



BANKING & FINANCE LITIGATION UPDATE

ISSUE 68

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The Banking & Finance Litigation Update is published monthly and covers current developments affecting the Group's area of practice and its clients during the preceding month.

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DOMESTIC BANKING

BANK OF ENGLAND

1. The Bank of England's Funding for Lending Scheme has not resulted in an increase in lending during its first 12 months of operation. In fact net lending by banks and other financial institutions involved in the scheme has gone down slightly.

Guardian, 3 September 2013

2. Mark Carney expects interest rates to remain low for the next three years and for the level of assets purchased as part of the Bank's quantitative easing policy to remain at £375 billion.

Guardian, 29 August 2013

3. Mark Carney has implemented a new radical policy known as "forward guidance" under which interest rates will be kept low for the next three years until unemployment falls from 7.8 per cent to 7 per cent.

Telegraph, 8 August 2013

4. The Prudential Regulation Authority (PRA) has issued a consultation paper relating to the implementation of the Basel III requirements in Europe and has ordered UK banks to reduce a capital shortfall of £121 billion within the next six years. The PRA's chief executive said that "Well capitalised and resilient firms are crucial for ensuring financial stability and supporting UK growth".

Telegraph, 3 August 2013

BARCLAYS

5. Barclays has said that it will publish more information on complaints than the Financial Conduct Authority ("FCA") requires it to do going forward. The bank intends to publish the data quarterly instead of twice a year.

Times, 21 August 2013

6. Barclays is planning to sell off its retail lending business in the United Arab Emirates following a review by its chief executive Antony Jenkins. The bank has said it wants to focus on businesses and regions where it is strongest and can develop.

Times, 14 August 2013

7. Barclays has said that another nine banks are to be added to the syndicate which will run its recently announced £5.8 billion rights issue, bringing the total so far to 14. Barclays is intending to use the issue to close a £12.8 billion shortfall in its capital

following a capital requirements review by the PRA.

Telegraph, 6 August 2013

CO-OPERATIVE BANK

8. The Co-operative Bank is to close its offshore branch in Guernsey as part of a wider plan to simplify its business. The closure follows a similar move by the Bank of Ireland which closed its Isle of Man branch in August.

Telegraph.co.uk, 2 September 2013

9. The Co-operative Bank has warned that it will go bust unless it can push through a £1.5 billion rescue plan. Euan Sutherland, Group Chief executive, has warned that there is "no plan B" if bondholders fail to approve the rescue package.

Independent, 31 August 2013

HSBC

10. Wealth management and insurance products will no longer be offered by HSBC in Bahrain, Jordan or Lebanon, a decision the bank said was taken in line with its commitment to only operate where it has profitable scale. The review of its global business has already seen HSBC cut its retail banking in those countries.

Times, 2 September 2013

11. HSBC has confirmed plans to increase charges for 700,000 small business customers from the beginning of September, with a number of customers likely to find themselves being charged for the first time. The monthly account maintenance fee will rise from £5.00 to £5.50.

Times, 30 August 2013

12. Foreign diplomats in London have been asked by HSBC to close their accounts as part of the bank's efforts to reduce its business risks. Over 40 embassies, consulates and high commissions have been affected by the request, including those from the Vatican, Benin and Papua New Guinea.

Independent.co.uk, 4 August 2013

LLOYDS BANKING GROUP

13. Hopes are rising that Lloyds Banking Group will shortly start selling the 39% stake in the business currently owned by UK taxpayers. This follows the sale of the bank's German life insurer, Heidelberger Leben, for £255 million to Cinven and Hannover Re, as well as the raising of a further £254 million through the sale of a portfolio of high risk loans to ELQ Investors II Ltd.

Guardian, 22 August 2013

14. The 632 branches of the new TSB Bank, created by the division from Lloyds Bank, will open for business to their 4 million customers on 9 September. The new bank's website will also be launched. Existing customers of both banks will be able to use branches of both banks until sometime next year when the two banks will formally split.

Sunday Telegraph, 18 August 2013

15. Lloyds Banking Group is stepping up its plans to sell off assets which are no longer felt to form part of its core business and has received a number of bids for its asset finance and commercial lending business in Australia, valued collectively at almost £600 million. The bank is thought to be drafting a shortlist ahead of a sale scheduled for the end of the year

Telegraph, 14 August, 2013

16. Lloyds Bank has reported a return to profit for the first half of 2013 for the first time since the financial crisis hit in 2008. Profits of £2.1 billion were announced - a massive improvement on the same time in 2012 when the bank recorded a loss of £439 million. The figures have increased speculation that the government will sell off the taxpayers share in Lloyds in the very near future.

Guardian.co.uk, 1 August 2013

THE ROYAL BANK OF SCOTLAND

17. A court case brought by a hedge fund against The Royal Bank of Scotland ("RBS") in relation to a £630 million property deal has been dismissed by a High Court judge. The hedge fund, which had used a syndicated loan to invest in a property portfolio run by RBS, argued that the bank had failed in its duty by not communicating to the other lenders that there were problems with the portfolio.

Times, 4 September 2013

18. W&G Investments, one of the bidders for the 315 branches RBS is selling, has offered to boost its bid by letting the lender keep an interest in the business. The consortium of UK fund managers, which is fronted by Andrew Higginson, has suggested RBS could offer it a loan as it battles to compete with two rival bids from private equity firms.

Times, 31 August 2013

19. A new lending drive by RBS has extended an additional £3 billion of funds to 8,500 small and

medium sized enterprises. smaller parts, arguing that such a review would "generate significant additional costs".

Times, 29 August 2013

20. A campaign to break up RBS is being intensified by MPs amid suspicions in Westminster that the bank and officials at the Treasury will attempt to prevent a good bank-bad bank division. The Parliamentary Commission on Banking Standards said in a letter to the Financial Times that it is "important for all the options for [RBS's] future structure to be examined as a matter of urgency".

Financial Times, 27 August 2013

21. RBS could be fined by Brussels over a delay in the sale of its "Project Rainbow" branches which it must sell as a consequence of receiving state aid during the financial crisis. The lender was given until the end of 2013 to sell the 315 branches by the European Commission. Although three bidders are vying for control of the business, sources close to the bid battle say it will be impossible to meet the deadline.

Sunday Times, 25 August 2013

22. Fitch Ratings agency has said that the cost of dividing RBS into a "good bank" and a "bad bank" will exceed the benefits.

Telegraph, 15 August 2013

23. RBS and NatWest customers will receive 1 per cent of the amount they spend using their debit card in a pioneering scheme called Cashback Plus. Customers who use the card in selected stores will be given points which can be exchanged for cash once they have collected the equivalent of £5.

Telegraph, 15 August 2013

24. Philip Green will lead a bid backed by the Church of England to buy the so-called "Project Rainbow" branches from RBS. The former chief executive of United Utilities said he would "bring back traditional banking" if the bid was successful.

Telegraph, 8 August 2013

25. RBS's incoming chief executive, Ross McEwan, will forgo his annual bonus for the first 15 months of his tenure in an attempt to defuse the explosive subject of pay which plagued his predecessor, Stephen Hester. The lender's chairman, Sir Philip Hampton, said Mr McEwan wanted to "start life as RBS CEO with as little pay drama as possible". Mr McEwan will be paid less than Mr Hester, with

an annual salary of £1m, but will be entitled to a long-term incentive plan for 2014.

Financial Times, 3 August 2013

26. RBS reported a £1.4 billion profit for the first half of 2013 compared to a loss of £1.7 billion in the same period in 2012. Stephen Hester, the bank's outgoing chief executive, said it was "highly symbolic" that it had achieved two quarters of profits in 2013 for the first time since the financial crisis when it was saved by a £45.5 billion cash injection from the Government.

Times, 3 August 2013

STANDARD CHARTERED

27. Standard Chartered has been forced to take a \$1 billion charge against the value of its South Korean business following the introduction by the South Korean Government of a scheme to reduce the nation's household debt. The charge caused the bank's pre-tax profits to fall by 4 per cent from \$4 billion to \$3.3 billion.

Times, 7 August 2013

DOMESTIC GENERAL

28. The FCA has revealed that £500,000 has been paid out so far by Britain's banks to compensate those companies which were mis-sold interest rate swaps, with the figure likely to rise in the coming months.

Guardian.co.uk, 4 September 2013

29. The first half of 2013 saw complaints made to the financial ombudsman climb to a record high, largely driven by the on-going scandal of mis-sold payment protection insurance. Between January and June the ombudsman had over 327,000 new complaints, an increase of 15 per cent on the previous six month period, with PPI related complaints making up 86 per cent of the total.

Guardian, 3 September 2013

30. £1.1 billion is to be paid by British banks to reimburse savers who in 2008 lost access to their deposits in failed Icelandic banks. The payments will go to the Financial Services Compensation Scheme (FSCS), with the first of three yearly tranches beginning in September. The money will be used by the FSCS to repay a loan from the government that is due in April 2016. As the FSCS did not have adequate funds at the time to honour deposit guarantees, the Treasury footed the bill.

Financial Times, 2 September 2013

31. Barclays, HSBC, RBS and Standard Chartered have argued against plans put forward by the Competition Commission to force blue-chip companies to review their auditors every five years. The banks argue that the proposed measure would be disruptive, costly and could harm both the quality of oversight and competition.

Times, 28 August 2013

32. Members of the Parliamentary Commission on Banking Standards are to give increased scrutiny to the Government's reforms of the banking industry, including a possible split of RBS. The Commission's chairman, Andrew Tyrie, has warned that the commission would be "vigilant" over the approach and actions taken by the Government. Mr Tyrie's warning comes amid concerns that some of the key proposals set out by the commission could be watered down by the Government, with the authorities having effectively ignored a number of major proposals.

Telegraph, 28 August 2013

33. The FCA has identified fraud and mistakes made on small smartphone keypads as potential hazards faced by consumers using mobile banking. Consumers have been advised by the FCA that they should make sure phones and tablet computers are protected from fraud and viruses, whilst also taking care to ensure they type in the correct details and amount when transferring cash or making payments.

Independent.co.uk, 27 August 2013

34. Formal EU guidance on financial regulations has been rejected for the first time by the new markets supervisor in the UK, which has instead adopted rules favouring bankers and brokers. The last couple of months have seen the FCA publicly break from the formal EU interpretation of two rules in moves seen by City experts as linked to the tougher stance taken on Europe by the government.

Financial Times, 27 August 2013

35. Lenders have agreed to pay compensation of up to £1.3 billion to customers who were mis-sold credit card insurance. The FCA has revealed that lenders received commission rates as high as 60 per cent. 13 banks and other card issuers will refund credit card customers who were referred to insurance provider CPP for extra protection against identity theft and stolen cards.

Financial Times, 23 August 2013

36. Mukhtar Ablyazov, the former chairman of Ukrainian lender BTA Bank, who is being held in

Nice pending his extradition to Ukraine on fraud charges, has been refused bail. He spent time on the run before being apprehended at the end of July at a villa in Cannes. Ablyazov stands accused of stealing \$6 billion (£3.8 billion) from BTA and causing losses to a number of banks including Barclays, HSBC and RBS.

Times, 23 August 2013

37. A new survey by recruitment group Robert Half has shown how base pay is being pushed up in anticipation of an EU-wide regulation placing a cap on bonuses, with nearly two-thirds of financial services companies in the UK indicating that they have increased the salaries of key staff. Some bankers have warned that the cap, which comes in in 2014, will weaken links between performance and pay.

Financial Times, 20 August 2013

38. A report from KPMG has highlighted that, for the first time in three years, the country's largest banks have all returned to profit. In a sign of the returning health of the sector, Barclays, HSBC, Lloyds, RBS and Standard Chartered posted a combined profit of £16.5 billion for the first half of 2013.

Telegraph, 19 August 2013

39. On 16 September banks and building societies will launch a new service enabling account holders to change providers within a guaranteed seven days. The service was one of the recommendations made by the 2011 Vickers banking commission and, according to the Payments Council, will be available at 33 bank and building society for both individuals and small business customers.

Financial Times, 16 August 2013

40. Plans for the largest financial services firms to set a "target for gender representation on the management body" have been outlined by the PRA. Few clues have been provided as to what the target will be or which firms will have to set it and there is also no definition of what is meant by 'management bodies'. The targets are likely to only apply to a handful of the largest firms.

Guardian, 13 August 2013

41. Age UK has warned that some elderly people will be disadvantaged and confused by moves by some banks to remove paying-in slips from branches or not send out paying-in books to customers. A number of banks no longer provide either service.

Sunday Times, 4 August 2013

42. Compensation payments for mis-sold Payment Protection Insurance have now reached £18.4 billion, with banks having agreed to pay compensation that would equate to nearly £400 for each adult in Britain.

Times, 2 August 2013

EUROPEAN BANKING

BANK OF IRELAND

43. Bank of Ireland has announced that its pre-tax losses for the first six months of 2013 have been cut by over a half, compared to losses made at the same time in 2012. Losses were down to €504 million whilst revenues were up to €1.19 billion, a rise of over 35 per cent.

Times, 3 August 2013

CREDIT SUISSE

44. A \$2.5bn "wipeout" bond has been issued by Credit Suisse as banks across Europe get ready to do the same in an attempt to appease regulators keen for increased loss-absorbing capital.

Financial Times, 3 August 2013

EUROPEAN CENTRAL BANK

45. Gender targets have been brought in by the European Central Bank ("ECB") for the first time in an effort to double the number of women in its senior ranks. Under the plans, the number of women in senior management roles such as directors will increase to 28 per cent (from the current level of 14 per cent) by 2019. The ECB is also looking to boost the number of women in its middle management positions from the current 17 per cent to 35 per cent during the same period.

The Times, 30 August 2013

46. ECB president, Mario Draghi, has heralded an era of "richer communication" and increased transparency over how the governing council of the bank reaches its monthly decisions on interest rates. The practice of the ECB in keeping the minutes of those meetings secret for 30 years has been the subject of much debate, especially as it contrasts with other central banks which often publish the minutes within a month of the meetings being held.

Financial Times, 2 August 2013

SANTANDER

47. Santander has been voted the third "best bank" in the bi-annual user survey of the MoneySavingExpert.com website. The Spanish lender has turned around its reputation since the last time the survey was carried out in February 2013.

Times.co.uk, 21 August 2013

48. Talks between Santander and Funding Circle, by which the bank may start passing on information about small businesses looking for loans, have been defended by the peer-to-peer lender's chief executive, Samir Desai. Mr Desai described the talks as a signal that Funding Circle was "transitioning to the mainstream".

Sunday Telegraph, 4 August 2013

EUROPEAN GENERAL

49. The European Commission is to push ahead with a number of controversial reforms that will effectively lead to the end of Europe's €450 billion fixed value money market fund industry. A draft law is to call for so-called "constant net asset value (CNAV)" funds to be made to hold a cash buffer of 3 per cent in order to help avert a repeat of the "runs" some funds faced during the 2008 financial crisis.

Financial Times, 2 September 2013

50. There are signs that recruitment is starting to pick up again with a number of investment banks including Bank of America, Citigroup and Nomura beginning to hire dealmakers and traders in Europe. New staff are being hired in a number of revenue-generating positions.

Financial Times, 21 August 2013

51. Analysis by RBS has concluded that €661 billion of assets will have to be cut by Europe's biggest banks and €47 billion of capital generated in the next five years, if they are to comply with regulations aimed at reducing the chances of another taxpayer-funded bailout. Banks singled out in the report as most in need of fresh capital are Barclays, Crédit Agricole and Deutsche Bank. RBS say banks in Europe need to get rid of €3.2 trillion in assets by 2018 in order to comply with rules on capital and leverage in Basel III. It is smaller banks who have the largest burden, needing to get rid of €2.6 trillion from their balance sheets.

Financial Times, 12 August 2013

52. A study by the European Banking Authority, which examined how low-risk debt held by 35 big banks was treated, has found that it is differences in regulation and variation in collateral and maturity, as opposed to any regular effort to minimize potential losses on their balance sheets, which are responsible for the wide discrepancies in how banks across Europe calculate risk for sovereign and top-quality corporate debt holding. The study called for more moves towards a harmonisation of risk model rules.

Financial Times, 6 August 2013

INTERNATIONAL BANKING

BANK OF AMERICA

53. Bank of America is selling its final set of shares in China Construction Bank (CCB) which it purchased in 2005. The shares are worth \$1.5 billion and represent 1 per cent of CCB's shares and mark the bank's departure from the Asian investment market following similar moves made by Goldman Sachs and Citigroup.

Financial Times, 3 September 2013

54. Merrill Lynch, the subsidiary of Bank of America, could be merged with the US investment bank by the end of 2013 in a move to reduce costs and streamline operations. The Merrill Lynch brand will be retained for Bank of America's brokerage and investment bank.

Telegraph, 17 August 2013

GOLDMAN SACHS

55. Goldman Sachs saw its European profits fall by 60 per cent in the first six months of 2013, going from \$847 million for the same period in 2012 to \$335 million for this year. The bank has also estimated that its UK corporation tax bill for the period will increase to almost \$89 million, a rate of 26 per cent on profits, which is higher than the rate it paid for the same period in 2012.

The Times, 3 September 2013

56. Highlighting tentative efforts within the banking industry to boost liquidity in the \$9.1 trillion market for corporate debt, Goldman Sachs has been trying to enlist other banks to its electronic bond trading platform. A number of big banks have set up their own "single dealer" electronic trading platforms as they experiment with ways of trading corporate bonds. However there remains distrust

amongst most in the bond market of bank-run platforms.

Financial Times, 19 August 2013

57. Goldman Sachs is to sell a majority stake in its London-based specialist pensions business, Rothesay Life. The operation insures companies in the UK against the expense and volatility of their defined benefit pension schemes and bankers have estimated its value at £750 million to £1 billion.

Financial Times, 9 August 2013

JP MORGAN

58. Following criminal fraud charges made by the US Department of Justice ("DoJ") against two of JP Morgan's London-based traders, Javier Martin-Artajo and Julien Grout, in relation to the investigation into derivative losses made by Bruno Iksil, the "London Whale", the Serious Fraud Office has said that it is now involved in the investigation and is "liaising" with both the DoJ and the FCA.

Telegraph, 22 August 2013

59. The metals warehousing industry is under investigation by the Commodity Futures Trading Commission (CFTC) in the United States. The CFTC has subpoenaed JP Morgan and Goldman Sachs, as well as Glencore's metal warehousing division Pacorini, ordering them to disclose documents and emails as part of the investigation.

Telegraph, 13 August 2013

NATIONAL AUSTRALIA BANK

60. Credit ratings agency Moody's has downgraded Clydesdale Bank, owned by National Australia Bank, amid doubts about the future ownership of the bank, perceived low profitability and a view that it is weakened by its business lending.

Sunday Times, 25 August 2013

61. In its third-quarter filing National Australia Bank has set aside extra money to cover mis-selling of payment protection insurance at its UK subsidiaries Yorkshire Bank and Clydesdale Bank. The bank has said that UK profits were "broadly stable" and bad debt charges were down.

Times, 21 August 2013

INTERNATIONAL GENERAL

62. A planned new set of international capital rules would see institutions that fail bailed out by bondholders rather than taxpayers. Support for the plan is being sought by global regulators from world leaders at the G20 summit in Russia. The proposals would force banks to hold a minimum level of debt that could be "bailed in" should a bank collapse.

Financial Times, 3 September 2013

63. A tax agreement agreed by the Swiss and US governments could see around a hundred Swiss banks facing serious penalties. The agreement, which applies to Swiss second-tier banks, gives the banks a chance to resolve disputes over alleged tax evasion by wealthy Americans and marks significant progress for authorities in the US.

Independent, 31 August 2013

64. The latest meeting of the Financial Stability Board has seen global regulators propose tough new restrictions on the ability of banks, brokers and investment managers to temporarily trade securities for cash. The proposals are part of a wider attempt to tackle risks posed by "shadow banking".

Financial Times, 30 August 2013

PRESS RELEASES

65. **FCA publishes four month update on the banks' reviews of sales of interest rate hedging products**
The Financial Conduct Authority has published its first update on banks' reviews of sales of Interest Rate Hedging Products

Financial Conduct Authority, 4 September 2013

<http://www.fca.org.uk/news/update-on-the-banks-reviews-of-sales-of-interest-rate-hedging-products>

66. **Commission's roadmap for tackling the risks inherent in shadow banking**
The European Commission has adopted a communication on shadow banking and proposed new rules for money market funds (MMFs). The communication is a follow-up to the 2012 Green Paper on Shadow Banking (IP/12/253). It summarises the work undertaken so far by the Commission and sets out possible further actions in this important area. The first of these further actions - the proposed new rules for money market funds - aims to ensure that MMFs can better withstand redemption pressure in stressed market

conditions by enhancing their liquidity profile and stability.

European Commission, 4 September 2013

http://europa.eu/rapid/press-release_IP-13-812_en.htm?locale=en

67. Aberdeen Asset Managers and Aberdeen Fund Management fined £7.2 million for failing to protect client money

The FCA has fined Aberdeen Asset Managers Limited and Aberdeen Fund Management Limited £7,192,500 for failing to identify, and therefore properly protect, client money placed in Money Market Deposits with third party banks between September 2008 and August 2011.

Financial Conduct Authority, 3 September 2013

<http://www.fca.org.uk/news/aberdeen-asset-managers-and-aberdeen-fund-management-fined-72-million>

68. Bank of England and HM Treasury Funding for Lending Scheme – 2013 Q2 usage and lending data

The Bank has published updated data on the use of the Funding for Lending Scheme (FLS). The latest publication shows for each group participating in the FLS the amount borrowed from the Bank and the net quarterly flows of lending to UK households and businesses eligible under the Scheme up to the second quarter of 2013. In the quarter ending 30 June 2013, 18 participants made FLS drawdowns of £2bn, while one participant repaid £0.9bn. This took the total amount of outstanding drawings under the Scheme to £17.6bn, with 28 groups now benefitting from funding under the Scheme. Net lending by FLS participants over the quarter was £1.6bn, slightly stronger than in previous quarters, although net lending overall since the Scheme began remains broadly flat.

Bank of England, 2 September 2013

<http://www.bankofengland.co.uk/publications/Pages/news/2013/100.aspx>

69. Prudential Regulation Authority Statement on liquidity

Mark Carney, Governor of the Bank of England, confirmed in a speech that the PRA Board will implement the June 2013 recommendation of the Financial Policy Committee regarding the amount of liquidity held by banks and building societies.

Prudential Regulation Authority, 28 August 2013

<http://www.bankofengland.co.uk/publications/Pages/news/2013/099.aspx>

70. PRA statements on bank capital and leverage ratios released in 2013

Copies of the statements on bank capital and leverage ratios released by the PRA in 2013 have been published.

Prudential Regulation Authority, 28 August 2013

<http://www.bankofengland.co.uk/publications/Pages/news/2013/081a.aspx>

71. New report paints picture of 2022 payments

A new report published by the Payments Council shows the latest developments in payment behaviour and forecasts what life could be like in the payments industry in 2022. The report, UK Payment Markets 2013, looks at the way in which consumers are likely to make payments over the next ten years.

Payments Council, 19 August 2013

http://www.paymentscouncil.org.uk/media_centre/press_releases/-/page/2670/

72. BIS Working Papers - No 421: Evaluating early warning indicators of banking crises: Satisfying policy requirements

A Bank for International Settlements working paper discusses the evaluation of early warning indicators (EWIs) of banking crises on the basis of their performance relative to the macroprudential policy maker's decision problem, and discusses the practical aspects of this problem, including difficulties in assessing the costs and benefits of various policy measures and requirements for the timing and stability of EWIs.

Bank for International Settlements, 14 August 2013

<http://www.bis.org/publ/work421.pdf>

73. Bank of England provides explicit guidance regarding the future conduct of monetary policy

At its meeting on 1 August, the Bank of England's Monetary Policy Committee (MPC) voted to provide some explicit guidance regarding the future conduct of monetary policy. The Committee intends at a minimum to maintain the current highly stimulative stance of monetary policy until economic slack has been substantially reduced, provided this does not entail material risks to either price stability or financial stability. In particular, the MPC intends not to raise Bank Rate from its current level of 0.5% at least until the Labour Force Survey headline measure of the unemployment rate has fallen to a threshold of 7%, subject to some conditions.

Bank of England, 7 August 2013

<http://www.bankofengland.co.uk/publications/Pages/news/2013/096.aspx>

74. The Prudential Regulation Authority consults on strengthening capital standards

The PRA has published a consultation paper on changes to its rules required to implement the EU's Capital Requirements Directive. These changes will affect banks, building societies and those investment firms which are regulated by the PRA. It does not affect insurance firms.

Prudential Regulatory Authority, 2 August 2013

<http://www.bankofengland.co.uk/publications/Pages/news/2013/097.aspx>

75. Financial Conduct Authority publishes preliminary findings of review into mobile banking

The FCA has published a report exploring some early findings of a review into mobile banking services, setting out the possible risks to consumers and areas that firms should consider when developing their services

Financial Conduct Authority, 27 August 2013

<http://www.fca.org.uk/news/review-into-mobile-banking>

CASE LAW

76. PPI claim struck out when full compensation already offered under ADR scheme

Can a court terminate a claim when compensation has already been offered under an alternative dispute resolution (ADR) scheme but has not been accepted?

Here the claimants were mis-sold Payment Protection Insurance ("PPI") relating to a credit agreement by Firstplus Financial Group PLC ("FFG"). They made a claim under an ADR scheme set up by the Financial Services Authority ("ADR Scheme") reserving the right to make a county court claim. The ADR scheme made an award offering full monetary compensation for the losses incurred but no legal costs. The claimants then started a county court claim claiming additional damages.

FFG applied for summary judgment and/or to strike out the claim.

The District Judge thought there was a prospect that the claimants might be entitled to further damages above what had been offered under the ADR Scheme under s.140A of the Consumer

Credit Act and allowed the claim to continue. She did however warn the claimants that they might be exposed to an adverse costs order if they failed to recover more. FFG appealed.

Were there reasonable grounds for bringing the claim when there had been an offer of more than adequate redress under the ADR Scheme?

The judge noted that the FSA Scheme is free for users and saves costs. The claimants' continued pursuit of their court claim was neither a proportionate use of valuable court resources nor an appropriate way to resolve the dispute. Whilst it is a principle of English justice that no one should be deprived of access to the courts, it is equally axiomatic that courts should be masters of their own proceedings and should be entitled to devise procedures for dealing with cases which are an abuse of process. Where appropriate, courts should be able to deal with cases summarily either by striking them out or giving summary judgment. The courts have a duty under the overriding objective to encourage ADR. The proportionate management of cases is of cardinal importance.

Having regard to these principles, the court must possess the power to prevent litigation which has already achieved its objective from continuing.

If a party has a realistic prospect of obtaining greater damages or some other material advantage relevant to the case itself (as opposed to costs) the claim should be allowed to proceed with a warning as to a costs penalty if the ADR has been unreasonably avoided. But where the advantage is merely an adjunct to the claim - in the shape of costs - the claim must not be allowed to proceed as the court's process is then being used for an improper purpose.

Whilst the s.140A point might succeed, the claim had been accepted under the ADR Scheme and redress had been offered. There was no additional financial advantage to be gained by the pleaded claim under s.140A. The claimants would recover the same amount as they would under ordinary contractual damages. The only advantage in pressing on with the case was the possibility of an award of costs. Even that was highly speculative as the claimants would be at risk of having their costs disallowed on the basis that they should have used ADR.

Litigants should ordinarily follow the ADR route where there is a perfectly good scheme that offers speedy justice and full redress. In appropriate cases the court should and will strike out cases

where full redress has already been offered. Full redress relates to matters intrinsic to the case not costs adjunctive to it.

The claimants' case was struck out in its entirety, though the court made it clear that the ADR offer was still open and provided full redress.

Christopher and Claire Binns v Firstplus Financial Group PLC, Queen's Bench Division, 24 July 2013

77. Letter of credit - omission of ampersand in company name regarded as material discrepancy

Shinhan Bank ("Bank") issued a letter of credit under the standard UCP 600 rules in relation to the supply of grain by Bulgrains & Co Ltd ("B").

The Bank rejected presented documents as discrepant and refused to pay on the letter of credit. B commenced proceedings seeking to enforce the letter of credit.

The Bank claimed that there was a discrepancy between the name of the beneficiary as it appeared on the letter of credit (Bulgrains Co Limited) and as it appeared on one of the documents presented (Bulgrains & Co Limited). It also claimed that the description of the goods given in the commercial invoice did not conform to that given in the letter of credit. It claimed that it had notified these discrepancies to B.

Did the presence or absence of either the ampersand or the word "and" between "Bulgrains" and "Co" make the documentation discrepant? The court found that a document containing an error in the beneficiary's name will be regarded as discrepant unless the nature of the error is such that it is unmistakably typographical and cannot reasonably be referring to a different person/organisation to the one specified in the credit. The name of the beneficiary is a very significant matter. The UCP make it clear that documentary credit transactions are concerned with documents. Banks should not have to assume the responsibility of determining whether a discrepancy is material and risk getting it wrong.

Here, the discrepancy in B's name was not clearly and demonstrably a typographical error. Further, the description of the goods was not sufficient and did not correspond with the letter. The Bank was entitled to reject the documents.

Had the Bank complied with the requirements of articles 14 and 16 of UCP 600 in rejecting the

documents? The Bank had sent two free form SWIFT messages rejecting the documents and then an MT734 SWIFT message. B argued that the first two messages were not article 16 compliant and the MT734 message was not received.

The court held that the Bank had rejected the documents in time and had conformed to UCP 600 articles 14 and 16. Article 16 does not require "receipt" but notice to be given. B had in any event failed to show that it did not receive the MT734 message. The Bank could also rely on art. 35 of UCP which provides that for the purposes of the UCP a bank assumes no liability or responsibility for loss in transit of messages or errors in their transmission.

B complained that the messages rejecting the documents were not compliant because they did not make it clear that the Bank was refusing to honour or negotiate. This argument was rejected. The standard form message MT734 makes the recipient "perfectly aware" that the documents are refused. Even if the text of a message does not say so in terms, an implicit refusal is potentially valid. An MT734 advice of refusal is an industry term of art, the meaning of which is clear though implicit to bankers. The first message had said "Please regard this message as MT734" and in the judge's view there was no meaningful difference between that free form message and the standard form MT734.

The refusal notices were not defective because they did not spell out how the beneficiary's name differed or how and to what degree the description of the goods in the letter of credit differed from that in the invoice. It was not incumbent on the Bank to have to set out the discrepancies verbatim. All B needed to do was to compare one document with another.

The refusal notices were not defective because the Bank failed to expressly state what it was proposing to do with the documents pursuant to article 16(c)(iii). The messages stated "Notify, as per UCP 600 article 16(c)(iii)(b)". The word "notify" is an industry term of art clearly and unequivocally understood to mean:

"Documents held until the issuing bank receives a waiver from the applicant and agrees to accept it, or receives further instructions from the presenter prior to agreeing to accept a waiver".

Even if such language might appear to be code to a lay person, if in communication between banks the meaning is plain and universally understood, that suffices.

B's claim was dismissed.

Bulgrains & Co Limited v Shinhan Bank, Queen's Bench Division, 24 July 2013

78. Mortgagee's duties to residual beneficiary when exercising power of sale

Two companies ("Borrowers") borrowed monies from PK Finance SARL ("PK"), a Luxembourg company which is part of the General Electric Company in the United States, to buy seven aircraft which the Borrowers leased to a German airline, Blue Wings ("BW"). CIS Interfincom AG provided junior finance and was entitled to the interest in any balance of proceeds left after payment of sums due to PK.

PK also financed the purchase of three other aircraft ("the Caelus aircraft") by a company connected to the Borrowers. There was substantial equity in the Caelus aircraft over and above the amounts advanced for them which provided additional collateral for the BW debt. Alphastream Limited ("A") was entitled to the balance of any proceeds left on the Caelus aircraft after payment of sums due to PK. The Caelus aircraft were leased to a different airline, Olympic.

BW filed for insolvency. PK's power of sale arose in respect of the BW aircraft which were repossessed in poor condition. PK had them refurbished, debiting the mortgage account with refurbishment costs of \$49m.

Ultimately PK sold six of the seven aircraft to itself for \$146.8m at an auction at which there were no other bids. PK transferred the aircraft to a European subsidiary of the General Electric Company, GE Capital Aviation Services Limited ("GECAS"), which leased the aircraft to a US airline, JetBlue Airways Corporation ("JB").

The mortgage account was in substantial arrears after the sale. The outstanding balance was set off against the equity on the Caelus aircraft.

The Borrowers' holding companies, together with CIS Interfincom and A, (collectively the "Claimants") brought proceedings against PK and GECAS. They alleged that PK and GECAS had always intended to lease the BW aircraft to JB, that PK had not performed its duty as mortgagee

to take reasonable steps to obtain the best value for the aircraft and had not acted in good faith and for proper purposes.

As the sale was a "sale to self" the onus was on PK to establish that it had complied with its duties as mortgagee.

PK sought to rely on an exemption clause exempting it from liability save in respect of "wilful misconduct". The Claimants sought to argue that PK's conduct amounted to "wilful misconduct".

PK clearly owed duties as mortgagee to the Borrowers and their holding companies as well as CIS Interfincom. However, these entities could not establish any loss as the BW loans were so far "under water". The issue was therefore whether PK owed any duty to A as the residual beneficiary of anything left in the cross-collateralised Caelus equity. If no such duty was owed, could A rely on a breach of duty owed to the Borrowers or subsequent mortgagees to make out a case of causing economic loss to A by unlawful means on the basis that the breaches of duty amounted to the "unlawful means"?

The Claimants also claimed against GECAS alleging that PK's course of conduct was "directed, induced or facilitated" by GECAS so as to ensure the obtaining of the BW aircraft for lease to JB. They alleged that the breach of duty to A was procured by GECAS and that there was a conspiracy between PK and GECAS to cause loss by unlawful means.

It was PK's case that it owed no duty to A and that A had not suffered any recoverable loss. The three Caelus aircraft had not been sold and continued to operate.

The court concluded that as the case involved a sale to a connected party there was a heavy onus on PK to show that it had used its best endeavours to obtain the best price reasonably obtainable. It was not however necessarily impossible for GECAS to have pursued its determination to purchase the aircraft for the purpose of leasing to JB (and thereby strengthened its relationship with JB and obtained concomitant accounting advantages) provided that PK could show that the correct value had been obtained.

Had PK acted straightforwardly it would have been apparent that GECAS was a "special" or "uncommonly motivated" purchaser. The refurbishment works would have been carried out

to get the aircraft into the condition for lease to JB and GECAS would, as "special" purchaser have needed to pay, and be willing to pay more than, the market price. There would have been no need for the auction of "distressed aircraft" which had, according to the expert evidence, automatically devalued the value of the aircraft by 20%.

A reputable valuation should have been carried out on a post refurbishment works basis. That would have valued the aircraft at \$157.3m. As a special purchaser PK would have paid (just) more than this, say \$158m. Had steps been taken to obtain the proper market value, \$158m would have been credited to the mortgage account and not \$146.8m.

In a "connected sale" the desire to obtain the best price must be given "absolute preference" over any desire that an associate should obtain a good bargain.

On the facts, there had been a breach of duty to the Borrowers by PK. PK owed a duty not to have gone through the auction. An independent valuation should have been obtained. There had been a conscious preference of PK's close associate, GECAS. Damages would equate to the difference between the best price reasonably obtainable and the price paid.

The duty owed by the mortgagee to the mortgagor was also owed to A, the residual beneficiary of the proceeds of sale within the same contract structure.

A's loss was suffered when the mortgage account was not credited with the amount it should have been and the value of the equity was thereby diminished, regardless of whether A would, or could, have exercised its option to purchase or sought a remedy under section 91 of the Law of Property Act 1925.

The duty owed to the mortgagors was however limited by the need to show "wilful misconduct". The same limitation applied to the duty owed to A. For "wilful misconduct" to be proved it had to be shown that PK had intentionally done wrong, or been recklessly indifferent as to whether its actions were wrong and whether loss would result, or had taken a risk which it knew it ought not to take.

On the evidence, PK knew it was "going through the motions" and "preferring the interests" of GECAS over its obligations as mortgagee. PK knowingly took a risk in setting up a "minimalist"

auction, in which it would be in a position to outbid any comers by putting forward a bid which was affordable by making use of the Caelus equity, so as to secure the aircraft for GECAS, while paying no regard to its duties to take care to obtain the best possible price. Consequently there was "wilful misconduct".

On the facts, GECAS was also liable for procuring PK's breach of duty and GECAS and PK were liable for conspiring to cause economic loss to A by unlawful means.

Alpstream AG & Ors v PK Airfinance Sarl & Anor, Commercial Court, 31 July 2013

79. No breach of agent's duties to tell lender of an event of default and share financial information

This case arose out of structured lending to a property company ("D") which went into default and entered administrative receivership. The lending was called in and the security realised at a level well below the amount of lending outstanding with the result that lenders at several tiers in the finance structure did not recover their loans.

Two such lenders, Torre and Torre II ("T"), who participated in the finance structure at the Junior Mezzanine (or "B1") Level, brought a claim against The Royal Bank of Scotland ("RBS") which, amongst other roles it held in the finance structure, was the agent at the Junior Mezzanine lending level. RBS was also lender at the Junior Subordinated Mezzanine (or "B2") Level, i.e. the level below T.

The finance structure involved a number of inter-related agreements, including a loan facility agreement applicable to each tier of loans and an Inter-Creditor Deed ("ICD") which governed the relationship between lenders at different tiers in the structure. T claimed that RBS owed T duties as:

- the Agent at the B1 lending tier under the relevant loan facility agreement for that tier, the Junior Mezzanine Facility Agreement ("JMFA"), and
- as both Agent and Lender to D under the ICD.

T's claim had three distinct limbs: an "Event of Default Claim"; a "Business Plan Claim" and a "Negligent Mis-statement" claim.

The Event of Default Claim

In July 2007, in an email exchange between RBS and D, RBS spotted a mistake in interest payment and cashflow projections prepared by D. This resulted in D sending RBS a revised cash-flow spreadsheet which showed compliance with the covenants in the loan documentation and payment of interest on due dates but which would only be possible on the basis that interest due on the B2 loans (i.e. RBS' loans) was rolled up until the maturity of the loan. The projections suggested that unless the interest was rolled up on the B2 loans D would not be able to make their interest payments.

T claimed that these events amounted to an event of default under the JMFA and that, as Agent, RBS was under a duty to tell T. T also claimed that, as B2 Lender, RBS also had a duty to notify itself as agent of the event of default which would then trigger an obligation to notify the other lenders.

The Business Plan Claim

Under the JMFA D was obliged to provide the Agent with an annual budget and the Agent was obliged to circulate this to the lenders.

In October 2007 D provided RBS with a business plan ("Business Plan") and a related cash-flow spreadsheet. T argued that these documents constituted D's "annual budget" and that RBS was under an obligation as Agent to the B1 lenders to provide T with a copies.

The Negligent Mis-statement Claim

T claimed that in January 2008 an RBS employee made negligent mis-statements regarding the reason why RBS was, as lender at the B2 level, asking T to consent to the rolling up of interest due to be paid on the B2 loan held by RBS so that it would only be paid on maturity. T claimed that the false impression had been given that D wanted to roll up the interest due so as to make extra cash available for capital expenditure on D's property portfolio to improve its quality, whereas in reality the rolling up of the B2 interest was a commercial necessity in order to avoid a situation where it would have insufficient cash to be able to meet interest obligations by about mid-2008.

In relation to each of the above claims, T claimed that had they been provided with the relevant information/documents they would have sold their participation or sought some sort of restructuring in 2007 or early 2008 and would not have suffered the eventual loss of the value of their loans.

RBS denied that any event of default had occurred, that any negligent mis-statement had been made or that it was under any obligation to provide T with any more information than that which was provided. It also disputed whether T had suffered any loss as a result of its alleged claims.

Findings on the Event of Default Claim

The court concluded that the exchanges between RBS and D in July 2007 did constitute an event of default but that RBS was not obliged under the JMFA or the ICD to notify T.

Clause 23.5 of the JMFA stipulated that if D "by reason of actual or anticipated financial difficulties" entered into negotiations with one of its creditors (i.e. RBS as lender in relation to the B2 loans) with a view to rescheduling the debt (i.e. rolling up interest payments until maturity) this would constitute an event of default.

Clauses in the JMFA and ICD did require a lender to notify an agent about an event of default but under those clauses the obligation to notify only arose where the party "became aware" of the occurrence of an event of default. Here, the team at RBS did not actually appreciate that the circumstances in July 2007 amounted to an event of default and RBS was not therefore bound by those clauses to notify the agent.

A further clause under the JMFA placed an obligation on the agent to notify lenders if it became aware of non-payment under the finance documents or if it received notice of an event of default from one of the obligors. Neither of these things had happened so there was no obligation.

A further requirement that the agent should use the information it had to "evaluate" whether an event of default had occurred was inconsistent with the agent's stated role as being "solely mechanical and administrative in nature".

The court refused to imply a term into the JMFA that RBS as agent should pass on relevant information about the performance of the transaction to T. Such a term was not necessary and conflicted with express terms in the JMFA, one of which gave RBS a discretion as to whether to pass on information it received in its capacity as agent.

Findings in the Business Plan Claim

D had not put forward the business plan and cash-flow spreadsheet as its "annual budget" and so the

agent was not required to circulate it. The agent was only obliged under the JMFA to circulate financial information provided to it for the purpose of circulation to the lenders. The business plan and cash-flow spreadsheet had not been provided to RBS "for the purpose of circulation to the lenders". The agent's obligations were "solely mechanical and administrative" and did not oblige it to chase D to produce an annual budget.

As in the event of default claim, there was no implied duty on RBS as agent to pass on any financial information it actually received from D.

Findings in the Negligent Mis-statement Claim

RBS had assumed responsibility for the accuracy of the explanation it had given as to why T's consent was sought for the B2 interest to be rolled up to maturity and did owe a duty of care to take reasonable care to ensure that the explanation was accurate. RBS wanted to secure T's consent for its own purposes and appreciated that in order to obtain that consent it had to offer an explanation why it was being sought. It did not have to speak, but chose to do so. It gave a materially inaccurate and misleading account of the reason for the request and of why it was desired to save the cash by rolling up the B2 interest in question.

However, the negligent mis-statement claim failed as the scope of the duty owed was limited. RBS only assumed an obligation to exercise reasonable care to protect T from losses T might suffer from giving their consent to the rolling up of the B2 interest. In the event T suffered no such loss as even though they gave their consent, another lender did not and the proposed change to the financing arrangements to roll up the B2 interest never came into effect. The breach of the duty of care had no impact on T and they suffered no relevant loss as a result of it. The duty of care did not include an obligation to protect T against harm in respect of any decision made by T to remain part of the transaction.

Torre Asset Funding Limited & Anor v The Royal Bank of Scotland plc, Chancery Division, 3 September 2013

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