DLA PIPER

LITIGATION ALERT

Green & Rowley - the final chapter

In July 2013 the first English swaps mis-selling case reached the Court of Appeal. The appellants, John Green and Paul Rowley (**"GR"**), had hoped to overturn an earlier High Court judgment which had dismissed their claim in its entirety. Their appeal failed. The Court of Appeal has just published its written judgment.

THE BACKGROUND

GR had a pre-existing loan liability of £1.5m with The Royal Bank of Scotland (**"RBS"**). Keen to hedge against movements in the interest rate, in May 2005 they entered into a 10 year base rate swap with RBS for a notional amount of £1.5m at a rate of 4.83% (the prevailing base rate at that time was 4.75%).

Initially the swap worked well for GR and they were "in the money" as base rates exceeded the swap rate, but when interest rates plummeted in 2008 they fared very badly. Wanting to restructure their partnership they enquired about the cost of terminating the swap in 2009 at which point they learned that the break costs would amount to £138,650.

In 2011 GR issued proceedings claiming that RBS had mis-sold the swap. Their claim compromised of two distinct limbs:

- A *Hedley Byrne* claim for negligent mis-statement (**"Information Claim"**) in which they alleged that RBS had made negligent mis-statements about a number of issues including break costs; and
- A claim for negligent advice (**"Advice Claim"**) in which they alleged that RBS had advised them to enter into a swap which was not suitable as it failed to meet their requirements.

GR conceded that an additional claim for breach of statutory duty, arising out of RBS's alleged breach of the Conduct of Business (**"COB"**) rules (being the relevant regulatory rules in force at the time) under section 150 of the Financial Services and Markets Act 2000 (**"FSMA"**) was time-barred. It was however argued on GR's behalf that a concurrent and co-existing common law duty to comply with the COB rules arose, and that this duty was breached, in the context of the Information and Advice Claims.

FIRST INSTANCE DECISION

HH Judge Waksman QC dismissed the claim in its entirety. Drawing a clear distinction between the Information Claim and the Advice Claim, he ruled that the COB rules were not encompassed within the Hedley Byrne duty not to make negligent mis-statements, and that the Information Claim had to be decided within relatively narrow confines. On the facts RBS made no negligent mis-statements. Moreover, the information given to GR was not

misleading, unclear or unfair. The Information Claim therefore failed.

The judge also dismissed the Advice Claim, finding that on the facts that RBS gave no recommendation or advice to GR to enter into the swap and so no duty of care arose.

ISSUES ON APPEAL

On appeal GR sought to argue that a breach of the statutory duty is actionable as a breach of a concurrent common law duty of care where either (i) the purpose of the statute is to confer protection on a defined class of individuals (giving rise to an entitlement to damages), or (ii) where the statutory duty has been carelessly executed.

As such, GR claimed that, where a bank undertakes a regulated activity in circumstances where failure to comply with a statutorily imposed regulation is likely to give rise to damage to the counterparty, then a duty of care arises at common law which is co-extensive or concurrent with that imposed by statute (**"Concurrent Duty"**). This was ground 1 of the appeal.

In this case COB 2.1.3 imposed a duty upon RBS to communicate in a way which is clear, fair and not misleading, and COB 5.4.3 a duty to take reasonable steps to ensure that a private customer understands the risks of a transaction. GR claimed that RBS breached both duties, and that COB 5.4.3 required RBS to not only warn that break costs could be substantial but also to explain clearly and fairly the true potential magnitude of those costs so that GR could understand it.

GR contended that that the trial judge was wrong to conclude that there was adequate disclosure of break costs, and that the break costs warnings were inadequate. This was ground 2 of the appeal.

If GR succeeded in their argument that the Concurrent Duty existed, any proven COB breach could also equate to a breach of that Concurrent Duty, thereby giving rise to a common law damages claim. That common law claim would remain "in time" for the purposes of limitation.

COURT OF APPEAL DECISION

The Court of Appeal dismissed the appeal and, in so doing, rejected GR's contention that there existed a Concurrent Duty upon RBS co-extensive or concurrent with the statutory duty to comply with the COB rules. Key points from the judgment are as follows:

- If, in the opinion of the Court, the Bank had breached COB 2.1.3 or 5.4.3 then GR would have had a cause of action against RBS pursuant to s 150 FSMA. However, GR did not pursue that cause of action as their trial Counsel conceded that it was time barred.
- RBS owed a *Hedley Byrne* duty not to mis-state. As such, insofar as COB 2.1.3 refers to a duty to take reasonable steps not to mislead, this is comprised within the common law duty, but insofar as it refers to a duty to take reasonable steps to communicate clearly or fairly, this introduces notions which go beyond that duty.
- The duty imposed by COB 5.4.3 to take reasonable steps to ensure that the counterparty to a transaction understands its nature is well outside any notion of the *Hedley Byrne* duty not to mis-state.
- If RBS had given advice, such that an advisory duty had arisen, then COB 2.1.3 and 5.4.3 would have in part informed the content of that advisory duty. As RBS did not give advice, no advisory duty arose.
- There is no justification to impose the Concurrent Duty in circumstances whereby Parliament has provided by s 150 FSMA a remedy for contravention of the COB rules, nor any justification to impose a duty of care at common law to advise as to the nature of the risks inherent in a regulated transaction.
- RBS did not "cross the line" which separates the activity of giving information about and selling a product and the activity of giving advice. In the absence of advice, there is neither the justification nor need to impose a common law duty independent of, but co-extensive with, the remedy provided by s 150 FSMA.
- Neither COB 2.1.3 nor 5.4.3 point at all towards the assumption of a duty of care to advise, since both impose statutory duties upon firms which are in non-advisory or execution only relationships with their counterparties, as well as firms which have undertaken an advisory role.
- RBS did not owe a common law duty of care to GR which involved taking reasonable care to ensure that they understood the risks of entering into the swap transaction.
- Given that the Concurrent Duty argument was dismissed then the appeal failed on ground 1, and so it was not necessary for the Court to consider whether RBS had in fact breached COB 2.1.3 or 5.4.3, and the Court declined to do so.

IMPLICATIONS

The Court's dismissal of the notion of a Concurrent Duty represents yet another victory for lenders in the swaps mis-selling arena and provides welcome clarification of the extent of the common law duty owed by lenders to swaps counterparties. The common law "*Hedley Byrne*" duty, which has been part of the legal landscape for decades, remains untouched. A clear distinction has been drawn between this duty and the broader COB and COBS obligations. A breach of the COB(S) obligations can still be litigated but only by those who are eligible and who start their proceedings on time. Hedley Byrne does not offer a back door route to breach of COB or COBS for ineligible or tardy claimants.

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