WALLACE LLP

SWAPS LITIGATION

For further information please contact:

Alexander Weinberg Partner

alexander.weinberg@wallace.co.uk
Tel +44(0) 20 7467 8767

Mis-selling

The media is awash with stories about litigation against banks and other financial institutions for historic mis-selling of their products. One of the biggest scandals in this regard has been the mis-selling of Interest Rate Hedging Products (“**IRHPs**”). At Wallace we are experienced in advising clients as to whether they may have cause for complaint regarding IRHPs that they may have been mis-sold and assisting those clients to ensure that, if they are owed compensation, they achieve the best level of redress.

What are IRHPs?

Interest Rate Hedging Products or IRHPs are products that have tended to be sold to customers at the same time as taking out new, or renewing existing, lending facilities. IRHPs were marketed by the banks and financial institutions as a mechanism to reduce or negate the risk of rising interest rates and as an alternative to fixed rate loans.

The FCA has identified four principal types of IRHPs:

(i) SWAPs – SWAPs are agreements in which one form of interest rate, typically a floating rate, is “swapped” with another, fixed, rate.

(ii) Caps – Caps are separate contracts to the loan agreement, which set a ceiling for interest rates above which the customer would not have to pay.

(iii) Simple collars – Simple collars give customers a range in which interest rate rises can be limited.

(iv) Structured collars – Structured collars are more complex versions of simple collars, which, typically, compelled the customer to bear the risk of interest rates falling below the lower limit and, hence, if that did occur, the customer would have to pay interest at a higher rate.

What was the scandal?

IRHPs were first sold to customers, with the purpose of allowing them to manage the risk of interest rate fluctuations, at the beginning of the 21st Century. IRHPs, which are complicated financial products, were sold widely by a range of banks on the UK high street. Nine of these banks have conducted, or are conducting, reviews into how they sold and how they are selling IRHPs: Allied Irish, Bank of Ireland, Barclays, Clydesdale and Yorkshire, Co-operative, HSBC, Lloyds Banking Group, RBS and Santander UK.

When properly sold, in the right circumstances to the right customers, these products can protect customers against the risk of interest rate movements. However, it has become very apparent that IRHPs were not only sold in this context. In particular, for many customers, IRHPs were not appropriate for their needs but they were sold them nonetheless.

IRHPs were typically sold as a condition precedent of entering into a lending facility with the bank or even as a requirement for maintaining an existing lending facility upon renewal. Customers did not understand the products they were being sold, the potential ramifications for their businesses and the significant costs that they may have to pay. In many instances, customers did not feel that they had any option but to purchase an IRHP.

SWAPS LITIGATION cont.

Typical examples of how IRHPs were mis-sold

There are many ways an IRHP might have been mis-sold but common features of mis-sold IRHPs include:

(a) Suitability – no steps were taken by the bank to consider whether an IRHP was actually appropriate for the customer.

(b) Failure to explain costs – IRHPs commonly incorporated very high breakage or exit costs, which were not clearly identified to the customer when the product was taken out.

(c) Value mis-match – the notional amount of the SWAP exceeds the value of the loan taken out by the borrower.

(d) Duration mis-match – the term of the loan facility is inconsistent with the length of the IRHP.

Redress

In 2012, the FCA identified failings in the way that some banks sold IRHPs and entered into an agreement with the banks that they should review their sales of IRHPs made to "unsophisticated customers" since 2001.

The full review started in May 2013 and, to date, the banks have now considered in the region of 17,000 cases. So far, at least £1.9 billion has been paid in redress, including £400 million to deal with consequential losses.

However, "unsophisticated customers" has been defined narrowly and many genuinely-wronged businesses have been unable to achieve redress on the basis that they fall outside the relevant parameters. For example, a company with an annual turnover of £6.5 million and either a balance sheet total of more than £3.26 million or more than 50 employees (or both) will be considered "sophisticated" and ineligible for redress under the FCA scheme, even if the business and the individuals running it had no experience of complex financial products and did not understand them.

Whilst some customers might have an alternative route to redress through the Financial Ombudsman Service, for others their only recourse will be through the Courts.

Wallace LLP can consider with you your options on a case by case basis.

Grounds for bringing a claim

If a customer believes it was mis-sold an IRHP, it may have one or more of the following causes of action to found a claim against the selling bank:

- Breach of an established duty of care
- Negligent (and sometimes fraudulent) misrepresentation
- Failure to comply with regulatory obligations
- Fraudulent manipulation of LIBOR.

Timeframe for bringing a claim

The typical limitation period for bringing mis-selling claims in the English Courts is 6 years from the sale of the IRHP, although in certain circumstances, for example cases of fraud, one may be able to argue that such time limits should not apply.

Nevertheless, given the potential time-bar, a person or business that considers they might have a claim should not delay in pursuing the matter and should seek professional advice as soon as possible.

One Portland Place London W1B 1PN T 020 7636 4422 F 020 7636 3736 **www.wallace.co.uk**
Wallace LLP is a limited liability partnership registered in England (number OC305907) at One Portland Place, London W1B 1PN and is authorised and regulated by the Solicitors Regulation Authority.