IN THE HIGH COURT OF JUSTICE **Claim No. A40BS458**

QUEENS BENCH DIVISION

MERCANTILE COURT

BRISTOL DISTRICT REGISTRY

[2015] EWHC 2277 (QB)

BEFORE: HIS HONOUR JUDGE HAVELOCK-ALLAN Q.C.

30 July 2015

BETWEEN

SUREMIME LIMITED

Claimant

-and-

BARCLAYS BANK PLC

Defendant

John Virgo (instructed by **Tozers LLP**) appeared for the claimant

Rupert Allen (instructed by **Matthew Arnold & Baldwin**) appeared for the defendant

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Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....
HIS HONOUR JUDGE HAVELOCK-ALLAN Q.C.

1. This judgment determines an application by the claimant to amend the Particulars of Claim.

2. The claim in the action is for alleged mis-selling of an interest rate hedging product or "swap". The swap was a Structured Collar. It was entered into by the claimant with the defendant bank ("the Bank") on 11 June 2008. The transaction has been investigated by the Bank as part of the review of swaps agreed between the major banks and the FSA ("the FCA Review"[1]). The Bank has made the claimant an Offer of Redress. The claimant considers that the amount of the Offer of Redress is not adequate because it is based on what the claimant maintains is an unjustified assumption as to what kind of swap it would have entered into if the original transaction had conformed to the standards and principles agreed between the Bank and the FSA as the basis for the Review.

2. As an alternative to its claim for damages for negligent misrepresentation, breach of contract and/or negligent advice or the negligent provision of information, the claimant has pleaded that, by virtue of section 1 of the Contracts (Rights of Third Parties) Act 1999, it is entitled to enforce the agreements between the Bank and the FSA under which the FCA Review was instituted because it was a member of a class on whom the agreements purported to confer a benefit. The claimant alleges that the Bank is in breach of the agreements because it has failed to carry out the FCA Review in accordance with the standards and principles agreed with the FSA, and that the Bank is liable to the claimant for the consequences of that breach. I shall call this claim "the third party rights claim".

3. The third party rights claim is now dead in the water. When the particulars of claim were drafted, the exact terms of the agreements between the Bank and the FSA were not in the public domain. There were two agreements. The first was dated 29 June 2012 ("the June 2012 Agreement"). The second was dated 31 January 2013 ("the January 2013 Agreement"). Under the June 2012 Agreement, the Bank (together with HSBC, Lloyds and RBS) agreed to give a written Undertaking to the FSA to carry out a review of its sales of swaps since 1 December 2001 to private customers and retail clients who did not meet Sophisticated Customer Criteria, and to provide appropriate redress in cases where mis-selling was found to have occurred. The January 2013 Agreement followed a pilot exercise in which a sample of transactions had been reviewed. The pilot exercise suggested that certain amendments should be made to the Undertaking so as better to define the "Sophisticated Customer Criteria". These amendments were embodied in the January 2013 Agreement.

4. After initially declining to disclose copies of either Agreement as part of early disclosure, the Bank eventually furnished the claimant with a redacted copy of the

[1] The FSA was replaced on 1 April 2013 by the Financial Conduct Authority and the Prudential Regulation Authority. The role performed by the FSA in relation to the review passed to the FCA, hence it has come to be known as "the FCA Review".

June 2012 Agreement[2], which revealed that it contained the following express provision:

> "**Rights of persons other than the Parties**
>
> 9. A person who is not a Party to this Agreement has no right under the Contracts (Rights of Third Parties) Act 1999 or otherwise to enforce any term of this Agreement."

5. In the light of clause 9, the claimant has abandoned its claim under the 1999 Act, and seeks permission to delete that head of claim from the particulars of claim. The Bank consents to that part of the application to amend. The part which is opposed consists of 3 new claims, or bases of claim, by which the claimant says that it is entitled to enforce its rights under the FCA Review and to claim the same measure of damage as if the 1999 Act had applied. These proposed new bases of claim have been raised in at least one other swaps case in the Bristol Mercantile List and are likely to be raised in other swaps cases where there is dissatisfaction with the Offer of Redress. So the decision on whether permission to amend should be granted in this case may have wider repercussions.

6. The new claims are, in summary, as follows:

(1) that in consequence of the Bank's offer to the claimant to review the sale of the swap and the claimant's agreement to participate in the review process and incurring expense in so doing, a contract came into being between the claimant and the Bank under which the Bank owed the claimant a duty to conduct the review in accordance with the specification it had agreed with the FSA for the conduct of the FCA Review;

(2) that in agreeing to provide redress in accordance with the specification for the conduct of the FCA Review, the Bank owed the claimant an equivalent duty of care in tort; and

(3) that in entering into the June 2012 and January 2013 Agreements with the FSA, the Bank agreed to confer on customers whose swap transactions were reviewed the benefits of such a review and of redress if appropriate, and, in accordance with the principles explained in *White v Jones* [1995] 2 AC 207, owed the claimant a duty to implement the review process properly because any failure to do so would place the Bank in breach of its Agreements with the FSA in circumstances where the FSA and FCA would suffer no loss but the claimant, as intended beneficiary of the FCA Review, would suffer a loss.

7. The Bank's objection to these new claims is that they stand no real prospect of success. No issue of limitation arises, nor is it contended that, as a matter of discretion, the amendments should not be permitted if the new claims are capable of serious argument. The Bank's contention is that they are not capable of serious argument but are fanciful and contrived.

[2] A generic copy was also made publically available following a hearing of the House of Commons Treasury Select Committee on or about 12 February 2015.

8. The Bank is right that the relevant test is that which applies on an application to strike out or an application for summary judgment. The Court should not give permission to introduce by way of amendment new heads of claim which do not cross the arguability threshold of a "real prospect of success". To do so would be wasteful of the parties' and the Court's time and resources, and contrary to the overriding objective.

9. Whilst accepting that this is the correct approach, Mr Virgo, counsel for the claimant, draws attention to what was said by Mummery LJ in *Doncaster Pharmaceuticals Group Ltd v The Bolton Pharmaceutical Company 100 Ltd* [2006] EWCA Civ 661 at para. 5:

> "Although the test can be stated simply, its application in practice can be difficult. In my experience there can be more difficulties in applying the "no real prospect of success" test on an application for summary judgment (or on an application for permission to appeal, where a similar test is applicable) than in trying the case in its entirety (or, in the case of an appeal, hearing the substantive appeal). The decision-maker at trial will usually have a better grasp of the case as a whole, because of the added benefits of hearing the evidence tested, of receiving more developed submissions and of having more time in which to digest and reflect on the materials."

10. Mr Virgo also relies on the cautionary note struck by Lord Browne-Wilkinson in *Barrett v London Borough of Enfield* [2001] 2 AC 550 where (at 557E-G) he said:

> "In my speech in the *Bedfordshire* case [*X (Minors) v Bedfordshire County Council*] [1995] 2 AC 633 at pp. 740-741 with which the other members of the House agreed, I pointed out that unless it was possible to give a certain answer to the question whether the plaintiff's claim would succeed, the case was inappropriate for striking out. I further said that in an area of the law which was uncertain and developing (such as the circumstances in which a person can be held liable in negligence for the exercise of a statutory duty or power) it is not normally appropriate to strike out. In my judgment it is of great importance that such development should be on the basis of actual facts found at trial not on hypothetical facts assumed (possibly wrongly) to be true for the purpose of the strike out."

11. Mr Virgo points out that there is a second limb to the test for striking out, as it is reflected in CPR 24.2. The Court should not strike out a claim or give summary judgment in respect of it, and therefore should also not preclude its being introduced by way of an amendment, if there is a "… compelling reason why the case or issue should be disposed of at a trial". This, in Mr Virgo's submission, is a case where there is a compelling reason. He submits that the FCA Review was plainly intended to generate some legal entitlement for those customers whose swaps transactions fell within its remit. It has created an expectation that the principles of the FCA Review would be faithfully implemented by the banks who signed up to it. There are a number of cases, aside from the present case, where the customer is not satisfied with the basis of calculation of an Offer of Redress. The question whether the customer has a private law right to enforce compliance with the FCA Review specification as opposed only to a public law right to challenge decisions taken during the FCA Review is an issue of some public importance and ought to be decided at a trial.

12. I shall start by rehearsing the arguments on each side in a little more detail under each new head of claim. There is a considerable degree of overlap.

The contract claim

13. Mr Virgo accepts that the viability of the new claim in contract hangs on the claimant being able to identify the basic framework of a contract, in terms of offer, acceptance and consideration, in the exchanges which led to the subject swap being incorporated into the FCA Review. He submits that in the present case all the indicia of a contract are in play. The outline facts are as follows.

14. On 17 July 2013, the Bank's Interest Rate Hedging Resolution Team wrote a letter to the claimant as follows:

> "We are writing to you with regard to the … interest rate hedging product (IRHP) that you purchased from Barclays.
>
> We have determined that, at the time of the purchase, you met the criteria of a non-sophisticated customer according to the definition agreed with the Financial Conduct Authority (FCA). This means that the sale of the above IRHP is automatically eligible for redress. …
>
> As detailed in our guide to the review (which you can view online at www.barclays.com/swapsreview), we would like to invite you to take part in an impartial fact find regarding the sale of the above product, which we have asked Eversheds[3] to carry out. This is not compulsory, but does mean that Barclays will be able to take into account anything you wish to tell us. You are also invited to submit any documentation that you believe is relevant.
>
> Eversheds' role is to gather relevant information regarding the sale of IRHPs and to present that information to Barclays. This will be important to assist Barclays in determining what redress will be offered. Eversheds' role will not involve making any decisions about whether a mis-sale had occurred or, where redress is due, what amounts to a fair and reasonable redress.
>
> The FCA states in its report, "Interest Rate Hedging Products - Pilot Findings", not only that it encourages all customers to take advantage of this opportunity to engage in the review but also that they have received positive feedback from customer representatives on the engagement process.
> …
>
> If you choose to speak to Eversheds, they will not have access to any Barclays documents prior to the fact find with you. This will ensure that they do not have any preconceptions in relation to your sales experience. Their work will also be overseen by the independent reviewer to ensure that fact finds are conducted appropriately.

[3] Eversheds LLP is the firm of solicitors which the Bank has retained to assist it in conducting the review.

…

Please complete the attached form and return it in the enclosed prepaid envelope within 14 days from the date of this letter to let us know whether you would like to participate in a fact find or not.

…

If you do not wish to take part in a fact find, or we do not hear from you, we will continue with the review of your case, and provide you with a redress proposal.

We want to assure you that we are working hard to restore customer trust in Barclays and that we are committed to keeping you fully informed. In the meantime, you should continue to comply with all terms of any agreement you have with Barclays, including continuing to make payments under any IRHPs.

…"

15. The claimant signed the Response Form on 23 July 2013 saying that it wanted to talk to Eversheds and nominating one of its directors, Mr Atkinson, as the person with whom Eversheds should make contact. There followed a meeting on 16 September 2013 between the claimant, Eversheds and the independent reviewer[4]. The claimant's evidence in support of the application to amend does not say what happened at the meeting. The amendment itself (at paragraph 31) states only that the claimant "agreed to participate in the review process". The Bank accepts that on 16 September 2013 the claimant participated in the Fact Find with Eversheds. I infer from that that Mr Atkinson gave Eversheds the claimant's version of how the swap was entered into and possibly also some information as to the financial impact of the swap.

16. The Offer of Redress was sent to the claimant on 11 March 2014. It contained three options, the first involving acceptance of the Offer and no more, the second involving acceptance of the Offer and claiming consequential losses other than IRHP borrowing costs and/or lost profits/opportunities caused by mis-sale of the swap, the third rejecting the Offer and requesting a detailed assessment of IRHP borrowing costs and/or lost profits/opportunities caused by mis-sale of the swap as well as other consequential losses.

17. The claimant's solicitors responded on 21 May 2014. I have not seen the letter, but it challenged the basis of the Offer without selecting any of the 3 options. The challenge was presumably on grounds similar to those set out in the particulars of claim. The claimant's pleaded complaint is that the counterfactual by reference to which the Offer was calculated was a replacement swap in the form of a vanilla swap for 9 years and 10 months at a rate of 5.84% from which the claimant would have sought an exit on 3 August 2010, entailing a break cost of £131,533. The claimant's case is that if the Bank had complied with the relevant regulatory requirements it would have sought and obtained a hedge in the form of a 5 year interest rate cap at 6.5% and no more. It would not have sought to exit from that commitment and would not have incurred any break cost. The claimant further alleges that the Bank's counterfactual contravenes certain of

[4] The independent reviewer is the "Skilled Person" defined in the Undertaking given by the Bank under the June 2012 Agreement as "… an independent third party, approved by the FSA, who will report to the FSA under section 166 of the Financial Services and Markets Act 2000 on the [Bank's] conduct of the review". KPMG was the independent reviewer in this case.

the principles for the assessment of redress in the Annexes to the January 2013 Agreement.

18. The Bank wrote back on 21 May 2014 to say that the information provided by the claimant in support of its counterfactual had already been taken into account. However, further evidence would be considered if submitted within 14 days. The letter went on to explain that the Offer of Redress was the product of an assessment by a Customer Review Director within the Interest Rate Hedging Resolution Team. That assessment was then subjected to an internal quality assurance process before being referred to the independent reviewer. The role of the independent reviewer was to scrutinise the Offer for compliance with the standards and principles agreed between the Bank and the FCA and to determine whether it was fair and reasonable. The Bank gave the claimant an additional 14 days to confirm which option it was selecting. The claimant did not do so. At any rate the claimant did not confirm that it wanted to claim for any category of consequential loss. Accordingly the Bank wrote on 5 June 2014 to say that the Offer of Redress was now final and no further steps would be taken by the Interest Rate Hedging Resolution Team to review the sale of the claimant's swap.

19. From these exchanges, the amended particulars of claim assert that the Bank made an offer to review the sale of the swap to the claimant and the claimant accepted the offer by agreeing to participate in the review process and gave consideration by providing information to Eversheds. The resulting contract is alleged to have imposed an implied contractual duty on the Bank pursuant to section 13 of the Supply of Goods and Services Act 1982 to carry out the review with reasonable care and skill and/or an implied duty on the Bank (by necessary implication and/or to give business efficacy to the agreement between the Bank and the claimant) to comply with the principles and specification set out in the June 2012 and January 2013 Agreements.

20. Mr Allen, counsel for Barclays, submits that the contractual analysis is fundamentally flawed. The Bank was committed to carrying out the FCA Review whether or not the claimant wanted to participate. In the exchanges on which the claimant relies, it is not possible (he says) to extract an express promise by the Bank to the claimant that the Bank would comply with the Agreements. At most the Bank invited the claimant to engage with the Eversheds Fact Find and promised that any information supplied in the course of the Fact Find would be taken into account as part of the FCA Review. It was. If there was any contract established between the Bank and the claimant it must be one that can be inferred from the exchanges about the Fact Find. It is impossible, submits Mr Allen, to infer any contract of the kind now alleged, namely, that the Bank would comply with the specification in the Agreements when conducting the FCA Review, having regard to the fact that: (1) the Bank and the FCA had expressly agreed that third parties were to have no right to enforce the terms of the January 2012 Agreement whether under the 1999 Act "or otherwise", (2) the Bank and the FCA had included a confidentiality provision in clause 11 of the January 2012 Agreement so that, at the time the alleged contract was concluded in the summer of 2013, the claimant did not know the specification of the FCA Review which it now says that the Bank promised to observe, (3) the independent reviewer was appointed specifically to ensure compliance by the Bank with the specification of the FCA Review, and (4) the FCA also has the right to enforce compliance with the FCA Review and customers who are dissatisfied with the process can complain to the FCA.

21. Mr Allen further submits not only that there was no consideration for the alleged contract but also that the parties cannot have intended to create the legal relationship for which the claimant now contends. As Lord Clarke held in *RTS Flexible Systems Ltd v Molkerei Alois Muller GMBH & Co.* [2010] 1 WLR 753 at 45: "Whether there is a binding contract between the parties and, if so, upon what terms depends upon what they have agreed. It depends not upon their subjective state of mind, but upon a consideration of what was communicated between them by words or conduct, and whether that leads objectively to a conclusion that they intended to create legal relations and had agreed upon all the terms which they regarded or the law requires as essential for the formation of legally binding relations". Mr Allen points out that, where a contract is sought to be implied, the burden of proving that legal relations were intended rests on the party asserting the contract. By any objective assessment of the facts, Mr Allen says that the claimant stands no prospect of discharging that burden here.

22. Un-phased by these points, Mr Virgo insists that the contract claim crosses the arguability threshold. He accepts that the burden is on the claimant of proving that there was an intention to create legal relations: but contests that clause 9 or clause 11 of the June 2012 Agreement negate that intention. Neither of those provisions was in the public domain in the summer of 2013. The claimant knew only that the Bank had agreed with the FSA to conduct a FCA Review which covered the sale of the swap which it had entered into and which guaranteed the claimant compensation if a mis-sale was found. The claimant realised that there were likely to be principles governing the FCA Review because the Pilot Findings document published by the FSA in March 2013 (to which the Bank's letter of 17 July 2013 expressly drew attention) said so. The claimant knew from the Pilot Findings that the test of whether there had been a mis-sale was compliance with the regulatory requirements at the time of the sale. The claimant knew from the section of the Pilot Findings document entitled "Principles of redress" that there were principles of redress, but did not know precisely what those principles were, save that any redress was to be fair and reasonable and either full redress (if the customer would not have entered into any IRHP), alternative product redress (where the customer would have entered into a different IRHP) or no redress (where the customer would have entered into the same IRHP or has suffered no loss anyway). Specifically, the claimant was unaware that the Bank had agreed with the FSA that third parties should not be entitled to enforce the June 2012 Agreement. By contrast the Bank would or should have known that the claimant was ignorant of that fact when it wrote on 17 July 2013 to encourage the claimant to participate in the FCA Review process. That context is enough, submits Mr Virgo, for it to be more than merely arguable that, when the claimant agreed to engage in the process, the Bank undertook a binding obligation to conduct the FCA Review with reasonable care and skill and/or in accordance with the specification for the FCA Review that had been agreed with the FSA.

23. Mr Virgo submits that the effect of clause 9 was only to dis-apply the 1999 Act. It left untouched any other route by which customers with swap transactions subject to the FCA Review might argue that they had a right to enforce their entitlement to compensation in the FCA Review process. He points out that the Pilot Findings and clause 11 of the June 2012 Agreement itself are equivocal as to whether customers such as the claimant may have a private law right to enforce compliance with the FCA Review. The Pilot Findings document encouraged customer engagement in the FCA Review process. It explained, in Chapter 4, how the FCA Review would be conducted and, under the heading "Assessing compliance with regulatory requirements", included the following statement: "If a customer is dissatisfied with the outcome of the review, they may have recourse to the Financial Ombudsman Service where they are eligible. Other customers

may be able to take action through the courts". Clause 11 of the June 2012 Agreement stated that: "The terms of this Agreement are confidential between the Parties and their legal advisers and shall not be disclosed to any third party except as envisaged in this Agreement, to the extent required by law or to ensure, enable or enforce compliance with this Agreement. …". In Mr Virgo's submission, neither document rules out enforcement of the FCA Review by a customer who agrees to take part in it. Mr Virgo asks, rhetorically, whether it could seriously be contended that, if the claimant had stopped paying sums due under the swap and the Bank had sued for payment, the claimant would have been precluded from pleading, by way of a set-off defence, its right of redress under the FCA Review.

The duty in tort

24. The arguments for and against the imposition of a duty of care in tort run along similar lines. Mr Virgo recognises that the imposition of any such duty must satisfy the threefold "Caparo" test of proximity of relationship, foreseeability of harm and absence of any public policy reason for not recognising a duty of care, as well as the test for assumption of responsibility (see *Henderson v Merrett Syndicates Ltd* [1995] 2 AC 145) or the incremental approach (see *BCCI (Overseas) Ltd (in liquidation) v Price Waterhouse No. 2* [1998] PNLR 564 at 583). He submits that, against the factual background I have described, there is a real prospect of establishing that the Bank owed the claimant a duty of care and skill in carrying out the FCA Review. He questions why the Bank would want to deny such a duty and disputes that clause 9 of the June 2012 Agreement is a sufficient ground for doing so or that the exclusion of the application of the 1999 Act contradicts the imposition of such a duty.

The White v Jones duty

25. *White v Jones* is the leading case in a line of "disappointed beneficiary" cases. In *White v Jones*, the House of Lords upheld the imposition of a duty of care on a firm of solicitors in favour of two intended beneficiaries of a Will which, through negligence, was not drawn up and executed before the death of the testator, but under which the beneficiaries each stood to receive a legacy of £9,000. Under the testator's extant Will, which took effect on his death, the beneficiaries in question (his two daughters) received no inheritance. The rationale for imposing the duty was to fill a lacuna in the law arising from the fact that the person with a valid right to claim against the solicitors for breach of contract or duty in tort (the testator) had suffered no loss, whereas the persons who had suffered the loss (the beneficiaries) had no obvious basis of claim. Lord Goff of Chieveley (at 265D-H) drew an analogy with cases of transferred loss, where damage is caused in the performance of a contract but the damage is suffered by someone not a party to the contract. He observed that the situation was similar but not the same in disappointed beneficiary cases. The difference in the latter cases is that the loss is never one which the testator will suffer because his estate will not be depleted by the amount of the bequest in his lifetime. But the lacuna of no remedy for the person who has suffered the loss exists in both instances. In *White v Jones*, a *Hedley Byrne* type of duty of care towards the beneficiaries was imposed on the solicitors in order to plug the gap and give the beneficiaries a remedy where otherwise there would have been none.

26. Mr Allen submits that *White v Jones* is distinguishable from the present case, because there is no gap which needs filling. Unlike the situation in *White v Jones*, where

the contracting party (i.e. the testator) had died before the loss occurred, the FCA, both directly and through the independent reviewer, is able to enforce the terms of the June 2012 and January 2013 Agreements if they are not applied faithfully. The claimant also has remedies. It can complain to the FCA if it believes that the Agreements are not being followed. It can sue for damages in respect of the original sale of the swap, and has in fact done so. It may also be able to seek judicial review of decisions of the independent reviewer in the review process, if it believes that those decisions have failed properly to apply the specification for the FCA Review. In *The Queen on the application of Holmcroft Properties Ltd* [2015] EWHC 1888 (Admin), Kenneth Parker J gave permission to bring judicial review proceedings of just this kind, holding that it was arguable to the requisite standard under CPR 54 that customers participating in the FCA Review could challenge decisions taken by the "Skilled Person". In the circumstances, Mr Allen submits that there is no need for the claimant to be given a right in private law to enforce the terms of the Agreements between the FSA and the Bank. According to Mr Allen, the imposition of a duty of care on the Bank in the circumstances of this and other swaps mis-selling cases would involve an "unacceptable circumvention of established principles of the law of contract" of exactly the kind which Lord Goff deprecated in *White v Jones* at 268F.

27. In riposte, Mr Virgo points out that the fact that customers can complain to the FCA about the conduct of the FCA Review, and may even be able to challenge decisions of the independent reviewer, demonstrates that the FCA Review has conferred some legal rights on customers who participate in it. The question, he says, is whether the claimant is to be confined to a public law remedy or whether it is at least arguable that non-sophisticated customers have a private law right to complain about the way in which the FCA Review has been conducted.

28. Mr Virgo submits that allowing a private law right would not infringe the principle stated by Lord Diplock in *O'Reilly v Mackman* [1983] 2 AC 237 at 285 that "… it would …as a general rule be contrary to public policy, and as such an abuse of the process of the court, to permit a person seeking to establish that a decision of a public authority infringed rights to which he was entitled to protection under public law to proceed by way of an ordinary action and by this means to evade the provisions of Order 53 [now CPR Part 54] for the protection of such authorities". According to Mr Virgo, it would not infringe that principle for 2 reasons. The first is that it is by no means certain that the conduct of the independent reviewer or of the Bank in implementing the FCA Review is open to a public law challenge. There has yet to be a judgment on full argument in the *Holmcroft Properties* case. It could yet be decided that judicial review is not available. The second is that the principle in *O'Reilly v Mackman* is a general rule to which there are exceptions "… particularly where the invalidity of the decision arises as a collateral issue in a claim for infringement of a right of the plaintiff arising under private law …". Even if the applicant in the *Holmcroft Properties* case establishes the right to bring a public law challenge, any decision-making error in the implementation of the FCA Review in this or similar cases is arguably incidental to the breach of the duty owed to customers whose swaps transactions are the subject matter of the Review.

29. Mr Virgo cited, as an example of a case where public law and private law remedies co-existed side-by-side, the decision in *Roy v Kensington and Chelsea Westminster Family Practitioner Committee* [1992] 1 AC 624. Dr Roy issued a writ against the Westminster Family Practitioner Committee claiming payments to which he believed he was entitled, which the Committee had decided to withhold. The Committee failed in its attempt to have the claim struck out on the ground that the appropriate

remedy was judicial review of the decision not to make the payments. Even though the House of Lords considered that Dr Roy's relationship with the Committee was probably not contractual, the rights he had acquired under the statutory terms of service in the NHS were private law rights on which he could sue, notwithstanding that the decision of the Committee was susceptible also of judicial review. Lord Bridge of Harwich, commenting on the principle in *O'Reilly v Mackman* at 628G-629A, held that, while it was important to uphold the principle, it needed to be confined within proper limits. He went on: "It is appropriate that an issue which depends exclusively on the existence of a purely public law right should be determined in judicial review proceedings and not otherwise. But where a litigant asserts his entitlement to a subsisting right in private law, whether by way of claim or defence, the circumstance that the existence and extent of the private right asserted may incidentally involve the examination of a public law issue cannot prevent the litigant from seeking to establish his right by action commenced by writ or originating summons, any more than it can prevent him from setting up his private law right in proceedings brought against him."

30. Mr Virgo further submitted that to accord a private law right of challenge to the claimant on the facts of the present case would not be a radical step since a customer who is a private person already has a statutory right of action under section 138D of the Financial Services and Markets Act 2000 ("FSMA") and could claim for breach of the Dispute Resolution Rules in the FCA Handbook if an Offer of Redress in the FCA Review was alleged not to be appropriate. The Dispute Resolution Rule to which Mr Virgo referred was DISP 1.4.1R[5]. Since this point was raised for the first time in argument and was one which Mr Allen had not anticipated, I allowed the Bank to serve a written submission in response to it before Mr Virgo served his reply submissions in writing. Mr Allen took issue with whether a complaint about the FCA Review would be a "complaint" as defined in the FCA Handbook, namely, "… any oral or written expression of dissatisfaction … from or on behalf of a person about the provision of, or failure to provide, a financial service or a redress determination …". It seems to me that Mr Virgo is arguably right in saying that a complaint about the mis-selling of a swap and the way in which the Bank had offered inadequate redress through the process of the Review is a complaint which could be made under DISP 1.4.1R, although I do not have to decide that point. Mr Allen's more fundamental objection was that, since the statutory right of action under section 138D is only available to private persons and not to corporate entities, the recognition of a right of action in the claimant in contract or in tort to enforce the FCA Review against the Bank would circumvent the policy underlying the restriction on claims under section 138D of FSMA. Mr Virgo's answer was that the FCA Review applies to all non-sophisticated customers regardless of whether they are or are not private persons and applies the same standards in determining compliance with the FCA Review. It would therefore be discriminatory if non-sophisticated customers who were private persons had a right of suit via section 138D, but non-sophisticated customers who were not private persons had no right of suit at all.

[5] DISP 1.4.1R provides: "Once a complaint has been received by a respondent, it must (1) investigate the complaint competently, diligently and impartially, obtaining additional information as necessary, (2) assess fairly, consistently and promptly (a) the subject matter of the complaint; (b) whether the complaint should be upheld; (c) what remedial action or redress (or both) may be appropriate; (d) if appropriate, whether it has reasonable grounds to be satisfied that another respondent may be solely or jointly responsible for the matter alleged in the complaint taking into account all relevant factors; (3) offer redress or remedial action when it decides this is appropriate; (4) explain to the complainant promptly and, in a way that is fair, clear and not misleading, its assessment of the complaint, its decision on it, and any offer of remedial action or redress; and (5) comply promptly with any offer of remedial action or redress accepted by the complainant."

Conclusion

31. I have come to the clear conclusion that I should refuse permission to introduce the new claim in contract but permit the proposed amendments for a claim in tort. The former I regard as unsustainable. The latter raises issues which in my judgment are more than merely arguable. I also think that there is some other compelling reason why the new tort claims should be considered at a trial. My reasons in summary are the following.

32. The claim in contract faces an insuperable hurdle of lack of consideration. The Bank made it clear that it was going to include the claimant's swap in the process of the Review, whether or not the claimant engaged with the Fact Find. There was, as Mr Allen submits, no conditionality. The Bank did not promise to conduct a review of the sale of the claimant's swap in accordance with the specification of the FCA Review if the claimant agreed to supply information to Eversheds. The most that can be extracted from the exchanges relied upon is that the Bank promised the claimant that if it participated in the Fact Find the Bank would take into account, when conducting the FCA Review, any information which the claimant supplied to Eversheds. There is no evidence that the Bank did not do so. The claimant does not complain that the information it provided was not considered. The complaint is that the Bank failed to conduct the FCA Review in accordance with the specification agreed in the June 2012 and January 2013 Agreements. Although want of consideration is often a weak argument in the law of contract, that is not so where the contract terms which are sought to be enforced are ones which have been agreed between the counterparty and a third party because, in that situation, the premise is that the counterparty is already bound to perform his side of the alleged bargain. I do not think that there is a real prospect of the claimant successfully arguing that a contract can be implied from the conduct I have described in paragraphs 14 and 15 of this judgment.

33. The new claims in tort raise different considerations. Like the contract claim, they raise issues of mixed fact and law: but the factual matrix relevant to whether a duty of care should be imposed is broader. Mr Gordon QC (for the applicant) emphasised the significance of the factual and legal matrix in the ***Holmcroft Properties*** case and my reading of the judgment of Kenneth Parker J is that he accepted this part of Mr Gordon's argument. I cannot be confident that all the relevant facts are known and have been deployed at this early stage of the claimant's action. As Mummery LJ said in ***Doncaster Pharmaceuticals*** at para. 18: "In my judgment, the court should also hesitate about making a final decision without a trial where, even though there is no obvious conflict of fact at the time of the application, reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case."

34. The fact that there may be public law remedies with which to challenge the way in which the FCA Review has been implemented is not necessarily a bar to a private law duty of care being owed. In any case, it has yet to be decided whether public law remedies are available. If they are not, the case for implying a duty on the banks towards customers who swaps sales are being reviewed is arguably stronger. Nor, in my judgment, is the fact that the claimant can sue for the original mis-selling a sufficient answer to the proposed new claims in tort. The FCA Review was intended to provide a route to fair and reasonable compensation without customers having to sue for mis-selling. Those who stayed their hand and have not sued for the mis-sale in the hope of deriving a satisfactory result from the FCA Review process, but now allege that the specification of the FCA Review has not been faithfully applied, may be left without any remedy if they did not

agree a standstill or moratorium with the bank which sold the swap and the mis-selling claim has since become statute-barred. Whilst that is not this case, it is a relevant consideration because it is part of the wider landscape in which the Court will have to assess whether the banks should owe a duty of care to customers in their conduct of the FCA Review.

35. I think that Mr Virgo is arguably right in saying that the fact that a customer who is a private person may have a statutory right of action under section 138D of FSMA to claim for a breach of DISP 1.4.1R if the specification of the FCA Review has not been applied militates in favour of allowing a private law right of action for corporate customers in circumstances where the FCA Review does not distinguish between non-sophisticated customers who are individuals or corporate entities. There is otherwise a gap in remedy for which the rationale of according statutory rights of suit under section 138D to individuals only does not cater.

35. I am also not persuaded that the approach in ***White v Jones*** has no potential application in the present case because the FCA can enforce compliance with the principles of the FCA Review through the independent reviewer. The fact remains that the FCA will suffer no loss if the Bank falls short in implementing the specification of the FCA Review. The loss will lie with the customer for whose benefit (in the broad sense) the FCA Review was instituted. Furthermore, the case for the implication of a duty along ***White v Jones*** principles will be the stronger, if it is ultimately held that the conduct of the independent reviewer is not susceptible of judicial review.

36. I am concerned at this juncture only with whether the proposed new claims are sufficiently arguable for the amendment to introduce them to be allowed so that they can be pursued to trial. For the reasons I have given I do not consider that the claim based on an implied contract crosses the required threshold: but the claims in tort do.

37. This conclusion is in my judgment fortified by the fact that the question whether (and if so what) private law remedies accrue to customers who have participated in the FCA Review is a question of some public importance. It is one that affects a number of swaps claims in which an unacceptable Offer of Redress is alleged to have been made. Whilst in my judgment it is not possible to imply a binding contract between the claimant and the Bank on the facts of this case, there is a compelling reason why the new claims in tort should be permitted to go forward to trial. A trial in the present case is inevitable on the original mis-selling claim, assuming there is no compromise. The new and alternative bases of claim in tort arise in a factual matrix which is likely to prove to be the same or very similar to that in other cases. Thus, in my view, the tort claims merit argument at the trial, rather than being throttled at birth by a refusal of permission to amend.