Between 2005 and 2008 many of the high street banks started to market loan facilities to their customers which provided a variable interest rate between a high fixed rate (known as “a cap”) and a low fixed rate (known as “a collar”). Some of these “cap and collar” loan facilities included a provision whereby the cap was to apply if LIBOR fell to below the collar or some other low interest rate. In the case to which I shall refer, all of the employees of Yorkshire Bank referred to this provision as “a rebound” and the Court adopted the term. It is an apt description. This particular type of loan facility (which I shall call “a rebound facility”) carried with it the risk that the customer might end up paying interest at well above LIBOR for a long period if LIBOR fell to historically low levels. This has occurred and it seems likely that this will be the case for years to come. Many customers have suffered a considerable loss as a result. It has been suggested that there may be tens of thousand of such customers.

Financial products which include a rebound are not new. They have been used for many years between banks. Banks need to safeguard (or “hedge”) against fluctuations in LIBOR and do so using cap and collar products. A rebound is a device which alters the risks associated with such a cap and collar product. The bank which stands to lose if the rebound applies can buy its way out of the transaction by paying a termination sum or “exit charge”. The level of the exit charge is calculated by reference to the amount which will be payable if the rebound occurs or once it has occurred.
Rebound facilities were first offered to normal business customers by banks in the late 1990s. Prominent among such banks at least as regards northern business customers was Yorkshire Bank (owned by National Australia Bank). Rebound facilities were offered to customers with normal variable rate facilities. Each rebound facility was offset by an agreement between National Australia Bank and Yorkshire Bank which mirrored the transaction and provided the latter with a premium. Few customers appreciated that such a premium was being paid.

The major difficulty with the manner in which rebound facilities were marketed in the late 1990s was that many bank employees who had been assigned to explain the same did not fully appreciate all of the terms and in particular the nature and significance of the rebound. Rebound facilities are not easy to explain. You cannot explain something unless you understand it yourself.

Between 2002 and 2005 I was instructed by Lakeside Inns Ltd in a claim which it brought against Yorkshire Bank in the Manchester District Registry of the Chancery Division. I was instructed by Ian Gee of JWK Solicitors, Lancaster. This claim related to a rebound facility which had been taken out by a hotel company in 2000. The company already had a variable rate loan facility of just over £750,000. The director of the company believed that the loan facility was a simple cap and collar facility and had no idea that the same included a rebound. He would not have proceeded if he had known. The premium generated by Yorkshire Bank from its back to back transaction with National Australia Bank was £37,000. The rebound was triggered in 2001. During the claim, the company exercised its right to terminate and paid an exit charge of £130,000.

The claim was brought solely in misrepresentation on the basis that the bank manager had attempted to explain the rebound facility but had misunderstood the same himself and had failed to appreciate that it included a rebound. Although there was a claim for rescission of the rebound facility and damages in lieu of rescission under section 2(2) of the Misrepresentation Act 1967, this was not pursued actively. The primary claim was for damages under section 2(1) of the 1967 Act. The claim was kept as simple as possible. Notwithstanding this, it took three years to reach trial.
On 26th January 2005 His Honour Judge Maddocks gave Judgment in favour of my client. The quantum was just under £250,000 approximately half of which related to the exit charge. I dealt with a number of similar claims against banks at the time none of which proceeded to trial. It would appear that no other similar case reached trial.

The rebound facility being offered by the high street banks between 2005 and 2008 does not differ in substance from the late 1990s version. The major difference is that it was marketed much more widely. Invariably, there is a hefty exit charge which is linked to the anticipated profit to be generated by the bank from the rebound.

The FSA has concluded that there has been widespread mis-selling of rebound facilities in this latter period. In this regard mis-selling covers two very different claims. The first is misrepresentation of the nature of the rebound facility. The second is a breach of a duty to advise the customer as to the suitability of the rebound facility. The latter could include either a common-law duty of care assumed by the bank, a claim for breach of fiduciary duty or a claim under section 150 of the Financial Services and Markets Act 2000.

Comparisons have been drawn with the mis-selling of payment protection insurance. While there are some similarities, the major difference is that PPI is a product which has a real benefit for particular types of customer. The problem with PPI is that it has been sold to customers who will never qualify. In contrast, a rebound facility will be of benefit to a normal business customer rarely.

From my own experience, common themes in complaints made by customers in relation to rebound facilities made between 2005 and 2008 include the following:
1) The customer was content with its current loan facility and the rebound facility was suggested by the bank. Indeed, in many cases substantial pressure was applied to the customer to change.
2) The bank attempted to explain the terms of the same but did not do so fully. The rebound
itself was not mentioned.
3)The customer would never have transferred if it had known about the rebound. The customer never wanted to assume this risk. It wanted to reduce risk.
4)The nature and level of the exit charge were not explained.

Without wishing to down-play the importance of claims based upon the provision of advice, the obvious route of attack to a rebound facility by the customer affected must be in misrepresentation. No bank customer who already has a loan facility is going to replace the same with a rebound facility unless a bank employee makes representations with regard to the rebound facility. Once the bank employee starts to make representations about the rebound facility, the same must be complete and accurate. Otherwise, they will be misleading.

The customer can elect to rescind the rebound facility if it entered into the same as a result of a misrepresentation by the bank as to its terms. There is no need to show that the misrepresentation was deliberate or negligent. A wholly innocent misrepresentation is enough. Alternatively damages can be claimed instead under section 2(2) of the 1967 Act. The difficulty with this remedy is that it may be lost if the customer does not seek to exercise his right to rescind once he becomes aware of the problem. This will normally be when the rebound first takes effect. For most rebound facilities this will have been in late 2008.

Section 2(1) of the 1967 Act is a powerful alternative weapon which can be used by the customer against the bank if rescission is not available. Its main benefits are as follows:
1) It cannot be lost by affirmation (that is to say by making interest payments after becoming
aware of the problem).
2) In contrast with claims relating to the provision of advice, the law relating to section 2(1)
of the 1967 Act is well charted. There is no need to bring a test case and the claim will be fought on its facts.
3) Although there is no need to establish fraud, the claim for damages proceeds on the basis
that there has been fraud. In principle, all of the losses which have been suffered by the customer as a result of changing to the rebound facility can be recovered subject to issues of contributory negligence and mitigation. The fact that the customer could have discovered the correct position if he had read through the terms of the facility offer does not preclude a claim.
4) If the representation is held by the Court to be untrue, it is for the bank to prove that it had reasonable grounds for believing (and did believe) the same to be true. In practice, it can be difficult for the bank to prove this and may open up the internal communications of the bank to scrutiny by the Court.
5) Although rebound facilities will often include provisions which are designed to prevent the customer from bringing a claim in misrepresentation under section 2(1) of the 1967 Act, these provisions can only be relied upon if the bank can show (a) that they are sufficiently clear and (b) that it is reasonable for such liability to be excluded. The requirement of reasonableness imposed by section 3 of the 1967 Act applies to any such provision irrespective of whether it attempts to exclude such liability directly or attempts to prevent the customer from relying upon any representation made by the bank. It is difficult to see how such provisions could be held to be reasonable in respect of a financial product which is as complicated as a rebound facility.

On 27th June 2012 the FSA published that it had made an agreement with Barclays, HSBC, Lloyds and RBS for the resolution of claims against such banks for rebound facilities. Under this agreement each bank is required to notify any customer affected by a rebound facility of the possibility of mis-selling and deal with the same under its own internal complaints procedure.

There is no FSA compensation mechanism in place as yet.

What is the customer to do?
All high street banks have their own internal complaints procedure. Whether this is likely to produce the result which the customer wants (which will be restoration of the original loan facility and the repayment of sums paid in excess of what would have been payable under the same) will vary from bank to bank and case to case. This is the first and most obvious (and least expensive) option. Realistically, professional legal advice will be required in order to formulate the claim. The claim will be for a large sum of money and will relate to what was actually said at the time and the customer's understanding of the rebound facility. The letter of complaint should be as detailed as a Pre-Action Protocol letter. If the matter is to proceed by Court action, there will need to be a Pre-Action Protocol letter. The letter of complaint and the Pre-Action Protocol letter should accord with each other at least as regards the factual allegations.
If the customer is not content with the response of the bank, then it may be able to refer the matter to the FSA. Alternatively, Court action will be required. A claim form may have to be issued for limitation purposes anyway. In such Court action, the most obvious route will be in misrepresentation for the reasons set out above.
It remains to be seen how many claims will be dealt with by the banks themselves and how many will have to be dealt with by the Court.

Sean Kelly Chancery House Chambers 7 Lisbon Square Leeds LS1 4LY 6th July 2012 sean.kelly@chanceryhouse.co.uk