IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA650/2017
[2019] NZCA 245

BETWEEN	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 Appellants
AND	ANZ BANK NEW ZEALAND LIMITED First Respondent
AND	ROBERT LEWIS ENGLAND Second Respondent

CA180/2018

BETWEEN	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 Appellants
AND	ANZ BANK NEW ZEALAND LIMITED Respondent

Hearing:	30–31 October 2018
Court:	Miller, Asher and Clifford JJ
Counsel:	M D Branch and K F Shaw for Appellants S M Hunter, D T Street and J S Davies for First Respondent D P Turnbull for Second Respondent
Judgment:	24 June 2019 at 11 am

JUDGMENT OF THE COURT

A **The appeal is allowed.**

B **The question of damages is remitted to the High Court for consideration in light of this judgment.**

C **The costs order made in the High Court is quashed and should be reconsidered by that Court in light of this judgment.**

D **The first respondent must pay the appellants one set of costs for a complex appeal on a band B basis and usual disbursements. We certify for second counsel.**

REASONS OF THE COURT

(Given by Clifford J)

Introduction

[1] Sharon and Stephen Coomey are Taranaki dairy farmers. They and Bushline Trustees Ltd (the appellants) are together trustees of the Coomeys' two, mirror, family trusts which own the family's dairy farms. We refer to those trusts as "Bushline". We refer to Mr and Mrs Coomey as such, individually or together, when, as trustees, they represented Bushline in its dealings with ANZ.

[2] By 2008 Bushline had been a customer of the respondent, ANZ Bank New Zealand Ltd, including its predecessor National Bank of New Zealand Ltd (together ANZ), for many years. During that time ANZ had provided working capital support, and had funded the purchase of a number of farms. In April that year the Coomeys decided to purchase another farm. At that point Bushline's debt to ANZ totalled $11.97 million.[1]

[3] That debt had been borrowed at fixed and floating interest rates. To the extent borrowed at floating rates, by far the largest part had been hedged by Bushline pursuant to three separate fixed rate swap agreements.

[4] The new farm was to cost $7.25 million. To fund that purchase ANZ agreed to refinance Bushline's various facilities, consolidating them into one loan of

[1] For convenience, in this judgment dollar amounts are generally rounded to the nearest $10,000.

$19.47 million (the Refinancing Loan). The Refinancing Loan had an initial term of 12 months: interest was payable monthly at a floating rate, namely the bank bill rate, or BKBM, plus a margin of 0.7 per cent.

[5] Bushline hedged the full amount of the Refinancing Loan. It did so by restructuring its existing fixed rate swaps to the following effect (the Refinancing Swaps):

Notional Amount	Expiry Date	Fixed Rate
3,041,130	20.06.09	6.65 per cent
7,905,000	20.12.10	7.64 per cent
8,847,010	20.10.11	7.93 per cent

[6] Pursuant to the Refinancing Swaps ANZ would, in effect, meet Bushline's obligation to pay the floating BKBM base rate on the Refinancing Loan in exchange for which Bushline would pay the fixed swap rate. The margin payable on the Refinancing Loan remained Bushline's responsibility.

[7] The Coomeys say they agreed to the terms of the Refinancing Loan and Swaps (together, the 2008 Refinancing) in reliance on oral and written statements made by ANZ that (very much in summary):

(a) The effect of combining a floating rate loan with a fixed interest rate swap was equivalent to borrowing on fixed rate terms, but with added advantages.

(b) It would not increase the margin on Bushline's borrowings above 0.7 per cent for five years.

(c) It would manage Bushline's interest rate exposure under the Refinancing Swaps, including so as to allow it to benefit from the possibility of breaking the swaps when they were "in the money".[2]

[8] In 2014 Bushline commenced proceedings in the High Court at Auckland against ANZ on the basis that those statements created binding legal obligations which ANZ had breached. It claimed, on the basis of a variety of legal theories and loss calculation methodologies damages ranging between $75,947 and $6.29 million from ANZ as a consequence of ANZ's breach of those legal obligations.

[9] Edwards J, who heard the case in the High Court, summarised the Bushline claim as follows:[3]

> [6] The arguments are wide ranging and overlapping. But the core factual issues turn on whether there was an agreement to hold margins at 0.70 per cent for five years over all of Bushline's funding, and whether the Bank acted deceitfully so as to disentitle it from relying on the disclaimer clauses in the contracts and the Limitation Act 1950 defences. Key legal issues concern the effect of Mr England's independent legal advice and the disclaimer clause on the duties owned by the Bank.

[10] Bushline did not succeed. Edwards J found, again very much in summary, that although ANZ had misrepresented the effect of combining floating rate loans with fixed rate swaps, no legal liability followed; that there had been no promise by ANZ not to vary the 0.7 per cent margin; and that, to the extent ANZ had promised to manage Bushline's interest rate risks associated with the Refinancing Swaps, it had done so. The Judge awarded scale costs in favour of ANZ, increased by 50 per cent because, in her assessment, Bushline had acted unreasonably when it had declined two settlement offers ANZ had made to it before trial (the Judge simultaneously reduced

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2 A swap is "in the money" for one or other party to a swap when, in general terms, the net present value of that party's obligations under the swap is less than the net present value of the other party's obligations under the same swap. Under the Refinancing Swaps, ANZ's obligations were determined by the BKBM rate. From April 2008, and associated with the Global Financial Crisis (GFC), that rate fell from 8.85 per cent in April 2008 to 5.31 per cent in December 2008; 3.27 per cent in April 2009; 2.63 per cent in April 2010; and 2.61 per cent in April 2011. The Refinancing Swaps became, therefore, and from Bushline's perspective, increasingly out of the money over time as that base rate declined.

3 *Bushline Trustees Ltd v ANZ Bank of New Zealand Ltd* [2017] NZHC 2520, [2018] NZCCLR 19 [High Court judgment].

those costs by 10 per cent to reflect Bushline's limited success on some factual findings).[4]

[11] ANZ joined Bushline's solicitor Robert England as a third party, alleging that if ANZ was liable to the Coomeys, then Mr England was also liable. Given the Judge's findings in the High Court, she did not need to consider Mr England's position. At the same time, she ordered ANZ to pay costs to Mr England, also uplifted by 50 per cent for ANZ's failure to accept a settlement offer made by him.

[12] Bushline now appeals. It does so on the basis, in essence, that:

(a) The Judge was wrong to find ANZ had not agreed to fix the margin on its borrowings at 0.7 per cent for five years.

(b) Whilst the Judge was correct when she found "there was no real dispute that [ANZ] represented that it would provide ongoing advice and management to those customers who had swaps",[5] she was wrong to find:

(i) as regards Bushline, ANZ had, in general terms, lived up to that promise; and

(ii) more particularly, ANZ had in fact provided advice to Bushline in August and October 2009 which could not be said to have been flawed when assessed in the circumstances that existed at the time.

(c) Whilst the Judge had correctly found ANZ had represented the combined effect of floating rate loans and fixed interest rate swaps was equivalent to fixed rate loans, she had been wrong to conclude that misrepresentation had no particular legal effect.

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4 *Bushline Trustees Ltd v ANZ Bank New Zealand Ltd* [2018] NZHC 454 at [57].
5 High Court judgment, above n 3, at [98].

[13] Reflecting the wide net cast by Bushline's pleadings the Judge also reasoned:

(a) to the extent that the "ongoing advice" representation was a misrepresentation that had induced Bushline to enter the Refinancing Swaps, the contractual limitation clause included in their terms would have precluded liability; and

(b) alternatively, to the extent that representation might be said to have constituted a collateral contract, it was inconsistent with the terms of the 2008 Refinancing, in particular the entire agreement clauses included in those terms.

Bushline also challenges those aspects of the Judge's reasoning.

[14] Bushline separately appeals (in CA180/2018) against the costs order made against it in the High Court, challenging in particular the Judge's decision to increase costs due to Bushline's rejection of ANZ's settlement offers.

[15] To preserve its position against Mr England in the event the appeal succeeded, ANZ filed a notice of cross-appeal against the Judge's decision dismissing the third party claim. ANZ requested that, were Bushline's appeal to succeed, the third party claim be remitted back to the High Court for determination. With Mr England's consent, Harrison J ordered that ANZ and Mr England were exempt from arguing the cross-appeal and that there be no order for costs as between them in this Court.

Background

[16] There was only limited dispute between the parties as to the background facts, the disputed 0.7 per cent "fixed for five years" margin aside. Reflecting that, the parties filed a statement of agreed background facts in the High Court. To the extent common ground was not reached, each of Bushline and ANZ filed their own factual narratives.

[17] There was, unfortunately, a degree of inconsistency between that agreed statement of facts and those individual narratives, and ANZ's records, relating to the amount of money Bushline owed ANZ from time to time. There were also inconsistencies in ANZ's own records. We have, where possible, endeavoured to record the background facts on the basis of what we understand to be the relevant loan and swap documentation. At the end of the day, those inconsistencies are not generally material to the matters in dispute.

[18] On that basis we summarise the background facts by reference to three broad periods:

(a) Bushline's pre-April 2008 borrowing history;

(b) the April 2008 Refinancing; and

(c) what happened after April 2008.

Bushline's pre-April 2008 borrowing history

[19] The Coomeys purchased their first herd in 1987, becoming customers of ANZ at that time. They purchased their first farm in 1992 and settled Bushline in 1998. By late April 2005 Bushline owed ANZ approximately $3 million, on a combination of overdraft and term loans.

[20] ANZ began offering interest rate swap products to rural customers in mid-2005, at a time when interest rates were rising. Entering into a floating rate loan agreement, and then swapping into a fixed rate, was an alternative way of achieving a fixed rate to doing so by entering into a fixed rate loan agreement. The former was seen as having advantages over the latter: statements made by ANZ about those advantages form part of the basis of Bushline's claims.

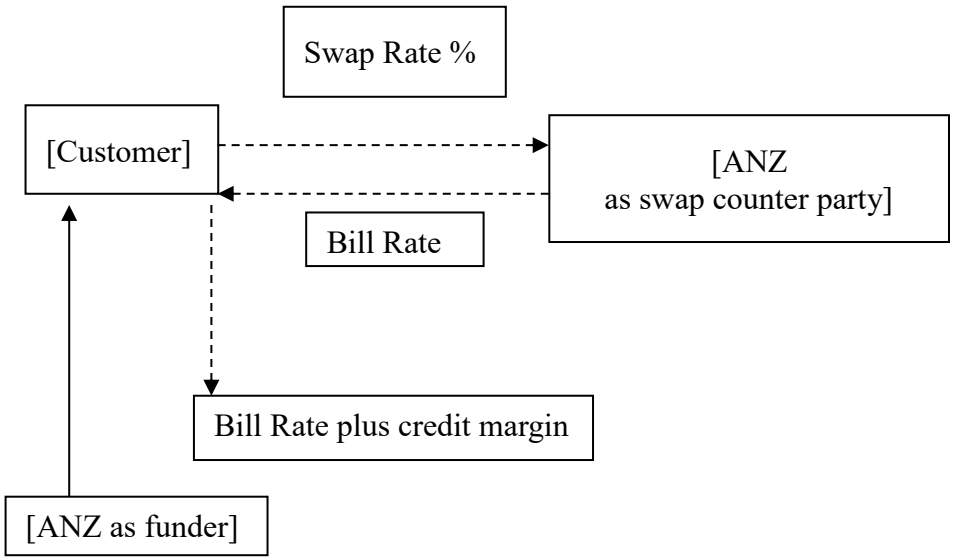
[21] ANZ's evidence was that swaps were first discussed with the Coomeys in September 2005. Mr Esquilant, at that time a dealer in ANZ's Global Markets team, recalled — based on his diary notes — giving what he described as his "swaps 101" presentation to the Coomeys at their kitchen table on 28 September 2005.

That presentation was based on a standard set of flip charts Mr Esquilant used, a copy of which he said he left with the Coomeys. Sometime later ANZ prepared a standard brochure for its swap clients. The Coomeys were at some time also provided with a copy of that brochure. We return to the terms of Mr Esquilant's presentation when we analyse the merits of this appeal. For their part, the Coomeys did not recall that meeting, nor later signing documentation which recorded the terms of the first swap they entered into.

[22] Mr Esquilant's 2005 presentation explained the rationale for entering swaps at that time and how swaps worked.

[23] It explained that interest rates were likely to rise over the next 12 months, and that funding at 90-day rates was unattractive. Longer term rates had better value so it suggested "having a good proportion of debt in fixed rates, ie up to 70%" and of that, recommended a strategy of fixing "50% for 3 years and 50% for 5 years". The key reason for using the swap products, as opposed to a fixed rate loan, was flexibility. If interest rates fell, the swap could be "extended" to get some advantage from lower rates.

[24] How interest rate swaps work was summarised by the following diagram:



[25] To explain:

(a) ANZ makes a floating, bill rate loan to the customer.

(b) Under a bill rate loan agreement, the customer's obligation is to pay interest on the amount of the loan at the bill rate plus a margin on stipulated interest payment dates.

(c) Under a swap agreement:

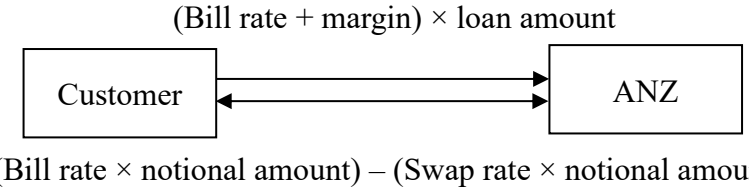
(i) the customer's obligation is to pay ANZ amounts equal to interest on the notional amount of the swap at the agreed, fixed, swap rate on payment dates which coincide with interest payment dates for a bill rate loan; and

(ii) ANZ's obligation is to pay the customer, on those same dates, amounts equal to interest on the notional amount of the swap at the bill rate.

[26] In that way, and to the extent that the notional amount of a swap is less than or equal to the amount lent under a bill rate loan agreement, on the interest payment dates the customer's net obligation to ANZ is to pay an amount equal to the interest on the bill rate loan at the fixed swap rate plus the margin set under the bill rate loan.

[27] As Mr Esquilant and Mr Rankin (a finance and banking expert who gave evidence for ANZ) explained, ANZ arranged the payments (pursuant, we assume, to Bushline's instructions) to achieve that result in a way not anticipated by that diagram. As we understand it, ANZ effected two transactions: one in which the customer paid the bank the floating interest rate payable under the principal loan from time to time (that is, including the margin), and a second effecting the adjustment

from the floating base rate to the fixed swap rate. Those transactions always summed to the fixed swap rate plus the margin. Thus diagrammatically:



[28] As indicated, the direction of the adjustment payment would change depending on whether the swap was "in the money" or "out of the money". If, on any particular payment date under the swap, the floating interest payable on the notional amount exceeded the fixed interest payable on that amount, the adjustment would be a payment from the bank to the borrower and the swap was said to be "in the money". If the floating interest payable on the notional amount was less than the fixed interest payable on that amount, the bank deducted the difference from the borrower's account and the swap was said to be "out of the money". Thus, the borrower's bank statements reflected the benefit or cost of the swap from time to time.

[29] Mr Rankin observed that transparency could tend to exacerbate customer satisfaction or dissatisfaction with the outcome of the swap, by making it impossible to overlook or ignore. Customers did not tend to calculate the precise impact of their fixed rate term loan by comparison with the floating rate from time to time in quite the same way.

[30] Mr Esquilant's evidence was that once the swaps product had been introduced to a customer, and interest expressed in it, a standard set of terms and conditions — to apply to all swaps — was sent to the customer (the Swap Terms).[6]

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[6] Interest rate swaps are one type of a broader range of financial products known collectively as "derivatives". Derivatives are complex transactions: a lack of understanding of those complexities was a major cause of the GFC. Those complexities reflect, in particular, the complex financial calculations which become necessary where, in breach of its obligations or by agreement, one party to a derivative transaction terminates the transaction before its scheduled maturity date. International standard terms have been developed for a range of derivatives transactions by the International Swaps and Derivatives Association (ISDA), known as the ISDA Master Agreement. ANZ developed the Swap Terms based on those standard term documents, but simplified and limited to swap transactions. The Swap Terms are, nevertheless, and like the ISDA Master Agreement but on a lesser scale, a complex and specialised document, comprising some 22 pages of small type.

[31] Mr Esquilant further explained that, for individual swaps, details would first be recorded in a telephone conversation between the bank's customer and him, or one of his colleagues. Those phone calls had to be made from within ANZ because that was the evidence the bank held on file to show a swap had been transacted. Once transacted, the details would be recorded in a standard form letter (a Confirmation).

[32] The Swap Terms provided explicitly that the bank and its customer would be legally bound "from the time the details of a Transaction are agreed between them". Moreover, that transaction would be valid and binding even if a Confirmation was neither sent to the customer nor signed by the customer. Nevertheless, the bank could, at the customer's risk, cancel a transaction if the customer did not sign and return the relevant Confirmation.

[33] The standard form Confirmation included the following statements:

> The purpose of this letter is to confirm the terms and conditions of the Transaction entered into between us. This letter constitutes a "Confirmation" as referred to in the Terms and Conditions specified below.
>
> This Confirmation supplements, forms part of, and is subject to, The National Bank Terms and Conditions of Institutional Financial Markets Transactions (the "Terms and Conditions") which have been provided to you and which are available on our website www.nbnz.co.nz.
>
> By signing this Confirmation, you confirm that the above details are correct and that this Transaction and this Confirmation are governed by and subject to the Terms and Conditions.

[34] Those Confirmations each bore the following legend:

> EACH PARTY AGREES THAT IT HAS NOT RELIED ON ANY ADVICE (WHETHER ORAL OR WRITTEN) FROM THE OTHER PARTY (OTHER THAN AS SET OUT IN THIS CONFIRMATION) AND THAT (A) IT HAS THE CAPACITY TO EVALUATE THE TRANSACTION AND (B) IT UNDERSTANDS AND ACCEPTS THE RISKS AND OBLIGATIONS INVOLVED.

[35] An internal ANZ document of 4 October 2005 records Mr Lawn, a Rural Manager from ANZ's Hawera branch, asking for a copy of the Swap Terms to be sent to Bushline. That document was sent the next day to Bushline's solicitors, Thomson O'Neil of Eltham. Thomson O'Neil returned that document, together with

a bank form evidencing Bushline's agreement to those terms, to ANZ on 22 December 2005 together with their solicitor's certificate on ANZ's standard form. In its letter instructing Thomson O'Neil, ANZ advised:

> **Additional Instructions:**
>
> The Bank is relying on you to confirm to it the matters set out in the enclosed Solicitor's Certificate after examination and consideration of any partnership agreements, partner resolutions and other documents and matters as necessary to give that certificate.

[36] ANZ's standard form solicitor's certificate, having addressed the formalities of execution, capacity and authorisation, concluded:

> **6. Documents Explained:** As far as I/we am/are aware, having made enquiries and taken action to the standards of a prudent and competent solicitor in the circumstances of the transaction, the nature and the effect of the provisions of the Documents have been explained to the Customer.

[37] As matters transpired the first swap Bushline entered into was evidenced at trial by a Confirmation sent by ANZ to Bushline dated 23 February 2006. The Coomeys would appear to have signed that Confirmation on 19 May. The Confirmation was late. The swap was expressed to have a trade date (that is, the date of telephone agreement) of 7 October 2005,[7] an effective date of 20 December 2005 and a termination date of 20 December 2010. The notional amount of the swap was initially $975,000, increasing to $2.91 million by 20 August 2007. ANZ was recorded as the fixed rate payer (6.85 per cent), Bushline was the floating rate payer (NZD-BBR-FRA (BID)).[8] Monthly payments were to begin on 20 January 2006.

[38] Explaining the initial rationale for that first swap, on 6 December 2005 ANZ and the Coomeys agreed the terms of a five-year term loan of $975,000. That loan was to be advanced in full on 22 December 2005, be used to repay an earlier loan, carry interest at a floating rate, be an interest only loan, and be repaid in full at the end

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7 Mr Esquilant could not recall whether he or one of his colleagues had spoken to the Coomeys on 7 October 2005, and nor was ANZ able to locate the record of that call.

8 Those allocations of payment obligations were obvious but significant errors, in view of ANZ's subsequent realisation of staff misdescribing swaps and their effect: the whole point of the transaction was for Bushline to become the fixed rate payer.

of its 60-month term. The floating rate for that loan was expressed in the following terms:

> The interest rate for the Loan is:
>
> > *Floating interest rate (bill-priced)*
> > for the first 30 days from the Date of Advance, the Bank's 30 day bill-priced interest rate applicable to the Customer (as determined by the Bank) at the Date of Advance (which at the date of this agreement would be 8.73% per annum), then the Bank's 90 day bill-priced interest rate applicable to the Customer (as determined by the Bank) which will be reviewed every 90 days.

[39] As can be seen, interest payable was not set by a base rate plus a margin. Rather, the reference was to the bank's 30/90 day "bill-priced interest rate applicable to the Customer".

[40] The 6 December loan agreement did not provide for any further advances other than the initial one of $975,000. Why the notional amount of the associated swap started at that amount, but subsequently increased, was not explained to us.

[41] The Coomeys continued to borrow from ANZ to maintain and expand their farming operation. They purchased another farm on 1 June 2006 for $3.45 million. In anticipation of that, Mr Coomey had on 21 March 2006 transacted a second swap by phone for a notional sum of $3.15 million for three years. The transcript of that call was in evidence. Having spoken earlier to Mr Esquilant, an ANZ dealer called Mr Coomey. The details mentioned were that the swap amount was to be "$3.15 million" and the rate was at "670". When asked whether he had any questions, Mr Coomey noted they had already done one swap. The following exchange then occurred:

> [Dealer] Oh you have, oh okay?
>
> [Mr Coomey] Yeah, so it's not so …
>
> [Dealer] So you're right on top of it then.
>
> [Mr Coomey] No, no, the first one I was bloody totally confused, but this one's not quite so bad.
>
> [Dealer] Yeah, well once you see the flows over your account a couple of times as you must have done then …

[Mr Coomey] Yep

[Dealer] Then you become pretty comfortable with what's going on and I thought maybe you were a new client, so…

[Mr Coomey] Yeah, nah

[Dealer] I won't have to work through a few of the minor issues with you.

[Mr Coomey] Hahaha nah, so it's not so bad this time hahaha.

[42] The conversation continued for a short while, including the ANZ dealer observing that "in the next 6 months or so you're definitely going to see that bank bill rate stay around that 740 area" so "you know you're getting a 70 point pickup between the two".

[43] The relevant Confirmation, dated 21 March and sent to the Coomeys, was signed for Bushline on 1 April. Bushline, the fixed interest payer, was to pay interest on the notional amount under that swap at the rate of 6.7 per cent: the swap had a notional amount of $3.15 million, an effective date of 20 June 2006 and a termination date of 20 June 2009.[9]

[44] As anticipated by the terms of that swap, on 23 May 2006 ANZ agreed to lend Bushline the $3.15 million purchase price for a term of five years. The interest rate for that loan was specified in identical terms to that of 6 December 2005, save that the 30-day floating interest rate applicable at the commencement of the loan was 8.48 per cent. Thus, again, the floating interest rate was not determined by reference to a base rate plus a margin.

[45] On 28 September 2006 ANZ transacted a further swap for Bushline (the third swap). The third swap had a notional amount of $400,000, an effective date of 20 October 2006, a termination date of 20 October 2011 and a fixed rate payable by Bushline of seven per cent per annum. ANZ sent a Confirmation to the Coomeys dated 29 September 2006. That was signed by the Coomeys on 6 October 2006.

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[9] This is an example of the inconsistency we mention at [17] above. The parties' agreed statement of facts gave the relevant interest rate as 5.7 per cent, a figure not supported by the original documentation and the evidence later given by Ms Owen, a witness for ANZ.

The third swap would not appear to have been related to any particular existing or new loan.

[46] On 1 June 2007 the Coomeys settled the purchase of a further farm. The price of that farm was $3.45 million. ANZ lent Bushline $6.46 million at that time, to refinance some of its earlier lending and to fund the additional purchase. Again, the interest rate for that loan was, as for the previous two, described as a "[f]loating interest rate (bill-priced) … applicable to the Customer (as determined by the Bank)". That rate was initially to be 9.10 per cent per annum. There was no new swap associated with that additional funding at that time.

[47] Thus, and as already explained, by early 2008 Bushline had total debt to ANZ of some $11.97 million. The terms of that debt were recorded in a number of fixed and floating, rural bill rate, loan agreements. Margins were not expressly provided for in any of those agreements, whether providing for fixed or floating interest rates.

[48] There were few explicit references to those margins prior to the Refinancing Loan. One of the few places where that occurs is in a letter sent by Mr Esquilant to the Coomeys in February 2006, with regard to the possibility of swaps being associated with the $3.15 million loan which was to be drawn down on 1 June 2006. That letter, as relevant, reads:

> With regards to your new loan for $3,150,000.00 drawing down 1 June 2006, I detail below the various alternative[s] available to you:
>
> Start Date 20 June 2006
> Amount $3,150,000.00
>
> | | Interest Rate | Credit margin | Total Rate |
> |---|---|---|---|
> | 3 Years | 6.85% | 1.10% | 7.95% |
> | 5 Years | 6.75% | 1.10% | 7.85% |
>
> You may wish to choose to include the full amount in either of these maturities or alternatively, and this may [be] a good strategy to spread your maturities and risk, put $1,575,000.00 in each
>
> As a final alternative we could add the new amount to your existing Swap (currently at 6.85% maturing 20/12/2010) and this would reduce the interest rate to 6.80% for the entire structure as at 20 March 2006.

April 2008 restructuring — the Refinancing Loan and Swaps

[49] In early 2008, Mr Coomey was approached with a possible transaction: the purchase of another farm, which would be incorporated into Bushline's business as a runoff block, with potential for development. One of ANZ's competitors, ASB, was prepared to fund the purchase, and to refinance Bushline's ANZ debt. ANZ would lose its customer. Mr Coomey approached ANZ.

[50] A Mr Harvey, who was by then the Coomeys' relationship manager at the ANZ Hawera branch, described his reaction to Mr Coomey's approach in the following terms:

> I remember thinking at the time that the purchase was a big step and would be a huge stretch for the Coomeys. But I needed to give it the appropriate due diligence given the Coomeys were my largest customer and that ASB had clearly introduced the opportunity with the aim of securing the business.

[51] Mr Harvey prepared a lending proposal to go to ANZ's credit department, working with the Coomeys to do so. Mr Harvey supported the Coomeys' business case, describing the proposed purchase as a good opportunity to secure the long-term viability of their operation through the possibility of increased productive capability and lower costs. He prepared budgets for the first three years "post purchase". At trial, budgets for the years ending 31 May 2008, 31 May 2009 and 26 May 2011 were exhibited. Those budgets provided for a moderate surplus in the 2008 year ($165,387) and deficits of $295,516 and $154,264 for the 2009 and 2011 years. Referring to those negative cash flows, Mr Harvey commented:

> Clients are well aware of their deficit cashflow situation status quo. Their attitude is to minimalise these losses and if [the] situation gets to a point where they are uncomfortable they will act on their options to get business to a more comfortable state.

[52] On 28 February 2008 credit approval was given by the Bank for total financing of some $19.47 million. Of that, $7.25 million was the purchase price for the property and approximately $700,000 was for additional related expenditure (additional dairy company shares, more cows and some plant and machinery).

[53] The approval conditions required written advice to be given to the Coomeys confirming the bank's concern regarding the viability of their business and the need for intensification to achieve sustainability. At the same time, the correspondence would also allude to the significant equity gains and the business growth they had achieved in the last couple of years.

[54] The next day the Coomeys signed an unconditional contract for the purchase of the property. Settlement and possession was set for 1 May 2008. Although the terms of that borrowing had not been agreed, the Coomeys had acted in reliance on Mr Harvey's verbal confirmation that the financing had been approved and would be available.

[55] Mr Harvey then began the process of settling the terms of the refinancing. He involved Mr Esquilant from the beginning, emailing him on 27 February to ask his availability over the next little while as ASB was "sniffing around".

[56] Mr Harvey met with the Coomeys to discuss terms on 18 March. As they were major clients, he took his senior manager, a Mr Rob Simcic, with him.

[57] The discussions that day focused on the margin. Mr Coomey told Messrs Harvey and Simcic that he had five-year, favourable, fixed margin offers from both ASB and BNZ. He was therefore looking for a significant reduction in his margin at the time. Mr Harvey made the following diary note:

> 18.3.2008 — Chris H & RS
>
> [Negotiation]
>
> BNZ offering 60 points on ongoing.
>
> ASB 8.1%
>
> Waiting for Bill to confirm offers from other banks to lock in margin with us.

[58] On that basis Mr Coomey wanted ANZ to commit to a 70 point margin on the spot. But he did not have any evidence of those offers. Messrs Harvey and Simcic could not obtain authority to offer such a margin without proof of the competing offers.

No agreement on margin was reached on 18 March. In fact, and as Mr Simcic put it, "nothing was agreed on the 18th".

[59] Notwithstanding, ANZ delivered two letters to the Coomeys that day and the Coomeys signed a standard form "acceptance of finance officer" document. One of those letters, in which ANZ presented its financing proposition, expressing enthusiasm for its future relationship with the Coomeys, referred to the "attached Finance Offer".

[60] The other letter was less enthusiastic, recording — perhaps somewhat surprisingly given the offer of finance — ANZ's concern at the viability of Bushline's farming business going forward.

[61] The standard form acceptance document also referred to the offer of finance set out in "the Bank's letter of 18th March 2008". No such document was ever found.

[62] Given:

(a) Mr Harvey and Mr Simcic's evidence that in fact nothing was agreed on the 18th; and

(b) that, in the first letter, under a heading "Summary of the key features of the Finance Offer" no features were listed,

we think it is more likely than not that no such document existed at that time.

[63] Delivering the two letters and having the Coomeys sign the standard form acceptance document may have been seen by Messrs Harvey and Simcic as some progress in retaining the Coomeys' business.

[64] When Messrs Harvey and Simcic returned the next day, Mr Coomey showed them a copy of the ASB offer. Mr Simcic went outside with that document, made contact with the responsible officer in the bank over the phone, and confirmed their authority to offer funding at a margin which Mr Harvey recorded in a handwritten note on the agenda of that day as being "Agreed — 70 pts ongoing".

[65] The meeting had not been an easy one. In particular, ANZ's insistence on seeing proof of the offers Mr Coomey said he had received from other banks caused him considerable upset: he felt he was not being believed. Nevertheless, and as Mr Harvey put it:

> We left the Coomeys' farm … having agreed that we would provide the necessary new funding at a 70 point margin over BKBM.

[66] Attention then turned to the associated swap arrangements. On Tuesday 25 March, Mr Esquilant emailed Messrs Harvey and Simcic, congratulating them on retaining the Coomeys' business and telling them he would look at strategies for swaps when the way in which the existing and new debt was to be structured had been agreed. Mr Harvey and Mr Esquilant met with the Coomeys on 28 March. Mr Harvey's agenda for the meeting records it was to discuss the loan structure going forward — three years versus five years, rates, strategy and timing. A diary note of Mr Harvey's relating to the meeting records: "Look [at] refinancing all debt into a three year swap."

[67] Mr Esquilant's evidence was that he had suggested a mix of three and five-year swaps, but that Mr Coomey had said five years was a bit too long for his liking.

[68] On 8 April, Mr Esquilant recorded a proposal whereby the existing and new debt would be structured as one loan and hedged by Bushline's existing three swaps on the basis that Bushline's $2.905 million swap would be increased to $7.905 million and the $400,000 swap would also be increased, first to $847,010 on 20 April and then again on 20 May (the settlement date) by another $8 million, taking it to approximately $8.8 million. The existing maturity of those two swaps would not be changed. The terms for the $3.15 million swap would not be changed. In August that year that swap was restructured by the reduction of its notional amount to $3.04 million.

[69] Mr Esquilant instructed one of ANZ's dealers to load those transactions that same day. We infer he had spoken to Mr Coomey before doing so. He asked the dealer to ring Mr Coomey the next day to confirm those details. That the dealer duly did, referring to the conversation Mr Coomey had had with Mr Esquilant the previous day.

The dealer explained the changes to the amounts of the swaps, specified what he called the agreed "base swap rates", and that the maturing dates for the swaps were not changing. That conversation ended with the following exchange:

> [Dealer] That's locked in for you. What will happen is you will get a couple of [confirmations] sent through and if you just sign those and return them as soon as possible that would be fantastic.
>
> [Mr Coomey] Good man.
>
> [Dealer] Cheers, for that.
>
> [Mr Coomey] Thanks a lot.
>
> [Dealer] Good one [Mr Coomey].
>
> [Mr Coomey] See ya.
>
> [Dealer] Bye

[70] Confirmations for those two swaps dated 8 April 2008 were sent to the Coomeys.

[71] The details of the Refinancing Loan were finalised in an agreement dated 21 April 2008. The loan was for the amount of $19.47 million, would be advanced in a single amount on 1 May 2008, had a term of one year (expiring 1 May 2009) and an interest rate expressed in the following terms:

> **5. Interest**
>
> The interest rate for the Loan is:
>
> *Floating interest rate (BKBM-priced)*
>
> for the first 19 days from the Date of Advance, the 1 month BKBM rate as at the Date of Advance (which at the date of this agreement would be 8.88% per annum) plus a margin of 0.70% per annum (reviewable at any time), then from 20 May 2008 the 1 month BKBM rate as at that date (which will be reviewed every 1 month) plus a margin of 0.70% per annum (reviewable at any time).

[72] The Refinancing Loan was, as noted, only for a term of one year. That was a very short period, given that the Refinancing Loan provided all of Bushline's financial support for its ongoing business operation. As can also be seen, there was a mismatch

between the one-year term of the Refinancing Loan and the (approximately) one, two and three-year terms of the interest rate swaps.

[73] Relevantly, Mr Rankin, in explaining the operation of swaps generally, noted that the term of a swap was:

> [A] term equal to or less than the intended term of the loan (which may be longer than the loan's formal term, if the parties anticipate that the loan will be rolled over) …

[74] That "mismatch" reflects an understanding that ongoing funding would be available from ANZ to the Coomeys, all things being equal. As Mr Esquilant described it:

> The swap contract and the loan underlying the swap are fixed term obligations. But the underlying loan facility would be of a duration of no more than one year. So for example, on a three year swap contract, the one year underlying loan would be renewed three times.

[75] If that funding was to be withdrawn before the end of the term of the swaps, an unmeasurable, contingent, risk would crystallise: that is, the close out costs of those swaps.

What happened after April 2008

[76] Events over the following five years, until Bushline ceased to be a customer of ANZ in July 2013 when it was refinanced by another bank, were dominated by two adverse influences:

(a) The purchase of the runoff block was not the success that had been hoped for. In addition, the Coomeys — like other dairy farmers — faced difficult conditions in their farming operations.

(b) The impact of the GFC severely affected credit markets and interest rates in New Zealand, as it did internationally.

[77] These were not good years for the dairy industry.

[78] The difficulties the Coomeys faced in their farming operations created requirements for additional financing and raised doubts for ANZ over the sustainability of the overall operation. The Coomeys arranged for Bushline's overdraft accommodation to be increased and, on at least one occasion, refinanced by way of a floating BKBM loan. Bushline attempted, without great success, to sell assets to reduce bank debt. In mid-2012, 12 of the 15 certificates of title of the Waverley farm were sold, reducing overall debt to something in the vicinity of $16 million. But the trading difficulties continued.

[79] From the Refinancing Loan onwards, Bushline borrowed on a short-term basis: the maturity of the loan agreements which documented its financing over this period never exceeded 12 months. Those loan agreements all contained the following term:

> **Default**
>
> The Bank may by written notice to the Customer:
>
> (i) cancel any undrawn amount of the Loan (any amount cancelled will not be available to the Customer); and/or
>
> (ii) require immediate repayment of the Loan, and payment of all interest and other amounts owing under this agreement if:
>
> (a) default is made in the payment of any amount due under this agreement, or on any of the Customer's accounts with the bank, or under any liability the Customer has to the Bank; or
>
> …
>
> (f) *in the Bank's opinion, an unsatisfactory feature develops in the affairs of the Customer or any Guarantor does not continue to conduct their affairs to the Bank's satisfaction*.
>
> The customer must immediately comply with any notice given under this clause.
>
> (Emphasis added.)

[80] The combination of the short-term nature of Bushline's funding, and the broad discretion given to ANZ by the "unsatisfactory feature" element of its default clause, left Bushline with little if any countervailing negotiating power, once the combination of the GFC and the downturn in the dairy industry dampened (to say the least) ANZ's appetite for providing equity financing to the dairy industry. It was in that context Bushline alleges that ANZ failed to support it as had been promised, as reflected in its

harsh and oppressive conduct cause of action under the Credit Contracts and Consumer Finance Act 2003.

[81] The principal focus, however, of Bushline's claims against ANZ in this appeal was on what happened to its funding costs from April 2008 onwards. The first part of that story relates to the actions taken by central banks in response to the GFC, as typified by the bankruptcy of Lehman Brothers in September 2008.

[82] The effect of those actions would have become apparent to the Coomeys from October 2008 at the latest.[10] Up until that point, the fixed rates on the three swaps were all lower than the floating BKBM rate, although that rate had been falling since peaking at 9.00 per cent in August the previous year. So, until then, Bushline was paying less to ANZ on the fixed rate side of its swaps than it was passing through its accounts on the floating rate side. It was "in the money", as it were, to that extent: the swaps were saving it money. It would have been able to see those savings in its bank statements.

[83] From October 2008 onwards, and for the rest of the duration of the swaps, that ceased to be the case. That month, when the fixed rate on two of the swaps exceeded the bill rate for the first time, Bushline was, as between ANZ and it, the "net" payer to the extent of approximately $7,380. All three swaps were out of the money by November 2008. By April 2009, the anniversary of the 2008 Refinancing , the BKBM bill rate had fallen to 3.27 per cent: that month Bushline's fixed rate payment obligation was approximately $70,730 greater than the floating base rate amount due on the Refinancing Loan and paid by ANZ. Again, that cost would have been plain from bank statements.

[84] The BKBM bill rate remained lower than the fixed swap rates for the balance of the terms of the Refinancing Swaps.

[85] Bushline's interest costs followed a different path. There were three reasons for that.

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[10] The position of the swaps, and whether they were "in the money" or "out of the money" at any given time, was summarised in an appendix to Ms Owen's brief of evidence.

[86] First — and as just set out — the direct effect of the Refinancing Swaps themselves.

[87] Secondly, in late 2008 and again in early 2009 ANZ progressively increased the margin on the Refinancing Loan: first to 0.85 per cent (in December 2008) and then to 0.97 per cent (in February 2009). In April 2009, before any of the Refinancing Swaps matured, the Refinancing Loan was rolled over for another year on its then existing terms.

[88] Thirdly, the underlying portions of the Refinancing Loan did not "revert" to the original BKBM plus 0.7 per cent floating interest rate. Rather:

(a) At first, ANZ increased that margin significantly: for example in June 2009, when the swap on a notional $3.04 million matured, ANZ refinanced that portion of the Refinancing Loan at a floating rate of BKBM plus 3.45 per cent (as opposed to BKBM plus 0.7 per cent).

(b) Thereafter, for example in December 2010 when the swap on a notional $7.91 million matured, ANZ refinanced the two then unhedged portions of the Refinancing Loan as a ten month "floating rate loan", at an initial interest rate of 8.1 per cent (as opposed to BKBM, then 3.15 per cent, plus 0.7 per cent). That interest rate was described as being:

> [T]he Bank's floating interest rate applicable to the Customer (as determined by the Bank).

[89] ANZ had recorded the circumstances leading to the December 2010 refinancing in a letter to the Coomeys of 17 November which, as relevant, reads:

> Dear Mr & Mrs Coomey,
>
> I refer to our meeting on the 4th November where we discussed loan structures. The issue you are confronted with is that as the SWAP contract of $7,905,000 is expiring on the 20th December 2010 and upon expiry the interest rate on the $7,905,000 portion of your bill rate loan will increase to approximately 11.48% (subject to change).
>
> We agreed with you there would be a substantial cashflow advantage by transferring this debt onto a floating rate loan. In this regard I enclose documentation for a loan of $11,887,080 comprising:

Refinance the portion of your bill loan as above	$ 7,905,000
Refinance your existing floating rate loan	$ 3,982,080
Total	$11,887,080

The details of the new loan are enclosed in the attached loan agreement but essentially

- Interest rate is 8.10% (subject to change)
- Expiry date is the 31/5/2011 (subject to review)
- Drawdown date will be the 20th December 2010
- Fee is $300

The residual bill rate loan will be for $8,847,010 and the plan is to leave the Bill Loan in place whilst the remaining SWAP contract is in place, then if there is a cashflow advantage also redocument this onto a term loan.

We have not been referred to, nor have we been able to find, any record of any discussion between ANZ and the Coomeys prior to the terms of the 2008 refinancing being agreed as to why the BKBM plus 0.7 per cent margin was only available when, and to the extent that, a fixed rate swap was in place.

[90] At some point following land sales, Bushline's various remaining floating rate loans were restructured into one, $15.9 million, floating rate facility. When Bushline refinanced with another bank in July 2013, it paid approximately $16.3 million to settle its remaining obligations in full to ANZ.

[91] At various points in 2008 the Coomeys raised with ANZ the possibilities of breaking their swaps. They explicitly asked what would be the cost of doing so. In response, ANZ identified a number of opportunities whereby particular swaps could be extended in time and on that basis repriced to Bushline's (marginal) advantage. At no point in 2008 did ANZ advise Bushline what it would cost them to break the Refinancing Swaps.

[92] Against that background, we turn to Bushline's claims against ANZ.

Bushline's Claims — the pleadings

The five representations

[93] Bushline's claims against ANZ were based on various statements Bushline said ANZ had made (together the Representations), in writing and orally, in March 2008 as the Coomeys and ANZ were agreeing the terms of the April 2008 refinancing.

[94] Bushline said those statements were representations that:

> (a) [T]he SWAPs operated like a fixed rate term loan, except with greater flexibility, and benefits, including the ability to easily restructure with low cost, and as such:
>
> (i) SWAPs managed the interest rate risk so that the overall cost of finance would be no worse than the fixed rate of the SWAP plus the original margin but would likely be better ("the Fixed Cost Representation"); and
>
> (ii) Margins on the Bushline funding from ANZ would not change for 5 years ("the Margin Representation").
>
> (b) SWAPs were transferable and would not prevent the Trusts from refinancing the Funding if they desired to do so ("the Transferability Representation").
>
> (c) ANZ could and would monitor and/or manage the Trusts' SWAPs on an ongoing basis to ensure that the Trusts were able to take best advantage of the flexibility and benefits of the SWAPs and that the Trusts could be assured that their exposure to interest rate risk would be managed in such a way that reduced the overall cost of finance to them ("the Monitoring Representation").
>
> (d) ANZ would be there for the Trusts in good times and bad ("the Good Times and Bad Times Representation").

Breach

[95] Bushline then asserted that each of the Representations was, when made, false and/or misleading. In effect, each of the Representations was, as evidenced by subsequent events, a misrepresentation. Central to that assertion were the circumstances in which, after the 2008 Refinancing had been put in place, ANZ over time increased the margin on Bushline's funding (hedged and unhedged) and failed to advise Bushline, whilst the swaps were still "in the money", that is until about October 2008, to break the swaps.

[96] Bushline particularised its "false and misleading" assertions as follows:

Breach — Fixed cost

(a) The Fixed Cost Representation was false and/or misleading as:

(i) the SWAPs did not manage the interest rate risk so that the overall cost of finance would be no worse than the fixed rate of the SWAP plus the original margin because the ANZ could choose to increase (and did increase) margins; and/or

(ii) the break costs under a SWAP were not calculated on the same basis as the early repayment fee under a fixed rate loan; and/or

(iii) unlike a fixed rate loan, entering into a SWAP resulted in the ANZ imposing a Market Replacement Risk ("MRR") which was treated as debt for the purposes of credit risk analysis.

Breach — Margin

(b) The Margin Representation was false and/or misleading, as ANZ could, and did, increase margins on the Funding.

Particulars

(i) The ANZ increased margins on the Funding during the first 5 years of the Funding with an associated increase in interest costs of $3,792,071;

(ii) The ANZ increased margins on the Funding while the SWAPs associated with the Funding were in place in the sum of $75,947.

Breach — Transferability

(c) The Transferability Representation was false and/or misleading as ANZ retained the ability to, and subsequently did (through its employee Malcolm Nitschke) on 29 January 2009, orally refuse to allow the transfer of the SWAPs to BNZ.

Breach — Monitoring

(d) The Monitoring Representation was false and/or misleading as ANZ did not, or was not able to, monitor or manage the Trusts' SWAPs on an ongoing basis to ensure that they were able to take best advantage of the flexibility and benefits of SWAPs.

Breach — Good Times and Bad

(e) ANZ did not support [Bushline] in bad times.

Causes of action

[97] Those assertions gave rise to five causes of action under which Bushline claimed ANZ was liable to it:

(a) in negligence: ANZ had a duty to competently and fully advise Bushline on an ongoing basis as to the suitability of the Refinancing Swaps, risks associated with the Swaps, and to advise on other financing options. The circumstances rendering the Representations false reflected breaches of that duty.

(b) under s 6 of the Contractual Remedies Act: Bushline had been induced by ANZ to enter into the 2008 Refinancing on the basis of the Representations. They were false. Bushline was accordingly entitled to damages.

(c) for breach of contract: the Representations reflected oral terms of the 2008 Refinancing or, alternatively, a collateral contract to the 2008 Refinancing. When breached, the circumstances then rendering the Representations false reflected breaches of those terms of contract. Bushline was entitled to contractual damages accordingly.

(d) under s 120 of the Credit Contracts and Consumer Finance Act for harsh and oppressive conduct: the circumstances rendering the Representations false, either individually or in combination, established ANZ had exercised its rights and powers under the 2008 Refinancing in an oppressive manner. Bushline was therefore entitled to have the 2008 Refinancing reopened, and to have the Court to order ANZ to pay it the appropriate sum.

(e) under s 9 of the Fair Trading Act 1986: the circumstances rendering the Representations false establish that ANZ had acted in a misleading and deceptive way, entitling Bushline to damages.

Damages

[98] Bushline claimed damages under each of those causes of action in three basic ways:

(a) First, but for the Representations, it would not have entered into the 2008 Refinancing: rather it would have borrowed (swapped into) a fixed rate for a third of that funding only and would have borrowed the balance on a floating rate. On that basis it claimed business losses of $3.76 million, or swap payments of $1.94 million or interest savings of $2.17 million.

(b) Secondly, but for the Representations, it would have borrowed from either of the two other banks, BNZ or ASB, who were willing to lend to it in April 2008. On that basis it claimed business losses of $6.29 million, and additional interest (calculated by reference to the position that would have resulted if it had taken advantage of the offers of those banks to fix the margin on its borrowings at 0.7 per cent for five years) of $3.79 million.

(c) Thirdly, ANZ had increased the margin on the Refinancing Loan during the term of the Refinancing Swaps. Bushline had incurred increased costs of $75,947.

ANZ's affirmative defences

[99] In addition to denying it had made the Representations, or if it had that they were false or misleading, ANZ advanced affirmative defences. These were based largely on various written terms of the 2008 Refinancing. The Judge described those terms collectively as the "disclaimer clauses".[11] The disclaimer clauses comprised:

(a) The self-reliance acknowledgement, found in the boxed text of the Confirmations (above at [34]).

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[11] High Court judgment, above n 3, at [60].

(b) The following provisions of the Swap Terms sent to Bushline in 2005:

> Customer should note the following general risks
>
> - Foreign exchange and derivative markets can be highly volatile and the prices of the underlying rates, currencies or commodities may fluctuate rapidly over wide ranges, and may reflect unforeseen events or changes in conditions.
>
> - The customer may suffer substantial losses as a result of those fluctuations. The Bank will not be liable for these losses in any circumstances.
>
> It is the customer's responsibility to understand the nature of the transactions the customer enters into, the risks associated with those transactions, and to monitor the transactions. The customer should not enter into transactions if transactions or the risks are not understood.
>
> …
>
> 10.1 Independent advice: The Customer has entered into and will enter into each Transaction and the Agreement in reliance on such independent advice (including tax, legal and financial advice) as the Customer considers necessary and not on any representation or information made or given by the Bank. To the maximum extent permissible by law, the Bank will not be liable for the Customer's loss in any circumstances.
>
> 10.2 Assessment: The Customer represents and warrants on entering into each Transaction and the Agreement that it:
>
> (a) is capable of assessing the merits of and understanding (on its own behalf or through independent expert advice) and understands, accepts and assumes the terms, conditions and risks of that Transaction and the Agreement;
>
> (b) is satisfied that the Transaction is suitable for its objectives, financial situation and needs; and
>
> (c) understands foreign exchange and derivatives markets and how they operate.
>
> …
>
> 14.2 Entire agreement: The Agreement contains all of the terms, representations and warranties made between the parties with respect to its subject matter and supersedes all prior discussions and agreements relating thereto.

(c) The following, or equivalent, acknowledgement was found in the Refinancing Loan when made in 2008 and was repeated each time as that loan was restructured:

> The Customer acknowledges that:
>
> …
>
> (c) no representation, warranty or undertaking has been made by or on behalf of the Bank in relation to the Loan which is not expressly set out in this agreement;
>
> (d) in deciding to obtain the Loan and/or to proceed with any transaction or project for which the Customer has sought the Loan, the Customer has not received or relied upon any advice given by or on behalf of the Bank
>
> …

[100] ANZ also pleaded limitation defences.

[101] As can be seen, the disclaimer clauses comprise, as the Judge described them, "no reliance clauses, limitation of liability clauses, or entire agreement clauses".[12]

[102] Bushline responded to ANZ's reliance on the disclaimer clauses and limitation defences first by alleging ANZ had acted fraudulently or negligently at the time of the 2008 Refinancing. By then it knew it had misled Bushline and the Coomeys but failed to correct those misrepresentations. Secondly, as regards the disclaimer clauses, Bushline submitted it was not fair and reasonable (in terms of s 4 of the Contractual Remedies Act) they be given effect to.

The High Court Judgment

The Judge's approach

[103] The Judge first asked whether, as a matter of fact, ANZ had made the (five) Representations contended for by Bushline, and whether those representations were false or misleading when made.[13]

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12 At [60].
13 At [73]–[119].

[104] As is perhaps already apparent, there is an issue here as to whether the "Representations" were, at common law, representations (statements as to a past or present fact) or whether they were undertakings (promises to do or not do something). Bushline would appear to have chosen the characterisation of "representation" so as to base a claim on s 6 of the Contractual Remedies Act. Be that as it may, the balance of the Judge's analysis confirms Bushline was relying on those statements in both ways.

[105] Having made those findings of fact, the Judge went on to consider:

(a) the effect of the disclaimer clauses on ANZ's liability in contract and for negligence, in light of Bushline's assertion of ANZ's disentitling behaviour; and

(b) ANZ's liability under each of Bushline's five causes of action.

[106] We summarise her analysis accordingly.

Breach — findings of fact

The Fixed Cost Representation

[107] Bushline said ANZ had made representations orally and in writing, at a meeting on 28 March 2008 to discuss the 2008 Refinancing, that interest rate swaps were like fixed interest rate loans. They said the written materials comprised a copy of a presentation Mr Esquilant made to them that day, and a standard brochure on swaps he had left with them that day.

[108] The Judge found that Mr Esquilant had most likely made his presentation in 2005, around the time of the first swap the Coomeys entered into.[14] She was not persuaded it was likely the Coomeys had been provided with the brochure, or if they had that they had read it.[15]

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[14] At [87].
[15] At [91].

[109] On that basis she found ANZ had made the following representations:[16]

(a) "[Swaps] [p]rovide a known "fixed" interest rate for the term chosen - (like the fixed loan product)"

(b) "Benefits are paid out on advantageous movements - (unlike the fixed loan product)"

(c) "[Swaps] [a]re tradable instruments and provide quick entry and exit from the market"

[110] Those representations were extended by the contents of a table in the 2005 presentation, comparing fixed rate loans to interest rate swaps, which contained the following information:

Fixed Rate Loans versus Interest Rate Swaps

Attribute	Fixed Rate Loan	Interest Rate Swap
Break costs	Clients pay break costs but do not receive break profits	Clients pay break costs but do receive break profits
Ability to extend term to take advantage of fall in interest rates	Fixed rate term can't be changed unless client breaks loan and pays cost	Can extend out to term of facility
Ability to extend term to take advantage of higher interest rates	No ability to do this	Can shorten

[111] The Judge found those representations were misleading because they failed to disclose the downsides of a swap compared to a fixed rate loan. In particular:[17]

(a) There was no disclosure that the credit margin could increase on an underlying floating rate loan, unlike a fixed rate loan. That was a critical difference to the fixed rate loan.

(b) There was no disclosure that break costs under a swap were calculated differently to break costs for a fixed rate loan, and were potentially much greater. That needed to be highlighted.

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16 At [88].
17 At [92].

(c) There was no disclosure that a more restrictive credit limit applied than would have been the case if Bushline had borrowed at a fixed rate or, indeed, at an unhedged floating rate.

The Margin Representation

[112] Mr Coomey's evidence was ANZ had agreed in March 2008 to hold the margin on all of Bushline's financing at 0.7 per cent for five years. He said that was the deal he wanted to stay with ANZ, as he had been offered a fixed five-year margin by BNZ and ASB who were competing for his business.

[113] The Judge accepted that, at the time, the Coomeys were dissatisfied with ANZ, and were giving serious consideration to accepting one of the two competing offers. The Judge was not persuaded, however, that ANZ agreed to fix the margin for five years. There were six considerations on which she based that conclusion. In summary they were:[18]

(a) She did not accept that either of ASB or BNZ had in fact offered to fix their margin for five years.

(b) It was unlikely ANZ would have agreed to fix the margin in that way, given its assessment, as communicated to the Coomeys, that the acquisition of the Waverley farm would put their business under significant cash flow pressure and could involve an erosion of their equity.

(c) There was no written record of that term.

(d) Neither Mr England nor Mr Schurr were aware that such a promise had been made.

(e) Bushline first made the margin representation claim in its Third Amended Statement of Claim, filed in September 2016. Bushline

[18] At [77]–[84].

had been aware from the outset that ANZ had increased margins: its initial complaint was based on the representation of a fixed rate on the Refinancing Swaps, not an assertion of an agreement to fix the margin on all its funding for five years.

(f) Given Bushline's practice of hedging, and — by March 2008 — the mutual expectation that Bushline would hedge the 2008 Refinancing, a reference in ANZ's notes to "70 pts ongoing", which Mr Coomey had said evidenced that five-year agreement, was more likely a reference to the term of the Refinancing Swaps, as Mr Simcic, a bank witness at trial, had agreed.

The Transferability Representation

[114] The Judge found it unlikely that Mr Esquilant had made the Transferability Representation during the discussion on 28 March 2008.[19] It was likely, however, that Mr Nitschke had told the Coomeys in 2009 that the swaps could not be novated.[20] But the evidence established ANZ had indicated it would be prepared to entertain a novation request to certain banks. Mr Einarsson, one of Bushline's accountants, advised that Bushline did not intend to migrate the swaps. So, the Transferability Representation had either not been made, or had not been breached.[21]

The Monitoring Representation

[115] The Judge first noted:

> [98] There is no real dispute that the bank represented that it would provide ongoing advice and management to those customers who had swaps.

[116] ANZ's standard presentation included a slide entitled "What We Do" which included the following:

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19 At [95].
20 At [96].
21 At [97].

> Advise and recommend to RMs/Clients interest rate risk strategies, including appropriate fixed rate exposure and optimal product mix to achieve financial objectives
>
> Provide on-going interest rate risk advice and strategies

[117] In its "sales" letter of 18 March 2008 ANZ had said:

> Our interest rate risk management package leads the market for flexibility and transparency. You can be assured that your exposure to interest rate risk is being managed in such a way that reduces the overall cost of finance to you.

[118] The question was, therefore, whether ANZ had breached that *representation*. The Judge concluded ANZ had lived up to its *promise*.[22] Mr Harvey had met with the Coomeys on a monthly basis to discuss strategies. He had passed on suggestions from Mr Esquilant. On other occasions, Mr Esquilant discussed matters directly with Mr Coomey.

[119] The Judge considered the specific claim Bushline made that ANZ should have advised Bushline to break its swaps any time up to October 2008, when they were "in the money". She noted Mr Esquilant had provided some suggestions to Bushline in August and October 2008 to lengthen its swaps to achieve lower rates. The Judge was not persuaded that advice, as opposed to breaking the swaps, was flawed when assessed in the circumstances as they existed at the time.[23] It was only with the benefit of hindsight that breaking the swaps appeared to have been a prudent course.

The Good Times and Bad Times Representation

[120] ANZ did not dispute that the representation was made. It was found in one of the letters given to the Coomeys on 18 March 2008. ANZ's case was that it had in fact stood by Bushline in good times and bad. The Judge assessed whether ANZ had done so when she considered Bushline's "oppressive conduct" claim.

The disclaimer clauses — disentitling conduct

[121] Bushline's response to ANZ's reliance on the disclaimer clauses and limitation periods to defeat its claims was to say that, by April 2008, ANZ knew it had

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22 At [100].
23 At [101].

misrepresented swaps to its customers, including Bushline. By knowingly repeating those false representations to Bushline, ANZ had acted fraudulently, so as to disentitle it to rely on the disclaimer clauses and limitation periods.

[122] In making its assertions as to ANZ's knowledge in 2008 of the falsity of the Representations, Bushline relied on internal ANZ emails which showed that, in April 2008 (and earlier), there was a growing realisation within ANZ of the need to increase customer margins in response to the credit crunch being caused by the GFC. Moreover, such conduct was seen internally as inconsistent with what had previously been said to those customers about their ability to treat the effect of swaps as being the same as a fixed rate loan. One senior manager asked "[a]re we effectively now to say that there is no such thing as a fixed rate and the only thing we are guaranteeing is the base rate?"

[123] Bushline also pointed to internal emails evidencing a growing realisation within ANZ that the explanatory material that had traditionally been provided to customers, and aspects of the bank's administration of those products, had been inadequate.

[124] The Judge reasoned that whilst the evidence showed that "some within the Bank" were aware of the wrong impression that had been given, those emails fell short of evidencing a realisation that misrepresentations about swaps had been made to Bushline.[24] More than a general awareness would be required, the Judge said, to trigger a duty to correct a misrepresentation (assuming such a duty arose in the first place).[25] Something more would also be required to constitute fraud for the purposes of s 28(b) of the Limitation Act 1950. The Judge also, in some tension with that conclusion, relied on the express terms of the Refinancing Loan to conclude that any false impression that margins could not move on swaps related lending must have been dispelled on the receipt of that document.[26] She summarised her reasoning as follows:

> [119] Therefore, I find that [ANZ] did not engage in any deceit or fraudulent concealment of the kind that would defeat its entitlement to rely on the disclaimer clauses or the statutory limitation periods.

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24 At [114]–[115].
25 At [116].
26 At [118].

Liability

[125] The Judge then analysed Bushline's claims under its five causes of action. Having done so, she summarised her findings in the following way:[27]

> (a) *Negligence*: There was not a proximate relationship between Bushline and the Bank sufficient to establish a duty of care. That is largely due to the effect of the disclaimer clauses, upon which Mr England advised. Even if such a duty had been found, the breach did not cause loss.
>
> (b) *Breach of contract*: The representations did not constitute terms of a collateral contract as they were inconsistent with the terms of the loan and swap agreements, including the entire agreement clauses. It was fair and reasonable that the entire agreement clauses and other disclaimer clauses were conclusive.
>
> (c) *Contractual Remedies Act 1979*: Clause 10.1 of the swap terms applies so as to exclude liability for misrepresentations. The disclaimer clauses, and the legal advice on them, meant the reliance and inducement ingredients of the cause of action could not be established. The claims were time barred by the Limitation Act 1950, and the limitation period is not postponed by fraudulent concealment.
>
> (d) *Fair Trading Act 1986*: The claims are statute barred, except for claims relating to the non-disclosure of the MRR [Market Replacement Risk, as internal assessment tool used by the bank]. The disclaimer clauses break the chain of causation insofar as the positive representations are concerned, but were not conclusive in relation to the stand alone allegation of non-disclosure of the MRR. If that non-disclosure was found to be in breach of s 9 (which is not conclusively determined), the MRR did not cause Bushline to suffer any loss and there is no basis upon which to grant relief under s 43 of the Fair Trading Act 1986.
>
> (e) *Oppression*: The Bank did not act oppressively and accordingly there is no basis upon which to reopen the credit contracts under s 120 of the [Credit Contracts and Consumer Finance Act].

[126] In our view there is some tension between those findings and the Judge's earlier finding, which ANZ did not dispute, that the Monitoring Representation had been made but that ANZ had lived up to the promise it represented. The finding the Monitoring Representation had been made and performed would appear to accept that there was a contractual promise, a contractual term, to the relevant effect which was not contained in any of the contractual documents (in the Refinancing Loan,

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[27] At [201].

the Swap Terms and the Confirmations). On the other hand, in her summary of liabilities the Judge appeared to find the disclaimer clauses precluded the possibility that the Monitoring Representation was a contractual term.

[127] That tension is, moreover, of some significance to the applicability of the disclaimer clauses to the Fixed Cost Representation. It can be seen that the Monitoring Representation and the Fixed Cost Representation are two sides of the same coin. They are ANZ's assurance to Bushline, given the objective complexities of swaps and ANZ's recognition (as recorded in the boxed warning found in the Confirmations) that swaps should only be entered into by customers who understand their complexities and in light of those are happy to look after themselves, and that it will to the stated extent assist its customer to do what the customer does not know how to. These are matters we return to later in this judgment.

The Appeal

Bushline

[128] On appeal, Mr Branch for Bushline reshaped the argument it had made in the High Court to challenge the Judge's decision in the following way:

(a) First, there were collateral contracts and/or oral agreements between it and ANZ either that ANZ would hold margin on the Refinancing Loan at 0.7 per cent for five years, or that it would hold the margin at that level for so long as the Refinancing Swaps were in place.

(b) Secondly, ANZ's conduct was misleading and deceptive in terms of the Fair Trading Act, and constituted actionable misrepresentations under the Contractual Remedies Act, to the extent of the Fixed Cost, Margin and Monitoring Representations.

(c) Thirdly, ANZ negligently breached its duty to properly explain the downside of the Refinancing Swaps and to provide ongoing, competent, management of Bushline's exposures.

(d) Finally, ANZ's behaviour taken as a whole constituted harsh and oppressive conduct in terms of the Credit Contracts and Consumer Finance Act.

ANZ

[129] In response ANZ focused particularly on the Judge's finding that there was no agreement by ANZ to fix the interest margin on the Refinancing Loan for five years, which is to say that the Margin Representation had not been made. In doing so for ANZ, Mr Hunter emphasised the very clear terms of the Refinancing Loan agreement and the Refinancing Swaps, as supplemented by the Swap Terms: in particular he noted that the Refinancing Loan was clear on its face, in that the margin could be adjusted by ANZ from time to time and at any time.

[130] As regards the Fixed Cost and Monitoring Representations on appeal, and notwithstanding its position in its pleadings if not at trial, ANZ did not challenge the Judge's findings that:

(a) it had made the Fixed Cost Representation and that representation was false and misleading; and

(b) it had made the Monitoring Representation.

[131] Rather, it relied first on the Judge's assessment of the disclaimer clauses as having the overall effect that:

(a) to be enforced, agreements had to be in writing (entire agreement);

(b) when entering into the 2008 Refinancing the Coomeys could not rely on the bank (no reliance); and

(c) the Coomeys were to take responsibility for their own actions, with the benefit of such advice as they obtained, including as recommended by ANZ and as reflected in the solicitor's certificate provided at the time (no liability).

[132] As regards the Monitoring Representation, and as the Judge had found, it had done what it was required to.

[133] Thus, whilst there may have been a degree of confusion within ANZ and its rural lending division as regards the true nature of the swap product, that did not give rise to any liability for ANZ. In the three years leading up to April 2008 the Coomeys had benefited from their decision to swap their floating rate borrowings to fixed rates. As the Judge had found, no-one could have predicted the GFC and, in particular, the rapid and unprecedented drop in official cash rates, and base rates such as BKBM, caused by the steps taken by central financial authorities to protect the financial system from the GFC.

[134] The overlapping causes of action the Coomeys' based their claims on were misconceived. In particular:

(a) The courts had long declined to accept that banks generally owed duties of care to customers. That was especially the case where, as here, a customer's business involved significant commercial operations and, hence, significant financial commitments.

(b) ANZ had dealt carefully and responsibly with the Coomeys once Bushline got into trouble. It had continued to support Bushline until it was refinanced by another bank. The terms on which it did so were no less favourable to the Coomeys and Bushline than those on which it dealt at the time with similar customers in similar circumstances: it had not acted oppressively.

[135] The appeal should, therefore, be dismissed.

Analysis

Overview

[136] The numerous overlapping causes of action pleaded by Bushline created, as is evident from this judgment thus far, considerable conceptual and legal complexity.

Whilst that approach was understandable given — as will be seen — the traditional complexities of the law in this area, it considerably complicated the Judge's task. To simplify matters we focus on the five "representations" by reference to which the Judge summarised her liability findings. We consider the extent to which those representations give rise to liability, as pleaded by Bushline, as contractual promises or under s 6 of the Contractual Remedies Act, as relevant. After all, and as we explain shortly, the purpose of the Contractual Remedies Act was to simplify the law relating to the enforcement of contractual promises.

[137] In carrying out that analysis an important issue is whether the Judge correctly assessed the effect on Bushline's claims of what she termed the "disclaimer clauses". As the Judge's summary of her liability findings shows, her assessment of those effects had a considerable influence on her reasoning.

[138] We will therefore first outline the relevant provisions of the Contractual Remedies Act and our approach to their proper interpretation. That Act has been re-enacted, with some relatively minor modifications, in sub-pt 3 of pt 2 of the Contract and Commercial Law Act 2017. As the Contractual Remedies Act remained in force at all relevant times for the purposes of this appeal, we refer to the sections of that Act as they then were, rather than the way in which they are now expressed.

[139] We then consider the substance of Bushline's appeal. To do so:

(a) First, we decide the correct characterisation of the five Representations. That is, we ask whether they are indeed representations for the purposes of the Contractual Remedies Act. That is, are they statements of past or present fact, or are they undertakings, that is, contractual promises to perform?

(b) Having done that, we go on to consider whether ANZ made a misrepresentation or failed to perform a contractual obligation and, if it did, to what extent.

(c) We then assess what we consider to be the proper implications, in that context, of the disclaimer clauses.

(d) Having done that, and as will become apparent, we do not consider it necessary to revisit the Judge's findings on negligence or on Bushline's Fair Trading Act and Credit Contracts and Consumer Finance Act claims.

(e) We then consider questions of limitation.

The Contractual Remedies Act

[140] A 1967 report of the Contracts and Commercial Law Reform Committee (the Committee) formed the basis for the enactment of the Contractual Remedies Act.[28] The initial stimulus for that report was an English report on innocent misrepresentation.[29] In March 1965 an earlier advisory committee had concluded that the English approach should not be adopted in New Zealand: rather, the subject should be approach in a more fundamental way. The Committee confirmed that conclusion, explaining:[30]

> Some of us feel that what is needed is to escape altogether from traditional categories and rules that hinder the Courts in determining the true bargain between contracting parties. Others consider that these rules and these distinctions do play a valid and useful role in the law and doubt the wisdom of dispensing with them. We speak with one voice however in recommending that the law be placed on a more rational and sensible basis and in particular that there should be a reformation of remedies for breach of contract and for misrepresentation inducing a contract.

[141] The Committee noted the significant difference between the context in which contracts were being made in 1967 from that which had been the case when many of the common law rules of contract were established.[31] It went on to observe that traditionally the courts, when determining contractual disputes, had largely concerned themselves with the interpretation of the terms used by the parties in what

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28 Contracts and Commercial Law Reform Committee *Misrepresentation and Breach of Contract* (March 1967) [1967 report].
29 Law Reform Committee *Tenth Report on Innocent Misrepresentation* (Cmd 1782, July 1962).
30 1967 report, above n 28, at [1.2].
31 At [2].

the Committee termed their "culminating agreement".[32] That approach had encouraged a process of attrition: for example, in the area of hire purchase, a new phrase would be printed, the Court would interpret it adversely to the vendor and a different phrase would appear requiring a new interpretation. The Committee observed:[33]

> One begins to wonder, despite Humpty Dumpty's thesis, whether the word is not master after all? We feel entitled to ask whether the Courts are aided or fettered in the quest for justice between contractors by rules designed for another age. And we propose to examine these rules in some detail.

[142] In carrying out that examination, the Committee first affirmed the principle that the existence and terms of a contract were to be determined objectively. The creation of a legally binding agreement did not require a subjective meeting of minds. As the Committee observed:[34]

> Indeed the experience is not uncommon in the negotiation of the complex agreements fashionable today that one party will assent to the language propounded by the other party for the sake of having the contract, deliberately leaving his private misgivings for debate after the contract has been signed.

[143] The Committee then addressed the confusion which arose from the complex way the law classified a statement made by way "of inducement to negotiate", or "during negotiations" in order to determine whether such a statement was part of a contract. It identified 13 classes in that classification. Ten of these comprised statements which were not terms of the contract: (i) invitations to treat; (ii) "puffs" or commendations; (iii) statements of opinion; (iv) statements of law; (v) the supply of information; (vi) innocent misrepresentations; (vii) negligent misrepresentations; (viii) fraudulent misrepresentations; (ix) statements of intention; and (x) independent or collateral contracts. A further three types were statements that were terms of the contract: (xi) fundamental terms; (xii) conditions; and (xiii) warranties.[35]

[144] It analysed the unsatisfactory confusion caused by the relationship between that complex classification and parties' remedies. In doing so it discussed in some

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32 At [2].
33 At [2].
34 At [4.7].
35 At [5.1].

detail the significance for the rules as to available remedies of the categorisation of representations as innocent, fraudulent and, following the then recent decision in *Hedley Byrne & Co Ltd v Heller & Partners Ltd*, of negligent misstatement.[36] It summarised the criticisms most often directed against the rules it had just outlined:[37]

(a) The rules were too complex and correspondingly difficult to apply in practice.

(b) Because of the confused state of the law, it was difficult for an innocent party to decide whether they had an option to rescind or affirm: equivocation often followed.

(c) Rescission for innocent misrepresentation was not always available.

(d) Especially in the case of sale of goods, but in other cases too, the principles upon which a party was entitled to cancel for breach of a term were vague and unreal.

(e) The unrestricted liberty to "contract out" had been abused.

[145] It highlighted that confusion by outlining the facts of a contractual dispute which had been recently considered in what was then the Supreme Court, noting:[38]

> From these simple facts, see how the law constrained the Courts to run through the gamut of classification from a statement without contractual intention through misrepresentation both innocent and fraudulent, in passing to ruminate upon the concept of a collateral contract, to the result that there was a misdescription amounting to a breach of condition.

[146] All members of the Committee agreed that this confusion was unsatisfactory. The Committee's views diverged, however, on the appropriate way to address that problem. The particular points of difference were whether the distinction between a

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36 *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465 (HL).
37 1967 report, above n 28, at [7.1].
38 At [7.2].

representation and a term was unreal and whether the parol evidence rule should be abolished to allow courts to directly ascertain the parties' true agreement.[39]

[147] The Committee unanimously agreed, however, that damages should be available for all misrepresentations:[40]

> Accordingly we recommend that it should be enacted that a party to a contract who is induced to enter into it by misrepresentation (whether innocent or fraudulent) of another party shall be entitled to damages from such other party as if the representation had been a term of the contract. In this context the terms "representation" and "misrepresentation" are intended to have their common law meanings.

[148] That recommendation was the origin of s 6 of the Contractual Remedies Act which, as relevant, provides:

> **6 Damages for misrepresentation**
>
> (1) If a party to a contract has been induced to enter into it by a misrepresentation, whether innocent or fraudulent, made to him by or on behalf of another party to that contract—
>
> (a) He shall be entitled to damages from that other party in the same manner and to the same extent as if the representation were a term of the contract that has been broken; and
>
> (b) He shall not, in the case of a fraudulent misrepresentation, or of an innocent misrepresentation made negligently, be entitled to damages from that other party for deceit or negligence in respect of that misrepresentation.

[149] The simplified remedial path provided by s 6 has, predictably, encouraged many contractual claims for damages to be expressed as claims based on a "misrepresentation".

[150] The Committee went on to consider the possible effect on the efficacy of that reform of what the Committee termed "exemption" or "exception" clauses,[41] or what the Judge referred to as "disclaimer clauses".

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39 At [10]–[10.3].
40 At [13.3].
41 At [20].

[151] As the Committee had acknowledged earlier in its report, the law recognised that parties by such clauses could limit both the extent to which the terms and representations of a contract were enforceable and the extent to which damages would follow an enforceable breach.[42]

[152] To summarise the problem presented by such clauses the Committee cited the following observations of Lord Reid in *Suisse Atlantique Société d'Armement Maritime SA v NV Rotterdamsche Kolen Centrale*:[43]

> Exemption clauses differ greatly in many respects. Probably the most objectionable are found in the complex standard conditions which are now so common. In the ordinary way the customer has no time to read them, and if he did read them he would probably not understand them. And if he did understand and object to any of them, he would generally be told he could take it or leave it. And if he then went to another supplier the result would be the same. Freedom to contract must surely imply some choice or room for bargaining. At the other extreme is the case where parties are bargaining on terms of equality and a stringent exemption clause is accepted for a quid pro quo or other good reason. … This is a complex problem which intimately affects millions of people and it appears to me that its solution should be left to Parliament. If your Lordships reject this new rule [that an exemption clause necessarily does not avail against breach of a fundamental term, which their Lordships did reject] there will certainly be a need for urgent legislative action but that is not beyond reasonable expectation.

[153] After considering a number of possible ways to address that problem, the Committee decided not to make any recommendations for reform. It said:[44]

> To the extent that exemption clauses are regarded as disentitling reliance upon general principles of liability, the reform of the law regarding exemption clauses must be dependent upon the nature of those general principles. … We have decided that the proper course is to reserve our opinion upon it until a decision is made whether or not to implement the recommendations contained in this Report.

[154] Time passed. In 1978 the Committee released a further brief report endorsing an attached draft Contractual Remedies Bill.[45] The following year Parliament passed the Contractual Remedies Act.

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42 At [17.1]–[17.2].

43 At [20.1], citing *Suisse Atlantique Société d'Armement Maritime SA v NV Rotterdamsche Kolen Centrale* [1967] 1 AC 361 (HL) at 406.

44 1967 report, above n 28, at [20.3].

45 Contracts and Commercial Law Reform Committee *Misrepresentation and Breach of Contract* (January 1978).

[155] As Dawson and McLauchlan explain in their 1981 text *The Contractual Remedies Act 1979*, the "problem" of exemption clauses was, notwithstanding there having been no relevant recommendation from the Committee, dealt with in ss 4 and 5 of the Contractual Remedies Act.[46] Section 4 addresses such clauses to the extent they limit the enforceability of representations and terms; s 5, the extent to which they limit liability that follows an enforceable breach.

[156] Dawson and McLauchlan explain the purpose of s 4 as regards clauses which limit enforceability, which Dawson and McLauchlan call "merger" and "acknowledgement" clauses, in the following way:[47]

> The effect of such clauses under the pre-Act law was far from clear. The main objection to them is that sometimes they may simply be *untrue*. Thus, in the case of a "merger" clause, the actual position may be that an oral undertaking was given which was intended to be legally binding, so that the writing was *not* in fact assented to as the complete record of the parties' contract. Even in a freely negotiated contract, it is possible that the parties may not have directed their minds to the accuracy or full implications of the clause. Similarly, in relation to the other types of clause mentioned above, there may be clear evidence that a representation *was* made and *was* relied upon, or that the agent *did* have ostensible authority to make the representation in question. Accordingly, s 4 has been enacted "to secure that the Court will not be precluded from ascertaining the position in fact". The representor "will not be able to shelter behind a lie".

[157] Section 4, as relevant, provides:

> **4 Statements during negotiations for a contract**
>
> (1) If a contract, or any other document, contains a provision purporting to preclude a Court from inquiring into or determining the question—
>
> (a) Whether a statement, promise, or undertaking was made or given, either in words or by conduct, in connection with or in the course of negotiations leading to the making of the contract; or
>
> (b) Whether, if it was so made or given, it constituted a representation or a term of the contract; or
>
> (c) Whether, if it was a representation, it was relied on—
>
> the Court shall not, in any proceedings in relation to the contract, be precluded by that provision from inquiring into and determining

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46 Francis Dawson and David W McLauchlan *The Contractual Remedies Act 1979* (Sweet & Maxwell, Auckland, 1981).

47 At 36–37 (footnotes omitted).

> any such question unless the Court considers that it is fair and reasonable that the provision should be conclusive between the parties, having regard to all the circumstances of the case, including the subject-matter and value of the transaction, the respective bargaining strengths of the parties, and the question whether any party was represented or advised by a solicitor at the time of the negotiations or at any other relevant time.

[158] The role s 5 plays is different. Again, Dawson and McLauchlan explain:[48]

> The reason for the inclusion of [s 5] was the desire of the Contracts and Commercial Law Reform Committee not to fetter unduly the parties' freedom of contract. The Committee took the view that, subject to some very limited overriding rules of public policy, the function of the courts in disputes between parties to contracts was two-fold: (a) to identify and ascertain the terms of legal significance and (b) to interpret and apply those terms.

[159] Section 5 provides:

> **5 Remedy provided for in contract**
>
> If a contract expressly provides for a remedy in respect of misrepresentation or repudiation or breach of contract or makes express provision for any of the other matters to which sections 6 to 10 of this Act relate, those sections shall have effect subject to that provision.

[160] The legislative history of s 5 is of some significance. As Dawson and McLauchlan explain:[49]

> As originally draft clause 5 of the Contractual Remedies Bill provided:
>
> > "*Contracting Out*—Sections 6 to 10 of this Act shall not apply so far as they are inconsistent with the express provisions of a contract."
>
> This clause was redrafted in order to prevent contracting parties nullifying the reforms in the Act by simply providing "The Contractual Remedies Act 1979 shall not apply to this contract". This was rightly thought undesirable as it would have led to the widescale preservation of the old common law remedies, and thus to two competing regimes regulating the remedies for misrepresentation and breach. Accordingly, s 5 was amended to strike a balance between allowing parties to provide their own remedies and to prescribe the extent of the liability undertaken whilst not permitting blanket exception clauses whose only purpose was to contract out of the Act. This explains why the section is drafted so that the contract must expressly provide for a remedy. A clause which merely attempted to preserve the old common law remedies ("The remedies governing this contract shall be those that exist at common law and equity") was intended to be ineffective.

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48 At 184 (footnote omitted).
49 At 184 (footnote omitted).

[161] Most applications to date of the section have considered clauses that specified the type or quantum of relief available in respect of a misrepresentation rendered actionable by s 6, rather than clauses which excluded relief entirely.[50] That approach is uncontroversial, as it accords with both the "broad" and "narrow" (also termed "purposive" and "literal" by Dawson and McLauchlan) reading of s 5.

[162] The more controversial question is whether a clause that purports to exclude liability altogether for breach of a representation to which s 6 applies — that is, a clause that provides no remedy — can fit within the ambit of s 5. As Dawson and McLauchlan observe, such a clause "does not provide a remedy: on the contrary it provides that there shall be no remedy".[51] We find, however, that we do not need to address that issue in this judgment.

[163] Against that background we turn to the substance of Bushline's appeal.

The Representations — statements of fact or promises to perform?

[164] Given the purpose and effect of the Contractual Remedies Act in general, and in particular ss 4, 5 and 6, it is therefore important that when a claim is made under s 6, the "statement" in question is, at common law, a representation: that is, a statement of fact which can accordingly be shown to be a false statement of fact. Hence the first question we ask here: were the Representations statements of fact or promises to perform?

[165] As Dawson and McLauchlan note:[52]

> The term "misrepresentation" is not defined in the Act, but it is clearly intended to bear its technical common law meaning of "false statement of fact".

[166] We have no difficulty in concluding that the Fixed Cost and Transferability Representations were statements of fact, and hence were capable of being shown to be

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50 See *Morris v Robert Jones Investments Ltd* [1994] 2 NZLR 275 (CA) at 277 and 279; *MacIndoe v Mainzeal Group Ltd* [1991] 3 NZLR 273 (CA) at 281; *Securi-max Holdings Ltd v Acanthus Projects Ltd* CA98/91, 31 July 1991 at 15; and *Cash Handling Systems Ltd v Augustus Terrace Developments Ltd* (1996) 3 NZ ConvC 192,398 (HC) at 192,416.

51 Dawson and McLauchlan, above n 46, at 186.

52 At 3 (footnote omitted).

misrepresentations for the purposes of s 6. It seems equally clear to us that is not the case with the Margin, Monitoring, and Good Times and Bad Representations. In our view they cannot properly be characterised as statements of fact. Rather, they are undertakings by ANZ to Bushline that it will:

(a) not exercise what would otherwise have been its contractual entitlement under the Refinancing Loan, and subsequent loan agreements, to increase the margin on those loans;

(b) monitor, manage and advise Bushline so as to enable it to take advantage of the flexibility and benefits of the Refinancing Swaps; and

(c) act, in terms of its contractual entitlements and otherwise, to support Bushline in "good times and in bad times".

[167] On appeal, Bushline did not pursue what it described as its claims based on the Transferability or the Good Times and Bad Times Representations. Therefore, we do not need to consider issues of falsity or failure to perform in their case. That leads us to assess, in light of the appeal as argued before us, the disputed issues of breach. That is:

(a) Was the Fixed Cost Representation a materially false statement of fact?

(b) Did ANZ fail to comply with the undertakings constituted by the Margin and Monitoring Representations?

[168] Reflecting that approach, hereafter whilst we continue to refer to the Fixed Cost Representation we refer to what to date have been described as the Margin and Monitoring Representations as, respectively, the Margin Undertaking and the Monitoring Undertaking.

Breach

The Fixed Cost Representation

[169] ANZ did not challenge the Judge's finding that the Fixed Cost Representation was false and misleading "for failing to properly disclose the downsides of swap transactions when compared to a fixed rate loan",[53] in the ways the Judge articulated and which we set out above at [107]–[111]. The factual narrative we have outlined shows, and in our view clearly, that there was considerable uncertainty and confusion within ANZ in 2008 and 2009 as to the true nature of the swap product it had been offering to rural clients since 2005. A number of factors would appear to have contributed to that.

[170] The swap product, as reflected by the Swap Terms, was a complex one. The impact the GFC had in reducing the availability of and increasing the cost of funding to banks put that product under considerable pressure. Although the BKBM reference rate was declining, bank funding costs were increasing. This focused attention on the role of the margin in the underlying BKBM loans. It would appear ANZ looked to recover increased funding costs from the margin, which hitherto had been largely a measure of customer risk.

[171] It is also clear from the evidence that not only customers, but also bank staff, and rural staff in particular, understood that the combination of a bill rate loan and a fixed rate swap "fixed" a customer's borrowing costs. From early 2008 onwards ANZ embarked on a significant internal re-education programme to address that misunderstanding. That misunderstanding was reflected in the adverse reactions of rural staff to the increase in margins on bill rate loans called for by ANZ from early 2008 onwards.

[172] Any number of internal bank emails and documents evidenced that misunderstanding. Three examples referred to by the Judge suffice to demonstrate that:[54]

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53 High Court judgment, above n 3, at [93].
54 At [110], [112] and [113].

(a) In an internal email dated 16 April 2008, Mr Young, a senior manager for markets at ANZ, wrote:

> My concerns are particularly around the loss of reputation and integrity we have with our clients if we adjust rates.
>
> The IRRM [the Interest Rate Risk Management] team have told clients that they can treat their budget [sic] rate same as a fixed rate loan. Are we effectively now to say that there is no such thing as a fixed rate and the only thing we are guaranteeing is the base rate?

(b) Mr Haden, a customer strategy manager, responded to that and similar emails noting, amongst other things:

> - Staff are correct that we may move client margins — but this can occur at any time, and not just in twelve months or at expiry. It is critical that Rural staff and Dealers understand this. It appears that this hasn't been the case in the past so we need this to change as soon as possible.
>
> ...
>
> - What we need from Dealers is to engage with Rural staff to get the message out that Bill loan CMs [client/credit margins] can move up as well as down. Practice in this has not been appropriate, so there is some catch-up to do.

(c) A strategy paper distributed to rural branches around that time emphasised that bill loans and swaps were separate "independent" products. It said:

> **Bill and Swap Understanding**
>
> **Separate, independent products**
>
> It appears there is still confusion about this. It is critical to realise that:
>
> …
>
> - Swaps do not have a client margin.
>
> …
>
> - When swap client margins are discussed, this is incorrect. You can add the client margin to a swap to compare price to that of [a] fixed loan, but you need to be very clear to

> the client, that this is not a "swap margin". Swaps and bills, together, do not equal a fixed loan.
>
> …
>
> - Whatever occurs with individual BKBM loan Client Margin repricing, any client interaction needs to leave the client under no doubt about the independence of the two products, and that the Client Margin can move with the market. Dealers will be requested to ensure this is the case.

[173] So, notwithstanding the very clear "just like fixed rate loan" description of the swap product in the past, staff were being told that was not the case and clients needed to be made aware of that fact.

[174] Of particular relevance to Bushline is an email sent by Mr Nitschke, ANZ's senior rural manager for Hawera and Whanganui, to a colleague in January 2009, commenting on margin increases:

> Both our integrity and reputation are on the line.
>
> …
>
> The decision to fund bills on a 12 month term I consider was a 'Bank need' and when combined with longer term SWAP's gave the impression to both clients and staff that the lending was for a much longer term. Once again the way these products were sold to the client by RM's is questionable. (Hindsight is a great thing).
>
> …
>
> Combine this with the need to reprice 12 mth bill loans that are rolling off, provides for some very significant increase in margins for some clients. Many of these clients have both R201 & R202 loans, yet it is only the 12 mth R202 that is taking the significant lift. Both clients, Intermediaries and staff are struggling to understand the necessity for the difference.
>
> This move will contribute to placing some of our larger clients that have recently expanded in a significantly worse position.
>
> For example:
>
> Coomey: Long standing client, $21.3m exposure. The bank supported this client to expand last year with a S Q budget deficit of $160k, 70pt margin and CCR of 5C. $19m of funding is on 12 month term and had to date been lifted by 15pts to 0.85 margin. A small new loan is currently on a margin of 1.5.
>
> Clients position has deteriorated and now rates as a 6C. At 1st June rollover this implies the need for a pricing guide margin of 2.60%. To lift as per the

> guide would mean an additional cost to this client of $344k with no guarantee there would not be further lifts. While I am confident we would price this group less than the guide in this case, never the less any rise has a significant impact on this business. As with all, this client accepted SWAPs to give certainty to his funding costs.
>
> …
>
> This issue is about integrity not facts.
>
> Funding advanced last year was always perceived to be for a longer term because we approved longer term [SWAPs], therefore the bill loans would be 'rolled over' because we need to match the bill with the SWAP term.
>
> …
>
> I believe we need to discuss/reconsider our strategy with regard to the repricing of these 12 month maturity Bill rate loans, especially when they don't line up with the maturity of the SWAP.

[175] Mr Nitschke's remarks anticipate the Coomeys' central complaint in this case. They are also evidence of knowledge within ANZ that the Fixed Cost Representation had been made to, and relied on by, the Coomeys in April 2008 when it was known by ANZ to be false.

[176] The merging in minds of bank officers and customers of loans and associated swaps was, somewhat ironically, reflected in Mr Esquilant's written brief. Mr Esquilant went to some length to emphasise the separate role of the margin on the underlying loan as distinct from the swaps, and how he always drew that to customers' attention. He then went on to describe the benefit of Bushline's swaps in the period up to 2008 in the following way:

> Between 2005 and 2008, *the interest rate margin on Bushline's swaps* fell from 1.1 %, to 1.0 % to 0.7 %. Bushline could not have enjoyed those margin decreases if it had chosen the fixed interest rate product because, unlike swaps, those products fix the customer's margin for the term of the contract.
>
> (Emphasis added).

[177] We note Mr Esquilant's reference to the "interest rate margin on Bushline's swaps": the margin was, of course, a term of the Loan Agreement, and it was that error ANZ had been trying to address since early 2008. Moreover, the margin decreases had nothing to do with any change in the terms of the swaps. Rather they reflected

adjustments to the margin, albeit not disclosed in the loan documents themselves, incorporated into the "floating interest rate applicable to the customer".

[178] There was no evidence that the adjustments "not disclosed" in the loan documents themselves, incorporated into the "floating interest rate applicable to the customer", had ever been explained to the Coomeys, or even drawn to their attention, by ANZ.

[179] Reflecting at least some of those issues, in August 2012 the Commerce Commission (the Commission) commenced an investigation into allegations that banks had breached the Commerce Act 1986 in their marketing of interest rate swaps to their rural customers in particular. In December 2013, following that investigation, the Commission advised ANZ, along with ASB and Westpac, that it considered there was a sufficient foundation for it to commence proceedings alleging breaches of the Commerce Act between 2005 and 2009. The Commission and ANZ subsequently settled the potential claims on the basis that ANZ would pay $18.5 million to affected customers, and would not oppose the Commission's application for a declaratory order.[55]

[180] In May 2015, the High Court made the following declaration:[56]

> Between on or about July 2005, and 31 March 2009, ANZ Bank New Zealand Limited breached s 9 of the Fair Trading Act 1986, in that, being in trade, it engaged in conduct that was misleading in relation to some of the customers listed in Schedule 1 to the Statement of Claim, in that it understated some of the risks and/or overstated some of the benefits of interest rate swap arrangements to those customers.

[181] We note that, as directed by the Commission, ANZ offered Bushline $155,120 out of that fund as compensation. The Coomeys declined that offer. That the Commission ordered such an offer to be made shows it regarded that at least part of the conduct of which the Coomeys now complain was, as they assert, misleading and deceptive.

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55 *Commerce Commission v ANZ Bank New Zealand Ltd* [2015] NZHC 1168, (2015) 14 TCLR 71 at [2].

56 At [20].

The Margin Undertaking — 70 points ongoing

[182] The Coomeys said ANZ undertook at a meeting on 18 or 19 March 2008 to fix the margin on Bushline's funding at 70 basis points for five years. ANZ said it gave no such undertaking. At trial, ANZ witnesses agreed, however, that there in fact had been such an undertaking, but not for five years. What ANZ had agreed to do, they said, was to fix the margin on what became the Refinancing Loan at 70 basis points for so long as, and to the extent that, Bushline had swapped from the BKBM base rate into a fixed rate.

[183] Mr Harvey's handwritten "agenda" note of 18 March 2008 records that agreement with the words: "Agreed — 70 pts ongoing".

[184] A series of Mr Harvey's typed diary entries records the following:

> 18/3/2008 – Chris H & RS
> [Negotiation]
> BNZ offering 60 points on ongoing.
> ASB 8.1%
> Waiting for Bill to confirm offers from other banks to lock in margin with us.
>
> 19/3/2008 – Chris H & RS
> Pretty negative phone call, Coomeys nearly out the door.
> Rob and myself back out. Charlie had given us the option to match the rate if we could get proof of offer.
> Bill wanted firm answer of 70pts on day and was frustrated that we were not willing to commit. Thought we didn't believe him that these were the rates being offered.
> Showed us offers but said we couldn't take them away with us.
>
> Spoke to Charlie – closed at 70 points.
> Breaking all fixed loans and starting with One bill rate loan.
> Taking Stu out to meet

[185] The question for us is, therefore, what does "70 pts" mean as regards the 2008 Refinancing? More specifically, we focus on the word "ongoing", as that is where the dispute arises — that is the duration of the promise.

[186] That question is to be answered objectively, in the manner outlined by Lord Hoffmann in *Investors Compensation Scheme Ltd v West Bromwich Building*

Society,[57] as adopted in New Zealand in *Boat Park Ltd v Hutchinson*.[58] That is, by ascertaining the meaning which the various references to "70 points" would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.[59] The phrase "background knowledge" or the "matrix of fact" as it is otherwise known, includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable person, excluding evidence of previous negotiations and declarations of subjective intent.[60]

[187] What is the matrix of fact here?

[188] In answering that question, it has to be acknowledged that certainly the Coomeys, and certainly relevant officers within the bank, and therefore almost certainly Mr England and others of Bushline's advisors, had only a limited understanding of what was being agreed from time to time and, more relevantly, the significance of those agreements. Remember: ANZ was providing equity financing to Bushline, and understood the likelihood of negative cashflows on an ongoing basis. Interest rates were but one of the costs which would contribute to those negative cashflows. Those negative cashflows were acceptable because of ANZ's willingness to lend to Bushline effectively on the existing equity in its business, given its view that farm prices would increase over time, including as a result of the Coomeys' abilities as dairy farmers. Having said that, we consider the essential elements of that matrix, as known to both the Coomeys and ANZ, were as follows.

[189] ANZ had, for a number of years, supported the Coomeys' business model by equity funding their farm development and expansion programme. That is, it was accepted that negative cash flows would be incurred as existing and new farms were developed and brought into production. Those development efforts, together with the rising value of dairy farms generally, would provide increases in equity over time so

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57 *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896 (HL).
58 *Boat Park Ltd v Hutchinson* [1999] 2 NZLR 74 (CA).
59 *Investors Compensation Scheme Ltd v West Bromwich Building Society* above n 57, at 912–913.
60 At 913.

as to secure ANZ's lending to Bushline until Bushline's cash flows and balance sheet would, together, provide a "steady state" business proposition.

[190] As already noted, when Mr Coomey approached ANZ in February 2008 for funding to purchase another farm, Bushline's debt to ANZ totalled some $11.97 million. As best as we can tell:[61]

(a) some $6.455 million of that had been borrowed for five years maturing July 2012, at a customer-specific floating rate; and

(b) the balance had been borrowed for 20 years (240 months), maturing June, July and December 2027, on terms which provided for fixed interest rates for an initial period (24 or 36 months) and thereafter a customer-specific floating rate.

[191] The three swaps, total notional amount $6.455 million, hedging that debt had maturity dates in June 2009, December 2010 and October 2011.

[192] On 29 February 2008, the Coomeys had signed an unconditional agreement for the purchase of the new farm for $7.25 million. Previously:

(a) Mr Coomey had spoken to ASB, and possibly also BNZ, about funding that purchase. ASB had indicated a willingness to do so, and to refinance Bushline's existing ANZ debt as well. Mr Coomey had told ANZ of that possibility.

(b) On 26 February, Mr Harvey had sought approval to lend the full purchase price to Bushline. In his report recommending approval Mr Harvey noted that the equity in Bushline's business would, reflecting that 100 per cent financing, decrease from 46 per cent to 34 per cent. The budgets included in that report showed negative cash flows for the first three years.

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[61] Based on tables included in the evidence of Mr Lawn, the Coomeys' Rural Manager until mid-2007, and in ANZ's February 2008 budgets.

(c) On 27 February, Mr Harvey had contacted Mr Esquilant for help to structure the proposed funding. The next day Mr Esquilant emailed a colleague. He was going to be away until 10 March 2008 and could not get hold of Mr Coomey or Mr Harvey. He was recommending the new money be swapped for three and five years in equal proportions. No doubt Mr Esquilant's colleague was to deal with queries whilst he was away.

(d) The financing proposal was approved on 28 February. There were, at that time, no agreed or proposed terms of lending other than ANZ would fund 100 per cent of the purchase price of the new farm.

[193] The Coomeys had therefore committed to purchase the new farm on the strength of Mr Harvey's verbal confirmation that funding would be available. Other than ANZ's commitment to fund the purchase no specific lending terms had been — it would seem — discussed or agreed.

[194] Mr Harvey and Mr Simcic met with the Coomeys on 18 March. There had, since 28 February, been no further discussion of lending terms. That meeting was, as Mr Simcic described it, "a key meeting with a key client". He was there to support Mr Harvey who, Mr Simcic knew, was concerned about keeping the Bushline business in the face of competition from other banks.

[195] Mr Coomey's focus that day was on Bushline's margin. Mr Coomey said BNZ was offering a 60 basis point margin, and ASB an 8.1 per cent loan.

[196] Mr Coomey wanted a firm answer to his request to ANZ to respond to the ASB offer and fix his margin at 70 basis points over BKBM for five years. Whilst Mr Harvey did not recall Mr Coomey mentioning that five-year period, Mr Simcic did. In cross-examination, the following exchange occurred:

Q. So what Mr Coomey was putting to you was, "this is what I can get elsewhere and I want the ANZ to match it". That's right?

A. Mmmm.

Q. Is that a yes.

A. Yes.

Q. And he says that what the competing offer was 0.65% above BKBM. He said that to you?

A. Yes.

Q. And he also says that was to be fixed by the ANZ for a five year period, he said that to you as well?

A. Yes.

Q. And that's why you talk about it, in your paragraph 9 [a reference to Mr Simcic's brief]. You question whether the other banks could honour the supposed offers to hold pricing?

A. Yes.

[197] Mr Harvey and Mr Simcic did not have authority to make such an offer. Mr Coomey either did not have, or would not provide, the offers he said he had received from other banks. The meeting ended inconclusively. In fact, Mr Simcic said nothing was agreed that day.

[198] On 19 March, Mr Harvey and Mr Simcic went back out to the Coomeys to see if they could reach a deal. By then Mr Coomey had ASB's offer in writing or, at least, was prepared to show a copy of it to Messrs Harvey and Simcic (as presented that offer was on its terms "confidential" to Bushline and ASB, and not to be disclosed). As relevant, that offer contained the following outline terms:

Type of Facility:

Rural Term Loan

Borrower:	Bushline Trust Partnership
Amount:	$18,382,000
Type of Loan:	Table loan
Total Term of Loan:	240 months
Interest Rate:	Refer options
Loan Date:	

…

Loan Date:

As at the time of writing the Banks Rural Base Rate is 10.50% per annum.

…

INTEREST RATES APPLICABLE

For variable rate loans floating/variable rate is based on the Banks Rural Base Rate (RBR) is currently 10.50%

- Overdraft rate is RBR + 1.20% (11.70%)

90 day 8.87% (approx) + 0.2%

For fixed rate loans 29th July Drawdown	**Term Loan**	**Swap Rate**
6 months	9.38%	
1 Year Fixed	9.11%	9.00%
2 Year Fixed	8.80%	8.68%
3 Year Fixed	8.70%	8.58%
4 Year Fixed	8.63%	8.52%
5 Year Fixed	8.59%	8.46%
7 Year Fixed		8.32%
10 Year Fixed		8.34%

[199] At the meeting on 19 March discussion centred, again, on margins: would ANZ agree to Bushline's request to fix its margin at 70 basis points for five years?

[200] Mr Harvey and Mr Simcic took the copy of the ASB offer outside to phone Mr Graham, who had authority to allow them to make an offer to the Coomeys at the 70 basis points level. Mr Simcic emailed photos of parts of the ASB offer document to Mr Graham.

[201] Those photos showed the table of applicable interest rates set out at [198]. A handwritten note on one photo says, clearly, "65 points" and, less clearly, an indistinct word followed by the word "margin". We suggest that the indistinct word is "includes": that is, it records the understanding (probably Mr Coomey's) that the term loan and swap rates cited by ASB included a margin, as Mr Simcic said he thought was the case. Hence, we infer, Mr Coomey's focus on that point on the margin. Mr Graham authorised a 70 basis points offer: Mr Simcic conveyed that offer to Mr Coomey. That offer is referred to in the evidence at different places, in a variety of ways:

(a) Mr Harvey's handwritten note: "Agreed — 70pts ongoing".

(b) Mr Harvey's typed diary notes: "[C]losed at 70 points".

(c) Mr Harvey's brief of evidence: "We left the Coomeys' farm … having agreed we would provide the necessary new funding at a 70 point margin over BKBM".

(d) Mr Simcic's brief of evidence: "[We were] authorised … to offer a 70pt margin over BKBM to Bushline for its new lending".

[202] In his brief, and as regards the use of the word "ongoing", Mr Simcic said that "[w]e would have used the term 'ongoing' to describe our intention to maintain that margin (70pt) for a period of time equivalent to the duration the swap that would be matched with the BKBM lending". That is a statement of subjective intent and of little help in this exercise. More relevantly, in response to further questions, Mr Simcic confirmed that it was not his diary note in which the word "ongoing" had been recorded and that he could not recall discussing with the Coomeys what the term "ongoing" meant. Mr Harvey had no recollection of the Coomeys being told what "ongoing" meant. Mr Coomey did not recall any reference to ongoing.

[203] No further terms or conditions were agreed that day.

[204] Taken overall, we think the reasonable bystander would have understood the meaning of ANZ's 70 basis points offer in that context by reference to four basic considerations:

(a) Bushline had for many years been a customer of ANZ. At that time it owed approximately $12 million on a mix of fixed and floating rate term debt. Most of that debt had been borrowed for five and 20 years. The greater portion of the floating rate part of that debt had been swapped for an initial period less than its full term, albeit averaging three to five years.

(b) Both Bushline and relevant ANZ personnel understood that the combination of floating rate loans and fixed rate swaps gave Bushline fixed rate funding.

(c) Mr Coomey had an offer from ASB, which included a five-year fixed interest rate. Mr Coomey understood that included a margin, as did Mr Simcic.

(d) Mr Coomey wanted ANZ to fix the margin on all Bushline's debt at 70 basis points for five years. Mr Coomey had made that clear at the 18 March meeting. If ANZ did not present an acceptable offer, Mr Coomey and ANZ both knew Mr Coomey could turn to ASB.

[205] At that point in time, we consider that a reasonable person with that shared knowledge of the matrix of fact would have understood ANZ's 70 basis points offer as having been made by reference to the five-year period Mr Coomey wanted Bushline's margins to be fixed for.

[206] It is also relevant in reaching that conclusion that it was not until the later meeting of 18 March that specific swap terms were discussed. It was not until sometime in April that it was agreed all of Bushline's financing, that is both its existing and new financing, would be provided under one, swapped, 12-month BKBM loan: a fresh approval dated 15 April 2008 records that approach. It was not until then that the one, two and three-year swap structure was agreed. Mr Simcic's explanation of how the term "ongoing" had been understood by him is, given its subjectivity, not only of little weight; it is also difficult to reconcile with that sequence of events.

[207] The Refinancing Swaps were loaded on 8 April. The Refinancing Loan was recorded in a Loan Agreement of 21 April, signed by the Coomeys, Mr England and Bushline's fourth trustee, its accountant Mr Schurr, on 23 April.

[208] We also think it is relevant that, as explained already, none of Bushline's funding was, in March 2008, on 12-month terms, nor, to the extent it was on floating rate terms, was it priced by reference to BKBM. Mr Esquilant explained the use of short-term lending in the following way:

> While I was not involved in the decision about the term of the underlying lending, the bank usually offered 12-month lending, regardless of the length of the swaps. I understand it was cheaper for both the customer and the bank, primarily because the bank itself had to provision less capital against shorter

> loans. Shorter loans were a change from when we first introduced swaps to our rural customers in 2005. At the start, the loans themselves may have been up to five years long.

[209] We do not think that the "12 month lending" was part of the parties' common knowledge. There is no evidence Mr Coomey would have known at that point a 12-month term was to be proposed. Nor we infer, from the internal bank material, would Mr Harvey or Mr Simcic have had that understanding. On 23 April 2008 Mr Esquilant had sent an email to various bank officers in the context of the ongoing focus within the bank on the significance of the margin on BKBM bill rate loans. In that email he noted:

> Bill Rate loan term facilities will now be 12 months max — we obviously have an issue with this and will continue to discuss.

[210] That ANZ internal decision would appear to be the origin of the Refinancing Loan having a 12-month term, not the five-year terms that had previously applied to its $6.455 million floating rate loan.

[211] Mr Simcic commented on the significance of BKBM bill loans in the following terms:

> I wish to make one final observation. The ANZ BKBM Loan product used alongside swaps was the only product for which we would or could openly disclose margin and discuss it with customers. I say that to be clear that when we were talking margin with Mr Coomey in March 2008, we were talking about margin with a customer who was already using swaps in circumstances where it seemed likely that the customer would continue to hedge interest rate risk through swaps. Our Rural Variable or Fixed Rates Loans would only ever be tabled as "all up" rates on offer. So had we been speaking about fixed rate loan products, we wouldn't have been discussing, let alone negotiating margin.

[212] We comment:

(a) As Bushline had not previously entered into a BKBM bill loan, Bushline's previous use of swaps could not have had the significance for Bushline that Mr Simcic appears to attribute to it.

(b) Given Mr Simcic's acknowledgement that both *Rural Variable* and *Fixed Rate Loans* were "all up" offers, the significance of his assertion

that if they had on 18–19 March been talking about "fixed rate loan products" they would not have been discussing "margins" is unclear. Whilst not expressly disclosed ANZ did figure a margin into its fixed and floating rate rural loans.

(c) ANZ had previously combined fixed rate and floating rate terms: for example the loan of $2.462 million for 20 years apparently drawn down on August 2007 had a fixed interest rate for the first three years, and a floating interest rate thereafter.[62]

[213] We comment further on two aspects of that background that the Judge referred to in reaching her conclusion. The Judge placed weight on the cautionary statement in ANZ's letter to the Coomeys' of 18 March 2008.[63] That statement reads:

> We would however like to highlight that in the Bank's assessment your projected cashflow may be insufficient to fully meet all your outgoings including interest. Given that the projected cashflow excludes any capital development expenditure we would expressly ask you to confirm that any significant capital development expenditure be made only after discussions with your Rural Manager. The new lending is effectively borrowed against the equity in your business and supported by the security held by the Bank. This further borrowing may result in a reduction of your equity over time as a result of cashflow shortfalls.

[214] We do not think that is an especially significant element of the matrix of fact. We are of that view for four reasons:

(a) That statement was preceded by the following more comforting one:

> The Bank has agreed to provide further financial assistance to your business. We recognise the outstanding growth rates that your business has achieved during the past 10 years (with estimated equity growth of 30% +) despite at often times facing challenging cashflow viability. The opportunity you have available to purchase a runoff and expand your business further is huge and we have every confidence you will continue to perform as you have done in recent years.

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62 We base those details on the copies of loan documents referred to in the documents relating to the approval of the Refinancing Loan. We note that quite a number of those documents would appear to be photocopies of originals executed by ANZ but not by Bushline.

63 High Court judgment, above n 3, at [80].

(b) That same day, ANZ wrote separately in very positive terms, emphasising its support for the proposed purchase of the new farm, its willingness to lend the purchase price and its commitment to Bushline on an ongoing basis. ANZ was after all, notwithstanding some apparent misgivings, agreeing to significantly increase its lending to Bushline.

(c) ANZ had previously cautioned Bushline in almost identical terms. Bushline entered into three separate loan agreements with ANZ on 27 July 2007: two for short-term advances of a total of $2.95 million and one for the advance for a further 20 years of $2.46 million of that $2.95 million. In all three of those agreements the following statement appears:

> The Bank has agreed to provide further financial assistance to your business. However we wish to highlight that in the Bank's assessment your projected cashflow may be insufficient to fully meet all your outgoings including interest. The increased loan facility is effectively borrowed against the equity in your business and supported by the security held by the Bank. This further borrowing may result in a reduction of your equity over time as a result of cashflow shortfalls.
>
> We recommend that you seek independent advice to ensure that you are fully aware of your obligations under the increased loan and the risks associated with this borrowing.

[215] That statement did not appear, however, in a subsequent floating rate loan agreement dated 14 December 2007, advancing what appears to be new money of $420,000 for 20 years. The significance of using those words again, when confirming its willingness to lend further, significant, funds in 2008, is significantly reduced by that very willingness and, to a lesser extent, by their inconsistent use in the past.

[216] Nor, unlike the Judge, do we think the timing of Bushline's express pleading of ANZ's undertaking that "the margin on the Coomeys' total lending would be fixed for 5 years at 0.70% from 21 April 2008" is of particular significance. A central focus of Bushline's claim against ANZ had, from the outset, been ANZ's promise to fix the margin along with its characterisation of the combined effect of floating rate loans and fixed rate swaps. From the outset it said, had it not entered into the swaps, it would have taken up ASB's offer to fix all borrowings for five years at a margin of 65 basis

points. It pleaded an implied term that ANZ would not increase margins for the purpose of minimising its own losses. It said increasing interest rate margins had been oppressive. In any event, at trial and on this appeal ANZ did not dispute an agreement to fix the margin at 70 basis points: the dispute was the term of that agreement and the debt which it applied.

[217] We also acknowledge that, in 2009, Mr England, Bushline's solicitor, wrote to ANZ commenting that the increased margin was acceptable, given the decline by that point in BKBM, but may need to be revisited in the future. Again, given the circumstances in which the 70 basis points offer was made and accepted, that after-the-fact observation — which Mr Coomey said he was unaware of — is of no great significance.

[218] We therefore conclude that the objective meaning of ANZ's agreement on margin was that it would fix Bushline's margin on the Refinancing Loan at 70 basis points over BKBM for five years. To the extent that, subsequently, the Coomeys entered into fixed rate swaps, they could not benefit from the decline in BKBM that occurred. But, in the absence of an agreement at that time to the contrary, they could have expected to obtain that benefit as and when the swaps matured during the "fixed" period of the Refinancing Loan.

[219] Bushline appeared from time to time to argue that undertaking extended not only to the loan of the $19.47 million, but also to any additional funding provided by ANZ from April 2008. We do not agree.

[220] Accordingly, ANZ did breach that undertaking when it increased the margin both on that part of the Refinancing Loan that continued to be hedged, and on what effectively became the re-advances of the Refinancing Loan over the subsequent five-year period either explicitly or by substituting a rate other than BKBM plus 70 points.

The Monitoring Undertaking

[221] Although expressed differently in the various causes of action pleaded, Bushline's central proposition was that ANZ breached the Monitoring Undertaking

when it advised Bushline to enter into swaps in April 2008. It also did so when it did not advise Bushline to break the swaps when — as Bushline put it — the swaps were "still in the money", namely up to or before October 2008. When arguing the appeal, Bushline's central complaint was that ANZ did not respond to Mr Coomey's requests for advice in 2008 on the possibility of breaking the Refinancing Swaps, and the costs that might be associated with doing so.

[222] The Judge found the Monitoring Undertaking in various statements made by ANZ (i) in its original presentation in 2005 to the Coomeys and (ii) in statements made in March and April of 2008 associated with the 2008 Refinancing.[64]

[223] ANZ's Monitoring Undertaking was summarised in the 2005 presentation in the following manner:

> - Advise and recommend the RMs/Clients interest rate risk strategies, including appropriate fixed rate exposure and optimal product mix to achieve financial objectives.
> - Provide on-going interest rate risk advice and strategies.

[224] Mr Esquilant summarised the key aspects of his standard presentation as explaining that:

> - swaps "provide a known fixed interest rate for the term chosen — (like the fixed loan product)";
> - "benefits are paid out on advantageous movements (unlike the fixed loan product)";
> - swaps "are tradeable instruments and provide quick entry and exit from the market";
> - swaps "are a flexible instrument and can be tailored to changing debt requirements";
> - customers using swaps "can fix any portion up to the entire amount of the loan";
> - "clients pay break costs but do receive break profits";
> - credit margins are separate from the underlying loan.

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64 At [98] and [99].

[225] As regards the final element of that explanation, that credit margins were separate from the underlying loan, Mr Esquilant acknowledged that in 2005 he would not specifically have mentioned margins, although they were referred to on slides.

[226] Mr Esquilant went on to say:

> I would definitely have discussed break costs — the fact that a customer could exit a swap and receive 'break profits' was a key feature of swaps; generally I worked through an example with the client, where I would note how swaps could be "in" or "out" of the money meaning either a payment upon exit or a fee for quitting the swap early.

[227] ANZ was offering to "advise and recommend" and to "provide on-going interest rate risk advice and strategies" so that Bushline would benefit from the advantages ANZ had represented interest swaps had over fixed rate loans in a table in the 2005 presentation set out again (see [110]) for convenience:

Fixed Rate Loans versus Interest Rate Swaps

Attribute	Fixed Rate Loan	Interest Rate Swap
Break costs	Clients pay break costs but do not receive break profits	Clients pay break costs but do receive break profits
Ability to extend term to take advantage of fall in interest rates	Fixed rate term can't be changed unless client breaks loan and pays cost	Can extend out to term of facility
Ability to extend term to take advantage of higher interest rates	No ability to do this	Can shorten

[228] In his evidence Mr Esquilant distinguished between identifying opportunities and ways for customers to obtain those benefits, as opposed to advising them to do so. Thus, in the case of the availability of paying break costs and receiving break profits, he said he would not be recommending or telling a client to break any swap. But that did not stop him from providing the client with what would be the costs or benefits of getting out of the swap.

[229] The following exchange between Mr Branch, counsel for Bushline, and Mr Esquilant, which took place shortly after Mr Esquilant had emphasised that

distinction, identifies very clearly what Mr Esquilant considered to be the scope of ANZ's obligation:

> Q. So the case for the plaintiff is that they thought you were giving them ongoing full advice and that would include at all times, options including pros and cons of breaking at a particular time. Do you accept that's what you promised?
>
> A. Yes.
>
> Q. You do accept without a question?
>
> A. Yes. Yes, I do accept.
>
> Q. You accept that's what you promised.
>
> A. Yes.

[230] Mr Esquilant went on to confirm:

(a) From April 2008 onwards ANZ was signalling possible volatility in the interest rate markets.

(b) On 5 June the Reserve Bank had signalled that it was likely to be in a position to cut rates later that year, which was earlier than expected. That was a fundamental change in the financial landscape.

(c) In July 2008 the Reserve Bank was expecting that by the early part of 2009 the official cash rate would have dropped from eight to six per cent, a huge drop in historical terms.

(d) That in those circumstances there was "potential definitely", if a client's swaps were in the market to say to them, as Mr Branch put it to Mr Esquilant:

> Look the rates haven't moved yet, but the indications they are going to and so here are your options. You can stay in and have the certainty, so if you think they are going to move downwards it might be a good time to break while you're in the money and take advantage of the decreased rates.

(e) Bushline's swaps were in the money in August, albeit slightly.

(f) There was no evidence that ANZ had at any point through 2008 considered the potential for Bushline to break.

[231] The evidence is a little unclear as to when Bushline itself first raised the possibility of breaking its swaps. In response to Mr Branch's proposition that ANZ had not even considered break costs through all of 2008, Mr Esquilant said that Mr Harvey, the Coomeys' rural manager, had asked for them and, that he'd be very surprised if he didn't provide them, but they couldn't find any documentary record. Mr Esquilant also agreed that he had been asked in August for break costs, because Mr Coomey was asking for that information.

[232] For his part Mr Coomey said that he thought they may have been considering breaking the swaps in August 2008, but he did not say they had actually raised that issue with ANZ at that time.

[233] What is clear is that in October 2008 Mr Coomey contacted Mr Harvey to ask for an update on swaps strategies, including break costs. Mr Harvey, in turn, passed that request on to Mr Esquilant. The advice Mr Esquilant provided in reply included several options for lengthening the swaps, with an associated interest rate saving. There was no response to the request for break costs.

[234] The first time a break cost calculation was provided to the Coomeys in terms of the documentary record was in February 2009, at which point the break costs were in the vicinity of $1.6 million.

[235] In our view, ANZ did breach the Monitoring Undertaking from 2008 onward by, at the least, failing to respond to the Coomeys' inquiries regarding break costs and, further, by failing to communicate to the Coomeys its developing view as to the likelihood of significant, indeed historic, reductions in official cash rates that were being signalled by the Reserve Bank and the possible significance of those reductions for Bushline.

[236] The expert evidence as to the choices Bushline may have had if its break cost inquiries had been responded to and if ANZ had, through Mr Esquilant, communicated

its developing view through 2008 as to the likely future path of interest rates, was mixed.

[237] Ms Cooper, one of Bushline's two expert witnesses, said it would have been advisable for Bushline to exit the Refinancing Swaps in June 2008, when they were still in the money, and that it was surprising ANZ had not discussed that possibility with the Coomeys. Ms Cooper recognised, however, the fact that those swaps were in the money meant that the market view was that it was sensible at that point to stay there. She acknowledged it would require a contrarian view at that time to break. Mr Dillon, the other expert for Bushline, focused on ANZ's promise to provide ongoing advice. In that context, and given what was happening in 2008, ANZ should have provided Bushline with advice on the break option. Mr Dillon did not go further than that.

[238] Mr Rankin, ANZ's expert witness, accepted that, in hindsight, breaking in June 2008 would have been very advantageous. But at that point no one was predicting the very rapid fall in rates that followed the coordinated, October 2008, intervention of central banks around the world.[65] Again, the fact that the swaps were in the money at that time reflected market consensus.

[239] Those are matters that will need to be assessed by the High Court when it considers damages.

Summary as to breach

[240] In short, we have thus far found:

(a) In making the Fixed Cost Representation, ANZ misrepresented the nature and effect of the Swaps; and

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[65] In his brief of evidence, Mr Rankin described how the unprecedented fall in interest rates followed developments in the United States' economy in response to the difficulties encountered by Freddie Mac and Fannie Mae (housing loan guarantee corporations) and the collapse of Lehman Brothers in September 2008: "Governments and central banks around the world responded with unprecedented fiscal stimulus, monetary policy expansion and institutional bailouts. Palliative fiscal and monetary policies were adopted to lessen the shock to the global economy — which meant that interest rates were lowered dramatically in an unprecedented and rapid fashion."

(b) ANZ gave the Margin and Monitoring Undertakings, but failed to comply with its obligations under those undertakings.

[241] We now go on to make the "fair and reasonable assessment" as regards the disclaimer clauses on that basis.

The disclaimer clauses — the s 4 fair and reasonable assessment

[242] For convenience, we set out s 4 again:

> **4 Statements during negotiations for a contract**
>
> (1) If a contract, or any other document, contains a provision purporting to preclude a Court from inquiring into or determining the question—
>
> (a) Whether a statement, promise, or undertaking was made or given, either in words or by conduct, in connection with or in the course of negotiations leading to the making of the contract; or
>
> (b) Whether, if it was so made or given, it constituted a representation or a term of the contract; or
>
> (c) Whether, if it was a representation, it was relied on—
>
> the Court shall not, in any proceedings in relation to the contract, be precluded by that provision from inquiring into and determining any such question unless the Court considers that it is fair and reasonable that the provision should be conclusive between the parties, having regard to all the circumstances of the case, including the subject-matter and value of the transaction, the respective bargaining strengths of the parties, and the question whether any party was represented or advised by a solicitor at the time of the negotiations or at any other relevant time.

[243] The terms of the assessment called for by s 4, namely whether it is "fair and reasonable" for disclaimer clauses to preclude liability for actionable breaches, is a radical, pragmatic response to the problems identified by the Committee's 1967 Report. It does represent a break from the past, as the Committee intended: to that extent it is radical. It is also pragmatic and reflects the importance for the law in New Zealand, both common and statute, of the values of fairness and reasonableness in everyday life.

[244] Whether it is "fair and reasonable" for a party to rely upon a disclaimer despite s 4 will depend heavily on the facts of each case.[66] As this Court said in *PAE (New Zealand) Ltd v Brosnahan*, the section ultimately requires the court to strike a balance:[67]

> Section 4(1) recognises a wide judicial discretion to determine whether it is "fair and reasonable that the provision should be conclusive". While the issue is to be determined "having regard to all the circumstances of the case", the specified criteria focus the inquiry on an assessment of the relative positions of the parties and their access to independent legal advice. Its apparent purpose is to protect one party's relative vulnerability from another party's power to impose an exemption from liability which is contrary to the factual reality or an existing legal obligation and is thus unreasonable and unfair. Section 4(1) is a mechanism for striking balances, both individually between parties and conceptually between freedom of contract and unfair or unreasonable commercial conduct.

[245] When considering the reasonableness of such a clause, the court will have regard to all the circumstances of the case, including the subject matter and value of the contract, the respective bargaining strength of the parties and whether they were represented.[68] Other relevant matters can include the circumstances in which the representation was made and whether the disclaimer was in a standard form or drafted especially.[69] In the end, the party seeking the benefit of such a contractual provision has a persuasive burden of demonstrating why it should prevail.[70]

[246] We also think it is important that the s 4 "fair and reasonable" test was seen as better enabling a court to determine the true bargain between contracting parties. Whilst the parol evidence rule was not abolished, s 4 addresses contractual terms that have a like effect as that rule. So the fairness and reasonableness of giving effect to such terms will be affected by the significance of the difference, the distance as it were, between what was written down in the "culminating agreement" — to use the Committee's phrase — and what the court finds was actually agreed.

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66 *Collings v McKenzie* (1988) 2 NZBLC 102,997 (HC).

67 *PAE (New Zealand) Ltd v Brosnahan* [2009] NZCA 611, (2009) 12 TCLR 626 at [15] (citation omitted).

68 Contractual Remedies Act 1979, s 4(1).

69 *Ellmers v Brown* (1990) 1 NZ ConvC 190,568 (CA) at 190,572 and 190,577–190,578; and *Collings v McKenzie*, above n 66.

70 *Ellmers v Brown*, above n 69.

[247] Taken overall, and as the Judge analysed, the disclaimer clauses:

(a) preclude reliance by the customer on statements made by ANZ, and advice or information provided by ANZ, as regards both loan agreements and swaps; and

(b) confirm:

(i) that the customer can and has understood swap transactions themselves, and has assessed and understood their merits, risks and suitability for its objectives; and

(ii) that as regards swaps, the Swap Terms are the entire agreement between the customer and ANZ, including as they do the content of Confirmations, as similarly the loan agreement is as regards loans.

[248] As the Judge's summary of her liability conclusions demonstrates, those clauses provided answers to Bushline's negligence, breach of contract, Contractual Remedies Act and Fair Trading Act claims.[71] They did so in the following ways:

(a) As regards Bushline's negligence claim, because the disclaimer clauses — together with Mr England's legal advice — meant there was not a sufficiently proximate relationship between Bushline and ANZ to establish a duty of care.

(b) As regards Bushline's breach of contract claims (which asserted a collateral contract or further oral or written terms of the refinancing arrangements), because the terms of the alleged further or collateral contract were inconsistent with those terms, and because it was fair and reasonable that those disclaimer clauses were conclusive.

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71 High Court judgment, above n 3, at [201].

(c) As regards the Contractual Remedies Act claim, because (and as with the negligence claim) they meant that the reliance and inducement elements of that cause of action could not be established.

(d) As regards the Fair Trading Act claim, because they broke the chain of causation insofar as the positive representations were concerned.

[249] Central to those conclusions were the terms of the disclaimer clauses themselves, and the legal advice the Judge considered Bushline had received, and for which it had claimed privilege.

[250] Given both the purpose of s 6, to provide liability for an inducing pre-contractual representation "as if it were a term of the contract", and the associated purpose of s 4, to reduce the impact of disclaimer clauses on a court's ability to determine what in fact was said and agreed, we do not think the existence or terms of the relevant disclaimer clauses are themselves especially relevant to the "fair and reasonable" assessment. If they were, and particularly if their effect was as determinative as the Judge found here, there would be little point in s 4 at all.

[251] We acknowledge the nature and extent of legal advice provided to a customer is relevant when making the fair and reasonable assessment. We also acknowledge that the Coomeys did not waive privilege as regards the legal advice they received. But we also think that, in assessing the relevance of legal advice in this case, a careful approach is required to the advice the Coomeys received on the Swap Terms in 2005, in terms of what ANZ required at that time of Bushline's solicitors.

[252] We are also of the view that Bushline's overlapping causes of action, and the attention paid to Bushline's claims in negligent misstatement under collateral contracts, may have clouded the significance here of the Contractual Remedies Act, in particular not only as regards s 6 but also, importantly, as regards s 4.

[253] We say that because, as the legislative history makes clear, those provisions were enacted to address the problems caused by the complexities and associated

inadequacies of the various remedies the law provided, in particular by way of collateral contracts and the then new tort of negligent misstatement.

[254] As regards the former, and responding to one commentator's endorsement of the value of collateral contracts, the Committee wrote:[72]

> We do not favour the extension of this devious device and prefer to strike at the roots of the injustice, the obstacles to enforcing oral terms.

[255] As regards the latter, the Committee went to some pains to explain its position:[73]

> Our second objection is against the intrusion of the concept of negligence. The law of contract has as its basic aim the enforcement of undertakings, using the term "undertaking" in a broad sense to include representations. It is beside the point whether an undertaking was given on reasonable grounds or not; it suffices that it was given. It seems to us that the proper as well as the traditional approach is to look not at whether there was any fault on the part of the representor but at the expectations of the representee that naturally arise from the undertaking.
>
> The concept of negligence itself is difficult to apply. To increase the turgid depths discussed [above] dismays us.

[256] We consider therefore a broader consideration is required here than that the Judge undertook into "all the circumstances of the case", including the matters specifically mentioned in s 4(1). It is also of some significance that s 4 does not save disclaimer clauses, unless the court considers that to do so would not be fair and reasonable: rather it obviates their effect unless the court considers that it is fair and reasonable their provisions should be conclusive.[74]

[257] In undertaking that consideration we think there are three particularly relevant circumstances here as regards the fair and reasonable assessment.

[258] First, as the Judge found (and which ANZ did not dispute), ANZ did make the Monitoring Undertaking.[75] That circumstance is especially relevant because, in our view, the Monitoring Undertaking is properly to be seen as having been made by

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72 1967 report, above n 28, at [5.38].
73 At [9.43].
74 See *Ellmers v Brown*, above n 69, at 190,572 and 190,577–190,578.
75 High Court judgment, above n 3, at [98].

ANZ because swaps were difficult and complex transactions, requiring expertise to assess prior to entry and to manage once entered which rural customers like the Coomeys were unlikely to have: hence the service offered. As Mr Harvey observed, when he acknowledged that ANZ said it would manage interest rate risks for the Coomeys, the team which sold swaps to rural customers was called the IRRM team, an acronym for "Interest Rate Risk Management".

[259] Second, there was a lack of understanding within ANZ itself, particularly amongst the staff dealing directly with its rural banking customers on a day-to-day basis, of the swaps' implications and the differences between fixed rate loans and the BKBM loans associated with fixed rate swaps. We have already summarised the evidential basis for that conclusion. If any further was required, Mr Harvey's frank acknowledgement of that fact in cross-examination will suffice. Mr Branch put to Mr Harvey the following comment from an internal bank document dated 21 April 2008:

> They should balance the flexibility of swaps with the certainty of fixed margin and funding, and make their decision on that basis. With swap and bill combinations they run a risk of client margins changing, and it is *imperative that they understand they run this risk*. …
>
> (Emphasis in original.)

[260] The following exchange then occurred:

> Q. … You were never made aware of that?
>
> A. No. lt was probably within two or three months after this, but yeah, didn't see this. If I had seen this document at the time I would have been having a conversation. 100% certain about it.
>
> Q. You would have been going to the Coomeys and saying, "I need to now tell you that under this combined package that you've got your margin may well go up."
>
> A. When I knew about this, absolutely. There's a risk of that that we didn't perceive to that point. I didn't perceive.
>
> …
>
> Q. So [the April 2008 Refinancing was executed by ANZ on] the same day as this document isn't it? So if you'd known what was in here you would have been saying to the Coomeys, "You need to reconsider this whole strategy because what I told you is no longer true".

A. If I'd read this I would be making it clear to the Coomeys that that's a risk of dealing in interest rate swaps, and that [they] be aware of it.

Q. They say that if they had been told that they wouldn't have gone into swaps and you don't have any basis for disbelieving them?

A. No.

[261] Mr Harvey was not re-examined.

[262] In our view, the failure to understand the significance of ANZ's ability to alter the margin is particularly significant in this context.

[263] There would also, in our view, appear to have been a misunderstanding of what transpired to be the position for the Coomeys from September 2009 onwards: namely that a floating rate BKBM plus a margin loan was, in reality, only available when and to the extent that such a loan was hedged by fixed rate swaps.

[264] Third, and as regards the Margin Undertaking, ANZ acknowledged it had promised Bushline would have a fixed 70 basis point margin: the question was what ANZ's promise meant, and in particular what the word "ongoing" meant in context.

[265] Additional factors also relevant here are:

(a) The imbalance of bargaining power:[76] the Swap Terms were not specially drafted or negotiated. Indeed, they were treated by ANZ as "non-negotiable" and intended for less sophisticated customers who lacked the capacity to negotiate.

(b) The fact that the subject matter was entirely within the representor's knowledge:[77] customers', lawyers' and accountants' limited understanding of the complex swap product marketed by ANZ had all come from the same source; that is, ANZ's presentations as made by its treasury specialists.

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76 See Contractual Remedies Act, s 4.

77 See *Russell v Wotherspoon* (1985) 2 NZCPR 351 (HC) at 354.

[266] There are, of course, situations where parties to a contract may in effect say that representations and terms will bind in honour only. But this is not one of those situations. That is, we do not think it is fair and reasonable — given the circumstances just outlined — that ANZ should be able in effect to say to the Coomeys: "Notwithstanding what we promised we would do and what we represented to be true, you have no claim against us even though we did not do what we said we would and what we represented to you was false."

[267] We turn now to more specific aspects of the disclaimer clauses as relevant to the fair and reasonable assessment.

[268] We accept, as the Judge concluded, it is of little significance that the boxed acknowledgement in the Confirmation was first communicated to the Coomeys after they had entered into the first swap, given the numerous times that acknowledgement was communicated subsequently.[78] We do think it is relevant, however, that the Swap Terms provide it makes no difference to the customer's legal obligations whether, after a swap has been entered into over the phone, ANZ does or does not send a Confirmation to its customer or, if it does, its customer does or does not sign and return it (although if the customer failed to sign the Confirmation, ANZ was entitled to cancel the swap transaction). If it does not affect the customer's contractual obligations if ANZ does not send a Confirmation, or if the customer does not sign one, how can it be fair and reasonable for that disclaimer to preclude (i) the inquiry provided by s 4 and (ii) the Court giving effect to representations made and terms agreed as determined by it following that inquiry?

[269] Turning to the relevant provisions of the Swap Terms, we consider the circumstances represented by the breach of the Monitoring Undertaking and the falsity of the Fixed Cost Representation are in our view determinative of the fair and reasonable assessment. That is, the fact ANZ has not in this appeal challenged the Judge's findings, and acknowledges that the independent advice and assessment clauses were simply not true.

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78 See High Court judgment, above n 3, at [158].

[270] We acknowledge the relevance of legal advice to the s 4 assessment. Bushline and the Coomeys were legally represented. The Judge placed significant reliance on that. What was the advice they received?

[271] As regards the Swap Terms, it was — as we think Mr England in his evidence fairly categorised it — of a mechanical, formal, nature. Considering the background of Mr Esquilant's 2005 "swaps 101" presentation, and ANZ's subsequent realisation of the various ways in which swaps had been wrongly explained by bank personnel, we do not think Mr England's advice in the circumstances materially impacts the fair and reasonable assessment.

[272] It is also to be remembered that advice was given only once, in 2005, at a time when the Coomeys — who could not be said to be sophisticated bank customers — had by our assessment only a limited understanding of the mechanics and risks of the swap transactions they were entering. What they did understand was that, as ANZ had represented, swaps were an alternative and financially advantageous way of obtaining fixed rate debt funding.

[273] Nor does the fact that a fuller certificate was provided to ANZ as regards the loan agreements help as regards the Fixed Cost Representation and the Monitoring Undertaking. As ANZ repeatedly emphasised, the legal structure was that the swaps were arrangements distinct from the loan agreements: accordingly, we do not think it would be fair and reasonable to take the view that advice on loan agreements was relevant to the existence and enforceability of those obligations entered into with respect to swaps.

[274] Nor can Mr England's advice help as regards the Margin Undertaking: it was not recorded in the Refinancing Loan and he was not at the meeting where the relevant undertaking was given. So his certificate does not address it.

[275] In summary, and unlike the Judge, we are unable to conclude that it would be fair and reasonable for the disclaimer clauses to have the effects ANZ asserted as regards the Fixed Cost Representation and the Monitoring and Margin Undertakings. We therefore find the breaches of the representation and undertakings enforceable.

Bushline's collateral contract, negligence and Fair Trading Act claims

[276] In our view, our findings on ANZ's enforceable breaches of the Fixed Cost Representation and the Monitoring and Margin Undertakings mean that there is little utility in analysing Bushline's alternative collateral contract, negligence and Fair Trading Act claims.

[277] As was the legislative intent, our enquiry into what was actually agreed, and into the effect on the enforceability of what was agreed of the disclaimer clauses, has identified the parties' bargain. Having done so, it is not necessary to look to collateral contracts. The exclusion of negligence causes of action by s 6(1)(b) of the Contractual Remedies Act can now be seen in its proper light: that is, and as the Committee concluded, there is no need to resort to the complexities of establishing a negligence claim to give effect to that contractual bargain.[79] Moreover, in these circumstances, the claim of false and misleading conduct under the Fair Trading Act adds little to Bushline's contractual claims, but faces considerable limitation difficulties.

Bushline's oppression claim

[278] "Oppressive" is defined at s 118 of the Credit Contracts and Consumer Finance Act as meaning "oppressive, harsh, unjustly burdensome, unconscionable, or in breach of reasonable standards of commercial practice".

[279] This Court said in *Greenbank New Zealand Ltd v Haas* that:[80]

> The various words which together form the definition of the term "oppressive" all contain different shades of meaning but they all contain the underlying idea that the transaction or some term of it is in contravention of reasonable standards of commercial practice.

[280] This definition was later endorsed by the Supreme Court in *GE Custodians v Bartle*, in a passage cited by Edwards J in the judgment below:[81]

> [46] A credit contract or other transaction to which Part 5 of the Act applies may be reopened as oppressive when it might not necessarily have been set

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79 See 1967 report, above n 28, at [9.43].

80 *Greenbank New Zealand Ltd v Haas* [2000] 3 NZLR 341 (CA) at [24].

81 High Court judgment, above n 3, at [187] citing *GE Custodians v Bartle* [2010] NZSC 146, [2011] 2 NZLR 31 (footnotes omitted).

> aside as unconscionable by a court of equity. … As Arnold J remarked, the scope of oppression under the Act is broader than the equitable doctrine of unconscionability. That follows from the fact that the definition of "oppressive" is wider than unconscionable conduct and includes a "breach of reasonable standards of commercial practice". The Court of Appeal has correctly said in *Greenbank New Zealand Ltd v Haas* that the various words which together form the definition of the term "oppressive" all contain different shades of meaning but they all contain the underlying idea that the transaction or some term of it is in contravention of reasonable standards of commercial practice. That sets an objective standard. A contract or course of conduct may therefore, as Arnold J also said, be treated as oppressive even though the party whose conduct is said to be oppressive may be (subjectively) blameless because the party is simply following industry practice. Where that practice is in breach of reasonable standards, compliance with it will not immunise a lender. It is for the courts rather than the industry to set the standard. But that assumes a situation in which the lender knows of the matter found to give rise to oppression or knows something which should have put it on inquiry.

[281] Having identified and confirmed the contractual enforceability of the representation and undertakings, and in particular in this context of the Margin Undertaking, again we see little point in undertaking the complex inquiry required under s 118. In saying that, we acknowledge that Bushline asserts that ANZ acted oppressively not only when it increased interest rates, but also more generally in the way Bushline says it was pressured, and its access to finance unreasonably restricted, as its financial circumstances more generally deteriorated. We do not think Bushline can dispute, however, that that deterioration in its financial circumstances occurred. Nor, in light of that, that ANZ could not properly take steps to protect its position. The contractual breach we have identified addresses in our view the significant elements of Bushline's complaints. Here we think it is sufficient to observe that, to the extent we have found ANZ breached obligations, that may also be seen as a breach of reasonable standards of commercial practice.[82]

Liability

[282] ANZ raises two liability defences. The exclusion clauses found in the disclaimer clauses and the effect of the Limitation Act 1950.

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82 Credit Contracts and Consumer Finance Act 2003, s 118.

The exclusion clauses

[283] The following exclusionary wording in the Swap Terms appears, as highlighted, in the passage below:

> Customer should note the following general risks:
>
> - Foreign exchange and derivative markets can be highly volatile and the prices of the underlying rates, currencies or commodities may fluctuate rapidly over wide ranges, and may reflect unforeseen events or changes in conditions.
>
> - The customer may suffer substantial losses as a result of those fluctuations. *The Bank will not be liable for these losses in any circumstances.*
>
> It is the customer's responsibility to understand the nature of the transactions the customer enters into, the risks associated with those transactions, and to monitor the transactions. The customer should not enter into transactions if transactions or the risk are not understood.
>
> …
>
> 10.1 Independent advice: The Customer has entered into and will enter into each Transaction and the Agreement in reliance on such independent advice (including tax, legal and financial advice) as the Customer considers necessary and not on any representation or information made or given by the Bank. *To the maximum extent permissible by law, the Bank will not be liable for the Customer's loss in any circumstances.*
>
> (Emphasis added.)

[284] Those clauses do not exclude liability for the breaches we have found. First, the breach of the Margin Undertaking is a breach of a promise relating to the BKBM bill rate loans, not of any of the Swap Terms.

[285] Secondly, whilst the Monitoring Undertaking does relate to the Refinancing Swaps, the terms of those clauses do not address the liability for losses associated with ANZ's breach of that promise. Those losses do not arise from the risk of volatility, and its consequences, but from ANZ's failure to monitor and advise. ANZ promised to monitor and advise to enable Bushline to manage that very risk.

[286] The reference to the terms "representation or information" in a clause headed "Independent Advice" informs the proper interpretation of the words "loss in any circumstance". In that context it would be going too far to interpret that phrase as extending to the circumstance of ANZ's failure to monitor and advise as it said it would, or to its liability for the falseness of the Fixed Cost Representation as it relates to swaps.

The Limitation Act

[287] The enforceable breaches we have found are of the terms of the contract between Bushline and ANZ. The limitation period for contractual claims is six years: that period runs from the date the relevant cause of action accrued.[83] Bushline originally filed its proceeding in May 2014. Claims relating to conduct before May 2008 are therefore out of time.

[288] To the extent that ANZ misrepresented the nature and effect of swaps when combined with floating rate loans, the relevant cause of action accrued at its earliest in 2005, again in April 2008 and, until corrected, each subsequent time Bushline entered into a swap to exchange a floating rate obligation for a fixed rate one. Bushline continued to do so on a number of occasions after May 2008. The claims for breaches of the Fixed Cost Representation are not, therefore, out of time.

[289] ANZ breached the Margin Undertaking by increasing margins on the Refinancing Loan whilst the Refinancing Swaps remained in effect and by requiring Bushline to repay and reborrow the Refinancing Loan as the Refinancing Swaps expired. It did so for the first time in December 2008, when it first increased the BKBM margin to 0.85 per cent. Bushline's claim for those breaches are, therefore, not out of time.

[290] Finally, ANZ breached the Monitoring Undertaking as regards the possibility of breaching the swaps probably as early as August 2008, but certainly in October 2008. Bushline's claims for the breaches are, therefore, also not out of time.

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[83] Limitation Act 1950, s 4(1).

[291] The question becomes one of damages.

Third party claim

[292] As noted above, to the extent this judgment raises any issues with regards to Mr England's potential liability, that issue will need to be determined in the High Court pursuant to Harrison J's order of 1 December 2017 which, as requested by the parties, provided that if Bushline was to succeed on its appeal, that issue should be remitted to the High Court.

Damages

[293] As requested, the question of the determination of damages payable by ANZ to Bushline is remitted to the High Court to be determined in accordance with this judgment.

Costs

[294] The costs order made in the High Court is quashed. Costs in the High Court are to be determined in line with this judgment. We therefore do not need to address Bushline's separate costs appeal. If, however, when damages are determined, the question of the effect of ANZ's settlement offers needs to be reconsidered, we record that in our view the High Court erred when it increased costs payable by Bushline to ANZ consequent upon Bushline declining settlement offers. That is, we do not think it can be said that Bushline acted unreasonably so as to provide a basis for such an uplift. The complexity of the law and the facts involved in Bushline's claim, and the breaches by ANZ we have found demonstrate that.

Result

[295] The appeal is allowed.

[296] The question of damages is remitted to the High Court for consideration in light of this judgment.

[297] The costs order made in the High Court is quashed and should be reconsidered by that Court in light of this judgment.

[298] In this Court, and in respect of both appeals, the first respondent must pay the appellants one set of costs for a complex appeal on a band B basis and usual disbursements. We certify for second counsel.

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