



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

**B E T W E E N :**

**FAROL HOLDINGS LIMITED**

Claimant

**and**

**(1) CLYDESDALE BANK PLC**

**(2) NATIONAL AUSTRALIA BANK LIMITED**

**(a company incorporated in Australia)**

Defendants

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**SHORT-FORM POINTS OF CLAIM**

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**Introduction**

1. Defined terms used in these short-form Points of Claim are as defined in the Master Particulars of Claim (“MPOC”).
2. These short-form Points of Claim supplement the MPOC. The MPOC state the basis for:
  - 2.1. the Claimant’s claims against the Bank and NAB arising out of the Statements;
  - 2.2. the allegations that the Statements were false;
  - 2.3. the allegations of deceit, negligence, breach of contract, misrepresentation and unjust enrichment made against the Bank and/or NAB.



## **Part A The background to the TBL**

### **The Claimant**

3. The Claimant is a company (Company Number 01143172) which at all relevant times has carried on business as a wholesale supplier of agricultural machinery, equipment and supplies and had the John Deere franchise from the Midlands to the edge of London.
4. At all material times, Mr Matthew Edward Vellacott (“MEV”), the Managing Director of the Claimant, represented the Claimant in its dealings with the Bank and NAB.

### **2007 TBL**

5. In late 2006, the Claimant had two variable rate loans with the Bank. The Claimant wanted to extend its borrowing and increase its working capital and therefore agreed with Steven Coward (“SC”), the Bank’s Agribusiness Manager (Bury St Edmund’s branch), that it would consolidate its existing borrowings into a new £2 million loan.
6. The new loan offered to the Claimant was a TBL. In January 2007, the Claimant was introduced by the Bank to Mr Kevin Horne, a NAB Treasury Solutions manager (“KH”) for the purpose of the Bank and/or NAB explaining to the Claimant the TBL product. The specific product which KH recommended to the Claimant was a FRL.
7. On 22 January 2007, KH sent the Claimant an email enclosing a paper dated June 2005 describing a FRL, a letter dated 23 January 2007 purporting to contain “several interest rate solutions” (but only describing a FRL) and a paper headed “*Break Costs - An explanation*” (“**Break Costs Paper**”).
8. The Break Costs Paper stated that:
  - 8.1. The Bank may enter into various arrangements and agreements with third parties which would need to be varied or terminated on an Early Repayment and which may lead to the Bank incurring a cost. That cost would be passed on to the customer as a Break Cost.
  - 8.2. “*Rates are based on market prices that may change instantaneously and will*



*not be firm until dealt on a recorded Dealing Room telephone line”.*

9. The Claimant was initially quoted a Margin of 1% over a Fixed Rate of 5.45%. SC subsequently stated to the Claimant that the “market rate” had increased by 0.2% and therefore the Fixed Rate would increase by 0.2%.
10. As MEV had been told that the Fixed Rate was a market rate (and therefore understood that this element of the overall rate was outside the Bank’s control), with the Margin representing the Bank’s profit element, MEV asked SC to reduce the Margin by 0.2% so that the overall rate remained the same. In response, SC agreed that the Margin would be reduced from 1% to 0.8%.
11. On 26 January 2007, the Claimant and the Bank entered into an amortising £2 million 15 year FRL with an expiry date of 26 January 2022 (“**the 2007 TBL**”). The Fixed Rate was agreed on that date on a telephone call with KH. Paragraph 8.2 above is repeated. Pending disclosure of the recorded telephone call, MEV believes that the Fixed Rate was described then as the “market rate”.
12. The Facility Letter incorrectly recorded that the Margin was 1%, although the schedule of repayments was based on a Margin of 0.8%. The overall interest rate was agreed at 6.45% (“*being an aggregate of the Fixed Rate plus Margin*”). Using the agreed Margin of 0.8%, this implied a Fixed Rate of 5.65%.
13. The Claimant was not provided with any version of the Standard Terms at any time.

### **Proposed new lending in 2011**

14. In October 2010, the Claimant requested further borrowing from the Bank of c.£1.5 million to fund the building of a new head office. The new head office was critical to the growth of the Claimant’s business as (among other things):
  - 14.1. It would mean additional engineers and sales staff could be recruited.
  - 14.2. There would be more space for key management meetings and for a centralised marketing and sales team.
  - 14.3. There would be additional over the counter sales due to increased footfall.
  - 14.4. It would mean that service engineers could work undercover in winter.
  - 14.5. A showroom would enhance public perception of the business.



15. At this time, the Bank's relationship manager for the Claimant was Richard Chapman and the Managing Partner was Andrew Pike ("AP") (who was based in the Agribusiness team, East Anglia).
16. On 16 March 2011, AP sent an email to the Claimant containing the Bank's proposal regarding the Claimant's current financing and the request for further borrowing. The email stated that all banks were having to balance their increased regulatory and capital requirement for new and renewed debt and that this was impacting on the margins the Bank was able to offer prospective borrowers.
17. In relation to the 2007 TBL, the 16 March 2011 email stated that:
  - 17.1. The Margin is 1% above the "fixed cost of funds".
  - 17.2. The Fixed Rate of 6.45% was incorrect as it was only 0.8% above "the cost of funds" and would be increased to 6.65% (described as "the correct rate of interest") from 14 April 2011.
  - 17.3. The indicative cost to break the 2007 TBL in the current market was £246,820.
18. In relation to the terms for the proposed new lending for the head office build ("**Proposed New Loan**"), the email set out 2 options:

### **Option 1**

- 18.1. The 2007 TBL and the Proposed New Loan would be amalgamated into one new 15 year loan of c.£3,122,000.
- 18.2. The interest margin would be 2.75% above cost of funds with a 1% arrangement fee (£15,000).
- 18.3. If the Claimant elected to fix the lending for 5 years, the overall rate would be 7.25% (new indicative fixed rate of 4.5% plus 2.75% Margin). "There would be no break costs in coming out of the existing arrangement and going into this new arrangement".
- 18.4. If the Claimant elected not to break the existing fixed rate (6.45%), then the 2.75% Margin would apply to the new loan with the "cost of funds" split as follows: £1,500,000 at 3.55% (current 3 month LIBOR (0.8%) plus Margin of 2.75%) and £1,622,000 at 8.4% (existing fixed rate of 5.65% plus Margin of



2.75%).

## **Option 2**

- 18.5. The 2007 TBL would remain in place subject to the increase in the Fixed Rate to 6.65%.
- 18.6. The interest margin on the new loan would be 4.8% (current 3 month LIBOR (0.8%) plus Margin of 4%) with an arrangement fee of 2%.
- 18.7. “The increased margin / fee would ensure that the Bank achieves its required return on the aggregate lending. The margin on the original loan is some way below current market rates and does not cover the costs of providing this loan to you”.
- 18.8. The “error regarding the loan margin” would need to be corrected.
19. By an email of the same date, MEV questioned the need to increase the Margin on the TBL, the high proposed new margin of 4.8% and the need to consolidate the 2 loans. MEV stated that the Claimant was seeking competitive margins and rates. In response, in an email dated 17 March 2011, AP stated that there was “*no real room for manoeuvre*” and that the 2007 TBL was “*generating virtually no income for the bank*”.
20. On 24 March 2011, a meeting took place at the Bank’s offices between the Claimant (represented by MEV, the Claimant’s After Sales Director Benjamin Vellacott and the Claimant’s Finance Director, Martin Jones) and the Bank (represented by AP, Richard Chapman, Graham Lilley and Peter Corcoran). At this meeting the Bank’s representatives reiterated that the TBL was not making enough money for the Bank and that the Bank would therefore only advance further funding if the Claimant agreed to restructure the lending. AP stated that if the Claimant broke the 2007 TBL, the Claimant would incur break costs of £300,000.
21. In view of the Alleged Break Costs of £300,000, and as the loan covenants prevented split lending, the Claimant was unable to obtain the Proposed New Loan from another lender. The Claimant therefore had no option but to shelve its development plans, maintain the 2007 TBL and agree to the increased Margin.
22. On 29 June 2011, MEV and Mr Jones met with the Bank at the Bank’s Hertford



offices to sign the paperwork for the Margin increase. At this signing meeting, Mr Chapman told the Claimant that if the Claimant did not sign, the Bank would call in the 2007 TBL. The words Mr Chapman used were “we will find something in the contract that you are in breach of” (or words to that effect).

23. Between 2011 and 2013, the Claimant was unable to expand its business or re-finance due to the Alleged Break Costs for the 2007 TBL. The Claimant’s growth was delayed for 2 years.

### **Payment of Alleged Break Costs in 2013**

24. In 2013, the Claimant again approached the Bank seeking an Early Repayment of the 2007 TBL.
25. On 22 March 2013, Martin Poole a Director in the Bank’s Corporate Business and Private Bank Midlands department based in Birmingham (“MP”) sent an email to the Claimant setting out proposals for the refinancing of “*the current loan of £1.4m and break cost of £0.3m*”.
26. By late 2013, the Claimant was in a position where it had to build its new head office or it would lose the planning permission it had obtained. The Claimant therefore refinanced the 2007 TBL with Lloyds Bank Plc. On about 25 November 2013, the Claimant paid £271,000 to exit the 2007 TBL, which included £242,000 in respect of the Alleged Break Costs paid to the Bank (and then likely paid over to NAB).

### **Part B1: The Break Costs Statements**

27. Paragraphs 17.3, 20, 25 and 26 above are repeated:
  - 27.1. On 16 March 2011, the Bank (AP) stated that the Alleged Break Cost was £246,820.
  - 27.2. On 24 March 2011, the Bank (AP) stated that the Alleged Break Cost was £300,000.
  - 27.3. On 22 March 2013, the Bank (MP) stated that the Alleged Break Cost was £300,000.
  - 27.4. On 25 November 2013, the Bank stated that the Alleged Break Cost was



£242,000.

27.5. In each case, the Alleged Break Cost is likely to have been provided to the Bank Employees (AP/MP) by NAB Employees.

28. For the reasons pleaded at paragraphs 17-20 of the MPOC, the Break Costs Statements were false.

### **Part C1: Reliance (Break Costs)**

29. In reliance on the false Break Costs Statements, the Claimant:

29.1. decided not to terminate the 2007 TBL on 16 March 2011 and continued to make Fixed Rate payments to the Bank under that TBL from then until 25 November 2013;

29.2. paid the Alleged Break Costs of £242,400 to the Bank on 25 November 2013.

30. If it had not been for the false Break Cost Statement made on 16 March 2011, the Claimant would have refinanced the 2007 TBL by entering into a variable rate loan with the same margin (over LIBOR) and the same remaining term as the 2007 TBL.

### **Part D1 Claimant's claims (Break Costs)**

31. For the reasons stated in paragraph 22 of the MPOC, the Bank and NAB are liable to the Claimant in deceit for the false Break Cost Statements. On the basis there stated, the Bank and NAB:

31.1. made the Break Cost Statements to the Claimant, and/or authorised the making of the Break Cost Statements and/or permitted them to be made and/or did not intervene to prevent them being made;

31.2. knew that the Break Costs Statements were untrue, and/or did not honestly believe them to be true and/or were reckless as to their truth;

31.3. knew and intended that the Claimant would act on the false Break Cost Statements, by deciding either to maintain its payments under the TBL or to pay the Alleged Break Cost.

32. For the reasons set out in paragraphs 23-24 of the MPOC, the Bank and NAB are



liable to the Claimant in tort (negligent misstatement) for the false Break Cost Statements. On the basis there stated:

- 32.1. The Bank and NAB owed the Claimant a duty to use reasonable care and skill when providing information to the Claimant (as described in paragraphs 17.3, 20, 25 and 26 above) about the amount of the Break Cost payable.
- 32.2. In making false Break Cost Statements (by AP and MP, who are likely to have been provided with that information by NAB Employees) to the Claimant, and/or (by the senior Bank Employees referred to in paragraph 22.7 of the MPOC and by the NAB Employees referred to in paragraph 22.11 of the MPOC) causing or permitting such statements to be made or failing to prevent them being made, the Bank and NAB acted negligently and in breach of the duty of care owed by the Bank and NAB to the Claimant.
33. For the reasons stated in paragraphs 26-27 of the MPOC, the Claimant is entitled to claim £242,000 as a mistaken payment. The Bank and/or NAB has been unjustly enriched by that payment.
34. For the reasons stated in paragraphs 28-31 of the MPOC, the Bank is liable to the Claimant for breach of the implied term of the TBL. The Bank acted in breach of the implied term on each occasion when it quoted or charged the Claimant the Alleged Break Cost.

**Part E1 Loss (Break Costs)**

35. The Claimant's loss arising from its reliance on the false Break Cost Statements and/or as a result of breach of the implied term is:
  - 35.1. the difference between the interest paid by the Claimant at the Fixed Rate under the 2007 TBL and the interest the Claimant would have paid under a variable rate loan (LIBOR) from 16 March 2011 to 25 November 2013 (£196,899);
  - 35.2. the Alleged Break Cost paid by the Claimant (£242,400);
  - 35.3. consequential losses (to be assessed) suffered as a result of the Claimant being unable to build its new head office (which was critical to the growth of its business for the reasons set out in paragraph 14 above) for a period of 2 years.



36. The Claimant is entitled to claim, and will claim interest pursuant to s.35A of the Senior Courts Act 1981.

### **Part B2: The Fixed Rate Statements**

37. Paragraphs 8.2 and 9-11 above are repeated. The Bank and NAB represented to the Claimant that the Fixed Rate was a market rate, not set by the Bank:

37.1. KH (acting as an agent of the Bank or within the scope of his employment with NAB) stated in the Break Costs Paper that “Rates are based on market prices that may change instantaneously”.

37.2. SC stated to the Claimant that the Fixed Rate of 6.45% which had initially been quoted could not be maintained as the market rate had increased (thereby representing that only the Margin element of the overall rate could be negotiated).

37.3. KH described the Fixed Rate as a “market rate”.

38. The Bank/NAB’s Fixed Rate Statements prior to the Claimant’s entry into the TBL are further evidenced by the way the Fixed Rate was described after the Claimant’s entry into the TBL. Paragraphs 17-19 above are repeated:

38.1. By describing the Margin on the 2007 TBL as being 1% above the “fixed cost of funds”, the Bank represented that the Fixed Rate represented the Bank’s cost of funds without any additional income for the Bank.

38.2. By stating, by reference to the Margin, that the 2007 TBL was “generating virtually no income for the bank” the Bank represented that the Bank/NAB had not earned any other income on the TBL. In fact, the undisclosed basis points on the 2007 TBL amounted to £41,140, which was additional hidden income for the Bank/NAB.

39. For the reasons pleaded in paragraph 39 of the MPOC, the Fixed Rate Statements were false.

### **Part C2: Reliance (Fixed Rate)**

40. In reliance on the false Fixed Rate Statements, the Claimant:



- 40.1. entered into the 2007 TBL at an inflated Fixed Rate which included the hidden basis points, and made Fixed Rate payments under that TBL until 25 November 2013;
- 40.2. paid the Alleged Break Costs of £242,400 to the Bank on 25 November 2013 (which were higher than the Alleged Break Costs the Claimant would have paid if the Fixed Rate had been the Market Rate).
41. If the Claimant had known that the Fixed Rate was not a market rate and included hidden basis points, it would not have entered into the TBL on the terms that it did and would instead have entered into a variable rate loan with the same margin (over LIBOR) and the same term as the 2007 TBL on 26 January 2007; alternatively the Claimant would have sought to negotiate the Fixed Rate down to the proper Market Rate.

#### **Part D2 Claimant's claims (Fixed Rate)**

42. For the reasons stated in paragraph 41 of the MPOC, the Bank and NAB are liable to the Claimant in deceit for the false Fixed Rate Statements. On the basis there stated, the Bank and NAB:
- 42.1. knew that the Fixed Rate Statements were untrue, and/or did not honestly believe them to be true and/or were reckless as to their truth;
- 42.2. knew and intended that the Claimant would act on the false Fixed Rate Statements, by deciding to enter into the FRL on the terms that it did.
43. For the reasons stated in paragraphs 42-44 of the MPOC, the Bank and NAB are liable to the Claimant in tort (negligent misstatement) or under section 2(1) of the Misrepresentation Act 1967 for the false Fixed Rate Statements. On the basis there stated:
- 43.1. The Bank and NAB owed the Claimant a duty to use reasonable care and skill when providing information to the Claimant (as described in paragraph 8.2 and 9-11 above) about the Fixed Rate;
- 43.2. In making false Fixed Rate Statements (by KH and SC) to the Claimant, the Bank and NAB acted negligently and in breach of the duty of care owed by the Bank and NAB to the Claimant.



43.3. The Bank (acting by SC, or by KH as the agent of the Bank) did not have reasonable grounds to believe that the Fixed Rate Statements were true.

**Part E2 Loss (Fixed Rate)**

44. The Claimant's loss arising from its reliance on the false Fixed Rate Statement is all the loss arising from its entry into the 2007 TBL, comprised of:

44.1. the difference between the interest paid by the Claimant at the Fixed Rate under the 2007 TBL and the interest the Claimant would have paid under a variable rate loan (LIBOR) from inception of the 2007 TBL (26 January 2007) to 25 November 2013 (£387,309);

44.2. the Alleged Break Cost paid by the Claimant (£242,400).

45. Alternatively, the Claimant's loss arising from its reliance on the false Fixed Rate Statement is the AV (£41,140) on the basis that the Claimant would have entered into the TBL on the same terms but at the proper Market Rate as at 26 January 2007 (5.33%).

46. Further, the Claimant will claim the losses referred to in paragraph 35.3 above as consequential losses arising from its entry into the 2007 TBL.

47. The Claimant is entitled to claim, and will claim, interest pursuant to s.35A of the Senior Courts Act 1981.

**AND the Claimant claims against the Defendants**

***In relation to the Break Costs Statements***

- (1) Damages as pleaded above on the basis of deceit or negligent misstatement; alternatively (as against the Bank only) on the basis of breach of contract;
- (2) £242,400, as money paid by mistake and/or as money by which the Bank and/or NAB has been unjustly enriched;

***In relation to the Fixed Rate Statements***

- (3) Damages as pleaded above on the basis of deceit or negligent misstatement or under the Misrepresentation Act 1967;



*And*

(4) Interest on the sums claimed as set out in paragraphs 36 and 47 above.

**Andrew Onslow QC**

**Lisa Lacob**

**STATEMENT OF TRUTH**

The Claimant believes that the facts stated in these Particulars of Claim are true. I am duly authorised by the Claimant to sign this statement.

Full name: **Mr Garbhan Colla Oisin Shanks**

Signed:

Position or office held at Michelmores LLP: **Partner**

Date: **1 May 2019**