

Case law in the UK tells us of the importance of the duty to take reasonable care and that, if you suffer loss as a result of another party's negligence, you can recover that loss. However, the recent case of Rubenstein v HSBC Bank has again highlighted that the loss suffered must be foreseeable if it is to be recovered.

In August 2005, Mr Rubenstein contacted HSBC regarding an investment of £1.25 million following the sale of his property. During correspondence, he was very clear with the financial adviser that he could not "accept any risk in the investment of the principal sum" as the capital investment would in the future be used to purchase another property.

The adviser sent Mr Rubenstein information about the AIG Premier Access Bond (the "Bond"), which offered a choice of 14 funds, but the adviser only gave details of one fund, the Enhanced Variable Rate Fund ("EVRF"), stating that "we view this investment as the same as cash deposited in one of our accounts". No other funds within the Bond were discussed and Mr Rubenstein decided to invest in the EVRF.

Following the collapse of Lehman Brothers in September 2008, other institutions, such as Merrill Lynch and AIG, came under pressure as a result of large scale withdrawals from investors. Mr Rubenstein attempted to withdraw his investment, but was advised that withdrawals had been suspended. He was subsequently informed that the EVRF would be closed in December 2008 and that withdrawals would be made at a substantial loss. Mr Rubenstein lost approximately £180,000 of his capital investment.

Mr Rubenstein claimed that he had been mis-advised, as he had wanted capital protection and part of his capital had been lost. The basis of the claim centred around whether the advice had been negligent and in breach of statutory and regulatory regime governing the conduct of investment business by IFAs. According to the FSA's Conduct of Business sourcebook ("COB"), which was in effect at the time the transaction took place, "when a firm communicates information to a customer, the firm must take reasonable steps to communicate in a way which is clear, fair and not misleading".

When considering the claim, the court highlighted the importance of COB rule 5.3.5(2)(a), which states that if a recommendation is given in relation to a packaged product (which this was), advisers must recommend the suitable product from a range of products.

HSBC denied that advice was given, saying that its adviser only provided information about the Bond. It argued that Mr Rubenstein made the decision to invest in the Bond and the choice of the EVRF was his. Even if the court were to find that HSBC gave advice, that advice was accurate when it was given: the EVRF was as safe as a cash deposit and remained so until September 2008. Any loss suffered by Mr Rubenstein was as a result of the financial markets collapse and not by any error in advice when the Bond was taken out three years earlier. The loss was therefore not reasonably foreseeable and too remote to be recoverable.

The court held that the bank had given Mr Rubenstein advice. Mr Rubenstein had asked for a recommendation and, in the absence of any disclaimer, any response would have to constitute advice. In this case, Mr Rubenstein set out his criteria and the adviser suggested a product that he felt best suited his requirements. Key phrases, such as "in our view", worked against the bank.

Previous case law had stated that a failure to comply with the Financial Intermediaries, Managers and Brokers Regulatory Association Rules was negligence because the skill and care to be expected of a financial adviser

would ordinarily include compliance with the rules of the regulator. The court held that the adviser was negligent in his advice, finding that an investment in EVRF was not the same as cash deposited because the structure of the investment was materially different and the risk was greater. More importantly, the court found that the adviser had breached the COB rules, firstly because he had equated EVRF to a cash deposit, but also because he failed to consider the other funds in the Bond as alternatives. Whilst at the time the investment may have been very safe, the alternatives were not discussed with Mr Rubenstein and they should have been. The duty of care owed to Mr Rubenstein was wider than a duty simply to ensure that the information provided was accurate; it was a duty to ensure that the recommendation was suitable for Mr Rubenstein, and the most suitable from a range of products.

Furthermore, the court found that Mr Rubenstein relied on the advice given. There was no evidence to suggest that he chose the Bond from a range of products, or the EVRF from other funds, and the court could therefore draw no other conclusion. The court also felt that it was “going too far to apportion blame to a client who asks the critical questions about risk but does not probe deeper into the workings of the product he is recommended, once he is told that the risk of investing in it is the same as a cash deposit”.

The court held that HSBC was liable for the foreseeable loss Mr Rubenstein suffered as, but for the negligent advice, he would not have invested in the EVRF. However, the court had to consider whether the financial crisis of 2008 was foreseeable at the time of the investment. The court found that the loss was not caused by the negligent advice, but by a set of circumstances that could not have been foreseen back in 2005, and a run on AIG was “so remote that no financial adviser would have been required to point it out as posing a risk to capital”. The loss was too remote in law and the court therefore denied Mr Rubenstein’s attempt to recover his losses as damages for breach of contract or tort.

Banks and advisers will no doubt be relieved by this decision, and investors will despair at the idea that negligent advice can still leave them out of pocket, particularly when they argue that they would not have made the investment, but for the advice. If this decision is appealed, or cases like this come before the courts, it could certainly be argued that any investment beyond a cash deposit comes at a risk as remote as financial collapse and that investment advisers should surely discuss this possibility with investors, especially when they seek advice on protecting their capital investment. In the meantime, it would be prudent for investors to ask their advisers for ‘worst case’ scenarios because, if the worst does happen, they may not have recourse to the courts.

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