Dispute Resolution
Case Law Update
Rosling King LLP

Background

Orchard (Developments) Holdings plc and Orchard (Huthwaite) Limited (the "**Claimants**") brought a negligence claim against National Westminster Bank plc (the "**Bank**") seeking damages arising out of the mis-selling of various interest rate hedging products in 2002 and 2004.

In November 2010, the Claimants noticed that the presence of hedging products had made it difficult for them to secure refinancing. By December 2011, at a board meeting of the Claimants (which was attended by the Bank), the Claimants acknowledged that the Bank would take account of the break costs of the products when carrying out its LTV calculations for refinancing. The Claimants also realised the break costs were considerable.

The Limitation Act 1980

Pursuant to Section 14(A) of the Limitation Act 1980 (the "**Act**") the period in which a claim must be issued before it is statue barred is either, six years from the date on which the cause of action accrued, or three years from the date on which a claimant has the requisite knowledge to bring the claim.

The Application

The Bank issued an application for summary judgment, asserting the claim was statue barred and that the claim had no real prospect of success. It was agreed between the parties that the claim would be time barred if the Claimants had the requisite knowledge before 29 June 2012.

The Bank argued that the Claimants had actual knowledge or, alternatively, the Claimants could reasonably be expected to have known of the alleged negligence by December 2011, at the latest. The Bank relied upon email correspondence and minutes of meetings between the parties, which the Claimants did not dispute.

The Claimants argued the Bank did not provide a sufficient explanation of the hedging products and that whilst knowing certain key facts before June 2012, the Claimants had no reason to believe that the hedging products had been mis-sold until July 2012. The Claimants relied upon the fact that the FCA first made a public announcement on 29 June 2012, in which the FCA confirmed they would provide redress to victims of mis-selling.

The Decision

The application hinged on whether the Claimants had the requisite knowledge more than 3 years before the claim was issued. The Court relied on the judgment in *Haward v Fawcetts [2006]* in which the House of Lords provided guidance on the issue. In *Haward* it was held that for time to start running *"the claimant need not have the kind of detail that one would see in a well-drafted Particulars of Claim, but need only have a broad knowledge of the essence*

of the relevant acts or omissions" and time would not start to run *"until the claimant knows, that there is a real possibility his damage was caused by the act or omission in question".*

In assessing the facts of the present case, case law and statute, it was reaffirmed that the Courts have no discretion in the application of section 14(A) and that a *"claim is either statute barred or not"*.

The Court held *"it was abundantly clear"* that the Claimants were aware that the advice was flawed well before June 2012 and it was irrelevant when the Claimants found out they had a claim in negligence. The Court therefore found in favour of the Bank and granted summary judgment.

Commentary

The case serves as a cautionary reminder of the approach the Courts will take in applying Section 14A of the Act. It is reassuring for lenders that the Courts are taking a robust approach to when potential claimants have the requisite knowledge in respect of mis-selling claims. It is also another timely reminder for all potential claimants to seek legal advice at the earliest opportunity

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