Dispute Resolution
Case Law Update
Rosling King LLP

In *Marsden v Barclays Bank plc*, the High Court granted summary judgment in favour of the Defendant bank, against the Claimant, who had commenced proceedings alleging mis-selling of two vanilla interest rate swaps.

It was held that the Claimant had compromised all of the valid causes of action in relation to the alleged mis-selling by signature of a settlement agreement, so that the claim had no real prospect of success.

The Facts

The Claimant, ("M"), was in the business of purchasing, restoring and selling public houses. M had previously entered into an interest-rate swap with the Defendant bank (the "Bank") in 2006 as a hedge against two loans to assist with the purchase of public houses in Suffolk and Derby. He terminated the swap in July 2007 and sold the Suffolk property. Shortly after, in September 2007, M entered into two further vanilla interest-rate swaps (the "Swaps") as a hedge against the purchase of another public house in Shropshire.

Under the terms of the Swaps, as interest rates fell in late 2008, M was obliged to make payments to the Bank. In addition, M's business began to experience significant cash flow problems which led to the Bank agreeing to suspend repayments on M's loans from February 2010 until August 2010.

The Bank was unaware that, in 2009, M had made a complaint to the Financial Ombudsman Service ("FOS"). M alleged that the Bank had mis-sold the Swaps to him by telling him that entering into the Swaps was a condition of the Bank's lending to him. For reasons unknown, the FOS did not write to the Bank in respect of the complaint until May 2010. In July 2010, M attended a meeting with the Bank to discuss the complaint, accompanied by his former solicitor, N. At the meeting there was a discussion of a restructuring of M's indebtedness and N noted that the Bank had stated that it would not agree to a restructuring whilst the complaint to the FOS remained unresolved. He asserted that this was economic duress and concluded that M would withdraw his complaint, once the Bank's restructuring offer had been made and accepted. In September 2010, M withdrew his complaint and informed both the Bank and the FOS accordingly.

Following negotiations, on 27 January 2011, the Bank offered M a new loan to consolidate his and his companies' liabilities. It was a condition of the offer that the Swaps were broken. M countersigned the offer by way of acceptance on 4 February 2011. On 3 March 2011, M also signed a settlement agreement, which stated that: "…*the entry by the Parties into the facility letter dated 27 January 2011 with a loan amount of £3,671,374.00 is in full and final settlement of all complaints, claims and causes of action which arise directly or indirectly, or may arise, out of or are in any way connected with the Swaps*."

The Swaps were terminated on 16 March 2011 and following a review of the sale of the Swaps in 2013 and 2014, M brought proceedings against the Bank, alleging that he was mis-sold the Swaps.

M claimed that he was mis-sold the Swaps by the Bank, alleging breach of contract, negligence and misrepresentation. Interestingly, M did not bring his claim on the basis of the allegation raised in his FOS complaint (that he was told by the Bank the entry of the Swaps was a condition of the lending). The Bank contended that all causes of action in relation to the Swaps had been fully and finally compromised by way of the settlement agreement and made an application for summary judgement against M. The Judge allowed the Bank's application.

Whilst M accepted that he had signed the settlement agreement, he contended that there had been no valid consideration for the compromise of his claim. Further, he alleged criminal conduct on the basis that the Bank had forced him to sign the settlement agreement. M also claimed that the settlement agreement did not compromise claims relating to the Bank's alleged misconduct or fraud and submitted that the Bank, in selling interest rate swaps to its customers was in gross breach of its regulatory duties. M also submitted that the Bank was aware of other claims which were the subject of investigation by the Financial Services Authority and contended that the Bank was guilty of sharp practice. The final argument advanced by M was that the settlement agreement does not release claims for breach of contract between the Bank and M as to the conduct of the review of the Swaps in 2013 and 2014.

Judgment

The Judge held that the Bank had provided valid consideration, as the loan agreement and settlement agreement were conditional on each other and together made up the transaction. Therefore, the settlement agreement was not unenforceable on that basis.

Further, there was no basis for alleging criminal conduct and it was not arguable by M that the settlement agreement had been signed because of duress; the Bank's requirement that M sign the settlement agreement had been a commercial decision, based on the fact that the Bank were advancing a large new loan to a defaulting borrower.

It was further held that the settlement agreement was plainly designed, to draw a line under all claims, present or future, in relation to the Swaps. It was not arguable that the fact that mis-selling may have been more widespread or involved regulatory breaches could affect the meaning of the settlement agreement, and the Judge determined that the settlement agreement on its true construction did cover a claim in deceit.

M's argument that this was a case of sharp practice was dismissed by the Judge as meritless on the basis that M was just as informed of the relevant facts as the Bank and had access to legal advice in any event.

In terms of M's final argument, the Judge decided that the review of the Swaps in 2013 and 2014 did not give rise to a new contract.

The Judge concluded that all of M's valid causes of action were fully and effectively compromised by signature of the settlement agreement so that they could have no real

prospect of success. Accordingly, summary judgment was granted in the Bank's favour.

Commentary

This case provides a reminder for litigants of the test that the Court will apply on an application for summary judgment. The Court will consider whether the claim has a realistic prospect of success, as opposed to a fanciful prospect. Applicants are reminded that it is a decision for the Court to conclude that there is no real substance in the case advanced by a respondent.

This case serves as a reminder to carefully consider the content of any settlement agreement and be clear on which claims will be compromised as a result of entering into it.

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