

Finance
Case Law Update
Rosling King LLP



The Mercantile Court was asked to consider whether Barclays Bank PLC had an advisory duty when it sold an interest rate swap to Thornbridge Ltd as a means of hedging interest rate risk on their real estate investment loan.

Background

Thornbridge Ltd (the “Claimant”) was a property investment business. In March 2008, the Claimant sought a loan from Barclays Bank PLC (the “Defendant”) to purchase retail investment property. The parties entered into a loan agreement, which included a condition that the Claimant should either execute an interest rate hedge or that the interest rate was to be fixed for the first five years.

The Claimant then discussed interest rate hedging with Mr Burgess (“B”), who was a Corporate Risk Advisor for Barclays Capital. Following their discussions, the Claimant entered into a swap agreement with the Defendant, which commenced in July 2008. Under the swap agreement, the Defendant paid to the Claimant a floating amount which was calculated with reference to the base rate for that month, and the Claimant paid a fixed amount to the Defendant. Interest rates subsequently fell to historically low levels following the 2008 financial crisis, and the Claimant ended up paying more under the swap agreement than it had anticipated. The Claimant then requested a restructuring of the swap. However, due to the size of the break costs, the Claimant decided to let the swap continue to maturity.

The Claim

The Claimant brought a claim against the Defendant for losses suffered as a result of entering into the swap agreement. The Claimant alleged negligence, breach of contract and breach of statutory duty by the Defendant in respect of advice and information given regarding the swap agreement.

Judgment

The Court considered whether the Defendant gave advice and whether it assumed an advisory relationship giving rise to a duty of care. After a review of an ‘Interest Rate Risk Management Strategy’ (the “Presentation”) sent by B to the Claimant, and various communications between the Claimant and B, the Court rejected the Claimant’s submissions that the communications steered the Claimant towards the swap agreement. In reaching its decision, the Court held that the Claimant would reasonably have understood that statements made by B were predictions or views, rather than advice. The fact that B’s job title was ‘Corporate Risk Advisor’ and that the job title appeared in correspondence sent to the Claimant, could not be given any significant weight when considered against the actual discussions which took place between the Claimant and B. Also, the Court held that even if advice was given by B, the Defendant had not assumed an advisory duty. The fact that the Defendant did not receive a fee for advice in relation to the swap agreement was a relevant factor in the Court finding that there was not an advisory relationship between the Claimant and Defendant.

The Court considered whether the Defendant was under a duty of care which went over and above the duty not to give inaccurate or misleading information. As the Court found that there

was not an advisory relationship between the parties, the Defendant's duty was limited to a duty not to misstate information, and there was no positive duty on the Defendant to provide any further information in relation to the swap agreement.

The Court then considered whether the Defendant provided adequate information concerning the break costs for the swap agreement. B explained that the break costs would be expensive, and provided a specific example of what the break costs would be based on a 1% move in the base rate. In 2009, the Claimant considered restructuring the swap agreement, and obtained a quote of what the break costs would be, and this quote was significantly higher than that in B's example. The Court held that there was a duty on the Defendant not to mislead the Claimant to the extent that B provided information on break costs. However, the Court held that the Defendant's duty was limited to a duty not to misstate information, and that there was not a positive duty on the Defendant to provide further information. The Court also commented that it was only with the benefit of hindsight that the Claimant knew that the base rate would drop as far as it did, and therefore the Defendant was not required to provide further examples of break costs based on greater falls in interest rates.

The Court also considered the Presentation that B sent to the Claimant and whether the Defendant failed to explain the advantages and disadvantages of the hedging options. The Court found that there was a misleading statement in the Presentation which offered 3 products, but did not make it clear that had the Claimant chosen the cap, rather than the swap agreement, break costs would not have applied. However, the Court found that the Claimant had not been misled by this and held that this misleading statement did not cause the Claimant's loss.

Conclusion

The claim was dismissed. As the Defendant had not given advice, its limited duty was not to misstate information and the single misleading statement made had not caused the Claimant's loss.

This decision follows a line of recent cases where the Courts have declined to assist borrowers seeking redress against banks arising out of commercial bargains struck prior to the 2008 financial crisis.

For further information, please contact [Georgina Squire](#) or the Partner with whom you usually deal.