

Bankers must know their products

David McCrostie and Fiona Reynolds | April 2013 | Banking

In *Coco v Westpac Banking Corporation* [2012] NSWSC 565, the Supreme Court of NSW found a bank guilty of having engaged in misleading and deceptive conduct as a result of the oral representations made to a customer by one of its financial advisors.

It is a sobering lesson to all lenders to ensure that staff are trained and tested on their understanding of the financial products on offer. As this case demonstrates, verbal representations may trump what is contained in any written contract signed by the customer.

The Facts

The plaintiff, Mr Coco, is a retired businessman and a long standing customer of Westpac. Mr Coco discussed his financial position with one of Westpac's financial advisers, a Mr Daly.

Mr Daly told Mr Coco certain things about a new Westpac product. Based on what Mr Daly told him, Mr Coco arrived at certain understandings about the way the particular product works; most particularly, Mr Coco understood that Westpac guaranteed to him that at the conclusion of the five year investment term, his capital investment would be returned and a profit would be paid.

What Mr Daly told Mr Coco was, albeit innocently, incorrect. Westpac offered no such guarantee to investors in the product being offered: that much was plain from the documents that Mr Daly gave Mr Coco.

Mr Coco invested in the Westpac product. The GFC occurred two years after the investment. Mr Daly informed Mr Coco that he would receive his capital investment back but no profit. Mr Coco sued Westpac for, generally, misleading and deceptive conduct.

The bank denied Mr Daly gave Mr Coco the advice alleged and denied any wrongdoing in its defence to Mr Coco's suit.

The Decision

The Court preferred the evidence of Mr Coco over that of Mr Daly.

Mr Coco was able to establish that he has suffered a loss as a direct result of each of Mr Daly's inaccurate statements. This was notwithstanding that the bank's documentation (apart from a statement of advice Mr Daly prepared) did not represent that the product

operated in the way it was explained to Mr Coco by Mr Daly.

The Court took the view that Mr Daly's oral representations qualified the written documents.

The Court noted that it was open to Mr Daly to refer Mr Coco to the Bank's written material to answer any query that he had in relation to the product; however, he declined to do so and provided Mr Coco with advice that was wrong.

Mr Coco sought to have his damages assessed on a 'no transaction basis' which would require the Bank to restore him to the position he would have been in had he not entered into the transaction which, he said, was \$5,171,954.

The Court declined Mr Coco's assessment of the measure of his damages. Instead, it determined that a more appropriate form of relief would be for Mr Coco to be awarded the value of the deal that he understood he would receive.

On this basis, the Court determined Mr Coco's measure of loss to be \$2,701,238.

Conclusion

This decision demonstrates that lenders must ensure that its agents and employees are thoroughly trained and have a proper understanding of its products. Lenders are bound by the conduct of their employees and agents.

It is a timely reminder to financial advisors. If you are in the business of providing advice in relation to certain investments products, be sure to know exactly how they work and what they will deliver to your client.

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