IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI

SC 64/2019
[2020] NZSC 71

BETWEEN	ANZ BANK NEW ZEALAND LIMITED Appellant
AND	BUSHLINE TRUSTEES LIMITED AND STEPHEN DANIEL COOMEY AS TRUSTEES OF BUSHLINE TRUST ONE, AND BUSHLINE TRUSTEES LIMITED AND SHARON LOUISE COOMEY AS TRUSTEES OF BUSHLINE TRUST TWO First Respondents
	ROBERT LEWIS ENGLAND Second Respondent

Hearing:	12 March 2020
Court:	Winkelmann CJ, Glazebrook, O'Regan, Ellen France and Williams JJ
Counsel:	S M Hunter QC, M C Sumpter and D T Street for Appellant M D Branch and K F Shaw for First Respondents A C Challis and D P Turnbull for Second Respondent
Judgment:	24 July 2020

JUDGMENT OF THE COURT

A **The appeal is allowed.**

B **We make no award of costs in this Court.**

C **We reserve leave for any party to apply for an order dealing with costs in the Courts below. Any such application should be made within 20 working days of the date of this judgment.**

REASONS
(Given by O'Regan J)

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Loan of $19.466 million

[1] In April 2008, the appellant, ANZ Bank New Zealand Ltd (ANZ), entered into a loan agreement with the first respondents, the trustees of Bushline Trust One and the trustees of Bushline Trust Two.[1] The two trusts operated as a partnership. We will refer to the partnership as "Bushline". Under the loan agreement, ANZ advanced $19.466 million dollars to Bushline for a loan period of 12 months.[2] The interest rate was a floating rate (the BKBM rate, explained below)[3] plus a margin of 0.7 per cent per annum (we will call this the 0.7 per cent margin). The interest rate clause in the loan agreement stated that the 0.7 per cent margin was "reviewable at any time".[4] The loan agreement was accompanied by three related swap transactions, under which ANZ swapped the floating (BKBM) rate payable by Bushline for a fixed rate. We explain the nature of these swap transactions below.[5]

Issues

[2] As it transpired, ANZ did, in fact, review the 0.7 per cent margin. Bushline claims that this was contrary to a representation or undertaking that had been given by representatives of ANZ prior to the signing of the loan agreement that the 0.7 per cent margin would be fixed for a period of five years. The primary issue in the present appeal is whether such a representation was made or undertaking given.

[3] Bushline's claim failed in the High Court. The High Court Judge found that there was no representation made, or agreement reached, to fix the margin for a period of five years.[6] However, the Court of Appeal overturned the High Court's factual finding and allowed Bushline's appeal.[7] At issue in the appeal to this Court is whether there was a proper basis for it to do so.

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1 ANZ was called "ANZ National Bank Ltd" at the time of the transaction.
2 All figures in this judgment have been rounded to the nearest $1,000.
3 See below at [20].
4 This appeared twice in the interest rate clause.
5 See below at [21]–[23] and [36].
6 *Bushline Trustees Ltd v ANZ Bank New Zealand Ltd* [2017] NZHC 2520, [2018] NZCCLR 19 (Edwards J) [HC judgment]. An application by Bushline for recall of the High Court judgment was dismissed: *Bushline Trustees Ltd v ANZ Bank New Zealand Ltd* [2017] NZHC 829.
7 *Bushline Trustees Ltd v ANZ Bank New Zealand Ltd* [2019] NZCA 245, [2019] 3 NZLR 455 (Miller, Asher and Clifford JJ) [CA judgment].

[4] If there was a representation or undertaking to fix the margin for five years, two further issues arise. First, whether the representation or undertaking bound ANZ, notwithstanding an "entire agreement" provision in the loan agreement.[8] Second, whether Bushline's claim is time-barred.

Parties

[5] The transaction in issue in the appeal was between Bushline and ANZ. Bushline had been a customer of ANZ and The National Bank of New Zealand Ltd (which was purchased by ANZ) for many years before the transaction was entered into.

[6] The Bushline trusts are associated with Stephen Coomey (known as Bill) and his wife, Sharon Coomey. The partnership comprising the two Bushline trusts is the vehicle through which the substantial dairy farming operations associated with Mr and Mrs Coomey were run at the time of the events in issue.

[7] At the time of the transaction, the trustees of Bushline Trust One were Mr Coomey, Robert England (the second respondent), and Christopher Schurr. The trustees of Bushline Trust Two were Mrs Coomey, Mr England and Mr Schurr. Mr England is a partner in the Taranaki law firm Thomson O'Neil & Co. He acted for the Coomeys and the Bushline trusts at the relevant time. Mr Schurr is an accountant. He was the Coomeys' accountant at the relevant time. Mr England and Mr Schurr were replaced as trustees of both trusts in 2013 by Bushline Trustees Ltd. Mr Schurr is now the sole director of Bushline Trustees Ltd.

[8] Although much of the dispute centres on communications between Mr and Mrs Coomey and representatives of ANZ, the contractual relationship in issue is, as noted earlier, between Bushline and ANZ, not the Coomeys and ANZ.

[9] Mr England was joined to the proceeding as a third party by ANZ on the basis that, if ANZ were liable to Bushline in tort, Mr England would be a joint tortfeasor.

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[8] The entire agreement provision is set out below at [48]. The agreement also included a clause providing that Bushline acknowledged it had not received or relied upon any advice given on behalf of ANZ, but that provision is not relevant to the issues before us.

ANZ's third party claim against him was not addressed in the High Court because Bushline's negligence claim against ANZ failed, rendering the third party claim moot.[9] It was agreed in the Court of Appeal that, if the High Court decision was overturned, ANZ's claim against Mr England would be remitted to the High Court. The Court of Appeal found it unnecessary to address the negligence claim but observed that, to the extent its judgment raised any issue as to Mr England's liability, ANZ's claim against him was remitted for determination by the High Court.[10] There is no appeal before us against the order remitting that claim to the High Court and so no need for us to address it.

Commerce Commission investigation

[10] The practices of ANZ in relation to the provision of funding involving loan agreements with floating rates, accompanied by swaps under which ANZ swapped the floating rate for a fixed rate, have become the centre of controversy. ANZ's conduct in relation to swaps (and that of other banks) was the subject of an investigation by the Commerce Commission. After that investigation, ANZ reached a settlement with the Commission under which it agreed to consent to the High Court making a declaration that ANZ's conduct was misleading and deceptive conduct in breach of the Fair Trading Act 1986. The declaration said the misleading and deceptive conduct was that ANZ understated some of the risks and/or overstated some of the benefits of interest rate swap arrangements to specified customers.[11] ANZ also agreed to pay compensation of up to $18.5 million to specified customers that were affected by its conduct. ANZ subsequently offered Bushline a settlement of approximately $155,000, but that was declined by Bushline.

The proceedings so far

[11] The litigation between ANZ and Bushline originally involved several issues arising out of the combination of the loans made by ANZ to Bushline and the swap transactions entered into by ANZ and Bushline. Bushline's claim against ANZ included claims for negligence, breach of contract, misrepresentation under the

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9 HC judgment, above n 6, at [202].
10 CA judgment, above n 7, at [15] and [292].
11 *Commerce Commission v ANZ Bank New Zealand Ltd* [2015] NZHC 1168, (2015) 14 TCLR 71 at [19]–[20]. See also at [4].

Contractual Remedies Act 1979,[12] breach of the Fair Trading Act and oppressive conduct in terms of the Credit Contracts and Consumer Finance Act 2003. As first pleaded, Bushline's claim focused on the overall effect of the loan and swap transactions.

[12] The claims that were pursued at trial were based on allegations of representations or undertakings by ANZ that:

(a) the 0.7 per cent margin would be held for five years on all of ANZ's lending to Bushline;

(b) swaps operated like a fixed rate loan, except with greater flexibility and benefits (the allegation being that there were important differences that were adverse to Bushline);

(c) swaps were transferable and ANZ would not prevent Bushline from refinancing if Bushline desired to do so;

(d) ANZ could and would monitor and/or manage Bushline's swaps on an ongoing basis to ensure that Bushline was able to take advantage of the flexibility and benefits, and to manage its exposure to interest rate risk; and

(e) ANZ would be there for Bushline "in good times and bad".

[13] Bushline's claim was commenced in May 2014. An amended statement of claim was filed in November 2015. Neither of these statements of claim contained an express allegation that ANZ had made a representation or given an undertaking to fix

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[12] The Contractual Remedies Act 1979 has been repealed and replaced by pt 2, subpt 3 of the Contract and Commercial Law Act 2017 (CCLA). The CCLA is a revision Act for the purposes of s 35 of the Legislation Act 2012 (s 4(1)), and the provisions relating to contractual remedies apply to all contracts made on or after 1 April 1980: s 6 and sch 1 cl 4. See *Kawarau Village Holdings Ltd v Ho* [2017] NZSC 150, [2018] 1 NZLR 378 at [73], n 101 per Ellen France J (with whom Elias CJ agreed: at [1]) and [214], n 255 per William Young and O'Regan JJ. We therefore disagree with the Court of Appeal's statement that the Contractual Remedies Act applied in this case: CA judgment, above n 7, at [138]. We will apply the CCLA. As the relevant provisions of the Contractual Remedies Act and the CCLA do not differ in any material respect, this makes no difference to the analysis or the outcome.

the margin at 0.7 per cent for five years. Bushline filed a further amended statement of claim (the third statement of claim) in September 2016. For the first time, the third statement of claim included a pleading that there was such a representation or undertaking. ANZ argues that the fact that this claim was made only in the third statement of claim is significant because it undermines the argument that there was, in fact, such a representation or undertaking. We will discuss this point later.[13] A further amended statement of claim was filed in March 2017.

[14] All of Bushline's claims were dismissed by Edwards J in the High Court.[14] She awarded increased costs to ANZ in a separate costs judgment.[15]

[15] However, Bushline's appeal to the Court of Appeal was allowed. The High Court judgment was reversed and the costs determination was quashed.[16] Of relevance to the present appeal, the Court of Appeal found that ANZ agreed that it would fix Bushline's margin at 0.7 per cent for five years.[17] The Court of Appeal said this undertaking applied to the loan made under the April 2008 loan agreement (which had a one year term) and any re-advances of that loan over the five-year period.[18] In effect, this means the undertaking to fix the 0.7 per cent margin for five years must have also been an undertaking that ANZ would continue to lend the principal amount for five years, notwithstanding the term of the loan as set out in the loan agreement was one year.

[16] The Court of Appeal also found that ANZ's defence based on the entire agreement clause in the loan agreement failed. That was because, for the purposes of s 4 of the Contractual Remedies Act (now s 50 of the Contract and Commercial Law Act 2017 (CCLA)), it was not fair and reasonable that these provisions would be conclusive between the parties.[19] ANZ's limitation defence also failed.[20] The Court

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13 See below at [95]–[102].
14 HC judgment, above n 6, at [201]–[202].
15 *Bushline Trustees Ltd v ANZ Bank New Zealand Ltd* [2018] NZHC 454 at [57(c)].
16 CA judgment, above n 7, at [295] and [297].
17 At [218].
18 At [220].
19 At [275].
20 At [289].

remitted the matter to the High Court for the determination of the amount of damages.[21]

Scope of the appeal

[17] ANZ was granted leave to appeal to this Court against all aspects of the Court of Appeal decision.[22] Since the granting of leave, however, the parties have settled all issues apart from that involving the "margin undertaking". What remains in issue is whether ANZ undertook or represented to Bushline that the 0.7 per cent margin would be fixed for a five-year period and, if so, whether ANZ was bound not to raise the margin during that five-year period. These are the only aspects of the original claim still alive. Connected with them is whether, even if Bushline proves the existence of a binding representation or undertaking to fix the 0.7 per cent margin for five years, its claim is nevertheless time-barred in whole or in part.

[18] On the face of it, the claim now relates only to the terms of the loans made by ANZ to Bushline and no longer concerns the swaps. But the Court of Appeal considered that ANZ's conduct in relation to the swaps was relevant to the application of s 4 of the Contractual Remedies Act (s 50 of the CCLA) and the arguments before us addressed the swap transactions as well.

[19] This Court granted leave primarily because of the issues relating to s 50 of the CCLA, which it considered were issues of public importance and in respect of which the challenge to the findings of the Court of Appeal appeared to have some substance. As will become apparent, our conclusion on the primary factual issue renders those issues moot. However, we briefly address s 50 below.[23]

BKBM interest rate

[20] As noted earlier, the rate of interest specified in the loan agreement for the $19.466 million loan was a floating rate. The rate was defined as "the rate of interest

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21 At [293].

22 *ANZ Bank New Zealand Ltd v Bushline Trustees Ltd* [2019] NZSC 115. The approved question was "whether the Court of Appeal was correct to allow the appeal from the judgment of the High Court".

23 See below at [129]–[132].

… for New Zealand Dollar bills of exchange for [the specified period] which appears on the Reuters Screen BKBM Page opposite the caption 'BID' as of 11.00am on [the relevant] date". The BKBM rate is a rate derived from the rate applicable to bank bills (that is, bills on which a bank is liable). The 0.7 per cent margin was added to the BKBM rate to reflect the credit risk attaching to the customer (Bushline).

Interest rate swap

[21] The operation of interest rate swaps is explained in some detail in the High Court[24] and Court of Appeal judgments.[25] It is not necessary for us to go into any detail on the swaps, given their peripheral role in the issue now before us. In the broadest terms, the swap agreement allows the customer, having borrowed money at a floating rate (BKBM rate) plus a margin, to obtain some certainty about the amount of interest it will have to pay by swapping its obligation to pay that floating rate for an obligation to pay a fixed rate. So when a swap agreement is entered into, the customer swaps its obligation to pay the floating rate for an agreed fixed rate on a notional amount. It is best practice for the payments to be timed to match the interest payment dates on the loan. Under the swap agreements linked to the $19.466 million loan, Bushline remained liable to pay the credit margin.

[22] Swap agreements are used in connection with loans with the objective of providing the customer with an end result similar to that which would have been obtained by borrowing money at a fixed rate of interest, but with a degree of flexibility because of the tradability of swaps and the ability to extend them. But swaps also involve risks, particularly when the terms of the loan and the swaps do not align. Part of the dispute between the parties that has now been settled concerned the allegation that ANZ misled Bushline as to the nature of these risks.

[23] In the case of the arrangement between ANZ and Bushline, the payment obligations were effected as two separate transactions, rather than by way of a netting off. So Bushline would pay ANZ the floating interest rate payable under the loan plus the margin, and then there would be an adjustment payment reflecting the difference

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24 HC judgment, above n 6, at [45]–[51].
25 CA judgment, above n 7, at [23]–[28].

between the floating rate and the fixed rate. If the swap was "in the money" from Bushline's point of view, the adjustment payment would be made by ANZ to Bushline. If the swap was "out of the money" the adjustment payment would be from Bushline to ANZ. This meant that the operation of the swaps was clearly recorded in Bushline's bank statements.

Factual background

[24] There are detailed accounts of the factual background in both the High Court and Court of Appeal judgments. Given the more limited scope of the issues now before us, we describe the background more briefly. The key event in the factual background is the exchanges between Mr and Mrs Coomey and two executives of ANZ, Robert Simcic and Christopher Harvey, on 18 and 19 March 2008 (the 18/19 March meetings).

[25] We will describe the facts by outlining the history of the relationship between Mr and Mrs Coomey, Bushline and ANZ leading up to the 18/19 March meetings, the 18/19 March meetings themselves, the completion of the transaction discussed at those meetings and the subsequent interactions between Bushline and ANZ.

Events in 2005–2007

[26] ANZ began promoting interest rate swaps to rural customers in July 2005. Stuart Esquilant, a dealer at ANZ, made presentations to potential customers. His evidence was that he made such a presentation to the Coomeys in 2005. This was confirmed in his calendar and by the evidence of an ANZ manager, Nicholas Lawn, who accompanied Mr Esquilant. The Coomeys contend the presentation was in 2008.

[27] Bushline entered into its first swap on 7 October 2005.[26] ANZ instructed Mr England to act on its behalf in relation to the legal documentation for the swap (and future swaps). Mr England certified to ANZ that he had explained the nature and effect of the swap terms to Bushline. However, the advice he gave when he met with

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[26] The swap was for a notional sum of $975,000 (increasing incrementally to $2,905,000) for five years from 20 December 2005. As the Court of Appeal noted, the swap confirmation incorrectly records Bushline as the "Floating Rate Payer" under the swap. The whole point of the transaction was for Bushline to become the fixed rate payer: CA judgment, above n 7, at [37], n 8.

the Coomeys prior to completing this certificate is privileged. Privilege has not been waived. The swap terms were provided to Bushline by ANZ in December 2005. Clause 10.1 of the relevant swap document provides that the customer enters into the transaction in reliance on its own independent advice and that ANZ will not be liable for the customer's loss in any circumstances.

[28] ANZ issued a swap confirmation for the first swap on 23 February 2006. This was a standard form document, which was to be signed by the customer when a swap was entered into. It stated that by signing the confirmation, the customer confirmed that the terms and conditions that it had previously been provided with governed the swap. The confirmation also included the following statement, set out in capital letters and framed with bold black lines:

> 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.

[29] Bushline entered into further swap transactions on 21 March 2006 and 28 September 2006. Confirmations on the standard form just referred to were signed on behalf of Bushline in respect of both of these transactions. The transcript of the telephone call between an ANZ dealer and Mr Coomey confirming the details of the March 2006 swap was in evidence. In that conversation, Mr Coomey confirmed to the dealer that he had done a swap transaction before. When asked about his understanding of the transaction, he said "it's not so bad this time". In his evidence at the trial, Mr Coomey said that, looking back, he had very little idea what the dealer was talking about in that phone call and did not understand what swaps were before 2008.

[30] By early 2008, Bushline had a total debt to ANZ of $11.97 million recorded in a number of loan agreements. None of these loan agreements referred to a margin, as was the case in relation to the loan agreement at issue in this appeal. Rather, the floating interest rate was defined in broad terms such as "[ANZ's] floating interest rate applicable to the Customer (as determined by [ANZ])" or "[ANZ's] 30 day bill-priced interest rate applicable to the Customer (as determined by [ANZ]) … then [ANZ's]

90 day bill-priced interest rate applicable to the Customer (as determined by [ANZ])" which was to be reviewed every 90 days. These formulations apparently included a margin over the bill rate payable by ANZ itself, but this was not expressly identified in the relevant agreement and therefore not obvious to Bushline. This also meant that the swap transactions relating to the pre-2008 loans related to the full floating rate (including the implicit but unstated margin) in contrast to the swaps relating to the loan at issue in this case.

February–April 2008

[31] The important events in February and March 2008 centred on the purchase by Bushline of a farm in Waverley, which was to be incorporated into Bushline's dairy farming business as a run-off block with potential for development into a dairy farm. The purchase price was $7.25 million.

[32] ANZ's relationship manager dealing with the Bushline account was Mr Harvey. He prepared a lending proposal for the Waverley purchase to go to ANZ's credit department. This recorded that, as a result of the purchase, the Bushline business would have a cashflow deficit in future years. ANZ agreed to lend the amount required to purchase the farm on 28 February 2008, without any specification of the terms. Mr Harvey communicated this approval to Mr and Mrs Coomey. That verbal commitment was sufficient for Bushline to enter into an unconditional sale and purchase agreement the following day. One of the conditions on which approval was given was a requirement that ANZ advise Bushline in writing about ANZ's concern regarding the viability of their business and the need for intensification to achieve sustainability. This was done by a letter dated 18 March 2008.

[33] ANZ lent Bushline the amount needed to pay the deposit. However, Mr Coomey made it clear to ANZ that he was considering refinancing with one of ANZ's competitors, ASB Bank Ltd (ASB). There was also mention of a possible refinancing with Bank of New Zealand (BNZ). This was a matter of concern for ANZ because Bushline was a significant customer. Mr Harvey described Bushline as his "largest customer". Mr Simcic described Bushline as a "key client".

[34] This was the backdrop for the crucial 18/19 March meetings involving Mr and Mrs Coomey for Bushline and Mr Harvey and his senior manager, Mr Simcic, for ANZ, at which the terms on which ANZ would finance the purchase of the Waverley farm were agreed. The evidence of what occurred at this meeting is at the heart of the key issue in the case and we will discuss it in detail later. There is no doubt ANZ agreed to lend the required money on a floating rate basis with a margin over the BKBM rate of 0.7 per cent. The duration of any commitment by ANZ to hold that margin at 0.7 per cent is disputed.

[35] Continuing the narrative, attention then turned to the loan structure and the swaps that would be entered into. There was a meeting between Mr Harvey and Mr Esquilant of ANZ with the Coomeys on 28 March. Mr Harvey made a note of the meeting which said, "look @ refinancing all debt into a three year SWAP". However, Mr Esquilant's evidence was that he had suggested a mixture of three and five-year swaps but that Mr Coomey had not wished to enter into a swap for a period as long as five years.

[36] In early April it was agreed that two of the three existing swap contracts between ANZ and Bushline would be restructured so that the amount of the loan would be covered by three swaps. The two restructured swaps had terms of approximately two years eight months, maturing in December 2010 ($7.905 million) (the December 2010 swap) and three years six months, maturing in October 2011 ($8.847 million) (the October 2011 swap). One of the existing swaps ($3.15 million) remained in place. It had just over a year to run, maturing in June 2009 (the June 2009 swap). In August 2008, the notional amount of the June 2009 swap was reduced to $3.041 million.

[37] The documentation for the loan was finalised on 21 April 2008. The loan was advanced on 1 May 2008, and was repayable on 1 May 2009. Mr England acted for ANZ and gave a certificate to ANZ that he had advised Bushline on the terms of the loan agreement. Privilege was not waived in relation to the advice he gave. Mr England signed the loan agreement himself as a trustee of both of the Bushline trusts.

[38] There was an obvious mismatch between the end date of the loan and the end dates of the December 2010 and October 2011 swaps. Given the link between the loan and the swaps, the parties must have anticipated that ongoing funding would be available from ANZ to Bushline until the swaps matured, all things being equal.[27] Mr Esquilant confirmed in evidence that entering into a three-year swap contract anticipated the loan being rolled over three times. In the event that the loan was not rolled over, the swaps would need to be closed out, which would give rise to a contingent risk to both parties.

Events after April 2008

[39] The purchase of the Waverley farm was not a success for Bushline. Like other dairy farmers they faced difficult conditions after 2008, in part because of the global financial crisis (GFC) that affected the market for the provision of finance in New Zealand. ANZ became concerned about the sustainability of Bushline's business. Bushline attempted to sell assets to reduce debt, and in mid-2012 it was successful in selling 12 out of 15 certificates of title of the Waverley property, which reduced its overall debt to about $16 million.

[40] During this time Bushline continued to borrow from ANZ, but always on short-term arrangements. We set out the details below. These loan agreements provided that ANZ was entitled to call up the loan if "in the Bank's opinion, an unsatisfactory feature develops in the affairs of the Customer or any Guarantor, or the Customer or any Guarantor does not continue to conduct their affairs to the Bank's satisfaction". As the Court of Appeal pointed out, this meant Bushline had little negotiating power given ANZ's concern about its operations and about the dairy industry itself.[28]

[41] Up until October 2008, the swaps worked in Bushline's favour, with the amount payable by Bushline to ANZ on the swap transactions being less than the

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[27] The term of the loan was significant to ANZ because, as Mr Esquilant explained, it had to provision less capital against short-term loans to meet regulatory requirements than required for loans of longer duration. This may mean that, if ANZ had in fact agreed to a five-year term as the Court of Appeal found, it had not made adequate provision for the loan.

[28] CA judgment, above n 7, at [80].

amount payable by ANZ to Bushline. However, that changed in October 2008, and from then on, the reverse was true.

[42] As mentioned earlier, ANZ did, in fact, increase the margin on its loans to Bushline above the 0.7 per cent that had been agreed in March 2008. In December 2008, ANZ increased the margin on the $19.466 million loan from 0.7 per cent to 0.85 per cent. It increased it again in March 2009 to 0.97 per cent.

[43] During the GFC, the BKBM rate fell significantly. At the time of the 21 April 2008 agreement, the BKBM rate was 8.88 per cent (as provided in the agreement). By April 2009, the BKBM rate was only 3.27 per cent. Bushline's fixed rate payment obligation under the swaps for April 2009 alone was over $70,000 more than the floating (BKBM) rate amount payable by ANZ to Bushline under the swaps.

[44] The $19.466 million loan was refinanced for a further 12 months on 4 May 2009 at a rate of BKBM plus 0.97 per cent. As the swaps matured, the loan was gradually transferred from a BKBM plus margin rate to a full floating rate (a rate that did not identify a margin) to reduce Bushline's interest expense. By agreement dated 9 September 2009, the $3.041 million which had rolled off the June 2009 swap was refinanced at BKBM plus 3.45 per cent. This amount was switched to a full floating rate by agreement dated 17 May 2010. A further $7.905 million was switched to a full floating rate by agreement dated 22 November 2010. A further $8.847 million, which included the balance of the original loan, was refinanced for a further 10 months at a rate of BKBM plus 0.97 per cent by agreement dated 21 December 2010. This final portion was transferred to a full floating rate by agreement dated 20 October 2011.[29] In 2013, Bushline refinanced its debt with another bank.

[45] The margin increases in December 2008 and March 2009 resulted in Bushline paying approximately $76,000 more in interest than it would have if the margin had been held at 0.7 per cent for the term of the swaps. So that would be the measure of its loss if ANZ's commitment to maintain the 0.7 per cent margin was for the period of the swaps, rather than for five years, as Bushline alleges. If the commitment was

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[29] These are the agreements of which there were copies in evidence. There is nothing to indicate there were others.

to maintain the margin for five years, the loss is said to be nearly $3.8 million. This illustrates the significance of the issue to the parties.

Loan agreement

[46] As mentioned earlier, the loan agreement dated 21 April 2008 provided for a floating interest rate. The relevant part of the interest rate clause in the agreement provided:

> 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).
>
> In this agreement, the term "BKBM rate", when used in relation to any period expressed as a number of months (such as 'the 3 month BKBM Rate'), means, on any date, the rate of interest (expressed as a percentage per annum) for New Zealand Dollar bills of exchange for a period equal to that number of months which appears on the Reuters Screen BKBM Page opposite the caption "BID" as of 11.00am on that date.

[47] That the margin is reviewable at any time is stated twice.[30]

[48] The loan agreement also included an entire agreement provision, on which ANZ seeks to rely:

> The Customer acknowledges that:
>
> …
>
> (c) no representation, warranty or undertaking has been made by or on behalf of [ANZ] in relation to the Loan which is not expressly set out in this agreement;
>
> …

[49] A similar clause appeared in the loan agreements for all of the loans made by ANZ to Bushline.

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[30] The loan agreement dated 4 May 2009, relating to the rollover of the $19.466 million loan, and the loan agreement of 21 December 2010, refinancing part of that loan, had similar interest rate clauses, except the margin in both cases was 0.97 per cent, rather than 0.7 per cent.

18/19 March meetings

[50] We now turn to the events surrounding the agreement on the terms of the loan that was said to have been reached at the 18/19 March meetings.

[51] On 18 March 2008, Mr Harvey and Mr Simcic met with Mr and Mrs Coomey. The focus of the discussion was on the margin. Mr Coomey said he had favourable fixed margin offers from both ASB and BNZ. He wanted ANZ to match these competing offers. Mr Harvey's note of the meeting was as follows:

> 18/3/2008 – Chris H & RS
> Negot[ia]tion
> BNZ offering 60 points on ongoing.
> ASB 8.1%
> Waiting for Bill to confirm offers from other banks to lock in margin with us.

The reference to "Chris H & RS" is to Mr Harvey and Mr Simcic. The reference to "Bill" is to Mr Coomey. As Mr Coomey had no evidence of ASB's or BNZ's offers, no agreement was reached on 18 March.

[52] However, ANZ did deliver two letters to the Coomeys at the 18 March meeting. The Coomeys also signed a standard form "acceptance of finance offer" document. Rather enigmatically, this document referred to the offer of finance set in ANZ's "letter of 18th March 2008". No such letter has ever been found. The Court of Appeal found that it was more likely than not that no such letter existed at that time.[31]

[53] Mr Harvey and Mr Simcic met with the Coomeys again on 19 March. During that meeting Mr Coomey showed them a copy of the offer he had received from ASB. Mr Simcic went to his car and called the responsible officer in ANZ, Charlie Graham. While in his car, he photographed certain pages of ASB's offer (the photographs were in evidence). He returned and confirmed an offer of funding at a margin of 0.7 per cent above BKBM. Mr Harvey recorded the outcome in a handwritten note on the agenda of that day as being "Agreed – 70pts ongoing". Mr Simcic emailed the photographs he had taken of the ASB offer to Mr Graham the following day.

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31 CA judgment, above n 7, at [62].

[54] Bushline's case is that ANZ's offer involved not only a commitment to a margin of 0.7 per cent but also a commitment to fix that margin for five years, thereby largely matching what it says was the terms of ASB's offer.

High Court's rejection of Bushline's case

[55] The High Court Judge found that no representation was made, or agreement reached, to hold the 0.7 per cent margin for five years. Rather, she found that ANZ agreed to set the margin at 0.7 per cent, but did not agree to fix that margin for five years.[32]

[56] Her reasons were:

(a) ANZ's offer was made in response to the competing offers from BNZ and ASB, and those offers did not include a margin that was fixed for a five-year term.[33]

(b) It was unlikely that ANZ would have agreed to fix the margin at that level for a five-year term given the context of the 18/19 March meetings. In particular, credit approval for the new lending was granted on the condition that written advice was provided to Bushline outlining ANZ's concerns about the impact of the Waverley purchase on equity given the forecast cashflow deficits.[34]

(c) There was no written record of such an important and far reaching term. Even in an environment where handshake deals were common, this was a significant transaction and if the five-year commitment had been made, then Mr Harvey would have been likely to record it in his notes.[35]

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32 HC judgment, above n 6, at [77]. The High Court Judge also found that this offer related only to lending which would be subject to swaps.
33 At [78]–[79].
34 At [80].
35 At [81].

(d) Neither Mr Schurr nor Mr England was made aware of the alleged agreement.[36]

(e) Bushline made this claim for the first time in the third statement of claim filed in September 2016. It had not mentioned this agreement when it had entered into loan arrangements with ANZ in the period between 2008 and 2012 after ANZ had increased the margins.[37]

(f) The discussion around margins was in the context of an interest rate to be hedged by swaps. In that context, the reference to "ongoing" in Mr Harvey's notes referred to the duration of the swaps.[38]

Should the Court of Appeal have deferred to the High Court?

[57] The Court of Appeal overturned this factual finding. The question we now address is whether it had a proper basis for doing so. We will address the Court of Appeal's findings as we deal with the submissions advanced by the parties.

[58] For ANZ, Mr Hunter QC argued that the Court of Appeal, in overturning this important finding of fact, failed to respect the advantages enjoyed by Edwards J. Mr Hunter referred us to the decision of the Court of Appeal in *Green v Green* which applied an earlier Court of Appeal decision, *Rae v International Insurance Brokers (Nelson Marlborough) Ltd*.[39] The extract from *Rae* cited in *Green* refers to the fact that the advantages possessed by a trial judge in determining questions of fact are obvious. Mr Hunter said this was especially so where assessments of credibility and reliability are involved. *Rae* was the subject of comment by this Court in its leading decision on the nature of a civil appeal, *Austin, Nichols & Co Inc v Stichting Lodestar*, where the Court said:[40]

> The appeal court must be persuaded that the decision is wrong, but in reaching that view no "deference" is required beyond the "customary" caution

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36 At [82].
37 At [83].
38 At [84].
39 *Green v Green* [2016] NZCA 486, [2016] NZFLR 987 at [31], citing *Rae v International Insurance Brokers (Nelson Marlborough) Ltd* [1998] 3 NZLR 190 (CA) at 199.
40 *Austin, Nichols & Co Inc v Stichting Lodestar* [2007] NZSC 103, [2008] 2 NZLR 141 at [13] (footnotes omitted).

> appropriate when seeing the witnesses provides an advantage because credibility is important. Such caution when facts found by the trial judge turn on issues of credibility is illustrated by *Rae v International Insurance Brokers (Nelson Marlborough) Ltd* and *Rangatira Ltd v Commissioner of Inland Revenue*.

[59] This Court made it clear that an appeal court is not required to show deference to the findings of fact of a lower court.[41] It did say that caution is appropriate in appeals from findings of credibility.[42] *Rae* is mentioned as an example, but the reasoning of *Rae* was not adopted by this Court (and certainly not with regard to reliability).[43]

[60] We do not consider there was any reason for the Court of Appeal to exercise caution in relation to the finding of fact now in issue. While the findings made by Edwards J related to oral statements made at a meeting nine years before the trial, there was no suggestion that any of the witnesses lacked credibility. In relation to the reliability of their evidence, the assessment involved considering the evidence given against the written record (substantially, the notes of Mr Harvey) and broader context. This did not involve the High Court having any advantage over the Court of Appeal.

[61] We reject, therefore, ANZ's argument that the Court of Appeal should have deferred to the High Court's finding of fact.

Question of fact

[62] We do, however, comment on one other aspect of the Court of Appeal's analysis before engaging directly with the evidence.

[63] The focus of the Court of Appeal's analysis was the meaning of the term "70pts" and, more specifically, "ongoing".[44] This referred to Mr Harvey's handwritten note that the parties had agreed to "70pts ongoing".[45] In order to determine whether the bank had made a commitment to hold the 0.7 per cent margin

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41 See also *Lodge Real Estate Ltd v Commerce Commission* [2020] NZSC 25 at [60].

42 This Court elaborated on the reasons for such caution with regard to credibility findings recently in *Sena v Police* [2019] NZSC 55, [2019] 1 NZLR 575 at [38]–[40].

43 *Rae* should not therefore be cited, except as an example of the cautionary approach.

44 CA judgment, above n 7, at [185].

45 See above at [53].

and, if so, for what period, the Court of Appeal applied the methodology for the construction of contracts set out in *Investors Compensation Scheme Ltd v West Bromwich Building Society* and *Boat Park Ltd v Hutchinson*.[46] So the Court asked itself what the reasonable bystander would have understood was the meaning of ANZ's offer of 70 basis points ongoing. The Court concluded that a reasonable bystander would have understood the offer as being made by reference to the five-year period Mr Coomey wanted to have Bushline's margins fixed for.[47]

[64] We do not think that the methodology derived from *Investors Compensation* and *Boat Park* had a role to play in the determination of whether ANZ agreed to fix the 0.7 per cent margin and, if so, for what period. Rather, the task was to determine whether an oral contract (or undertaking, to use the Court of Appeal's term) was entered into or a representation was made. Mr Harvey's note of "70pts ongoing" was not contractual language. Rather, it was his personal record of the discussion.[48] It was common ground that the term "ongoing" had not been used during the 18/19 March meetings. Mr Harvey's record was part of the evidence to be considered when determining whether ANZ had given an undertaking or made a representation to fix the 0.7 per cent margin for five years. It was not the words of a contract about which the parties had differing interpretations.

[65] Ascertaining whether an oral contract (or a partly oral and partly written contract) was entered into and, if so, what its terms are, is a question of fact.[49] This means that all evidence to assist that task is admissible, including evidence of the parties' subjective intentions and subsequent conduct.[50]

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46 At [186], citing *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896 (HL); and *Boat Park Ltd v Hutchinson* [1999] 2 NZLR 74 (CA).

47 CA judgment, above n 7, at [204]–[205].

48 He had also used the term "ongoing" in his note of the 18 March meeting in relation to what the Coomeys had said was the offer made by BNZ: see above at [51].

49 *Carmichael v National Power plc* [1999] 1 WLR 2042 (HL) at 2049 per Lord Hoffmann.

50 At 2051 per Lord Hoffmann. For discussion see David McLauchlan "Contract Formation and Subjective Intention" (2017) 34 JCL 41.

[66] In *Thorner v Major*, Lord Neuberger explained the reasons for this and for the contrast with purely written contracts as follows:[51]

> This shows that (a) the interpretation of a purely written contract is a matter of law, and depends on a relatively objective contextual assessment, which almost always excludes evidence of the parties' subjective understanding of what they were agreeing, but (b) the interpretation of an oral contract is a matter of fact (I suggest inference from primary fact), rather than one of law, on which the parties' subjective understanding of what they were agreeing is admissible.
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> [83] The reason for this dichotomy is partly historical. Juries were often illiterate, and could therefore not interpret written contracts, whereas they could interpret oral ones. But it also has a good practical basis. If the contract is solely in writing, the parties rarely give evidence as to the terms of the contract, so it is cost-effective and practical to exclude evidence of their understanding as to its effect. On the other hand, if the contract was made orally, the parties will inevitably be giving evidence as to what was said and done at the relevant discussions or meetings, and it could be rather artificial to exclude evidence as to their contemporary understanding. Secondly, and perhaps more importantly, memory is often unreliable and self-serving, so it is better to exclude evidence of actual understanding when there is no doubt as to the terms of the contract, as when it is in writing. However, it is very often positively helpful to have such evidence to assist in the interpretation of an oral contract, as the parties will rarely, if ever, be able to recollect all the details and circumstances of the relevant conversations.

[67] The issue before the Court of Appeal, and now before us, is whether Bushline proved its case that an oral contract was entered into on 19 March to fix the 0.7 per cent margin for five years.[52]

Bushline's case

[68] Bushline's case is founded on Mr and Mrs Coomey's account of what occurred at the 18/19 March meetings and other evidence that, it says, supports that narrative. Mr Coomey's account was:

> (a) At the 18/19 March meetings, Mr Coomey told the ANZ representatives, Mr Simcic and Mr Harvey, that he had an offer from

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[51] *Thorner v Major* [2009] UKHL 18, [2009] 1 WLR 776 at [82]–[83]. A similar view has been expressed in New Zealand: *Bryson v Three Foot Six Ltd* [2005] NZSC 34, [2005] 3 NZLR 721 at [20].

[52] Or, alternatively, that ANZ had made a representation that the margin was fixed and Bushline had relied on that representation. These are also questions of fact.

ASB which featured a margin of 0.65 per cent fixed for five years and that ANZ needed to match that offer.

(b) The ANZ representatives said they needed to get approval to do this. On 19 March, Mr Simcic, after talking to his superior at ANZ, Mr Graham, confirmed that ANZ was prepared to offer funding at a margin of 0.7 per cent (rather than 0.65 per cent). Bushline says that, as this was the only modification of the terms that Mr Coomey had put forward by reference to the ASB offer, it was implicit that ANZ's offer also involved fixing the margin for a five-year term. This was, in effect, a counter-offer to the proposal that had been put forward by Mr Coomey on behalf of Bushline.

(c) Mr Coomey accepted this counter-offer on behalf of Bushline. He said he was prepared to live with the margin of 0.7 per cent, rather than 0.65 per cent, because of his relationship with ANZ.

[69] To make ANZ's undertaking to fix the 0.7 per cent margin for five years meaningful, it also required a commitment by ANZ to keep funding Bushline through the five-year period. We consider there would also need to be an implicit commitment that such funding would be provided using the one-month BKBM rate as the base for calculation of interest. Otherwise, adopting a different baseline (for example the three-month BKBM rate, if higher than the one-month rate) could have a similar effect on Bushline as increasing the 0.7 per cent margin, unless the obligation to pay the floating rate was the subject of a swap under which Bushline paid a fixed rate instead of the BKBM rate.

Evidence relied on by Bushline

[70] Bushline points to the evidence described below in support of its case that the ANZ representatives at the 18/19 March meetings agreed to fix the 0.7 per cent margin for five years.

Context

[71] Bushline argues that this evidence must be seen in context. As acknowledged by ANZ, Bushline was an important customer for ANZ.[53] The market for rural lending at the relevant time was highly competitive. And, as confirmed by an expert witness, Christopher Darlow, "handshake deals" were common at the time. We accept the evidence confirms all of these features applied at the time of the 18/19 March meetings.

Matching ASB

[72] Mr Coomey's evidence was that he told Mr Simcic and Mr Harvey that he had an offer from ASB that involved a margin of 0.65 per cent for a term of five years and that he wanted ANZ to match this. Mrs Coomey, who was also present at the meeting, gave evidence to the same effect.

Mr Simcic's concession

[73] Mr Simcic confirmed that a competing offer from ASB had been put before him and Mr Harvey on 19 March and that Mr Coomey was seeking an immediate commitment to a margin of 0.7 per cent.[54] Mr Simcic thought when ANZ agreed to the 0.7 per cent margin, it was agreeing to hold that margin for the term of the swaps. However, in cross-examination he accepted that Mr Coomey said to him that Bushline had a competing offer featuring a margin of 0.65 per cent and that this margin was to be fixed for a five-year period. We accept this concession by Mr Simcic provides significant support for Bushline's case as to what happened at the 18/19 March meetings. As we will come to, it was not put to Mr Simcic in cross-examination that he had, on behalf of ANZ, agreed to the 0.7 per cent margin for five years.[55]

Mr Graham's approval

[74] It was common ground that Mr Simcic and Mr Harvey needed approval of a higher ranking ANZ manager, Mr Graham. Mr Simcic accepted that he had

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53 See above at [33].
54 Mr Coomey's evidence was that he was actually seeking a margin of 0.65 per cent.
55 See below at [103].

photographed some of the pages of the offer made by ASB to Bushline, and had then obtained Mr Graham's approval to offer a margin of 0.7 per cent (he emailed the photos to Mr Graham the following day). However, his evidence was that the offer related to new lending to Bushline and that the period for which the margin would be held would be the duration of a swap that would be matched with the BKBM lending.

[75] Mr Graham was not called to give evidence as to what was discussed between him and Mr Simcic and there was no evidence of any document recording Mr Graham's approval of the offer to Bushline. Bushline argues that, in light of the failure by ANZ to call Mr Graham, the Court should assume that his evidence would have been unhelpful to ANZ's case.[56] Even if such an assumption were made, an inference that his evidence would have been unhelpful does not of itself prove that ANZ offered to fix the 0.7 per cent margin for five years.

ASB's offer

[76] As we will come to, there was evidence from an ASB employee, Blair Robinson, that ASB's offer did not, in fact, involve a commitment to fix the margin for five years, as Mr and Mrs Coomey claimed. Mr Coomey said this evidence was wrong, but we do not consider his evidence on that point (discussed below at [83]–[88]) to be convincing in the face of the evidence to the contrary.

[77] Counsel for Bushline, Mr Branch, argued that even if ASB had not offered to fix its 0.65 per cent margin for five years as Mr and Mrs Coomey suggested, this did not necessarily undermine Bushline's case. What was important, he said, was what ANZ thought it had to match, rather than what ASB had actually offered. There was no suggestion that Mr and Mrs Coomey had misled ANZ as to what ASB was offering; rather, their evidence was based on their recollection as to what ASB had actually offered. This does leave open the possibility that Mr and Mrs Coomey thought ASB was offering to fix the 0.65 per cent margin for five years, even though they were mistaken in that regard, and communicated this to Mr Simcic and Mr Harvey.

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[56] It appears that Mr Graham left ANZ other than on good terms.

"Ongoing"

[78] As mentioned earlier, Mr Harvey's handwritten note on the agenda for the meeting on 19 March recorded "Agreed – 70pts ongoing". Bushline argues that this supports its case that the commitment was for a five-year period. It was common ground that the term "ongoing" was not discussed by the parties during the meeting. But the case for Bushline is that it must have referred to a period of five years, given that this was what was being proposed by ASB and what ANZ was matching.

[79] As already mentioned, Mr Simcic said he thought that what had been agreed was that the 0.7 per cent margin would be applicable for the term of the swaps related to the loans. Edwards J accepted this was correct.[57] However, that assumes that all of the parties were working on the assumption that swaps would be entered into, something which Mr and Mrs Coomey both deny. Mr Harvey said he thought that ongoing meant that it was fixed until a review; that is, it was not a promotional rate. We do not see that as a plausible interpretation of "ongoing".

[80] We accept that "ongoing" could refer to a five-year commitment. But it is open to many other interpretations. It was recorded by Mr Harvey, who had no recollection of a five-year commitment being discussed at the 18/19 March meetings.

November 2009 file note

[81] An undated file note made by Mr Harvey, which appears to have been written in November 2009, records under the heading "Interest Rates": "ASB offer @ .65 margin 5 yrs". This appears to be a record of what either Mr or Mrs Coomey told Mr Harvey at a time when the relationship between Bushline and ANZ was fractured and ANZ had increased the margin on its lending to Bushline. Bushline points to this as supporting its version of events, namely that this was what the Coomeys had told ANZ they had been offered by ASB, and what ANZ had agreed to match on 19 March. We accept this note may provide some corroboration for what Mr and Mrs Coomey thought the ASB offer had been. But we do not think a note of what Mr and Mrs Coomey told Mr Harvey more than 18 months after the events in question

[57] HC judgment, above n 6, at [84].

provides assistance in determining what was agreed at the 18/19 March meetings. And, if ANZ had, in fact, matched (or nearly matched) the ASB offer, it could have been expected that ANZ's contractual commitment would have been the topic of discussion, rather than the ASB offer.

Evidence relied on by ANZ

[82] We now turn to the evidence relied on by ANZ in support of its case that no undertaking to fix the 0.7 per cent margin for five years was made at the 18/19 March meetings. The essence of its case was that the High Court Judge was correct to find there was no undertaking given to fix the margin for five years at the 18/19 March meetings, for the reasons she gave. ANZ placed particular weight on two of the reasons given by Edwards J: that the ASB offer did not involve a commitment to fix the margin for five years and that the allegation of a five-year commitment by ANZ was not made until the third statement of claim.

ASB's offer did not involve a five-year commitment

[83] There was evidence from an ASB manager, Mr Robinson, that ASB did not, in fact, offer to fix its 0.65 per cent margin for five years, as claimed by Mr and Mrs Coomey. His evidence was that this was not a product offered at the relevant time.[58] Bushline disputes Mr Robinson's evidence. But he was not cross examined on this (or any other) aspect of his evidence.

[84] The Court of Appeal referred to the record of the offer made by ASB. This was the document that was the subject of the photos taken by Mr Simcic, though a full copy was also in evidence, having been produced by Mr Robinson.[59] The photographed pages set out a list of interest rates applicable for fixed terms, but a handwritten notation "65 Points" had been added, with a different notation showing the word "margin", preceded by an indistinct word that the Court of Appeal thought was probably "includes". From this the Court deduced that the handwritten notations

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58 A representative of BNZ, William Purvis, confirmed that BNZ did not offer this sort of product either, at least on an unhedged loan. Mr Harvey said he had been told by the Coomeys that BNZ was offering a margin of 0.6 per cent "ongoing" but was not asked what he understood that to mean.

59 This was a copy retrieved from ASB's computer records, so it did not include the handwritten notations that were visible in the photos taken by Mr Simcic.

recorded Mr Coomey's understanding that the term loan and swap rates cited by ASB included a margin of 65 points or 0.65 per cent.[60] As just mentioned, Mr Robinson's evidence was that ASB did not offer to fix that margin for five years and there is no reference in the document itself or in the handwritten notation to the margin being fixed for five years.

[85] Mr Coomey's evidence was that he understood ASB's offer to be for a loan with a floating rate based on BKBM with a margin of 65 points fixed for a five-year period. He said there was an attachment to ASB's offer document that included a handwritten amendment showing that the offer was for a floating interest rate of BKBM plus a 65-point margin for a five-year period. Mrs Coomey said this was her recollection too.

[86] But Mr Coomey was unable to produce this attachment. He said he had put his copy of the ASB offer (including the attachment) in a safe place but had since been unable to find it. If the attachment to the offer document was the basis on which ANZ formulated its competing offer, it could have been expected that Mr Simcic would have photographed it. But he did not, and neither he nor Mr Harvey was asked whether they recalled this attachment. Mr Robinson did not mention such an attachment in his evidence. He was not required to give evidence in person, so he also was not asked whether such an attachment existed.

[87] Mr and Mrs Coomey's recollection is strongly based on their perception that ASB had offered to fix the margin for five years. But that is at odds with ASB's offer, the notations on the parts of the offer photographed by Mr Simcic, and Mr Robinson's evidence. It is also contrary to Mr Harvey's note that ASB's offer was 8.1 per cent, which in turn is contrary to Mr Coomey's recollection, the ASB offer and the photographs, none of which refers to that rate. When asked whether it was possible that ASB's offer was for a fixed rate, but with an assumed margin of 65 basis points, Mr Coomey answered that he was sure "it wasn't completely fixed". The fact that Mr and Mrs Coomey cannot produce the attachment they say included ASB's offer to fix the margin for five years undermines their ability to prove that such an offer was made,

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60 CA judgment, above n 7, at [201].

as does the failure to ask Mr Robinson, Mr Simcic or Mr Harvey whether they recalled seeing the attachment.

[88] We are not satisfied there is sufficient evidence of what ASB offered and what Mr Simcic and Mr Harvey thought ASB was offering to conclude that when ANZ agreed to a margin of 0.7 per cent, it was agreeing to fix that for a five-year period. Relevant to this conclusion is that the representatives of ASB and BNZ both denied agreeing to fix the margin for five years and the latter indicated that no bank was offering that sort of commitment at the time.

No assertion of five-year commitment until third statement of claim

[89] As mentioned earlier, ANZ increased the margins on loans to Bushline in both December 2008 and March 2009.[61] Subsequent loans taken by Bushline were not priced at a margin of 0.7 per cent (and, indeed, some were floating rate loans not involving a separately identified margin at all).[62] The Coomeys complained about these increases. But when doing so they did not suggest there was any agreement on the part of ANZ to hold the margin at 0.7 per cent for five years on all of its lending to Bushline. ANZ argues that, if it had made a contractual commitment to maintain the 0.7 per cent margin for five years, Bushline would have said so when ANZ signalled its intention to increase the margin.

[90] When ANZ first increased the margin in 2008, the Coomeys complained to Mr Harvey that the margin was fixed and could not be raised, to which Mr Harvey replied that it could. Mr Coomey said he could not believe this.

[91] On 28 August 2009, Mr England wrote to ANZ in response to a loan offer. In that letter, he noted that the margin above the BKBM rate was somewhat higher than previous and added "however, we would consider this to be tolerable in the circumstances whilst the BKBM rate remains as low as it is. Were the BKBM rate to lift we would be requesting [ANZ] to review its margin". The Court of Appeal considered this "after-the-fact observation", which it said Mr Coomey was unaware

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61 See above at [42].
62 See above at [44].

of, was of no great significance.[63] But Mr England confirmed he had written the letter on Bushline's behalf pursuant to an instruction from the Coomeys.

[92] Malcolm Nitschke, an ANZ officer who dealt with the Coomeys when the margin was increased, said he could not recall the Coomeys mentioning that there was a five-year commitment to hold the margin at 0.7 per cent. Notably, the Coomeys' complaint about increasing the margin did not refer to there being an agreement to hold the margin for five years. Their complaint was just as consistent with Bushline's understanding that swaps operated like a fixed rate loan (and therefore the margin would not increase), which formed the basis of a distinct cause of action.[64]

[93] Bushline points to the file note of Mr Harvey (referred to above at [81]) to illustrate that the Coomeys did assert there was a commitment to hold the margin for five years. It will be recalled this file note recorded that Mr Harvey had been told "ASB offer @ 65 margin 5 yrs". The context of this is unclear and it does not, in any event, record an assertion that ANZ was contractually bound to hold the 0.7 per cent margin for five years.

[94] Bushline also entered into at least six loan agreements refinancing the original $19.466 million loan at a rate other than BKBM plus a margin of 0.7 per cent.[65] It is true that at this time, Bushline was in difficulties and was a price taker. But this would not have prevented it enforcing a contractual term, or attempting to do so, had one existed.

[95] There was no mention of an undertaking or representation to fix the margin for five years in either the first or second iterations of the statement of claim.[66] This was first pleaded in the third statement of claim dated 23 September 2016. Edwards J

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63 CA judgment, above n 7, at [217].

64 See above at [12](b).

65 See above at [44].

66 Nor was such a commitment mentioned in Mrs Coomey's affidavit of 20 May 2016 in support of an interlocutory application concerning discovery matters and the possibility of a split trial. This affidavit referred to the offer received from ASB (a 0.65 per cent margin for five years) and Mr Harvey's file note recording this offer (referred to above at [81] and [93]). Mrs Coomey then continued: "We were very aggrieved later when ANZ continued to put our margins up when it knew that we had turned down a very good offer from ASB to stick with it." If there had been an agreement by ANZ to fix the margin for five years, it could have been expected that it would have been referred to in this affidavit.

thought it was significant that Bushline had never suggested there was a commitment to fix the margin for five years until its third version of the statement of claim despite all of the earlier opportunities to raise the point.[67]

[96] In contrast, the Court of Appeal did not consider it was of "particular significance" that Bushline's express pleading of an undertaking to fix the margin for five years did not appear until the third statement of claim. The Court said that the central focus of the claim from the outset had been ANZ's promise to fix the margin along with its characterisation of the combined effect of floating rate loans and fixed rate swaps. The Court noted that Bushline had pleaded that its loss could be measured on the basis that, had it not entered into the swaps, it would have accepted ASB's offer to fix all borrowings for five years at a margin of 65 basis points (though it is hard to see how it could have established this given that no such offer had ever been made according to ASB). The Court said Bushline had also pleaded an implied term that ANZ would not increase margins to minimise its own losses and had argued that increasing margins had been oppressive conduct.[68]

[97] We consider the Court of Appeal was wrong to discount the significance of this factor. We agree with Edwards J that it was not just the failure to plead this cause of action until the third statement of claim that was significant, but also the fact that there had been a number of occasions on which it could have been expected that Bushline would have asserted an agreement to hold the margin for five years if such an agreement had been reached.

[98] The Court of Appeal's analysis engages only with the pleading point. We disagree with the Court of Appeal that this was insignificant. It is true that, as the Court of Appeal noted, the earlier pleading focused on a commitment of fixed margins and the characterisation of the combined effect of floating rate loans and fixed rate swaps. But that says nothing about a commitment for a five-year duration and does not explain the omission of a pleading of a representation or undertaking that the margin would be fixed for five years. In fact, it could be seen as more consistent with a commitment for the period of the swaps only. Bushline's pleading that it would have

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67 HC judgment, above n 6, at [83].
68 CA judgment, above n 7, at [216].

taken up ASB's offer had it not entered into the swaps with ANZ does not say anything about whether ANZ agreed to match ASB's offer. It could have been expected that the express reference to ASB's offer as a yardstick for quantifying loss would have prompted Bushline and its legal representatives to refer to ANZ's commitment to fix the margin for five years if such a commitment had been made.

[99] Similarly, the fact that Bushline pleaded an implied term that ANZ could not increase margins to minimise its own losses seems to us to have the opposite effect to that attributed to it by the Court of Appeal. The Court of Appeal saw this pleading as supporting Bushline's case that a five-year commitment had been entered into. We see it in the opposite light. If ANZ had made the five-year commitment, it is hard to see why there was any need to plead an implied term that ANZ would not increase margins to minimise its own losses or to plead that increasing margins had been oppressive conduct. Of course it would not be surprising that such pleadings may have been seen as fall back positions from the allegation of a five-year commitment. But the fact they were pleaded *instead of* such an argument seems to us to support ANZ's position that no five-year commitment was made.

[100] It is also significant that in the second statement of claim, Bushline pleaded that ANZ had made what was characterised as "the Margin Representation". The nature of that representation was said to be that margins on swaps and the funding provided by ANZ would not change. It could have been expected that this would have gone on to refer to the five-year commitment if such a commitment had been made.

[101] It was only in the third statement of claim that the "margin undertaking" for the first time is characterised as a commitment to fix the 0.7 per cent margin for five years.

[102] In conclusion, we consider the failure of Bushline and its legal representatives to mention the alleged five-year commitment in the period between 2008 and 2016 counts against the existence of a contractual commitment by ANZ to fix the margin of 0.7 per cent for five years.

Case not put to Mr Simcic in cross-examination

[103] Mr Simcic accepted that Mr Coomey was seeking a five-year commitment. But it was not put to Mr Simcic that he had, on behalf of ANZ, agreed to match a competing offer from ASB of a margin of 0.65 per cent fixed for five years (albeit with a margin of 0.7 per cent). Mr Hunter argued that, given that was Bushline's case, it should have been put to him.[69] We agree. The failure to do so undermines Bushline's ability to prove that the outcome of the 19 March meeting was an agreement by ANZ to fix the margin for five years.

Mr Harvey's evidence

[104] Mr Harvey said the agreement reached at the 19 March meeting related to the margin (0.7 per cent) but not the period of time for which the margin would apply. Bushline's position that he and Mr Simcic had agreed to fix the margin for five years was put to him in cross-examination. He said he was "100% certain" that a period of five years had not been discussed at the 18/19 March meetings, and stated further that they were not talking about periods of time in relation to the margin. His evidence was that the details of the terms on which the funding was to be provided were left to be decided after a future discussion about swaps. However, he accepted his memory of events was affected by the nine-year gap between the meeting and the High Court hearing.

ANZ's concern about negative cashflow

[105] Edwards J considered it was unlikely ANZ would have agreed to fix its margin for a five-year term given its concerns about the Waverley farm purchase.[70] She noted that the 0.7 per cent margin meant the interest rate was already close to ANZ's cost of funds. Credit approval for the lending required to fund the Waverley farm purchase had been granted on the condition that written advice was given to the Coomeys outlining ANZ's concerns about the impact on the equity of the business of an entirely debt-funded purchase and the forecast cashflow deficits. As noted earlier, this was communicated to the Coomeys in a letter dated 18 March 2008.[71] The letter noted the

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69 As required by s 92(1) of the Evidence Act 2006.
70 HC judgment, above n 6, at [80].
71 See above at [32].

potential cashflow issues and asked Bushline to confirm that any significant capital development expenditure be made only after discussions with the rural manager at ANZ. It also noted the potential reduction in Bushline's equity over time as a result of the cashflow shortfalls.

[106] The Court of Appeal did not think this was a significant element of the matrix of fact to be taken into account in applying the interpretive approach set out in the *Investors Compensation* and *Boat Park* cases.[72] This was because the statement of concern was preceded by a more positive statement in the same letter and, in addition, ANZ had written separately to Bushline on the same day supporting the proposed purchase of the Waverley farm and confirming its willingness to lend the purchase price. ANZ had also previously cautioned Bushline in July 2007 in very similar terms, but the caution was not repeated when ANZ advanced a further $420,000 on 14 December 2007.

[107] Bushline argues that little weight should be given to ANZ's caution. Mr Branch pointed to evidence that handshake deals were both encouraged and honoured by ANZ. This was confirmed by Bushline's accountant (who had worked for the National Bank before it became ANZ) and Mr Darlow, a solicitor called as an expert by Mr England.

[108] Mr Branch also relied on the evidence of an expert called by Bushline, Hayden Dillon, who said that ANZ's request that no significant capital development expenditure be made until discussed with the rural manager was itself an indication that ANZ was relying on a side deal. We disagree. It was a request, not a legally binding obligation.

[109] We accept the Court of Appeal's view that the cautionary wording appeared to be something of an exercise of "going through the motions", and did not detract from the clear enthusiasm of ANZ to compete for the business of providing funding to Bushline for the purchase of the Waverley farm. Mr Hunter did not press this argument and we consider he was right not to do so.

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72 CA judgment, above n 7, at [214].

Position of Mr Schurr and Mr England

[110] ANZ draws support for its case from the evidence of Mr Schurr and Mr England, both of whom were trustees of both the Bushline trusts, that they had no knowledge of any agreement to fix the 0.7 per cent margin for five years. Neither had any knowledge of any commitment made by ANZ other than that evidenced by the loan agreement entered into on 21 April 2008.

[111] Mr England also advised on that agreement and certified to ANZ that he had explained it to the trustees, including Mr and Mrs Coomey. Edwards J considered this was a significant factor.[73] She said it was reasonable to assume that Mr and Mrs Coomey would have mentioned such an important promise to their fellow trustees and, at the very least, would have been expected to say something to Mr England when he was advising them on the terms of the loan agreement, given that agreement specifically provided that the margin was reviewable at any time. She considered the fact that neither Mr Schurr nor Mr England was made aware of the commitment to hold the margin for five years suggested that no promise to that effect had been made.

[112] The Court of Appeal did not engage with this point in its judgment. But in our view it is significant for the reason given by the High Court Judge.

[113] Because there has been no waiver of privilege in relation to Mr England's advice to the trustees at the time of the execution of the loan agreement, we do not know exactly what occurred. We do not draw any adverse inference from Bushline's refusal to waive privilege. That is something it was entitled to do, and it should not be criticised for doing so.[74]

[114] However, there was no suggestion that Mr England was not competent to give this advice. In the absence of any evidence to the contrary, we assume the advice was given competently. The evidence was that Mr England would, normally, go through the important aspects of a loan agreement when explaining it to a client. It is hard to imagine that would not have included explaining how the interest rate was calculated,

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73 HC judgment, above n 6, at [82].

74 *Sayers v Clarke Walker* [2002] EWCA Civ 910 at [16]; and *Edwards-Tubb v JD Wetherspoon plc* [2011] EWCA Civ 136, [2011] 1 WLR 1373 at [9].

the fact that the margin was reviewable and the fact that the term of the loan was for one year only, with no commitment to roll over the loan at the end of that period.

[115] The fact that Mr Schurr and Mr England did not know of the agreement was also significant because as trustees of both of the Bushline trusts, they were binding the trusts to the loan agreement of 21 April 2008. ANZ's loan was to Bushline, not to the Coomeys. Although the Coomeys were clearly acting on Bushline's behalf at the 18/19 March meetings, it is surprising that they would not have informed their fellow trustees of what was said to have been agreed on 19 March, namely the margin being fixed for five years. It seems unlikely that Mr England would have signed the loan agreement (and advised his fellow trustees to sign it) without seeking alignment between the written terms and the verbal agreement if such an agreement had been made and he had been informed of it.

Swap context

[116] Edwards J considered that the discussion about margins was in the context of an interest rate that was to be hedged by swaps. She acknowledged that the formal discussion about swaps did not occur until 28 March 2008 (nine days after the 18/19 March meetings) but considered that it must have been contemplated by all parties that Bushline would continue to use swaps to hedge its lending, given that swaps had worked well for Bushline in the previous three years. She considered that certainty in relation to interest costs was more important for Bushline than ever before given that the Waverley purchase increased Bushline's overall debt considerably. These factors led her to conclude that the reference to "ongoing" in Mr Harvey's notes referred to the duration of the associated swaps, rather than the five-year term alleged by Bushline. She noted that this interpretation was also favoured by Mr Simcic. She considered it was the most plausible in the circumstances.[75]

[117] The Court of Appeal considered that Mr Simcic's recollection that "ongoing" referred to the term of the swaps was difficult to reconcile with the sequence of events that followed. The Court noted that it was not until April that it was agreed that all of Bushline's financing, both existing and new debt, would be provided under one

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75 HC judgment, above n 6, at [84].

12-month BKBM loan with three associated swaps. This arrangement was confirmed in a fresh approval dated 15 April 2008.[76]

[118] Mr Simcic accepted that ANZ's loan offer was not conditional on swaps being entered into. However, that does not mean that there was not an underlying assumption that swaps would, in fact, be entered into. Bushline had entered into swap transactions from 2005 onwards, and these had been advantageous to it when compared to fixed rate lending. Mr and Mrs Coomey denied receiving a briefing on swaps in September 2005 and said they did not understand that they had entered into swaps before 2008.

[119] Mr Simcic said that ANZ would not have disclosed, let alone negotiated, a margin on anything other than a BKBM loan that was to be hedged by swaps. ANZ's variable or fixed rate loans would involve "all up" rates, which would incorporate a margin that was not disclosed to the customer. The Court of Appeal noted, however, that it was not clear that the parties were thinking of a 12-month BKBM loan during the 18/19 March meetings because ANZ's policy of 12-month lending was new and almost certainly unknown to Mr Coomey at the time.[77]

[120] It is hard to accept that Mr and Mrs Coomey had not realised that Bushline was entering into the swap transactions that occurred between 2005 and 2008. They had signed a confirmation letter after each swap transaction was entered into in the period between October 2005 and April 2008.[78] They had been advised by Mr England on the terms of the swaps signed in 2005. If the swaps briefing took place in 2005 as Mr Esquilant and Mr Lawn said, that would make it even harder to accept.

[121] It also seems unlikely there would have been discussion of a loan of several million dollars involving a floating rate adjusted monthly (even if the loan for the Waverley purchase is considered separately from the existing funding that was rolled

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76 CA judgment, above n 7, at [206].

77 At [209].

78 The word "swap" was not used in the confirmation letter for the first swap, which was transacted on 7 October 2005. The confirmation letters for the second and third swaps, which were transacted on 21 March and 28 September 2006, are both headed "RE: INTEREST RATE SWAP TRANSACTION".

into the $19.466 million loan) without some assurance as to the ongoing affordability of the interest rate, which could be achieved by a swap transaction.

[122] We consider that the swap context provides some support for ANZ's argument that if any commitment to maintain the margin was made, it would have been for the period of the swaps, rather than for five years.

Conclusion

[123] We conclude that the evidence does not establish on the balance of probabilities that there was an agreement reached between ANZ and Bushline on 19 March 2008 that ANZ would fix the 0.7 per cent margin for five years. Nor does the evidence establish that ANZ made a representation to that effect.

[124] We see the high point of Bushline's case as being the concession by Mr Simcic that he was told that ANZ needed to fix the margin for five years to match the competing ASB offer. But Mr Simcic's evidence-in-chief was that the "ongoing" commitment was for the term of the swaps and it was not put to him that he had, contrary to that evidence, agreed or represented on ANZ's behalf that the margin would be fixed for five years.

[125] There are many indications that both parties engaged with each other over a period of years on the basis that no such five-year commitment had been made. The professional trustees of Bushline were unaware of any such commitment and Bushline did not assert that there was any agreement by ANZ to fix the margin for five years at any time until its third statement of claim. The evidence on behalf of ASB and BNZ was that they were not offering such terms at that time (and the ASB representative was not cross examined). At the very least, these factors lead us to conclude that Bushline did not prove this aspect of its claim on the balance of probabilities. We conclude that the High Court Judge was correct about this aspect of the case and the Court of Appeal should not have overturned her finding.

Outcome

[126] Edwards J considered the most plausible construction of what was agreed at the 18/19 March meetings was that ANZ had agreed to fix the 0.7 per cent margin for the term of the swaps.[79] She noted that was Mr Simcic's view. But Mr Simcic also said in cross-examination that the loan offer was not conditional on swaps being entered into. If that was so, it is hard to see the logic in agreeing to fix the margin for the period of the swaps.

[127] Mr and Mrs Coomey's evidence was that they were not even aware, at the time of the 18/19 March meetings, that Bushline was involved in swap transactions. They said they did not know what swaps were. If that is correct, it is hard to see why they would have agreed on Bushline's behalf to a transaction referable to the term of the swaps.

[128] The case before us was confined to the question of whether ANZ undertook or represented to Bushline that the 0.7 per cent margin would be fixed for a five-year period and, if so, whether ANZ was bound not to raise the margin during that five-year period. Having found that Bushline did not prove that ANZ made the five-year commitment, we allow ANZ's appeal on the only issue now before us. It is not necessary for us to go on to decide whether or not ANZ agreed to fix the margin for the period of the swaps.

Section 50 of the Contract and Commercial Law Act 2017

[129] Having found that there was no representation, undertaking or agreement by ANZ to fix the 0.7 per cent margin for five years, it is not necessary for us to address s 50 of the CCLA. The issue under s 50 would be whether the entire agreement clause would prevent the Court from inquiring into and determining whether an oral undertaking was given or representation was made that the 0.7 per cent margin would be fixed for five years and whether it was a term of the contract between ANZ and Bushline.

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79 HC judgment, above n 6, at [84]. See above at [116].

[130] We do, however, make the following observation. The Court of Appeal in this case quoted the following passage from that Court's earlier decision, *PAE (New Zealand) Ltd v Brosnahan*:[80]

> [Section 50's] apparent purpose is to protect one party's relative vulnerability from another party's power to impose an exemption from liability which is contrary to the factual reality or an existing legal obligation and is thus unreasonable and unfair.

[131] The Court of Appeal then, however, went on to characterise the purpose of s 50 as "better enabling a court to determine the true bargain between contracting parties". It saw the reasonableness of giving effect to an entire agreement clause as being affected by "the significance of the difference, the distance as it were, between [the written agreement] and what the court finds was actually agreed".[81]

[132] We would characterise the position differently. Section 50 does not mandate a general empowerment to determine the "true bargain" between the parties. Instead the task of the court is to assess whether in all the circumstances,[82] it is fair and reasonable for an entire agreement clause[83] to be conclusive between the parties.

Limitation

[133] Our conclusion that there was no agreement or undertaking to fix the 0.7 per cent margin makes it unnecessary to address ANZ's limitation defence.

Result

[134] We allow the appeal and restore the decision of the High Court.

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80 CA judgment, above n 7, at [244], citing *PAE (New Zealand) Ltd v Brosnahan* [2009] NZCA 611, (2009) 12 TCLR 626 at [15]. See also *Brownlie v Shotover Mining Ltd* CA181/87, 21 February 1992 at 31–32.

81 CA judgment, above n 7, at [246].

82 All the circumstances include the matters set out at s 50(3)(a)–(c) of the CCLA. This includes the relative bargaining strength of the parties and whether any party was represented by a lawyer.

83 Or any other provision purporting to prevent a court from inquiring into or determining an issue set out in s 50(1).

Costs

[135] Counsel for ANZ advised the Court that ANZ and Bushline have agreed that neither will seek an award of costs against the other in this Court. Given Mr England's limited role in the appeal, we see no basis for making an award of costs in his favour or against him. Accordingly, we make no award of costs in relation to the proceeding in this Court.

[136] We are not clear as to the status of the costs awards in the Courts below after the settlement between ANZ and Bushline. In these circumstances, we make no order in relation to costs in the Courts below but reserve leave to any party to apply for such an order. Any such application should be made within 20 working days of the date of this judgment.

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