terms which they have themselves said will govern their relationship, and sets the Court off on a search, we would say, or engages the Court in a search for what the Court of Appeal described as the true bargain, and we say that for policy reasons that's undesirable because what it does is it leads to exactly the suggestion that we have here, where the, we have one judicial officer, the trial Judge, who's been through all the evidence, reached one view of what has occurred. The Court of Appeal has reached another, but in fact the parties themselves documented their agreement in the loan agreement, agreed that oral representations would not form part of it, and that I suppose –

GLAZEBROOK J:

You're mixing up the two points, aren't you, because you could certainly frame what the Court of Appeal did in absolutely conventional Contractual Remedies Act terms couldn't you, that there'd been a representation that there would be this fixed margin for five years that induced them to enter into the contract you could certainly draw – I'm not saying this is what you would do, but if you were reframing what the Court of Appeal found you could reframe it as a representation that induces entry into the contract, and therefore becomes a term of the contract, and then the only issue then is the section 4 one and should the entire argument clause prevail.

MR HUNTER QC:

Except what Your Honour is saying, that is not in fact what the Court of Appeal –

GLAZEBROOK J:

Well it mightn't have been but if that's what they could have done then you could reframe it easily like that, then they haven't made an error of principle, and their radical change was actually the change that was designed and meant by the framers of the Contractual Remedies Act, and the people who enacted it, because they were fixing up that mess that the common law had got into with representations. Well the mess that they, well they thought it was a mess, and I think probably what's happening elsewhere shows that it was a mess.

MR HUNTER QC:

Your Honour, what the Court of Appeal says is that this can't be treated as a representation because representations are statements of present fact, so the Court of Appeal says –

GLAZEBROOK J:

Well I think they're wrong on that. They're quite clearly wrong on that. I represent that you're going to make $500,000 for the next five years, you're not representing a fact but you're certainly making a representation based on current fact, so they must be wrong on that.

MR HUNTER QC:

Yes, the difficulty on the facts of this case –

GLAZEBROOK J:

No, I'm not talking about the facts. You're saying it's a radical departure, but I'm just challenging you on that, and I think your best point is actually the section 4 point.

MR HUNTER QC:

Well I'm not going to be one of those counsel that ignores an invitation to address my best point, but just very briefly Your Honour, the Court of Appeal says, no one has alleged that ANZ made this representation. What the Court of Appeal says is that objectively viewed that was the party's bargain,

so we are treating it as a term not a representation for the purposes of the Contractual Remedies Act, and so when I say no one has alleged, I'm not talking about the pleadings, I'm talking about the evidence as it emerged at trial was not that someone from ANZ had come along and said, we will provide you 70 basis points for five years such as would potentially form part of the contract for the purposes of section 6.

WINKELMANN CJ:

Is the heart of your point really captured in one paragraph in the Court of Appeal's judgment where they seem to apply an *Investors Compensation Scheme* analysis to Mr Harvey's file note, which is –

MR HUNTER QC:

What is an interpretation case.

WINKELMANN CJ:

So they're actually effectively applying contractual interpretation –

MR HUNTER QC:

Yes.

WINKELMANN CJ:

To a file note which is not, no one's saying that that was actually what was said, but they're acting as if they're working out what the agreement was at that time, which is at paragraphs 182 to 188. Is that the…

MR HUNTER QC:

Yes Your Honour. That is what we say is so dangerous about – well, dangerous sounds hyperbolic, undesirable about a judicial search for the so-called true bargain, going through things that were never said by anyone at the time, file notes and so on. The Court of Appeal doesn't say this representation was made. It says that going through the background we can find an objective agreement that means so and so. Now perhaps I could just

return immediately to the point that Justice Glazebrook's invited me to address, which is the section 4 –

GLAZEBROOK J:
No, I wasn't trying to, I was just suggesting…

WINKELMANN CJ:
I'm quite interested in this point because I was, when I was reading this, my mind snagged on this because it seems as if they're sort of going back into pre-contractual discussions, and seeing what was the, they're applying almost a contractual analysis to see what was the true agreement formed at that point, as opposed to whether there was a representation, but isn't there other material in the judgment that does actually suggest that they thought there was a representation?

MR HUNTER QC:
So two points Your Honour. I agree with Your Honour in relation to the use of *Investors Compensation Scheme*, and I think my learned friend refers in his submission to *Vector Gas Ltd v Bay of Plenty Energy Ltd* [2010] 2 NZLR 444, we would say those are interpretation decisions rather than contract formation decisions. Now Your Honour when the Court of Appeal at paragraph 166 is careful to draw a distinction between representations, and it uses the word "undertaking", so in respect of the fixed cost it describes that as a representation, but it describes that we're talking about today, namely the margin, uses the word "undertaking" which I am taking as a synonym for agreement.

ELLEN FRANCE J:
Sorry, so you say undertaking is agreement in 166?

MR HUNTER QC:
Yes, that's the way I read the Court of Appeal's judgment, Your Honour, that what they're saying is not that there was a representation that becomes a term via section 6, which was the point that Justice Glazebrook was making to

me, but rather than objectively they find an actual agreement or undertaking that was agreed between the parties. Now we say that –

GLAZEBROOK J:

Well what's say they'd said, we absolutely undertake that this is what we'll do, despite the written agreement which induced the entry into the contract. You're saying that's not a representation and nobody can take, and it's writing and they say this, nobody can take that either as a separate agreement that modifies, or as a representation that induces the entry into the written contract.

MR HUNTER QC:

Well I suppose if the parties discuss and – is Your Honour asking if –

GLAZEBROOK J:

What I'm saying is, how far does this go. You say they didn't make that offer, and it was – well that's a factual matter, but if they did say in the meeting, if you enter into this agreement the margin will be fixed for five years, and they agree they made that, you're saying you just ignore it, and it can't become part of the contract?

MR HUNTER QC:

I'm saying that, Your Honour, in a context where there is a discussion but that is followed by a documentation of the agreement, and that when the documentation of the agreement occurs, the parties and we say with legal advice, their agreement is that what has gone before does not form part of our bargain.

GLAZEBROOK J:

Yes, but that's a section 4, not that's this point, that's not the first point we're talking about. But you're insisting is the issue, or one of the issues.

MR HUNTER QC:

I'd prefer to put it as a powerful inference that the written agreement is the terms to which the parties have agreed, and then come separately to the section 4 analysis which relates to the entire agreement clause.

GLAZEBROOK J:

So even if there has been a representation there's still a strong presumption that the written agreement doesn't include that representation as a term, whether it induced the entry into the contract or not, it's not a possible argument is it?

MR HUNTER QC:

Yes, I mean I can see that that there could be –

GLAZEBROOK J:

In light of section 6.

MR HUNTER QC:

Sorry, I didn't mean to cut you off. I mean I can see that there could be cases on the facts where – well, how does one, let's say, Your Honour, that you have a situation where the party, there is a very clear – there is evidence that there is oral discussion of a point and then that very same point is captured in the parties' written agreement. So there is a direct inconsistency between the two, that's what happened in *Newfoundworld*, that's what happened in *Krukziener*. There is a square inconsistency between what the, one party alleges was said in an oral discussion, and then what the parties subsequently wrote down. What I say is that the parties, where the parties have agreed to capture their agreement in writing, as a matter of law and policy it makes good sense that that captures their agreement.

WINKELMANN CJ:

It's evidential really, isn't it? The best evidence of what the parties agreed is the contract. The written contract.

GLAZEBROOK J:

Section 6 doesn't it specifically deal with that?

MR HUNTER QC:

In terms of representations, Your Honour.

GLAZEBROOK J:

Yes.

MR HUNTER QC:

Yes, although –

GLAZEBROOK J:

If you find it is a representation of course.

MR HUNTER QC:

Yes, although Your Honour don't you run into a difficulty with section 6? If the representation is squarely inconsistent, or alleged representation, with what the parties have subsequently written down so you had potentially two directly contradictory terms of the contract, the Chief Justice is describing it in terms of an evidentiary issue, but we would say that the written agreement prevails. Now plainly with section 6 you could have terms which sit alongside other terms and then if you had an entire agreement clause, or a no representations clause, then we feed into the section 4 analysis.

WINKELMANN CJ:

Okay, can I just take you back to the question we started out with that I was trying to get your help about, what the Court of Appeal is actually doing here, because when you combine 166 with that material I took you to earlier, 182, it does seem as if they're trying to work out what the agreement was, reached. So it's a contractual analysis. It's not a representation. It's a collateral contract.

MR HUNTER QC:

I completely agree with you Your Honour. The Court of Appeal is engaged in a contractual analysis. I understood Justice Glazebrook to be saying that Her Honour appreciates that but that it could be done differently but as Your Honour Justice Winkelmann says, yes, the Court of Appeal approaches this squarely as a matter of contract.

WINKELMANN CJ:

And implicit in that finding is that they don't find a representation. Or is it not.

MR HUNTER QC:

Yes, Your Honour, they do not find a representation. Rather they say objectively viewed this is what an objective observer could find that the parties agreed.

WILLIAMS J:

Are you saying when they say these are representations the subsequent part of that sentence nullifies that proposition?

MR HUNTER QC:

In respect of the margin undertaking, which is what I've been focusing on Your Honour, that don't characterise that as a representation.

WINKELMANN CJ:

It's hard to see what they're saying at 166, isn't it.

WILLIAMS J:

Well they say fixed cost and transferability representations. Is the margin undertaking not the fixed cost?

MR HUNTER QC:

No, so the fixed cost representation, that has been resolved between the parties.

WILLIAMS J:

Oh, that's the swap?

MR HUNTER QC:

That's the swap, exactly Your Honour. The monitoring issue has been resolved between the parties. All that I am seeking to talk about with respect is the margin undertaking.

WILLIAMS J:

Okay.

MR HUNTER QC:

I'm conscious of the time Your Honour and I will come in a moment to the section 4 analysis. Just very quickly, and the other points are in my oral outline, this is returning to the discussion I had with Justice O'Regan. I do say that this is an important point that the Courts are not engaged – this might sound like a point against myself, as I've sort of talked about what the Committee was really setting out to achieve, but with respect I say the Court of Appeal judgment places too much emphasis on what is going on in the minds of Law Reform Committee. What the Court is concerned with is obviously the legislation that Parliament has enacted and Parliament's intent, as evidenced by the words "Parliament has chosen" and I've put a citation there to *Williams v Central Bank of Nigeria*, another UK Supreme Court decision, there was a debate between the Judges in that case as to the emphasis that should be put on a Law Reform Committee report that led to the English 1939 Limitation Act, and Lord Sumption and Neuberger say at the passages that I've referenced that we need to bear in mind, or that the Court should bear in mind, that it is construing Parliament's intent, or the Act, not the Committee's report, and so whilst I've provided the reports to Your Honours, I wouldn't want to place too much emphasis on what discussion members of the Committee, well before the legislation is enacted, had between themselves.

So, Your Honours, I won't go to some of the case references, but I have just noted there that the decisions of the Court of Appeal in the early 1990s, that's *Brownlie v Shotover Mining Ltd* CA181/87, 21 February 1992, endorsed the passages quoted in full in the *PAE (New Zealand) Ltd v Brosnahan* (2009) 12 TCLR 626 (CA) decision, I'm conscious that Your Honour Justice France was on the Court in that case, and then in *Newfoundworld* I'm conscious that Your Honour Justice Winkelmann was on the Court. Each time that is a re-endorsement of the law as set out in *Brownlie,* which again is this presumption, and doesn't view section 4 as being some sort of general disapproval of entire agreement clauses. The Courts say it's desirable that parties record their agreements in writing and desirable that the agreement between the parties, their full contractual terms are as set out therein.

I will come, after the break, to paragraph 3 of my oral outline which is applying the statutory factors from section 4 of the Contractual Remedies Act to the facts of this case.

WINKELMANN CJ:
Thank you Mr Hunter. We'll take the morning adjournment.

COURT ADJOURNS: 11.31 AM

COURT RESUMES: 11.47 AM

MR HUNTER QC:
Your Honour, if I could begin by just giving Justice Glazebrook the references that Her Honour asked me for before the break. The place where Mr Coomey says in his evidence that ongoing had never been mentioned to him, is 201.0177 at line 18. Mr Coomey effectively said to me, you tell me what it means, because it's not something that's ever been said to me. The reference to only being a handshake with BNZ is at 201.0174, line 8. Just picking up on a question Justice Williams asked me about the loan going, or the purchase of Waverley going unconditional, that occurred on the 29th of February. So they were unconditionally bound well before this

discussion about margins and then just picking up on the discussion with Your Honour Justice Winkelmann, if I could just refer to paragraph 218 of the Court of Appeal's judgment and I think that illustrates the point, well both that I was trying to make and I think Your Honour was making to me that the Court of Appeal doesn't sort of analyse this in terms of representations. It says that we conclude that the objective meaning of ANZ's agreement on margin was that it would fix Bushline's margin on the refinancing loan. So it's not that there was a representation of that that was made, it's that the Court of Appeal says, having looked at all the circumstances, that's what we find objectively the parties agreement to have been and as discussed we say that's not the right way of looking at things.

While we're with the Court of Appeal's judgment, and this feeds into the next section of my oral outline, section 3, which is the statutory factors under section 4 of the Contractual Remedies Act, if I could refer Your Honours to paragraph s274 of the Court of Appeal's judgment? Paragraph 274 is the, really as regards the loan agreement rather than the swaps. This is the complete analysis of the effect of, or the Court of Appeal's analysis of the effect of Mr England's legal advice. So, as I've said in the outline, one of the factors which Parliament directs the Court to have regard to when considering whether an entire agreement or no representations clause should be upheld is whether the parties have had legal advice, and the Court of Appeal dismisses the legal advice that had been provided by Mr England by saying, firstly, that it's not recorded in the refinancing loan. Now the margin undertaking, of course it's not recorded in the refinancing loan. ANZ's position is and has always been and the trial Judge found that it was never made. So I think the suggestion is that Mr England didn't have an opportunity to say, "Well, this oral representation was made to you but it's been overtaken by the written terms," because the oral representation's not written down or in fact never raised with him, and in my submission that's not a basis on which to dismiss his advice because, by very definition, the pre-contractual discussion that the Court will always be considering is not going to be recorded in the loan agreement or any written agreement. And the second point that the Court of Appeal says is that Mr England was not present at the meeting where

the relevant undertaking was given. Now this is a very significant basis for dismissing legal advice, because it is going to apply in many, many circumstances. Almost always, or certainly in the lending context, the legal advice is given on the final agreement, there's not a –

WINKELMANN CJ:
Well, isn't it same point as the first one really? Is it the same point as the first one, it's effectively they didn't know about it?

MR HUNTER QC:
Yes, well, yes, I guess the Court's saying he didn't know about it for two reasons: it wasn't written down and he wasn't there. But just in terms of that second aspect, the fact that he wasn't there, section 4 does say that the Court should look at whether legal advice was provided at any relevant time. So in my respectful submission it's not a question of whether Mr England was present at the negotiations, what he says in his evidence is that I met with Mr and Mrs Coomey and, you know, discussed the loan agreement.

Now can I just very briefly make a point in relation to this? Your Honours will notice that the cross-examination and Mr England's answers are given in terms of what he would have done rather than the advice he actually gave. Now the reason for that is that the respondent asserted privilege in Mr England's advice, so there has never been any ability to test the substance of the advice. But all parties have always accepted that the advice was given, so Mr England will say in his submissions before the Court the respondents don't contend otherwise, Mr England, no one at trial contended otherwise. He did take them through the loan agreement, and he says in his evidence, "I would take clients to the interest rate clause because it's very important, I would take clients to the term of the loan, I would, I agree that an entire agreement clause is something you would go to," and so on, but I wasn't permitted to ask questions about what advice he actually gave because of the assertion of privilege. But just –

WINKELMANN CJ:

So because in this context because privilege was asserted, if there was an issue, a live issue about that kind of thing, you might point to an inference that the inference should be against the person asserting privilege, but that doesn't arise here?

MR HUNTER QC:

Yes Your Honour. I agree as a general matter that it can't be right that people can assert privilege and therefore prevent the advice being tested in circumstances where they want to say that it was inadequate, but as Your Honour says that's not the position here. In terms of the solicitor's certificate, which is at 307.3608A, clause 6 says –

GLAZEBROOK J:

Can you just slow down on that sorry?

MR HUNTER QC:

Sorry Your Honour. 307.3608A, the A, there was a missing page inserted, and it's clause 6 of the solicitor's certificate. Now that is not the actual solicitor's certificate from this loan, but that was gone through at some length in cross-examination and it's accepted that that clause captures what Mr England in fact did in this case, namely the nature and effect of the provisions of the document have been explained to the customer and there is a factual finding which I don't believe is in dispute, Justice Edwards at paragraphs 152 and 160 of Her Honour's judgment she says, "Inconceivable that advice would not have been given on clause 5," which is the clause about the margin. The reference to Mr England saying that he would have explained about the no representations clause, it's actually set out that in my oral outline, 203.1165.

So section 4 directs the Court, says all the circumstances but Parliament has identified three factors in particular that are important in determining whether or not the no representations clause should be upheld. That's the legal advice which we've just discussed and say is significant in this case.

The nature of the agreement and we say that we are talking here about a nearly $20 million loan. It's not a consumer context, for example, it's a significant transaction where one would expect parties to take care, and of course there were two professional trustees who say that they read the agreement and signed it, and then were asked to think about the respective bargaining strengths of the parties, and as I've said in our written submissions plainly, as a matter of a general proposition, the bank is almost always going to be regarded as the party with superior bargaining strength, but in this particular case the evidence is that the respondents had other options. They were assessing offers from other banks and weren't in a position where they had to go to ANZ. So in my submission all three of the factors in this case, but particularly the legal advice favour upholding the no representations clause, and that clause, in my submission, should be seen not as a way of excluding aspects of the parties' agreement, but rather the clause itself is part of the parties' agreement. The parties themselves have said, we are capturing our agreement in these written terms and whatever has gone before is not part of the agreement, and for the policy reasons that I've talked about, set out in the Court of Appeal's decision in *Brownlie*, set out in the UK Supreme Court's decision in *MWB*, that is a desirable thing to do. It avoids the situation we have here where people are seeking to recall what occurred at a meeting, now 12 years ago, nine years ago at the time of trial.

And that leads to my fourth point, Your Honours, which is to look at what the trial Judge herself found as to what occurred here, because I wouldn't want to be taken from our discussion to be here today saying, yes there was an agreement but we are, it is trumped by these clauses. In terms of the margin undertaking, the alleged amount, 70 basis points for five years, ANZ's position and the findings by the trial Judge was that no such agreement ever occurred, and I realise this is all an –

WINKELMANN CJ:

Agreement of representation?

MR HUNTER QC:

I beg your pardon?

WINKELMANN CJ:

Agreement of – well, it's all right, don't answer it. Carry on.

MR HUNTER QC:

Either way, Your Honour. Saying I appreciate this area of the law's very familiar to this Court, has been discussed in previous decisions such as *Austin, Nichols & Co Inc v Stichting Lodestar* [2007] NZSC 103, [2008] 2 NZLR 141, but on the facts of this case what we submit occurred is that the Court of Appeal failed to have regard to what an earlier Court of Appeal in the *Green v Green* [2016] NZCA 486, [2017] 2 NZLR 321 referred to as "fundamentals", which is that, while an appellate Court must reach its own view on the facts, in doing so it has regard to the advantages enjoyed by the trial Judge.

GLAZEBROOK J:

You might want to rather refer to our decision in *Sena*, I think it was, where this is discussed at some length. It's a criminal decision, so just might be why you're not familiar with it.

MR HUNTER QC:

Right. And also, Your Honour, the *Rae v International Insurance Brokers (Nelson Marlborough) Limited* [1998] 3 NZLR 190 (CA) decision, that's, you know…

GLAZEBROOK J:

Well, that clearly is no longer the law.

MR HUNTER QC:

Yes.

GLAZEBROOK J:

So you really would be better looking at our decision on this, and discussion on it.

WINKELMANN CJ:

There's future study for you, Mr Hunter, *Sena* with an S.

MR HUNTER QC:

Right…

O'REGAN J:

But, I mean, what were the advantages, I mean, given that a lot of this was, there's not really credibility findings here, are there? The Judge didn't say, "I think X was lying or being untruthful," she just preferred certain evidence over the other, and a lot of it was written down.

MR HUNTER QC:

Your Honour, I accept entirely that credibility, there aren't credibility findings and there has been no, there was no cross-examination directed on either side to say that anyone was lying in this case. But in terms of the advantages enjoyed by the trial Judge, *Green v Green* also talks in terms of reliability, and so it isn't inherent in Her Honour's findings that she makes, Her Honour made, reliability findings, Her Honour sets out her key factual findings from paragraph 73. So in terms as a matter of reliability of certain evidence that was given for the respondents, Her Honour finds it implausible, and we submit that the trial Judge is in a position to measure the written record against the oral evidence given by the various witnesses as it unfolds in the course of the trial – and, Justice Glazebrook, I hope here what I'm saying is not inconsistent with the Court's approach?

GLAZEBROOK J:

I think it probably is slightly, but I was just looking, in fact, to see what we said, because it was a slight gloss – well…

WINKELMANN CJ:

Well, I mean, *Sena* – of course in a civil case there is large trial record of documents and it comes in with the witness evidence, and that's the point you're making, I suppose?

MR HUNTER QC:

Yes, that the Judge is able to measure the written documents, and just there are a large number of written documents in this case but there are none really which document, other than a handwritten reference to ongoing, there is actually a complete absence of written documents as to what occurred at the meeting on the 18th and 19th of March. The allegation of 70 basis points for five years, that is an allegation which is based purely on oral evidence and, with respect, we say that Justice Edwards was in a better position to evaluate the reliability of that oral evidence measured against the written record, and Her Honour does make findings – as my discussion with Justice O'Regan – not credibility findings but implicitly reliability findings when Her Honour says it's implausible that this oral agreement that is never mentioned to anyone for years and years and years, and even in the initial pleadings, in fact occurred in the way that's now alleged.

And then quite apart, Your Honours, from whatever the presumptions might be in favour of Justice Edwards' ability to judge, in our submission the Judge's findings were based on very strong evidence in this case. I've summarised some of those in the bullet points under paragraph 4 and given the references. The fact that there was no mention of the alleged oral agreement to the co-trustees. There was no mention in subsequent correspondence over margins or in the first three statements of claim. That it was inconsistent with the multiple later agreements, and that's a document I've taken you to. The fact that it wasn't a product available in the market and I've just highlighted there that that is captured in our full written submissions at paragraphs 51 to 62.

O'REGAN J:

What do you say about Mr Graham not giving evidence?

MR HUNTER QC:

The four witnesses that gave evidence are the four who were at the meeting. My learned friend draws something from the fact that they went away and made the phone call and that the bank failed, didn't call the person on the other end of the phone call, and my submission is there's nothing to be drawn from that. There's no, he didn't have any note which referred to this supposed agreement, or nothing has ever been found, and just to emphasise, this is not an agreement which the plaintiffs themselves recall for many years, so say Justice Edwards had the opportunity to observe the evidence of the four key people, namely the four people who attended the meeting, and that that gave Her Honour a sufficient basis on which to judge what had occurred.

I'm conscious of the time. I was just going to address, unless there's any other further questions on the sort of heart of the matter. I was going to say something very brief about the limitation issue. The question is really in terms of the *Transpower New Zealand Ltd v Todd Energy Ltd* [2007] NZCA 302 decision, whether there is a true or significant difference between the original claim, which is the claim that the swaps were sold like a fixed rate loan, and the subsequent claim first raised in the fourth amended statement of claim, which is that ANZ agreed to fix the margin for five years, and in our submission there is, if one just sits down and compares the original statement of claim with the final iteration of the pleading, they really are quite different claims. The original claim is an implied term versus an actual agreement – sorry. Is an implied term whereas the final pleading is an actual agreement, and they have very different financial consequences. So in our submission the contractual claim that there had been an actual agreement between the parties was something new and limitation ought to run from the time that that claim was filed. My learned friend makes two points which I'd just like to address. He says that even if that is so, and if the contractual claim was filed, if the Court finds that the contractual claim was filed for the first time in 2016, that part of the claim remains in time because if one is alleging a five year agreement from 2008 onwards, then the part of the claim which relates to 2010 to 2013 would be in time, and I accept that that is correct if one is applying a contractual analysis. If one is doing what the Court of Appeal does

and says, this is an actual term of the parties' agreement that was subsequently, then those subsequent breaches I accept are in time. There is a more difficult issue if it is treated as a representation for the purposes of section 6 of the Contractual Remedies Act and the two alternative analyses, one option is to say it is a representation which induces entry into the contract. That is when the cause of action accrues and therefore six years from that point it's out of time. The other analysis is to say, well section 6 says treat it like a term of the contract. If you treat it like a term of the contract which is subsequently breached, then as my learned friend submits, part of the claim will be in time. We obviously prefer the first alternative, but on the Court of Appeal's judgment it doesn't arise because they treat it purely as a contractual claim. So part of it would inevitably be in time.

GLAZEBROOK J:

Wouldn't you always be out of time if you had an ongoing contract with a representation. I don't really think you could look at it on the first aspect.

MR HUNTER QC:

There is actually –

GLAZEBROOK J:

Because you'd oddly be out of time in many cases, wouldn't you, in that situation, where there's a clear agreed misrepresentation, clearly agreed but it induced entry into the contract.

MR HUNTER QC:

I can see the force in that view Your Honour. There is a school of thought which says this is really a misrepresentation claim. Section 6 tells us how we should deal with misrepresentation claims, and sorry, when I say "this" I mean the hypothetical that we're talking about. This is really a misrepresentation claim. In a remedy sense we are directed by section 6 to give a contract-based remedy, so in other words as if it was a term of the contract rather than a tort-based remedy, but nevertheless, as with other misrepresentation claims, the cause of action accrues when the

misrepresentation induces entry into the contract. As I say, I can see the force in what Your Honour says, and I don't think it arises here so I wouldn't propose to say more about it. I am just highlighting the fact that there is actually a dearth of authority on this point and it is a live debate in the law, if I can put it like that.

WINKELMANN CJ:
Can I take you back to your first point under the limitation issue which is in relation to the allegation the initial pleading that the swaps were sold like a fixed rate loan, that's an independent cause of action from this one, isn't it? It continued as a claim?

MR HUNTER QC:
It did Your Honour.

WINKELMANN CJ:
So it did morph into this one, this was a different…

MR HUNTER QC:
That's right Your Honour. So the way in which the pleadings are set out is they are set out by cause of action, so there was a Contractual Remedies Act, a contract cause of action, a Fair Trading Act cause of action and so on, and then pleaded various alleged conduct by the defendant under each cause of action, but there was a separate pleading on the sold like a fixed rate loan which has been, that issue has now gone between the parties, and there was a specific pleading which was only added, featured in later statements of claim, that ANZ had agreed or represented or what have you that the plaintiffs would have a fixed margin for a five year period.

WINKELMANN CJ:
And that appeared for the first time in 2016?

MR HUNTER QC:
Yes Your Honour.

WINKELMANN CJ:

So the point I'm making is the swaps being sold like a fixed rate loan which was a cause of action that went through a trial on its own and this new one, whether it was or not part of that cause of action, didn't pop up until 2016?

MR HUNTER QC:

That's correct Your Honour. I haven't addressed orally arguments about extension of the limitation period, but those are set out in our written submissions. I'm conscious it's now 12.15, which is exactly when I told my learned friend that I'd hand over. So unless there's any further questions from the Court?

WINKELMANN CJ:

Thank you for your good timekeeping Mr Hunter. Mr Branch?

MR BRANCH:

As my learned friend has, Your Honour, I have an outline of the oral argument that I filed earlier today, which I'd like to hand up.

What I planned originally to do was to work through that as the summary, but I would like to depart from that and first look at some of the claims that my learned friend has made in relation to the facts, just deal with them at the start, and then pick up on the discussion that the Court was having around the misrepresentation versus undertaking argument and the way that the Court of Appeal approached that issue.

So I'll just start with a couple of points that my learned friend made, and the first one was this focus on the other agreements, so the fact that they had subsequently entered into other agreements which didn't provide for a BKBM plus a margin of 0.7.

If the Court's to accept that there was an agreement to hold it for five years' BKBM then necessarily there must be a term loan, there must be a debt facility which matches that, otherwise it makes no sense, the two go hand in

hand. So when it comes to explaining why they didn't continue with that, the evidence is clear that they were price takers, and I have two reference to the evidence where – and one of those is Mr England – just explaining that they didn't have any choice. The evidence has exchanges with the bank officials talking about receivership and all those sorts of matters, so they were price takers, and those reference, Your Honours, the first one is 203.1175, line 23 to 27

O'REGAN J:
And that's Mr England, is it?

MR BRANCH:
That's Mr England, and that refers to Mr Schurr saying the same thing. And then Mr Dillon, who's the expert, banking expert, that the respondents called – and that's 201.0471.

WINKELMANN CJ:
Is there any evidence of Mr Coomey ever protesting the fact that these were agreements outside the, the rates were outside the agreement?

MR BRANCH:
Yes, Your Honour. So there are a number – and it's in my submissions, which I'll come to – but there are a number of meetings where the complaint was made, and each time – the first complaint was made when the first increase in the margin came. Now what my friend says, well, that didn't specifically refer to the five years issue, and he says that there's no mention of that at all, and I'll take you to a point where that was raised and acknowledged by Mr Harvey. But if I could just first finish off that point about the agreements?

My friend said that it required the Court to set aside those other loan agreements and, with respect, that's not the case. All that's happened is those loan agreements stood, they were enforceable, but they overcharged on interest, because all the time the agreement, if the agreement's upheld, the agreement was 0.7 BKBM and they charged a different rate. So you're not

setting aside those loan documents, all you're doing is adjusting the amount of interest charged under those loan documents. So just coming back to –

O'REGAN J:

So are you saying that the agreement to hold the margin at .7 percent above BKBM rate also bound the bank to keep funding the two trusts for five years?

MR BRANCH:

No, Your Honour. I'm saying that to the extent that they did continue to fund. So if there was a breach and there was a call-up or receivership or whatever there may be, they may be released. But at –

O'REGAN J:

No, obviously that's always, the bank can always call it up if there's a breach, but assuming no breach did the bank, even though that everyone signed a one year loan agreement, was there really a five year loan agreement?

MR BRANCH:

Yes Your Honour there was. So that's –

O'REGAN J:

So the undertaking wasn't just that we will have an interest rate, it was we'll also provide you with successive funding agreements for the next five years.

MR BRANCH:

Yes Your Honour and just maybe talk about that 12 month issue. What the evidence was from the swaps expert within the ANZ was that you should always match the term of the loan, that's the physical money loan, to the swap, because if the swap is, if the term loan is less than the swap period, it creates a mismatch and a real risk, because what happens is after 12 months if the bank were to change their mind and call up the loan, then obviously you've still got the swap and you've got no money. But important where that flows back to is if you're going to say that a swap is like a fixed rate loan, then the period of the loan has to be the same as the swap. As a minimum.

O'REGAN J:

The swaps were only five years though weren't they?

MR BRANCH:

No, they were one, two, three in the end, but at the time they did the, actually agreed to the 19.4 million they didn't know what the period was going to be.

O'REGAN J:

So on that basis you had a mismatch the other way. So the bank was exposed, wasn't it, or not?

MR BRANCH:

The bank was never going to be exposed as long as they held security because they would close out the swap –

O'REGAN J:

But they were obliged to lend at BKBM plus .7 without a swap on your case?

MR BRANCH:

Yes, yes, that's right Sir.

O'REGAN J:

So is there any evidence that the bank did agree to that?

MR BRANCH:

Well it just gets back to finding what was agreed on the day Sir. So if it was agreed, because what is being discussed there is a five year package at a rate, and so the issue is simply whether the bank agreed to a five year facility with a fixed margin, that's a five year loan facility, notwithstanding the agreement says 12, because of course the agreement wasn't around –

O'REGAN J:

Well what was Mr England doing? If there was an agreement for a five year facility why did he tell them to sign a one year document?

MR BRANCH:

Well Mr England, because of the way the bank operated, so these discussions were just with Mr and Mrs Coomey, and the letter where they agreed to take the loan was not even addressed to the trust, it was just addressed to Mr and Mrs Coomey from the bank, signed by Mr and Mrs Coomey, and so at the time that they went to see Mr England, Mr England didn't know that there was an agreement. He did not even know about the swaps.

O'REGAN J:

Lawyers normally wouldn't, would they? I mean if you have a banker/client relationship and then you go to your lawyer after you've done your negotiations, the lawyer wouldn't be present, that's just normal.

MR BRANCH:

Except, Your Honour, in this case Mr England is also a borrower.

O'REGAN J:

Well, true, but doesn't that count against you, that the representation wasn't made to him? I mean basically you're saying the bank agreed with the counterparty something that the counterparty didn't even know about.

MR BRANCH:

So the issue of whether the lack of knowledge of Mr England or Mr Schurr has never been raised, but if it had been raised the response would have been either that the bank had accepted the power of the Coomeys to make those decisions on behalf of the trust, and it would be up to the trustees to say, well, we don't agree with that, and of course they never took that step.

WINKELMANN CJ:

It's not really how the bank was choosing to operate. Wasn't it how Mr and Mrs Coomey were choosing to operate, because they were dealing on behalf of the two trusts on their own, which is not an uncommon thing. I'm not saying it's something to be criticised.

MR BRANCH:

No, Your Honour, I guess the thing that is unusual here is that you would still normally see the bank address the correspondence saying you are taking the loan, you still expect to see that addressed to the trust, but it wasn't, it was only addressed to Mr and Mrs Coomey. There were only places to sign for Mr and Mrs Coomey and that's what they did. So both sides of this agreement were operating on the basis that the Coomeys had the ability to bind the trust.

O'REGAN J:

But do you accept that at the time that this all happened, the Coomeys did have other options, so they weren't price-takers at this stage.

MR BRANCH:

Absolutely .

O'REGAN J:

So if they had a five year commitment why didn't they insist on it being in the written agreement?

MR BRANCH:

Well, Your Honour, there's two issues. The first issue is they had options, and they put those options to the bank as part of a negotiation. So they're saying we can leave unless you can match this deal, and the bank came close to matching that deal, they say, and they allowed a little bit of a premium over the 0.65 because of the existing relationship, but that's the whole point. They weren't risk takers then, didn't have to take the debt then, but that's the reason why they stayed, because they were offered exactly, or slightly higher than what they could get somewhere else. Then when it gets to why didn't –

O'REGAN J:

Well, hang on. It was higher but the ASB was offering the fixed term, based on that photo.

MR BRANCH:

Yes Your Honour –

O'REGAN J:

Sorry, a fixed rate. It wasn't offering – the 65 basis points was just Mr Coomey's writing, isn't it?

MR BRANCH:

That's right Your Honour, I think that's – I'm about to have the discussion about the misrepresentation of the agreement. So Mr Coomey maintained that that's what he was told by the ASB but the critical –

O'REGAN J:

And maintained that that was for five years.

MR BRANCH:

Yes Your Honour. So the –

WINKELMANN CJ:

Can I just be clear, Mr Coomey maintained that what he was told by the ASB was different to what was typed on the letter then, because what's typed on the letter is a fixed rate loan, which is different to a bank bill rate plus margin.

MR BRANCH:

Yes Your Honour. The 0.65 is handwritten, and the Court of Appeal found that was probably the margin component of the fixed rate overall rate. But the important –

O'REGAN J:

But how could that be, because the BKBM is a 90 day rate, and the loan was a one year loan, or on your case a five year loan. So how could it be relative to the bank rate, bank bill rate?

MR BRANCH:

Sorry Your Honour, I'm getting – so we've got the ASB, what the ASB –

O'REGAN J:

The ASB rate was just a rate of interest that would apply for whatever the term of the loan was, whereas the BKBM rate resets every 90 days.

MR BRANCH:

Yes.

O'REGAN J:

So you couldn't correlate them, could you?

MR BRANCH:

No Your Honour but you – so the ASB offer also had BKBM rates and it also had swap rates, but it also had fixed, so the situation here is that whatever reason Mr Coomey believed that he had been offered 0.65 BKBM for five years from the ASB. So that's the starting point. So I was going to go into the negotiation issue now as to why that's important or I could come back and deal with this misrepresentation versus agreement.

O'REGAN J:

Yes, do it in the order you want to do it in, that's fine.

MR BRANCH:

I'll go back then to the issue, the concern or the discussion around whether there was a misrepresentation or an undertaking. So the exclusion clause, the entire agreement clause talks about excluding representations, warranties and undertakings. So the contest in this case, I suppose, is between representations and undertakings, and so what the Court of Appeal found was that this was an undertaking and agreement reached between the parties, and so what I submitted is that a plaintiff is entitled to argue both of those. So, because a misrepresentation doesn't require any agreement. It could be a gratuitous statement, it could be in response to a question, and then all you need for that is that it's false, doesn't even have to be deliberately false, and you need inducement. So that's what you need there. Alternatively, in my submission, you can say, well, in fact we had an agreement, so offer

acceptance objectively judged we had an agreement, and then the issue is whether that agreement gets excluded by the entire agreement clause as far as it relates to undertakings. One of the potential issues around the misrepresentation claim was, in a way, that I think the evidence pretty much shows that the bank did intend to honour this deal at the time, and what changed was the GFC, and suddenly their cost of funding was going up, and they had linked themselves to a product which had nothing to do with their cost of funds but BKBM, and so there was an argument that any representation by the bank was true at the time because, in fact, they intended to do that very thing, so that's why in my submission it is acceptable to look at it, as in this case, to ask the question whether objectively the parties reached an agreement. Then that leads into whether there was, in fact, an agreement.

O'REGAN J:
What's your case?

MR BRANCH:
Well, our case is that there was an express agreement to hold margin on a five-year loan facility at BKBM plus 0.7 margin.

Now before I go into that I'll just pick up on a couple of points. My friend said that nowhere was it raised about the five years fixed in the ASB, and I'd like to refer the Court to volume 201, which will be the…

WINKELMANN CJ:
Sorry, what do you say Mr Hunter said?

MR BRANCH:
That there wasn't any reference going forward as to what they had received from the bank, from the ASB, as being 0.7 fixed for five years.

WINKELMANN CJ:
No, I'm still not with you.

MR BRANCH:

So that they didn't act in a way, they never said, "Well, hang on, you said you'd fix the margins for five years," all they said was, "You can't put the margins up." So what my friend was focusing on was the lack of a reference to the five-year period. And, sorry, the reference is 306. So that's the yellow one, case on appeal, exhibit volume 6, it will be towards the end.

WINKELMANN CJ:

Sorry, what was that reference again?

MR BRANCH:

306.2995, Your Honour. And the reference is under, "Interest rates," and the reference to the ASB offer at .65 margin five years. And this document is dated towards November 2009, it's a diary note of Mr Harvey's.

WINKELMANN CJ:

Sorry, what date?

MR BRANCH:

Probably November 2009, and that was established by, on page 2994, the reference to 70 cows having sore feet, and the reference dating that, Your Honour, is at 201.0160, so that's the evidence dating it at 2009.

WILLIAMS J:

The reference at the bottom of that page to mid-January '09, is that a retrospective reference?

MR BRANCH:

I think it must be, Your Honour, because definitely the cows were established as having the sore feet at, the 70 cows referred to on page 2994, and I think also from the reference to the High-field on page 2995.

O'REGAN J:

Sorry, can I just get the significance of this? This is at a point where ANZ were saying, "We're going to put the margin up," and this was his response to it, is that right?

MR BRANCH:

Yes. And then finally before I take the Court to the actual –

WINKELMANN CJ:

So there's no reference there, he hasn't said, "You agreed to fix your rate," he just points out that the ASB offer was at this low rate?

MR BRANCH:

Well, this is a record from the bank who are saying he must have been told by the Coomeys that there was an ASB offer at 65 margin for five years. So all I'm saying that it undermines –

WINKELMANN CJ:

But this is in 2009?

MR BRANCH:

It is 2009. So, but each time the margins went up there was a complaint about the interest rates going up – sorry, that it was in breach of the agreement they had reached.

WINKELMANN CJ:

Well, you say there was a complaint that it was in breach of the agreement they reached?

MR BRANCH:

Yes.

WINKELMANN CJ:

It's quite important whether or not they actually complained it was in breach of the agreement they reached or they complained that the rates were going up.

MR BRANCH:

No, they complained it was in – and I will take you through there where they, because there's a series of meetings where they complained.

GLAZEBROOK J:

Is your contention then – just to put in slightly different terms – that the agreement was that they would match the ASB offer, except that it wouldn't be 65, it would be 70?

MR BRANCH:

Absolutely, Your Honour.

GLAZEBROOK J:

Okay.

MR BRANCH:

Because what I – I'm probably best to wait to take you through it, because that in my submission is the only reasonable conclusion out of the negotiations from the undisputed facts. But there was one further point about Mr Harvey that I'd like to take before I take Your Honours there, and that's my friend was reinforcing or making much of the fact that Mr Harvey had said a hundred percent there was no term mentioned. So if I could please refer the Court to volume 202, which will be the green one, evidence volume 2…

GLAZEBROOK J:

Volume 2 of the evidence, is that right?

MR BRANCH:

Yes, the green one, Your Honour.

WILLIAMS J:

Sorry, the page, please?

MR BRANCH:

202.0654.

WILLIAMS J:

Who is this?

MR BRANCH:

This is Mr Harvey's cross-examination. So probably if I could ask the Court just to read page 654 and down to line 30?

O'REGAN J:

That seems to link it more to the swap period, does it?

MR BRANCH:

It does, Your Honour, but it goes to the view of Mr Harvey that he was a hundred percent certain that no term was being discussed, and yet there is something he's saying that they would have perceived or the people that were in that meeting would have perceived that at least if they took a five-year position then that that would be, it would be fixed. So that's just that Mr Harvey wasn't a hundred percent certain on it being more than something where he just set the rate and it could be reviewed at any time.

So that brings me to my outline of oral argument, and that's set out at paragraph 2. So what I submit there is that if you look at the undisputed facts then, if you're going to look at this objectively, which in my submission is the correct approach, then first of all undisputed Bushline advised ANZ that it could obtain the funding on the basis of margin of 0.65 fixed for five years, that's not in dispute. "Bushline told ANZ that if ANZ could not match those terms Bushline would move banks," again not in dispute. "In other words, any offer by ANZ of an initial margin of 0.7 capable of being increased at any time in the following five years," which is what ANZ says is the case," was not acceptable and would result in ANZ losing one of its largest customers in a time when ANZ was focussed on growth." So it's accepted that during this period which, dark ages or cowboy terms or however it's going to be described, Mr Harvey accepted that if you didn't lend the money the farmer could go down the road and someone else would. And they've got this growth strategy, and this is one of their larger clients at $19 million. So for that

reason – and this does feed into the section 4 argument – is that reaching agreement on fixing the margin was therefore vitally important to both parties, not just –

O'REGAN J:
But if it was, why wouldn't they have put it in the contract?

MR BRANCH:
Well, I can't explain that, Your Honour.

O'REGAN J:
Well, it's a pretty big hole in your case, isn't it?

MR BRANCH:
Well, no, Your Honour because –

O'REGAN J:
You've got someone borrowing $19 million, legally advised, the accountants and lawyers on the trust, and you say it was absolutely fundamental to them, this term was the most fundamental, and yet they get a loan agreement that has a different term and is a clause that says prior representations are excluded.

MR BRANCH:
Yes Your Honour. So what, in my submission the approach has to be is first decide whether there was an agreement, and get over that hurdle. Then we get to the next hurdle, which is, well, should that agreement be binding on the ANZ, or is the ANZ able to prove that it's fair and reasonable that they rely on the limitation clause. So that's, in that second bit comes the question of the legal advice and why they didn't do that, and all we know is, and I'll come onto it, so there are factors there. First, the lawyer didn't have all the information. Secondly, that there's this trusted advisor and we are partners in your firm, in your business, and so I can go into detail on that, but they had created this environment and this corporate image that –

O'REGAN J:

But did Mr Coomey read the one year term as really being a five year term. I mean how does it explain that. It's in one words of one syllable.

MR BRANCH:

Well Your Honour I can't, other than saying that it talks about the margin – well the margin will be reviewable. It doesn't use the word "increase" –

O'REGAN J:

But it says the loan is for one year.

MR BRANCH:

Yes, Your Honour, it does say the loan's for one year, but again it's based on this overall trust arrangement that has been built up by the bank with their relationship manager so that when someone says you have got an agreement –

O'REGAN J:

You just ignore the written material.

MR BRANCH:

No Your Honour, you don't take as much notice of it –

O'REGAN J:

I mean you're saying you had a commitment to a five year loan, and you signed a document that said, or your client signed a document that said one year. Why would they do that?

MR BRANCH:

Your Honour they didn't appreciate the points that you're making. That they believed that they had that and the bank would honour it, and with respect the bank would have honoured it but for the GFC.

WINKELMANN CJ:

Was Mr Coomey asked why he didn't communicate this thing which was very important to his fellow trustees?

MR BRANCH:

I don't recall him being asked that. I think the questioning was along, to the trustees as to whether they knew anything about it. But Mr Coomey's evidence was, well when they, they just signed documents, they didn't really read them.

WINKELMANN CJ:

But he had the documents explained to him by Mr England.

MR BRANCH:

Yes, Your Honour, he did.

WILLIAMS J:

So is there a midpoint here where the two scenarios aren't in direct conflict, don't have a head on collision, which is the bank fudged this.

MR BRANCH:

Well –

WILLIAMS J:

And there was no undertaking and they just didn't nail the point on purpose, because banks don't like getting locked into long deals, if they can help it, unless they're very, very sure of what's going to happen going forward.

MR BRANCH:

Yes, Your Honour, I think that's unlikely in my assessment of the witnesses that I saw, that I think the more likely approach, and it's shown by that other cross-examination of Mr Harvey, that no one expected margins to go down and no one expected the GFC. So when they entered into that agreement they fully intended to comply with it.

WILLIAMS J:

But you see that might be why five years is never nailed down, because no one sees the dark clouds on the horizon at all, no one even sees it as an issue.

MR BRANCH:

Well that's potentially true Sir, but the issue is you do have five year fixed loans.

WILLIAMS J:

You certainly do, yes.

MR BRANCH:

So you lock it in. The 12 month aspect is really a bank-driven requirement because it affects their funding, so the less, the number of longer term locked-in debts that you're talking about can affect their credit rating and the cost of monies so it's not, in my respectful submission, not unusual to have a 12 month loan and have a five year commitment on the basis that you've already committed to roll it over.

WILLIAMS J:

Was it unusual in those days?

O'REGAN J:

But then the bank facility agreement would have said that. All things being equal, we'll keep rolling this over for five years, if that's really what they'd agreed to. I mean that wasn't uncommon either, for bank facility agreements to say that.

MR BRANCH:

To say all things being equal they would roll it over?

O'REGAN J:

Yes, we'll provide you, we're committed to five years all things being equal, but we'll do it one year at a time.

MR BRANCH:

And, Your Honour, that's one of the issues about, when you look at how this came about. What you're saying there is that there actually was no loan facility agreement. So you would normally see the offer generally, which was only sent to the Coomeys, which they signed, then you would get the loan facility agreement and then it would have all those things in it, and then you have a pre-printed term loan form. In this case that second step was missed out. So the solicitor never saw the loan facility agreement. So those are the sorts of things that you would see. And I have to deal with the fact that they received legal advice, but there are a number of factors to go into it. But I'd also say, Sir, that when you get to the section 4 argument it's generally, the approach that's been taken today is you add up down one side all the things for not allowing the entire agreement clause to be relied on, and then the opposite on the other side, and then you look at them and make a call. So I can't do anything about the fact of the legal advice, and that's going to go on one side. But what I'm saying to the Court is that when you start to look at all of them together, relationship, the trust, never question it, and then as I go on to, that the bank knew they had misled the Coomeys before they drew the money down or signed the loan agreement, then that's going to more than outweigh any legal advice.

But in my respectful submission the first part is decide whether there was an agreement. Because if there is agreement, but for the entire agreement clause, it could be enforced. And I just set out the basis in 2(a) and 2(b), that is that the margins were going down, (c), that, over the page at page 2, "Obtaining a fixed margin for five years was what Mr Coomey was most interested in," that's what the bank accept was the case. They say he was a good negotiator, and in my submission he got what he wanted, at that stage anyway. He got commitment, agreement to a five-year fixed-rate facility and then finally the agreement was reached.

So if you'd get to the conclusion and work backwards is that the whole idea of this was that the bank had to come up with something to stop the Coomeys leaving. The Coomeys have said, "If we're going to stay then you've got to match this deal." They effectively matched the deal.

WINKELMANN CJ:
I think we've got the general proposition. You might like to take us to the evidence you say shows that was that agreement?

MR BRANCH:
Your Honour, it's in those footnotes in 2(a) to (b), so I can take you through those.

So for each of those propositions – and they in my respectful submission aren't in dispute – but I can take you through those or leave with the references.

WINKELMANN CJ:
Well, I was interested in your point. You've said that there is evidence of the Coomeys saying, "You're breaching the agreement"?

MR BRANCH:
So that comes into the issue about – okay. So, yes, Your Honour, I can do that. As an indicator of the existence of the agreement, you said?

WINKELMANN CJ:
Yes. Because it is against your clients at the moment, being said against your clients at the moment, they didn't raise it, they didn't plead it, they didn't plead it until 2016, so that's…

MR BRANCH:
Well, I don't –

WINKELMANN CJ:

I know you don't accept that, so I'm asking you to…

MR BRANCH:

Yes. So it's a slightly different issue in relation to the pleadings as to what they did. So if Your Honour has my submissions, that's mine, not the summary –

WINKELMANN CJ:

Yes.

MR BRANCH:

– and going to page 27? So this is in relation really to the complaints not being dealt with and an extension of time, but they equally apply to Your Honour's enquiry. So that starts at 114.

O'REGAN J:

There's a slight difference between complaining about the rate going up and complaining about a breach of contract. Of course they would have been unhappy that the rate was going up.

MR BRANCH:

Well except at paragraph 115 of page 28 they specifically said, "It's fixed, you can't raise our margins," to which the bank replied, "Yes we can."

O'REGAN J:

Well exactly. I mean that's the bank saying there isn't any contractual commitment. I mean you can't raise our margins means it's not fair that you raise them.

MR BRANCH:

Well no, Your Honour, that's not the context it was made in. It was made in the context of you can't raise our margins because you've agreed to fix it.

O'REGAN J:
Well did they say that?

MR BRANCH:
Well I can take –

O'REGAN J:
I mean the bank might have said, well show us in the document where it says that, and they wouldn't have been able to.

MR BRANCH:
And that's exactly what the bank did, Your Honour.

O'REGAN J:
So how does that help you?

MR BRANCH:
It just moves to the point, Your Honour, where you have to decide whether it's fair for the bank, fair and reasonable for the bank to be able to say that.

WINKELMANN CJ:
No, no.

O'REGAN J:
At the moment we're just trying to establish whether the bank committed to do it.

WINKELMANN CJ:
So we're asking you, because it's said agianst your clients that they didn't say, hang on, on this date we agreed with the bank that it was going to be fixed at .07 points above the BKBM and you said yes they did raise that in post meetings, and this is what you say is the evidence it's there, it's Mr and Mrs Coomey saying it's fixed, you can't raise our rates.

MR BRANCH:

That's right, Your Honour, and also the file note that I referred you to earlier which specifically referred to the five years in the ASB offer, because that was always their comeback, that we had this other option that we could have taken and we didn't on the basis that you matched it, and now you're turning around and increasing the margin, and the bank was saying, and the cross-examination of Mr Harvey is enlightening in my view because he says this increasing of the margins was not fair but the bank looked at it and decided under the loan agreement they could do it. So that's the driver. They have looked at the loan agreement and said, well, actually, I think it says we can review and any prior agreements are excluded. So we can raise this even though I say objectively they agreed not to do that, and so the issue becomes are the bank entitled to rely on that to say, notwithstanding our earlier agreement, that we intended to honour, and did honour for a period of time, we can now go back on that by relying on an entire agreement clause, or is it not fair, or has the ANZ failed to show it's fair and reasonable to do that. So in my submission we really do need to separate the two. Get a definitive answer on A, and then move to B.

ELLEN FRANCE J:

Mr Branch, when you're questioning Mr Harvey about this you say, "Why didn't you acknowledge their complaint that they thought they'd got fixed rate margins for the term of the swaps?" So where is the reference to their complaint that they thought they got fixed rate margins for the swaps?

MR BRANCH:

That –

ELLEN FRANCE J:

Where the Coomeys are saying that, that's what I'd be interested in seeing.

MR BRANCH:

I'd have to find that Your Honour.

ELLEN FRANCE J:

I don't mean immediately but perhaps after the break.

MR BRANCH:

Yes because, of course, at that time Mr Harvey wouldn't even accept that –

ELLEN FRANCE J:

No, no, I understand that, it's just you're obviously relying on something there, when you asked that question, I just want to see what that something is.

MR BRANCH:

Yes. The context of that was at the time saying, well you went to these meetings, you've been told you can't put up our rates, why were you not, because by this time he knows that there's been this selling, so why haven't you said that yes your complaints are entirely correct when we sold it to you as a fixed rate loan, equivalent to a fixed rate loan, that wasn't true, and so that's the line of cross-examination there, to get him to say, well why was, why weren't you telling him, and that's when it came down to say, well because we were told not to, and the bank had decided that legally it could rely on this clause and, in my words, go back on the agreement because –

WINKELMANN CJ:

But those are your words, Mr Harvey is not saying them?

MR BRANCH:

No, that's right, they are my words to say that went back on the agreement, and that's why I say in the analysis it's so critical to make that first determination as to whether there was an agreement.

WILLIAMS J:

So if you look at 303.1093. Volume 3, the yellow pages, it's the email from Mr Nitschke. So 303.1093.

MR BRANCH:

Yes Your Honour.

WILLIAMS J:

There's an email from Malcolm Nitschke. He talks about the problem with the 12 month rollover and the integrity issue, you'll be familiar with this, right?

MR BRANCH:

Yes.

WILLIAMS J:

And they say these people are expecting much longer terms than 12 months and that the rates won't go up, and he gives the Coomeys as an example.

MR BRANCH:

Yes.

WILLIAMS J:

Says that the 12 month issue is an internal bank issue about cost of money, it's got nothing to do with the relationship here, right?

MR BRANCH:

Yes.

WILLIAMS J:

Yes, so this is all on your, so this all works for you?

MR BRANCH:

Yes it does Your Honour and even, there's even earlier communications because these are –

WILLIAMS J:

Right, but I just want to say, this is all kind of generally in your zone because they're saying this was never a 12 month deal, because it had to at least match the swaps.

MR BRANCH:

Absolutely Your Honour.

WILLIAMS J:

But even in this case Nitschke doesn't say five years.

MR BRANCH:

No he doesn't say five years.

WILLIAMS J:

The best you've got is the swaps, to the extent of the swaps

MR BRANCH:

The best I've got is the swaps except, Your Honour, that Mr Nitschke wasn't involved in the actual –

WILLIAMS J:

No.

MR BRANCH:

And then of course Mr –

WILLIAMS J:

But obviously the story had got around because he's written about four paragraphs on the Coomeys.

MR BRANCH:

Yes. And for the section 4 argument one of the critical points we make, and I can take you through the emails after the event is that before the Coomeys are sent the loan document, or on the day that the Coomeys are sent the loan document, remembering that's all they have, two days before they signed the loan agreement the bank becomes aware, or the bank puts down on paper that they're aware that there's been mis-selling. That these, that the way it had been sold as a fixed rate, that you could rely on a fixed rate loan is not correct. So they become aware of that and they say things like you have to

go out and let the customers know that they cannot no longer rely on a fixed margin, even though that's what we've told them.

WINKELMANN CJ:
That's the overall affect of the package, isn't it, is what they're talking about there, isn't it?

MR BRANCH:
Was supposed to be, but once you have the ability to increase margins, which is what the bank maintain they always had, you don't have a fixed rate because one of the components can move, and that was the fundamental with it, as long as the bank did not move the margin, a facility that was matched by a swap did do the same as a fixed rate loan. But if you retained the ability to increase the margin, which is what the bank is saying they could do, then you didn't have a fixed rate, you just had a swap and a variable rate. So, and the bank know that and they're saying –

O'REGAN J:
Well you were still hedged against the bank bill rate moving, you just weren't hedged against the margin.

MR BRANCH:
You're swapping the fixed rate – I don't think so Sir. So the effect of the transactions is you get left with the fixed rate and…

WILLIAMS J:
And the margin.

MR BRANCH:
Yes.

O'REGAN J:
Instead of the bank bill rate and the margin. So you are still –

MR BRANCH:

Yes, those two, those two bill bank bill rates go, that's right, so if you take, you've got a fixed swap component and then a margin component. Now these were sold on the basis when you put those two together you got a fixed rate for the period of the swap. But if you can move the margin then the whole system comes crashing down, it doesn't work, and so the bank realised this, mainly because they suddenly realised they had liquidity issues, they had to look to recover money. There's reference there to Mr Graham saying they need to find $5 million. So they start to load these up with what they called liquidity cost premiums, LCPs, but of course they couldn't do that to BKBM loans because that's not, you can't build a premium in those. So they find this out, and I'll take you through it after the lunch adjournment, just to show you what they knew. So what I'm saying is when we put that into the mix, that more than outweighs the issue of the legal advice when it comes to the section 4 enquiry. Because if they had told people, and particularly the Coomeys, then that would have left the Coomeys with the option of going to the ASB, whatever that was, renegotiating. The lawyer would have known that what's in the loan documentation was a real problem, and all those sorts of things. So I'll take the Court through that after lunch.

WINKELMANN CJ:

We'll take the luncheon adjournment.

COURT ADJOURNS: 1.00 PM

COURT RESUMES: 2.17 PM

WINKELMANN CJ:

Mr Branch.

MR BRANCH:

Just coming back to Justice France's question about the questions asked of Mr Harvey, there weren't any specific questions in relation to any mention of those meetings of the five years being raised, because I'd tried earlier in that

exchange to get him to accept that the five years was live and he wouldn't accept that, so changed the focus of the question.

WINKELMANN CJ:

So was it your case that there was an explicit representation that it would be fixed for .7 for five years?

MR BRANCH:

It was run on both representation and partly written, partly oral. So, yes, the same essential allegation for both of those claims.

WINKELMANN CJ:

And on your case who said it?

MR BRANCH:

On who…?

WINKELMANN CJ:

Who made the representation?

MR BRANCH:

The representation was effectively made by Mr Simcic. Because what we have is we have the meeting, in a way we have an offer from Mr and Mrs Coomey saying, “This is what we want,” and the bank come back and say, “Well, the best we can do to stop you leaving is this,” and then the Coomeys accept that.

WINKELMANN CJ:

Okay, so where did you put that really to Mr Simcic?

MR BRANCH:

I didn’t put to him expressly that he had agreed to that. What I relied on was that he had to make an offer of that nature to be able to retain the business, and they did retain the business, and along with obviously the evidence of the

Coomeys, and also relied on in part that the real person that we could have had here or should have had in the High Court was Mr Graham.

WINKELMANN CJ:

Well, why do you say that? Because you've got to show an agreement of representation and you're saying it was Mr Simcic. Wasn't he the critical person?

MR BRANCH:

Well, if it's a representation that's not –

WINKELMANN CJ:

Or an agreement.

MR BRANCH:

Or an agreement. So he has to make an offer, that's right. And we say he came back and made an offer, which was accepted by the Coomeys.

WINKELMANN CJ:

Okay. So did you put to him that he came back and made an offer to that effect?

MR BRANCH:

No, I just put what's in the cross-examination, which I plan on taking you through. I can go there now. Would you like me to take you to cross-examination now, Your Honour?

WINKELMANN CJ:

Are you planning to?

MR BRANCH:

Yes, I am.

WINKELMANN CJ:

Yes, all right.

MR BRANCH:

I can do it now or where I was –

WINKELMANN CJ:

Okay, well, you do it when you want to.

MR BRANCH:

So what I want to do is spend the time, and it's to go through some of the documents showing the state ANZ's knowledge prior to the drawing down of, or in fact the agreement by Bushline to take a loan of $19.4 million. And I start with volume 2 of the exhibit, which is the yellow-faced document and volume 2.

WINKELMANN CJ:

This is about the state of ANZ's knowledge of what?

MR BRANCH:

Sorry, Your Honour.

WINKELMANN CJ:

The state of ANZ's knowledge about what?

MR BRANCH:

About what they knew as to their mis-selling or their misleading people, including the Coomeys, to believe that they had a fixed-rate line, so that their margin would in effect not go up. And so we start at page 0617, so we start at the bottom, the Darren Young email, 16th of April. So by the 16th of April there's a swap booked but that's not effective, or the effective date's not till the 21st of April, so the swap is yet to be effective. The loan document as dated by the bank is dated the 21st of April, and the Coomeys signed the loan agreement on the 23rd of April and the money is advanced on the 1st of May, so that's the sequence. So the key parts, the Coomeys at this stage have not accepted or signed the loan agreement. So the point here is that what's been raised is in the – three lines up from the bottom – "Are we effectively now to

say that there is no such thing as a fixed rate and the only thing we're guaranteeing is the base rate?" So there's now realisation that these products that they've been selling and making representations and agreement around, that the rate will remain fixed for a period of time, is no longer the case. And then we go up to the next one, number 2, we get Dave Haden, and then talks about it renegotiating individual deals and particularly focusing on the subject of tough customer negotiations. So those are the ones they'll look to to move. Number –

O'REGAN J:
Sorry, where's that? That's above this?

MR BRANCH:
Same page, sorry. Just one email up from Dave Haden's. Then the third one, in chronological order, is over the page, from Darren Young again, and so now his staff is saying they're worried that, "We, 'the bank', will move credit margins adversely against their clients after 12 months, and hence RMs are suggesting to just deal fixed rate loans to give their clients a guaranteed fixed rate.

WILLIAMS J:
Sorry, I can't – where is that?

MR BRANCH:
Sorry, that's 302.0615, the bottom paragraph.

WILLIAMS J:
Ah, back a page.

MR BRANCH:
Yes. And then –

WILLIAMS J:
Sorry, now point that out to me again please.

MR BRANCH:

Starting in that last paragraph, “They are worried that –

WILLIAMS J:

“It’s in respect of…

MR BRANCH:

– ‘we’, the bank,” yes. And then, sorry, to go back –

GLAZEBROOK J:

Can you just give me just a very brief overview of what these, what we’ve been taken to these for?

MR BRANCH:

So what I’m – yes, Your Honour, all I’m doing is starting that suddenly there’s an awareness in the bank that the representations or agreements or whatever they are, that you can rely on your margin going up, not going up, are no longer true, because of changes in the bank around LCPs, liquidity cost premiums. So what I’m going to develop is how that, what they say should be done, and what they say should be done is that clients should be left in no doubt, they should be told, they should be told that what they were told before was wrong, and that despite that the Coomeys never got told. And the bank was saying all these things at the time and before the Coomeys committed to taking the money. So the bank knew that what they had told the Coomeys was wrong, and other people. It knew that they were relying on it, and they failed to let them know before they drew down the money.

O’REGAN J:

But this is about the effect of the swaps, isn't it? It’s not about a commitment to keep funding them for five years at a certain rate?

MR BRANCH:

No Your Honours, it’s looking at it from a causation, I guess, point of view, because you can't, the effect of the swaps is to fix the rate, and the effect of

the – and by this time the swaps are committed to, so we're now talking about swaps will be in place, although they're yet to be transacted, so there are swaps in place. Before we were just talking about whether there was a straight line, but we get to this point in time, and now the swaps which are supposed to provide the protection, it will no longer be the case. So what I'm saying, and the cross-examination says of Mr Harvey is that the Coomeys evidence was that if they had been told what is in these documents and what the bank knew before they had signed the loan document, they would not have proceeded with the bank.

O'REGAN J:
But that doesn't say that the bank made a contract to fund them for five years at BKBM plus 0.7%.

MR BRANCH:
No Your Honour, and I accept that, and I'm sorry for confusing you. So what I'm saying is first of all we look over here as to whether there was a loan. When we get to the section 4 argument one of the factors Your Honour is focusing on is obviously the legal advice, then I'm saying yes that is a factor but over here the bank knew, before they'd even got that legal advice, that what they had told the Coomeys was false, and so that goes into that ledger that I was suggesting before.

O'REGAN J:
But it wasn't that what they told him, that they could get funding for five years at bank bill rate plus 0.7%, it was what they'd told them about the effect of the swap transactions. They're different things.

MR BRANCH:
Well they're different things but they lead to the same result Your Honour. So if they had said, because both of those –

O'REGAN J:

Because the swaps weren't for five years, and you're saying there was a funding commitment for five years. They're not the same.

MR BRANCH:

No Your Honour I accept that those concepts are now the same. What I'm saying, as I said, it's more like a – if you're looking at people's conduct and deciding whether they should now be able to –

O'REGAN J:

But the law of contract doesn't say if you behave badly you are bound to a contract that isn't in the written document.

MR BRANCH:

No, what I do say is that law of contract says that if you make a representation that you find out to be false prior to the date, then you have an obligation to let the party know, and so that's –

O'REGAN J:

Yes, but what I'm putting to you is that the representation that you're now talking about, that they realised was wrong, wasn't anything to do with funding the Coomeys for five years.

MR BRANCH:

All I can say Your Honour is that the two, whatever agreement was in place focuses on the fact that the rate cannot go up, the margin cannot go up, so –

O'REGAN J:

Yes, but that doesn't tell us anything about the five year period, does it?

MR BRANCH:

No Your Honour but what I'm saying is that if the bank had done what Mr Harvey said that he would have done if he'd known about it, he would have gone to the Coomeys and said, you need to be thinking about this because

there's serious risk, and so what I'm saying is, and the Coomeys' evidence is, if we had done that we would have gone with the ASB or we would have done something differently. Now I accept that they're different conceptual issues, but I'm focusing on the behaviour and saying that when you come to do that balancing exercise for section 4, the only reason the bank are looking to rely on this clause now is because they didn't tell the Coomeys what they knew before the Coomeys committed to the loan. So that's what I'm using it for Your Honour.

WINKELMANN CJ:
Have you finished then on your evidence that shows it wasn't an agreement?

MR BRANCH:
I should go to Mr Simcic if I'm going to –

WILLIAMS J:
You still need to nail the five year issue before you get to section 4.

MR BRANCH:
Okay so –

GLAZEBROOK J:
Just so I'm clear, this was a section 4 question not an agreement question?

MR BRANCH:
That's right, yes.

GLAZEBROOK J:
Sorry, I just…

MR BRANCH:
I apologise for getting off track. So if we go to Mr Simcic's cross-examination, and that's at the evidence, which will be the green one, volume 2, and that's at pages 06 –

WILLIAMS J:
Got a tab?

MR BRANCH:
So, let me just find it, Sir. 202.0700, isn't it? 0700, I think.

WILLIAMS J:
That's the cross?

MR BRANCH:
Yes. So that's tab 43, yes.

So the case for Bushline is based on the emphatic and consistent evidence of the Coomeys as to what they wanted and then effectively looking at what Mr Simcic accept he was told and what he needed to do to stop those consequences of what he was told coming to pass. So probably if I, it's a short cross-examination so it's probably best to leave you to read it.

WINKELMANN CJ:
Well, what I'm asking you, I suppose, is that if you're putting to the bank, a bank witness, that they've made a representation that they're to be bound by, where is it you've put that representation to them, or under agreement, whether it's representation or an agreement?

MR BRANCH:
I haven't directly put that question, Your Honour. As I say, it's based on that, and through there how he had to match that rate, that's what he had to do in order to stop the Coomeys walking out the door.

GLAZEBROOK J:
Wouldn't you normally have to put an allegation of an agreement or representation directly? I mean, I can understand if all you've got is documents and you say you have to infer it from the documents, but if you've

got the live witness there normally wouldn't there be an obligation to put that explicitly?

MR BRANCH:

Well, Your Honour, I thought I had enough on the basis that he was confirming what the Coomeys were expressly saying was that, “This is the offer I’ve got, this is the offer you have to match,” he says, “Well, I need to take that away and get the approval of my boss before I can do that,” and he comes back and the deal’s concluded. So I can’t take it any –

WINKELMANN CJ:

But he’s saying he didn’t conclude it, so you had to put the contrary proposition to him.

MR BRANCH:

Well, no, Your Honour. What I’m saying, as the Court of Appeal did, saying that if you look at what, objectively, what occurred, the context, all those things, then you reach the conclusion that objectively that's what these parties agreed to.

WINKELMANN CJ:

It’s a question of fact whether or not they reached an agreement.

MR BRANCH:

Yes.

WINKELMANN CJ:

Then the content of the – yes, I’m pretty sure you should have put it to him, Mr Branch, what it is that you said he was agreeing to. But it’s quite obscure to me when I read this, for instance, what exactly it is that you're putting to Mr Simcic.

MR BRANCH:

Well, and then I go on to talk about Mr Graham and –

WINKELMANN CJ:

I mean, you could have just asked what, did you ever ask him what the deal was he has relayed?

MR BRANCH:

Well, that – well, if I didn't ask him it's obvious from that. The deal that he was relaying was the photo from the phone that he put to Mr Graham, which had the 0.65 on it. So the Court of Appeal says that he, so that's the deal that was put to Mr Graham and which Mr Graham approved. Because Mr Simcic doesn't come back in and say anything other than, "Yes, well, that's approved, that's the deal that we've got."

O'REGAN J:

Yes, but the 0.65 had no time period. The ASB, that notation on the photo didn't have a time period.

MR BRANCH:

No, it's doesn't, Your Honour. And so what I rely on there is the fact that, like in any negotiation, the starting point is that Mr Coomey – there's no suggestion he was lying, or he may have been mistaken possibly – but the point is he's saying in any negotiation, just like if you went into a shop or to buy a car, "This is what I can get down the road," and then it's up to that person to decide whether they match that or not. And what we say is that Mr Simcic agreed to match that via – or he didn't personally, he relayed the approval of Mr Graham.

WINKELMANN CJ:

Mr Simcic says in his evidence at paragraph 14 what he said he was agreeing, and you seem to just get him to repeat that.

MR BRANCH:

Yes, but if you add to that – so he's saying he offered it effectively for the period of the swaps, and so I say, well, the positive things out of that is that he got approval to offer the 70 point margin, he says it was for the length of the

swaps, which actually hadn't yet been determined at that stage as to what length they were, but then you add that to the fact that he had to match the ASB offer and he was told the ASB offer was 0.65. so if he had to match it and he matched it then, or close to match –

WILLIAMS J:
Well, he didn't really have to match it, did he? He had to get within cooee of it.

MR BRANCH:
That's right. Because that's what Mr Coomey says.

WILLIAMS J:
Because he didn't match it, it was at 70 not 65.

MR BRANCH:
That's right, and Mr Coomey –

WILLIAMS J:
So there was some value in the relationship which meant that the Coomeys would take a slightly worse deal to avoid the pain and suffering of having to change banks?

MR BRANCH:
Well, and also, Your Honour, the fact that they had established this relationship with this bank for a number of years.

WILLIAMS J:
So the question is really even if Mr Simcic knew that five years was the deal, it would have been enough if he agreed to get within cooee of it, and the length of the swaps makes better sense from a logical point of view.

MR BRANCH:
Yes, Your Honour. But, well, except Mr Simcic – well, so when Mr Simcic says in paragraph 14, "We've used the term 'ongoing' to describe our

intention," so he accepts in the cross-examination that that was in his, to him, and he was just – so the fall-back I guess on that is saying, well, Mr Coomey was saying in his evidence, he was never shaken on this, that, "That's what I was telling them they had to match. In the end I gave way on the margin." There was never any suggestion put to him or that he accepted that he'd given way on a term.

WINKELMANN CJ:

So did Mr Coomey say that Mr Simcic came back and said, "I agree that it'll be .7 over the BKBM for five years"?

MR BRANCH:

I suspect, Your Honour, that there's no specific reference to Mr Simcic, it's probably generally in the bank. But there will be repeated statements by the Coomeys that that's what they agreed with the bank.

ELLEN FRANCE J:

So where's the best illustration of what they said they were told?

MR BRANCH:

Yes, so, the green volume, volume 1, that is the evidence volume, tab 7, which is Mr Coomey's reply evidence, at paragraph 109, which is referring, a reply to Mr Simcic's evidence.

WILLIAMS J:

So Mr Coomey says he was sure it was for five years but the letter disappeared from behind the gun cabinet?

MR BRANCH:

Yes, and on that note, Your Honour, I'd say the that's not the, it's not the important – the important point is that that's what Mr Coomey was relaying to the bank that they needed to match. So it's a bit like the car dealer. I mean, you say the car dealer down the road is doing this, then the important point is do they match it? Yes, they do, they do on their basis. So although we

weren't ultimately able to prove that 0.65 applied to BKM for five years as being the counter-offer available from the ASB, in my submission it's not the important point. The important point is – and remember the bank took that, we don't know for sure what the bank took away. We've got some photographed pages, but they took it away and they were satisfied when they came back. So it's not as if they came back and said, "Well, you can't get BKBM in lending you can only get fixed-rate lending." So they offered the BKBM in lending, there's no doubt about that, and they offered it at 0.7.

WINKELMANN CJ:

Yes. And was there evidence that that was a standard thing, to offer lending which, or was it a first, was it at a rate moving up and down, an explicit rate moving up and down above the BKBM?

MR BRANCH:

The standard bank documentation allows for a review, which can go up and down. So what Mr Harvey says is that – I'll have to find that reference, Your Honour, but it was – well, I took you to the one before which said that as far as he was concerned he thought that they would have an expectation of rates staying the same for as long as they have the swaps. So there was –

WINKELMANN CJ:

Is that Mr Harvey who says it or is that Mr Simcic?

MR BRANCH:

No, that's Mr Harvey who says that. So there was, he said that they would expect that that would be the case, they would expect to have that margin held, that's what the Coomeys would expect, based on the discussions that took place in relation to the swaps. So he also says…

WILLIAMS J:

Can you tell me, Mr Branch, who first puts the BKBM plus margin idea on the table?

MR BRANCH:

I think it must be Mr Coomey, because that's the offer that he had from the ASB.

WILLIAMS J:

So the ASB is the trigger for that structuring?

MR BRANCH:

Yes. Because Mr – well, Bushline didn't have BKBM lending before that.

WINKELMANN CJ:

It's quite sophisticated, isn't it?

MR BRANCH:

BKBM is, well, it –

WINKELMANN CJ:

Because the letter doesn't say "BKBM", it says "fixed rate", doesn't it? But there's, isn't the suggestion of BKBM from the scrawled note?

MR BRANCH:

No, I think the loan document refers to BKBM.

WINKELMANN CJ:

No, no, from the ASB.

O'REGAN J:

The ASB document.

MR BRANCH:

Oh, the ASB. I think on one of those other pages it's got a list of BKBM rates as well, and some swap rates.

WILLIAMS J:

So prior to that point National Bank/ANZ wasn't doing this stuff?

MR BRANCH:

I think they were.

WILLIAMS J:

Oh, it's just that not, not with the Coomeys?

MR BRANCH:

Because I think I put to Mr Simcic, "You're not saying, are you, that the National Bank didn't do BKBM lending?" and he said, "No," he accepted they did BKBM lending. But it wasn't the type of lending that they had used for the Coomeys before.

WILLIAMS J:

So when Mr Harvey's handwritten note says ASB is offering .65, 65 basis points for five years, is my recollection accurate?

MR BRANCH:

Yes.

WILLIAMS J:

That, you say, is, you must say is an accurate reflection of what was being put on the table by ASB?

MR BRANCH:

Yes.

WILLIAMS J:

That it would be a BKBM plus margin fixed for five years?

MR BRANCH:

Yes. And he's recording a conversation with the Coomeys in that file note. So that that's come from them, which just reinforces what I've said about the Coomeys were telling the bank that's what they had to match, and in my submission, viewed objectively, they did match it, apart from the rate, the

extra 0.5, which Mr Coomey accepts or the Coomeys accept was what they were prepared to pay for the relationship.

WILLIAMS J:

You accept then, do you, that on the other side of this see-saw the ANZ officials do not refer to five years insofar as this particular deal is concerned, even if they do in respect to the ASB, and the best you get is that customers are expecting them to go longer than the 12-month rollovers and probably lined up with the swaps, that's the best you've got?

MR BRANCH:

If you don't accept that it, that's the fall-back argument.

WILLIAMS J:

No, I'm talking about words, black and white, one or two syllables, five years, relates on the ANZ official side only to ASB, and the best you've got is the length of longer than the 12 months and up to the length of the available swaps?

MR BRANCH:

Yes, if you don't accept the evidence of the Coomeys, that's right.

WILLIAMS J:

That's right, yes.

MR BRANCH:

Yes. And I guess the other objective, matters like the bank accept they didn't expect the margin to change. So Mr Harvey says, "I think that we agreed at the 70 points and they didn't expect it to change, just like we didn't." So there's that fact, they didn't expect the rates to change, so there was no real downside in the bank.

WINKELMANN CJ:

But wasn't that the perception of market?

MR BRANCH:

Well, they expect, that's right, they expected margins to reduce, so, which is a factor as to why the bank would not be overly concerned with locking in margins because – and I've referenced it in my submissions with – but everybody was expecting margins to continue to decrease.

O'REGAN J:

If ANZ had committed to funding the Coomeys for five years, you'd expect their internal material to have got approval for a five-year loan, wouldn't you?

MR BRANCH:

Absolutely, Sir. The difficulty is that – and you'll see in my cross-examination of Mr Simcic – he found it unusual or somewhat unusual that that document was not produced. Because at the end of the day they're out on the farm, they're in a car, they're taking photos on a Nokia phone and going back in, they're not writing anything down –

WINKELMANN CJ:

You're talking about something else here. He said it was unusual that Mr Graham's file note, anything that Mr Graham generated was not unusual, was not produced. But there were approval documents from the bank produced, weren't there?

MR BRANCH:

No, I don't think so.

WINKELMANN CJ:

Just not Mr Graham's material.

MR BRANCH:

No, I don't think I've seen any approval document, apart from the original one which they committed to internally before they'd even bought Waverley. So there was a, they went unconditional on an oral agreement that the bank would fund them, and internally there was an approval of that. But I don't

believe I've ever seen any document from the bank which records what the terms of this deal was, apart from the loan document itself. And that's what Mr Graham – you would expect that the person who signs it off and approves the loan would have made a record somewhere of what that agreement was and, if not, then he should have given evidence to say what he recalled he gave.

ELLEN FRANCE J:
So just so I'm clear, Mr Branch, the internal bank approval, is that the one of 28 February 2008?

MR BRANCH:
Yes, that would be probably right.

ELLEN FRANCE J:
Right.

MR BRANCH:
So that doesn't get, the Coomeys never see that.

WINKELMANN CJ:
But it's not about the Coomeys seeing it though, is it? Because you're looking for an internal document.

MR BRANCH:
Yes, an internal document which post-dates the negotiation, which isn't until April. So what was the outcome? Something from the bank. Apart from all we've got is 70 point ongoing in a file note. But we're talking a $19 million loan and there's no, there's not a bit of paper that says what the terms of that loan were.

WINKELMANN CJ:
Well, was it your case that they destroyed it?

MR BRANCH:

No, no. It wasn't explained as to why it wasn't there. But if that's the case, if it's not there and it was there, then, with respect, Mr Graham should have given evidence. I don't even faintly suggest the bank's going to go around destroying documents.

WINKELMANN CJ:

Well, what could Mr Graham, if he didn't take a note, what could he have given evidence of, one phone call many years ago?

MR BRANCH:

I don't know, Your Honour.

WINKELMANN CJ:

Because the critical thing was what Mr Simcic said when he came back into the room, wasn't it?

MR BRANCH:

Well, except it's the – what Mr Simcic said may or may not be accurate in the sense of what he conveyed. But the decision-maker, the person who approved that and the person who Mr Simcic says would have noted in something which might just be like an email, was not found, and Mr Graham, I mean, it would have been so easy for Mr Graham – I guess he possibly comes along and says, "I don't remember" – but it's a $19 million loan.

WINKELMANN CJ:

It's 18 years later, or how many years later, 12 years later. It's unlikely he'd recall anything from a phone conversation is what it seems to me.

MR BRANCH:

Well, probably, with respect, Mr Graham should have been contacted the first time these claims were made.

WINKELMANN CJ:

In 2016?

MR BRANCH:

No, Your Honour, claims in relation to the…

WINKELMANN CJ:

Yes, but in relation to this point though, Mr Branch, the first clause.

MR BRANCH:

Well, I don't accept what my friend says on that, so when I get to the limitation argument I'll take you through that.

WINKELMANN CJ:

Okay, well, that's good.

MR BRANCH:

So the Court can tell me if there's any benefit in taking you through these documents, but what they show is that, for example, on the 21st of April the bank's producing internal substantial training material which is saying that, "Client interaction needs to leave the client in doubt that client margins can move. Dealers will be requested to ensure this is the case," and all the way through, "We need to make clients aware what is in their bill rate loan agreements regarding rate increases." So internally the bank is saying, all before Bushline has signed the loan documentation, "We need to tell these people." And so I'm saying if they had told the Coomeys, the Coomeys wouldn't have been in the position that they're in now, and so that's a factor when it comes to decide whether the bank should be able to rely on the exclusion clause.

WINKELMANN CJ:

But doesn't that, that's all related to the fixed, the part that you've already resolved, which is to do with the impact of the overall swaps, that they produced a fixed rate?

MR BRANCH:

That's correct in the sense that that's what, that was what they were saying the effect of that was. But at this point in time it's – what I'm saying is that they had an obligation at that point in time to tell the Coomeys that the product they had, whatever it is, the margins could go up. And if the bank had told them that the margins could go up when they were under the impression, one way or another –

O'REGAN J:

That's just the Fair Trading Act claim, that's gone.

MR BRANCH:

Well, no, Your Honour, I've got it in my written submissions. What I'm saying is in contract there is an obligation if you become –

O'REGAN J:

Yes, but the problem is that it doesn't say five years, it doesn't help us with the five-year thing. The whole, this case is about whether the bank agreed to fund them for five years at this BKBM plus 0.7, and all this shows is there was a whole lot of misleading information perpetrated by National Bank employees about the effect of swapping a floating rate with a fixed rate when the margin was still at large, and that is a different point, because that's got nothing to do with term.

MR BRANCH:

And I apologise for merging these two inappropriately, Your Honour, because what I'm saying is I really have, that's, we decide on whether there was an agreement there and then if you come into the section 4 argument then that's where that factor comes in, and so I'm sorry I haven't made that clear.

O'REGAN J:

But, I mean, I'm just not sure how much it helps us in the section 4 context either.

MR BRANCH:

Well, Your Honour, if you have a contract which, and bearing in mind this time the swaps are in place, so a contract where you have said that those swaps will mean your facility is the same as a fixed-rate loan, and you then find that, no, that's not true, "We have misled you," and then before you draw down the loan they don't correct it, that would be, and they knew you were relying on it, then that's deceit, that's the elements of deceit. So all –

O'REGAN J:

Yes, but you haven't sued them for deceit, have you?

MR BRANCH:

Well, Your Honour, what *Brownlie* says is that deceit, not always but generally, will be the answer to a section 4 inquiry. So it is, with respect, directly relevant to the section 4. So *Brownlie* –

WINKELMANN CJ:

I don't think it's talking about this kind of deceit, *Brownlie*, is it? It's talking about fraud.

MR BRANCH:

Well, it specifically says it's the civil fraud as in –

WINKELMANN CJ:

Equitable fraud.

MR BRANCH:

– knew what you said – yes – knew what you said was wrong, knew the other person was relying on it, and so, and that reference I think is at – because some of the early cases said the civil fraud was a total answer but *Brownlie* says – so that's, it's in the appellant's bundle of authorities at tab 4, which is *Brownlie,* and that's at page 33 of judgment, the last paragraph. So that's talking about effectively fraudulent misrepresentation, and it would not be "fair and reasonable" to be conclusive, and then goes on to say it will not always

necessarily have this effect. So that's why we place emphasis on the knowledge that they had that what they had told them was wrong, that they knew that they were relying on it and the failed to correct it before Bushline changed its position and drew down the money.

So I don't think I can take the deal, agreement, any further, unless there's anything further to talk to Your Honours about.

WINKELMANN CJ:
And is that your submissions on section 4 as well?

MR BRANCH:
Not quite, Your Honour. I'll just make a comment about the, I guess the appellant's view about the primacy of the documents in that exercise, and in my submission it's, sufficient weight has to be given to the fact that the legislature didn't say that the onus is on Bushline to prove that the term was unreasonable. So in effect the agreement has got a couple of clauses, well, it's got a clause in it that doesn't really work until such time as the Court has come along and validated that or endorsed it. So in that way – and I think the Court of Appeal made this point – is not too much focus should be given to the fact that the clause is there. So, you know, you say, "Well, it's there, so therefore you do not get your section 4 remedy." It's really just putting that to one side a bit and saying, "In all the circumstances," and look at the circumstances first, is it fair and reasonable for that clause to then be conclusive? So that's probably…

One final thing, I just talked to Justice O'Regan about the loan finance offer, and for completeness if I could just take you to that? That was volume 3, it will be the evidence, exhibits bundle volume 2, and it's at page –

O'REGAN J:
Sorry, which volume are you at?

MR BRANCH:

So this is yellow, exhibits volume 2, and page 540. So this is the extent of it, so when we get to the key features of the finance offer at the bottom of the page there are none.

O'REGAN J:

And was the evidence that this was usually followed up with a more formal sort of loan agreement or facility agreement?

MR BRANCH:

If it wasn't in the evidence I think it was generally accepted that you would see the terms in that, which follow that paragraph at the bottom of the page. So at that stage, because all you ultimately get is the term loan, which is a pre-printed form. So if you want to have these side agreements about anything, that's effectively where you'd see them.

O'REGAN J:

So where is the finance offer? You see at the bottom of that page, 540, it says, "Detailed in the attached finance offer."

WINKELMANN CJ:

The evidence was it wasn't…

O'REGAN J:

Was there nothing attached?

MR BRANCH:

No.

O'REGAN J:

Well…

MR BRANCH:

So, and you'll see it's addressed to just Mr and Mrs Coomey, no mention of the trusts.

O'REGAN J:

So did they then execute mortgages, presumably, over the farm?

MR BRANCH:

Just a mortgage and a term loan.

O'REGAN J:

Did they have term loan features in the mortgage document, or was just a pure security document?

MR BRANCH:

Well, no, not – just your standard term loan document. Slightly different forms, depending on whether it's a BKBM, because of the wording, but generally speaking the same standard document. And that's what Mr Dillon said was that that's what you'd normally expect to see, because the banks don't want to go round trying to change standard agreements. So if your standard agreement says, "Reviewable at any time," whatever, then you generally expect to see that in some other document. Because if you start changing the pre-printed form in one part then you're going to feed into problems and you've got, and banks just aren't into handwriting amendments on standard form documents. So what Mr Dillon says is that's where you would have expected to see it, but that was never received from the bank and it was never received by Mr England.

O'REGAN J:

So there was a term loan agreement that recorded the terms of the loan? There were separate security agreements or were they all in one document?

MR BRANCH:

Just a mortgage, as I understand, for the new –

O'REGAN J:

Oh, I see, because they would have already executed mortgages over the other ones, yes, okay.

MR BRANCH:

Yes, so it would have been for Waverley.

O'REGAN J:

So there was a mortgage for the Waverley property?

MR BRANCH:

I'll double check, but I'm sure they only just put one new mortgage in place but…

O'REGAN J:

Right. And are you saying there should have been some intermediate document between this letter and those formal standard printed documents that were signed?

MR BRANCH:

I think there should have been, if only because this dated the 18th of March. So you would have, A, this should have set out their offer as to what it was, but once the deal had been done there should have been confirmation from the bank as to what the deal was.

O'REGAN J:

And was this, did the Coomeys reply to this letter?

MR BRANCH:

No. They executed –

O'REGAN J:

Is it the previous page that they signed?

MR BRANCH:

Yes, yes, so…

O'REGAN J:

But that says a fee of dollars blank.

MR BRANCH:

Agreed, yes, a fee. And there was no finance offer. So it's the fee is blank, and that's it. So that's the, and of course that's the 18th of March. So the Court of Appeal accepted that there was no actual finance offer ever provided.

O'REGAN J:

And these were signed by Mr and Mrs Coomey and not by the other trustees?

MR BRANCH:

And not even addressed to the trust. So as far the bank was concerned, they were just operating with Mr and Mrs Coomey.

WINKELMANN CJ:

What's the significance of that?

MR BRANCH:

The significance of that is, Your Honour, is that when we're looking at the provision of legal advice and a part of a discretion and a weighting exercise, then the bank, with respect, should take some responsibility for the situation that unfolded in the sense that they didn't send an offer at all, they didn't send the documentation to the trustees, and then criticised the lack of advice. Whereas if they had just sent actually what the deal was that would have been so easy for the Coomeys to see if it did or did not match, because that's where you expect to see –

WINKELMANN CJ:

But when you look at the loan documents, Mr Branch, they're actually very simple documents, very simple documents, 302.0619, and they're simple documents and they're explained by Mr England to them.

MR BRANCH:

Yes, Your Honour, I'm not disputing that at all. All I'm saying is –

WINKELMANN CJ:

So I'm just, what I'm asking you is, it was just a simple question, what's the significance of the fact that they dealt with Mr and Mrs Coomey?

MR BRANCH:

Well, my answer was, Your Honour, that when you look at the discretion, the overall weighting and the exercise, and one of those as going against my clients on that side is the provision of legal advice. And so all I'm saying on that is that –

WINKELMANN CJ:

Well, if you're just saying what you've already said you don't need to repeat it.

MR BRANCH:

Yes, Your Honour. I don't have anything to add, other than that, as part of weighting exercise.

O'REGAN J:

So this document at 0619, that wasn't attached to the letter at 0540?

MR BRANCH:

No. I think the bank sent that on the, it's dated by the bank on the 21st of April, and later by the Coomeys, so that the bank must have sent that prior to the Coomeys signing.

I think I'll turn to the issue of credibility briefly. In my submission there were no findings of credibility at all –

WINKELMANN CJ:

No, but there's still a preference, there's still a rejection of Mr Coomey's evidence, I guess, implicit in the Judge's finding that she did not accept that there was an agreement by the bank to fix margin rates for five years.

MR BRANCH:

Yes, Your Honour, I –

WINKELMANN CJ:

Which is a reliability finding rather than a credibility finding, I imagine.

MR BRANCH:

Well, in my submission it was never even suggested that Mr Coomey had not told the truth when he said that it was the offer he had. So it wasn't even, in my submission, so much reliability, it's just at the end of the day the Judge looked at all the surrounding circumstances and reached that view. But I would respectfully submit that in the High Court the judgment didn't really take the objective approach in the sense of there's no reference to *Vector* or *Boat Park Ltd v Hutchinson* [1999] 2 NZLR 74 (CA) or those sorts of matters and the focus, with respect, seemed to be more on what the bank subjectively would have done or why they wouldn't have done certain things.

WINKELMANN CJ:

Well, the Judge is trying to find as a matter of fact whether or not the bank said, "We agree to bind ourselves to a .7 margin over the BKBM for five years," so she's quite right to take a subjective approach to that.

MR BRANCH:

Well, with respect, Your Honour, that's not the approach the Court of Appeal took, and in my –

WINKELMANN CJ:

No, I know that, and you heard our discussion with Mr Hunter.

MR BRANCH:

Yes, and I do refer to the English authority they put in which made it clear that talking about the test to be applied when looking at collateral agreements or partly written, partly oral, was to be objective as well. So that –

WINKELMANN CJ:

And interpreting what the agreement reached was.

MR BRANCH:

Well, no, whether there was an agreement.

O'REGAN J:

But here it wasn't a dispute about interpretation –

MR BRANCH:

No…

O'REGAN J:

– it was a dispute about whether there was an agreement at all.

MR BRANCH:

That's right, and that's why that, I believe, in my submission, that English authority is saying. So when you come to decide whether there was an oral side agreement effectively, partly, you apply the objective standard to that assessment as well. So not just in an interpretation issue.

O'REGAN J:

Well, I don't think it's an interpretation issue at all.

MR BRANCH:

No.

O'REGAN J:

I don't think the Court of Appeal was right to apply the *Investors Compensation* case.

WINKELMANN CJ:

Can you take us to that authority, Mr Branch?

MR BRANCH:

It's in my written submissions, Your Honour. It's in my written submissions at page 17, and the –

WINKELMANN CJ:

Oh, yes, that's a different thing though, which is the standard test for whether or not a contract is formed, yes. That's just – yes, but my point is that she was trying to make a finding of fact about really what was said at the meeting, I suppose.

MR BRANCH:

So this case, Your Honour, was all about whether there was a collateral contract, so, and then if we – so this is in my bundle of authorities at tab 3, and in 48 says, "These tests concern the question of intention to create legal relations, clearly an important issue in the context of a collateral contract." So in my submission that's the way that the Court of Appeal approached it on an objective, not, apply the objective test, even though it was not an interpretation issue.

GLAZEBROOK J:

Well, I suppose it's just the same thing, "Well, I intended, I personally give evidence I intended to enter into contractual relations," but if the other person didn't objectively then there is no contract, is that the…

MR BRANCH:

Yes.

GLAZEBROOK J:

That's effectively the point you're making?

MR BRANCH:

Yes. So the Court of Appeal said if you look at this and take the appropriate person who's judging it, if they looked at what was being said, regardless of

what the ANZ thought, if you looked at it on that basis you find objectively there was an agreement.

GLAZEBROOK J:
Although I think you can on that take into account subjective evidence, can't you? Just, I'm reaching back to a formation of contracts.

MR BRANCH:
I'm not sure about that…

GLAZEBROOK J:
No, I can't remember either, I must say, explicitly.

MR BRANCH:
It seems, yes, it would seem to be contrary to just, to have – I can see it going the other way, obviously, when you want a rectification, but, no, I'm sorry.

GLAZEBROOK J:
No, it isn't just whether, it isn't just an intent thing. So it could well be relevant if both parties subjectively intended to enter into a contract, I suppose, even if they weren't sure, even if there is then an issue as to what that contract actually was.

MR BRANCH:
Yes.

GLAZEBROOK J:
Anyway, it's not really the point here, is it?

MR BRANCH:
No. My point is that the Court of Appeal was correct to apply that approach, even though it wasn't an interpretation issue.

So one, I can go to the limitation point, but I'd please like to just withdraw part of my submissions, that's my main submissions, and that's paragraphs 64 to

69. I think I went down the wrong track with those submissions, because any issue about conflict between what was actually signed up for and what was agreed, that comes later. The first stage is just was there an agreement, and it's obviously it's only then when you get past that that we then get into the section 4.

So the last point is the limitation argument, and that's in my submissions really starting at about page 25, paragraph 100 – oh, sorry, the previous page, my apologies, paragraph 99 on page 24. So the first point being the original statement of claim, expressly pleaded, that there was a partly written and partly oral contract. Also pleaded there was an implied term that the margin would not increase to minimise the bank's losses, which is essentially what we say was happening in relation to the LCP, so it's said that fair warning is given there. But in that same original statement of claim it was also – I accept in a different claim, not a contract claim – that the quantum of the claim was the difference between BKBM plus 0.7 for five years and the actual interest charge, so –

WINKELMANN CJ:
So can you just re-state that, what you just said? I'm sorry, I didn't…

MR BRANCH:
So I was just reading from paragraph 100 of my submissions, Your Honour.

O'REGAN J:
The fact that the same amount's claimed doesn't make it the same claim though.

MR BRANCH:
No, Your Honour, I accept that. I'm focusing on, I guess, the policy situation, so was the bank going to be surprised by having to look at this issue of whether there was a BKBM plus 0.75 on one hand and the interest they actually charged on the other. I accept it's not in the same cause of action but

it is in the statement of claim, and it highlights the critical issues here, that are still there, is –

WINKELMANN CJ:
But the thing the bank was going to be surprised by was the factual allegation of this agreement, not the quantum. Quantum can always be worked through. It's the factual allegation.

MR BRANCH:
Well, except, Your Honour, what I would say to that is that – I mean, if, to even get off base one you've got to prove there was an agreement of BKM plus 0.7 for five years, that's a starting point for the claim, and you wouldn't –

WINKELMANN CJ:
Yes, I know, and the allegation. But the bank is surprised by the allegation because it's made so later after the six-year limitation period.

MR BRANCH:
Well, Your Honour, what I'm suggesting is they weren't surprised because they knew that the claim on which that quantum was based was that there was an agreement BKBM plus 0.7 for five years.

WINKELMANN CJ:
How would they know that?

MR BRANCH:
Well, just from the fact that it's pleaded there, Your Honour, that that's the breach and the breach must be based on a breach of that obligation to keep BKBM at 0.7 for five years.

WINKELMANN CJ:
Are you saying it's implicit?

MR BRANCH:

Well, no, I – well, I do say it's implicit but I also really focus on that they would have had fair warning that that was going to be a claim, that there was a claim that they could only charge interest at BKM plus 0.7 for five years.

WINKELMANN CJ:

Well, if whoever's doing the pleading and Mr Coomey had it so clearly in the mind that this was the basis of the claim, why would they not advance it? Why would it be left to be a matter of inference from the pleading? Because why should the bank be assumed to understand it when the person who was drafting the pleading didn't seem to?

MR BRANCH:

Well, Your Honour, it fitted within the negligent mis-statement claim at that stage, rather than the contract claim. So the drafter, that would be me, hasn't pleaded that as part of the contract claim. But I do say in paragraph 101, I mean, the bank accept that the original claim included the 75,974, and that's part of that claim. So BKBM plus 0.7 percent, if it's just for the swaps and not the five years, then that's where the 75,000 comes from. So the bank accepts that it knew at least there was a claim for 75,974 based on a failure to keep it at BKBM plus 0.7.

But then alternatively again in 103, the 19 November 2015 claim, that's specifically pleaded a partly oral, partly written contract, that margins on swaps and the funding would not change. So that seems, in my submission, to clearly put the issue…

WILLIAMS J:

Well, except – right, that you mean the 2015 pleading…

MR BRANCH:

Yes, the 19 November 2015 pleading, Your Honour.

WINKELMANN CJ:

Where's that?

MR BRANCH:

That's at 101, which is the pleadings folder, page 187.

O'REGAN J:

Just say that number again, sorry?

MR BRANCH:

So it would be volume 1, page 187, Your Honour.

GLAZEBROOK J:

Sorry, volume 1 of what?

WILLIAMS J:

Tab 11 of the pleadings.

GLAZEBROOK J:

The pleadings. So which amended, is that the second amended?

MR BRANCH:

Amended statement of claim, Your Honour.

GLAZEBROOK J:

No, I know that, but we've got about four amended so I just…

MR BRANCH:

Ah, sorry, amended, it's at page 187, it's just the amended rather than the first, it's just…

O'REGAN J:

It doesn't refer to five years.

GLAZEBROOK J:

No, no, I've got that. I'm just saying is this the first one that was amended?

MR BRANCH:

No, it doesn't refer to five years, Your Honour, but if –

WILLIAMS J:

Which paragraph, can you tell me?

MR BRANCH:

Oh, sorry.

O'REGAN J:

It's page 190 and it's 15(a)(ii).

WILLIAMS J:

Right.

ELLEN FRANCE J:

So that's effectively the second amended statement claim, Mr Branch, is that right?

MR BRANCH:

I think it should be the first, but, otherwise we should have called the – I think the first one's at tab –

GLAZEBROOK J:

What date was it, do you know, sorry? Because it might be the easiest way of dealing with that.

MR BRANCH:

Yes, yes, it's the 19th of November 2015. So tab 9 is the original one, 27 May 2014. So that's the second claim filed.

ELLEN FRANCE J:

Yes. It's just the next one along is the third, described as the third.

MR BRANCH:

Oh, right.

O'REGAN J:

There is no number 2.

WINKELMANN CJ:

It's probably just the second amended statement of claim, but the third pleaded.

MR BRANCH:

Yes, we should have called that the second amended statement of claim, unless I've missed one out.

GLAZEBROOK J:

Actually we've slightly got off track, or at least I've sort of lost track. So what do you say from this?

MR BRANCH:

Well, just going through, that there's enough information there to tell, to let bank know that the issue is their ability to increase the margin above 0.7.

GLAZEBROOK J:

So you're relying on 15(a)(ii)?

WINKELMANN CJ:

And this is 15(a)(ii)?

GLAZEBROOK J:

Is that what you're relying on?

WINKELMANN CJ:

Yes.

MR BRANCH:

Yes.

WINKELMANN CJ:

And there's no reference there to five years and you accept that?

MR BRANCH:

No, there's no reference to the five years.

WINKELMANN CJ:

Right.

MR BRANCH:

And then in the alternative the extension of time, which is, I don't need to, don't intend to go through that, but that builds on those same, the same knowledge that the bank had leading up to the Coomeys drawing down the loan and then the meetings where their enquiries or their concerns were deflected.

And, finally, at 125, saying that prior, well, whatever it is, then we go back six years and any breaches that occurred, that is any interest charged in excess of 0.7 in that six-year period is recoverable, so whether the bank's starting position was that the whole claim was statute barred, but my friend seems to have accepted now that provided there's a breach within that six-year period that will be recoverable.

WILLIAMS J:

I'm not sure he conceded that. He mentioned that as possible argument.

MR BRANCH:

I think, well, I'll let him do in reply, but my understanding was that provided it was a contract claim he accepted that that was the case, if it was a misrepresentation claim he…

WILLIAMS J:

Yes.

MR BRANCH:

Unless you have any other further questions, Your Honours? Thank you.

MS CHALLIS:

Good afternoon, Your Honours. I will be very brief, but I did do a short oral outline as well, if I could just hand that up?

There was a point made by Mr Hunter in his written submissions about whether or not Mr England needed to be represented at this hearing, and I just wanted to explain the reasons why we are here.

The claim against Mr England has not been finally determined, he remains a party, and the outcome of this Court's determination will also have an effect on him. So that is one reason why we are here, and the second is that the terms of the partial settlement reached between Bushline and the ANZ are unknown to us, we don't know the terms on which, obviously we can't be bound by that because we didn't participate in its negotiation but it still could impact us, and even in his submissions Mr Hunter said that the ANZ is still considering how that partial settlement affects Mr England. So –

WINKELMANN CJ:

So your submissions will be directed to what then? Because you're only here to represent your client, your client's interests.

MS CHALLIS:

Well, it was principally in relation to the extent of Mr England's advice and the extent to which that is relevant to the section 4 discretion and in particular the legal advice, and I wanted to ensure that Mr England's, the advice that he gave and the circumstances in which he gave it were articulated before this Court. Hopefully it should be apparent from everything which has gone before, but I just wanted to reiterate that, I suppose, and put it as simply as I could as to what his role was, because we say it was a limited role. This is not a situation which a solicitor with full of knowledge of what was happening in respect of his client gave full and detailed legal advice.

WINKELMANN CJ:

But his client was himself.

MS CHALLIS:

Well, it wasn't. In the High Court we distinguished between the role of the trustee and a solicitor and the *Hansen v Young* [2003] 1 NZLR 83 (HC) different hats that a solicitor wears and then what a trustee wears.

WINKELMANN CJ:

Yes, but he still had the knowledge though, didn't he? Whatever knowledge he did, he may not have known about the side conversation but he knew about the swaps, et cetera.

MS CHALLIS:

Well, he didn't know that the swaps had been entered into or discussed leading up to the receipt of the loan agreement or the instructions to act in respect of explaining the nature and extent of the loan agreement, he did not know there were recent swaps having been discussed or happened. The extent of his advice on swaps was limited to when he first received instructions back in October 2005. He received various documents from the bank on 5 October and was asked to explain those to the Coomeys. He didn't do so immediately, it was a month or so later, yet the Coomeys entered into the swaps transactions on the 7th of October. So there were various

requirements of the bank, I think, to have confirmations and solicitor's certificates that they had explained or the solicitor explained all of these documents to their client, yet they hadn't received that solicitor's certificate at the time the swaps transactions were entered into. So the case that was put in the High Court on behalf of Mr England was it didn't seem to matter what advice he might give.

WINKELMANN CJ:
But that's back in two thousand and…

MS CHALLIS:
2005, yes. So what I'm saying is he knew that had entered into or were going to potentially enter into some sort of financial arrangement, didn't know precisely what that was at that point in time, and then he had nothing more to do in effect with the negotiations or swaps transactions which were dealt with between the bank and the Coomeys directly and he was unaware that there were fresh or ongoing swaps or what the relationship was with the bank and the swaps.

O'REGAN J:
Who was signing the documents?

MS CHALLIS:
Well, he didn't sign anything to do with swaps as such, he signed the loan agreement as a trustee, obviously, and he certified that he had explained the nature and extent of that document. But all I'm saying is that's in a vacuum and there was everything else –

WINKELMANN CJ:
It's not that much of a vacuum though, was it? It's a long period of time, and he knew about the swaps. He may have signed all the documents but when I read through the narrative it was clear that he knew quite a lot about the swaps over a period of time.

MS CHALLIS:

No, well, he didn't actually know and didn't have a huge understanding about what the swaps were, and I think everyone accepted that even people at the bank in the rural environment didn't have –

WINKELMANN CJ:

That's moved onto a different issue, Ms Challis.

MS CHALLIS:

Yes. Well…

O'REGAN J:

But why does this affect what we're deciding today?

MS CHALLIS:

Well, the main reason is simply because the legal advice is obviously a factor that comes into the section 4 consideration, and I just wanted to distinguish and say that this isn't, we argued that this isn't a situation where there is a full a comprehensive understanding of what was going on, such that the legal advice, there could be a spectrum, and in the discretion if the legal advice is not as detailed as it might have or could have been or should have been maybe if the solicitor had been properly informed of everything that was going on, then that would be something to take into account in the discretion about the nature of the legal advice given.

WINKELMANN CJ:

But is it really all that relevant anyway? Because the Coomeys say that really their case is based on this loan agreement, it was a very simple document, and in some ways the lack of all the noise around it would have made his advice to them all the clearer.

MS CHALLIS:

Absent what they understood or thought about this agreement about the margin.

WINKELMANN CJ:
Yes. So he would have said, “This is what this document records.”

MS CHALLIS:
Yes.

The one thing I did want to clarify, there was some discussion before about the loan agreement and how that had got, I think to the Coomeys, and the instructions from the bank forwarding their loan agreement itself went to Thomson O’Neil on the 21st of April and the instructions, if they assist, I don’t know if they do, are at 302.0608. So that was the letter from the bank with the loan agreement, the mortgage and the solicitor’s certificate to sign those.

WILLIAMS J:
Can you just repeat those documents? The loan agreement, certificate…

MS CHALLIS:
Sorry, the instructions, just sending all of those documents to Thomson O’Neil was 302.0608.

O’REGAN J:
But we don’t actually have the certificate?

MS CHALLIS:
No, no. The bank couldn't locate the signed certificate and neither was a copy, I don’t think, on Thomson O’Neil’s file. But the bank produced a solicitor’s certificate which was in a form that was used at the time and the particular form used had in fact Mr England as a trustee of another redacted trust, and Mr England accepted there would have been a term in that agreement which said he had explained the nature and effect of the documents to the Coomeys or to the trustees.

That was all I wanted to say today, unless you have any other questions.

WINKELMANN CJ:

Thank you, Ms Challis.

MR HUNTER QC:

Your Honours, there was nothing I wished to say specifically in reply, but I'm obviously happy to answer any questions that may arise.

WINKELMANN CJ:

Thank you, Mr Hunter. Thank you, counsel, for your very helpful submissions, we are much assisted by them. We will take some time to consider this quite complex matter and we will let you have the judgment in due course.

COURT ADJOURNS: 3.35 PM