SQUIRE SANDERS

COURT OF APPEAL UPHOLDS DECISION THAT RBS NOT GUILTY OF INTEREST RATE SWAP MIS-SELLING

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Summary

On Monday, the Court of Appeal dismissed an appeal by Messrs Green and Rowley that they had been mis-sold an interest rate hedging product, upholding the first instance decision of the High Court, which dismissed their mis-selling claim in its entirety. Judgment has been reserved, so the precise reasoning is not yet known. It is believed that the appeal turned on questions of limitation and duty of care, the Court of Appeal determining that the claim was out of time and that the Bank either did not owe a duty of care, or was not in breach of that duty.

The facts of the case were complex and Mr Justice Waksman was keen to point out at first instance that the decision was highly fact-specific, turning largely on disputed evidence as to what had or had not been said to the claimants at the time that they agreed to take out the interest rate hedging products.

Facts

Paul Rowley, a hotelier, and John Green, his business partner, alleged that they were mis-sold an interest rate hedging product by the Bank in 2005. The claim was that the Bank had made a negligent mis-statement and/or given negligent advice to the partners on the swap product. The business had been paying interest at 1.5% above base. The swap fixed the interest rate payable on a £1.5 million loan at 4.83% for 10 years. This benefitted the business until 2009, as interest rates rose, but prevented the business from benefitting when the interest rates plummeted to their current historic lows of 0.5%.

Under the terms of the swap, if either party wished to terminate the swap agreement early, there would be a break cost that had to be paid. It applied equally to both parties, so that if the interest rate was above the fixed level at the time of breakage, the Bank would have to pay money to the customer, or if below the fixed level, the customer would have to make payment to the Bank. In the circumstances, the business decided in 2009 that it wanted to break the swap early and was shocked to learn the cost of doing so (because of the low interest rates) would be £138,650.

The business claimed that the Bank had negligently advised them that:

1. The costs of breaking the swap would be "modest" or "affordable";
2. The swap arrangement would be separate to the loan, but it was in fact linked and recoverable under the "all monies" provisions in their security;
3. The margin payable was fixed; and
4. The swap was portable.

The customers contended that, had the Bank not made these negligent misstatements, would not have entered into the swap and so should be released from it and instead only pay what they would have had to pay under the original variable rate arrangement.

The Court carefully considered the evidence and recognised that the decision was going to be highly fact-sensitive, since so much of the claim turned on what was said or not said between the parties and how much reliance was placed on those statements. The Court carefully considered the facts presented to it and recognised that, on both sides, given the time elapsed, the recollections of what was said at various meetings would not be perfect. The judge was satisfied that Green and Rowley had not been pressurised into accepting the swap product and had understood how it worked.

HHJ Waksman QC considered the claim in two parts – the "Information Claim" and the "Advice Claim".

The "Information Claim" turned on the Bank's common law duty to take reasonable care when making statements. After a careful analysis of the available evidence, the judge concluded on all four of the above heads (break costs, separation, fixed margin and portability) that there was no case to answer here and that the Bank had not made any misstatement on these issues that the customer had relied on to their detriment.

On the "Advice Claim", the claimants argued that the Bank had positively recommended the swap product to them in such a way that it created a direct duty of care on the Bank as advisor to the customer as to its suitability and affordability. The Court determined that, as a matter of evidence, nothing said by the Bank to the customer at the time of creation of the swap would give rise to an actionable duty of care. Further, on the Bank's standard terms and conditions, the Bank specifically excluded the creation of any such advisor relationship. HHJ Waksman QC referred with approval to the 2012 Court of Session decision in *Grant Estates v RBS* as good authority that the Bank could rely on such clauses to negate any advisory relationship.

The judge went on to decide that, even if he was wrong on this point and such a duty of care did exist, there had been no breach of that duty in this case.

Comment

The fact that the Court of Appeal has unanimously dismissed the claimant's appeal and endorsed the first instance decision will be welcomed by all financial institutions currently subject to the FCA review. The Bank will also draw some comfort from the endorsement by the English Courts of the Scottish decision in *Grant Estates* as to the effect of its standard terms of business and ability to rely on the exclusion clauses concerning the creation of a duty of care as advisor. It is understood that, as part of the appeal the FCA (as a neutral party) submitted a skeleton argument before the Court of Appeal as to their interpretation of the application of the standard Conduct of Business terms, although the details of that submission are not yet public knowledge.

It is also clear that this decision turned very much on the facts and the available evidence, so it is of limited value as a precedent. It does, however, give an indication of the level of investigative work that will need to be undertaken in each case to determine whether any misstatements were made and relied upon by customers to their detriment. From the Bank's perspective, the sheer scale and cost of undertaking such a review in each case where a swap product was sold must be a daunting prospect. This is unlikely to impact significantly upon the outcome of the FCA review that is currently on-going, although it may have more relevance for those "sophisticated" customers that fall outside of the scope of that process but are nevertheless aggrieved.

From a potential claimant's point of view, the cost of preparing such a claim could be prohibitive, particularly where note taking is imperfect and the time elapsed will inevitably cloud the memories of those involved as to what was said at the time. Of more pertinence will be the question of limitation and working out when the clock can properly be said to start to run for such claims. Given that many such claims will relate to products sold in 2005-2007, many claims could be time-barred.

What is clear is that, although this decision will perhaps lead those intending on embarking on such litigation to think carefully about the case they bring, and whether there will be sufficient reward to merit bringing a case at all, it will certainly not be the final word on the matter.

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