

Lender
Case law update
Rosling King LLP



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This dispute relates to an interest rate swap product that was allegedly miss-sold by the Defendant, Barclays Bank (“Barclays”), to Suremime Limited (the “Claimant”), a holiday park operator.

The Facts

The original swap transaction was investigated by Barclays as part of a formal agreement entered into by them and the FSA (now the FCA) to review the miss-selling of swaps by the major banks (known as the “FCA Review”). Barclays decided that the Claimant did not meet the FCA’s definition of a sophisticated investment customer and was therefore eligible for redress under the FCA Review. As a result, the Claimant participated in a fact finding meeting with Barclays’ legal advisors to investigate the circumstances surrounding the sale of the swap in 2008. Following this investigation, Barclays proceeded to make an offer of compensation, which was deemed inadequate and therefore rejected by the Claimant.

Subsequently, the Claimant decided to issue proceedings against Barclays for damages for misrepresentation, breach of contract, and the negligent provision of information. In addition, the Claimant made an application to introduce the following three claims:

1. That Barclays owed the Claimant a contractual duty to conduct the review in accordance with the terms of the FCA Review agreement.
2. That Barclays owed the Claimant a duty of care in tort as a result of their agreement to provide a form of redress in accordance with the FCA Review agreement,
3. By entering into the FCA Review, Barclays had agreed to confer the benefits of swap transaction reviews on its customers and they owed the Claimant a tortious duty to implement the review process correctly. Further, by failing to properly implement the review process, the Claimant, as intended beneficiary of the FCA Review, suffered the loss rather than the FSA or FCA.

The Court had to decide whether these three additional heads of claim stood any prospect of success, or if there was a compelling reason why these claims should be disposed of at trial.

The Decision

The Court refused permission to introduce the new contractual claim on the basis that the claim lacked consideration, being an integral component of a binding contract. In forming this view, the Court had regard to the fact that Barclays had made it clear that the Claimant was included as part of the swap review process even if the Claimant decided not to engage with them. Accordingly, the review of the swap was not conditional on any consideration.

In contrast, the Court granted permission for the Claimant to bring the two new tortious claims. Further, it was held that the issue of whether a duty of care to the Claimant arose from the FCA Review was an issue that ought to be decided at trial and was of significant importance to the public. The Court was also mindful of the significant number of businesses who have taken part in the review process that have alleged that the compensation offered has been wholly inadequate. This decision offers fresh hope to these small businesses who had previously considered their claims to be time-barred.

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Commentary

Historically, it has only been private individuals who were able to bring a statutory right of action under the Financial Services and Markets Act 2000 against banks in mis-selling claims. However, this decision opens up the possibility of non-sophisticated corporate entities also taking advantage of the statutory regime. Importantly, in the event the additional claims in tort are successful at trial, this could provide many businesses with further redress against their banks, if they feel aggrieved by the level of compensation provided to them under the FCA Review.

For further information, please contact Georgina Squire or the Partner with whom you usually deal.