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Mis-selling claims by high net worth couple for poorly performing investments sold by bank's pushy ex-salesman dismissed

Les and Janet O'Hare v. Coutts & Co
[2016] EWHC 2224 (QB)

Article by David Bowden

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Les and Janet O'Hare v. Coutts & Co -[2016] EWHC 2224 (QB)

Mis-selling claims by high net worth couple for poorly performing investments sold by bank's pushy ex-salesman dismissed

Following a 10 day trial, in which mis-selling claims were made against a private bank by a high net worth couple, in a surprising ruling the judge has dismissed all claims. The bank failed to call its former salesman Mr Shone to give evidence to defend his and the bank's reputation despite having said it would do so. All of the bank's witnesses that did give oral evidence were castigated by the judge. The judge however found that all 3 of the claimant's witnesses were credible and telling the truth. A complaint about one product had been made to and dismissed by the bank but it had offered $250k as a goodwill gesture to be offset against future charges. Despite the bank's figures and evidence on this being hopelessly muddled, the judge ruled that Mr & Mrs O'Hare had received the full benefit of it. Claims in relation to 2010 products were dismissed but without reference to them being time barred.

Mr & Mrs O'Hare claimed that RBSI products were misrepresented to them because they had glowing past performance figures in the glossy sales brochures which were made up but an explanation of this was buried in the small print. Mr & Mrs O'Hare claimed that ever heavier sales persuasion techniques were practiced on them to persuade them to buy products which, whilst riskier for them, were increasingly profitable for the bank. The bank reclassified its risk categories for products in 2007 but did not explain the nature of this to Mr & Mrs O'Hare. The judge ruled that the newer test laid down by the Supreme Court in 2015 for medical negligence cases in *Montgomery* was now the appropriate one to apply in mis-selling cases where a breach of the Financial Services & Markets Act 2000 or the FCA rulebook is alleged.

Les and Janet O'Hare v. Coutts & Co
[2016] EWHC 2224 (QB), [2016] All ER (D) 37 (Sep) *9 September 2016*
High Court of Justice, Queen's Bench Division, Mr Justice Kerr

What are the facts?
The claim is for £3.3million.

Mr & Mrs O'Hare sold their business and were introduced to the bank. They became a private banking client in 2001. Their total wealth and assets are around £35millon. Initially they invested in a low risk offshore bond. After Mr Shone started to become their relationship manager, he persuaded them to invest in ever riskier investments. Mr Shone left the bank in 2008 and Mr Eugeni became the account manager. He sought to rebalance the portfolio.

Mr O'Hare made a formal complaint about one product (OCR) which, whilst the bank dismissed it, decided as a goodwill gesture to rebate $250k against future charges and commissions. The financial markets deteriorated after 2007 and Mr & Mrs O'Hare suffered portfolio losses. They liquidated some loss-making investments which were in high risk products and placed them elsewhere. In 2010 they were sold new products from Royal Bank of Scotland International and claimed they were misled into buying them because the brochures contained glowing past performance figures which had been '*simulated*' and explanations on this were buried in the small print.

Mr O'Hare said the bank used ever more heavy persuasion techniques on him to get him to buy riskier products. He said this was not documented by the bank. Although the bank said Mr Shone would give evidence in its pre-trial questionnaire, he was not produced to give evidence and defend his or the bank's reputation. Mr O'Hare accepted that he had taken a punt on a couple of products and took those losses on the chin. However he maintained that some of the products had been mis-sold to him.

What agreements did the O'Hares sign up to with the bank? What assets did they have?
Mr & Mrs O'Hares signed up to the following 4 contracts with the bank:

- Investment Management Service Agreement – August 2001,
- Agreement to provide Investment Advice – September 2001,
- Discretionary Investment Management Services - May 2005, and
- Tailored Portfolio Managed Services -December 2008.

They own 2 substantial mortgage-free homes – 1 in Cheshire and the other in Florida. They had substantial cash in the bank following the sale of Mr O'Hare's business. They are the beneficiaries of funds invested in 2 tax efficient retirement benefit schemes. The judge estimated their wealth at around the £35million mark.

What products were sold by the bank and when?

The bank sold Mr & Mrs O'Hare the following 5 sets of products:

- **CMI** - Clerical Medical International offshore bond (May 2005),
- Investment in **Coutts Private Equity Ltd Partnership** (which Mr & Mrs O'Hare had to borrow funds to invest in – March 2007),
- **Orbita** funds comprising:
  - OAG – Orbita Asian Growth (April 2006),
  - OGO – Orbita Global Opportunities (September 2007),
  - OCR – Orbita Capital Return (September 2007),
- **Novus** funds comprising:
  - NNR – Novus Natural Resources (September 2007),
  - NGCO – Novus Global Credit Opportunity (December 2007),
  - NGEM – Novus Global Emerging Markets (December 2007),
  - NNRS – Novus Natural Reserve Strategy (December 2007 & March 2008),
- **RBSI** - Royal Bank of Scotland International products (both May 2010):
  - Autopilot, and
  - Navigator.

How did the bank categorize the risk of its products? Did this change?

Until April 2007, the bank categorized the risk of its products as follows:

- cautious,
- moderate, and
- high risk.

After April 2007 these risk categories changed to:

- wealth preservation (the least risky),
- wealth enhancement (intermediate risk) subdivided according to investment timescales of
  - either 3 to 5 years, or
  - 5 to 8 years, and
- wealth generation (the most risky).

The judge seems to assume that this change in 2007 was one of name only. He does not however investigate which products previously classed as '*high risk*' were downgraded to '*wealth enhancement*' in this process. Nor does the judge enquire what Mr O'Hare understood about this risk re-classification.

Which products that the bank sold were high risk?

Whether on the post-April 2007 wealth generation or its predecessor high risk test, all the Novus funds products as well as the Orbita OAG funds were high risk. It is not clear whether OCR was a high or medium risk product. The Orbita OGO and both the RBSI products were low risk ones.

Which products performed well?

It is quite difficult to draw this out from the judgement which is poorly written and spends too long on other irrelevant issues. The Clerical Medical bond appears to have performed as expected or better. It also seems the investment in Coutts Private Equity Ltd Partnership was still held. Autopilot was sold 2 years early for a £54k loss. It is not clear if the RBSI Navigator product is still held.

Which products did Mr & Mrs O'Hare lose money on?

The judgement records that Mr O'Hare was dissatisfied with the '*poor performance*' of both OGO and NGCO. In relation to OCR, Mr O'Hare made a formal complaint to the bank which it dismissed under DISP. In August 2008, Mr O'Hare cut his losses and asked the bank to liquidate his investments in OAG, NGEM and NNRS.

Did the bank lose out?

The bank was rewarded very handsomely for providing this poor advice, mediocre service and recommending these loss-making products. It was receiving an annual management fee, a fee for buying the investments, a fee for selling them as well as undisclosed commission because the majority of products it recommended were from other companies in the bank's wider corporate group.

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What witnesses were called to give evidence at the trial?
Mr and Mrs O'Hare gave evidence on their own behalf. They also called Mr Raymond Eugeni who had been a relationship manager with the bank responsible for the Hares' account. Mr Eugeni now works for one of Mr Hare's businesses.

The bank called the following people to give evidence:
- Mr Dylan Williams, Managing Director, London office,
- Mr Glyn Thomas, Financial Planning Specialist,
- Miss Amy Barlow, Junior Private Banker, and
- Mr Nigel Pitigala, Complaints Handling Officer.

What assessment did the judge make about Mr & Mrs O'Hare and their witnesses?
Mr Justice Kerr was only appointed to the bench in June 2015. Rather disappointingly there is not a specific section in his judgment which deals with his assessment of the witnesses. This is one of the reasons why his judgement is vulnerable to attack on appeal. Scattered through his judgement are these value judgements:
- **Mr O'Hare.** He was astute in business and in consequence wealthy. He built up a successful chemical engineering business which he has since sold. In the course of acquiring wealth had got to know something about investing but he did not have expertise to match that of Coutts. He had worked for many years to build up his business, and would not recklessly expose its fruits. Mr O'Hare had a '*desire to exercise caution and moderation in the running of risk'*. The judge found '*Mr O'Hare to be an honest and truthful witness, although his recollection was not always accurate, as he was the first to admit whether or not against his interest*.' The judge noted he '*was cheerfully candid about admitting mistakes and being corrected*' and that he '*did not answer questions after considering what type of answer would best in his judgment assist his cause'*. He rejected any suggestion that his answers were '*evasive*'. The judge found he is '*is a man of few emails, of few words in writing but many said orally'*.

  The judge found that *'he was to only a very limited extent a sophisticated investor. He was a private individual not a professional investor. He had dabbled in share dealing. He knew what markets were, that they go & down and that currency exchange rates fluctuate'*. The judge noted that his '*discomfort*' about being asked some questions '*reflected not a reluctance to tell the full story but rather a wish restrain himself from speaking of Mr Shone in inappropriately strong pejorative language'*. The judge said that Mr O'Hare's '*caution*' had to be contrasted with Mr Shone's '*bullishness*'.
- **Mrs O'Hare**. Her background is in business administration. She did not attempt to keep abreast of market developments. Mr O'Hare consults her on any major financial decision such as whether to make a substantial investment. She acts as a '*sounding board'*. She attended meetings with Coutts sometimes, in particular when it was necessary for her to sign documents. She took her cue from her husband after hearing from him about a proposal. She understood his explanations and their decisions on how to invest were joint and agreed by her. '*She was not aware of any detail and was not able to name the five investment products in issue in this case'*. She was not comfortable with their main residence being mortgaged to secure investments, but agreed to it.
- **Mr Eugeni**. Mr Eugeni later fell out with Coutts and now works with businesses associated with Mr O'Hare. The bank intimated that his evidence was influenced by a desire to harm Coutts by helping the O'Hares and claimed his witness statement was seeking to '*settle a score'* with them. The judge said '*this is odd because his evidence is quite favourable to Coutts. I reject these accusations against him'*. The judge found him to '*be a truthful witness with reasonably good recall'*. He had no quarrel with Coutts until 2012 and we have documents from him dating from September 2008 which are '*in my judgment reliable and more candid than Mr Shone's or Mr Thomas's*'. As to the O'Hares' complaint, he had tried to '*nip this in the bud'*. Mr Eugeni's note of the meeting is '*reliable and accurate'*. Mr Eugeni gave unchallenged evidence not that he was negligent but that after the 2010 investments were made he regarded the portfolio as '*suitable and properly balanced'*. Mr O'Hare's relations with Mr Eugeni were fruitful and their discussions constructive. Mr Eugeni's notes show '*full consideration by him of Mr O'Hare's requirements, and full and adequate disclosure about the products recommended in order to meet them'*. There is no suggestion that Mr Eugeni '*downplayed the risk of the 2010 investments'*.

What assessment did the judge make about the bank and its witnesses?
The judge notes this about the bank's various witnesses:
- **Mr Dylan Williams.** His answers to questions on his narrative and the electronic records from Coutts Quasar system were '*guarded, wary and verging on obtuse'*. Mr Williams only answered questions '*after considering what type of answer would best'* in his judgment assist the bank's case. I am not confident that the explanation given to Mr Williams was a comprehensive or accurate statement of Mr Shone's reasons for not wanting to give evidence. Mr Williams' hearsay account of Mr Shone's explanation does not satisfy me of why Mr Shone could not be called '*blind*' to give oral evidence. Mr Williams attempts to discredit Mr Eugeni's were all rejected. Mr Williams's evidence '*failed to address*

the Bank's contemporary records on exchange rate calculations'. Finally his late evidence produced the new revelation that for six months from 17 July 2009, Coutts had applied a 100% discount on its charge for monies belonging to the O'Hares and held in its liquidity fund.

- **Mr Glyn Thomas.** He only answered questions '*after considering what type of answer would best*' in his judgment assist the bank's case. Mr Thomas downplayed Mr O'Hare's complaint as '*a little moan regarding the recent draw down'* on OCR. In his witness statement he attempted to compensate for Mr Shone's absence producing documents which he '*professed little knowledge'* about discussions between Mr O'Hare and Mr Shone when he was not present. He was less concerned with recalling events than with portraying Mr O'Hare as a man who could not be influenced. The judge said this was '*an unsatisfactory feature'* of his evidence. I accept Mr O'Hare's evidence that he remained unhappy about OCR contrary Mr Thomas's account of the meeting in his witness statement and in cross-examination. The documents from Mr Eugeni are '*in my judgment reliable and more candid than'* those of Mr Thomas's.
- **Miss Amy Barlow.** In her oral evidence '*it turned out that she had no knowledge or understanding of what the figures represented and had taken them on trust (together with the accompanying narrative which was not in her own words) from Coutts' advisers, and that she had accepted from the advisers that the figures were correct, without understanding why'*. Her evidence consisted of '*complex arithmetic in the figures*' which she '*had produced but not understood'*.
- **Mr Nigel Pitigala.** He wrote to the O'Hares on 3 March 2009 saying their complaint was formally rejected. The letter stated at length reasons why Coutts said the product had not been mis-sold and explained its poor performance by reference to the instability and upheavals in world markets.

How did the bank get away without calling Mr Kevin Shone to give evidence?
Mr Shone worked for the bank from 2001 until 2008 when Mr Eugeni took over the O'Hares' account. He then went to work for Goldman Sachs. He retains authorisation from the FCA to carry out controlled functions and now works at Alfred Simmons Investment Management Limited.

No witness statement was provided by Mr Shone. Mr Shone did not attend trial to give evidence. The judge was shocked by this noting critically in his judgment that he had '*chosen not to defend his professional reputation in these proceedings.*' The judge noted that Mr Shone had said

> *'.that he was too busy with his business responsibilities to devote the time required. He found time, however, to attend a charity event at Buckingham Palace on 17 May 2016, where he met Mr Williams and the proceedings were mentioned.'*

There were other hollow excuses proffered that the judge saw through for what they were. The judge also noted that he '*would expect him to answer the charge of negligence by giving evidence for the party facing that charge'*.

What reason did the judge give about Mr Shone's evidence?
The early part of the judgment is occupied with an analysis by the judge of Mr Shone's absence. He sets out in §21-22 the 9 competing submissions by both sides as to whether despite his absence, Mr Shone's notes made for the bank should be preferred over the testimony of Mr O'Hare. The judge notes that either side could have issued a witness summons against Mr Shone. The judge notes that the O'Hares' case is not that Mr Shone's notes were false but rather that '*they mislead by omission'*. Surprisingly the judge goes on the find no procedural failure by the bank that he needs to take into account under either the CPR or the Civil Evidence Act 1995.

The judge does however rule that he did '*not accept that the O'Hares could be expected to call Mr Shone as a witness*'. He notes that Mr Shone '*did not vouch for the accuracy of his documents nor attest to Mr O'Hare's account being misleading*'. With glorious understatement he rules that Mr Shone's '*evidence about OCR would have been relevant'*. He goes on to consider whether the bank should have called Mr Shone '*blind*' that is without sight of a prior written witness statement. The bank had provided Mr Shone's name as one of its witnesses in its pre-trial directions questionnaire.

The judge observes that the bank's legal team had '*assessed the potential benefits and risks of calling him, if necessary under compulsion of law, and concluded that the risks outweighed the benefits'*. In the end the judge fudges this by saying that although he found Mr O'Hare to be an '*honest and truthful witness'* that he would on '*a point by point basis'* decide whether to prefer Mr Shone's contemporaneous notes to Mr O'Hare's sworn testimony. However the judge seems to then contradict himself when he rules that Mr Shone's notes '*repeatedly describe Mr O'Hare as "keen" to buy the products <u>without mentioning the exertion of persuasion</u> or influence by Mr Shone'*.

What expert witnesses were called to give evidence?
Each side called 1 expert witness each:

- Mr Ian Barton, Director of Mazars Financial Planning Limited was called for the O'Hares, and
- Mr David Croft, Director of GBRW Limited was called for the bank.

What were the 2 issues the experts had to opine on and what did they conclude?
The 2 issues were:

- Where the boundary lies delimiting the proper role of a financial adviser, and
- the extent to which the use of persuasion to run risk and achieve sales is an acceptable practice

Although the experts had produced a joint statement dated 27 May 2016 they had been unable to agree on little. The judge noted that both experts had considerable experience in advising on banking and financial markets and investments. The judge found that neither expert had reassured him that there was a clear consensus within the financial services industry about the boundaries that delimit the proper role of a financial adviser or the extent to which use of persuasion to run risk is acceptable.

The COBS rules provide a useful starting point for determining what investments are suitable but do not define whether an investment is suitable in particular circumstances. The experts disagreed about whether the investments at issue were too risky to be suitable, or whether they were suitable for investors with the wealth, experience, sophistication and risk appetite of the O'Hares.

When did the FCA's Conduct of Business Rules come into force? What do they say?
COBS came into force on 1 November 2007. These rules are relevant (August 2016 version):

- **2.2.1R:** '(1)A firm must provide appropriate information in a comprehensible form to a client about:
  (a) the firm and its services,
  (b) designated investments and proposed investment strategies; including appropriate guidance on and warnings of the risks associated with investments in those designated investments or in respect of particular investment strategies'.
- **4.2.1R: '**(1) A firm must ensure that a communication or a financial promotion is fair, clear and not misleading'.
- **9.2.1R:** '(1) A firm must take reasonable steps to ensure that a personal recommendation, or a decision to trade, is suitable for its client.'
- **9.2.2R:** '(1) A firm must obtain from the client such information as is necessary for the firm to understand the essential facts about him and have a reasonable basis for believing, giving due consideration to the nature and extent of the service provided, that the specific transaction to be recommended, or entered into in the course of managing:
  (a) meets his investment objectives,
  (b) is such that he is able financially to bear any related investment risks consistent with his investment objectives, and
  (c) is such that he has the necessary experience and knowledge in order to understand the risks involved in the transaction or in the management of his portfolio.'
- **9.2.3R:** 'The information regarding a client's knowledge and experience in the investment field includes, to the extent appropriate to the nature of the client, the nature and extent of the service to be provided and the type of product or transaction envisaged, including their complexity and the risks involved, information on:
  (1) the types of service, transaction and designated investment with which the client is familiar,
  (2) the nature, volume, frequency of the client's transactions in designated investments and the period over which they have been carried out,
  (3) the level of education, profession or relevant former profession of the client.'
- **9.2.6R:** 'If a firm does not obtain the necessary information to assess suitability, it must not make a personal recommendation to the client or take a decision to trade for him.'

How did the bank's new product publicity material seek to mislead prospective customers?
Mr Eugeni in his evidence '*highlighted the fact that both Autopilot and Navigator had only been running for short periods and that performance prior to this had been illustrated as simulated*'. The judge said that this '*was a necessary corrective to misleading written product information issued by RBSI, which used the heading "Past Performance" for a product that had never performed'.*

The financial promotion contained:

- 6 Year History of the RBS UK Navigator Index, and
- 10 Year History of Autopilot

to describe products that '*had no history*'. The judge records that the revelation that this '*history*' was '*simulated using actual historic market prices'* was however '*relegated to a footnote in such small print that I infer RBSI would not mind it being overlooked*.'

Mr O'Hare says that he did not take this in and the time and '*later became indignant – with some justification*' that RBSI could publish such a description of its products.

It would have been far better for this case to have been tried by an experienced Commercial Court judge who could have examined whether such misleading financial promotions met the FCA Principles let alone the detailed provisions in the FCA handbook. Based on these impugned brochures, Mr O'Hare was persuaded to invest £4m in Navigator and £8m in Autopilot.

How did the O'Hares' complaint against the bank arise? What did the bank do with it?
Mr O'Hare was dissatisfied with the OCR product which he was sold in September 2007 at the start of the financial crisis. Mr O'Hare's complaint was about how this product '*was pitched to him'* by Mr Shone. Mr O'Hare honestly said that he knew the NGCO and OGO products were '*risky*' and invested in them '*with his eyes wide open'* but that this was not the case for OCR.

Following a series of meetings in November 2008 Mr Eugeni advised Mr O'Hare to '*raise a cedar'* against the bank. This expression being Coutts flippant categorization of CDR or '*complaint for dispute resolution*'. Pragmatically Mr O'Hare was seeking a refund of some of the upfront fees which he quantified as *'$100k would be too little and $500k would probably be too much'*. Mr O'Hare put in a written complaint. There appears to have been a superficial internal investigation by the bank and a standard brush-off letter dated 3 March 2009 was sent to him formally rejecting his complaint.

Pausing here, that letter being a final dispute letter should have contained the FSA mandated wording advising that Mr O'Hare had a period of 8 weeks to advance his complaint to the Financial Ombudsman Service. Mr O'Hare clearly did not go to FOS. Disappointingly there is nothing in the judgment about whether it is an abuse of court proceedings to try and raise by way of claim a matter that could and should have been determined by FOS. Further there is no mention of the appellate case law such as *Clark v. In Focus Asset Management & Tax Solutions Ltd* **[2014] EWCA Civ 118** on this either.

How did the bank agreed to resolve the O'Hares' complaint? How was the compensation to be paid?
Notwithstanding the bank's rejection of Mr O'Hare's limited complaint, it recognized he was a valuable customer. Mr Eugeni recommend that a goodwill gesture of up to $250k be offered to Mr O'Hare to be paid not as cash but rather by way of offset against future commissions or fees due to the bank from Mr O'Hare. It is neither entirely clear that the bank did agree to this nor the amount of compensation. The bank's evidence on this was quite hopeless. Miss Barlow had attempted to piece together some figures by going back over Mr O'Hare's portfolio but this was lambasted by the judge as '*complex arithmetic in the figures*' which she '*had produced but not understood'*.

The judge seems to accept that a benefit of more than $250k was conferred on Mr & Mrs O'Hare. However this is not entirely clear because the judge notes that Mr O'Hare would have been perfectly capable of negotiating a good deal on future investments with the bank. In his judgement he says that '*in return for dropping the complaint about OCR, Coutts offered only discounts it might very well have been prepared to offer anyway'*. So despite raking through all the records it remains unclear whether Mr O'Hare obtained $250k more than he would have otherwise have negotiated anyway.

What was said about influencing the O'Hares to buy products? Why was this relevant?
Mr O'Hare said there were many meetings – at his house, at the Dorchester Hotel in London, on the golf course and occasionally (but not often) at the bank's offices. He said at these meetings the bank's salesmen, particularly the reluctant witness Mr Shone, used slick or polished or subtle sales persuasion techniques on him to persuade him to buy products that were ever riskier for him but ever the more profitable for the bank and its salesmen.

Mr O'Hare submitted that the notes that Mr Shone wrote up for the bank's credit committee and line managers after these meetings made no reference to this. Instead they were slanted to suggest that Mr O'Hare was 'keen' to buy these products. As Mr Shone failed to provide a witness statement yet

alone attend for cross-examination, Mr O'Hare's claims about this have to be accepted. The judge noted that Mr Shone had '*chosen not to defend his professional reputation in these proceedings.*'

The judge did make these findings however:
- The O'Hares submitted that Mr Shone was a persuasive salesman who described the O'Hares as '*keen'* to denote his success in persuading them to accept his recommendations to invest in more high risk products than they would otherwise have favoured.
- '*I accept Mr O'Hare's basic proposition that Mr Shone used persuasion on him'*. This is '*not necessarily a criticism of Mr Shone or Coutts; provided the products sold are suitable, there may be nothing wrong with using selling techniques*'.
- Mr Shone's notes repeatedly describe Mr O'Hare as '*keen*' to buy the products '*without mentioning the exertion of persuasion or influence by Mr Shone or anyone else at Coutts'*.
- There is nothing intrinsically wrong with a private banker using persuasive techniques to induce a client to take risks the client would not take but for the banker's powers of persuasion '*provided the client can afford to take the risks and shows himself willing to take them, and provided the risks are not …so high as to be foolhardy'*.
- The COBS rules do not rule out the use of persuasion '*though they do stress the need for full information to be given and conflicts of interest to be properly managed'.*

What had the Court of Appeal previously decided in *Bolam?*
In *Bolam v. Friern Hospital Management Committee* **[1957] 1 WLR 582,** the Court ruled that the test in a medical negligence case was whether the defendants were in acting in the way they did were acting in accordance with a practice of competent respected professional opinion. It agreed with the judge who said that '*This is in accordance with a practice accepted as proper by a responsible body of men skilled in that particular art*.' The harsh result reached in Bolam in the 1950s was to deny compensation to a patient who had clearly suffered harm at the hands of her surgeon.

How had the *Bolam* test been modified in *Montgomery*?
An expanded panel of the Supreme Court in *Montgomery v Lanarkshire Health Board* **[2015] UKSC 11, [2015] AC 1430** held that 2 generations on that *Bolam* was no longer the appropriate test in medical negligence cases. Lords Kerr and Reed JJSC said that an adult of sound mind is entitled to decide which (if any) of the available treatments to undergo and consent must be obtained before treatment interfering with bodily integrity is undertaken. A doctor is under a duty to take reasonable care to ensure that the patient is aware of any material risks involved in proposed treatment and of reasonable alternatives.

A risk is '*materia*l' if a reasonable person in the patient's position would be likely to attach significance to it or if the doctor is or should reasonably be aware that their patient would be likely to attach significance to it. Further:
- assessing the significance of a risk is fact-sensitive and cannot be reduced to percentages,
- in order to advise, a doctor must engage in dialogue with her patient, and
- the therapeutic exception is limited and should not be abused.

Are there any other prior authorities of relevance?
These authorities are relevant in this case to how the duties under COBs are to be applied:

Rubenstein v. HSBC Bank Plc **[2012] EWCA Civ 1184** (Court of Appeal - Rix, Lloyd & Moore-Bick LJJ)

> The statutory purpose of the COB regime is to afford a measure of carefully balanced consumer protection to a 'private person'. That purpose is elucidated not only by the content of the COB rules themselves but also by section 2 of FiSMA, which speaks of 'the protection of consumers'. The rules to be created by the regulatory authority are to be informed by a proper regard for 'the differing degrees of risk involved in different kinds of investment … the need that consumers may have for advice and accurate information … the general principle that consumers should take responsibility for their decisions'. These basic principles and purposes are reflected in the imposition under the COB rules of onerous duties designed to ensure that the investment adviser understands his client and his client understands risk.

Zaki v. Credit Suisse (UK) Ltd **[2013] EWCA Civ 14** (Court of Appeal – Etherton, Rix & Patten LJJ)

> Where the issue arises in the context of statutory duty, it is possible that the statutory requirements may to a greater or lesser extent mould their own solutions, so as to give greater weight to requirements of

process. Nevertheless what is aimed at is the provision of suitable advice (COB 5.3.5) or suitable lending arrangements (COB 7.9.3) and not merely suitable advice or lending arrangements in the abstract but suitable advice or arrangements for the client and his proposed investments. The complex rules are an attempt to hold the balance between the parties fairly, giving weight both for the need to protect investors from ignorance and for the need to permit ultimate autonomy to the properly informed investor to make and take responsibility for his own mistakes. Where it is ultimately to be found, giving all due weight to the statutory requirements, both of form and substance, that personal recommendations or lending arrangements are suitable, they cannot be rendered unsuitable by some incidental and essentially immaterial failure of mere form.

Green v. Royal Bank of Scotland Plc **[2013] EWCA Civ 1197** (Court of Appeal – Richards, Hallett & Tomlinson LJJ)

It is common ground that the financial advisors owed a common law duty to act with the skill and care to be expected of a reasonably competent financial advisor. In determining the extent of this duty, it is useful to start with the requirements of the relevant regulatory regime. This is because the skill and care to be expected of a reasonably competent financial advisor ordinarily includes compliance with the relevant regulatory rules.

What claims were made and abandoned at or prior to trial?

A claim that the bank had 'churned' Mr & Mrs O'Hare was abandoned. Churning involves the sale and purchase of funds which though not unsuitable in themselves are made so frequently that their object is to generate commission for the bank. The O'Hares' expert said this was not made out. A separate claim for negligent misrepresentation was not developed. Counsel for Mr & Mrs O'Hare said it no longer added materially to the other causes of action.

What were the issues that the judge had to try?

After hearing the evidence in a trial lasting 10 days, the judge determined that he had to determine these 4 issues:

- Whether the 2007-8 investments were suitable or whether it was negligent to recommend them,
- Whether the bank undertook a binding legal obligation to resolve the OCR complaint. If so what it was and whether it was fully or partly performed,
- Whether the 2010 investments were suitable or whether it was negligent to recommend them, and
- The measure of damages suffered (if any).

What did the judge rule on whether the 2007-8 investments were suitable or not?

The judge rules that there was '*nothing intrinsically wrong with a private banker using persuasive techniques to induce a client to take risks the client would not take but for the banker's persuasion'*. He noted that the expert evidence was that '*it was safer for the adviser to err on the side of caution'*. He ruled that the COBS rules '*do not rule out the use of persuasion'*. There is judicial notice of the financial crisis and he says that '*it cannot be that all who failed to predict it were incompetent'*.

The judge rules that the '*fullness of the information Mr O'Hare was given meant it was impossible to complain that products were mis-sold to him*'. Finally the judge goes out on a limb by siding with the bank's expert who had opined that '*competent practitioners at the time – avoiding hindsight – would not regard investment in the Novus products as foolhardy for persons in the position of the O'Hares'*.

What did the judge rule on the impact of the bank's prior settlement agreement with the O'Hares?

The judge rules that the Court of Appeal decision in *Clarke v. Nationwide Building Society* **[1998] EG 47 (CS)** was '*not authority for a general proposition that offers made "*as a gesture of goodwill*" are not capable on acceptance of binding the offeror'*. He fudges this again by limply ruling that it '*all depends on the circumstances*'. However he then rules that the bank did not come near '*to discharging the heavy onus on it to show that determining the matter objectively the parties did not intend to be legally bound by the settlement agreement*'.

Despite the holes in the bank's evidence as to what credits were given and Miss Barlow's arithmetic that '*she had no knowledge or understanding of'*, the judge against the questionable weight of the evidence presented by the bank which Mr O'Hare disputed, ruled that '*I find myself constrained to accept*' the bank's counsel's submission that '*the obligation had been performed'*. With resounding

confidence which cannot be the case on the bank's evidence, paperwork and calculation, the judge concludes that the '*obligation was to discount future business. That was done'*.

What did the judge rule on whether the 2010 investments were suitable or not?
On this he rules that Mr & Mrs O'Hare do '*not succeed in showing that the 2010 investments in RBSI Autopilot and Navigator products were objectively unsuitable'* even though this meant £10million was placed with one bank and was contrary to the Mr & Mrs O'Hares' objectives of spreading risk. The judge finds instead that these investments significantly reduced the '*proportion of their investable wealth that was exposed to the risk associated*' with the high-risk or wealth generation products.

Mr Eugeni's evidence was that when he took over the portfolio in 2008 he regarded it as '*over-exposed to risk'*. The judge found that the 2010 investments enabled Mr & Mrs O'Hare to borrow more '*for the purpose of financing new business transactions'*. As to the lack of a track record for these new products, the judge brushes this aside and blame Mr O'Hare who he said did '*not properly absorb and digest the explanation*'.

This finding seems odd given the judge's ruling that this explanation had been '*relegated to a footnote in <u>such small print</u> that I infer RBSI would <u>not mind it being overlooked</u>.*' Instead in his judgement, the judge simply forgets the assessment he has made of the evidence and contrarily rules that he rejects the '*suggestion that insufficient information about products….and insufficient comparative information about alternatives was provided'*.

The judge finds that Mr & Mrs O'Hare were sent 2 suitability letters in June 2010 which were supplemented by key features documents. The judge rejects the complaint that Autopilot was misrepresented to Mr O'Hare because it included investments in riskier exchange-traded funds, emerging markets and developed property sectors rather than directly in indices that he wanted. The judge finds that the bank '*did not inform the O'Hares of this*'.

As to the claim relating to the substitution of the Nikkei index for the S&P one, he finds that that was '*an operational breach of contract'* and that this '*breach did not cause any loss'*. He therefore dismissed '*the claim founded on the proposition that Coutts was negligent'*.

What ruling did the judge make on the measure of damages due to the O'Hares?
Having dismissed the claims the judge correctly notes that '*the issues concerning the measure of damages and the quantum of damages do not arise*'. He then goes on to consider whether a contractual or tortious measure of damages would be appropriate. All his comments on this are *obiter* and given the legion issues with everything else the judge gets wrong, need to be treated with a pinch of salt.

For what it's worth the judge says that he would not have allowed Mr & Mrs O'Hare *'to benefit from the more favourable measure of damages in tort*' reasoning that this would mean that '*they would be benefitting from their failure to bring the contract claim less than 6 years before the cause of action in contract arose*'. Having said this, rather oddly the judge then says that he doubts '*whether the measure of damages in tort would be different from the contractual measure'*.

What was the order the judge made?
The judge dismissed all claims. Costs will usually follow the event so that Mr & Mrs O'Hare will have to bear all their own costs (unless their solicitors were acting on a conditional fee agreement or similar). They will have to pay the bank's costs.

Will there be an appeal?
Mr & Mrs O'Hare have 21 days from the handing down of the judgment to lodge an application for permission to appeal with the Court of Appeal. To be in time, this must be lodged by 30 September 2016. It was a 10 day trial and in some ways the claim was too broad. If they focus on their really good points and can identify where the judge failed to deal with this properly in his judgment, then there are good prospects of permission being granted. Conversely, in his evidence Mr O'Hare said he regarded some (but not all) the investments 'as a punt'. If he has taken the same attitude to success in this litigation, he may decide to cut his losses and enjoy some time in his Florida home instead.

Is there anything which seems questionable in the judgement?

From a stand back reading, there are the following 8 points which stand out as indicating the judge has come to the wrong result in this case.

- The judgement is not well structured or organized. This of itself indicates muddled thinking by the judge. In relation to the facts, dates and features of the various products sold, the judgment doesn't even indicate clearly which what the risk profile was and what the losses were claimed for each.
- The judge's conclusions in relation to the failure to call Mr Shone cannot be supported and are arguably wrong. Mr Shone was a competent and compellable witness. The bank should have issued a witness summons to compel his attendance. Mr Shone had critical evidence to give as to whether he unduly persuaded Mr & Mrs O'Hare to load up their risk profile with the result that their exposure increased whilst his commission levels increased. Although the judge sets out the submissions from both sides on this, it is submitted he comes to the wrong conclusion. The judge should have made an adverse finding against the bank for failing to call this critical witness. Instead the judge wrongly says that he finds '*no relevant procedural failure on Coutts' part'*. This cannot be right and is contrary to his other findings & evidence.
- The judge simply rattles off a list of numbers from the COBS rulebook. He fails to demonstrate in his judgment that he has looked at the actual rules – still less to make an assessment of whether the bank has complied with the rules for each product at the time of each sale or not. This is an obvious flaw in the judgement and one that a Lord Justice of Appeal considering an application for permission to appeal should readily pick up.
- On COBS, the judge rules that they '*add nothing into the obligation's implied into the O'Hares' contract*'. Whilst the bank's contract(s) with Mr & Mrs O'Hare should be COBS compliant, there is no guarantee that they were. This is moreover the case where the business relationship predated the rules by many years. This seems to beg the question and the judge has ducked this critical issue. Further as the judge found that the bank couldn't even get its sums correct as to what compensation was credited to Mr O'Hare and when, this should have sounded alarm bells that all was not well with the bank's systems and controls. The judge should have been more robust and inquisitive into COBS compliance than he was.
- The judge fails to set out clearly and in 1 place his assessment of the witnesses. These assessments are there but they are littered throughout his rambling 43 page judgement. It is clear when the assessments of the 4 bank witnesses are grouped together, just how poorly they all stood up in cross-examination. If the judge had written his judgment properly, then this should have then caused him to stand back and treat the bank's evidence as a whole with more circumspection.
- Conversely, the 3 witnesses on the other side all stood up exceedingly well. Mr O'Hare made admissions that he needed to. Mr O'Hare was candid that he regarded some of the Novus investments as a punt and took those losses on the chin. However Mr O'Hare was focussed. His real gripes remained in relation to OCR and the bank's botched complaint and the way he was misled into buying the RBSI products based on their bogus past performance claims.
- The judge fails to group the products sold, the dates and the risks. When this exercise is undertaken it bears out what Mr O'Hare is saying that he was subjected to ever heavier persuasion techniques by the bank to buy ever riskier products. The judge accepts Mr O'Hare's evidence on this. The judge does not have the evidence from Mr Shone and does not accept the reason the bank gives as to why Mr Shone cannot be called. Pulling the strands together, the judge should have gone on to find that the case on '*persuasion*' and pushing ever more risky products against Mr O'Hare's wishes was made out.
- Finally the judge goes down a blind alley with his focus on *Bolam* and the test in medical negligence cases. There have been a number of Court of Appeal cases on investment mis-selling and others are pending. He should have focused on these, the FiSMA duty and COBS. Instead he allows himself to get diverted, makes comparisons with solicitor's advice cases whilst all the while failing to concentrate on what really went on in the case before him.

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