BLOW TO SWAPS MISSELLING CLAIMS

The Court of Appeal has decided that banks do not owe a duty of care in tort to customers when carrying out of the swaps misselling review required by the banks' agreement with the FCA. One attempt to circumvent limitation and other problems in the underlying misselling claims has therefore been blocked.

Key issues

- A duty of care in tort would be inconsistent with the statutory framework for liability for regulatory breaches
- By doing what the FCA required, the banks did not assume a duty of care to their customers
- It was difficult to see how customers relied on the review

In the period before Lehman's collapse, it was common for banks to require borrowing customers to enter into interest rate hedging products alongside loans in order to guard against the risk of interest rates rising. These products might have been vanilla interest rate swaps, caps, collars, structured collars or something else. However, since early 2009, interest rates have been near zero. The effect of hedging has therefore commonly been to deprive the borrower of the benefit of the low interest rates. Many borrowers have sued their banks - indeed, there have even been lawyers' advertisements alongside the elevated section of the M4 motorway encouraging those affected to do so.

Many of these claims have faced difficulties, whether in the underlying facts or because the limitation period had expired before the claim was brought. One common means to try to get round these problems has been to include a claim that the banks owed their customers a duty of care, distinct from any obligations regarding the original sale, when carrying out the swaps misselling review required by the agreement of 29 June 2012 between the FCA and various banks. This agreement required the banks to carry out a review of the sale of certain interest rate hedging products under the supervision of an independent reviewer and, with the reviewer's approval, to offer redress where appropriate to customers. Customers argued that the banks carried out this review negligently, failed to offer proper compensation, and were liable to the customers for this failure in the same sum as the underlying claim.

In *CGL Group Ltd v The Royal Bank of Scotland plc* [2017] EWCA Civ 1073, the Court of Appeal decided that claims based on the conduct of the misselling review have no basis in law. The banks did not owe a duty in care in the tort of negligence for the conduct of the review and, as a result, could not be liable for deficiencies, if any, in the course of the review.

The Court of Appeal's reasoning was complex, but included the following:

- The agreement between the banks and the FCA was reached as part of the FCA's role in enforcing the banks' obligations under the UK's financial services regulations. That legislation provides that, in certain circumstances but not in others, customers of financial services firms have claims against the firms for breach of the regulations. The

imposition of a general duty of care in the carrying out of regulatory obligations would undermine the statutory framework.

- The communication between the banks and their customers about the review did not suggest that the banks were assuming responsibility to their customers for the conduct of the review. The banks were doing what the FCA required them to do. Further, the role of the independent reviewer in scrutinizing offers of redress pointed against any responsibility of banks to their customers. The reviewers owed no duty to customers; nor did banks.
- Imposing a duty of care would circumvent the limitation period for the original misselling.
- There was no lacuna that required filling. If banks failed to carry out the reviews properly, the FCA could take action against them.
- Reliance on the review by customers was an important aspect in any claim, but it was hard to say what customers would have done differently had they not been told about the review.

The decision in *CGL Group* (and the two other cases heard with it) will not bring an end to the swaps misselling claims, which continue under various guises. It will, however, make it more difficult for some customers to pursue those claims.

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