Don't bank on it

Does a bank performing an interest rate hedging product review owe the claimant a duty of care, asks Simon Duncan

IN BRIEF

- Duty of care & limitation.
- Is imposing a duty of care "more than merely arguable?"

One of the difficulties facing a claimant seeking redress from a bank for allegedly mis-selling an interest rate swap prior to the financial crisis is that such a claim may be met with a limitation defence. This was the position of the claimant in *CGL Group Limited v Royal Bank of Scotland* [2016] EWHC 281 (QB). The swap complained of was "sold" more than six years before the proceedings were issued and so the claimant had sought to rely on s 14A of the Limitation Act 1980. It was struck out on an application brought by the bank. (See "Know your limits", *www.newlawjournal.co.uk*, 27 November 2014).

The claimant also brought an application to amend their particulars of claim. The amendment sought to add allegations that the defendant owed the claimant a common law duty of care having agreed to review the sale of the swaps to the claimant under the auspices of the Financial Conduct Authority (FCA) redress scheme. This allegation was made in reliance of the decision of Judge Havelock-Allan QC in *Suremime Limited v Barclays Bank Plc* [2015] EWHC 2277 (QB) where it was held that such a claim was "more than merely arguable". (See "The new wave", *www.newlawjournal.co.uk*, 22 September 2015 for commentary on this decision from the same writer.)

Had this application succeeded, it would have had the secondary effect of extending limitation. This is because had a tortious duty been imposed on the bank at the time that the bank was performing the review, then for limitation purposes time would start to run from the date of any breach of that duty. As the FCA redress scheme was introduced in 2013 then clearly any breach of any such duty must necessarily be later in time. The claimant would not therefore have been vulnerable to the limitation defence on a claim issued in January 2015.

Is imposing a duty of care "more than merely arguable?"

In *CGL* counsel for the bank made seven points in answer to the claimant's prayer for relief:

i. The review was limited to non-sophisticated customers;
ii. The rationale of the scheme was to arrive at speedy and straightforward resolution of the complaints;
iii. The review addressed all matters post 01 December 2001;
iv. The review looked at matters not directly actionable by customers;
v. The bank had expressly made it clear that it was not willing to accept and indeed expressly rejected the possibility of any liability arising to customers from the manner in which the review was conducted (part of the settlement agreement between the FCA and the bank);
vi. The customer's protection against an improper review was afforded by the statutory duty of the skilled person overseeing the process; and
vii. The FCA monitored the progress of the reviews and acted as the overseer of the reviews.

> *"...A claimant dissatisfied with the performance of the review of his particular case could complain directly to the FCA & expect the FCA to act"*

For these reasons, no duty of care could arguably be said to arise. His Honour Judge Bird had no difficulty in adopting both this reasoning and this conclusion. He added: "It seems to me that it is right to say that the bank cannot be treated as having taken on a duty of care when it has expressly excluded the possibility of it doing so and I am further persuaded that it is not just or reasonable to impose a duty of care in circumstances where such imposition would ride a coach and horses through a clearly defined statutory scheme." (At para 52.)

The *Suremime* decision was distinguished on the grounds that Judge Havelock-Allan QC did not have the full facts before him. Should it subsequently be decided by another Court that *Suremime* proceeded on the full facts then Judge Bird would have concluded that the *Suremime* decision was wrong.

Comment

It is not clear why the existence of an exclusion clause denying third party rights of enforcement in the settlement agreement between the FCA and the bank should be effective against a person in the position of the claimant.

The claimant sought to show that in undertaking a review of the sale of the swap, the bank was under a duty to conduct the review properly. The claimant was not seeking to enforce the terms of a settlement agreement to which it was not a party. This could be a possible ground of appeal. Note that an appeal is listed to be heard in June 2017.

It would also be open to a claimant to argue that a breach of the principles that underpin the review would give rise to a duty of care. The claimant could seek a declaration as a matter of private law. However, this would be risky because the court is clearly alert to what it sees as attempts to extend a statutory scheme by using the common law to get beyond the confines of s 138D FSMA 2000.

Nor is it obvious why significance has been attached to bank's contention that the FCA monitors the review process. It is fair to say that the FCA monitors the review process in broad terms but that is not commensurate with a review of every single case in the review. That function must surely have been devolved to the "skilled person" appointed for that purpose pursuant to S166 of FSMA 2000.

However, the Administrative Court specifically left open the possibility that a claimant dissatisfied with the performance of the review of his particular case could complain directly to the FCA and expect the FCA to act.

Indeed, any failure to investigate the complaint on the part of the FCA could expose the FCA to judicial review. (See *R (on the application of Holmcroft Properties Limited) v KPMG LLP* [2016] EWHC 323 (Admin), [2016] All ER (D) 220 (Feb) at para 46.) It follows that a direct request to the FCA to review the review process in their case remains an option for dissatisfied claimants. **NLJ**

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