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Dispute Resolution Case Law Update Rosling King LLP

In *Finch and another v Lloyds TSB Bank Plc and others [2016] EWHC 1236 (QB)*, the High Court considered whether a lender owes a duty, either contractual or tortious, to a borrower to advise in respect of onerous terms within a loan agreement.

Facts

The Claimants in this dispute were the assignees of Bredbury Hall Limited ("the Company"). Until the Company went into Administration in March 2014, it traded as Bredbury Hall Hotel and Country Club ("the Hotel"), in Stockport. The dispute arose in connection with a loan entered into on 31 January 2008 between Lloyds TSB Bank Plc ("the Bank") and the Company. The Bank agreed to make a fixed interest rate loan of up to £11.6 million to the Company for a term of 10 years ("the Loan Agreement"), to enable the Company to purchase the Hotel. Under the Loan Agreement, if the Company repaid the loan early it would be obliged to pay any resulting break costs incurred by the Bank. This could include potentially significant costs incurred by the Bank as a result of it breaking a swap it had entered into in order to hedge against the risks posed by lending money at a fixed rate that it had borrowed from the interbank market at a variable rate.

In December 2013, the debt owed by the Company to the Bank, both under the Loan Agreement and an associated overdraft was assigned by the Bank to Promontoria Holdings 87 BV ("Promontoria"). The Company was unable to pay the overdraft when it was subsequently called in, resulting in the Company entering Administration on 18 March 2014. Under the Loan Agreement this constituted an event of default which resulted in the Company's full indebtedness becoming immediately repayable.

The Claimants claimed, amongst other things, that the Bank owed a duty to the Company to advise, either in contract or tort, in respect of any onerous terms in the Loan Agreement. The Claimants alleged that that the Bank had failed to do this as it did not explain the scope and extent of the break costs provision or, in the alternative, that the Bank owed a continuing advisory duty following the conclusion of the Loan Agreement, which it breached by failing to advise on the risks of the break cost clause.

The Claimants also claimed that the Bank negligently misrepresented to the Company that the Loan Agreement had been "tailored" to its needs when in fact it had not as the costs of early exit made it unsuitable. Particularly as it was alleged that the Bank knew that the Company would want to repay early, given the ages of the investors in the Company and their intentions to exit the Company within five years.

Background

The general position is that a bank is not under any legal obligation to provide advice. However, if it does provide advice then it must do so using reasonable care and skill. For misselling claims in tort, it is not enough to assert that poor advice has been given. The question for the Court to consider is whether the financial institution owes a duty of care for advice given which results in an economic loss. If the facts of the matter do not fall into an established category of duty of care, then the test to establish whether a duty of care exists is as set out in *Customs and Excise v Barclays Bank plc [2006] UKHL 28*.

Decision

On the facts the Court held that the Bank had no contractual duty to advise the Company about the terms of the Loan Agreement.

HHJ Peeling QC found that the Bank was not obliged to advise the Company on the existence, or the effect, of the break cost clause. He noted that the proposition that the Bank was under a tortious duty to provide advice which may be contrary to the Bank's own commercial best interests went beyond any established tortious duty previously considered. The circumstances in which such a duty could arise "*would have to be exceptional and markedly different from the conventional relationship of banker and customer*". Such exceptional circumstances did not arise in this case, particularly as the Company was represented by a broker and solicitors. It was found that the use of the phrase "*trusted advisor*" to describe the Bank was only for marketing purposes used by the Bank to differentiate itself from its competitors.

With regards to the misrepresentation claim, HHJ Peeling QC found that the Bank did not negligently misrepresent to the Company that the Loan Agreement would be "tailored" to its needs. It was held that the Bank had not been informed that the investors wished to exit within 5 years. In any event, the expression "tailored" could only mean that the loan offered would be the best the Bank was prepared to offer, taking into account the Company's requirements for the amount and term. "Tailored" could not be construed as requiring the Bank to offer facilities on terms that were subordinate to its commercial interests.

Commentary

This case will be a welcome addition to the case law in lenders' favour in relation to the misselling of financial products. It strengthens a lender's position regarding their lack of obligation to pro-actively advise their customers on certain specific terms of a loan agreement. Even if a lender adopts an enthusiastic marketing strategy which emphasises their willingness to work with the borrower to find the best solution for the borrower's needs, this case confirms that the borrower will struggle to establish that the lender had a duty of care to advise on the terms of the loan agreement.

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