Feature

KEY POINTS

- While the rate may be reducing, "mis-selling" claims in respect of interest rate hedging products (IRHPs) will remain active for the foreseeable future.
- With regard to claims for breach of statutory duty, *Titan Steel* and the line of authorities following it remain good law.
- Tortious claims for negligent advice remain largely unaffected by the IRHP litigation.
- Attempts to expand the scope of causes of action have largely fallen on deaf ears.

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A lost cause of action?

In this article, the authors consider the difficulties faced by claimants in their claims against banks for the mis-selling of interest rate hedging products.

In 2012, the Financial Services Authority (FSA) identified failings in the way some banks sold customers interest rate hedging products (IRHPs).[1] These findings led to nine banks participating in the FSA-approved[2] past business review (the Review), which has resulted in over 18,200 businesses receiving redress payments in excess of £2.2bn.[3] Despite these payments, the banks involved have been subject to extensive litigation over the past five years, principally by customers deemed "sophisticated"[4] under the Review and so ineligible for redress compensation.

While the statute of limitation means that the rate of claims is reducing, there is still significant litigation ongoing and it is worth reflecting on some key conclusions. Despite efforts to the contrary, claimants have largely failed to engender significant changes to the legal landscape and this can be illustrated by considering three separate issues.

With the Court of Appeal due to hear the Thornbridge appeal in July 2017, IRHP cases will remain active for the foreseeable future.

The first relates to claims for breach of statutory duty. Prior to the raft of IRHP litigation, it was generally understood that only a "private person" (ie an individual and not a company) could bring a statutory claim for breach of an FCA rule under section 138D(2) of FSMA.[5]

The Court of Appeal hinted in *Bailey*[6] that there may be scope for a contrary argument when it held at the oral application for permission to appeal that there was merit in the court considering whether the *Titan Steel* and *Camerata Property*[7] cases were wrongly decided. However, these issues were never fully considered as the case settled before a full Court of Appeal hearing could take place. The consequence is that *Titan Steel*, and the line of authorities following it, remain good law.

TORTIOUS CLAIMS

The second issue to remain largely unaffected by the IRHP litigation is in respect of tortious claims for negligent advice. In order to succeed in such a claim, a claimant will need to establish that advice was, in fact, given and that such advice was given in circumstances which give rise to a duty to exercise reasonable care and skill.

While the authorities suggest differing tests for establishing a duty of care, the cases are consistent in holding that there must be a clear assumption of a duty to advise.

In *Springwell*,[8] it was noted that there would be instances where a salesman was giving advice and making recommendations, which were relied upon by the customer, but the judge held that this did not 'predicate that a duty of care arises on the part of the salesman'. Even if reliance were established, it does not necessarily give rise to an advisory relationship, with consequential duties of care.

The reasoning in *Springwell* has been followed in a number of subsequent cases. In the IRHP context, HHJ Moulder noted in *Thornbridge*[9] that 'it is clear following the principles laid down in *Springwell* that one needs to look at all aspects of the objective evidence of the relationship between the parties' to determine whether any advice was given and if a duty of care assumed. The judge noted the distinction drawn in *Springwell* between 'the investment adviser retained to advise a client and the advice or recommendations given by a salesperson as part of the selling process'.

SCOPE OF CAUSES OF ACTION

In order to overcome the above difficulties, a third issue arises and is where claimants have sought to expand the scope of causes of action, although such arguments have largely fallen on deaf ears. In *Green and Rowley*,[10] the Court of Appeal reiterated the line separating, on the one hand, giving information about a product[11] and, on the other hand, giving advice. In circumstances where this line is not crossed (as happened in that case), there is neither justification nor need for the imposition of a common law duty to advise which is independent of but co-extensive with the statutory remedy provided by section 138D(2) of FSMA.

In *PAG*,[12] it was held on the facts that a "mezzanine" duty[13] (less onerous than the duty to give advice but more onerous than the duty not to misstate) did not arise on the facts. Although obiter, the judge considered that while such a duty was likely to be on the advisory spectrum, it may not fall foul of the non-reliance clauses commonly used as the basis for a contractual estoppel defence.

With the Court of Appeal due to hear the *Thornbridge* appeal in July 2017, IRHP cases will remain active for the foreseeable future. While there may be an element of the banks carefully selecting which cases to fight and which to settle, the reality is that the various claimants have so far failed to convince the courts of the merits of their claims, despite some apparent judicial sympathy.

The most vivid example of this was perhaps *Crestsign*, where the court held

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that the bank successfully disclaimed responsibility for the advice given (which was negligent but not actionable), due to the basis clauses contained in the bank's documentation in respect of the IRHP. This could reflect a desire for contractual certainty, but there may have been an awareness of the broader regulatory context and the Review itself. In the final paragraph, the deputy judge concluded that '[w]hile the result may seem harsh to some, it is not the role of the common law and this court to act as a regulator'. ■

1 That is, structured collars, swaps, simple collars and cap products.
2 Since 1 April 2013, the Financial Conduct Authority (FCA) has overseen the Review.
3 www.fca.org.uk/consumers/interest-rate-hedging-products
4 See www.fca.org.uk/publication/archive/fsa-irs-flowchart.pdf for how "sophistication" is assessed under the Review.
5 Financial Services and Markets Act 2000. See the leading case on the issue, *Titan Steel Wheels Ltd v The Royal Bank of Scotland Plc* [2010] EWHC 211 (Comm).
6 *MTR Bailey Trading Ltd v Barclays Bank Plc* [2015] EWCA Civ 667.
7 *Camerata Property Inc v Credit Suisse Securities (Europe) Ltd* [2012] EWHC 7 (Comm).
8 *JP Morgan Chase Bank & Ors v Springwell Navigation Corporation* [2008] EWHC 1186 (Comm).
9 *Thornbridge Ltd v Barclays Bank Plc* [2015] EWHC 3430 (QB).
10 *Green & Anor v The Royal Bank of Scotland Plc* [2013] EWCA Civ 1197.
11 The so-called *Hedley Byrne* duty not to misstate.
12 *Property Alliance Group Ltd v The Royal Bank of Scotland Plc* [2016] EWHC 3342 (Ch).
13 Following *Crestsign Ltd v National Westminster Bank Plc & Anor* [2014] EWHC 3043 (Ch).

Further Reading:

- Fault lines in English financial law: *Thornbridge v Barclays Bank* [2016] 5 JIBFL 266.
- The big picture about the small print: why the courts' approach is unreal [2016] 11 JIBFL 649.
- LexisNexis Loan Ranger blog: First reported case on swaps mis-selling resolved in bank's favour.