Case No: LM-2018-000204

Neutral Citation Number: [2013] EWHC 3741 (Comm)

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
QUEEN'S BENCH DIVISION
LONDON CIRCUIT COMMERCIAL COURT (QBD)

Before:
HH Judge Kramer sitting as a judge of the High Court

The Moot Hall, Castle Garth,
Newcastle upon Tyne, NE1 1RQ

Date: 28/05/2019

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Between:

BARCLAYS BANK PLC	**Claimant**
MR JONATHAN EDWARD MARSDEN	**Defendant**

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Mr Rupert Allen for the **Claimant**
Mr Justin Fenwick QC for the **Defendant**

Hearing date: 15 March 2019

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Judgment

HH Judge Kramer

Overview

1. This is the claimant's application of 8th February 2018 to strike out the Defence and Counterclaim on the grounds that the latter discloses no cause of action and is an abuse of the process. The claimant is represented by Mr Allen, of counsel, and the defendant by Mr Fenwick QC.

2. The case started as a claim for the possession of a mortgaged property on the grounds of arrears owed by Mr Marsden, as mortgagor, to the claimant mortgagee. The claim has been overtaken by events as the property has now been sold and mortgage redeemed.

3. All that is left of the action is a counterclaim. As pleaded, the defendant alleges that the claimant has wrongfully failed to pay a redress award of £608,601.14 which he said was due following the bank's review of its sale to him of two interest rate swap contracts; the review was undertaken pursuant to an agreement between the Financial Services Authority and the claimant. By his original Defence and Counterclaim the defendant sought to set-off the £608,601.14 against the sums claimed in the mortgage possession action albeit that the mortgage was entirely separate from the swap transactions.

4. The defendant now seeks to amend the counterclaim. In the new pleading he points to the fact that he was made bankrupt in May 2012 and discharged from bankruptcy in May 2013. He seeks a declaration that the claimant, when making the offer of redress in May 2014, was not entitled to set-off the award against the indebtedness of the defendant's estate in bankruptcy. He asks that the case as set out in the proposed amendment should be that against which the application to strike out is considered.

5. This is the third claim, of which I am aware, between these parties. In the first, issued on 26th November 2014, the Particulars of Claim, settled by counsel, were extensive and alleged breaches of regulatory obligations and contract, unjust enrichment and various torts both relating to mis-selling in relation to the swap transactions and the conduct of the review. The claim was dismissed with costs on the bank's application for summary judgement by Phillips J on 5th July 2016; an order for costs against the defendant for £40,000 remains unpaid. The case is reported as **Marsden v Barclays Bank plc [2016] EWHC 1601** and much of the background history is to be found in that report. There was also an unsuccessful attempt at appeal with an adverse costs order against the defendant which remains unpaid.

6. The second claim was issued by Mr Marsden on 19th April 2017. He claimed that the bank had *"wrongfully not paid"*, his words, the £608,601.14 to him and he claimed those sums and £9.3 million of consequential loss due to the mis-selling. He again made numerous allegations of breaches of regulations, contract, and various torts. Mr Marsden discontinued that claim in the face of an application for summary judgment and strike out. He is liable for the costs of that claim but they are yet to be quantified.

7. The issues which arise in this case are as to whether:
    a. The defendant is entitled to ask the court to adjudicate on the set-off issue at all or whether the bank's withholding of the award under a bankruptcy set-off is a matter for the decision of the Financial Conduct Authority.
    b. The bank is entitled to a set-off against the bankruptcy debt.
    c. It is an abuse of the process for the defendant now to make a claim that the award is not subject to bankruptcy set-off when he could have raised it in the first set of proceedings.

The court's task

8. The application has been brought under CPR 3.4(2)(a) and (b).

9. Under CPR 3.4(2)(a) the court may strike out a statement of case if it appears to the court *"(a) that the statement of case discloses no reasonable grounds for bringing or defending the claim".* PD 3A 1.4 provides examples of cases falling within this rule. Paragraph 1.4(3) gives the example of a claim which contains a coherent set of facts, but those facts, even if true, do not disclose any legally recognisable claim against the defendant. The claimant says this is such a case, even on the proposed amended counterclaim. Mr Allen accepts that where a defective pleading may be cured by amendment so that a viable claim can be demonstrated, the court should not strike out but give the party relying on the pleading an opportunity to amend; **In Soo Kim v Youg Geun Park [2011] EWHC 1781 (QB) at [40]**. I remind myself that for the purposes of this exercise I have to assume that the pleaded facts are correct as this is not a suitable procedure for cases where there are factual disputes the resolution of which requires evidence to be heard. Furthermore, striking out in these cases is only appropriate where I come to the conclusion that it is bound to fail. It is not suitable for developing areas of the law as these ought to be based on actual findings of fact; **Barrett v Enfield BC [1989] 3 W.L.R. 83.**

10. Mr Allen points out that this is not a case where there is a factual dispute and argues that, albeit there is no other case on point, the question of whether the bankruptcy set-off applies on these facts is a question of law which should be determined at this stage. Mr Fenwick, whilst at one stage putting his case on the basis that all he had to show was that his claim for a declaration, based on the absence of the availability of a bankruptcy set-off, was arguable, opened his submissions by saying that the question as to set-off was a pure question of law. I agree with both counsel that this is a pure question of law. As a result, it can, and should, be determined in the course of considering both the claimant's application and the application to amend and the answer to that question will determine whether the case ought to be struck out.

11. The court's power to strike out under CPR 3.4(2)(b) arises where the statement of case, in this case the counterclaim, is an abuse of the court's process. The bank asks the court to find that the case is an abuse on the grounds that the set-off point should have been brought in the first action, if at all. It relies upon the rule in **Henderson v Henderson (1843) 3 Hare 100** as explained in **Johnson v Gore Wood & Co [2002] 2 AC 1**, the principles of which I will deal with when considering the abuse point.

The background facts

12. As indicated earlier, much of the history is set out in the judgment of Phillips J to which reference can be made. I only set out the facts as relevant to the issues in dispute.

13. Mr Marsden was in the business of purchasing, restoring, selling and developing public houses and hotels. By September 2007 he had two business loans from the claimant, one in the sum of £850,000 and a later loan in the sum of £1.4 million. On 11th September 2007 he entered into two 15 year interest rate swap transactions in the amortising notional amounts of £1.4 million and £850,000 to hedge the interest rate risk from these loans. Under the terms of the swaps he was subject to a fixed rate of interest of 5.63% on the notional amounts and the bank paid him a floating rate on the same amounts.

14. As a result of falls in interest rates the swap contracts became financially onerous for Mr Marsden. He made a complaint to the Financial Ombudsman Service on 10th August 2009 complaining that the swaps had been mis-sold. The Ombudsman returned the papers to Mr Marsden as the bank had not been informed of the complaint. On 14th July 2010 Mr Nurse, from the bank, met Mr Marsden to discuss the complaint - it was rejected. At the same time, they discussed restructuring the debt. What followed was that after negotiation between solicitors for the bank and a retired solicitor acting on behalf of Mr Marsden, the bank provided a facility letter on 27th January 2011 for a new on demand loan of £3,671,374 to consolidate his and his companies' debt; whilst Mr Marsden ran his business through various companies his dealings with the claimant in relation to the loan and swaps were in a personal capacity. A condition of the loan was that the swaps were broken, the cost of so doing, £352,728, being paid out of the loan.

15. Mr Marsden signed for the loan on 4th February 2011, and as found by Phillips J, as part of that transaction he countersigned a settlement agreement on 3rd March 2011. The agreement reads:

> "*Interest rate swaps entered into by Barclays Bank PLC ("Barclay") and Mr Jon Marsden ("the Counterparty") (together the "Parties" both dated 10 September 2007 (the "Swaps")*
> *By signing this letter, the Counterparty acknowledges and agrees that the entry by the Parties into the facility letter dated 27th January 2011 with a loan amount of £3,671,374.00 is in full and final settlement of all complaints, claims and causes of action which arise directly or indirectly, or may arise out of or are in any way connected with the Swaps.*
> *The Counterparty acknowledges and agrees to waive irrevocably any such complaints, claims and causes of action (the "Complaints"). Neither Barclays not any companies in the Barclays Group make any admission as to liability in relation to the Complaints."*

In his judgment in the first proceedings Phillips J held that the settlement agreement fully and effectively compromised all of Mr Marsden's valid causes of action in relation to the sale of the swaps.

16. On 29th June 2012, the Financial Services Authority, now the Financial Conduct Authority (FCA), entered into an agreement with the claimant bank requiring them to review sales of interest rate hedging products. As part of the agreement the claimant gave an undertaking that in carrying out the review it would include, in relation to customers such as Mr Marsden, termed customers who did not meet the 'Sophisticated Customer Criteria':

    - *"carrying out file reviews for all Customers who indicate they would like their sale reviewed to assess compliance with Regulatory Requirements:…*
    - *if a breach of the Regulatory Requirements has occurred, determining and, if relevant, providing appropriate redress on the basis of what is fair and reasonable in the circumstances."*

    'Regulatory Requirements' are defined in the agreement as "*the principles, rules and guidance contained in the FSA's Handbook"* This definition has the result that redress may be given on a review for losses arising from behaviour which would not necessarily constitute a traditional cause of action, or indeed, where the customer is not a *"private person"*, a claim for a contravention of the regulatory rules under s 138D of the Financial Services & Markets Act 2000.

17. The bank wrote to Mr Marsden offering a review of the swaps on 18th February 2013. He requested a review. The bank was unaware that Mr Marsden had been made bankrupt on 12th May 2012. Upon discovery, the bank wrote to his trustee in identical terms. The trustee assigned *"his rights of action arising out of the sale of"* the swaps to Mr Marsden and notified the bank of this fact by a letter of 4th November 2013. In the context in which that letter was written, the rights purportedly assigned must have included any rights derived from the fruits of the review. I say 'purportedly assigned' for in his judgment in the first claim, Phillips J held, on the evidence, that the bank undertook the review process as part of its regulatory obligations, the process was gratuitous and there was no contract between Mr Marsden and the bank to conduct the review or as to how it should be conducted; paragraphs 55 and 71 of the judgment. Since the decision of Phillips J, the Court of Appeal has held that there is no contract between the bank and the customer in relation to the conduct of the review, see **Elite Property Holdings Limited v Barclays Bank PLC [2018] EWCA Civ 1688 per Flaux LJ at [59] to [65]**, and referring to **CGL Group Ltd v Royal Bank of Scotland [2018] 1 WLR 2137** where it was held that there was no duty of care to the customer in carrying out a review and in which it was said:

    "More broadly, I consider that the overall regulatory regime is a clear pointer against the imposition of a duty of care, and suggests that to recognise a common law duty of care in the present case would circumvent the intention of Parliament. The FCA has a wide range of powers as regulator, including to make or require a section 404 scheme or restitution under section 384. It was the deliberate intention of Parliament that only the FCA was to have the power to require the banks to comply with these schemes, and that no individual customer could enforce them or sue for breach. Accordingly, the effect of the regime is that a non-private customer cannot

sue in relation to a complaint or a complaint handling issue. Nor can a non-private customer complain about a redress determination if a bank proactively sets up a redress scheme. If a bank fails to comply with the terms of the Review agreement, it is the responsibility of the FCA to bring enforcement proceedings." **per Beaston LJ at [87]**.

18. On 22nd May 2014 the bank wrote to Mr Marsden and his trustee in bankruptcy with a redress offer, what may be called basic redress, in the sum of £608,601.14, made up of a refund of payments made under the swaps and compensatory interest but with a deduction for income tax. It stated that the offer would not result in a payment to Mr Marsden due to the *"application of the insolvency off-set"*. Together with the offer, the bank provided a summary as to how the offer was calculated and in the notes to the summary stated that after the bank's application of insolvency set-off and other recoveries and sums held in escrow pending the review, the amount owed to the bank at bankruptcy, £3,821,895.26 had reduced to £2,876,748.54.

19. The offer gave Mr Marsden 3 options of which he could select one. Option 1 provided that he could accept the offer in settlement of all of his claims connected with the sale of the swaps. Option 2 enabled him to accept the redress offer in settlement of all such claims but that for consequential loss, for which he could submit a claim in the review. Under option 3, he could decline to accept the redress offer and submit a claim for his consequential loss, such as loss of profit, and for the sums available under basic redress to be assessed together.

20. The offer provided that if options 1, 2, or 3 were not selected or there was no acceptance in 40 days, the offer remained open until such date as the bank agreed with the FCA that the review was complete. Despite the bank granting extensions for acceptance, Mr Marsden did not choose an option or accept or reject the offer within the 40 days or the time for acceptance as extended. In, or around, April 2016 the FCA confirmed that the review in respect of all the bank's customers had come to an end.

<u>The law to relation to bankruptcy set-off</u>

21. Before examining the parties' respective cases it is necessary to consider the rules governing set-off in bankruptcy. These are to be found in s 323 of the Insolvency Act 1986, which provides:

    '323. Mutual credit and set-off

    (1) This section applies where before the commencement of the bankruptcy there have been mutual credits, mutual debts or other mutual dealings between the bankrupt and any creditor of the bankrupt proving or claiming to prove for a bankruptcy debt.

    (2) An account shall be taken of what is due from each party to the other in respect of the mutual dealings and the sums due from one party shall be set off against the sums due from the other.

    (3) Sums due from the bankrupt to another party shall not be included in the account taken under subsection (2) if that other party had notice at the time they became due that a bankruptcy petition relating to the bankrupt was pending.

(4) Only the balance (if any) of the account taken under subsection (2) is provable as a bankruptcy debt or, as the case may be, to be paid to the trustee as part of the bankrupt's estate.'

The effect of this provision is that in cases where there are mutual claims between the bankrupt and a creditor, the only chose in action which continues to exist is the net balance between the parties. The individual claim continues to exist only to the extent that it can play its part in ascertaining the underlying balance; see **Stein v Blake [1996] 1 AC 243 per Lord Hoffmann p. 255 A to G** and, most recently, **Bresco Electrical Services Limited (in liquidation) v Michael J Lonsdale (Electrical) Limited [2019] EWCA Civ 27 per Coulson LJ at [28] and [29]**. I shall look at how the section applies in this case when considering the bank's claim to set-off.

22. At this stage, the only other feature of the law of bankruptcy to which reference need be made is the effect of the bankruptcy order and, subsequently, the bankrupt's discharge. In **Green v Wright [2017] Bus LR 1070** the Court of Appeal described this effect as follows:

"On the making of a bankruptcy order, a statutory moratorium on proceedings against the debtor or his property comes into force under section 285(3). The bankrupt is not thereby released from his debts. That occurs on his discharge. Unless extended, a bankrupt is automatically discharged from bankruptcy after one year. Section 281(1) provides that "where a bankrupt is discharged, the discharge releases him from all the bankruptcy debts but has no effect" on the trustee's functions or the operation of the Act as regards those functions, including in particular the right of any creditor to prove in the bankruptcy. The debts continue to exist for the purposes of proof in the bankruptcy and payment out of the realisation proceeds of the assets subject to the bankruptcy. The effect is to separate the debtor from his bankruptcy estate which continues to be administered for the benefit of his creditors as at the date of bankruptcy. The debts continue to exist as the means of defining the rights and interests of creditors in the bankruptcy but they cease to be the debtor's personal obligations." **See per David Richards LJ at [32]**

I have referred to this passage because at paragraph 3L of the proposed amended counterclaim and paragraph 38 of the statement of Steven Hopkins, Mr Marsden's solicitor, upon which reliance continues to be placed, both assert that the debt to the bank was discharged upon Mr Marsden's discharge from bankruptcy. Both are wrong, as is apparent from the extract from **Green, above.**

The claimant's case

23. Mr Allen advances three grounds for striking out the counterclaim both in its existing and amended form. First, it is an abuse of process to bring the claim before the court at all as the complaint raised by Mr Marsden is not justiciable by the court. Second, the redress award is properly subject to the insolvency set-off. Third, the dispute concerning the set-off should have been raised in the ligation before Phillips J and it is, accordingly, an abuse of process to raise it now. I shall deal with these in turn

Is the complaint about the application of the insolvency set-off of itself an abuse of the process?

24. Essentially, Mr Allen argues that in the light of the authorities Mr Marsden should direct his complaint about set-off to the FCA whose job it is to enforce its agreement with the bank concerning the review. He relies upon the absence of privately actionable rights as between Mr Marsden and the bank in relation to the conduct and outcome of the review. In support he refers to the passage in **CGL Group Limited,** set out above and the decision in **Elite Property Holdings Limited**. He argues that what the defendant is seeking to do is obtain a ruling from the court which, should he obtain his declaration, he could use to persuade the FCA to compel the bank to pay over the redress sum or use in a judicial review of the FCA if they declined to do so. As support for the proposition that the involvement of the court for this purpose is an abuse of the process he relies upon **Day v Barclays Bank Plc [2018] EWHC 394 (QB)** and **Fine Care Homes Ltd v National Westminster Bank Plc and others [2018] EWHC 3328 (Ch)**

25. Both **Day** and **Fine Care Homes** were cases in which the claimant customers, whose purchase of hedging products had been subject to the FCA review process, sought declarations as to matters relevant to the review and the way it was conducted within proceedings which claimed damages for causes of action arising from the mis-selling itself. The defendant banks objected to the declarations being sought. In **Day** the objection was dealt with on the claimants' application to add the declarations by amendment and in **Fine Care Homes** it was dealt with on an application for summary judgment/strike out. In both cases the defendant succeeded in preventing the claimants from pursing their claims for declarations.

26. **Day** and **Fine Care Homes** are, however, distinguishable from the present case. In both cases the claimants were seeking to require the court to make findings about breaches of the terms of the review which, following **CGL Group Ltd**, above, are matters for the FCA alone. In **Day**, HH Judge Waksman QC held that this was impermissible as it would make the claimant an informal enforcer of the FCA regulatory regime and it was for the FCA to decide when to take enforcement action, not the claimant or the court, save where the FCA's failure to act was susceptible to judicial review, to which the FCA would be a party. Further, it would require the court to make findings which were not germane to the substantive claim before it. A similar point was made by Penelope Reed QC, siting as a deputy high court judge, in **Fine Care Homes**. She reasoned that as the claimant could not maintain a private law action against the bank for the way in which the review was carried out, the claim for the declaration appeared to be seeking by the back door what could not be obtained by the front.

27. In the present case, however, Mr Marsden is not seeking a declaration as to the conduct of the review but on a discrete legal issue as whether the insolvency set-off provisions apply to the basic redress award in this case. Unlike the position in **Day** and **Fine Care Homes**, the entitlement to the insolvency set-off is directly in issue between the defendant and the bank. The question as to whether it operates in the circumstances pleaded in the proposed amended counterclaim is a pure matter of law, as both parties acknowledge, and is to be decided by the court and not the FCA. The

fact, therefore, that the question arises because of the outcome of the review does not render the claim for this declaration an abuse of process of itself.

28. In argument, Mr Allen sought to treat the claim to exercise the insolvency set-off as part of the redress offer. He says the bank never made an offer without the set-off. Because that offer has not been accepted, there is nothing due from the bank to Mr Marsden under the review to which the granting of a declaration would be relevant and which took this case outside the rule that it is for the FCA to enforce the conduct of the review. I do not agree with this analysis. The bank's duties under the review were to determine whether there had been regulatory failings and the level of the redress offer. In seeking to set-off the offer against the debt from the estate in bankruptcy it was not exercising its powers and duties under the review but its private law entitlement to the insolvency set-off which, it is to be remembered is mandatory and cannot be ousted by contract; see **Halesowen Presswork & Assemblies v National Westminster Bank [1972] AC 785.** This analysis gains some support from the fact that the independent reviewer who, under the scheme of the review has the final say on the issue of redress, has not reviewed the decision to apply the insolvency set-off.

29. Had the bank sought to set off the bankruptcy debt on the basis of a general equitable set-off or that to do so produced redress which was just and equitable in the circumstances, its entitlement to act in that way would, indeed, have been a question for the FCA and not the court. Such a decision would fall within the conduct of the review, but that is not what happened here; the scheme for the review makes specific provision dealing with the setting off of redress against the debt to the bank.

30. Finally, under this head of the abuse argument, it is not unarguable that a court would grant the requested declaration, assuming the defendant's case was made out. Many of the factors which would support the grant of a declaration by way of remedy are present here; there is a real and present dispute between the parties as to the existence of a legal right between them, each party is affected by the court's determination of the issue and all sides of the dispute on the insolvency set-off issue are before the court, see **Rolls-Royce Plc v Unite the Union [2010] 1 WLR 318 per Aikens LJ at [120]**.

<u>Is the redress award subject to the insolvency set-off?</u>

31. The claimant's case is that Mr Marsden's entry into the swaps and the acts and omissions of the bank, found on the review to constitute mis-selling, were mutual dealings for the purposes of section 323 of the 1986 Act. Thus, they must be brought into account under section 323(2). It is irrelevant that the defendant was adjudged bankrupt prior to the commencement of the review or discharged prior to the redress offer. The offer is merely a quantification of the losses arising from the mutual dealing. Mr Allen acknowledges that the review came about as a result of an obligation voluntarily assumed by the bank towards the FSA and created no privately actionable rights as between the bank and Mr Marsden but argues that the review is a mechanism by which customers might receive redress for mis-selling. He postulates that as the fruits of a claim in tort, for example for negligent advice in the sale of the

swap, would undoubtedly fall within section 323, it would not make sense if a redress offer which arose from the same actions of the bank did not.

32. Mr Allen says that Mr Marsden's approach would result in him receiving an unjust windfall at the expense of the bank as the unrecovered debt in the bankruptcy exceeds £3 million and if it was required under the review to ignore the set-off it would be out of pocket to a further sum in excess of £600,000. He says that although there is no contractual right to an offer, if it is accepted, the parties would enter a compromise agreement under which he would acquire enforceable contractual right to the sums offered, albeit subject to set-off. Finally, he points to the fact that the only redress offer made by the bank included the set-off. The offer was not accepted. Thus, the bank owes Mr Marsden nothing.

33. The defendant's case is that there are no mutual dealings to trigger a s. 323 set-off because at the time of the bankruptcy order there were no existing mutual obligations as regards the redress award. Mr Fenwick says that the possibility of being awarded redress was not a contingent liability of the bank prior to the bankruptcy because (a) all liabilities of the bank to Mr Marston were released by the settlement agreement, (b) the bank did not give credit for the mis-selling liability in the bankruptcy, (c) Phillips J found that there was no contractual or tortious right created by the FCA review (d) the bank had relied on the settlement in the successful application in the first proceedings, and (e) the review was a post-bankruptcy creation of the FCA, and as the review process does not give rise to rights and liabilities between the bank and the customer there is nothing in the review process itself which can give rise to a contingent liability. For such a liability there must be some pre-existing right in law which may, subject to the occurrence of the contingency, give rise to a claim.

34. Mr Fenwick placed reliance on **Donnelly v Royal Bank of Scotland plc [2017] SAC (Civ) 1,** a decision of the Sheriff Appeal Court in Scotland, as persuasive authority for the proposition that where a compensatory award is made by a bank as part of its consumer compensation obligations, in that case a PPI compensation payment, post-bankruptcy, it cannot be subject to an insolvency set-off. He sought further support from **Dooneen Ltd (t/a McGinness Associates) v Mond [2016] CSIH 59 and [2018] UKSC 54** a decision to like effect on a Scottish appeal.

35. Both counsel referred to **M.S. Fashions Ltd v BCCI [1993] Ch 425, Stein v Blake [1996] 1AC 243** and **Secretary of State for Trade and Industry v Frid [2004] 2 AC 506** as cases in which the applicable principles which supported their respective positions are to be found. It was common ground that whilst **M.S Fashions** and **Frid** are cases of corporate insolvency and **Stein** personal bankruptcy, the rules for set-off do not differ.

Discussion

36. The relevant principles which may be derived from the last three cases are as follows:
    a. If there have been mutual dealings which have given rise to cross-claims before the bankruptcy/winding up order ("the order") neither party can sue for

his full claim but is limited to an account of the balance due ("the mandatory principle").

b. The account must be taken as at the date of the order ("the retroactivity principle");

c. In taking the account the court has regards to events which have occurred since the date of the order ("the hindsight principle"): **see M.S. Fashions (above) per Hoffmann LJ at p.432 F-H.**

d. The hindsight principle can be applied in the case of a contingent liability in cases where the contingency has not occurred at the date of the order. In the case of a creditor's contingent claim, where the estate needs to be wound up before the contingency has occurred an estimated value is placed on the contingency for the purposes of proof. There is no similar mechanism for valuing contingent claims by the insolvent so that the liquidator or trustee will not be able to rely upon the claim as a cause of action or set-off and the creditor can prove for the full amount. **See M.S. Fashions (above) per Hoffmann LJ at p.435 D-G and Stein (above) per Lord Hoffmann p.252 E-253 B.** This point answers Mr Fenwick's argument that the bank did not give credit for the review amount when it proved in the bankruptcy.

e. Debts whose existence and amount are contingent at the date of the order are capable of proof and can be set off provided they arise from mutual dealing but they must have resulted in a quantified money claim by the time of set-off; **Frid (above) per Lord Hoffmann at [9] to [11].**

f. Mutual dealings which give rise to the mandatory set-off under s.323 are dealings which give rise to commensurable cross-claims between the same parties acting in the same capacity but they do not need to be exclusively referable to a contract or transaction between the parties to the set-off; see **Frid per Lord Hoffmann at [24]-[26].**

37. In the light of these principles the key considerations are as to whether (a) there were mutual dealings which (b) gave rise to a contingent claim by the time of the bankruptcy order and (c) have resulted in a quantified money claim. It is for this reason that the cases of **Donnelly** and **Dooneen (above)** are of no assistance.

38. Both cases concerned the construction and effect of trust deeds in Scottish insolvencies. As is apparent from **Dooneen (per Lord Reed DP at [1])** under Scots Law a debtor can enter into a voluntary arrangement with their creditors, usually in the form of a trust deed by which their trustee is given power to collect in debts, realise assets and distribute the estate. The deed usually provides for the discharge of the debtor and the restoration to them of any surplus in their estate. In both cases the effect of the deed was that on the final distribution by the debtor's trustee the debtor was discharged on the basis of what was in effect a composition with the creditors, so the debt ceased to exist. Thus, in both cases the proceeds of post-discharge claims for PPI compensation based upon pre-trust deed mis-selling were the property of the, now discharged, debtor and were not vested in the trustee for the benefit of the creditors. This contrasts with the position in bankruptcy where the debt does not cease to exist following discharge albeit that it cannot be enforced against the debtor but only his estate in bankruptcy.

39. In **Green v Wright [2017] Bus LR 1070**, a case involving very similar facts, but where the debtor had been subject to an IVA in England, the Court of Appeal held that PPI compensation payments arising from pre-IVA dealings, but which had been claimed after the certificate of completion of the IVA, were subject to the trusts in favour of the creditors. Under the terms of the IVA in that case the debtor agreed to make available to his creditors all his property save for his matrimonial home and his car. Thus, the mis-selling claim, though unknown to the supervisor and creditors, and maybe the debtor, was available to be made at the time of the IVA and, by analogy with bankruptcy, was available to his creditors. **Donnelly** and **Dooneen** were considered to be of no assistance for the reasons I have set out.

40. In the present case the swap transactions were a mutual dealing between the bank and Mr Marsden; it was a dealing between the same parties acting in the same capacity. The dealing has resulted in the quantified redress offer. Is that properly regarded as a money claim in view of Mr Fenwick's argument that the FCA review procedure does not give rise to any contractual or tortious obligation? That question is best looked at by asking whether such an offer could amount to the property of the bankrupt at the time of the bankruptcy order if it was a contingent claim at that time.

41. Under section 283(1) of the Insolvency Act 1986, subject to certain exceptions which do not apply here, a bankrupt's estate includes "*all property belonging to or vested in the bankrupt at the commencement of the bankruptcy"*. Property is defined in section 436 which provides that:

> *"property includes money, goods, things in action, land and every description of property wherever situated and also obligations and every description of interest, whether present or future or vested or contingent, arising out of, or incidental to, property".*

42. In the course of submissions I asked Mr Allen about a first instance decision where it was held that sums due to a barrister under an honorarium earned prior to bankruptcy but unpaid at that date were not property which vested in the trustee; **Gwinnutt v George [2018] EWHC 2169 (Ch), [2019] Ch 52**. That decision has since been reversed on appeal (**[2019] EWCA Civ 656**) where, in referring to the case of **Ex parte Huggins (1882) 21 Ch D 85**, in which a pension which had to be voted on annually by the Colonial Legislature of Sierra Leone was held to be property vesting in the trustee, the court said:

> *"In any event, Jessel MR's analysis in Huggins does not appear to have depended on the existence of a contract. He stressed that "property" "goes far beyond choses in action" and that the "mere fact that you cannot sue for the thing does not make it not 'property'". Annuities on tonnage and poundage dues were "property" even though "you would not sue the Crown for them, and they could not even be made the subject of a petition of right, because they were granted out of the voluntary bounty of the Crown". For good measure, it must be doubtful whether Mr Huggins was, or would have been considered to be, a party to an actual contract. In Gilham v Ministry of Justice [2017] EWCA Civ 2220, [2018] ICR 827, the Court of Appeal concluded that a District Judge's relationship with the Ministry of Justice was non-contractual. More relevantly, perhaps,*

when in 1956 Lord Goddard CJ said in Inland Revenue Commissioners v Hambrook [1956] 2 QB 641, at 654, that he considered that the employment of a civil servant "depends not on a contract with the Crown but on appointment by the Crown", he was reflecting a view that had had currency for many years (see e.g. Dunn v The Queen [1896] 1 QB 116)."

And later it was said:

"Non-contractual barristers' fees were unique in nature. A barrister had more than a mere moral claim to such fees and more than just a hope (or "spes") that he would receive them. If needs be, the barrister could invoke the Bar Council's "Withdrawal of Credit Scheme", and a solicitor's failure to pay a fee could potentially amount to professional misconduct. The highly unusual character of a barrister's fee is also manifest in the client's inability to revoke his solicitor's authority to pay counsel and the solicitor's right to reimbursement. The law recognised that, notwithstanding the absence of a contract, payment of an outstanding fee was not to be regarded as voluntary. In practice, a barrister would normally be paid". **See per Newey LJ at [17] and [28]**

43. Mr Marsden, too, has more than a moral claim to the redress offer. Whilst he has no contractual entitlement to receive an offer, he can complain to the bank's regulator if the offer is not provided in accordance with the review. Following **Gwinnutt** and the very wide description of property in s.436 of the Act, it is irrelevant that under the redress scheme Mr Marsden had no contractual right to an offer. The availability of an offer under the scheme was property in his estate at the time of the bankruptcy provided that it existed as a contingent claim at the time.

44. What can amount to a contingent claim? Mr Allen's answer to the question is that it was sufficient that there had been mis-selling of the hedging contract which could give rise to any claim, albeit one that would have to be founded on a claim to set aside the 2011 settlement agreement or depended on the regulator prompting the bank to review the swap sale at some future time. Mr Fenwick argues that it must be some pre-existing right at law which may, subject to the happening of some event, give rise to a claim. Clearly, in view of **Gwinutt**, there are circumstances when it need not be founded on a legal right. He rejects Mr Allen's answer on the basis that the fact that someone may make an ill-considered challenge to the validity of the settlement agreement is too remote an event to be characterised as a contingency capable of giving rise to a contingent claim. He treats the act of the regulator in instituting the review process in a similar way.

45. Notwithstanding that the question I pose is central to the issue I have to decide I have been referred to very little authoritative guidance as to what can amount to a contingent claim. In **Green v Wright** it was common ground that the receipts from the PPI mis-selling claims were assets which fell within the IVA without further analysis. On the appeal in **M.S. Fashions Ltd v BCCI (above)** Dillon LJ at p.466 C-D cited with approval the judgment of Dixon J in **Hiley v Peoples Prudential Assurance Co. Ltd (1938) 60 C.L.R. 468** where he said, at p.496-497:

"In the first place, the general rule does not require that at the moment when the winding up commences there shall be two enforceable debts, a debt provable in the liquidation and a debt enforceable by the liquidator against the creditor claiming to prove. It is enough that at the commencement of the winding up

mutual dealings exist which involve rights and obligations whether absolute or contingent of such a nature that afterwards in the events that happen they mature or develop into pecuniary demands capable of set off."

46. In **Hiley** a life insurance company had issued a policy of insurance to a policy holder who subsequently charged the policy to the company to secure a loan from the company. Later the company was wound up and the liquidator repudiated the policy. The policy holder's claim against the company for repudiation thus post-dated the winding up order. Nevertheless, it was held that he was entitled to set-off his claim against his liability to the company for the loan. Dillon LJ said, at 446 G that the judgment of Dixon J accorded with the judgment of Romer LJ in **In re Daintrey; Ex parte Mant [1900] 1 QB 546 at p.573-574**.

47. In **Daintrey**, which Hoffmann LJ also referred to in **M.S Fashions Ltd**, at p.435 E, as an example of the application of the hindsight principle to a contingent claim in favour of an insolvent, Daintrey, a solicitor, sold his practice to Mant, another solicitor. The price for the sale was a proportion of the profits earned over the 3 years following sale. Not long after the sale a receiving order was made against Daintrey. At the time of the order he owed Mant £86 but no profits had been made by the sold practice. At the end of the 3 year period, £300 was due from Mant as the agreed portion of the profit. The Court of Appeal allowed Mant to set-off the £86 against the £300, notwithstanding that at the time of the bankruptcy there may have been no profits in the 3 year period and nothing due. Romer L.J. said at p.573:

> *"I agree that the amount which ultimately became payable by [Mant] could not be ascertained until some time later than the date of the receiving order, and it was possible that the amount might be very small; but, whatever sum eventually became payable, became payable to Daintrey by virtue of this agreement ... and of nothing else."*

48. In **In re Charge Card Services Ltd [1987] Ch 150**, Millett J, considered a large number of cases concerning contingent claims in insolvency, and referred to the above passage and the judgment of Lord Lindley M.R. in that case where, at p. 572 he had said:

> *"Looking at this agreement, I fail to see that at the date of the receiving order there was nothing payable under the agreement. Under the circumstances it is clear that when this agreement was executed very considerable sums would become payable under it."*

Millet J said, at p.572:

> *"It was submitted before me that the reason why Lindley M.R. and Romer L.J. seemingly discounted the possibility that no profits at all would be earned from the business was that this eventuality was too remote to be considered; but in my judgment it was rightly discounted because it was irrelevant. If no profits were earned, cadit quaestio; Mant would owe nothing; and there would be nothing against which the £86 could be set off. In every case the claim to set off requires that any contingency to which the liability was still subject at the date of the receiving order has since occurred. In my view, the emphasis in the passages I have cited is not in the*

degree of probability that a sum would become due from Mant, but in the source of that potential liability. What was both necessary and sufficient was that any liability of Mant to Daintrey which did mature should be exclusively referable to the agreement between them already existing at the date of the receiving order, and not to any subsequent transaction."

49. The passages from **Hiley**, **Daintrey** and **In re Charge Card Services** favour Mr Allen's submission on the contingent claim issue. The remoteness of the chance that Mr Marsden would be able to obtain redress for mis-selling as a result of setting aside the settlement or the FCA instituting the redress scheme is irrelevant. It was sufficient that the liability or benefit which matured was exclusively referable to the swap transactions which existed at the date of the bankruptcy order.

50. Mr Fenwick puts forward two arguments as to why such an analysis is untenable, both directed at showing that there was no contingent claim to vest on bankruptcy. First, he relies upon the settlement agreement in 2011 and argues that there can have been no contingent claims to vest as these had all been compromised. Secondly, he argues, that the agreement between the bank and the FCA to review swap sales post-dated the bankruptcy, in the event by a period of about 6 weeks. The effect of this timing is that such interest as Mr Marsden acquired by virtue of the review did not exist at the date of bankruptcy.

51. The argument based on the settlement agreement is something of a red herring for whatever else its effect it did not operate to compromise Mr Marsden's interest in the FCA review. If, for example, the dates of the bankruptcy and the agreement to review past sales, including that to Mr Marsden, had been reversed, it would be unarguable that any benefits due to him would not fall within his estate at the time of bankruptcy, they would be the product of the mutual dealing and obligations contingent on the outcome of the review. In the course of argument, I postulated whether the agreement to review the sale to Mr Marsden and offer compensation amounted to a partial waiver of the compromise agreement. Mr Fenwick said that was an untenable view as the bank had relied upon the compromise in the first claim, without qualification, and because under the FCA agreement the bank was not entitled to rely upon such settlement, they had to review all sales falling within the category to which Mr Marsden's belonged. Having heard Mr Fenwick on this point, it seems that the 2011 settlement did not compromise Mr Marsden's interest in the review either because, despite the use of comprehensive language, it did not compromise rights in relation to a review which the bank itself offered, the wording of the settlement referring to "*complaints, claims and causes of action"*, probably because neither party had foreseen that the FCA would step in as it did, or because the regulator will not allow the bank to avoid its obligations under the review agreement by reliance on the settlement. Whichever is the proper analysis, the fact is that the bank has not been able to rely upon the settlement to extinguish its obligations under the review.

52. What of the timing point? Whilst at the date of the bankruptcy the agreement to review between the bank and the FCA was several weeks into the future, the fact is that the sale of the swaps was subject to regulation which could, as here, lead to the regulator taking

steps to ensure the righting of past wrongs. The setting up of the review was a mechanism for providing redress for losses arising out of the swap contracts, not a subsequent transaction giving rise to rights or benefits independent of the mis-selling.

53. It was said in **M.S Fashions** *"The problem of contingent claims can often be solved by the hindsight principle."* **Per Lord Hoffman at p.535 D**. This permits the court to look at the events which have happened since the bankruptcy. It is to be remembered that, as in **Hiley's** case and **Daintrey**, the existence of the liability, not only its quantification, can be contingent at the time of the bankruptcy so as to require a section 323 set-off. Whilst in some cases it will be more obvious than in others that a liability may eventuate, the test is not whether a liability is foreseeable at the time of the bankruptcy, which is a test of remoteness, but whether the lability that eventually matures in one which is exclusively referable to the agreement, or in the case of labilities arising otherwise than by contract, the circumstances which in law give rise to the liability, and the agreement, or circumstances pre-date the bankruptcy. Accordingly, there could be a contingent claim of which no-one knew, or could have foreseen, at the date of the bankruptcy but which can, exercising hindsight, be shown qualify as such.

54. In **Gwinnutt v George** the Court of Appeal summarised the effect of some of the case law in respect of the 1986 Act. It said:

> *"It is "legitimate and necessary to bear in mind the statutory objective" when interpreting the 1986 Act, albeit that "however desirable it may be to construe the Act in a way calculated to carry out the parliamentary purpose, it is not legitimate to distort the meaning of the words Parliament has chosen to use in order to achieve that result" (see Bristol Airport plc v Powdrill [1990] Ch 744, at 758-759, per Browne-Wilkinson V-C)"*

55. The object of section 323 of the 1986 Act, like its predecessor, section 31 of the 1914 Bankruptcy Act 1914, *"is to prevent the injustice to a man who has had mutual dealings with a bankrupt from having to pay in full what he owes to the bankrupt while having to rest content with a dividend on what the bankrupt owes him."* see **In re Charge Card Services Ltd per Millett J at p.190 D.** The above approach to determining what constitutes a contingent claim, which is a form of property under section 436 of the 1986 Act, accords with the statutory objective without any distortion of the words of the Act.

56. As at the date of this bankruptcy there had been hedging contracts which, events have shown, had been mis-sold thereby causing Mr Marsden loss. The mis-selling was susceptible to review and the offer of redress if the FCA and/or bank decided to take remedial action, that being the contingency. In the event, this is what occurred and resulted in the review offer of £608,601.14. Accordingly, judged by the events which have happened, the review offer was a contingent claim which is subject to the section 323 set off and the timing point does not assist Mr Marsden.

<u>Henderson v Henderson abuse of process</u>

57. The claimant's case is that any claim that the bank had mis-applied insolvency set-off in the review should have been brought in the first claim and it is an abuse of the process to bring the claim now. The first claim contained numerous allegations as to why Mr Marsden should have a remedy due to both the mis-selling and the conduct of the FCA review. The fact that it is an abuse is supported by the fact that Mr Marsden brought a second claim in which he made such an allegation but discontinued the claim when faced with an application for summary judgment and/or strike out. He has paid none of the costs of the earlier proceedings; he has been ordered to pay £40,000 for the first claim and costs yet to be determined on the failed appeal and discontinued second claim. Mr Allen says that Mr Marsden had counsel in the first and second proceedings and has been represented by 3 firms of solicitors since April 2017. He has thus had access to legal advice throughout and there can be no justification for his piecemeal approach to this litigation. From his client's point of view this is a clear case of unjust harassment.

58. The defendant's case is that there is no abuse and that in carrying out a broad merits based judgment as required by **Johnson v Gore Wood & Co [2002] 2 AC 1**, I should weigh in his favour that the counterclaim, in its proposed amended form, raises a straightforward issue of law which is of some public interest as there may be many people in the position of Mr Marsden, that is to say who have suffered bankruptcy following hedging contract mis-selling but who in the course of their financial decline settled potential claims against the bank pre-bankruptcy. As to the point that the issue now to be litigated should have been in the first claim, Mr Fenwick says that it is not Mr Marsden's fault that the point was not raised by his previous counsel and that he should not be deprived of the opportunity to argue the point due to his difficulty in accessing advice capable of identifying that matter. He is of limited means and is unlikely to have been able to obtain the best advice. Finally, he should be entitled to a fair adjudication in a claim which may result in him receiving a large amount of money and, in any event, the proceedings were not brought at his instigation but in response to the mortgage possession claim. Mr Fenwick accepts that the counterclaim as currently pleaded cannot be sustained in the light of the judgment of Phillips J in the first claim.

The law

59. The modern application of the rule in **Henderson v Henderson (1843) 3 Hare 100,** which restricts the bringing of successive actions arising from the same factual matter, is to be found in the judgement of Lord Bingham in **Johnson v Gore Wood & Co [2002] 2 AC 1 at p.31** and may be summarised as follows:
    a. The underlying public interest is that there should be finality in litigation and a party should not be vexed in the same matter twice.
    b. Both the bringing of a claim and the raising of a defence in later proceedings may without more amount to abuse if the court is satisfied that it should have been raised in earlier proceedings but is not necessarily abusive.
    c. There is no need to identify an additional element such as a collateral attack on a previous decision or dishonesty although where they exist abuse will be more obvious.
    d. There will rarely be a finding of abuse unless the latter claim involves unjust harassment of a party.

e. The onus is on the party alleging abuse.

f. A lack of funds would not ordinarily excuse a failure to raise in earlier proceedings that which is subsequently raised but is not irrelevant, particularly where this appears to have been caused by the party against whom the claim is made.

g. The question to ask is whether given all the circumstances a party's conduct is an abuse.

h. In answering that question the court must make a broad merits based judgment taking into account the public and private interests involved, all the facts of the case and focussing on whether, in all the circumstances, a party is misusing or abusing the process of the court by raising before it an issue which could have been raised before.

Discussion

60. The counterclaim as pleaded cannot possibly succeed, as acknowledged by Mr Fenwick. On the face of it, it was put forward to fend off the possession claim. That was a counterclaim with which the claimant should not have been faced, having succeeded before Phillips J on points which rendered the counterclaim unsustainable; in effect he was re-litigating an alleged contractual cause of action which had been found not to exist. The original counterclaim is an abuse of process on ordinary *res judicata* principles.

61. The claim made in the proposed amended counterclaim could and should have been included as an alternative claim within the first proceedings for they cover the same factual matters and, on the defendant's argument, central to both the first claims and the present claim is the effect of the 2011 settlement agreement. Further, both claims are concerned with what, if any, remedy is available to Mr Marsden in consequence of the mis-selling of the swap transactions and the FCA review. The raising of the current claim is potentially a **Henderson v Henderson** abuse.

62. Looking at the wider circumstances, the fact that it is said that Mr Marsden lacks funding is not a weighty consideration in this case. The relevance of the lack of funding is that it may result in no, or restricted, access to legal advice. On the evidence, that has not been the case here as Mr Marsden has had counsel and solicitors acting for him in his two previous claims. Mr Fenwick tells me that his lawyers, including himself, have acted under conditional fee agreements, but whatever the basis of remuneration, the fact is that he has had access to legal advice. The argument that the previous lawyers did not identify the point is a factor which should be given little weight, first because in **Henderson v Henderson** it was said that the rule applied where the failure to bring forward part of the case was due to *"negligence, inadvertence, or even accident"*, see per Sir James Wigram V-C at 115, and secondly because the rule would lose its force if it was open to a party to say I did not bring my whole case forward because my original lawyers did not think of the point. Save in special circumstances, redress for such failure should be a matter between that party and the original lawyer, who would have a better idea why the point was not taken, rather than by permitting the party to bring a second claim against the original opponent on what are the same, or closely allied, facts.

63. It does not matter that the claim is a counterclaim to an action brought by the bank. The fact that Mr Marsden chose to respond to the claim by raising the set-off issue put the bank in the position of having to deal with the claim in a second set of proceedings when it could have been dealt with in the first. They are being vexed by the same matter twice in the sense that they are again having to deal with the question as to whether any and, if so, what remedy, should accrue to Mr Marsden as a result of the mis-sold swaps and FCA review. The same can be said of the argument that the point now raised is a discrete legal issue which may have implications for others in the position of the defendant.

64. Stepping back and asking myself whether the bank has satisfied me that the current claim is an abuse, considerable weight should be given to the facts that (a) the bank had to defend the large number of claims in the first action of which this could have been one, (b) the validity of the 2011 settlement agreement was in issue in the first proceedings and the bank, and court, should have been made aware at that stage of Mr Marsden's full case as to its effect if not set aside, (c) the bank was entitled to expect that the first claims having been dismissed that would be the end of its dispute with Mr Marsden as to the mis-selling and the FCA review, (d) it is inefficient in terms of both cost and use of the court's resources to bring the current claim by way of a separate action, (e) Mr Marsden has yet to pay the bank's costs of the first action and, from what I have been told by Mr Fenwick, it would seem that he is not a position to pay for his own costs let alone those already ordered against him. These are factors which, in my view, establish that the bank is being unjustly harassed by the current action. Set against these matters the factors raised by Mr Fenwick are, for the reasons I have given, not of great weight. I acknowledge that he has an interest in having his claim concerning the set-off considered by the court, but he had that opportunity when he brought the first action. Having balanced the competing factors and taken into account the public interest in the finality of litigation and that of the bank in not being vexed by the same matter twice, I conclude that the proposed amended counterclaim would be a **Henderson v Henderson** abuse of the process.

Conclusion

65. The application to amend the counterclaim must be refused. An amendment should only be allowed if the case sought to be introduced is arguable but the claim as amended cannot succeed. Mr Fenwick accepts that the original counterclaim cannot succeed. For that reason alone it should be struck out. Additionally, however, the counterclaim is an abuse of process and for that reason as well it should be struck out.