CLIFFORD CHANCE

Briefing note

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A crown of thorns: misselling claim against bank fails

Misselling claims against banks have a poor record in the English courts. A few claimants have won, but most cases that have gone to trial in the last few years have proved unsuccessful. A recent case has added to this record of failure. The judge recognised that a bank selling interest rate swaps does not accept the responsibilities of an adviser just because it provides information about a swap and views on likely interest rate movements. Further, the documentation for the swap was sufficient to prevent any liability arising.

Key issues

- Neither sales patter nor explanation is enough to give an advisory obligation
- An acceptance that it was not receiving advice prevented a party asserting the contrary
- There is an obligation to ensure that information is accurate
- Hindsight is a wonderful thing

Thornbridge Ltd v Barclays Bank plc [2015] EWHC 3430 (QB) is typical of a number of misselling claims against banks now making their way through the courts. The case concerned a swap entered into in May 2008 to hedge the borrower's interest rate exposure on a £5.7 million floating rate loan from the bank to acquire commercial property. The loan was for 15 years but the loan agreement required hedging to be in place for at least the first five years. The borrower therefore entered into a five year interest swap with the bank under which the borrower paid the bank a fixed rate of 5.65% and received a floating rate based, like the interest payable on the loan, on the bank's base rate. As a result of the fall in interest rates after Lehman's collapse, reaching 0.5% in March 2009 where they remain, the swap has proved expensive for the borrower.

The borrower sought to escape the consequences of the swap by alleging that the bank had acted negligently, in breach of contract or in breach of statutory duty in respect of information and advice given in respect of the swap. The borrower lost on all counts.

In particular, the judge decided that:

- The bank had not taken on an advisory role. Despite those involved working in "Corporate Risk Advisory", the bank was selling a swap, not advising in return for a fee. The bank had provided information about how the swap would work and had made predictions, but had not moved from sales into advice. Even if some of the bank's statements could be construed as advice, they did not go beyond the daily interactions of a sales force with a purchaser. The borrower could have sought advice from others and, ultimately, the borrower had made up its own mind as to what it wanted to do.

- Even if the bank had taken on an advisory role, the terms of the swap confirmation prevented the borrower from asserting that the bank had given advice. The borrower stated in the confirmation that it was not relying on investment advice from the bank, which created a contractual estoppel. The judge considered that this clause was not subject to a test of reasonableness under the Unfair Contract Terms Act 1977 but, even if it had been, it would have been reasonable.

- The bank was obliged to ensure that any information it in fact gave to the borrower was accurate and not misleading, but the bank did not by reason of that limited obligation also undertake a wider obligation to ensure that the information it gave was full, accurate and proper.

- The borrower was categorised as a retail customer. However, because it was carrying on business, the borrower could not claim against the bank under section 138D of the Financial Services and Markets Act 2000 for alleged breaches of the FSA's (now the FCA's) conduct of business rules.
- The reference in the bank's terms of business to all transactions being subject to the FSA's rules and all other applicable laws, rules and regulations did not incorporate the FSA's rules into the contract between the bank and the borrower. The borrower could not therefore claim against the bank on the basis that alleged breaches of the FSA's rules also constituted breaches of contract.
- As a matter of fact, the information given by the bank could not be criticised. The bank gave an illustration of the costs of terminating the swap following a small fall in interest rates, but could not be blamed for failing to provide figures for higher falls when there was no evidence that a reasonable person would, at the time, have predicted the scale of the decline in interest rates that actually occurred (indeed, market expectation was of a rise in rates). There was, in any event, no indication that the borrower might want to refinance the loan or terminate the swap within the swap's five year term.
- The bank did mistakenly state on one page of a presentation that break costs would also be payable on a cap, but this did not influence the borrower.

Conclusion

The judge's conclusion was that *Thornbridge* was "a case based on hindsight… it is not a case of a claimant being advised to enter, or being misled into entering, into a swap which in the circumstances was unsuitable." After more than six years of near zero interest rates, it is easy to forget that perceptions of the economic and financial outlook were very different in the first half of 2008.

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