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Mis-sold Swaps: An Update

Much has been made by the press in the past twelve months about high pressure sales tactics adopted by banks in respect of products designed to hedge against the risk of interest rate increases. Such products have resulted in borrowers being liable for increased payments following the plummet of interest rates in 2008 - 2009.

On 21 December 2012 His Honour Judge Waksman, sitting as a High Court Judge in the Manchester Mercantile Court handed down his judgment on the case of *Green & Rowley -v- Royal Bank of Scotland Plc [2012]* ("Green & Rowley"). It is clear from his judgment that the decision reached was mainly based on what was discussed at the meeting between the bank and its customers to consider the various hedging products available.

Whilst Waksman HHJ clearly considered the witness evidence of all the people in attendance at the meeting he gave particular weight to the evidence of the party who had a contemporaneous note of that meeting. This was a bank representative with experience of selling interest rate derivative products. Her ability to explain the way she would typically structure such meetings, the procedures she would adopt coupled with her contemporaneous record led the Judge to prefer her account of the meeting to those of the other parties. Waksman HHJ dismissed the claim against the bank.

Whilst there were interesting points raised about negligent mis-statements and duties of care, it is clear from the Judgment in this case that the Courts will, first and foremost, look at the facts of each case.

In this particular instance:

- The interest rate swap was entered into in 2005 for a shorter period of time than the outstanding length of the loan;

- The bank's customers enjoyed the benefits of the interest rate swap for a number of years before the drop in base rate in 2008- 2009;

- The interest rate swap was not a condition of lending and was in fact something mentioned by the bank because the relationship manager was concerned about the customers' ability to service the loan if interest rates increased (which in fact did occur before the rapid decrease between October 2008 and March 2009).

Clients with concerns about hedging products they have been sold should speak to us about whether they might have an actionable claim and should be mindful of time limits. The FSA redress scheme will not prevent potential claims from becoming time-barred. The usual time period for making claims, referred to as the limitation period, will run for six years from the date advice was given rather than the date on which a product was entered into. Claims based on advice given in 2007 will become time barred during the course of this year (2013). This is a complex area of law, but once a claim is time barred it may be lost for all time. If in doubt, we suggest you contact someone to discuss your options.

The outcome of Green & Rowley and in particular Waksman HHJ's careful consideration of what occurred at the meeting between the bank and its customers when hedging products were discussed demonstrates the fact-sensitive nature of these claims. As can be seen from this case any mis-selling claim will be likely to turn on the specific circumstances in which the product was entered into. These will differ from case to case and it emphasises that class actions are unlikely to be an appropriate way to pursue an action for mis-selling in many cases and that each claim should be considered and, if necessary, litigated on its unique facts.

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