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Case No: 2012/1463

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

The Rolls Building
110 Fetter Lane
London EC4A 1NL

Date: Friday, 16 May 2014

BEFORE:

MR JUSTICE HAMBLEN

BETWEEN:

KAYS HOTELS LTD (TRADING AS CLAYDON COUNTRY HOUSE HOTEL) — Claimant

- and -

BARCLAYS BANK PLC — Defendant

Judgment

MR JUSTICE HAMBLEN:

Introduction

1. This is an application by the defendant for summary judgment on the claim in its favour under CPR 24.2 and/or to strike out the Claim Form under CPR 3.4(2) on the grounds that the claim is indisputably time-barred and therefore should be summarily dismissed.

Factual background

2. The claimant is a private limited company engaged in the hotel and hospitality business which operated a hotel in Suffolk called The Claydon Country House Hotel. At the material time, Mr Khuraam Saeed and his father were directors and owners of the claimant. The defendant is a bank, regulated at the material time by the FSA. In March 2005 the defendant offered the claimant a loan of £1.34 million repayable over 20 years at an interest rate of 1.5 per cent above the defendant's base rate. The claimant accepted that offer on 30 March 2005, but there was apparently no draw down until later on.

3. There were meetings and discussions between Mr Saeed and Mr Challis of the defendant which, according to the Particulars of Claim, took place over a period between November 2004 and August 2005, and there was a particular meeting in August 2005 at which there were discussions about the interest rate hedging product which is the focus of the present litigation. That product was one which Mr Saeed says he was told that the claimant had to enter into if there was to be any draw down under the loan. The nature of the product was that it was an interest rate hedging product with a collar. The terms of the collar were these: there was a ten-year term with a notional amount of £1 million amortising; if the Bank of England base rate increased above 5.5 per cent, the defendant would pay the difference between the base rate and 5.5 per cent; if the Bank of England base rate fell below 4 per cent, the position was reversed so the claimant would pay the defendant interest at 4 per cent, plus the difference between the 4 per cent and the weighted average base rate for each relevant calculation period, subject to a maximum rate of 5 per cent if the base rate fell to 3 per cent or below (the "double floor"); if the Bank of England base rate was between 4 per cent and 5.5 per cent, neither party made payments to the other.

4. Between 1 December 2005 and 5 July 2007, the Bank of England base rate remained within the 4 to 5.5. per cent range and so there were no payments under the collar in either direction. Between 5 July and 6 December 2007, the base rate rose to 5.75 per cent and so payments were made to the claimant totalling just over £1,000. Between 6 December 2007 and 6 November 2008, the base rate returned to the 4 to 5.5 per cent range so there were no payments in either direction. On 6 November 2008, the Bank of England cut the base rate from 4.5 per cent to 3 per cent and thereafter there were various cuts, with the result that between the period 1 December 2008 to 2 November 2009 payments of some £36,000 would have been required to be made from the claimant to the bank, and during the latter half of that period the rates had gone down to 0.5 per cent.

5. In June 2012 the FSA announced an agreement with various banks including the defendant to review sales of interest rate hedging products to non-sophisticated customers. On 8 November 2012 the claimant issued this claim against the defendant alleging the collar had been mis-sold to it. The defendant took the position from the outset that the claims were time-barred and made an application to strike out the claim on 19 April 2013. This claim was, however, stayed while the claimant's application for redress under the Past Business Review in relation to interest rate hedging products (which had been put in place by the defendant on direction of the FSA) was processed. Under that process, to date the defendant has paid some £166,000 to the claimant by way of redress representing net payments under the collar. There is also an outstanding application for redress in respect of alleged consequential losses. To date, that application has been rejected by the defendant but a revised claim has been put forward by the claimant which is currently under review. However, the stay originally agreed or ordered has expired and the defendant has now restored its application for a strike out.

The application

6. The causes of action asserted in the Particulars of Claim were for breach of contract, breach of statutory duty and breach of a common law duty of care at law. It is accepted by the claimant that the breach of contract and breach of statutory duty claims are time-

barred. The issue, on the present application, relates to the duty of care at law. In this regard the claimant relies on Section 14A of the Limitation Act 1980 which states as follows:

> "(1) This section applies to any action for damages for negligence, other than one to which section 11 of this Act applies, where the starting date for reckoning the period of limitation under subsection (4)(b) below falls after the date on which the cause of action accrued.
>
> (2) Section 2 of this Act shall not apply to an action to which this section applies.
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> (3) An action to which this section applies shall not be brought after the expiration of the period applicable in accordance with subsection (4) below.
>
> (4) That period is either—
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> (a) six years from the date on which the cause of action accrued; or
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> (b) three years from the starting date as defined by subsection (5) below, if that period expires later than the period mentioned in paragraph (a) above.
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> (5) For the purposes of this section, the starting date for reckoning the period of limitation under subsection (4)(b) above is the earliest date on which the plaintiff or any person in whom the cause of action was vested before him first had both the knowledge required for bringing an action for damages in respect of the relevant damage and a right to bring such an action.
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> (6) In subsection (5) above "the knowledge required for bringing an action for damages in respect of the relevant damage" means knowledge both—
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> (a) of the material facts about the damage in respect of which damages are claimed; and
>
> (b) of the other facts relevant to the current action mentioned in subsection (8) below.
>
> (7) For the purposes of subsection (6)(a) above, the material facts about the damage are such facts about the damage as would lead a reasonable person who had suffered such damage to consider it sufficiently serious to justify his instituting proceedings for damages against a defendant who did not dispute liability and was able to satisfy a judgment.
>
> (8) The other facts referred to in subsection (6)(b) above are—

(a) that the damage was attributable in whole or in part to the act or omission which is alleged to constitute negligence; and

(b) the identity of the defendant; and

(c) if it is alleged that the act or omission was that of a person other than the defendant, the identity of that person and the additional facts supporting the bringing of an action against the defendant.

(9) Knowledge that any acts or omissions did or did not, as a matter of law, involve negligence is irrelevant for the purposes of subsection (5) above.

(10) For the purposes of this section a person's knowledge includes knowledge which he might reasonably have been expected to acquire—
(a) from facts observable or ascertainable by him; or

(b) from facts ascertainable by him with the help of appropriate expert advice which it is reasonable for him to seek;

but a person shall not be taken by virtue of this subsection to have knowledge of a fact ascertainable only with the help of expert advice so long as he has taken all reasonable steps to obtain (and, where appropriate, to act on) that advice."

7. The claimant contends that this section applies with the consequence that there has been a three-year extension of time allowed for the purpose of bringing proceedings. In relation to that issue and the question of knowledge, what needs to be focused on is the knowledge of the claimant up until 8 November 2009, being three years before these proceedings were commenced.

The pleaded claim

8. The nature of the claim is set out in the Particulars of Claim and I refer in particular to the following paragraphs:

"7. In the course of giving the said recommendation and advice and for the purpose of seeking to persuade the claimant to enter into the derivative product:

(a) Mr Johnson and Mr Challis represented and stated that the derivative product was or was principally designed to protect the claimant from rises in the defendant's base rate of interest for the period of the derivative product;

(b) Mr Johnson expressly described the derivative product as and represented and stated. that it was a product which would provide

"interest rate protection for the commercial mortgage" in an email of 30 July 2005;

(c) Mr Challis represented and stated in an email dated 12 August 2005 that the "structured collar" proposed by the defendant would "offer (the claimant) certainty around the worst case interest rate (it might) pay over a 10 year horizon";

(d) Mr Johnson and Mr Challis represented and stated that entry into the derivative product was required by the defendant if the claimant wished to accept the loan;

(e) Mr Johnson and Mr Challis represented and stated that interest rates were likely to rise and to continue to rise during the ten years of the derivative product;

(f) Mr Johnson and Mr Challis informed the claimant that it should enter into the derivative product;

(g) Mr Challis telephoned the claimant's managing director on 17 August 2005 and advised and represented to him that the claimant should enter into the derivative product that day because interest rates were likely to rise and further that the defendant would not thereafter be in a position to offer the derivative product on the same terms as were then recommended and proposed;

(h) During that telephone conversation Mr Challis recommended and advised that the claimant should enter into the derivative product on terms that provided for:

(i) The claimant to pay the defendant a fixed premium of £4,000.00 on 1 December 2005;

(ii) The defendant to be a floating interest rate payer on a nominal amortising amount, with a "rate cap" of 5.5 per cent per annum such that the defendant would pay the claimant a sum of interest at that rate calculable by reference to the relevant amortising amount at any time during the term of the derivative product when Bank of England base interest rates exceeded 5.5 per cent per annum;

(iii) The claimant to be a "floor floating rate payer" with a "double floor" of 4.0 per cent and an "ultimate floor" of 3.0 per cent.

…

9. The derivative product was not suitable for the claimant and was not a product which met the claimant's wishes, intentions and needs, which were to protect itself against rises in the base rate of interest without exposing itself to excessive risk. The derivative product provides inter alia that if Bank of England base interest rates at any time during the term of the derivative product fall

below 4 per cent per annum, the claimant is obliged to pay to the defendant the "floor rate" (being a rate of 4.0 per cent per annum of the relevant amortising amount) plus the difference between the "floor rate" and the weighted average of the base rate for each relevant calculation period (as defined by the derivative product), subject to a maximum rate of 5.0 per cent.

….

13. The representations made by the defendant to the claimant were not true and were made negligently in that:

(a) As the defendant knew or should have known, the claimant was not obliged to enter into the derivative product if it wished to accept the loan;

(b) As the defendant knew or should have known, the derivative product was not or was not only a product designed to give the claimant "interest rate protection" in the event of rising interest rates. It was a product designed or also designed to provide the defendant with substantial profit if the Bank of England base interest rate dropped below 4.0 per cent;

(c) Mr Johnson and/or Mr Challis had no reasonable ground on which to express their opinion that interest rates would continue to rise for the ten year term of the derivative product.

14. Further, in breach of its contractual and/or tortious duties, the defendant:

(a) Failed to inform or advise the claimant that it was not obliged to enter into the derivative product and that it was not a condition of the loan that it do so;

(b) Wrongly told the claimant that it was obliged to enter into the derivative product if it wished to accept the loan;

(c) Failed to inform or advise the claimant that if Bank of England base interest rates at any time during the term of the derivative product fell below 4 per cent per annum; the claimant would be obliged under the derivative product to pay to the defendant the "floor rate" (being a rate of 4.0 per cent per annum of the relevant amortising amount) plus the difference between the "floor rate" and the weighted average of the base rate for each relevant calculation period (as defined by the derivative product), subject to a maximum rate of 5.0 per cent;

(d) Failed to provide the claimant with any illustrations of the likely rates or sums that might be paid or payable by it under the derivative product;

(e) Failed to inform or advise the claimant that the nature and effect of the derivative product was not or was not only to provide it with protection if interest rates were to rise;

(f) Failed to provide the claimant with information about the derivative product which gave any fair or prominent indication of the financial risks associated with it;

(g) Failed to provide the claimant with a clear, fair and/or readily comprehensible explanation of the nature and effect of the derivative product;

(h) Failed to inform the claimant that in order to terminate the derivative product it would become obliged to pay a termination fee;

(i) Failed to take into account the fact that the claimant was not a sophisticated investor when recommending that it enter into the derivative product;

(j) Failed to take any steps to consider whether the derivative product was suitable for the claimant and its needs;

(k) Failed to explain the nature and type of the derivative product in such a way as to enable the claimant to decide whether to enter into it on an informed basis;

(l) Failed to obtain information from the claimant which would provide the defendant with a reasonable basis for believing that the derivative product would meet its financial needs and/or objectives, that the claimant was able financially to bear the risks associated with the derivative product and/or that it had the necessary experience and knowledge in order to understand the risks involved in the derivative product;

(m) Failed in all the circumstances to take reasonable care and skill in recommending and advising that the claimant enter into the derivative product;

(n) Exposed the claimant to a foreseeable risk of loss and damage."

The evidence

9. Before the court there has been evidence from Mr Woodd-Walker of the defendant's solicitors, a statement from Mr Mather of the claimant's solicitors, and two statements from Mr Khuraam Saeed together with various exhibits.

10. In relation to the issue of knowledge under Section 14A, what Mr Saeed says in his statement is mainly set out at paragraphs 21 to 26:

> "21. Mr Woodd-Walker describes at paragraph 13 to 15 of his statement how the collar operated once it had been entered into, and implies at paragraph 20(3) that I must have realised that I had a claim against Barclays in November 2009 because some payments under the collar went out of our account before this time.
>
> 22. I deny that I had any such realisation. Had I known that such a claim was possible, I would have contacted the bank or sought advice immediately. In fact, I did not focus on the Barclays loan/collar transaction on a regular basis after entering into the transaction. My immediate concern was building the extension to the hotel and then developing the business further. Indeed, in the summer of 2007 we moved to Natwest in order to obtain finance to purchase an additional hotel, the Gatehouse Hotel.
>
> 23. The account at Natwest linked to the loan/collar transaction was Kay Hotel's main business account. The account generally operated (we had a £30,000 overdraft at the time), and monies were coming in and out of the account all of the time. My recollection is that we had about 20 or so standing orders/debits on that account. Loan payments were also coming out of that account at a rate of about £4000 per month. I did not pay that much attention to every payment out, and would have been that alarmed by payment of a few thousand pounds leaving the account each month.
>
> 24. More importantly, there was nothing in the payments out to alert me to the fact I had been sold a product that I should not have been sold. Barclays did not sell me a product on the basis that I would never have to pay monies. They sold me a product which they said I had to take, which would protect me against rate rises, and which was held out to be suitable.
>
> 25. My expectation was also that the product would prove itself to my advantage over its entire life (indeed, I had already received some payments under the collar), and that the limited payments that I might have to make in the short term would be balanced by greater advantage later down the line.
>
> 26. There was also nothing in the payments out to alert me to the fact that Barclays should have advised me on a range of matters, including that we did not need to enter into the transaction, on the risks associated with the transaction, on alternative transactions, on the effect of the transaction on our credit rating, and on commission and termination payments under the transaction, or that Barclays should have used information appropriate to our level of sophistication to explain the transaction and any alternatives. The payments out, therefore, to my mind, were a result of short term extreme interest rate drops, which had nothing to do with my advice that Barclays (who were not even my current bankers) had given us."

The relevant principles

11. The principles to be applied in relation to Section 14A have been considered in a number of cases. I have been referred by the defendant to the decision of Sir Thomas

Bingham MR (as he then was) in Spencer-Ward v Humberts [1995] 1 EGLR 123 and in particular what is said at page 125 L to M and page 126 M. In those passages the Master of the Rolls refers to the need for the claimant to be alerted to the factual rudiments of the claim and to know the facts needed to know how to take advice and to mount proceedings if so advised. He also refers to the importance of approaching the matter in a broad common sense way and not being too particular or clever.

12. I was also referred to the leading case of Haward v Fawcetts [2006] 1 WLR 682. The decision in that case is summarised in the headnote as follows:

> "Knowledge for the purpose of Section 14A of the 1980 Act meant knowing with sufficient confidence to justify embarking on the preliminaries to the issue of a writ."

In the judgments in that case, I have been referred to various passages and in particular: Lord Nicholls at paragraphs 8 to 10, paragraphs 12 to 15, and paragraphs 23 and 24; Lord Scott at paragraph 50, and Lord Brown at paragraph 90. The defendant stresses in particular what Lord Nicholls says at paragraphs 19 to 23 where he says as follows:

> "19. ….The conduct alleged to constitute negligence in the present case is not the mere giving of advice. The conduct alleged to constitute negligence was the giving of flawed advice …
>
> 20. This feature of the advice cannot be brushed aside as a matter of detail. Nor can it be treated … as a matter going only to particulars. Far from it. This feature is the very essence of Mr Haward's claim. Stated in simple and broad terms, his claim is that Mr Austreng did not do his job properly. Time did not start to run against Mr Haward until he knew enough for it to be reasonable to embark on preliminary investigations into this possibility.
>
> 21. … For time to start running there needs to have been something which would reasonably cause Mr Haward to start asking questions about the advice he was given.
>
> 23… The relevant date was … when Mr Haward first knew enough to justify setting about investigating the possibility that Mr Austreng's advice was defective."

13. The defendant submits that the legal position is helpfully summarised in *Simpson: Professional Negligence and Liability* as follows at 3.141.5:

> "Thus where the claimant has acted on the advice of a professional, and suffered loss, the crucial question will often be whether or not the claimant had any reason to question the advice he received, or to think that something must have gone wrong with it."

14. It is apparent from the judgments in Haward v Fawcetts that it is important to seek to identify the essence of the act or omission to which the damage is attributable. One needs to identify, as it was put by Lord Scott, "the essence of the complaint of

negligence". A helpful summary of the approach to be adopted can be found in Hoffman LJ's judgment in Broadley v Guy Clapham and Co [1994] All ER 439 at 449 where he said the section was designed:

> "To determine the moment at which the plaintiff knows enough to make it reasonable for him to begin to investigate whether or not he has a case against the defendant."

At page 448 he said:

> "One should look at the way the plaintiff puts the case, distil what he is complaining about and ask whether he had in broad terms knowledge of the facts of which that complaint is based."

15. In this case the defendant says that from the authorities one can derive the following: firstly that the claimant must have actual or constructive knowledge that he suffered some damage; secondly he must have actual or constructive knowledge that that damage was suffered as a result of relying upon advice given by the defendant; thirdly he must have actual or constructive knowledge sufficient to cause him to investigate whether there was some flaw or inadequacy in the advice given; fourthly he must have actual or constructive knowledge of the flaw or the inadequacy to a high level of generality - he must know of the essence of the claim, not all its particulars; fifthly, he does not need to know that the advice was negligent or in breach of duty or that he has a cause of action. That summary is given in the context of a claim for negligent advice, which is how the defendant characterises the claim in this case.

The claim

16. I turn then to consider the essence of the complaint in this case. The defendant says that the essence of the complaint is that the claimant (1) was told that interest rates would rise throughout the life of the product and (2) was given no or no adequate warning about the nature of the floor and the risk of payment liabilities. The claimant says that the essence of these matters were plainly known, or at least ought to have been known, to the claimant from the fact that for the period of about a year payments were being made by the claimant under the collar. It is pointed out that there are references in the Reply and to Mr Saeed's statement to his actual knowledge of these payments but that on any view he ought to have been aware of these payments which were substantial in amount and which were paid over a considerable period of time. The fact of those payments, the defendant says, meant that the claimant knew or ought to have known that interest rates were not going to rise and had not risen throughout the life of the product and that not only was there a risk of payment liabilities, but actual payment liabilities. That, he said, was sufficient for him to investigate into the advice he was given.

17. The claimant, by contrast, summarises the essence of the complaint in a very different way. The claimant says that the essence of the complaint is that (1) he was not told of the risks of the product as a whole and that included issues as to payment on termination and the risk over the whole life of the product rather than particular periods within it; (2) he was not told that it was an unsuitable product for a person such as the claimant who was not a professional or sophisticated investor; (3) he was told that he was required to take out the product if there was to be a loan or draw down under the loan, and (4) he was not told particulars as to what would happen if the interest rate

dropped and in particular how the floor worked rather than the mere fact that he might have to make payments.

18. If one seeks to analyse the essence of the complaint, I consider that it is one for mis-selling and the fact that the product was allegedly unsuitable for this claimant, and particularly so in the light of the advice which he says he was given.

19. Focusing on the Particulars of Claim, at paragraph 9 it is said:

> "The derivative product was not suitable for the claimant and was not a product which met the claimant's wishes, intentions and needs, which were to protect itself against rises in the base rate of interest without exposing itself to excessive risk." (emphasis added)

20. That is clearly putting the case of suitability in fairly broad terms and it is not focusing on the fact that there might be some interest rate loss. It is acknowledging that there might be. The point being made is that the claimant was not meant to be exposed to "excessive" risk; that connotes some loss, but not excessive loss. So the mere fact that the claimant may have suffered some loss would not lead him to know that there was a lack of suitability as there described.

21. The Particulars of Claim in paragraph 14 also makes a number of assertions relating to suitability, in particular that the defendant:

> "(i) failed to take into account the fact the claimant was not a sophisticated investor when recommending that it enter into a derivative product;
>
> (j) failed to take any steps to consider whether the derivative product was suitable for the claimant and its needs;
>
> (k) failed to explain the nature and type of the derivative product in such a way as to enable the claimant to decide whether to enter into it on an informed basis;
>
> (l) failed to obtain information from the claimant which would provide the defendant with a reasonable basis of believing that the derivative product would meet his financial needs and/or objectives, that the claimant was able financially to bear the risks associated with the derivative product and/or that it had the necessary experience and knowledge in order to understand the risks involved in the derivative product."

22. Those complaints relate in essence to whether this was a suitable product to sell to the claimant and that suitability is by no means limited to the risk of having to make interest rate payments. The focus of the complaint is and is going to be suitability.

23. This is borne out by various documents to which I have been referred and upon which the claimant places reliance. These include a disclaimer which the claimant says he was not provided with, although the defendant says otherwise. It is to be noted that the disclaimer says:

> "This communication is being made available to persons who are investment professionals. It is directed at persons who have professional experience in matters relating to investments. The investments to which it relates are available only to such persons and would be entered into only with such persons."

24. Reliance is also placed on a note of conversations between the claimant and the review director for the defendant in which the review director is noted as saying:

> "Obviously the review findings reflect that because you bought a structured product, Barclays agree with the FSA that fair reasonable redress is due. They are complex products that should not have been sold to non-sophisticated customers."

25. That summarises the essence of the complaint being made in these proceedings. It is not a complaint which focuses simply on advice; still less is it a complaint which focuses on one aspect of that advice, namely interest rate loss. Furthermore, even if one was focusing on interest rate loss, one would be looking at an interest rate loss over the entire life of the product, which is some ten years, and the mere fact that there may be a period of interest rate loss would not necessarily indicate that there was excessive loss or excessive risk inherent in the product.

26. The defendant's approach is far too narrow and does not correctly identify the essence of the complaint being made against it. If the complaint had simply been that the claimant had been advised that he would incur no interest rate loss, then one could understand that as soon as it became apparent that the claimant was having to pay interest rate losses, he would or should have known the facts necessary to investigate into such a claim. However, that is simply one facet of a much more complex claim; a claim which is not simply based on interest rates but which focuses on questions of suitability. In my judgment the mere fact that it was known that some interest payments were being made for a period of about a year does not give rise to an unanswerable case that the claimant knew or ought to have known sufficient facts to make the requisite investigation for the purpose of Section 14A.

27. For all those reasons I am satisfied that the claimant does have a real prospect of establishing that he is entitled to rely on Section 14A. In any event, one has to have regard for the fact this is a summary application and therefore not the type of application that should be determined if there are likely to be facts which need to be investigated at trial and which cannot be dealt with simply on the basis of witness statement evidence. This is a case where the facts will be important. It is quite right to point out, as the defendant does, that one is not just concerned with actual knowledge; constructive knowledge is sufficient under Section 14A(10). However, that section requires one to enquire into the knowledge which a person:

> "Might reasonably have been expected to acquire: (a) from facts observable or ascertainable by him; or (b) from facts ascertainable by him with the help of appropriate expert advice which it is reasonable for him to seek,"

28. That is an objective test but it is a test that has to be considered in the context of the circumstances applicable to the person in question. In the present case that involves looking into the degree of Mr Saeed's sophistication, what he had been told or not told,

what his general state of knowledge was in 2008/2009 and what the more general state of knowledge was at that time, for example in relation to the anticipated future trend of interest rates. These are all matters that depend on a full factual picture and mean that the issue is not appropriate for summary determination.

Conclusion

29. For all those reasons, I conclude that this application must be dismissed.