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Good News for Financial Institutions as High Court Rejects Request for Specific Disclosure of Similar Complaints in a Swaps Mis-Selling Claim

Investment mis-selling claims remain a prominent feature of the litigation landscape, particularly when it comes to interest rate swap products.

In our experience, claimants often ask for specific disclosure of similar customer complaints by defendant financial institutions, in an attempt to strengthen a weak claim or to try to embarrass the institution into settlement. Compliance with these types of request can also cause significant expenditure of management time, resource and costs and the risk of having to disclose commercially sensitive information.

Welcome news for institutions on the receiving end of such disclosure requests has come with the recent Commercial Court's decision in *Claverton Holdings Ltd v Barclays Bank Plc* which provides potentially invaluable authority for those trying to resist similar requests for disclosure.

Background

The court refused the claimant's application for specific disclosure of similar mis-selling complaints made against Barclays, which had led to admissions by Barclays or findings by the Financial Conduct Authority (FCA) or the Financial Ombudsman Service (FOS).

The claim arose out of alleged misrepresentations and negligent advice relating to the sale of an interest rate swap product by two Barclays employees. The court had ordered standard disclosure. However, the claimant sought specific disclosure in respect of other mis-selling allegations against the two employees, arguing that the complaints would help in proving the claim. The claimant said that Barclays had received almost 3,000 complaints and that it could be inferred that some of those would relate to the employees.

The claimant submitted that specific disclosure would likely result in the disclosure of similar illustrative factual evidence, and evidence of oral statements made in other mis-selling situations, and that those could be relied upon in support of the alleged oral statements in the claimant's case.

The claimant confirmed that it did not intend to call evidence at trial. Rather, it sought to refer to the nature and extent of the other complaints and would cross-examine any witnesses relied upon by Barclays, on those complaints.

Judgment

The court held that the mere existence of other complaints would not amount to proof of the claimant's mis-selling allegations. As the claimant was not seeking to call evidence, its reference to the complaints in the proceedings would simply amount to evidence of other allegations, that would be hearsay and consequently be of little relevance.

The claimant's request was also said to amount to "fishing", potentially forcing Barclays to expend significant resources to undertake an expensive search and analysis of a voluminous amount of documents in order to comply with the request. The court held that that was wholly disproportionate and oppressive.

The court also considered that it was unlikely that Barclays would have admitted liability in any settlements it entered. Furthermore, any conclusions reached by the FOS would not contain legally binding findings of fact, as they would be concerned with whether Barclays should provide compensation.

Implications

This case is a very useful authority for institutions faced with responding to potentially onerous requests for the specific disclosure of complaints similar to those that are the subject of the legal proceedings.

More widely, it also clarifies that previous FOS complaints, or FCA findings, are likely to offer little or no probative value of allegations in other court claims as the complaints or findings on them are not binding legal precedent or evidence of admissions of liability.

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