

BANK SETTLES ON SECOND DAY OF TRIAL IN FIRST CASE TO ADDRESS THE DIRECT APPLICATION OF THE COBS RULES TO A MIS-SOLD SWAP

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John Virgo leading Holly Doyle (instructed by James Taylor of Wards) were involved last week in the trial of what is believed to be the first case in which the High Court would have had the opportunity to consider the direct application of the COBS rules to the mis-selling of an interest rate swap to an individual private retail client.

Previous cases had either been brought by a corporate claimant, or (if by an individual) in negligence only due to limitation problems with a breach of statutory duty claim under s 138D FSMA 2000.

In this case, the Claimant, a sole trader, had been sold the unsuitable swap by National Westminster Bank plc in 2008. The bank's standard trade documentation included the usual raft of what have come to be known as "basis clauses", the effect of which is to seek to avoid any advisory duty arising at all (as opposed to excluding liability for breach, which is impermissible under the COBS rules). While these clauses have generally found traction with the Court in the cases to date, the Claimant argued that this was an impermissible attempt to "re-write history" and could not be effective to oust the application of COBS in the SME context. Further and in any event, the Claimant contended that, even if the bank could not be said to have "advised" him, it had failed to properly explain the risks of the hedge (as required by the COBS rules). He invited the Court to hold that, in the context of an SME, the COBS rules required a quantitative (and not merely qualitative) explanation and illustration of the possible break costs.

This case therefore had the potential to have far reaching consequences for the banking industry in the context of claims for the mis-selling of hedging products.

The bank fought the claim vigorously and the case was listed for a 6 day trial before His Honour Judge Havelock-Allan QC in Bristol Mercantile Court. However, at the end of the second day, after the Claimant's evidence finished and as evidence was being heard from the Claimant's relationship manager, the bank accepted the Claimant's final (and very substantial) pre-trial part 36 offer to bring the claim to a successful conclusion.

This case is further evidence that claimants need to be determined in order to achieve a just outcome in litigation against a large and well-resourced defendant.

