Limitation and continuing duty of care in financial mis-selling cases

02/12/2015

Dispute Resolution analysis: A judge has ruled that a claim in relation to the sale of an investment portfolio, in which it was alleged there was negligence and breach of contract and statutory duties by a bank, was time barred under the Limitation Act 1980 (LA 1980). David Bowden, freelance independent consultant, comments on the consequences of Worthing v Lloyds Bank PLC and what lessons can be learned from this case, particularly with regard to when a continuing duty to correct earlier advice might arise.

Original news

Worthing and another v Lloyds Bank plc [2015] EWHC 2836 (QB), [2015] All ER (D) 84 (Oct)

The Mercantile Court dismissed the claimants' case against the defendant bank for compensation for their losses on the sale of their investment portfolio. The court held that in giving the advice that it had done the defendant had not acted negligently, in breach of contract, or in breach of its statutory duties under the Financial Services and Markets Act 2000 (FSMA 2000) and the Conduct of Business Sourcebook Rules (the COBS Rules).

What is the background to this case?

Investors claimed compensation for their losses against the defendant bank. This was on the basis that, in giving them that advice, the defendant acted:

- negligently
- in breach of contract
- in breach of its statutory duties under FSMA 2000 and its Conduct of Business Sourcebook Rules and the COBS Rules

What were the facts in this case? What documents support this?

In January 2007 the claimant investors invested £700,000 in an investment portfolio provided by the defendant bank through its Mayfair asset management service.

The bank sought information about the claimants' personal financial situation and asked a series of questions designed to identify their attitude to risk. The bank prepared a risk and planning document setting out its assessment of the claimants' risk profile. The defendant had four categories of risk--cautious, balanced, progressive and adventurous--and the claimants were assessed as a balanced risk and recommended to invest in a medium-risk portfolio.

The claimants adopted the recommendation and entered into an asset management contract with the bank. By the time of the first annual review meeting the portfolio had reduced a little in value and the claimants had a large overdraft that they were hoping to discharge from a property sale. In due course the property sale fell through.

In July 2008 the claimants surrendered their investment, receiving back only £657,388.21 and used this to discharge the mortgage. The claimants say that the losses they suffered on the investment were due to bad advice given to them by the defendant--initially in January 2007--to invest in the portfolio and subsequently in a review meeting on 13 March 2008 to retain the investment.

The claimants' case is that they ought to have been advised at the outset that the portfolio--a medium-risk investment--was inappropriate for them as investors wanting only low risk. The claimants say that subsequently the defendant ought to have corrected its initial mistake and advised them to disinvest from the portfolio. Proceedings were commenced on 16 March 2013. At a hearing on 13 August 2014 the claimants conceded that their causes of action were statute-barred in so far as they related to alleged breaches of duty in relation to the initial advice that occurred before 16 March 2007.

The claim that was pursued related to a failure to correct the initial advice to invest and to subsequent advice to retain the investment.

What findings did the trial judge make about the witnesses?

Both the claimants gave evidence.

In cross-examination Mr Worthing candidly accepted a number of important matters. He had not been overly concerned about short-term fluctuations in the stock market. He had been given a proper opportunity to read the risk and planning document and had understood the importance of providing accurate responses. He was prepared to accept the risk of capital loss in the interests of achieving growth. It was put to Mr Worthing that he chose a balanced profile because he was happy with it, and he accepted that that was correct. Mr Worthing said that to him a balanced profile meant a 'relatively low risk'.

The judge found that after making the investment, they largely 'forgot about' the money. When asked about this, Mrs Worthing accepted that the reason for this was that they both knew that in the short to medium term the value of the investment might fall.

The claimants had not wanted to sell the investment portfolio. They had sold reluctantly because they needed access to the money to repay their overdraft, which had not existed or been envisaged when the investment had been made. The judge ruled that:

'...It will not do to paint them as naïve, unsophisticated or timid. Both of them are obviously intelligent. Mr Worthing has been a remarkably successful businessman. They are clearly a close couple, who had joint finances and made their investment decisions on a genuinely joint basis. They were not ignorant about the implications of exposure to the financial markets, at least in general terms.'

For the defendant, oral evidence was given by Mr Aidan Doyle who conducted the review in March 2008. The defendant had a file note and agenda in respect of each meeting which had been dictated by Mr Doyle very shortly after each meeting. The judge said that the file notes--with other contemporaneous documentation--seem to him to be the best starting-point when considering what happened at the meetings. The judge found Mr Doyle to be 'an impressive witness, giving answers thoughtfully and intelligently and with conviction. The impression of scrupulous honesty he conveyed tends to be confirmed by testing his evidence against the documentation'.

The judge ruled that the bank:

'...was entitled to use standardised documentation for the purpose of explaining to its customers the nature of its products and the risks attendant on them; that entitlement is now expressly recognised by COBS 2.2.1 R. There is a clear advantage in using such documentation, because it avoids the vagaries of inconsistent and perhaps unclear explanations and information and provides a clear reference for assessment and approval by the regulatory authorities. The documentation used by the defendant with respect to the claimants was clear and straightforward in its explanations of the risks involved in a balanced, as distinct from a cautious, profile.'

There were two expert witnesses, Mr Charles Levett-Scrivener and Ms Louise Claro, who gave evidence as to the standard of advice given by the defendant. However, the judge found that for the most part this expert evidence did not add much to a consideration of the pleaded issues that arose on the facts.

What evidence was in dispute?

The terms and conditions of the defendant's 'Asset Management Service--Investment Portfolio Service and Portfolio Administration Service' was not in dispute. Prior to the claimants investing in the portfolio there had been four meetings with the defendant--on 29 September 2006, 7 November 2006, 9 January 2007 and 18 January 2007. Mrs Worthing could not attend one of these meetings. The claimants disputed what 'balanced risk' meant and Mrs Worthing said in evidence 'I thought balanced meant safe.' What was said at these meetings was in dispute.

There was a fifth meeting--an annual review meeting--held on 13 March 2008 and what was said at that was disputed. The claimants sold their portfolio on 18 July 2008 and its value had decreased by a further £18,765 since the annual review meeting.

What submissions were made at the hearing by the claimants?

The claimants argued that the bank had:

- failed to ensure that they understood the nature of the investment risk
- breached its continuing contractual obligation to correct the initial incorrect advice
- failed to carry out an assessment of their risk profile at the annual review meeting and had failed to advise that the investment was no longer suitable

Why did the defendant say that the claim should fail?

The defendant said the claim in relation to the initial investment advice was time barred under LA 1980. While any claim in in relation to the annual review meeting on 13 March 2008 was brought within the six-year limitation period, the bank submitted that the investment decision was taken based on the meetings held between September 2006 and January 2007, and that there was no continuing duty of care which would start the limitation clock running again when the annual review meeting took place on 13 March 2008.

What did the trial judge rule?

The judge dismissed the claim.

The claimants had expressed a desire to invest in a portfolio with a balanced profile and that is what they had obtained. Although they had not previously invested in financial products, they were not ignorant of the implications of exposure to financial markets. The bank had been entitled to use standardised documentation to explain to customers the nature of its products and the attendant risks. The risk assessment had been a robust method of probing and assessing attitude to risk and had been properly applied. Therefore, there had been no error in the initial advice for the bank to correct.

The judge rejected any claim that the defendant had not properly assessed the claimants' attitude to risk at the outset. The effect of this ruling was that the defendant had nothing to correct at the subsequent review meeting.

As to whether the bank owed a continuing duty of care in relation to the original investment advice, the judge found that this could exist in three ways:

- the original investment advice was given under a contract, but the incorrect advice did not discharge the bank's duty under the contract such that the bank remained contractually bound to perform that duty and correct its original advice
- after the initial advice was given, a new contract came into existence under which the bank was required to correct any incorrect advice it had given
- the bank was under a duty to conduct periodic reviews of its advice with reasonable skill and care and in accordance with COBS rules

On the facts of the present case, however, no such continuing duty was established.

The judge found that the claimants signed the bank's standard terms and conditions after the original advice had been given. Therefore, the advice could not have been given under any contract. Even had it been, that contract would not have generated any continuing obligations.

Any contract that came into existence after the original investment advice did not impose on the bank an obligation to correct any earlier advice given. The judge said it could not be correct to say that 'at each moment after the giving of the incorrect investment advice there is a new breach by way of failure to rectify the earlier breach'. While the bank did have an obligation to conduct periodic reviews, that did not impose a duty to carry out a completely new risk assessment only to see if anything had changed since the last assessment and give advice on that basis.

In relation to periodic advice reviews the judge found that this could apply because a new contract came into existence after the original investment advice. However, the bank's standard terms and conditions did not contain an absolute duty on it to correct any earlier error in its original investment advice. There was no contractual obligation to carry out a new risk assessment The bank had conducted the review with reasonable care and skill. It had not failed to advise the claimants that the portfolio was no longer suitable as:

- the claimants' investment objectives had not changed
- it had been reasonable to give advice that no immediate decision should be taken to sell
- their future investment objectives could not properly be assessed at the time

The judge applied the ruling of the Privy Council in *Maharaj and another v Johnson and others (Trinidad and Tobago)* [2015] UKPC 28, [2015] All ER (D) 198 (Jun). Here Lord Wilson gave the majority ruling and described a claim in negligence against solicitors in relation to a conveyance that had occurred 22 years earlier as 'fictious'.

In relation to the claim under section 13 of the Supply of Goods and Services Act 1982 (SGSA 1982) that the bank had a duty to exercise reasonable skill and care, the judge accepted that if the original investment advice was given pursuant to a contract, SGSA 1982, s 13 would apply. However, even then it would only support an argument that incorrect investment advice had been given in breach of contract. The fact that advice might have been given without reasonable skill and care was not sufficient in and of itself to establish a continuing duty.

Will there be an appeal?

Judge Keyser sat as a High Court judge on this case. However, at the end of the judgment, the judge noted that the parties:

'...have not been able to reach agreement on consequential matters, including costs, I shall adjourn consideration of those matters to a later hearing.'

No application for permission to appeal was made to the judge at this consequential orders hearing. There is the possibility that an application for permission to appeal will be made directly to the Court of Appeal which to be in time must be lodged within 21 days of that further hearing.

Interviewed by David Bowden.

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