A new and better approach to claims against financial advisers?

A Judge has found in favour of Coutts in a claim for negligent investment advice for just under £3.3m plus interest. The Judge's findings are of interest given that he refused to assess whether the investments recommended were suitable for the Claimants according to a body of accepted professional opinion (the so called "Bolam Test"). Instead, the Judge focused on whether the risks of the investments were properly explained to the Claimants, whether they could afford to take such risks and showed themselves willing to do so.

Background Facts

The Claimants were Mr and Mrs O'Hare. Their aggregate overall wealth ranged from £25m to £38m. Mr O'Hare was an experienced businessman and Mrs O'Hare's background was in business administration. Mr O'Hare was an experienced investor but of very limited extent. He was willing to take risk as part of his wealth but not too much and provided he was informed about the risk he was taking.

Coutts advised the Claimants on their investments from 2002. However, the allegations involved the following investments:

- 2007 investments of £4m in Novus Global Credit Opportunities, £2.125m in Novus Natural Resources Strategy and £2m in Novus Global Emerging Markets.
- 2008 investment in a Tailored Portfolio Managed Service.
- 2010 investments in products called Autopilot (£8m) and Navigator (£2m) with Royal Bank of Scotland (RBS).

Allegations

The Claimants argued that the investments in 2007 and 2008 were unsuitable as they offered no capital protection, risks had been underplayed, the investments meant that an unjustifiably high proportion of their wealth was exposed to losses and they made the investments given that they understood the investments to be suitable for them when they were not in fact suitable.

In relation to the 2010 investments, as both investments were in RBS, the Claimants argued that placing so much money in one institution was itself unsuitable, charges were not properly disclosed and Autopilot's underlying investments included emerging markets and exchange traded funds which had not been disclosed to them.

The Judge's approach

The Judge referred to the contents of the agreement between the Claimants and Coutts and in particular that Coutts were required to "work with" the Claimants "to understand [their] circumstances, objectives and requirements to enable [Coutts] to develop

Any comments or queries?

Robert Morris
Partner
+44 20 3060 6921
robert.morris@rpc.co.uk

Rachael Healey
Senior Associate
+44 20 3060 6029
rachael.healey@rpc.co.uk

an investment strategy". The Judge found that the contractual terms did not require Coutts to develop an investment strategy for the Claimants but instead to recommend products as and when agreed, or when Coutts considered it appropriate to recommend a product.

The Judge found that there was an obligation on a professional adviser to engage in proper dialogue and communication with a client. Crucially, he concluded that the required extent of those communications was not governed by the Bolam Test – whether or not Coutts acted in accordance with a practice of competent respected professional opinion. Instead the Judge chose to divert from the Bolam Test in a manner adopted previously by the Courts in medical negligence cases, such as *Montgomery v Lanarkshire Health Board* [2015]. This alternative test focusses on whether or not the professional has taken reasonable care to ensure that any material risks involved in, and any alternatives to, a proposed course of action were fully explained to and understood by the claimant. The materiality of risks should be tested by reference to whether a reasonable person in the claimant's position would attach significance to the risk or the professional was or should be aware that the claimant would attach significance to that risk.

The Judge noted that the COBS rules could produce a result different to the position under common law. However, in the circumstances of the case the COBS rules added nothing to the implied obligations in the contract or the duty imposed by common law.

Was Coutts negligent? No

The Judge found that there was nothing intrinsically wrong with a private banker using persuasive techniques to induce a client to take risks the client would not otherwise take but for the banker's representations provided the client can afford to take those risks, shows a willingness to take them and provided the risks are not so high as to be "foolhardy". The standard of care must balance the propositions that (1) an adviser must on occasion save an investor from themselves and (2) investors must take responsibility for their own investment decisions including mistaken ones.

The Claimants had been provided with extensive and full information such that it was "impossible" for them to complain that the products were mis-sold to them. Practitioners at the time would not have regarded the investments in 2007 and 2008 as foolhardy and responsibility for the investment decision could fairly be taken by the Claimants; the investments were not objectively unsuitable.

The advice in 2010 was also not negligent. Coutts had specifically discussed with the Claimants placing money with one institution and so the Claimants were fully aware of the counterparty risk but were willing to run that risk as RBS was effectively state owned. The Claimants also could not prove that the product had been misrepresented as alleged.

Quantum

Despite not upholding the claim, the Judge nevertheless briefly considered quantum. He referred to the recent case of *Wellesley Partners LLP v Withers LLP* [2016], in which the Court of Appeal held that when a claim was brought concurrently in contract and in tort, the test of remoteness should be the more restrictive contractual test. With that decision in mind, he held that despite the fact the Claimants were out of time for bringing a claim for breach of contract in relation to advice in 2007 and 2008, they could not benefit from the more generous assessment of quantum in tort given their own failure to bring the claim in time.

Take-away

The Judge's disapplication of the Bolam Test in favour of a test based on the risks explained to a client is arguably a departure from the Courts' previous approach to cases of this kind. However, it is potentially helpful for financial advisers.

It is often the case that claimants will assert that, notwithstanding the specific risks of a given investment were set out and explained to them, an adviser should be liable for losses incurred on any investment that was not "suitable" for them. This has generally required an assessment of whether the investment recommended matched the claimant's documented willingness to accept risk, capacity for absorbing losses and personal and financial objectives at the time the investment was entered into. This approach (before the Courts at least) usually required expert evidence, and it was telling in this case that the Judge concluded from the expert evidence he heard that there appears to be little consensus in the financial services industry about how the treatment of risk appetite should be managed by an adviser.

The decision in this case adjusts the focus more on to the question of whether or not an adviser fully explained the type and level of risk involved with any given investment.

Various aspects of the judgment are particularly helpful to financial adviser firms:

- the Judge emphasised that the onus is not on the adviser entirely to "save the client from themselves". Indeed, his express acknowledgement that investors have to take responsibility for their own investment decisions is to be welcomed
- the Judge acknowledged that the commercial basis of Coutts' contract with the Claimants was that it was a platform to enable it to sell its products (or third party products) to them
- the Judge stated that the authorities do not exclude the proposition that in an appropriate case, advice may condition a client's risk appetite rather than the other way round. (In other words, provided proper explanation is given and the client can afford it, there's nothing wrong with an adviser persuading a client to take more risk than the client originally wanted to take.)

This is a decision of some importance and should be welcomed by financial adviser firms and their insurers alike. It remains to be seen whether the Financial Ombudsman Service takes heed of the decision and applies its reasoning when deciding complaints.

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16513

Tower Bridge House
St Katharine's Way
London E1W 1AA
T +44 20 3060 6000

Temple Circus
Temple Way
Bristol BS1 6LW
T +44 20 3060 6000

11/F Three Exchange Square
8 Connaught Place
Central Hong Kong
T +852 2216 7000

12 Marina Boulevard
#38-04 Marina Bay Financial Centre Tower 3
Singapore 018982
T +65 6422 3000