Critique on NAB/Clydesdale Bank Defence

These legal proceedings a predicated on a "***Big Lie***" – that an **Interest Rate Swap** contract magically converts a contract for a **variable interest rate loan** into a **fixed interest rate loan.**

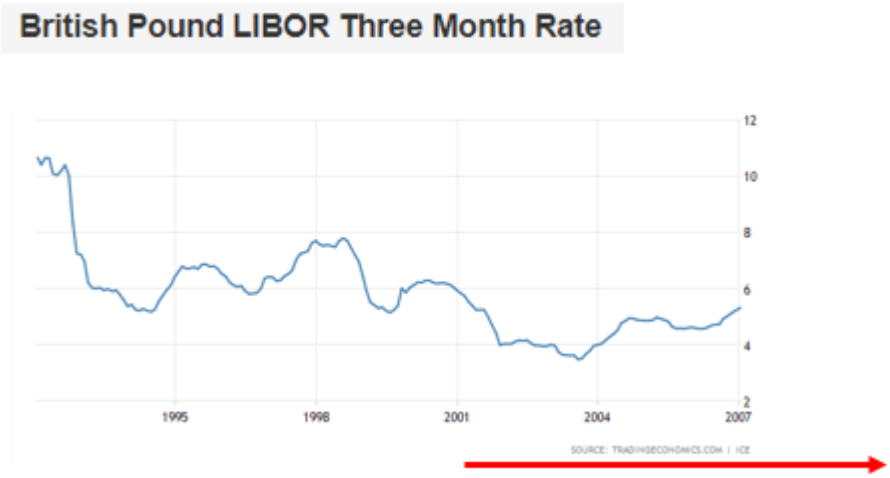
That is why the contract documents bearing the signatures of the SME borrowers are being wilfully concealed from the court in these proceedings.

If you have signed up to any group action ("*class action*") where the Loan Offer document {***Facilities Letter***} which bears the signature of one or more representative Claimants is not being tabled as evidence – you should be very concerned – very concerned.

Preamble

What were so-called "**Tailored Business Loans**" and why were they developed?

"**Tailored Business Loans**" or "**TBL**s" were an innovative financial product developed by NAB's boffins at the Melbourne Head Office and marketed in the UK from 2001 to 2012 {*But not in Australia*}.



Tailored Business Loans marketed from 2001 to 2012

From 2001 to 2003 the interbank interest rate {LIBOR} was falling, however, it then started to rise before collapsing with the Global Financial crisis.

From 2004 it would be prudent for SME borrowers to consider protecting their loans from possible further increases in interest rates.

Historically, the options for SME borrowers were limited to either:

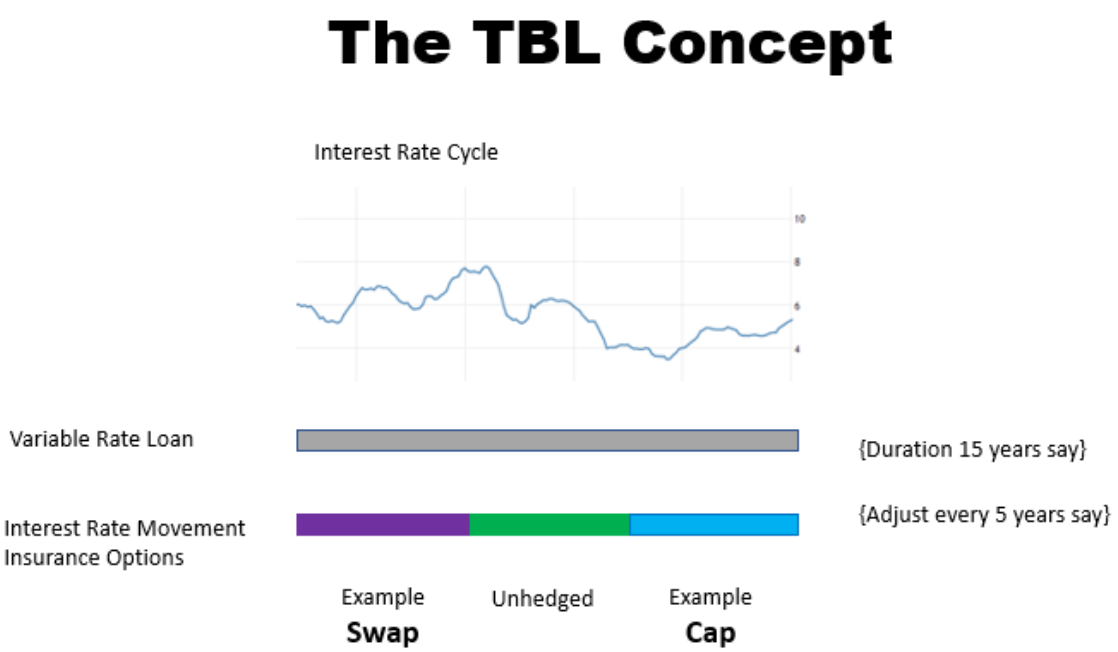
- A **variable interest rate loan**; or
- A **fixed interest rate loan**.

However, fixed interest rate loans were generally of shorter duration compared to variable rate loans. Also the rate was fixed for the term of the loan contract.

Large companies could engage in trading in financial derivatives to protect themselves from adverse interest rate movement by employing financial specialists who would trade in the '*over-the-counter*' financial derivatives markets in interest rate caps, collars and swaps.

This resulted in an opportunity for banks, such as NAB, to provide something similar for SME borrowers.

The TBL concept was to provide SME borrowers with more flexibility that was traditionally provided with a simple <u>one contract fixed interest rate</u> loan.



Borrowers would accept an offer for a <u>variable interest rate</u> loan {**Contract #1**}, but would then have the option during the term of the variable interest rate loan to adopt various hedging strategies depending on the outlook at various stages of the interest rate cycle.

This would involve accepting offers for various Interest Rate Movement Insurance options.

In the example illustrated above a variable interest rate loan with a term of 15 years is the loan contract is assumed.

The interest rate movement outlook at the start of the loan is for rising interest rate so an interest rate **swap** with a tenor of 5 years {duration} looks attractive. A **swap** requires no up-front payment of a premium.

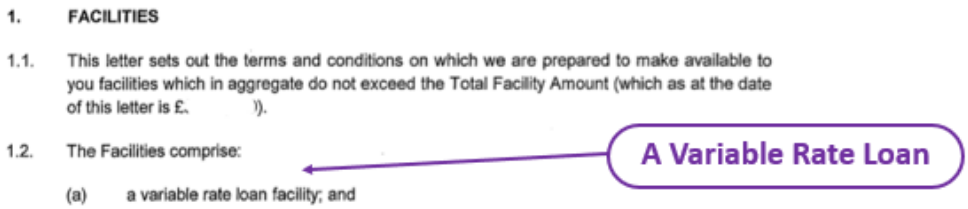
After 5 years the outlook is for falling interest rates – so leaving the variable rate loan unhedged looks attractive to take advantage of falling interest rates.

After 10 years the outlook again changes to rising interest rates so a **cap** {which requires an up-front premium payment} may look like a prudent choice.

Each of the Interest rate movement protection options is a separate contract {apart from leaving the variable rate loan unhedged}.

> **IMPORTANT**: There is no need for a simple one contract fixed interest rate loan option since this would run counter to the whole concept of the TBL concept and its selling point – flexibility to manage interest rate movement risk over the duration of the commercial loan as the outlook for interest rates change.
>
> The "***Facilities Letter***" or offer document for all '**Tailored Business Loans'** was of a similar format.

A Common Feature of a Typical Tailored Business Loan Offer Document



List of Interest Rate Movement Hedging Options

A list of Interest Rate Movement Hedging Options would be provided in the offer document, typically ranging from 1 to 5 options.

When the borrower signed the offer document confirming the acceptance of a **variable interest rate** loan facility at a nominated margin to LIBOR, the Borrower then had a legal obligation to make interest payments on a **variable interest rate** loan.

In the event of early terminating there was a pre-agreed damages clause {**Condition 8.5**} that would allow Clydesdale Bank to demand payment of a "***Break Cost***" {*which was a relative small amount*}, without the need to seek a court order for damages at common law.

A so-called "**Fixed Rate Facility**" under the TBL program would be the result of matching a variable interest rate loan with and an **Interest Rate Swap** which has the effect of fixing a borrower's monthly (or quarterly) payment obligations.

The better name would be a "**Fixed *Payment* Rate Facility**".

> **IMPORTANT:** An Interest Rate Swap is a separate contract and it DOES NOT convert a contract for a variable interest rate loan in to a fixed interest rate loan contact.

An Interest Rate Swap is a "***Contract for Difference***" and is subject to regulation by the FSA/FCA. It is a separate contract to the associated variable interest rate loan.

That is a "**Fixed Rate Facility**" under the TBL program is not a "**Fixed *Interest* Rate Facility**".

There was no special contract document for loans that have been classified as "**Fixed Rate TBLs**" by Clydesdale Bank

That is there were no contracts for simple fixed interest rate loans under the TBL program.

Failure to Properly Implement the Concept.

The TBL concept was developed at NAB's head office in Melbourne but was never implemented in Australia.

NAB was the market leader in SME loans in Australia at the time so it may have been that this new "*innovative*" financial product was not though the effort of introducing and training staff in how to sell this product.

It appears that Clydesdale Bank was more receptive to the concept since Clydesdale Bank was not a major player in the SME loan market and a new "innovative" product would help sell more loans.

However, while the variable interest rate loan component was marketed by Clydesdale Bank, purported **Interest Rate Movement Protection** insurance was marketed by NAB's Treasury Solutions division.

A class case of the "*right hand not knowing what the left hand was doing*".

Current Legal Proceedings

Clydesdale Bank's response to current legal proceedings ignore the reason why TBLs were developed and marketed in the first place.

They are an attempt to re-write history because of the implementation failure.

An example of how these legal proceedings are being used to "*rewrite history*" is demonstrated in paragraph 10 of the **Defence of the First Defendant Document.**

This is not a "*factual summary*". This is deliberate "*dumbing down*" so as to rewrite history and rewrite contractual and legal obligations.

C1. Farol

10. The factual summary in relation to Farol is as follows:

10.1. Farol entered into a Fixed Rate Facility in January 2007.

10.2. The Bank entered into a Corresponding NAB Hedge with parameters corresponding to the tenor, notional value and fixed rate of the Fixed Rate Facility.

10.3. In March 2011 and March 2013, Farol was provided with Break Cost indications which corresponded with the likely costs that would have been charged to the Bank by NAB if the Corresponding NAB Hedge had been terminated.

10.4. In November 2013, Farol terminated the Fixed Rate Facility and paid Break Costs of £242,400 to the Bank. The Break Costs corresponded to the sums payable by the Bank to NAB upon termination of the Corresponding NAB Hedge. The Bank paid the corresponding termination payments to NAB.

Para 10.1

No mention is made of key aspects of contract formation and of the ***Essential Terms*** {*essentialia negotii*} and dates of contract or contracts formation.

Mrs Justice Rose in a hedged commercial loan case {*London Executive Aviation Ltd v The Royal Bank of Scotland Plc* [2018] EWHC 74 (Ch)} cited the comments of Lord Millet in *The Starsin* [2004] 1 AC 715:

> 175. The identity of the parties to a contract is fundamental. It is not simply a term or condition of the contract. It goes to the very existence of the contract itself. If it is uncertain, there is no contract.

The terminology is of a customer "Farol" "***entering into a Fixed Rate Facility in January 2007***" – with the specific date not mentioned.

The objective is to use the theatre of the court to avoid the questions of:

(i) How many contracts were involved for each victim?; and
(ii) What was the nature of these contracts, including which ones were valid?

Para 10.2

This has been denied by the former Clydesdale Bank CEO and by the testimony of Douglas Campbell.

In any event "***Break Costs***" which are damages for breach of contract cannot be imposed on "***internal swaps***", since no loss was incurred by the bank group entity as a whole {Refer to **Appendix A**}.

Para 10.3

Purported "**break costs**" are calculated on the basis that the borrower accepted an offer of a simple one contract fixed interest rate loan {which was not the case} and are based on the "*loss of opportunity*" for a simple fixed interest rate long and not on the early termination of a Contract for Difference governed by an ISDA Master agreement

Para 10.4

No "***Break Cost***" is payable even if an internal interest rate swap existed, which did not exist.

The borrower should also have received statement of all transfer payments on moneys to NAB, if these existed, given the ***Principal – Agent*** relationship.

This is part of the strategy to misrepresent was has been classified by NAB/Clydesdale Bank as a "**Fixed Rate TBL**". That is to "*gaslight*" the victims.

Paragraph 10 should be written as follows to provide a **truthful** version of historical event.

10.1 on XX of January 2007 the Business Solutions division of Clydesdale Bank made an offer in writing to Farol for a fixed interest rate loan facility at a margin to 1M-LIBOR of x.xx% for an amount not exceeding Y million GBP. This offer was accepted by Farol on YY January 2007. The term of the loan was z years.

A number of Interest Rate Movement protection options were also listed in the offer document for Farol to consider.

If a separate Interest Rate Swap contract had been executed with a Third Party for the same notional value (with a tenor {duration} less than or equal to the term of the loan), then the monthly payment obligations of Farol would be "*fixed*" for the nominated tenor period. However, Clydesdale Bank would continue to have a legal right to receive interest payments at the nominated margin to 1M-LIBOR.

If interest rates when up, then the Third Party would make payments to Clydesdale Bank and if interest rates went down, the Clydesdale Bank would make payments to the Third Party.

10.2 An Interest Rate Swap contract is a "***Contract for Difference***" and was/is subject to regulation by the FSA/FCA.

The original position of NAB/Clydesdale Bank is that there were no Interest Rate Swaps associated with **Tailored Business Loans** and so **TBL**s did not fall under the FCA mandatory remediation program for Interest Rate Hedging Products.

The position for these legal proceedings is that Clydesdale Bank did execute a *back-to-back* Interest Rate Swaps with is parent, the **National Australia Bank {NAB}.** That is so-called "*Internal Swap*" contacts were in fact executed.

If this was the case, then Farol should have been provided with regular statements disclosing:

(i) **Variable interest rate** payments made to Clydesdale Bank as per the written contract signed on YY January 2007;
(ii) Payments made by NAB to Clydesdale Bank if and when interest rates increased above the agreed "***swap rate***" and
(iii) Payments made by Clydesdale Bank to NAB when interest rates fell below the agreed "***swap rate***".

Farol is also entitled to a copy of the Interest Rate Swap contract between Clydesdale Bank and NAB.

Condition 8.5 in the Terms and Conditions document provided pre-agreed damages in the event that the **variable rate loan** was terminated before the agreed maturity date. A pre-agreed damages clause {Liquidated Damages} empowers the non-defaulting party to demand payment of the pre-agreed amount without seeking a court order for damages for breach of contract at common law. {**Note**: This would only amount to a few thousand pounds for most SME loans

With an "***internal swap***" the bank as a whole does not incur a real "*loss*" since a notional loss of one department is offset by a notional gain by another department {Refer to **Appendix A**}

10.3 In March 2011 and March 2013, Farol was provided the "***Break Cost***" indications for terminating the variable rate loan facility before maturity.

10.4 In November 2013, Farol paid the sum of 242,400 GBP to Clydesdale Bank when the loan facility was terminated.

However Farol's legal obligation was to pay only x,xxx GBP to Clydesdale Bank as per **Condition 8.5**.

NAB was in no position to demand damages for the early termination of a purported "*internal swap*" since no real loss had been incurred by NAB as a whole, since a notional loss by NAB Treasury Division had been offset by a gain by its subsidiary company – Clydesdale Bank

Damages for breach of contract can only be claimed on "*real*" losses. Penalties are not enforceable.

Rewriting History

NAB/Clydesdale Bank have sought to misrepresent the most common type of TBL as a simple one contract fixed interest rate loan

On this basis, most TBLs were excluded from NAB/Clydesdale Bank's voluntary remediation program.

Clydesdale Bank | Yorkshire Bank

Information relating to Clydesdale and Yorkshire Banks Review of Interest Rate Hedging Products (12 October 2012)

TBLs where the interest rate was fixed for the period of the loan or any part of it will not be reviewed. If you hold such a product and are unhappy about the way in which it was sold, your right to complain is unaffected (see section H for more details).

In the witness statement of Douglas Campbell to the Scottish Court of Sessions, Mr Campbell testified that so-called "**Fixed Rate TBLs**" were "***bespoke loans***" with no associated Interest Rate Hedging Product (eg Interest Rate Swap} (**Appendix B**).

If inference that NAB/Clydesdale Bank sought to make is that certain SME borrowers were offered a fixed interest rate loan at a nominated Fixed Interest rate which was then accepted by those borrowers? That is only one contract associated with each borrower is involved.

However, the key contract formation information that has been deliberately excluded from these legal proceedings is that an offer of a **variable rate loan** made by the Financial Solutions Division of Clydesdale Bank, which was then accepted.

Here are some typical examples.

Offers in Writing of Variable Interest Rate Loans

Offer Made by Financial Solutions Division of Clydesdale Bank
or Clydesdale Bank Trading as Yorkshire Bank

Customer	Amount {GBP}	Margin	Term {Years}	Date of Offer	Date of Acceptance
John Glare	3,950,000	2.25%	25	13/02/2008	13/02/2008
PFSOL	1,942,000	1.69%	15	30/01/2008	7/02/2008
GSP	575,000	1.70%	5	7/11/2007	8/11/2007

Also excluded is mention of the offer for **NAB Treasury Solutions** division to act in the capacity of an ***agent*** for the borrower to arrange interest rate movement protection for the variable interest rate loan that was accepted by the borrower.

It is not necessary to have a formal contract of agency.

NAB Treasury solutions should have executed a *back-to-back* Interest Rate Swap Contract with an identifiable THIRD PARTY {such as ***Bank of America***} so as to comply with **Condition 8.1.**

There would then be TWO contracts that were legally enforceable:

(i) The contact for a **variable rate loan** with the **Financial Solutions** Division of Clydesdale Bank; and

(ii) A contract for an **Interest Rate Swap** arranged by NAB's **Treasury Solutions** Department with an identifiable THIRD PARTY on behalf of the borrower.

IMPORTANT: An Interest rate swap does not magically turn a variable interest rate loan into fixed interest rate loan – it does however "*fix*" the monthly payment obligations of the borrower as illustrated in the following diagram.

The lending bank still receives the variable interest rate, however, the borrower's payment are fixed.

Bona Fide "Fixed Rate TBL"

Loan Amount	**1,000,000** GBP	{Full Hedged for One Year}	
Swap Rate	**5.00%** {"Fixed Rate"}		

					Interest Rate Swap			
					Contract for Difference			
				Loan Contract		Floating Rate	Floating Rate	
	1M-LIBOR	Margin + Mandatory Costs	Total	Lending Bank Receives {GBP}	1M-LIBOR minus Swap Rate	SWAP Counterparty Pays {GBP}	SWAP Counterparty Receives {GBP}	Borrower Pays {GBP}
Jan	5.00%	1.5%	6.50%	5,417	0.00%	-		5,417
Feb	5.20%	1.5%	6.70%	5,583	0.20%	166.67		5,417
Mar	5.40%	1.5%	6.90%	5,750	0.40%	333.33		5,417
Apr	5.60%	1.5%	7.10%	5,917	0.60%	500.00		5,417
May	5.30%	1.5%	6.80%	5,667	0.30%	250.00		5,417
June	5.00%	1.5%	6.50%	5,417	0.00%	-		5,417
Jul	4.70%	1.5%	6.20%	5,167	-0.30%		250	5,417
Aug	4.50%	1.5%	6.00%	5,000	-0.50%		417	5,417
Sep	4.00%	1.5%	5.50%	4,583	-1.00%		833	5,417
Oct	3.50%	1.5%	5.00%	4,167	-1.50%		1,250	5,417
Nov	3.30%	1.5%	4.80%	4,000	-1.70%		1,417	5,417
Dec	3.00%	1.5%	4.50%	3,750	-2.00%		1,667	5,417

IMPORTANT: An Interest rate Swap is not a loan – it is a **Contract for Difference** which gives rise to an exchange of cash flows between the counterparties as illustrated in red in the above table.

If such a contract was executed by NAB **Treasury Solutions** acting as an ***agent*** for the borrower then the borrower has a legal right to be provided with a record of these cash flow payments.

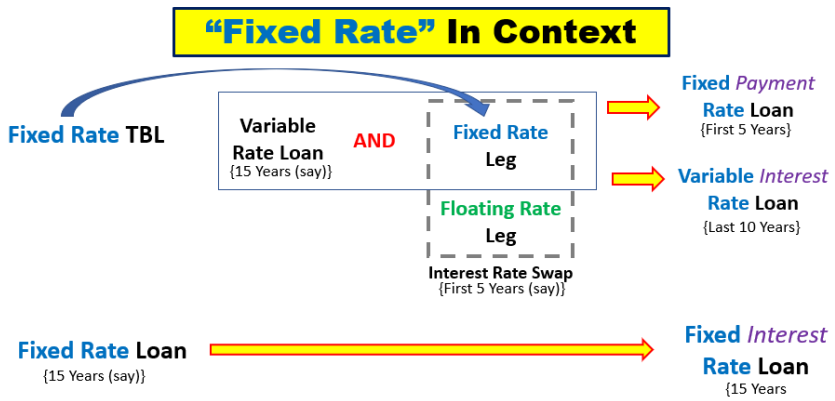
The borrower also has a right to be provided with a copy of the contract documents.

One of the selling points of Tailored Business Loans was the flexibility they provided for managing interest rate movement risk.

For example, with a simple one contract simple fixed interest rate loan, the borrower is locked into servicing a fixed interest rate loan for the duration of the loan contract.

By hedging a variable interest rate loan with an interest rate swap, the duration (tenor) of the swap can be less than the duration of the loan.

This was THE selling point of Tailored Business Loans.



There was no provision for a single contract Fixed Interest Rate Loan in the TBL Program for that reason.

No *Back-to-Back* Hedging Contracts

This is how TBLs were "*sold*".

"Fixed Rate Tailored Business Loan"

Offer #1 For the "**Financial Solutions**" Division of Clydesdale Bank to provide a **Variable Interest Rate Loan** Facility

Offer #2 For the "**Treasury Solutions**" Division of nab to act as an **Agent** for the borrower to arrange an **Interest Rate Swap** with a "**Third Party**"

Utilising both Contracts would provide a **Fixed** *Payment* **Rate Loan** Facility

Outcome

Loan advanced and the borrower then had a legal obligation to make monthly **variable rate interest** payments at the prescribed margin to **LIBOR**.

An **Interest Rate Swap** was "*priced*", however no **SWAP** {***Contract for Difference***} was ever executed with an identifiable "**Third Party**".

Loan payment obligation was to pay variable interest at the prescribed variable rate

Also there were no so-called "***Embedded Swaps***" associated with TBLs.

No 'Embedded Swaps'

Former CEO Clydesdale Bank

HOUSE OF COMMONS

Treasury Committee

Chair: We are talking about embedded swaps here.

David Thorburn: There is not an embedded swap in any of these products, and I can explain how this worked if it is of interest to the Committee but none of these products have an individual embedded swap.

Chair: Of course by being classified as a tailored business loan they do not come under the direct regulatory supervision of the FCA, is that correct?

David Thorburn: Yes that is correct.

17 June 2014

However "**Contract for Difference**", including Interest Rate Swap contracts, are subject to regulation by the FSA/FCA.

Paragraph 6 is contradicted by the witness statement of Douglas Campbell {**Appendix B}.**

6.3. In fact, when the Bank entered into Fixed Rate Facilities under a TBL with each of the Claimants, it entered into specific corresponding hedging transactions with NAB in order to hedge the interest rate risk transferred from each Claimant to the Bank by the Claimants' respective Fixed Rate Facility ("**Corresponding NAB Hedges**"). Each of the Corresponding NAB Hedges corresponded to the tenor, notional value and fixed rate of the Fixed Rate Facility to which it related.

6.4. Each of the Corresponding NAB Hedges was:

6.4.1. entered into pursuant to an ISDA Master Agreement entered into between the Bank and NAB dated 20 January 1992 (as amended from time to time);

6.4.2. intended to and did hedge the Bank's position in respect of the applicable Fixed Rate Facilities, with the Bank paying to NAB an amount equivalent to the fixed rate element of the interest it received.

IMPORTANT: Tailored Business loans were not marketed in the UK until 2001

NAB acquired Clydesdale Bank in 1987. So the ISDA Master Agreement dated 20 January 1992 would relate to loan book hedging and not to the hedging of individual SME customer loans.

NAB would have also been hedging current movement risk between the GBP and the AUD.

The former CEO of ***Clydesdale Bank***, David Thorburn testified before the **Treasury Select Committee** on 17 June 2014 as follows:

Chair: Are you offering hedging embedded as part of the loan or separated out?

David Thorburn: There is no individual hedge. I am not trying to avoid your question; I am trying to be precise in my answer to your question.

There is no individual embedded swap in any of these loans. The swaps are aggregated by a parent company as part of the broader balance-sheet management activities and funding.

This begs the question as to how the "***swaps are aggregated by the parent company as part of the broader balance sheet management activities and funding***" in light of the doctrine of **Privity of Contract**. Just not legally possible.

The **Treasury Division** of **National Australia Bank (NAB)** does undertake trading with "**Third Parties**" with all types of hedging instruments which are not limited to **Interest Rate Swaps**.

However, SME borrowers are not privy to any of these hedging contracts.

Furthermore, the **Treasury Division** is not in the habit of terminating any of these hedging instruments (contracts) before maturity and thereby incurring '***Break Costs***" or "***Break Gains***".

Therefore, there are no "***break costs***" to allocate back to any particular SME loan, even if this were technically and legally possible.

As to so-called "***Internal Swaps***", Mr Justice Warren in ***Barnett-Waddington Trustees (1980) Ltd & Ors v The Royal Bank of Scotland Plc*** [2015] EWHC 2435 (Ch) ruled that a "***break cost***" could not be imposed on the early termination of a so-called '**Internal Swap**' since no loss was actually incurred by the parent bank – a notional loss in one Division was offset by a notional gain in another Division of the bank.

No evidence of the **Financial Solutions** Division arranging '***Internal Swap***s' with the necessary **Essential Terms** can be produced by ***Clydesdale Bank*** because no such '***Internal Swaps***' were arranged with **NAB Treasury Solutions** *{Despite what is stated in the defence document}.*

If they were then, each SME borrower should have been provided with a regular account showing the monthly (or quarterly) cash flow exchanges under the purported Internal Swap.

No such statements were ever provided.

36.8. As to paragraph 22.5, the quotation is incomplete. It is preceded by the words: "*Customers with fixed rate loans are not contracted into a swap or any other derivative in the market*". The passage as a whole is to the same effect as the quotation from Mr Thorburn's evidence, namely that NAB did not generally engage in individually matched swaps externally on the market. But that is irrelevant to the point that the Bank entered into Corresponding NAB Hedges and was entitled to indicate, determine and demand Break Costs in the circumstances pleaded above.

Again one division of a bank cannot claim damages for an "*internal swap*" where the loss of one division is offset by a gain in another division.

Again refer to **Appendix A**.

Summary

Loans classified by NAB/Clydesdale Bank as "**Fixed Rate TBLs**" are in fact better described as "**unhedged variable rate loans**".

Condition 8.5 provides a pre-agreed formula for determining damages in the event of the early termination of a variable interest rate loan {ie ***Liquidated Damages***}. This is only a small amount.

There is no condition that provides a pre-agreed formula for determining damages in the event of the early termination of a one contract fixed interest rate loan, since the original intention was not to offer one contract fixed interest rate loans under the TBL program since this would have defeated one of the key selling points of TBLs, which was the ability to flexibly manage interest rate movement risk

The starting point of any contract dispute is to put the written contract document before the Court {or in the case of a group action, one or more representative contract documents}.

If a signature has been forged, then the Claimant can plead ***non est factum*** (Latin for "**it is not** [**my**] **deed**"). This is a defence in contract law that allows a party to escape performance of an agreement if they have not signed the contract document or which is fundamentally different from what he or she intended to execute or sign if the signature has not been forged.

If the signature is valid, then the next step is to examine pre-contract representations to determine if misrepresentation led one of the parties to accept an offer from the other party.

It may be found that there was misrepresentation which could have been either:

- Dishonest (ie fraudulent);
- Negligent; or
- Innocent.
- Representation amounting to misleading or deceptive conduct in contravention of statute

Why would such fundamental aspects of contract law be excluded from any bona fide group action?

You be the judge!

Author: Phillip Charles Sweeney

Dictionary

"Fixed Rate Facility"

This is an ambiguous phrase which should be avoided since it can mean either:

- **Fixed** ***Payment*** **Rate Facility** where the lending bank receives a variable interest rate, while the borrower's payment obligations are "fixed" as a result of an associated "Contract for Difference" in the form of an Interest Rate Swap contract; or
- **Fixed** ***Interest*** **Rate Facility** where the lending bank receives interest payments at a fixed rate, while the borrower makes interest payments at a fixed rate with no back-to-back interest rate Swap contract involved.

"**Pre-Agreed Damages**" {or "Liquidated Damages"}

At common law the non-defaulting party to a breach of contract is entitled to an award of damages by a court for any identifiable losses incurred due to the breach of contract, this can include "loss of opportunity" costs. If the parties to the contract include a "***Pre-Agreed Damages***" clause which includes a quantum or a formula for determine damages, then the non-defaulting party can demand payment without first seeking a court order.

"Break Gain"

With a "***Contract for Difference***" in the form of an **Interest Rate Swap** {or other financial derivative}, the defaulting party in some circumstances can be entitled to a payment from the non-defaulting party depending on how interest rates have moved since the inception of the "***Contract for Difference***".

The term "Break ***Gain***" is applied to such payments.

"Break Cost"

Where the non-defaulting party has incurred a real identifiable loss {and not just a notional account loss which is offset by an notional accounting gain} then the non-defaulting party is entitled to a payment of damages for breach of contract.

If a "***Pre-Agreed Damages***" clause has been included in the contract between the contracting parties, then the non-defaulting party can demand payment without seeking a court order beforehand.

If there has been no pre-agreement between the contracting parties as to a quantum or formula for determining damages for breach of contract, then the defaulting party must seek an award for damages at common law from a court.

"Privity of Contract"

Is a doctrine where only parties to a contract can be legally bound by the obligations of that contract.

An important exception to this doctrine is where an ***Agent*** acts on behave of his ***Principal*** and accepts an offer on behalf of that ***Principal***, either orally or in writing.

A formal contract of agency is not required since a court can determine from the circumstances of contract formation as to whether the laws of ***Agency*** come into play.

Appendix A

No Actual Loss to the Bank Incurred with an "*Internal Swap*'

Barnett Waddington Trustees (1980) Ltd & Anor v The Royal Bank of Scotland Plc [2015] EWHC 2435

Mr Justice Warren states:

"47. She accepts that, if the Bank were, for some reason, to choose to unwind the Internal Swap without the loan having been repaid, it would suffer no loss since it retains the whole income stream which it was expecting to receive. That is why she identifies the cost of unwinding the Internal Swap when the loan is repaid as reflecting the loss of that income stream. I agree with the conclusion that the Bank would suffer no loss; I would add that it is also the case, in my view, that it would not suffer a "Loss" either. But this is not so much because it retains the income stream but because it has not incurred any cost. Everything is internal to the Bank and it, in contrast with its different departments, is in precisely the same position both before and after the unwinding of the Internal Swap."

……

56. I will make the declaration sought by paragraph 3 of the Amended Claim Form to the effect that the Borrowers are not liable to pay to the Bank any sum in respect of the Internal Swap.

Appendix B

Extract from **Witness Statement of Douglas Campbell** – Paragraphs 3.3 to 3.5.

I, Douglas Campbell, c/o Clydesdale Bank plc, 30 St Vincent Place, Glasgow G1 2HL, will say as follows:

.....

3.3 One way the banking market met the demand from customers for certainty and protection from the effects of interest rate rises was through Interest Rate Hedging Products (**"IRHPs"**). IRHPs are regulated by the Financial Conduct Authority (**"FCA"**). These products are essentially contracts for differences, which enable a customer to manage fluctuations in interest rates, such as swaps and derivatives.

3.4 The Bank did not provide many IRHPs. The Bank is relatively small, compared to other UK banks. It has traditionally focused on the "small-to-medium-sized enterprise" or SME lending market and does not have many large corporate customers, who might be interested in these more complex and sophisticated products.

3.5 The Bank had a bespoke range of products known by their brand name, Tailored Business Loans (**"TBLs"**). Within this range of products, were Fixed Rate Tailored Business Loans (**"FRTBLs"**), which are not contracts for difference and are therefore not regulated in the same way as IRHPs. This was confirmed by the FCA General Counsel in a letter dated 26 June 2014 to the Treasury Select Committee of the House of Commons (Production 7/191). These products had characteristics which could provide customers with a degree of interest rate protection, through fixing interest over a period of time for some or all of the funds advanced.

Fixed rate lending has been around for generations, long before anything like swaps and derivatives and other IRHPs existed. With straightforward fixed rate lending like FRTBLs, the customer would have certainty over what their interest rate would be throughout the term of the fixed period, no matter what happened to interest rates in the UK.

.....

I declare that the evidence in this witness statement is true to the best of my knowledge and belief.

SIGNED: D.I. Campbell

PRINT FULL NAME: DOUGLAS IAN CAMPBELL

DATE: 28 July 2015.

Appendix C

B. SUMMARY OF THE CLAIMS AND THE BANK'S DEFENCE

5. The Claimants appear to advance two categories of claim against the Bank and NAB:

5.1. First, that the Bank and NAB had given indications or determinations of Break Costs payable upon the early repayment of Fixed Rate Facilities (as defined in the TBL Facility Letters and Standard Terms) in circumstances in which the Claimants had no obligation to pay those Break Costs. This claim appears to be based upon the Claimants' beliefs that:

5.1.1. the Bank did not enter into individual corresponding transactions in order to hedge its risk arising from entering into the Fixed Rate Facilities with the Claimants; and

5.1.2. as a matter of construction of the TBL Facility Letters and Standard Terms they were only obliged to pay Break Costs in the event that the Bank had both entered into such individual corresponding transactions, and terminated them upon early repayment of a Fixed Rate Facility.

The Claimants contend that this gives rise to claims for deceit, negligence, breach of an implied contractual term and/or a claim in unjust enrichment.

5.2. Second, that the Bank and NAB misrepresented the nature of the Fixed Rate payable under the Claimants' Fixed Rate Facilities, leading the Claimants to believe that the Fixed Rate was set independently of the Bank and NAB and/or that the Fixed Rate could not contain any element of profit or income.