IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV-2014-404-001276
[2017] NZHC 2520

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 Plaintiffs
AND	ANZ BANK NEW ZEALAND LIMITED Defendant
	ROBERT LEWIS ENGLAND Third Party

Hearing:	29 and 30 May 2017, 1-3 March 2017, 20-25 and 27-28 February 2017
Counsel:	M D Branch and K F Shaw for the Plaintiffs S M Hunter, M C Sumpter, D T Street and W M Cheyne for the Defendant A A Challis and D P Turnbull for the Third Party
Judgment:	16 October 2017

JUDGMENT OF EDWARDS J

This judgment was delivered by Justice Edwards
on 16 October 2017 at 2.30 pm, pursuant to
r 11.5 of the High Court Rules

Registrar/Deputy Registrar
Date:

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Para No.

Introduction

[1] In April 2008, the plaintiff trusts (whom I shall call Bushline) purchased a run-off block known as the Waverley farm. The ANZ Bank New Zealand funded the purchase price, and restructured Bushline's existing lending into a $19.46 million loan. As it had done on previous occasions, Bushline decided to hedge the interest rate payable on that loan, through an interest rate swap.

[2] This case is about representations made by the Bank before the $19.46 million loan and associated swaps were agreed; and about the way the Bank treated Bushline subsequently. Bushline says the Bank breached a promise to hold the margin

component of its interest rate at 0.70 per cent for five years over all its funding; made misrepresentations about interest rate swaps; and failed to stand by Bushline "in good times and in bad".

[3] Bushline sues the Bank for negligence, breach of contract, misrepresentation under the Contractual Remedies Act 1979, breach of the Fair Trading Act 1986, and oppression under the Credit Contracts and Consumer Finance Act 2003.

[4] The Bank denies each of these claims. It says there was no promise to hold margins, no misrepresentations, and that it supported Bushline over the hard times by advancing further funds and extending overdrafts. In addition, the Bank relies on the contractual clauses in the swap and loan agreements to defeat all but the oppression causes of action. It also says that most of Bushline's causes of action are out of time.

[5] The Bank has joined Mr England as a third party to the claim. Mr England was Bushline's solicitor and trustee at the relevant time. He gave advice on the terms and conditions governing interest rate swaps and on the $19.46 million loan agreement. On each occasion he certified to the Bank that he had explained the meaning and effect of the documents to the trustees. In the event the Bank is found negligent, the Bank pursues Mr England as a concurrent tortfeasor, liable in respect of the same loss. Mr England, for his part, denies liability.

[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 clauses on the duties owed by the Bank.

Factual narrative

[7] Mr and Mrs Coomey are regarded as very good dairy farmers in the Taranaki region. They purchased their first herd in 1987, which is when they became customers of the National Bank of New Zealand (now the ANZ). They purchased their first farm in 1992, and continued on a period of capital growth from then on.

[8] The Bushline trusts were settled in 1998. Mrs Coomey is a trustee of Bushline Trust Two. Mr Coomey (known as Bill) is a trustee of Bushline Trust One. The trusts operate the Bushline Trust Partnership, which is a farming partnership.

[9] Mr Schurr and Mr England were Bushline's independent trustees at the relevant time. Mr Schurr is an accountant, and Mr England is a solicitor. Both trustees retired in July 2013, and were replaced by Bushline Trustees Ltd. Mr Schurr is the sole director of Bushline Trustees Ltd. Mr England resigned as a director of Bushline Trustees Ltd in 2014.

2005 – 2006 swaps

[10] In July 2005, the Bank began to offer and promote an interest rate swaps product to its rural customers. An interest rate swap is a financial transaction which allows a borrower to manage interest rate risk on a loan.

[11] A senior dealer for the global markets team at the Bank, Mr Esquilant, made presentations to potential customers about the Bank's swap product. Part of the presentation included a comparison between swaps and fixed rate loans. Swaps were promoted as being like a fixed rate loan, but with upside and flexibility.

[12] Mr Esquilant made a presentation to the Coomeys, but there is a dispute about whether it was in 2005 (as the Bank asserts), or in 2008 (as the Coomeys contend). In any respect, Bushline entered into its first swap on 7 October 2005.[1] This was effected by Mr Coomey placing a telephone call to the swaps team to "lock in" the trade, with the details of that trade subsequently confirmed in writing.

[13] Mr England was instructed by the Bank to act on its behalf in relation to the swap documentation. That documentation included the Terms and Conditions of Institutional Financial Markets Transactions (swaps terms) and the Institutional Financial Markets Authority (IFMA). The IFMA provides that all derivative transactions, which include swaps, will be governed by the swap terms. Clause 10.1 of the swap terms provides that the customer enters into the transaction in reliance on

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[1] That swap was for a notional sum of $975,000 for five years from 20 December 2005 at a fixed swap rate of 6.85 per cent.

its own independent advice, and that the Bank will not be liable for the customer's loss in any circumstances. The effect of clause 10.1 of the swap terms is in issue in this proceeding.

[14] Mr England wrote to the Coomeys on 11 October 2005, and met with them on 22 December 2005. The Coomeys have not waived privilege over the advice received at the meeting. Nevertheless, Mr England completed a solicitor's certificate in which he certified that the nature and the effect of the swaps terms had been explained to Bushline.

[15] The IFMA was signed by all four trustees in December 2005. It was returned, together with the solicitor's certificate, and other documentation, to the Bank shortly afterwards. For reasons which are not relevant to this dispute, amended documentation, including an amended solicitor's certificate, were sent to the Bank on 5 January 2006.

[16] The Bank issued a swap confirmation for the first swap on 23 February 2006. Swap confirmations contain the terms and conditions of the swaps agreed over the phone. Counterparties to the swaps sign the confirmation and return it to the Bank. The confirmation includes a clause which is in capital letters and contained in a black box just above the signature clauses. It provides that each party agrees that it has not relied on any advice from the other, and that it has the capacity to evaluate the transaction. The effect of this contractual term is also in issue in this case. The confirmations were signed by the Coomeys and returned to the Bank on 19 May 2006.

[17] Bushline entered into a second swap on 21 March 2006.[2] Mr Coomey is again recorded as confirming the details of the swap over the phone. This swap was in relation to an underlying loan agreement for the purchase price of one of the four farms in Kaponga, known as the "home farms". The Bank issued a swaps confirmation the same day which was signed and returned by the Coomeys on 1 April 2006.

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2 That swap had a notional sum of $3.15 million for three years from 20 June 2006 at a fixed swap rate of 5.7 per cent.

[18] Bushline entered into a third swap on 28 September 2006.[3] The Bank issued swap confirmations on 29 September 2006, which were signed and returned on 6 October 2006.

[19] There is no complaint about any of the swaps entered into between 2005 and 2006. Those swaps delivered an interest rate which was below the prevailing floating rates at the time.

[20] Further loan agreements were entered into in 2007, and Bushline purchased another of the home farms on 1 June 2007. A bach was purchased in December 2007, which was also funded by the Bank. By the end of 2007, Bushline owned four farms at Kaponga (bordering the Egmont National Park), two residential properties, a bach and a number of other properties. Its debt with the Bank sat at $12 million.

The Waverley purchase

[21] In February 2008, the Coomeys became interested in purchasing a run-off block located in Waverley. Mrs Coomey explained in her evidence that the purpose behind buying the Waverley farm was to make the business self-sufficient. By this, she meant that the Coomeys would not have to send their stock out to graze and would also not have to buy in supplements.

[22] The purchase price of the Waverley farm was $7.25 million. The Bank's rural manager (sometimes referred to as relationship manager) for Bushline at that time was Mr Harvey. He met with Mr and Mrs Coomey to discuss the farm purchase and prepare budgets to apply for Bank financing.

[23] The Bank agreed to lend the money needed to purchase the Waverley farm on 28 February 2008, and an unconditional sale and purchase agreement was signed the following day. The Bank provided a loan for payment of the deposit.

[24] Mr Harvey and Mr Simcic, a senior rural manager at the Bank, met the Coomeys at their farm on 18 and 19 March 2008. The purpose was to discuss the

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3 That swap was for a notional sum of $400,000 for five years from 20 October 2006 at a fixed swap interest rate of 7.0 per cent.

Bank's offer of finance for the Waverley purchase. The Coomeys say that there was agreement at this time to fix the margin at 0.70 per cent for five years on all of the funding. This alleged representation (referred to as the margin representation) is central to Bushline's claim.

[25] The Bank provided a number of letters dated 18 March 2008 at these meetings. In one of those letters, the Bank stated that it would provide "continued support and flexibility through good times and bad", and assured the Coomeys that their "exposure to interest rate risk is being managed in such a way that reduces the overall cost of finance". Bushline relies on both representations in its claims against the Bank.

[26] Another of these letters was addressed to Mr and Mrs Coomey personally. It highlighted the Bank's assessment that the projected cashflow could be insufficient to fully meet outgoings, including interest, and that further borrowing could result in a reduction of equity over time. The Waverley purchase was going to be a stretch.

[27] There was another meeting on 28 March 2008 between the Coomeys, Mr Harvey and Mr Esquilant. The Coomeys say that this is when the swaps presentation was first made to them. That is disputed by both Mr Esquilant and Mr Harvey who say that the meeting was simply focused on swap strategies, and in particular the term of the proposed swaps.

[28] It was agreed that the Bank would consolidate all of Bushline's existing lending into a single loan. The interest rate on that loan was to be hedged through interest rate swaps. Mr Esquilant was proposing a three or five year term for those swaps. Mr Coomey eventually settled on one, two and three year maturities for each of the swaps.

[29] The swaps on the loan were a combination of new swaps and a restructure of the first and third swaps. As before, Mr Coomey locked in the swaps on 8 and 9 April 2008 with an effective date of 21 April 2008.[4] The second swap, which had a maturity date of 20 June 2009, remained in place. As at 21 April 2008 therefore, Bushline had

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4 The first swap was restructured so that the notional amount was $7.905 million at a fixed interest rate of 7.64 per cent, terminating on 20 December 2010. The third swap was restructured so that the notional amount was $8.847 million, the fixed interest rate was 7.93 per cent, and the swap would terminate on 20 November 2011.

three swaps in place for terms of approximately one year, two years and three years respectively.

[30] On 21 April 2008, the Bank sent an instruction letter to Mr England asking him to act in relation to the new loan agreement. The loan agreement was for just over $19.46 million with a term of 12 months from the date of advance. The interest rate specified in the agreement was the floating interest rate (BKBM price), plus "a margin of 0.70 [per cent] per annum (reviewable at any time)". Whether the alleged representation to hold margins at 0.70 per cent for five years can sit alongside this clause in the loan agreement is a key question in this case.

[31] All four trustees signed the loan agreement on 23 April 2008. Mr England subsequently returned that loan agreement, together with his signed solicitor's certificate confirming that he had advised the trustees on the loan agreement.

Post-Waverley

[32] Bushline's fortunes began to take a downward turn a matter of months after the Waverley purchase. It fell behind its targeted milk production and required additional funding to cover the purchase of additional cows, spending on machinery, and seasonal funding.

[33] The Bank advanced further funds to cover these additional expenses. In August 2008, Bushline took out a new loan in the sum of $327,036.00 at BKBM plus a 1.5 per cent credit margin. From 2008 onwards, Bushline's overdraft was extended on successive occasions, and new loans were agreed or refinanced at varying rates and margins. There is a dispute between the parties as to whether this was enough to support Bushline through the bad times.

[34] The global financial crisis began to have a real impact on interest rates from mid 2008. In July 2008, the Reserve Bank cut the Official Cash Rate (OCR) by 0.25 per cent, its first drop since 2003. The rate was cut again in September 2008, this time by 0.5 per cent. Further and steeper cuts followed.

[35] On 20 December 2008, the margin on the $19.46 million loan was increased from 0.70 per cent to 0.85 per cent. It was increased again from 0.85 per cent to 0.97 per cent on 20 March 2009 and then held at that level through to the maturity of each swap. Those two margin increases resulted in Bushline paying approximately $76,000 more in interest than it would have if the margin had been held at 0.70 per cent.

[36] The Coomeys were not happy with the increases in their margins. In January 2009 there was a meeting between Bank managers and the Coomeys to discuss margins and the possible transfer of their lending, including the swaps, to another bank. By this time, the Coomeys were taking advice from Mr Einarsson, an accountant employed by Mr Schurr's firm who had an understanding of swaps.

[37] The term of the $19.46 million loan agreement expired on 1 May 2009 and was rolled over on the same terms. A short time later, Bushline's second swap matured. That part of the lending hedged by swaps was refinanced into a floating rate loan.

[38] There was no improvement for Bushline in the 2009/2010 season. It fell further behind in its milk production targets. There was also a very wet spring in October 2009, and Bushline's herd had a high empty rate (that is, a failure to fall pregnant). The pressure to reduce debt was increasing and a number of Bushline's properties were put up for sale.

[39] In early 2010, Bushline was transferred to rural lending services, the specialist recovery branch of the Bank. Efforts to sell properties to reduce debt had been met with limited success, and in 2011 the Coomeys took steps to convert the Waverley farm into a dairy farm. But there were cost overruns in the conversion, and the milk production problems that had plagued the 2008 – 2010 seasons continued into the 2011 and 2012 seasons. Eventually Waverley was put on the market, and a substantial part of it sold in July 2012.

[40] The first and third swaps matured in December 2010 and October 2011. As the underlying lending became unhedged, it was refinanced into floating rate loans. By October 2011, Bushline no longer had any swaps with the Bank.

[41] The relationship between the Bank and the Coomeys had been under severe strain since the latter part of 2008, and by 2013 it had broken down completely. Bushline succeeded in refinancing its debt with another bank, and left the ANZ in July 2013.

The Commerce Commission offer

[42] In December 2012, the Commerce Commission began investigating the selling of swaps. ANZ subsequently entered into a settlement agreement with the Commerce Commission, which was the subject of a High Court declaration. That declaration stated that the ANZ had breached s 9 of the Fair Trading Act 1986 by understating some of the risks and/or overstating some of the benefits of interest rate swaps to its customers.[5]

[43] As part of the settlement, the Bank agreed to pay $18.5 million with that sum to be offered to all "affected customers". Bushline was offered $155,120, being the increases that the Bank made to margins on the loans linked to the swaps, and a payment set at 0.4 per cent of the notional value of swaps as at 30 September 2008. Bushline chose to reject that offer, which left it free to pursue this claim. Proceedings were issued in 2014.

[44] To understand Bushline's complaints it is necessary to describe the interest rate swap product being sold by the Bank and the contractual terms which governed both the loan and swap agreements. That context is provided below.

Context

Interest rate swaps

[45] An interest rate swap is a financial derivative which is used by borrowers to hedge the interest rate risk payable on a loan. The swap transaction is separate and distinct from the loan transaction. But the term "swaps" is sometimes used to refer to the swap and loan transaction combined.

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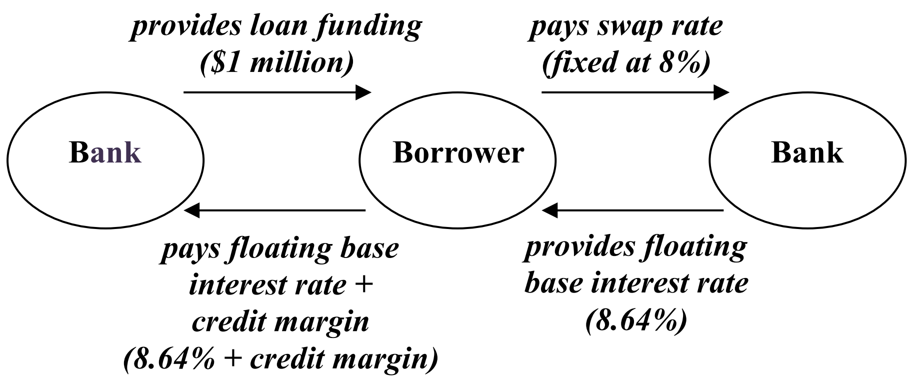
5 *Commerce Commission v ANZ Bank New Zealand Ltd* [2015] NZHC 1168, (2015) 14 TCLR 71.

[46] The loan transaction involves the borrower taking out a loan with the Bank for a sum of money with interest payable at a floating interest rate. That interest rate comprises a base rate (typically the 30 or 90 day bill rate or BKBM), plus a credit margin. In broad terms, the credit margin reflects the borrower's creditworthiness.

[47] The swap transaction involves the borrower agreeing to make payments to the Bank at a fixed interest rate. In return, the Bank agrees to make payments to the borrower at the same floating base interest rate specified in the loan agreement, but without the credit margin. In other words, the parties agree to "swap" a floating rate interest rate for a fixed one.

[48] The transactions were represented in a diagram referred to in the evidence of Mr Derek Rankin. That diagram is reproduced (with some additions) below. The loan part of the transaction is represented on the left hand side of the diagram, and the swap transaction is represented on the right.



[49] In the example given in the above diagram, the two floating base interest rates (at 8.64 per cent) cancel each other out. That leaves the customer paying interest at the swap rate on the swap transaction (fixed at 8 per cent), plus the credit margin on the loan.

[50] If floating interest rates rise, the customer continues to pay the 8 per cent interest rate, plus the credit margin. If floating interest rates fall, the customer's interest rate remains fixed at 8 per cent plus the credit margin. In that sense, swaps operate like a fixed rate loan.

[51] But there are also a number of differences between swaps and fixed rate loans:

(a) The key difference is that the credit margin component of the interest rate on the underlying loan can also fluctuate. Margins were relatively stable up until 2008. But the global financial crisis meant that the Bank's costs of funds increased, and that was reflected in increased margins towards the end of 2008.

(b) An interest rate swap is a tradable instrument, which means it can be sold and bought, lengthened and shortened. Swaps therefore provide a level of flexibility in the management of interest rate risk which is not available on a fixed rate loan. The cost of that flexibility depends on the market value of the swap at the time, that is, whether it is "in the money" or "out of the money". If the swap is "in the money", the borrower receives a cash benefit. If the swap is "out of the money", the borrower must pay to exit the swap.

(c) Break costs are also calculated differently to the break costs for a fixed rate loan. If the swap is "out of the money" at the time of termination, the break costs can be prohibitively high.

(d) Because the loan agreement and swap transactions are separate, there can be a mismatch between the maturity of the loan, and the maturity of the swaps. That mismatch means that the borrower is exposed if the underlying loan expires prior to the swaps, and is not rolled over on the same terms.

(e) Finally, borrowers who had swap agreements with the Bank were subject to an internal assessment which the Bank referred to as a Market Replacement Risk (MRR). The MRR is a tool used to assess the Bank's exposure to a borrower with swaps. From the borrower's perspective, the MRR can limit the amount of further lending the Bank is prepared to extend. Borrowers with fixed interest rate loans were not subject to a MRR.

The contractual matrix and disclaimer clauses

[52] In 2008, the terms of a swap were agreed between the borrower and Bank over the phone. Both parties became bound at that point in time, although the swap did not become effective until a date specified in the future. In this case, Mr Coomey agreed the terms of the swaps on behalf of Bushline.

[53] The Bank subsequently sent a swaps confirmation to the customer setting out the agreed details of the transaction. The swaps confirmation includes a place for the customer to sign confirming the terms of the swap. A box just above the signature clauses provides as follows:

> 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.

[54] The swap confirmation confirmed that the Terms and Conditions of Institutional Financial Markets Transactions (swap terms) governed the transaction. The front page of the swap terms warns customers of the risks associated with foreign exchange and derivative transactions as follows:

> 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.

[55] Clauses 10.1, 10.2 and 14.2 of the swap terms are relevant to the issues in dispute. Those clauses provide:

> 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.
>
> (emphasis added)

[56] Clause 10.1 comprises both a no-reliance clause, and a limitation of liability clause. I have italicised the latter part of the clause for emphasis.

[57] The advance of $19.46 million was governed by the Bank's standard loan agreement. Clause 5 of that agreement specified the interest rate on the loan as follows:

> 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).

[58] Clause 22 of the $19.46 million loan agreement is also relevant. It provides:

> 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.

[59] Each of the loan agreements between Bushline and the Bank contained clauses similar to clause 22 above.

[60] The clauses in the swap terms, swap confirmation and loan agreement are all examples of basis clauses, no reliance clauses, limitation of liability clauses, or entire agreement clauses. I shall refer to them collectively as disclaimer clauses in this judgment.

Claims and defences

[61] Bushline commenced this proceeding by statement of claim filed on 27 May 2014. Amended statements of claim were filed on 19 November 2015 and 23 September 2016. The latter amendment included the claim relating to the alleged promise to hold margins at 0.70 per cent for five years over all of Bushline's funding. These dates are relevant to Bushline's defences under the Limitation Act 1950.

[62] The fourth amended statement of claim was filed on 10 March 2017, and is the pleading referred to in this judgment unless stated otherwise.

[63] Bushline's fourth amended statement of claim pleads five causes of action: negligence, breach of contract, misrepresentation under the Contractual Remedies Act 1979, breach of the Fair Trading Act and oppression under the CCCFA.

[64] Bushline claims that if the Bank had not breached its legal duties, then it would not have entered into the swaps. Several alternative measures of loss are presented. The primary loss claimed is calculated on the basis that Bushline would not have

entered into a bill rate loan hedged with swaps and would instead have structured their debt on a one-third fixed and two-thirds floating basis for the period of the swaps.

[65] There are five representations which underpin Bushline's claims. Those are:

(a) The *margin* representation: The promise to hold margins at 0.70 per cent for five years on all of Bushline's funding.

(b) The *fixed cost* representation: That swaps operated like a fixed rate loan except with greater flexibility and benefits.

(c) The *transferability* representation: That swaps were transferable and the Bank would not prevent Bushline from refinancing if they desired to do so.

(d) The *monitorin*g representation: That the Bank could and would monitor and/or manage Bushline's swaps on an ongoing basis to ensure Bushline was able to take advantage of the flexibility and benefits, and manage their exposure to interest rate risk.

(e) The *good times and in bad times* representation: That the Bank would be there for Bushline in "good times and in bad".

[66] The Bank denies each of the allegations against it. In addition, it pleads six affirmative defences: voluntary assumption of risk, contributory negligence, the exclusion clause in clause 10.1 of the swap terms, and limitation defences under the Limitation Act 1950 and the Fair Trading Act 1986.

[67] Bushline attempts to meet the Bank's reliance on the disclaimer clauses and limitation periods by claiming that the Bank acted fraudulently and deceitfully. It says the Bank knew that it had made misrepresentations about swaps prior to Bushline signing the $19.46 million loan agreement, and it failed to correct those misrepresentations.

[68] Finally, in the event it is found negligent, the Bank claims against Mr England as a joint tortfeasor. Mr England defends that claim on the basis that the Bank cannot discharge its onus in the absence of a waiver of privilege, the scope of his duty was limited, there was no breach, and even if there was, there is no causal connection between the loss and any alleged breach.

[69] My key factual findings in relation to the representations and fraud allegations follow. But first, I make brief mention of the decision in *Cygnet Farms Ltd v ANZ Bank New Zealand Ltd*.[6]

Cygnet Farms Ltd v ANZ Bank New Zealand Ltd

[70] The claim in *Cygnet* was the first contested case about the ANZ's promotion of interest rate swaps in New Zealand. Like this case, *Cygnet* also involved the promotion of interest rate swaps by the Bank to rural farmers in the Taranaki region.

[71] Palmer J found that the Bank's relationship with Cygnet was sufficiently proximate to establish a duty of care in tort for negligence. His Honour found that the capitalised and bold words in the box on the swap confirmation were sufficient to negative a duty of care to provide reasonable advice, but they were not effective to preclude a duty to provide an accurate explanation and honest replies. That duty was found to have been breached, but the effect of s 6(1)(b) of the Contractual Remedies Act 1979 precluded Cygnet from recovering damages in tort.[7] The remaining causes of action were dismissed.

[72] This case has similarities to *Cygnet,* but also has some important differences:

(a) The alleged fixed cost and monitoring representations are the same, although the content of the alleged representations is not identical.

(b) Mr Esquilant, the Bank's senior market dealer, promoted the swaps in both cases. However, the circumstances in which he did so differ to those in *Cygnet.*

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6 *Cygnet Farms Ltd v ANZ Bank New Zealand Ltd* [2016] NZHC 2838, [2017] 2 NZLR 538.
7 At [17], [188]–[189].

(c) Bushline's claims are broader than the claims in *Cygnet*. The main focus of Bushline's claim is on the alleged promise to hold margins at 0.70 per cent for five years over all of its funding. The claim is not limited to representations about interest rate swaps. Bushline's claims also include allegations that the Bank treated it oppressively when times got tough. There was no oppression claim in *Cygnet*.

(d) Finally, the involvement of Mr Schurr and Mr England as Bushline's trustees and independent advisors is a significant distinguishing feature of this case. As explained further, the involvement of both professionals, and Mr England's advice on the swap terms and the loan agreement in particular, provides the point of departure from *Cygnet* in terms of the proximity necessary to establish a duty of care.

Key factual findings

The margin representation – was there agreement to hold margins at 0.70 per cent for five years over all funding?

[73] Bushline claims that agreement to hold margins at 0.70 per cent for five years over all funding was reached between the Bank and the Coomeys at the meetings on 18 and 19 March 2008. Both Mr Harvey and Mr Simcic attended those meetings on behalf of the Bank.

[74] Those meetings were to discuss the Bank's offer of finance for the Waverley purchase. Mr Coomey had received finance offers from the ASB and the BNZ. He was prepared to take Bushline's business to another bank if the ANZ did not match these offers. Mr Harvey's internal notes from 19 March 2008 record "Coomeys nearly out the door".

[75] After getting proof of the competing offers, Mr Simcic received approval on 19 March 2008 to agree a 0.70 per cent margin. This was communicated to the Coomeys the same day, and was recorded in Mr Harvey's notes from the meeting on 19 March 2008 as follows:

> "Agreed – 70 pts ongoing".

[76] The 0.70 per cent margin was expressly provided for in the $19.46 million loan agreement. There is no dispute that this was the margin agreed. The issue is whether there was agreement to fix that margin for five years, and whether it covered all of Bushline's lending, or just the lending hedged by swaps.

[77] I do not consider there was any representation made, or agreement reached, to hold the margin for five years or to apply it to all of Bushline's lending. The agreement was to *set* the margin at 0.70 per cent, and that was for lending which would be subject to swaps. My reasons for those findings are as follows.

[78] First, the Bank's agreement to set the margin at 0.70 per cent was made in response to competing offers received from BNZ and ASB. Mr Simcic and Mr Harvey had no authority to agree to the 0.70 per cent margin unless they had proof of those competing offers. Those offers did not include a set margin for a five year term. The ASB offer refers to 65 points, but makes no reference to a five year term. Mr Robinson was the rural manager for the ASB in the Taranaki region in 2008. His evidence was that the margin of 0.65 per cent above BKBM was offered to Mr and Mrs Coomey. But, he specifically denies that the margin was to be fixed for five years. His unchallenged evidence is that it was not part of the proposal, and not something offered by the ASB at the time.

[79] Similarly, there is no evidence of a comparable offer being made by the BNZ in 2008. Mr Purvis was the former BNZ head of rural banking at this time and was called to give evidence for the Bank. He confirmed that BNZ would not have offered to fix a margin for five years.

[80] Second, I consider it unlikely that the Bank would have agreed to fix the margin at that level for a five year term. The context of the discussions on 18 and 19 March 2008 was lending for the Waverley farm purchase. Credit approval for that new lending was granted on the condition that written advice was given to the Coomeys outlining the Bank's concerns about the impact on equity given the forecasted cash-flow deficits. That written advice was set out in a letter delivered to the Coomeys on 18 March 2008. The Bank is unlikely to have agreed to fix its margin for a five year

term in those circumstances – particularly when the 0.70 per cent margin agreed was already close to the Bank's cost of funds.

[81] Third, there is no written record of such an important and far reaching term. Although I accept that the commercial landscape was very different in 2008, and business deals may well have been done on a handshake, this was a significant deal for both parties. Mr Harvey made notes of the discussions on both 18 and 19 March 2008. His notes from 19 March 2008 simply record agreement to the 70 point margin on an "ongoing" basis. If there had been agreement to fix the margin for five years, across all of Bushline's lending, then Mr Harvey is likely to have recorded it in his notes.

[82] Fourth, Mr Schurr and Mr England were not made aware of the alleged agreement. It is reasonable to assume that the Coomeys would have mentioned such an important promise to their fellow trustees. At the very least, the Coomeys could have been expected to say something to Mr England when he was advising them on the terms of the $19.46 million loan agreement. The interest rate term in that agreement expressly provided for the margin to be reviewed at any time. That was at odds with an agreement to hold the margin for five years. The fact that neither Mr Schurr, nor Mr England, were made aware of the promise to hold margins for five years suggests that the promise was not made in the first place.

[83] Fifth, Bushline made the claim for the first time in the amended pleading filed in September 2016. Yet, Bushline's margins on its $19.46 million loan were increased in December 2008, and then again in March 2009. It took out a number of loans over the 2008 to 2012 period which were not priced at a 0.70 per cent margin. Bushline's complaint about those increases was not in relation to an agreement to hold margins at 0.70 per cent for five years across all its funding. Rather, the complaint was about margins being increased generally, when the expectation was that swaps related lending would operate like a fixed rate loan.

[84] Sixth, and finally, I consider the discussion around margins was in the context of an interest rate to be hedged by swaps. Although the formal discussion about swaps did not occur until 28 March 2008, it must have been contemplated by all the parties

that Bushline would continue to use swaps to hedge its lending. There was no reason for Bushline to change a strategy which had worked well for it the previous three years. In fact, certainty in relation to interest costs was more important for Bushline than ever before given that the Waverley purchase was going to increase its overall debt to nearly $20 million. In that light, I consider the reference to "ongoing" in Mr Harvey's notes referred to the duration of the associated swaps. That is the interpretation favoured by Mr Simcic, and the one which I consider is most plausible in the circumstances.

[85] I therefore find that there was no agreement to hold margins at 0.70 per cent for five years over all the funding.

The fixed cost representation – was it made and was it misleading?

[86] Bushline claims the Bank made misleading representations about interest rate swaps being like a fixed rate loan at the meeting on 28 March 2008. The representations were said to be made orally and in writing.

[87] There is a conflict in the evidence about whether the swaps presentation was given in 2005, or at the meeting on 28 March 2008. I find that it was given in 2005. The Bank's internal diary suggests that there was a meeting between Mr Esquilant, the Coomeys, and Mr Lawn (the rural manager at the time) on 28 September 2005. I consider it unlikely that the Bank would have allowed swaps to be transacted without the Coomeys having first received the presentation.

[88] A version of the presentation which Mr Esquilant was likely to have given in 2005 was produced in evidence. That presentation included the following representations about interest rate swaps:

(a) "Provide 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) "Are tradable instruments and provide quick entry and exit from the market"

[89] Further representations were made in a table comparing fixed rate loans to interest rate swaps. Those representations from the table which are relevant in this context are:

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 shorten term to take advantage of higher interest rates	No ability to do this	Can shorten

[90] Although there was some variation between the different versions of the presentations, the substance of the above representations remained the same. In particular the same representations were made in the presentation which Mrs Coomey said they received, and which was passed to Mr Nitschke, at the meeting between the parties in January 2009.

[91] Bushline's claim also relied on representations made in a brochure. But the evidence about the brochure was equivocal. Mrs Coomey was not certain that the brochure passed to Mr Nitschke was the same one which she thought had been left at the meeting in 2008. Mr Esquilant said his invariable practice towards the end of 2005 was to leave a brochure, but he could not recall whether one had been left when he met with the Coomeys in September 2005. There was no definitive evidence that the Coomeys had read a brochure, or that the representations in the brochure had been drawn to their attention. In light of that uncertainty in the evidence, I am not persuaded that other written representations set out in a brochure were made to Bushline.

Therefore, I find that the written representations made about interest rate swaps were those set out above.

[92] The next issue is whether those written representations were misleading. I find that they were. That is because they failed to disclose the downsides of a swap compared to a fixed rate loan. Specifically:

(a) There was no disclosure that the credit margin could increase on an underlying loan, unlike a fixed rate loan. Although the credit margin was identified as a separate component in the graphs in the presentation material, there was no disclosure of the fact that they could move. That was a critical difference to the fixed rate loan.

(b) There was no disclosure that break costs were calculated differently to break costs for a fixed rate loan. Break costs were referred to in the presentation. The table comparing interest rate swaps and fixed rate loans made specific reference to break costs being payable for both transactions. But the key point of difference to fixed rate loans was that the costs payable depended on the current market value of the swap at the point of termination. That needed to be highlighted in the comparison of swaps to fixed rate loans.

(c) There was also no disclosure that entering into swaps could impact on future lending decisions due to the MRR. Some versions of the brochure disclosed that a credit limit would need to be agreed between the Bank and the customer. But the key point about the MRR being potentially more restrictive than the credit limit that would apply for a fixed rate loan was not made explicit in the Bank's material.

Mr Esquilant says he would have discussed the MRR with the Coomeys when he met at their place on 28 March 2008. I reject that evidence. None of the other participants at the meeting, including Mr Harvey, recall him discussing the MRR, and it is not recorded in any of the notes taken at this time.

[93] I therefore find that the fixed cost representation was made, and it was misleading for failing to properly disclose the downsides of swap transactions when compared to a fixed rate loan.

The transferability representation – was it made and was it misleading?

[94] Bushline claims that the Bank also made misrepresentations about the transferability of swaps at the meetings on 28 March 2009 and January 2009.[8]

[95] As to the 2008 representations, Mrs Coomey said in her evidence in chief that Mr Esquilant had told them that that swaps could be transferred to another bank. Mr Esquilant denied saying this. On this point, I prefer Mr Esquilant's evidence. The discussion on 28 March 2008 was about swap strategies and the terms of the swaps. The Coomeys had already agreed to remain with the ANZ. It is unlikely that the transferability of swaps was discussed at this time.

[96] As to the 2009 representations, the Coomeys say that another bank manager, Mr Nitschke, told them at a meeting in January 2009 that swaps could not be novated. Mr Nitschke does not recall making the comment. I consider it likely that he did so. He understood that this was Bank policy at the time. However, subsequent to that meeting, the Bank indicated that it would be prepared to entertain a novation request to certain banks. That was passed on to Bushline's accountant, Mr Einarsson, who responded by saying that Bushline did not intend to migrate swaps at the time. To the extent that Bushline maintains a claim that the Bank refused to allow it to transfer its swaps, then such a claim must be dismissed in the face of this evidence.

[97] I find that there were no representations made about transferability in 2008. Any representations made in 2009 were not misleading, and there is no evidence of breach.

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8 This claim was not pursued in respect of the contract cause of action, but was nevertheless referred to in the oppression claim

The monitoring representation – was it misleading and/or breached?

[98] There is no real dispute that the Bank represented that it would provide ongoing advice and management to those customers who had swaps. The Bank's presentation included a slide entitled "what we do" which included the following representation:

> 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

[99] Similarly, one of the letters dated 18 March 2008 contained the following statement:

> 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.

[100] The issue in dispute is whether the Bank lived up to that promise. I consider it did. The evidence shows that Mr Harvey met with the Coomeys on a monthly basis to discuss swap strategies. He passed on swap strategies received from Mr Esquilant prior to these meetings. On other occasions, Mr Esquilant discussed matters directly with Mr Coomey.

[101] Bushline says that the Bank should have advised it to break its swaps any time up to October 2008, when its swaps were "in the money". Mr Esquilant provided some strategies for Bushline in August and October 2008 for lengthening its swaps to try and lower the proposed rates. I am not persuaded that this advice, as opposed to breaking the swaps, was flawed when assessed in the circumstances as they existed at the time.

[102] The Reserve Bank stated in its monetary policy statement issued on 5 June 2008 that the "outlook for economic activity is now weaker than in our previous statement" and that "provided the economy evolves in line with our projection, we are now likely to be in a position to lower the OCR later this year, which is sooner than previously envisaged". But the rate at which interest rates fell after this date was unprecedented and, as Mr Rankin confirmed, could not have been predicted in

advance. It is only with the benefit of hindsight that the prospect of breaking the swaps appears to have been a prudent course.

[103] In summary, I find that the ongoing management representation was made, but it was neither misleading, nor breached, in Bushline's case.

The good times and in bad times representation – was it misleading and/or breached?

[104] There is no dispute that this representation was made. It was set out in one of the letters given to the Coomeys on 18 March 2008.

[105] The Bank did not raise any issue with the nature of such a representation. Rather, it contended that it did, in fact, stand by Bushline in good times and in bad times.

[106] Bushline's claims relating to this representation form the basis of its oppression claim. Whether the representation was misleading and/or breached is therefore addressed in that context.

Did the Bank act fraudulently or deceitfully?

[107] The Bank relies on the disclaimer clauses and limitation periods under the Limitation Act 1950 to defeat Bushline's contract and negligence claims.

[108] Bushline responds by submitting that in April 2008, the Bank knew that it had misrepresented swaps to its rural customers. It says the Bank was under a duty to correct its misrepresentations, and the failure to do so was fraudulent or deceitful.[9] It says that this is sufficient to obviate the effect of the disclaimer clauses,[10] and extend the statutory limitation periods.[11]

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9 Bushline relies on *Jones v Dumbrell* [1981] VR 199 (SC); *Cramaso LLP v Ogilvie-Grant* [2014] UKSC 9, [2014] AC 1093at [31]; and *Amaltal Corporation Ltd v Maruha Corporation* [2007] 1 NZLR 608 (CA) at [47] to establish this duty.

10 For the purpose of preventing the Bank from relying on the disclaimer clauses: see *HIH Casualty and General Insurances Ltd v Chase Manhattan Bank* [2003] UKHL 6, [2003] 1 All ER (Comm) 349 at [16].

11 Limitation Act 1950, s 28(b).

[109] Bushline relies on a series of internal emails from mid April 2008 as evidence of the fraud and deceit. Because this forms a central plank of Bushline's case, and the emails need to be considered in context, I have set out the text of those emails in full.

[110] In an internal email dated 16 April 2008, Mr Young, senior manager for markets at the Bank, wrote:

> My concerns are particularly around the loss of reputation and integrity we have with our clients if we adjust rates.
>
> *The IRRM have told clients that they can treat their budget 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?*
>
> If you are planning on lifting margins across the board on bill rate loans are you also adjusting fixed rate term loans as well? It would appear we are penalising clients for using the right products, and I believe this would cause significant client flight risk in future years, and also the RMs may struggle on this and simply move towards FRTLs to avoid the threat of losing face with their clients.
>
> (emphasis added)

[111] In another email sent on 21 April 2008, Mr Young wrote:

> This morning I've fielded calls that I feel you should be made aware of in respect to concerns being raised from some RMs across some of the regions, in particular raised in Canterbury/Central/BOP.
>
> Its in respect of the 12 month bill facilities. *They are worried that we "the bank" will move credit margins adversely against their clients after 12 months and hence RMs are suggesting to just deal fixed rate loans to give their clients a "guaranteed fixed rate"*. This is of obvious concern to my team as well. Impacting on behaviours with RMs and potentially disadvantage cleints [sic] longer term who opt to fix without the added flexibility and our on going advice not to mention our rates business going forward.
>
> *Is this just an education issue with lack of communication hitting the RMs at this stage?* How do you want my team to respond given they are dealing with the front line and are much more aware of the issues facing the bank in terms of raising capital?
>
> (emphasis added)

[112] On 21 April 2008, Mr Haden, customer strategy manager, responded in an email of the same date:

> I have sent you a paper to the Rural I have sent to branches to help understand the issues.

In regard to your comments below:

- *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.*

- One year Bill in conjunction with a swap should be cheaper than longer fixed, but there is a risk clients in this that will have to manage. This needs to be considered part of their risk management strategy. Clients can take longer bill, but at a cost. *We still can't commit on CM*

- *What we need from Dealers is to engage with Rural staff to get the message out that Bill loan CMs can move up as well as down. Practice in this has not been appropriate, so there is some catch-up to do.*

- Strategy includes some upward movement of existing Bill Rates. We need to get Dealers and branch staff working together on this.

- *In regard to customer and product selection, what we have to do is give clients accurate information to base their decisions on. There is a risk that CMs will move, and customers need to balance this against other factors.*

- Outcomes for business for both Rural and Markets will change, but the risks to revenue, and reputation are the primary issue

We can go through this in some detail on Wednesday.

(emphasis added)

[113] The above email refers to a strategy paper which was then distributed to rural branches. That strategy paper refers to the risk of client demands changing and the importance that clients understand that they run that risk. Under a heading "Bill and Swap Understanding", the strategy paper includes the following:

Bill and Swap Understanding

Separate, independent products

It appears there is still confusion about this. It is critical to realise that:

- Swaps are derivative products

- Bill loans are quite separate funding lines with a base rate set on the BKBM rate

- The two operate quite independently, but dealers are required to ensure a Bill loan exists, for an amount equal to or greater than the swap

- Swaps do not have a client margin
- Bill loans do 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 a [sic] 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.*
- Swap pricing is the responsibility of Markets Dealers
- Bill pricing is the responsibility of Rural Banking
- Bills are able to be repriced at their billing intervals (R201 30-90D, R202 - monthly)

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.

(emphasis added)

[114] It is clear from these emails that some within the Bank were aware that swaps had been aligned to fixed rate loans, and that not enough had been done to make it clear that margins could rise at any time on the underlying loan agreement. The concern was that increasing margins could lead to customer flight. And, it could also lead to rural managers recommending fixed term loans rather than swaps which would have implications for the sale of swaps in the future.

[115] However, the emails fall short of evidencing a realisation that misrepresentations about swaps had been made *to Bushline*. The concerns expressed about the promotion of swaps are general in nature and across the board. There is no explicit recognition in these emails of misrepresentations being made to Bushline. That is important because exactly what was said about swaps, and the circumstances in which they were promoted, varied from customer to customer, as the differences between this case and *Cygnet* demonstrates.

[116] In my view, something more than a general awareness would be required to trigger a duty to correct a misrepresentation (assuming such a duty arose in the first place). Something more would also be required to constitute fraud within the meaning

of s 28(b) of the Limitation Act. Knowledge of the essential facts constituting a cause of action is a necessary ingredient of the fraud referred to in that section.[12]

[117] Furthermore, this email correspondence does not show any attempt by the Bank to conceal the fact that it had made misrepresentations about swaps. The Bank's response to the concerns expressed in the emails was to circulate a strategy paper to rural managers clarifying the position. That is not the behaviour of an institution trying to cover things up. And, there is no suggestion in any of these emails that Bank staff were deliberately keeping Bushline in the dark so as to induce it to enter into a $19.46 million loan agreement hedged by swaps.

[118] Bushline's claim is also difficult to sustain in the face of the express terms of the $19.46 million loan agreement. The fact that the margin on a swap related loan could be increased was apparent from the interest rate clause in that agreement. Clause 5 stipulated that the margin was "reviewable at any time". Bushline's trustees received legal advice on that clause. To the extent that they were operating under a false impression that margins could not move in swaps related lending, then such an impression must have been dispelled on receipt of this loan agreement.

[119] Therefore, I find that the Bank 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.

Negligence

[120] Bushline's fourth amended statement of claim pleads the following duty of care:

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12 *Inca Ltd v Autoscript (New Zealand) Ltd* [1979] 2 NZLR 700 (SC) at 711; *Matai Industries Ltd v Jensen* [1989] 1 NZLR 525 (HC) at 536.

> The ANZ had a duty to competently and fully advise the Trusts (on an ongoing basis) as to the suitability of SWAPs, and in particular, the risks of SWAPs and to advise on other financing options and not to mislead the Trusts (the Duty of Care)

[121] In closing arguments, Bushline submitted that this duty comprised two distinct duties of care:

(a) A duty to explain the downsides of swaps; and

(b) A duty to provide ongoing competent advice.

[122] All counsel referred to the former as a duty not to mislead (that is, the duty imposed in *Hedley Byrne)*,[13] and the latter as a duty to advise. They are the same two duties considered in *Cygnet*.

[123] Ten separate breaches of the duty of care are pleaded in the fourth amended statement of claim. However, by the time of closing arguments, those had been whittled down to just two:

(a) The duty not to mislead had been breached by failing to inform Bushline of the downsides of swaps. Those downsides included:

  (i) that a margin could increase;

  (ii) an MRR could affect security values;

  (iii) break fees were calculated differently; and

  (iv) that there could be a mismatch between the term of the loan and the term of the swap.

(b) The duty to advise had been breached by the failure to advise Bushline to exit the swaps when they were "in the money" and would therefore have avoided break fees.

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[13] *Hedley Byrne & Co Ltd v Heller* [1964] AC 465 (HL).

Did the Bank owe a duty of care?

[124] In opening Bushline's case, Mr Branch sought to characterise this cause of action as being one of "pure negligence" as opposed to negligent misstatement. The apparent purpose in drawing that distinction was to circumvent the effect of s 6(1)(b) of the Contractual Remedies Act 1979 which, Mr Branch submitted, only applied to the latter and not to the former.[14]

[125] The description of the ongoing management aspect of the claim varied, but overall I consider Bushline's claim to most closely resemble a claim of negligent misstatement. It is essentially a claim that the Bank was careless in what it said about credit margins, interest rate swaps, and ongoing management, and that carelessness has caused it to suffer economic loss. But, in any event, any difference between the two causes of action does not impact on the duty of care analysis. And, as will become apparent from what follows, I have not found it necessary to address s 6 (1)(b) in this judgment.

[126] In *Invercargill City Council v Southland Indoor Leisure Centre Charitable Trust*, the Court of Appeal framed the elements of negligent misstatement as follows:[15]

> (a) Proximity: the parties must be in a relationship of proximity, or a "special relationship". This requires that the adviser knew for what purpose the advice was wanted, knew the advice would go to the plaintiff or an ascertainable class that included the plaintiff, and knew the advice would likely be acted on without independent inquiry. Knowledge may be imputed, the court having found that the adviser ought in the circumstances to have known or foreseen what would likely happen.
>
> (b) Policy: wider policy reasons must not exclude a duty of care in the circumstances. For example, a court may exclude a duty for risk of indeterminacy, or for conflict with some other duty or the public interest.

14 Section 6(1)(b) of the Contractual Remedies Act 1979 provided that if a party to a contract has been induced to enter into it by a misrepresentation, "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."

15 *Invercargill City Council v Southland Indoor Leisure Centre Charitable Trust* [2017] NZCA 68, [2017] 2 NZLR 650 at [85].

(c) The ultimate question: whether, having regard to (a) and (b), a duty is fair, just and reasonable.

(d) Specific reliance and loss: the plaintiff actually relied on the advice and suffered loss in consequence.

(footnotes omitted)

[127] The principles summarised by Miller J were derived from recent Supreme Court cases, and the House of Lords decision in *Caparo Industries plc v Dickman*.[16] As Miller J observed, reliance is relevant to whether there is a duty of care (the defendant's expectation of reliance), and to the causation question (whether there is actual reliance).

[128] Applying these principles to the case at hand, the first question concerns proximity. The fact that losses could be sustained as a result of interest rate swap transactions is not seriously disputed. (However, there is a dispute about whether all the losses claimed by Bushline were reasonably foreseeable. I consider that dispute is best dealt with as part of any causation and damages assessment rather than as part of the duty of care analysis).

[129] The banker – customer relationship does not automatically give rise to a duty of care. But the interposition of the rural manager, "the trusted advisor", does bring the parties closer together in this case. The rural managers knew Bushline's business and were involved in the funding decisions which Bushline made as a part of it. In this case, Mr Harvey sat down with the Coomeys around their kitchen table to prepare a budget for the Waverley purchase, and he walked over the farm with them prior to the purchase being finalised.

[130] In terms of the relative positions between the parties, the Bank was clearly in a dominant position. It knew and understood the product it was marketing to rural farmers, and the terms of the contracts were in standard form and non-negotiable. However, the degree of Bushline's vulnerability was not the same as in *Cygnet*. In this case, Bushline had two professionals as trustees – an accountant and a lawyer.

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16 *Carter Holt Harvey Ltd v Minister of Education* [2016] NZSC 95, [2017] 1 NZLR 78; *North Shore City Council v Attorney-General* [The Grange] [2012] NZSC 49, [2012] 3 NZLR 341 at [147]–[161]; *Caparo Industries plc v Dickman* [1990] 2 AC 605 (HL).

The very purpose in appointing those trustees was to have professional expertise available to the Coomeys in running their significant business enterprise.

[131] That is not to say that Mr England and Mr Schurr's involvement completely redressed the knowledge imbalance between the parties regarding interest rate swaps. Mr England did not possess any particular expertise or knowledge about swaps, and Mr Schurr candidly admitted that he did not understand swaps and he told the Bank as much.

[132] But there was a source of swap expertise available to Mr Schurr, and therefore to the other Bushline trustees. Mr Einarsson was employed at Mr Schurr's accountancy firm from 2006, and was at the firm in 2008. Mr Einarsson was a self-proclaimed "swaps man", who had previously worked in the banking industry and had some insight into the derivatives markets. Mr Einarsson would have been well placed to evaluate the risks associated with swaps – at least in respect of margins and break costs. I accept, however, that he may not have known about the MRR. That was an internal Bank assessment which was not directly connected with the operation of swaps. Therefore, to that extent, there remained a knowledge imbalance.

[133] Another ingredient of the proximity analysis concerns the expectation of independent inquiry. That ingredient arises out of Lord Oliver's dictum in *Caparo Industries PLC v Dickman*.[17] It has been adopted by the Supreme Court in *North City Council v Attorney-General [The Grange]*,[18] and *Carter Holt Harvey Ltd v Ministry of Education*.[19] In the passage from *Invercargill City Council v Southland Indoor Leisure Centre Charitable Trust* set out above, Miller J framed this aspect of the test as whether the adviser "knew the advice would likely be acted on without independent inquiry".

[134] In *Williams v Hacking*, Associate Judge Bell observed that there were difficulties with Lord Oliver's dictum and no guidance as to the specific content of the

[17] *Caparo Industries PLC v Dickman* [1990] 2 AC 605 (HL) at 638.
[18] *North City Council v Attorney-General [The Grange]* [2012] NZSC 49, [2012] 3 NZLR 341 at 109.
[19] *Carter Holt Harvey Ltd v Ministry of Education* [2016] NZSC 95, [2017] 1 NZLR 78 at [80].

independent inquiry requirement.[20] I do not consider those difficulties arise here. This is not a case where there is any real doubt about whether the Bank could have reasonably expected Bushline to make its own inquiries, and relied on its own independent advice. The Bank had a very clear and real expectation that Bushline would do so which was made explicit in the swap and loan agreements.

[135] In *Cygnet*, Palmer J found that the clause in the swaps confirmation was enough to attenuate the Bank's duty of care in relation to the duty to advise.[21] That finding applies equally in this case. The capitalised and bold words contained in the box just above the signature clause state that each party agrees that it has not relied on any advice from the other party.[22]

[136] But, the concerns which led Palmer J to finding that clause 10.1 of the swap terms found in the "22 closely typed pages of legalese" was not sufficient to obviate a duty of care do not apply in this case.[23] That is because the Bank ensured that Bushline received legal advice on the swap terms, including clause 10.1, by instructing Mr England to provide that advice. It may be inferred from the execution of a solicitor's certificate, that Mr England did in fact do just that. That legal advice means clause 10.1 is also effective in this case.

[137] Clause 10.1 provides that the customer enters into the transaction "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". It also makes clear that the Bank would not be liable for Bushline's loss. Clause 22 (d) of the $19.46 million loan agreement is to the same effect. That clause expressly provides that the Customer has not received or relied on any advice given by or on behalf of the Bank. Bushline received legal advice on that agreement including that clause also. The Bank's expectations regarding reliance on statements made prior to the swaps and loan agreements could not have been made clearer.

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20 *Williams v Hacking* [2017] NZHC 799 at [54]–[57].

21 *Cygnet Farms Ltd v ANZ Bank New Zealand Ltd* [2016] NZHC 2838, [2017] 2 NZLR 538 at [144]-[146].

22 *Carter Holt Harvey Ltd v Ministry of Education* [2016] NZSC 95, [2017] 1 NZLR 78 at [25]–[28].

23 At [143].

[138] The entire agreement clauses in both the loan and swap agreements add weight to that assessment. Clause 14.2 of the swap terms provides that the agreement contains all the terms and representations made by the parties. Clause 22 of the loan agreement provides that no representation, warranty or undertaking has been made by the Bank in relation to the loan "which is not expressly set out in this agreement". The parties therefore agreed that their liability would be determined in accordance with the terms of the respective agreements. Those terms allocated the risk of the transaction between the parties and the disclaimer clauses made it clear that the Bank did not assume responsibility for any other risk beyond that set out in the agreements.

[139] In my view, the disclaimer clauses, and the fact that Bushline received legal advice on them, disentangled any last vestiges of proximity between the parties. Bushline proceeded with the transaction at its own risk and in the knowledge that the Bank did not accept liability for representations or statements which were not recorded in the agreements. It follows that I do not consider there to be sufficient proximity between the parties to establish a *prima facie* duty of care.

[140] My findings regarding proximity mean that the second question concerning policy considerations does not need to be considered in any detail. In any event, neither party made submissions directed to policy factors. Palmer J canvassed them in *Cygnet*.[24] I would add the effect of the Contractual Remedies Act 1979 (now replaced by the Contract and Commercial Law Act 2017) and the Fair Trading Act 1986 to that enquiry. Whether there was any reason why the duties in tort and the duties in contract should not be co-extensive in this case would also be relevant to the policy enquiry. Ultimately, however, there is nothing in the policy assessment which would lead me to find a duty of care being found in this case.

[141] Finally, in terms of the third and final question, I consider it is fair, just and reasonable to find that the Bank did not owe a duty of care to Bushline in this case. The parties agreed the basis upon which they were to conduct their business. Bushline received legal advice on those agreements which made it clear that they entered into the loan and swaps transactions in reliance on their own independent inquiries. There

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24 At [152]-[154].

is no reason to find that the Bank assumed any greater duty than that prescribed by contract in this case.

[142] I therefore find that the Bank did not owe a duty of care to Bushline.

Was there a breach causing loss?

[143] That finding is sufficient to dispose of the negligence cause of action. However, for completeness, I record my factual findings on the other elements of this cause of action, albeit in very brief terms.

[144] If I had found that the Bank owed a duty of care, I would have found it breached that duty by failing to disclose that margins could increase; by failing to disclose the MMR; and by failing to disclose the different basis on which break costs were calculated.

[145] Despite the breaches, I would have found that Bushline could not satisfy the reliance and causation ingredients of the causes of action. I would have found that Bushline's independent legal advice prior to entering into the swaps and loan agreement broke the causative effect of any reliance Bushline placed on the Bank's misrepresentations. In particular, Mr England's advice on the $19.46 million loan agreement, which specifically referred to the margin being "reviewable at any time" meant that the reliance element of the claim in relation to this representation could not be established.

[146] Similarly, I would have found that it would have been obvious to Bushline that there was a mismatch between the term of the loan and the term of the swaps. The swap maturities were one, two, and three years, as against a loan term of 12 months. Those swap maturities were specifically selected by Mr Coomey. Bushline could not therefore claim that it had relied on the failure to advise it of the mismatch in entering into the swaps.

[147] In addition, I would have made adverse causation findings in relation to Bushline's damages claim. In particular, I would not have accepted Bushline's counterfactual that it would have fixed one-third of their lending, and floated the

remaining two-thirds. Given its debt position of $19.46 million, and the forecasted cashflow shortfalls, Bushline needed certainty in terms of the interest rates payable on its loan. In addition, the predominant form of lending to the rural sector at this time was on a fixed rate basis. I do not consider Bushline would have opted for a floating rate loan in the circumstances.

[148] Finally, these findings mean it is unnecessary for me to consider the Bank's defences under the Limitation Act 1950. However my provisional view is that this case is not on all fours with *Davys Burton v Thom*.[25] I would have been hesitant to find the claims statute barred in those circumstances.

[149] In summary, I have found that the Bank did not owe a duty of care. But even if I had found that there was a duty, the claim would have faltered on other grounds. The negligence cause of action is dismissed.

Breach of contract

[150] Bushline claims that there was a partly written and partly oral contract, or alternatively a collateral contract with the Bank. Five separate terms of the alleged contract are pleaded in the fourth statement of claim which were distilled into three main terms during closing submissions:

(a) That the margin would be fixed at 0.70 per cent for five years on all of Bushline's funding.

(b) That the Bank would provide ongoing management and full advice.

(c) That the Bank would stand by Bushline in good times and bad.

[151] A collateral contract was pleaded in *Cygnet* also. The law regarding collateral contracts is not controversial and was summarised by Palmer J as follows:

> [115] In some circumstances, courts can find there to be a collateral contract - a contract consideration for which is the making of another contract. The two contracts are independent of, but related to, each other. The leading text on

[25] *Davys Burton v Thom* [2008] NZSC 65, [2009] 1 NZLR 437.

> contract law characterises collateral contracts in these terms: "the device may be used to enforce a promise given prior to the main contract and but for which this main contract would not have been made". The attraction to a plaintiff of a collateral contract being found to exist is potential escape from clauses that exclude or limit liability in the main contract.
>
> (footnote omitted)

[152] I do not consider the representations constituted terms of a collateral contract in this case. They are inconsistent with the primary written terms of the swaps and loan agreements. In particular, the alleged promise that margins would be held at 0.70 per cent is inconsistent with clause 5 of the loan agreement which specifically provides that margins are reviewable at any time. Mr England certified that he had given advice on this agreement. It is inconceivable that advice was not given on clause 5, which, in the circumstances of a $19.46 million loan was of central importance to both parties.

[153] In the same vein, I consider it implausible to suggest that the Bank would have agreed an oral side deal on a loan agreement for $19.46 million. The terms and conditions upon which that loan was advanced were set out in a carefully drawn and comprehensive agreement. The Bank required Bushline's trustees to receive legal advice on that agreement. That conduct is inconsistent with an oral agreement to fix the interest rate on a different basis.

[154] The other alleged terms of the collateral contract are also inconsistent with the entire agreement clauses of both the swaps terms and the loan agreement. Bushline submits that these clauses should not preclude the Court from inquiring into whether the representations constituted a term of the contract because it is not "fair and reasonable" that they have that effect within the meaning of s 4 of the Contractual Remedies Act 1979.[26]

[155] I have already found that that there was no fraud or deceit which would prevent the Bank from relying on these clauses. I deal (briefly) with Bushline's other arguments as to whether the terms should be conclusive.

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[26] See *PAE (New Zealand) Ltd v Brosnahan* (2009) 10 TCLR 626 (CA) at [15] for the principles relevant to s 4 Contractual Remedies Act 1979.

[156] Bushline claims that the fact that the swap confirmations were not signed by all four trustees means that the disclaimer clause in the bold box cannot apply. I do not agree. The IFMA was signed by all four trustees. The word "severally" has been written in beside the signatures. That is sufficient evidence that the signatures of all four trustees were not required on the swap confirmations.

[157] The fact that Bushline's trustees did not receive legal advice on the swap terms until after the first swap was placed does not advance Bushline's case. The first swap is not in issue in this proceeding. It is the 2008 swaps which are at the heart of the claim. By the time the 2008 swaps were agreed, Mr England had given his advice on the swap terms.

[158] The fact that the swap confirmation was not signed until after the swap was placed on 8 April 2008 does not provide a reason not to enforce the bold and capitalised words in the box. The swap terms signed earlier made it plain that they would govern all future swap transactions. And, by the time of the 2008 swaps, Mr Coomey had signed a swap confirmation including the bold box on at least three separate occasions.

[159] Bushline also argued that the disclaimer clauses in the swap terms do not apply, because this claim is not about the swaps component of the transaction, but only concerns the loan component. That argument is strained. Although the margin representation only concerns the loan, the fixed cost, transferability, and ongoing management, representations are squarely about swaps. In any respect, both the loan agreement and the swaps agreement include entire agreement clauses which are at odds with a representation forming a separate term of a collateral contract.

[160] Finally, for the reasons set out in relation to the negligence claim, I consider Mr Schurr and Mr England's involvement in this case also makes it fair and reasonable that the clauses are treated as conclusive. Their role as independent trustees and advisers to Bushline, coupled with Mr England's legal advice on both the loan and swap agreements, redresses any imbalance between the parties. That includes any imbalance in negotiating power, and knowledge and expertise about swaps.

[161] The parties agreed on how the risk associated with a $19.46 million loan, and the associated swaps, was to be allocated. There is no reason in this case not to respect that agreement. The breach of contract cause of action is dismissed.

Contractual Remedies Act 1979

[162] Bushline claims it was induced it to enter into the April 2008 swaps by the five pleaded representations. It claims relief under s 6 of the Contractual Remedies Act 1979.

[163] I consider the exclusion of liability in clause 10.1 operates to defeat Bushline's claim in this case. As Palmer J held in *Cygnet*, that clause excludes contractual liability for misrepresentations.[27] It is effective irrespective of whether it is "fair and reasonable" to uphold the clause under s 4 of the Contractual Remedies Act 1979.

[164] In addition, I consider Bushline is unable to establish an essential ingredient of the cause of action, being reliance and inducement. Not only did Bushline have the opportunity to seek separate legal advice on the transactions, it actually received that legal advice on both the swap terms and the loan agreement. The terms of both agreements made it clear that the Bank understood that Bushline was capable of understanding the transaction, and was relying on its own independent enquiry in proceeding with both transactions. If, contrary to these clauses, Bushline went ahead with the transaction still placing reliance on the Bank's representations, then it did so at its own risk.

[165] In any respect, as Bushline accepts, its claims are time barred by s 4 of the Limitation Act 1950. Bushline entered the swaps and loan agreement in April 2008 which is more than six years before the claim was filed in May 2014. For the reasons set out earlier, the time period is not postponed by the Bank's alleged deceit.

[166] The Contractual Remedies Act 1979 cause of action is dismissed.

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[27] *Cygnet Farms Ltd v ANZ Bank New Zealand Ltd* [2016] NZHC 2838, [2017] 2 NZLR 538 at [112].

Fair Trading Act 1986

[167] Bushline claims that the representations were misleading and deceptive in breach of s 9 of the Fair Trading Act 1986. In addition it pleads that the Bank failed to disclose the following:

> (a) By entering into the swaps the Trusts would be subject to a MRR which could affect the Trusts' risk profile and margins charged by ANZ;
>
> (b) The break costs under a swap were not calculated on the same basis as the early repayment fee under a fixed rate loan.

[168] The Bank claims that this cause of action is time barred by s 43A of the Fair Trading Act 1986. That section provides that a person may apply for an order under s 43 at any time within three years after the date on which the loss or damage had already occurred or was likely to occur. The principles relevant to s 43A set out in the Supreme Court's judgment in *Commerce Commission v Carter Holt Harvey*,[28] were summarised in *Cygnet* as follows:[29]

> (a) "time starts running when the applicant discovers or ought to have discovered that loss or damage has already occurred, or is likely to occur in the future".
>
> (b) discovering loss means being aware of it;
>
> (c) being likely to occur means loss is more probable than not; and
>
> (d) the loss that must be discovered is more than minimal loss.

[169] Bushline argues that time did not start to run until it discovered that the Bank's conduct amounted to a contravention of the Fair Trading Act, which was not until the Commerce Commission began investigating the Bank's conduct. It also argues that it could not have reasonably discovered the contravention of the Act, because it did not know of the Bank's deceptive conduct, being the failure to correct misrepresentations prior to the swaps and loans being agreed.

[170] I have already found that the Bank did not act deceitfully or fraudulently, which disposes of the second of Bushline's submissions. The first submission was

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28 *Commerce Commission v Carter Holt Harvey Ltd* [2009] NZSC 120, [2010] 1 NZLR 379.
29 At [176].

considered and dismissed in *Cygnet*.[30] The clock started ticking when Bushline had knowledge that the statements made were incorrect, rather than when they knew that those false statements amounted to a contravention of the Act.[31]

[171] Bushline's Fair Trading Act 1986 cause of action was pleaded in the original statement of claim filed on 27 May 2014. If there was knowledge or awareness that damage had already occurred or was likely to occur in the future arising out of the misrepresentations or non-disclosure conduct prior to 27 May 2011, then the claims will be statute barred.

[172] The only representation which I have found was either made or was misleading in this case is the fixed cost representation.[32] In relation to that representation, Bushline knew by at least 26 May 2011:

(a) That its margin was not fixed, whether at 0.70 per cent or at all. The Coomeys had been told that their margins would go up in August and October 2008. Bushline's margin on its swap related lending was increased in December 2008, and then again in March 2009.

(b) That break fees were calculated differently. By January 2009, the Coomeys were receiving advice from their accountant, Mr Einarsson. There was a meeting on 29 January 2009 where the issues around the calculation of break fees were discussed. There were a number of emails between Mr Einarsson and the Bank in February 2009 regarding the transferability of the swaps, and the cost of breaking the swaps at this time.

[173] The claims in respect of these representations, and the non-disclosure conduct concerning the break costs set out in (b), are therefore statute barred.

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30 At [179] and [180].
31 *Houghton v Saunders* [Lifting Stay] (2011) 20 PRNZ 509 (HC).
32 For the reasons set out in the oppression section which follows, I have not found the "good times and in bad times" representation to be misleading and/or breached in this case.

[174] The only fact which Bushline did not know about was the Bank's MRR. Mrs Coomey's evidence is that they did not find out about the MRR until after proceedings were issued. I accept that evidence. That claim is not statute barred.

[175] I have already found that non-disclosure of the MRR made the statement that swaps were like a fixed rate loan misleading and deceptive in breach of s 9. But Bushline's pleaded claim under the Fair Trading Act 1986 does not just rely on the fixed rate representation. Non-disclosure of the MRR is pleaded as a separate and stand-alone category of misleading and deceptive conduct unconnected to the representations comparing swaps with fixed rate loans.

[176] Neither party addressed whether general non-disclosure, unconnected to the fixed costs representation, was misleading and deceptive in breach of s 9. Given my findings as to causation below, it is unnecessary to determine the issue to dispose of Bushline's case. Because it may have significance for other cases, I decline to do so in the absence of legal argument. The rest of the analysis of this cause of action proceeds on the assumption that the stand alone non-disclosure of the MRR constituted a breach of s 9.

[177] In *Red Eagle v Ellis*,[33] the Supreme Court said that if the Court decides there has been misleading and deceptive conduct, it must then go on to consider whether the claimant was actually misled or deceived by the conduct, and if so, whether the breach was an effective cause of the claimant's loss or damage.[34]

[178] The disclaimer clauses are relevant to the causation enquiry under s 43. The relevant principles arising out of *PAE (New Zealand) Ltd v Brosnahan*[35] were recently summarised by the Court of Appeal in *Fonterra v McIntyre* as follows:[36]

> [178] In *PAE (New Zealand) Ltd v Brosnahan* this Court accepted as settled law the proposition that a party cannot contract out of the s 9 prohibition on misleading or deceptive conduct. The policy justification is that the FTA is designed to protect the consuming public. However, this Court found that

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33 *Red Eagle v Ellis* [2010] NZSC 20, [2010] 2 NZLR 492.

34 See *Poplawski v Pryde* [2013] NZHC 2042 at [47]; *Poplawski v Pryde* [2013] NZCA 229, (2013) 14 NZCPR 528 at [44]–[45].

35 *PAE (New Zealand) Ltd v Brosnahan* (2009) 10 TCLR 626 (CA).

36 *Fonterra Co-operative Group Ltd v McIntyre and Williamson Partnership* [2016] NZCA 538, (2016) 14 TCLR 435.

> while the policy factors were a starting point, the consumer protection purpose was not necessarily an absolute or decisive consideration. Supporting this point, the following passages from this Court's earlier decision in *David v TFAC Ltd* were cited:
>
>> "[63] While such mechanisms are not determinative, it has been accepted that they are relevant to the s 9 analysis. For example, in *Kewside Pty Ltd v Warman International Ltd* (1990) ATPR (Digest) 46-059, French J said (at 53,222):
>>
>>> 'A disclaimer or exclusion clause will affect liability for misleading or deceptive conduct only if it deprives the conduct of that quality or breaks the causal connection between conduct and loss. Whether it has that effect in a given case is a question of evidence and not a question of law.
>>
>> "See also *Butcher v Lachlan Elder Realty Pty Ltd* (2004) 218 CLR 592 (HCA) at [50]—[51]. But a disclaimer or similar clause may be overwhelmed by oral assurances or other conduct (see *Phyllis Gale Ltd v Ellicott* (1997) 8 TCLR 57 (HC) at 65—66 and *Cornfields [Ltd v Gourmet Burger Co Ltd* (2000) 9 TCLR 698 (HC)] at [41])."

[179] As the above passages show, the question of the effect of the disclaimer clauses on relief is a matter of fact. It was not necessary for the Court of Appeal to consider the issue in that case as the trial judge had left the effect of the entire agreement clauses to be determined as part of any later enquiry into reliance and damages.

[180] For the reasons I have already canvassed under the negligence and misrepresentation causes of action, I consider the disclaimer clauses, and Mr England's advice on them, break the chain of causation insofar as reliance on the representations. The terms of the agreements made it clear that Bushline was not relying on anything the Bank said about swaps being like a fixed rate loan, and that it agreed to the transaction in reliance on its own independent enquiries.

[181] But that assessment does not sit easily with the non-disclosure of the MRR as a stand-alone category of misleading and deceptive conduct. It is one thing to agree that you have not relied on anything the Bank *has said* ("swaps are like fixed rate loans"); but quite another to agree that you have not relied on anything the Bank *has not said*. In my view, the disclaimer clauses would not deprive the non-disclosure of

the MRR of its misleading and deceptive conduct (assuming that it is proved to be misleading), or break the chain of causation, in those circumstances.

[182] Ultimately, however, the causation claim in this case fails on the evidence. To the extent there was a dispute between the expert evidence of Mr Dillon (for Bushline) and Mr Glubb (for the Bank) on the effect of the MRR, then I prefer the evidence of Mr Glubb. His opinion was based on an analysis of what would have happened had the MRR been excluded from any assessment of the Bank's exposure to Bushline. In his expert opinion, Bushline would still have been in serious financial difficulty had the MRR not been in place. And, the Bank would have taken the same action to protect its position in light of the rapid deterioration in Bushline's business after 2009. Mr Glubb's evidence was not challenged in cross-examination. In the face of that evidence, I am not prepared to find that the non-disclosure of the MRR was causative of any loss, and I decline to grant relief under s 43 of the Fair Trading Act 1986.

Oppression – CCCFA

[183] Bushline claims that the Bank exercised its rights and powers in an oppressive manner contrary to s 120(b) of the CCCFA. It seeks an award of damages under s 127 of that Act.

[184] The particulars of the alleged oppressive conduct overlap to a substantial extent with the representations and non-disclosure conduct the subject of the other causes of action. My earlier findings in relation to the margin representation, the transferability representation, the fraud and deceit claims, and the non-disclosure of the MRR respond to those specific claims of oppression and are not considered further in this part of the judgment.

[185] Bushline also claims that Bank staff made various threats, forced the sale of property, and acted in a way designed to force the financial collapse of Bushline's business activities. The substance of the oppression claim is that the Bank breached a promise to be there in good times and in bad times.

[186] Section 120(1)(b) of the CCCFA permits a Court to reopen a credit contract if a party has exercised its rights or powers in an oppressive manner.[37] Oppressive is defined in s 118 of the CCCFA as follows:

> **118 Meaning of oppressive**
>
> In this Act, oppressive means oppressive, harsh, unjustly burdensome, unconscionable, or in breach of reasonable standards of commercial practice.

[187] In *GE Custodians v Bartle*, the Supreme Court considered the meaning of oppressive and said:[38]

> … 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.

[188] Section 124 sets out guidelines for deciding whether to reopen a credit contract, or an arrangement. Those guidelines include the circumstances relating to the making of the arrangement or the exercise of any right or power conferred by the arrangement. As Mr Branch submits, oppression needs to be assessed in context.

[189] Relevant context in this case is the fact that the Waverley purchase was a real risk for Bushline. The purchase price was 100 per cent financed on budgets which forecasted a three year deficit. The lending for this purchase increased its overall debt to nearly $19.5 million. Both the Bank and the Coomeys were well aware of this risk. The Bank made sure of it by pointing it out in one of the letters which accompanied the loan offer:

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[37] Section 7 of the CCCFA defines a credit contract to mean a contract under which credit is or may be provided, and a transaction that is in substance a credit contract, even if the contracts or arrangements do not themselves constitute a credit contract.

[38] *GE Custodians v Bartle* [2010] NZSC 146, [2011] 2 NZLR 31 at [46].

> 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.

[190] As Mr Hunter submitted in closing: "Bushline needed fair winds for Waverley to work out, but that did not happen; it hit heavy weather in every sense of the word". That heavy weather included the global financial crisis, high empty rates for Bushline's herd, a drop in the Fonterra pay out through the first season, and a wet spring in the 2009/2010 season. Those external factors clearly had an impact on Bushline's financial condition and are part of the background circumstances in which the Bank's conduct is to be considered.

[191] A number of "internal" factors also had an impact. These were every day decisions made by the Coomeys in the management of their farming business. For example, the decision to amalgamate two of the Kaponga farms resulted in cows getting sore feet; and the decision to spend more on extra feed came with no discernible return.

[192] In addition, the budgets prepared to obtain funding were overly optimistic, and Bushline failed to meet its predicted milking targets. Although Mr Harvey assisted in preparing those budgets, Mr and Mrs Coomey must take responsibility for the inputs. It was, after all, their business.

[193] With that context in mind, I turn to the specific allegations which found the oppression claim. The overarching allegation is that the Bank did not stick by Bushline through the good times and bad times. That representation was made in one of the letters dated 18 March 2008. In the highly competitive environment that existed at the time, it was undoubtedly a promise designed to ensure Bushline remained with the Bank, and did not transfer its business to a competitor.

[194] To the extent that this promise is relied on to say that the Bank should have continued to fund Bushline no matter what the circumstances, then it is rejected. The

specific obligations being accepted by the Bank were set out in the loan and swap terms on which Bushline received legal advice. Those specific obligations must take precedence over statements in a covering letter which, if not actual puffery, certainly come close to it.

[195] In any event, the Bank did offer additional financial support in an effort to see Bushline through the hard times. It extended the overdraft on numerous occasions. In March 2008, the overdraft sat at $600,000, but successive extensions saw it increased to $2.1 million by August 2009. This was to accommodate Bushline's over-expenditure, and to assist with cashflow. The Bank also advanced new funds and refinanced existing loans from 2008 onwards.

[196] Increased margins undoubtedly placed further pressure on Bushline's otherwise precarious financial position. But those margins were increased across the board in response to an unprecedented global situation. And, the $19.46 million loan agreement which Bushline signed after receiving legal advice, allowed the Bank to do the very thing that it did. Some of Bushline's interest rates were priced above the applicable guide. However, the lending associated with swaps was priced below guide, and other loans were priced at guide. Mr Glubb's uncontested expert opinion was that the Bank's margins were as one would expect for a customer in Bushline's position.

[197] Bushline complains that the Bank forced it to sell property in order to reduce debt levels. That property included the Waverley farm in 2012, an 11 hectare run-off section in 2010, and residential houses in 2009. But the evidence shows that Bushline's trustees had come to an independent view that assets would have to be sold to reduce debt and proposals were made to the Bank on that basis.

[198] In any respect, in the circumstances which Bushline faced at the time, requiring a sale of assets to reduce debt was not unreasonable. I accept Mr Glubb's expert evidence that the Bank acted reasonably in requiring Bushline to reduce its debt.

[199] Bushline made a number of specific allegations of oppression which I address briefly below:

(a) *Increasing margins beyond 1.8 per cent*: Bushline complains that the Bank increased interest rate margins after Mr Nitschke guaranteed that the margin on the funding would not go above 1.8 per cent on 29 January 2009. But even if such a promise was made — and on balance, I consider it likely that it was — it would have related to the lending hedged by swaps. The margin on Bushline's lending hedged by swaps did not increase above 1.8 per cent, so no issue with that alleged representation arises.

(b) *Increasing margins as a penalty*: Bushline says the Bank increased margins as a penalty for Bushline refusing to extend or enter new swaps. This allegation is unsubstantiated. I accept Mr Langwell's evidence that as the swaps matured, the lending had to be re-structured and re-priced. Mr Nolan's evidence was that it was priced according to guide. There was no penalty applied for failure to take up swaps.

(c) *Ensuring other creditors took action against Bushline*: I reject the allegation that the Bank conducted itself in a way designed to ensure other creditors of Bushline took action which would result in the sale of its assets. Those actions included reversing IRD cheques and dictating which creditors could be paid. There would simply be no interest or advantage to the Bank in conducting itself this way. If another creditor undertook liquidation proceedings, the Bank itself could lose control of the process and prejudice its own security position.

(d) *Acting 'threateningly'*: Bushline claims that Mr Nolan orally threatened to exercise ANZ's securities by appointing a receiver with an associated statement that the Coomeys could lose everything, and he drew a diagram showing what would occur. It is also alleged that he threatened to put Bushline's margin up by a further 2.0 per cent unless Bushline sold the Waverley farm.

> It is likely that Mr Nolan told Bushline that they risked liquidation and receivership if they did not take immediate action to sell assets and reduce debt. Mrs Coomey's evidence was compelling. It was a very stressful situation for her and the thought of losing everything after all of their hard work left her distraught. Mr Nolan is also likely to have mentioned the prospect of increased margins in the event property was not sold to reduce debt. But there is insufficient evidence of Mr Nolan "threatening" the Coomeys as alleged, rather than outlining possible consequences of continued default.

[200] Stepping back, and considering the Bank's conduct as a whole, I do not consider that the Bank's actions amounted to oppression. I have no doubt that the Coomeys suffered significantly throughout 2008 to 2013. Many others suffered the same fate. Increased margins on Bushline's lending did not help that situation, and the pressure to reduce debt or face total collapse added enormously to the strain. But the Bank's conduct cannot be regarded as harsh, unjustly burdensome, or unconscionable in the circumstances. It did not breach reasonable standards of commercial practice. There is no basis upon which to reopen the loan contracts under s 120 of the CCCFA and no grounds to grant relief. The oppression cause of action is dismissed.

Summary of findings

[201] My findings in relation to each of Bushline's causes of action are summarised below:

(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. 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 CCFA.

Result

[202] Bushline's claims are dismissed. This makes it unnecessary to determine the third party claim by the Bank against Mr England and that claim is also dismissed.

[203] The parties shall endeavour to agree on costs. If agreement cannot be reached, then memoranda in support of a claim for costs shall be filed and served by Friday, 10 November 2017, with memoranda in response filed on or before Friday, 24 November 2017.

Edwards J

Counsel: S M Hunter, Auckland

Solicitors: Harkness Henry, Hamilton
Chapman Tripp, Auckland
McElroys, Auckland