Neutral Citation Number: [2018] EWHC 3583 (Comm)

Claim No: CL-2017-000345

IN THE HIGH COURT OF JUSTICE
THE BUSINESS AND PROPERTY COURTS OF ENGLAND & WALES
COMMERCIAL COURT (QBD)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20/12/2018

Before :

MR JUSTICE ROBIN KNOWLES CBE

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Between :

(1) MUNROE K LIMITED
(2) MUNROE K LUXEMBOURG S.A. — **Claimants**

- and –

BANK OF SCOTLAND PLC — **Defendant**

- -
- -

Alan Gourgey QC and Thomas Robinson (instructed by **Penningtons Manches LLP**) for the **Claimants**
Giles Wheeler (instructed by **Norton Rose Fulbright LLP**) for the **Defendant**

Hearing date: 17 October 2018

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Approved Judgment

I direct that pursuant to CPR PD39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic

MR JUSTICE ROBIN KNOWLES CBE

Mr Justice Robin Knowles:

Introduction

1. The Defendant ("the Bank") sold to the Claimants three interest rate swaps ("the Swaps") on 13 November 2006, 3 October 2008 and 21 November 2008.

2. In relation to these sales the Bank had undertaken a calculation ("the PFE Calculation") of its potential future exposure to the Claimants as a result of the Swaps, on a "worst case" scenario.

3. The Claimants allege that an advisory duty and a duty not to misstate each or both required, in the circumstances of the case, the Bank to tell the Claimants of the existence of the PFE Calculation. It is alleged that the Bank did not do so, and that the Claimants did not learn of the fact of the PFE Calculation until November 2015.

4. The Bank asks the Court to grant summary judgment in its favour on this part of the claim, or to strike this part of the claim out. This is on the ground that the period within which, if the claim was to be brought, it had to be brought, has expired.

5. Further parts of the claim, which are concerned with alleged LIBOR manipulation, are not the subject of this application.

The material legislation

6. Section 14A of the Limitation Act 1980 provides in part:

> "…
>
> (3) An action to which this section applies shall not be brought after the expiration of the period applicable in accordance with subsection (4) below.
>
> (4) That period is either –
>
> (a) six years from the date on which the cause of action accrued, or
>
> (b) three years from the starting date as defined by subsection (5) below, if that period expires later than the period mentioned in paragraph (a) above.
>
> (5) For the purposes of this section, the starting date for reckoning the period of limitation under subsection (4)(b) above is the earliest date on which the [claimant] or any person in whom the cause of action was vested before him first had both the knowledge required for bringing an action for damages in respect of the relevant damage and a right to bring such an action.
>
> (6) In subsection (5) above "the knowledge required for bringing an action for damages in respect of the relevant damage" means knowledge both:
>
> (a) of the material facts about the damage in respect of which damages are claimed; and
>
> (b) of the other facts relevant to the current action mentioned in subsection (8) below.
>
> (7) For the purposes of subsection (6)(a) above, the material facts about the damage are such facts as would lead a reasonable person who had suffered such damage to consider it sufficiently serious to justify his instituting

proceedings for damages against a defendant who did not dispute liability and was able to satisfy a judgment.

(8) The other facts referred to in subsection (6)(b) above are –

(a) that the damage was attributable in whole or in part to the act or omission which is alleged to constitute negligence; and

(b) the identity of the defendant; and

(c) …

(9) Knowledge that any acts or omissions did or did not, as a matter of law, involve negligence is irrelevant for the purposes of section (5) above.

…".

The Claimants' case on their statement of case

7. At paragraph 75 of the Particulars of Claim it is alleged:

> "At no stage during the period … did a representative of [the Bank] disclose to [the Claimants] the fact that in advance of entering into each of the Swaps, [the Bank] had calculated the 'contingent liability' to which they gave rise. This was a calculation of [the Bank's] potential future exposure to break costs under the relevant swap using a "worst case" scenario, for example including declining interest rates. This calculation constituted an assessment by and/or for [the Bank] of the level of financial exposure posed by the relevant swap in a worst case scenario. It had the potential to affect the credit assessment of a borrower by contributing immediately to that borrower's liabilities that are taken into account for lending purposes and covenant calculations. It is referred to hereafter as the "contingent liability"."

8. At paragraph 76 of the Particulars of Claim the Claimants indicated that on their case the likely amount of the contingent liability associated with one of the Swaps was in the region of £17 million at the date of its purchase.

9. Taking the Particulars of Claim, the Claimants allege:

   a. The Bank owed to the Claimants a "duty to exercise reasonable skill and care in advising in relation to the Swaps" (paragraph 79(a)).

   b. The Bank owed to the Claimants a "duty to exercise reasonable skill and care in providing information to the Claimants to ensure that the information they provided was accurate, not misleading, and fit for the purpose for which it was provided (namely to enable the Claimants to make an informed decision as to whether to enter into the Swaps)." (paragraph 79(b)).

   c. In breach of the duties alleged, the Bank "[f]ailed to inform the Claimants at any time of the amount of the contingent liability that [the Bank] calculated

would be, or had been, incurred as a result of the entry into the Swaps" (paragraph 80(a)).

d. In breach of the duties alleged, the Bank "[f]ailed to inform the Claimants at any time of the existence of such a calculation … despite … referring to other potential risks of entering swaps …and proposing swaps of long durations, meaning the likelihood of the Claimants needing to break early was increased, the contingent liability was higher, and the importance of the calculation of the contingent liability of the Swaps was all the greater" (paragraph 80(b)).

e. In breach of the duties alleged, the Bank "[f]ailed to inform the Claimants at any time of the effect of the contingent liability, including its potential effect on credit assessments, loan to value calculations and the Claimants' ability to take out further borrowing with [the Bank]" (paragraph 80(c)).

f. In breach of the duties alleged the Bank "[p]rovided partial, inaccurate and misleading descriptions of the risks posed by the Swaps, by describing the Swaps as: i. "zero cost"; ii. equivalent to insurance policies; iii. such as would allow [the First Claimant's] directors to "sleep at night"" (paragraph 80(d)).

g. By reason of the breaches of duty alleged, "… the Claimants have suffered loss and damage. Had [the Bank] complied with the duties … by providing information regarding the Swaps that was accurate, fit for purpose and not misleading, then [the Bank] would have disclosed to the Claimants the contingent liability associated with the Swaps when offering them, and the effect of that contingent liability." (paragraph 82).

h. "In the event of such disclosure, the Claimants would not have entered into any of the Swaps. The Claimants will say that, in such event, it was more likely than not, they would have entered into interest rate caps." (paragraph 82).

i. "Had [the Bank] complied with the duties set out above by advising with reasonable care and skill, the Claimants will also say that this information would have been provided, and the same result would have occurred, ie the Claimants would not have entered into any of the Swaps." (paragraph 82).

10. When, then, did the Claimants have "the knowledge required for bringing an action for damages in respect of the relevant damage"? It is not in issue that they had knowledge of "the material facts about the damage in respect of which damages are claimed" and "the identity of the defendant". This leaves as the material question, the question posed by section 14(8)(a) of the Act i.e. when the Claimants knew "that the damage was attributable in whole or in part to the act or omission which is alleged to constitute negligence".

11. On a true analysis of the cause of action on which the Claimants rely, the Bank's failure was in not advising or informing the Claimants of their potential liability to the Bank on the Swaps when the Swaps were sold in 2006 and 2008.

12. The PFE Calculation is a measurement of that liability. Had it been disclosed, the Claimants would not have the cause of action they allege. However that means no more than that the PFE Calculation was but one means of advising or informing the Claimants of their potential liability. The Bank's failure, if the Claimants are right, does not depend on the PFE Calculation.

13. By 2009, with the fall in interest rates, the Claimants knew they had an actual liability on the Swaps and that it was significant. They were paying substantial sums to the Bank in consequence. At material times mark-to-market information and their accounts showed the same. On any view by 2009 the Claimants knew that they had not been advised or informed that they had a significant potential liability to the Bank on the Swaps, whether or not it was as high as the PFE Calculation, undertaken on a "worst case" scenario.

14. For the Claimants, Mr Alan Gourgey QC and Mr Thomas Robinson argue that the essence of the claim depends on the breach, whilst the Bank would (they suggested) define it by reference to the duty.

15. I intend no disrespect for Mr Gourgey's attractively presented argument but this point admits of a short answer. It is common ground there is no cause of action without breach, but section 14A does not work to extend the limitation period until every last particular of breach is identified (see Haward v Fawcetts [2006] 1 WLR 682, passim).

16. This is not a case where the duty was a continuing duty with breaches of that duty over time. Although one looks at the statement of case to ascertain the cause of action, a choice to omit one particular of breach (material enough to satisfy section 14A(7)) in favour of another particular (perhaps later discovered, as with the existence of the PFE Calculation) does not affect the incidence of section 14A.

The 2010 Reduction and the Standstill Agreement

17. In April 2010 the Claimants reduced the notional principal of the Swaps ("the 2010 Reduction"). The 2010 Reduction was effected by cancelling one of the Swaps and partially terminating another.

18. The Claimants again allege that the Bank negligently advised them or provided them with negligently incomplete information. For the purposes of the current application brought by the Bank the question is whether the claim in relation to the 2010 Reduction falls within or outside the scope of a written standstill agreement made between the parties on 20 July 2015 ("the Standstill Agreement").

19. Under the Standstill Agreement the Claimants and the Bank agreed (by Clause 2.1):

> "(a)for all purposes of any defence or argument based on limitation … whether based on the Limitation Act 1980 … or otherwise, ("a Limitation Defence") time will be suspended from [10 June 2015] until the earlier of any of the dates or events referred to in paragraph 2.4 (the "Period");

(b)no party shall raise any Limitation Defence that relies on time running during the Period; …"

20. The crucial definition for the purposes of the present application is the definition of the "Dispute". By paragraph (B) to the Standstill Agreement:

> "The 'Dispute' means any claim(s) or counterclaims arising out of or in connection with the sale of interest rate hedging products with trade dates of 13 November 2006 and 21 November 2008, or the ISDA Master Agreement dated 15 January 2007, entered into by the Parties."

21. The Bank points out that the only "sales" were in 2006 and 2008, on the trade dates given in paragraph (B) (and with a third on 3 October 2008). The 2010 Reduction was not a sale. The Claimants counter that the words "in connection with" bear a broad interpretation and are capable of covering a dispute in relation to claims which arise out of matters which start causally with the sale of a Swap. The 2010 Reduction was one of those matters, argue the Claimants.

22. I consider that the meaning of the provision can and should be determined on this application for summary judgment. The language is plain. The parties referred to the sales in 2006 and 2008 and not to the cancellation and part termination in 2010. The only extended compass given was that the claims or counterclaims might "aris[e] out of or in connection with" those sales. The claims over the 2010 Reduction do not.

23. As Mr Giles Wheeler (to whose careful and concise argument throughout I pay tribute) put it for the Bank, "…'in connection with' is a relatively broad term, I would accept that, but [what matters] is what the claim has to be in connection with. It has to be in connection with the sale of the swap" "… to describe everything as being in connection with the sale of the swap … effectively reduces to nothing the requirement of this agreement that to be subject to the standstill it be a claim in connection with the sale of the swap.".

Conclusion

24. In the circumstances the Bank is entitled to summary judgment on part of the claim.