SWAPS – ANOTHER VICTORY FOR THE BANKS

In late 2013, in a case called Green & Rowley, the Court of Appeal confirmed that the banks in swap cases did not have a common law duty to ensure that customers understood the nature of the risks they were embarking upon. Subject to further appeal, the banks have also succeeded in a case involving a family company, Crestsign, which invested in commercial property.

Following the demise of Northern Rock, Crestsign wanted to find new bankers to provide interest only loan facilities, and this they obtained via Nat West, with a five-year loan, but with a requirement that Crestsign enter into a swap to be provided by RBS.

The swap was for 10 years. There was evidence before the court that it was unsuitable. It hedged 100% of the debt. It was inflexible for Crestsign, but not for RBS. It hedged beyond the five-year term of the loan which might not be renewed or adequately re-financed. It placed nearly all of the risk on Crestsign and little on RBS, which had a cancellation option. It exposed Crestsign to adverse interest rate conditions for seven of the 10 years and exposed Crestsign to substantial break costs to exit it.

In his conclusion the judge said that the banks '*did provide negligent advice*'. He also said '*They did not show themselves worthy of the trust [Crestsign] placed in them*'. But Crestsign lost. How can that be, one might ask.

The judge said that on the evidence before him, and in particular advice given face-to-face and via email to Crestsign, the banks would normally have had a duty to use reasonable skill and care when giving advice and making recommendations. However, various documents which Crestsign signed had made it clear that the banks were not giving advice and would not accept liability for any advice that may have been imparted, for example '*We will not except where we have specifically agreed to do so, provide you with advice on the merits of a particular transaction or the composition of any account or provide you with personal recommendations (as defined by the FSA) in relation to any transaction or account*'. The bank documentation also expressly excluded the duty of '*best execution*', which is normally a duty requiring banks to take all reasonable steps to get the best possible result for a client when executing an order.

The judge found that these provisions did not operate as exclusion clauses, and so did not fall foul of the Unfair Contract Terms Act.

RBS had suggested four different possible swap solutions to Crestsign. It was accepted by all parties that the banks had a duty to give accurate information about these four products. The judge found that RBS had complied with this obligation. He held that RBS only had a duty to inform accurately about the four solutions it proposed and no other solutions or products it had even though those others might have been more suitable for Crestsign. Where RBS might be considered particularly fortunate is that when considering what RBS said about early exit cost risks, the judge found a mere generic warning of the risk of '*substantial*' break costs sufficient information. If there is an appeal this appears to be one likely ground, as would be the finding that various provisions in the banks' documentation did not constitute exclusion clauses for the purposes of the Unfair Contract Terms Act.

For those that were eligible and pursued the internal mis-selling review process overseen by the FCA, on facts such as these, a mis-selling finding would almost certainly have been made, but with the bank paying less compensation than would probably have obtained via the courts.

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