No banker's duty to advise customer of harsh terms in its loans

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THE *FINCH V. LLOYDS TSB BANK* DECISION.

1. Only in exceptional circumstances will a bank owe a duty in tort towards a customer to whom it is pitching for business, to volunteer advice about onerous terms in the product that it is offering: Fitch v. Lloyds TSB Bank plc [2016] EWHC 1236 (QB) (6 May 2016, HHJ Pelling QC).

2. That issue, to which this note is confined, was one of a number that arose in the latest judgment arising out of allegedly mis-sold loans and interest hedging products. The decision emphasises the important distinction between two situations: where a bank in fact volunteers (wrong) advice; and where no advice is given, but the customer alleges that it *should* have been. Fitch was an example of the latter.

3PB'S ANALYSIS.

3. **Facts.** The claimants sued on behalf of a company (Bredbury Hall Limited; **"the Company"**) that had been set up to purchase the trade and assets of an hotel near Stockport. To fund the purchase the Company took out a 10 year fixed-rate loan with Lloyd's Bank (**"the Bank"**) of up to £11.6 million (**"the Loan"**).

4. Clause 6.10(b) required the Company, if it repaid the Loan early, to pay the Bank "*any cost or loss to the Bank which in the Bank's reasonable opinion results from such action*", including the break costs of associated finance agreements (**"the Clause"**).

5. **The claim.** The Clause proved damaging because, after signing the Loan, the Company became aware that the Bank had purchased a swap agreement and that the break costs under it would be likely to exceed £1 million. The exposure to pay the break costs under the Clause prohibited the Company from repaying the Loan early. It was unable to re-finance at a lower interest rate, triggering (it was said) its entry into administration.

6. This was a 'no advice' case. The Company alleged that the Bank had *failed to give* advice about the Clause, in breach of a tortious and/or implied contractual duty. Had it done so, the Company would not have taken the Loan.

7. **The decision.** The Bank had not in fact given any advice about the Loan or its suitability. Did it owe a duty to do so? The Court accepted that a Bank employee had, during the course of meetings: highlighted that the Bank could provide advice, cooperation and expertise; and had emphasised that it would get the Company the best possible deal. The claim nonetheless failed because:

   7.1. **Contract (1982 Act).** The Supply of Goods and Services Act 1982, s.13 did not generate a duty to *give* advice. The bank had not contracted to provide that service and so s.13 (which requires any contracted service to be performed with reasonable care and skill) was not engaged (see at [48]-[49]).

   7.2. **Contract (implied term).** An implied term to *give* advice was not arguable on any of the conventional tests for implication (see at [50]).

   7.3. **Tort.** It is well established that the banker-customer relationship is not one of adviser-client. A bank is generally not under a legal duty to provide advice.[1] Such a duty could only be founded on the familiar tests for the creation of a tortious duty (assumption of responsibility; threefold test; incremental) where justified by the particular relationship. A case would have to be exceptional, and markedly different from the typical customer-banker one, for such a duty to arise (see at [52]-[58]).

8. Ultimately, it was inimical to a duty of care that: the Company had had its own financial advisors throughout the transaction, who were present at the meetings; the relationship was adversarial, in that the bank was protecting its own interests in negotiating the Loan; and the Company's representatives were experienced. The statements made during meetings with the Bank (see para. 7 above) had to be viewed in context (see at [56]).

[1] Woods v. Martins Bank Ltd [1958] 1 QB 55 (QB); Bankers Trust International Plc v. PT Dharmala Sakti Sejahtera (No. 2) [1996] CLC 518 (QB)

IMPACT OF THE DECISION

9. Consistently with recent case law,[2] Fitch reiterates the distinction from cases where a Bank in fact offers advice about a product (even though not contractually bound to). On familiar principles, a bank owes no common law duty to advise upon the terms or suitability of a product, but *should it offer* such advice then (absent disclaimer of responsibility) it must be given with reasonable care and skill. Unless advice is offered, the Bank merely owes a lesser duty not to mislead the customer about the product.[3]

10. Perhaps unsurprisingly, the judge declined to extend tort to impose an obligation to give advice involuntarily where the bank would be negotiating in its own interests. Although HHJ Pelling QC did not entirely close the door to such a duty, he did note that the "*circumstances would have to be exceptional*" (at [54]).

11. The fact that the Company had the benefit of professional advice was important. It remains to be seen therefore whether the courts will be more willing to make that extension where the customer lacks it. In the meantime, private individuals who are able to invoke the FCA's Conduct of Business rules may be better served by invoking a statutory claim for breach of statutory duty.[4]

6 July 2016

This article intends to state the law at the date indicated above. Although every effort is made to ensure accuracy, this article is not a substitute for legal advice.

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[2] See, for example, Thornbridge Ltd v. Barclays Bank plc [2015] EWHC 3430 (QB).

[3] Green v. Royal Bank of Scotland [2013] EWCA Civ 1197, at [17]. In that case, where duties arose under the FCA's Conduct of Business Rules, the Court of Appeal refused to develop a concurrent common law duty of similar scope.

[4] Financial Services and Markets Act 2000, s.138D.