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Les and Janet O'Hare v. Coutts & Co
A2/2016/3773

Article by David Bowden

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Les and Janet O'Hare v. Coutts & Co – A2/2016/3773

Executive speed read summary

After a 10 day trial in 2016, Mr Justice Kerr handed down a lengthy reserved 43 page judgment in which he dismissed all allegations made by Mr & Mrs O'Hare that Coutts had not followed the FCA's Conduct of Business Rules. Although the judge found that Mr O'Hare was a reliable and honest witness, he ruled that Mr O'Hare had entered into these investments with his eyes wide open. Mr O'Hare claimed that Coutts had used ever heavier 'persuasion' techniques on him to get him to invest in ever riskier investments. Mr O'Hare had sold his engineering business for £13million and had been looking to invest £10million. Coutts persuaded him to invest in 4 hedge fund products under the 'Novus' brand. Following the financial crash the O'Hares were nursing losses on these hedge fund products of £1.14 million. Lord Justice Henderson refused the O'Hares permission to appeal to the Court of Appeal. An oral permission hearing was listed before the Chancellor, Sir Geoffrey Vos. There were 3 grounds of appeal namely that the trial judge made inconsistent findings of fact and that it was not permissible for a private banker to use 'persuasion' to get their customers to buy riskier products. The final ground also that claimed breaches of the FCA's Conduct of Business rules provided the O'Hares with a cause of action over and above any claim in negligence that the trial judge had dismissed. In a lengthy 1 hour judgement, Lord Justice Vos has refused permission to appeal on all 3 grounds ruling that there was no realistic prospect of success on this appeal and that there was no other reason for the court to hear it. This is the end of the road for Mr & Mrs O'Hare in their legal battle against Coutts.

Les and Janet O'Hare v. Coutts & Co
A2/2016/3773 6 February 2018
Court of Appeal, Civil Division (Chancellor of the High Court, the Right Honourable Sir Geoffrey Vos)

What are the facts?

The O'Hares claim losses in the Novus funds of £1.14million. Mr & Mrs O'Hare sold their business and were introduced to the bank. They became a private banking client in 2001. Their total wealth and assets are around £35millon. Initially they invested in a low risk offshore bond. After Mr Shone started to become their relationship manager, he persuaded them to invest in ever riskier investments. Mr Shone left the bank in 2008 and Mr Eugeni became the account manager. He sought to rebalance the portfolio.

Mr O'Hare made a formal complaint about one product (OCR) which, whilst the bank dismissed it, decided as a goodwill gesture to rebate $250k against future charges and commissions. The financial markets deteriorated after 2007 and Mr & Mrs O'Hare suffered portfolio losses. They liquidated some loss-making investments which were in high risk products and placed them elsewhere. In 2010 they were sold new products from Royal Bank of Scotland International and claimed they were misled into buying them because the brochures contained glowing past performance figures which had been '*simulated*' and explanations on this were buried in the small print.

Mr O'Hare said the bank used ever more heavy persuasion techniques on him to get him to buy riskier products. He said this was not documented by the bank. Although the bank said Mr Shone would give evidence in its pre-trial questionnaire, he was not produced to give evidence. Mr O'Hare accepted that he had taken a punt on a couple of products and took those losses on the chin. However he maintained that some of the products had been mis-sold to him.

What products were sold by the bank and when?

The bank sold Mr & Mrs O'Hare the following 5 sets of products:

- **CMI** - Clerical Medical International offshore bond (May 2005),
- Investment in **Coutts Private Equity Ltd Partnership** (which Mr & Mrs O'Hare had to borrow funds to invest in – March 2007),
- **Orbita** funds comprising:
  - OAG – Orbita Asian Growth (April 2006),
  - OGO – Orbita Global Opportunities (September 2007),
  - OCR – Orbita Capital Return (September 2007),
- **Novus** funds comprising:
  - NNR – Novus Natural Resources (September 2007),
  - NGCO – Novus Global Credit Opportunity (December 2007),

- NGEM – Novus Global Emerging Markets (December 2007),
- NNRS – Novus Natural Reserve Strategy (December 2007 & March 2008),

- **RBSI** - Royal Bank of Scotland International products (both May 2010):
  - Autopilot, and
  - Navigator.

The Novus products were all hedge fund investments.

What ruling did Mr Justice Kerr give?
On 9 September 2016 the judge dismissed all claims in a reserved 43 page judgement - **[2016] EWHC 2224 (QB).**

What do the relevant FCA Conduct of Business Rules provide?
COBS came into force on 1 November 2007. Only these 3 rules were relevant for the Court of Appeal (August 2016 version):

- **4.2.1R: '**(1) A firm must ensure that a communication or a financial promotion is fair, clear and not misleading'.
- **9.2.1R:** '(1) A firm must take reasonable steps to ensure that a personal recommendation, or a decision to trade, is suitable for its client.'
- **9.2.2R:** '(1) A firm must obtain from the client such information as is necessary for the firm to understand the essential facts about him and have a reasonable basis for believing, giving due consideration to the nature and extent of the service provided, that the specific transaction to be recommended, or entered into in the course of managing:
  (a) meets his investment objectives,
  (b) is such that he is able financially to bear any related investment risks consistent with his investment objectives, and
  (c) is such that he has the necessary experience and knowledge in order to understand the risks involved in the transaction or in the management of his portfolio.'

What did the court rule in *Al Sulaiman v. Crédit Suisse Securities (Europe) Ltd*?
Mr Justice Cooke sitting in the Commercial Court handed down his judgement in this case on 1 March 2013 - **[2013] EWHC 400 (Comm).** Ms Al Sulaiman had failed to prove that the risks of leveraged investments in structured notes had not been adequately explained to her. She had received many copies of term sheets, effect of leverage documents and other documents which cross-referred to the underlying concepts which she understood. From these documents it appeared that sufficient explanation had been given to her of the risks of leveraged investment in the notes. Employees of the bank had taken reasonable steps under COBs to ensure that she understood the nature of the risks involved in her investments and that they were suitable for her in the light of her investment objectives, her knowledge and experience and her financial status. There had been no breach of statutory duty or any other duty in failing to explain the risks of the notes.

Are there any other prior authorities of relevance?
These 5 authorities (listed chronologically) are relevant in this case to how the duties under COBs are to be applied:

Rubenstein v. HSBC Bank Plc **[2012] EWCA Civ 1184** (Court of Appeal - Rix, Lloyd & Moore-Bick LJJ)
The statutory purpose of the COB regime is to afford a measure of carefully balanced consumer protection to a 'private person'. That purpose is elucidated not only by the content of the COB rules themselves but also by section 2 of FiSMA, which speaks of 'the protection of consumers'. The rules to be created by the regulatory authority are to be informed by a proper regard for 'the differing degrees of risk involved in different kinds of investment … the need that consumers may have for advice and accurate information … the general principle that consumers should take responsibility for their decisions'. These basic principles and purposes are reflected in the imposition under the COB rules of onerous duties designed to ensure that the investment adviser understands his client and his client understands risk.

Zaki v. Credit Suisse (UK) Ltd **[2013] EWCA Civ 14** (Court of Appeal – Etherton, Rix & Patten LJJ)
Where the issue arises in the context of statutory duty, it is possible that the statutory requirements may to a greater or lesser extent mould their own solutions, so as to give greater weight to requirements of process. Nevertheless what is aimed at is the provision of suitable advice (COB 5.3.5) or suitable lending arrangements (COB 7.9.3) and not merely suitable advice or lending arrangements in the abstract but suitable advice or arrangements for the client and his proposed investments. The complex rules are an attempt to hold the balance between the parties fairly, giving weight both for the need to

protect investors from ignorance and for the need to permit ultimate autonomy to the properly informed investor to make and take responsibility for his own mistakes. Where it is ultimately to be found, giving all due weight to the statutory requirements, both of form and substance, that personal recommendations or lending arrangements are suitable, they cannot be rendered unsuitable by some incidental and essentially immaterial failure of mere form.

Green v. Royal Bank of Scotland Plc **[2013] EWCA Civ 1197** (Court of Appeal – Richards, Hallett & Tomlinson LJJ)
It is common ground that the financial advisors owed a common law duty to act with the skill and care to be expected of a reasonably competent financial advisor. In determining the extent of this duty, it is useful to start with the requirements of the relevant regulatory regime. This is because the skill and care to be expected of a reasonably competent financial advisor ordinarily includes compliance with the relevant regulatory rules

Figurasin v. Central Capital Ltd **[2014] EWCA Civ 504** *(Court of Appeal – Laws, Patten & Vos)*
The trial judge was entitled to find that the broker had breached ICOB 2.2.3R. Mrs Figurasin had been misled by a telephone conversation which had not communicated information about the loan in a way that was 'clear, fair and not misleading'. The broker had provided an inadequate explanation of how the PPI was to be funded and had failed to mention that it would cost an additional £8,750. The requirements of r.2.2.3 had to be satisfied whenever a firm communicated information to a customer. If the telephone conversation and the subsequent delivery of the documents were separate communications, there had been a clear breach in relation to the former, regardless of how clear and fair the draft loan agreement was. Whilst the FCA sourcebook rules were not required to accommodate any level of irresponsibility on the part of a consumer, they existed to protect consumers from being misled.

Thornbridge v. Barclays Bank **[2015] EWHC 3430 (QB)** (High Court, QBD, Manchester Mercantile Court - Mrs Justice Moulder)
The bank had not recommended an interest rate swap. Even if the bank had given advice during the conversations, the bank had not assumed an advisory duty. The bank's statements on likely movements in interest rates would reasonably have been understood to be predictions rather than formal advice. Even if the bank's views had amounted to advice, they had not gone beyond the daily interactions between an institution's sales force and its customers and a court has to consider all aspects of the parties' relationship. The bank had not received a fee for advice - this was a relevant factor against finding an advisory relationship. There was no broad duty to provide information in the absence of an advisory relationship. Under the contract terms, the borrower had no contractual right in respect of the bank's obligations to comply with the relevant FSA rules. Nor was there a direct right of action for breaches of the COBs rules. Although the bank had no common law duty to provide full information, it had a duty not to mislead when providing break costs examples. There was a duty not to mislead regarding the products' competing advantages and disadvantages. The swap had not been unsuitable. It had done what it was supposed to do: it had limited the borrower's liability to rising interest rates.

On what grounds did Mr & Mrs O'Hare seek permission to appeal?
Mr & Mrs O'Hare sought to advance these 3 grounds of appeal:

- The judge below made inconsistent findings of facts,
- A private banker cannot use '*persuasion*' to get a customer to take on more risk than he would otherwise, and
- The judge below did not adequately address the claim for breach of statutory duty, namely that on:
  - COBS 4.2.1R – fair communications,
  - COBS 9.2.1R/9.2.2R – suitability of the Novus products

What decision did Lord Justice Henderson give on the papers?
On 18 July 2017 Lord Justice Henderson refused permission to appeal on the papers. On Ground 1 he ruled that on a fair reading there was no contradiction and Kerr J dealt with this at paragraphs 96 and 224-226 of his judgment. Henderson LJ said there was no realistic prospect of the Court of Appeal interfering with those findings. As to Ground 2 Henderson LJ said it was not negligent to permit higher risk. Finally on Ground 3 Henderson LJ ruled that Kerr J was entitled to find co-terminous duties from 1st November 2007 which was after the investment decision.

What submissions did counsel for Mr & Mrs O'Hare make at the oral permission hearing?
Mr David Wolfson QC (who did not appear below) made a number of valiant submissions that Mr & Mrs O'Hare could not understand why they had lost their case. He submitted the reason why they

lost was not apparent from Kerr J's judgment. He also said it was difficult for them to square their defeat given the findings that the trial judge had made of the witnesses. Kerr J had found Mr O'Hare to be 'an honest and truthful witness'. On the other hand the bank's 3 of the 4 witnesses who attended trial were castigated as being '*guarded, wary and verging on obtuse'* (Mr Williams), only answering questions '*after considering what type of answer would best'* in his judgment assist the bank's case (Mr Thomas), and '*it turned out that she had no knowledge or understanding of what the figures represented and had taken them on trust'* (Ms Barlow).

Did Lord Justice Vos grant permission to appeal?
No. Permission to appeal was refused.

What did Vos LJ rule on the allegation that the trial judge made inconsistent findings of facts?
Sir Geoffrey Vos started his judgement by observing that that '*this is a factual ground of appeal and the O'Hares need to show the judge was wrong and there is a real prospect of the Court of Appeal interfering'*. He noted that Mr Justice Kerr '*heard the witnesses over 9 days'* and he '*relied on Mr Shone's contemporaneous notes as opposed to his witness statement'*. Vos LJ said that he did '*not see reasonable prospects of showing Kerr J over-stated the impact of Mr O'Hare's cross-examination and re-examination*'. He went on to add that he had '*looked at some but not all of the transcripts of evidence'* but that the '*highest it can be put is that he cannot remember this but he accepted that his recollection was not always accurate'*:

Vos LJ picked it up from paragraph 52 of Kerr J's judgment where he ruled that:

> *'**52.** The first is that I find Mr O'Hare to be an honest and truthful witness, although his recollection was not always accurate, as he was the first to admit whether or not against his interest. I do not accept that his evidence was profoundly unsatisfactory, as Ms Oppenheimer submitted. He was cheerfully candid about admitting mistakes and being corrected. And, unlike two of Coutts' witnesses, Mr Thomas and Mr Williams, he did not answer questions after considering what type of answer would best (in the witness's judgment) assist his cause."*

Vos LJ ruled that in his '*judgment Kerr J fully understood this - as is clear from paragraphs 98, 214 and 224-226 of his judgment*'. He went on to note that '*Mr O'Hare agreed to the investment on the basis that it was in line with their overall moderate attitude to risk, which had not changed.'*

Vos LJ also homed in on a few further paragraphs in the judgement of Kerr J. These were:

> '**215.** *As I have found, the O'Hares were wealthy and intelligent, but not particularly sophisticated or experienced investors. Mr O'Hare was astute in business and willing to take risk, but would always balance risk against caution. For example, he did not favour cash investments in 2010 when interest rates stood at only 0.5 per cent. On the other hand, their investments were relatively conservative before Mr O'Hare's dealings with Mr Shone.*
> **'216.** *The latter's persuasiveness influenced Mr O'Hare in the direction of taking considerably higher risk than hitherto. This is not surprising. The terms of the O'Hares' contract meant that Coutts had to sell products to them (or earn commission from third party sales to them) for the relationship to be commercially viable for Coutts. Mr Shone succeeded in making the relationship profitable for Coutts.'*

For Vos LJ he said that '*this leaves the $64,000 question - were the investments objectively suitable to the O'Hares?'*. On this Vos LJ looked at COBS 9.2.1R/9.2.2R and ruled that the investments '*did meet the O'Hares' financial objectives and the O'Hares had the necessary experience'*. Going on Vos LJ ruled that the trial judge '*clearly found that they were able to balance risk at paragraphs 222 and 225 of his judgment'*. From this Vos LJ ruled that '*Mr O'Hare thought this was a risk worth taking'* noting too that '*he did not complain he was mis-sold the OCR product*'.

More controversially Vos LJ focused on paragraph 85 of Kerr J's judgment where he had found that:

> '**85**. *Mr O'Hare denied in cross-examination that receipt of that sum increased his appetite for risky investments and reduced his desire to exercise caution and moderation in the running of risk. Broadly speaking, I accept his evidence to that effect. However, having an additional £13 million made him more amenable to advice to go for higher returns, running higher risks, than he would otherwise have been. He intended to invest about £10 million of it.'*

Vos LJ also endorsed what Kerr J had ruled at paragraph 70 of his judgment where he said that Mr O'Hare '*had no difficulty with returns on investments of more than 5 per cent per annum, but would have been dissatisfied with less. His 5 per cent figure was a benchmark or rule of thumb he used in measuring in his own mind whether he was satisfied that his money was working hard enough.'*

Vos LJ was scornful of Mr Wolfson's '*dock plea'* submission ruling that in his '*judgment it is far from right for Mr Wolfson to submit that the O'Hares do not know why they lost this case. There were clear risks that the O'Hares were running. This is a factual appeal – it has no real prospect of success'*.

What did Vos LJ rule on the 'persuasion' point?
Mr O'Hare said there were many meetings – at his house, at the Dorchester Hotel in London, on the golf course and occasionally (but not often) at the bank's offices. He said at these meetings the bank's salesmen, particularly Mr Shone, used slick or polished or subtle sales persuasion techniques on him to persuade him to buy products that were ever riskier for him but ever the more profitable for the bank and its salesmen. At trial Mr O'Hare submitted that the notes that Mr Shone wrote up for the bank's credit committee and line managers after these meetings made no reference to this. Instead they were slanted to suggest that Mr O'Hare was '*keen*' to buy these products.

On this ground, Vos LJ ruled that he did '*not consider that this ground has real prospects of success'* noting that it was a '*factual not a legal ground'*. Vos LJ said that the expert evidence below had said that Coutts had made the '*risks sufficiently clear'*.

Vos LJ note that Kerr J's conclusions on this issue were at paragraphs 224-226 of his judgment '*where he makes this clear'*. Going on Vos LJ highlighted too paragraph 217 where Kerr J ruled that 'as *I read the authorities and the COBS regulatory scheme, there is nothing intrinsically wrong with a private banker using persuasive techniques to induce a client to take risks the client would not take but for the banker's powers of persuasion, provided the client can afford to take the risks and shows himself willing to take them'*.

As to *Al Sulaiman v. Crédit Suisse Securities (Europe) Ltd,* Vos LJ simply ruled that it '*was a different case on different facts*' noting that Kerr J had concluded that '*Mr O'Hare was taking higher risks'* saying that this was why the trial judge noted that Mr O'Hare *'was willing to take the performance of the Novus products "on the chin" having gone into them with "eyes wide open"*.'

What did Vos LJ rule on whether a claim under COBs added anything to one in negligence?
Vos LJ starts by noting that this 3rd ground of appeal alleges failures of COBS 4.2.1R (fair communications), and COBS 9.2.1R/9.2.2R (suitability of the Novus products). Vos LJ said that '*Mr Wolfson submits that the judge below should have considered these separately relying on* Green *&* Rowley *and* Thornbridge' noting too that Mr O'Hare's counsel '*argues that the COBS rules are not co-extensive with the common law duty of care'*

Vos LJ observed that Mr Wolfson relied on *Figurasin v. Central Capital Ltd* (a case on the Insurance Conduct of Business Rules) where it was held that rule 4.2.1R in ICOB had to be satisfied. Mr Wolfson QC also submitted that the trial judge '*should have found COBS 9.2.2R a reasonable step where personal recommendation is substituted as it (i) meets the client's objectives, (ii) financially able to buy these products, and (iii) client has sufficient experience'*.

These submissions were roundly rejected by Vos LJ at the end of his one hour judgment. Vos LJ ruled that in relation to COBS 9.2.1R/9.2.2R that Kerr J had dealt *'objectively'* with them as regards to the O'Hares. Vos LJ went further adding '*moreover the COBs ground is a clear rule and an appeal cannot succeed. It is alleged that Mr Shone broke this COBs rule in a 2007 meeting – but this was after the rule came into force'*. Concluding Sir Geoffrey Vos ruled that there was '*no realistic prospect of success on this appeal'* and that there was '*no other reason for the court to hear this'* so that he refused permission to appeal.

What will happen next?
This is the end of the road for the O'Hares. In default of agreement, the costs will have to be assessed both in the Court of Appeal and the High Court and paid by the O'Hares to Coutts.

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David Bowden is a solicitor-advocate and runs David Bowden Law which is authorised and regulated by the Bar Standards Board to provide legal services and conduct litigation. He is the cases editor for the Encyclopedia of Consumer Credit Law. If you need advice or assistance in relation to consumer credit, financial services or litigation he can be contacted at info@DavidBowdenLaw.com or by telephone on (01462) 431444.