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No Contractual Duty Owed to Customers by Banks when Conducting FCA Review into IRHPs

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The Court of Appeal in *Elite Property Holdings Limited, Decolace Properties Limited v Barclays Bank Plc [2018] EWCA Civ 1688* considered the appellants' Application for permission to appeal against the Mercantile Court Judge's decision to strike out part of the Appellants claims against the Respondent Bank. Whilst the application concerned permission to appeal, this was the first occassion on which the Court had considered whether or not a bank owed a contractual duty to customers in relation to its conduct of the review of the sale of interest rate hedging products ("**IRHPs**") pursuant to an agreement with the Financial Conduct Authority ("**FCA**"). Therefore, the Court of Appeal gave permission for the judgment to be cited.

Facts

Elite Property Holdings Limited and Decolace Properties Limited ("**Appellants**") were associated companies, which undertook property investment and development. Barclays Bank Plc ("**Bank**") granted loan facilities to the Appellants of around £7.5 million and between October 2006 and July 2008 the Appellants entered into three structured collars ("**Collars**") with the Bank in relation to the loan facilities.

The Appellants suffered financial difficulties and from December 2008 complained that the Collars had been mis-sold by the Bank. In August and September 2010 the Appellants terminated the Collars. Following this, the Bank provided further loan facilities to fund the termination of the Collars ("**Break Costs Loan**") and the Appellants also entered into swaps with the Bank as replacement hedging for the original loan facilities.

In 2010, the Appellants signed a settlement agreement in respect of the Collars, which barred all mis-selling claims regarding the Collars.

In June 2012, the Bank agreed with the FCA to undertake a review of the sale of its IRHPs. The review would be undertaken pursuant to the terms set out in an Appendix to the agreement between the FCA and the Bank ("**FCA Agreement**"). In accordance with the terms of the FCA Agreement, the Bank would provide appropriate redress to customers who had been mis-sold structured collars or swaps.

In June 2014, the Bank made basic redress offers to the Appellants and explained that they had three options in respect of the offers. Each option would have certain consequences in respect of a claim for consequential loss. The Appellants chose 'Option 3' and thereby rejected the basic redress offer, and submitted a consequential loss claim.

However, a few months later, the Appellants again found themselves in financial difficulty and requested that the Bank pay the basic redress. The Bank agreed and issued a revised redress offer to the Appellants. This did not include compensatory interest and acceptance of the revised offer was expressed to be in full and final settlement of all claims and causes of action other than in respect of consequential losses. The revised offer further stated that the Bank would assess the Appellants' claims for consequential losses in respect of the IRHPs. The Appellants agreed to this.

The Bank ultimately rejected the Appellants' consequential loss claims and stated that an Independent Reviewer had confirmed the appropriateness of the Bank's offer of redress.

In November 2015, the Appellants issued proceedings and pursued three sets of claims against the Bank:

1. mis-selling claims for breach of a duty of care in tort, negligent misstatement and misrepresentation regarding the Collars and swaps;
2. review claims regarding breach of a duty of care in tort regarding the Bank's conduct of the review; and
3. conspiracy claims alleging that the foreclosure of the Appellants' facilities and appointment of a receiver was a conspiracy to injure the Appellants. (The Court of Appeal later said that this claim was not relevant to the issues to be decided by that Court.)

The Bank applied to strike out the mis-selling claims and the review claims. However, before the application was heard, the Appellants conceded that the mis-selling claims regarding the Collars were time-barred.

In an attempt to respond to the Bank's application, the Appellants also sought permission to amend their particulars of claim in the following ways:

1. to argue that the swaps and Break Costs Loan entered into following the termination of the Collars "…*merely repackaged and continued the losses already caused by the mis-sold* [Collars]…"; and
2. to include a further claim that their acceptance of the revised redress offer gave rise to a contractual duty for the Bank to investigate their losses and the Bank had breached this duty ("**Review Agreement Claim**"). Following recent case law, the Appellants attempted to pursue this claim in place of their claims that the Bank had been in breach of a duty of care in tort in relation to its conduct of the review.

Mercantile Court Judgment

The judge found that all mis-selling claims in respect of the Collars were barred by the 2010 settlement agreement. The mis-selling claims in respect of the swaps were struck out and the judge held that the loss pleaded by the Appellants in the particulars of claim was only caused by the breaches of duty owed in respect of the Collars. The judge stated that "…*the chain of causation which ends with the loss starts with the sale of the* [Collars]…".

In relation to the Review Agreement Claim and the alleged breach of duty of the Bank, the Court held that although the Bank had an obligation to investigate the issue of consequential loss, the only source of this obligation was the FCA Agreement. In doing so, the judge followed the line of *Marsden v Barclays Bank*[2016] EWHC 1601 (QB). The judge also noted that the FCA Agreement expressly excluded third party rights to enforce its terms.

Appeal Judgment

Appeal ground 1: *The judge was wrong to conclude that the claim in respect of the mis-sold swaps had no reasonable prospect of success because he wrongly concluded that the pleaded case did not link breach of duty and loss*

The Appellants argued that there was a continuing financial outlay because of the swaps and pointed to various examples of how entering into the swaps had caused them financial loss. However, the Bank argued that the Appellants were lumping together the exit from the Collars, the entering of the swaps and the entering of the Break Costs Loan "…in *an attempt to establish a single causative event*." Further, it was clear when trying to identify which losses were attributable to the Collars, and which were attributable to the swaps, that the pleaded losses were caused by the Collars and not the swaps.

The Court found that it was entirely correct to conclude that the Appellants had failed to establish any link between the alleged breach of duty in mis-selling the swaps and the consequential loss allegedly suffered by the Appellants. The judge was therefore correct to refuse permission to amend the particulars of claim. This was because, in reality, the only loss pleaded in the original pleading was caused by the mis-selling of the Collars, and the proposed amendments did not improve the Appellants' position. The Appellants' description of the losses being "*repackaged and continued*" appeared to the Court to be implicit recognition that the cause of the alleged loss was the mis-selling of the Collars. Further, claiming that the losses were incurred after the inception of the swaps did not assist the Appellants because "…*what matters in this context is not when the loss occurred but what caused it*."

Appeal ground 2: *The judge was wrong to refuse amendment to plead the 'Review Agreement Claim', which was properly arguable, given that he had accepted that the acceptance of the revised redress offer gave rise to a contractual relationship*

The Court upheld the Bank's arguments and stated that the Appellants were wrong in their assertion that the Bank had a contractual obligation to them when they accepted the revised redress offer. There was no contract at the time the redress offer was made because:

1. the FCA Agreement expressly excluded rights of third parties;
2. it makes no sense to argue that "…the [Bank] suddenly came under an additional contractual obligation to the [Appellants] mid-way through the review process…";
3. there had been no consideration for any alleged contract as the Appellants had already chosen Option 3, forgoing the basic redress and interest on it; and
4. the Bank's obligation was to the FCA.

A key case cited by the Court was *CGL Group Ltd v Royal Bank of Scotland Plc [2017] EWCA Civ 1073*. The Court confirmed the judge's reasoning in this case. Imposing a duty of care on a bank when there was no clear intention of a bank to assume such a contractual obligation, would cut across the regulatory regime. It is not "fair, just and reasonable" to impose such a duty of care on banks and to do so would circumvent the intention of Parliament. The Court therefore held that this further indicated strongly against there being a contractual obligation in relation to the conduct of the review.

For these reasons, the Court found that the judge had been right to refuse the Appellants' application to amend the particulars of claim to plead the Review Argument Claim.