INSOLVENCY BULLETIN

30 October 2014

Limitation in Swaps Misselling Claims

Kays Hotels Ltd v Barclays Bank plc [2014] EWHC 1927 (Comm)

Barclays Bank fails on a summary strike-out application in respect of a misselling claim bought more than six years after the contract was entered into.

This was an action by Kays Hotels Ltd against Barclays Bank in respect of a complex interest rate hedging product that was sold to it by the bank in connection with a £1.34 million loan entered into on 30 March 2005.

The terms of the hedging product meant that, if interest the base rate rose above 5.5% the bank would refund the balance over 5.5% to the claimant. If, on the other hand, the base rate fell below 4% the claimant would be charged 4% plus the difference between 4% and the base rate. On 6 November 2008, the Bank of England base rate fell below 3% and has remained there ever since resulting in very substantial charges being levied against the claimant.

The claimant issued proceedings on 8 November 2012 and Barclays immediately contended that it was out of time as the six years' limitation ran from the date of the loan and had, accordingly, expired on 29 March 2011.

The claim was founded in breach of contract, breach of statutory duty and breach of a common law duty of care (ie negligence). It was accepted by the claimant that its claims for breach of contract and statutory duty were time-barred but it claimed that its claim in negligence survived by virtue of **section 14A of the Limitation Act 1980**.

Section 14A provides that, in respect of a negligence action to which it applies, the limitation period will be *either* six years *or* three years from the date on which the claimant could reasonably have expected to know that he had the right to bring a claim.

The claimant's evidence was, *inter alia,* that the Bank had told it (i) that it had to take the derivative product in order to get the loan, (ii) that the product was principally designed to protect the claimant, (iii) that interest rates would continue to rise for ten years and (iv) that the claimant should enter into the derivative product.

The judge found that the claimant had required a product that would protect it against interest rate rises without exposing it to excessive risk. On the facts, the judge found that, in March 2009, the claimant may well not yet have realised that it had a potential claim in negligence against the bank as the level of risk to which it had been exposed would not have been apparent. The directors may not, at that time, have had the requisite knowledge for the purposes of section 14A and, accordingly, the bank's strike application was dismissed.

This case is clearly an important victory against the bank but one must not get carried away. It was merely a summary application for strike out which was rejected on the basis that there was a triable issue as to the claimant's level of knowledge at the relevant time. It is, nonetheless, an important judgment for those claiming misselling in respect of missold derivative products.

If you have any queries in relation to this, or any other, matter, please do not hesitate to contact us – *office@amblaw.co.uk* or 020 3651 5646.

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