BANKING DISPUTES

QUARTERLY

Q2 2015

DLA Piper's Banking & Finance Litigation team welcomes you to our quarterly round-up, designed to keep you informed of the latest news and legal developments, and to let you know about future developments that may affect your practice.

INTRODUCTION

Welcome to the summer issue of Banking Disputes Quarterly, keeping you informed about the latest news and legal developments in banking disputes.

In On the Horizon we look ahead to an important appeal to be heard by the Supreme Court in July which will examine whether a contractual right to borrow is an asset which can be frozen under a freezing order (see **Can you freeze a contractual right to borrow?**)

We also consider major reforms to the regulatory regime (see **Senior Managers Regime in force from 7 March 2016**) and Government plans to modernise cheque payments (see **Image conscious? Modernising cheque payments**).

In **Recent Development and Cases** we look at a recent Court of Appeal decision which clarifies the kind of ancillary disclosure orders the courts can make to ensure that freezing orders are effective (see **Fewer place to hide: English Courts can order wily operators to disclose interest in trust under worldwide freezing orders**).

We go on to look at a commercial court decision in which an upside fee for over €100 million survived an attack that it was a penalty and therefore unenforceable (see **Can an upside fee be toppled by the rule against penalties?**)

The importance of the law on penalties is difficult to overstate. It has the potential to impact on a very broad range of contracts, from those negotiated between sophisticated commercial parties with comparable bargaining power at one end of the spectrum to other more standard form consumer contracts at the other. In individual commercial cases the sums involved may be considerable. In consumer cases, whilst the fees in question may be comparatively small, the impact is felt in the volume of contracts which could be affected.

Significant developments in this area are expected later in the summer when the English Supreme Court will hear appeals in the two very different cases of Cavendish Square Holding BV v Tala El Makdessi and Barry Beavis v ParkingEye Ltd and revisit the law on penalties in detail. One issue which the court has been asked to consider is whether the rule against penalties should apply at all to contracts negotiated between sophisticated parties. We will keep you updated.

The last case we focus on is the Supreme Court decision in Tael One Partners Limited v Morgan Stanley & Co International PLC [2015] UKSC 12 in which the court considered how payment premiums should be allocated under the LMA Standard Terms and Conditions.

Finally, in our Spotlight On.... section we focus on our banking disputes practice in New Zealand.

ON THE HORIZON

In this section we summarise cases, legislation and other developments in prospect in coming months

Can you freeze a contractual right to borrow? Supreme Court to consider in July

A freezing order can be an effective means of preventing opponents from disposing of assets before you obtain judgment against them. But what sorts of assets can you freeze and do they include a contractual right to borrow?

The Supreme Court will examine these issues at the end of July when it hears an appeal in the infamous case of *JCS BTA Bank v Ablyazov* (*"Ablyazov")* and considers whether a party's right to borrow under an unsecured loan agreement is the kind of "asset" which can be caught within the ambit of a standard form freezing order.

The point will be of interest to anyone trying to recover money through litigation but particularly those pursuing "*sophisticated and wily operators*" who try to "*thwart … effective enforcement*".

A freezing order prohibits a party from disposing of, or dealing with their assets. The aim is to preserve ownership of assets which could be enforced against should the claimant go on to win their case. A freezing order is a potent weapon. Breach can lead to imprisonment, a fine or having assets seized.

Given the seriousness of breach and the fact that freezing orders are deployed at a stage in litigation where no judgment has yet been entered, fairness to the party against whom an order is sought dictates that such orders should be expressed in clear and unequivocal language and strictly construed against those seeking to rely on them.

In the *Ablyazov* case, Mr Ablyazov ("A") took out four unsecured loan agreements totalling £40 million after a freezing order had been obtained against him. The money was used to pay for his legal and living expenses.

The claimant, JSC BTA Bank ("Bank"), objected, arguing that A's right to draw down under the loan agreements constituted an "asset" for the purposes of the freezing order and that A's exercise of that right amounted to "disposal of" or "dealing with" an asset, both of which were prohibited by the terms of the order. The Bank was concerned that A had diminished his net asset position.

The High Court, and later the Court of Appeal, confirmed that A's right to borrow, which was unsecured and non-assignable, was not to be regarded as an "asset". The wording in the standard form order had to be construed strictly and the words given their natural meaning. Most people "*would be surprised to have an unused loan agreement described as one of their assets*". Also the terms "dispose of" and "deal with" suggested some kind of transfer of an asset rather than the exercise of a right to borrow.

The Bank has appealed these findings.

The issue is of obvious significance to those both seeking and on the receiving end of such orders. Any development could potentially impact on freezing orders already made and have other wide implications. While we await this decision those seeking freezing orders who want their orders to cover contractual rights to borrow will need to adapt the standard wording and use precise and unequivocal language.

If you are interested in this area, see our further article: **Fewer places to hide: English Courts can order wily operators to disclose interests in trusts under worldwide freezing orders.**

Senior Managers Regime in force from 7 March 2016

Changes to the regulatory regime to make senior bank staff individually accountable when things go wrong will come into force on 7 March 2016.

The Senior Managers Regime ("SMR") is a major reform with significant implications for banks, building societies, credit unions and investment firms regulated by the Prudential Regulation Authority ("PRA").

Under the new regime, affected firms must tell the PRA and the Financial Conduct Authority ("FCA") who they intend their senior managers to be and seek regulatory approval for them by 8 February 2016. Firms must allocate specific responsibilities to each of their senior managers and record these in individual statements of responsibilities. Firms must also prepare a "Management Responsibility Map" which will serve as an overall governance map. The intention is that there will be no room for ambiguity about who is responsible for what.

Significantly, in the event of a regulatory breach after 7 March 2016, the onus of proving wrongdoing will no longer rest with the regulator. Instead senior managers will be presumed to be personally responsible and liable to disciplinary action unless they can prove they took reasonable steps to prevent or stop the breach.

The new regime also introduces a new criminal offence of "reckless misconduct". Senior managers could face prosecution for reckless misconduct if their decisions cause a bank or certain PRA regulated financial institutions to fail.

Sitting alongside the SMR there will also be a licensing regime called the Certification Regime ("CR") which will apply to other staff whose actions or behaviour could seriously harm the financial institution or its customers. Such individuals will need to be approved by the bank annually as fit and proper to perform their roles.

Both the SMR and the CR will be supported by new Conduct Rules. These rules will apply to all staff except those carrying out purely ancillary functions such as secretarial and administrative work.

The regulators intend to publish final rules over the course of the summer. This leaves firms with a relatively short time-frame to:

- identify which individuals are in-scope;
- decide on individual responsibilities;
- draft individual Statements of Responsibilities and the Management Responsibility Map; and
- train staff.

For more information on this topic please contact Tony Katz (Partner) tony.katz@dlapiper.com or Sam Millar (Partner) sam.millar@dlapiper.com or click on this link to read our more detailed article.

Image conscious? Modernising cheque payments

Government plans to modernise cheque payments moved a step closer in March with the enactment of the Small Business, Enterprise and Employment Act 2015 ("Act").

From 31 July 2016 cheques can be presented for payment by providing an electronic image rather than the original paper document. The paying bank will no longer have the option of demanding to see the original cheque. Consumers will therefore have more choice over how they deposit cheques in the future, including the option of using their smartphones or tablets. The changes could also speed up

the cheque clearing cycle, possibly reducing the current clearing cycle from six days to as few as two.

The Act also gives the Treasury the power to make more detailed regulations on discrete issues in due course. One issue which will need to be addressed is where responsibility should lie when fraudulent cheques enter the system. Under the current regime the paying bank tends to pay for undetected fraud. Prospective regulations could shift that liability to the collecting bank.

UK banks still process over 750 million cheques a year. Before the Act comes into force, financial institutions providing cheque services will have to ensure that they have the necessary facilities to accept and process cheque images. Current practices will also need to be reviewed and consideration given to what fraud prevention checks might be needed before cheques images are introduced into the clearing system.

Whilst the costs implications may be significant in the short run, over time digitisation could result in considerable efficiency savings and provide opportunities for innovation and new services.

Fewer places to hide: English Courts can order wily operators to disclose interests in trusts under worldwide freezing orders

By Jean-Pierre Douglas-Henry (Partner) and Sean McGuiness (Associate)

Devious operators are good at concealing their assets. They often use complex trust or corporate structures to obscure the position. This makes it difficult for prospective claimants to identify assets which might be available to satisfy any judgment and obtain freezing orders over them. What help can the courts provide in these circumstances?

In February of this year the Court of Appeal clarified the jurisdiction of the English Courts to make whatever ancillary orders are necessary to ensure that freezing orders are effective, including the power to order defendants to provide detailed information and disclosure about their interests in discretionary trusts. Such information may ultimately help prospective claimants go on to obtain freezing orders over trust assets.

Background

In *JSC Mezhdunarodniy Promyshlenniy Bank & Anr v Sergei Viktorovich Pugachev* [2015] EWCA Civ 319, the claimants, JSC Mezhdunarodniy Promyshlenniy Bank (the **"Bank"**) and its liquidators, had brought a claim in Russia exceeding US$2 billion against Mr Pugachev relating to an alleged scheme perpetuated by Mr Pugachev under which he extracted money from the Bank for the benefit of himself and other companies under his control. The claimants successfully obtained a worldwide freezing order (**"WFO"**) in the English Courts against Mr Pugachev in support of the Russian proceedings. The WFO included the standard wording ordering Mr Pugachev to produce a schedule of his assets.

In addition to the standard wording, the order included optional wording recommended by the Commercial Court Guide which prevented Mr Pugachev from "*disposing of, dealing with, or diminishing the value of any of his assets whether he was interested in them legally, beneficially or otherwise*". The order further included bespoke wording which prohibited disposal, dealing with, or diminishing the value of "*any interest under any trust or similar entity including any interest which may arise by virtue of the exercise of any power of appointment, discretion or otherwise howsoever*".

Disclosure of discretionary trusts

Following the granting of the order, Mr Pugachev produced a schedule of assets which confirmed that he was one of a number of beneficiaries in five discretionary trusts based in New Zealand. Following this disclosure, the claimant liquidator successfully applied for an order ancillary to the freezing order that Mr Pugachev swear an affidavit identifying details of the trust assets, and the names of the trustees and beneficiaries. Mr Pugachev was also ordered to provide copies of the trust deeds which were in his control or which he had a right to inspect or copy.

Mr Pugachev appealed, arguing that a beneficiary under a discretionary trust has no proprietary right in trust assets and that in the absence of "good reasons" for supposing that the assets held on trust in fact belonged to him they should not be included within the scope of a freezing order and he should not have to disclose further information.

The Appeal

The Court of Appeal had to decide whether, under the terms of the freezing order as made, the judge was right to

order Mr Pugachev to provide information about the discretionary trusts. Did the court have the jurisdiction to order the disclosure of Mr Pugachev's interest in the trust in the way that it had, and if so what were the circumstances in which it could exercise that jurisdiction?

The Court of Appeal followed *JSC BTA Bank v Ablyazov* [2014] 1 WLR 1414 noting the three guiding principles with respect to freezing injunctions identified by Beatson LJ in that case, being:

1. **The enforcement principle:** the purpose of a freezing order is to stop dissipation or disposal of a defendants property which could be subject to enforcement if the claim ultimately succeeds;
2. **The flexibility principle:** the Court should exercise its jurisdiction to grant freezing orders in a *"flexible and adaptable manner"* to deal with new situations and new ways used by *"sophisticated and wily operators"* to thwart enforcement of freezing orders; and
3. **The strict interpretation principle:** freezing orders should be clear and unequivocal and strictly construed due to the penal consequences of breaching a freezing order and the defendant needing to know where they stand.

Appeal upholds order to disclose

The Court of Appeal upheld the order, noting that the courts have jurisdiction to make freezing orders and to make whatever ancillary orders are necessary to make them truly effective. At this juncture the claimants were only seeking information in relation to Mr Pugachev's interest in the trusts and not an order preventing him from dealing with assets which would be much more intrusive. The claimants merely wanted the opportunity to test their assertion that Mr Pugachev was the effective owner of the trust assets. On that basis the evidential threshold which the claimants had to meet was lower than that required to secure an order freezing those assets.

Comment

The judgment provides clarity on the scope of disclosure orders which can be granted in support of a freezing order in order to ensure that it is effective.

The Court of Appeal's approach also gives comfort to prospective claimants that the English courts will continue to be creative in ensuring that the terms of freezing orders are flexible so as to adapt to new and changing ways in which defendants may seek to hide their assets.

Can an upside fee be toppled by the rule against penalties?

By Jeremy Andrews (Partner) and Amy Billing (Associate)

An earlier version of this article first appeared in the May 2015 issue of Butterworths' Journal of International Banking and Financial Law.

On 30 January 2015, the Commercial Court gave judgment in *Edgeworth Capital (Luxembourg) S.A.R.L and Anor v Ramblas Investments B.V*, in which the Claimants claimed sums due as a fee under an Upside Fee Agreement ("UFA") entered into by the defendant corporate borrower ("Ramblas").

The decision endorses the well-established principle of English law that a clause will only be regarded as penal (and therefore unenforceable) if it is triggered by a breach of duty on the part of the party seeking to attack the clause against the party wanting to enforce it. It also emphasises the point that a clause will not be struck down as a penalty just because it involves payment of a very large sum of money. Such a clause may still be enforceable if it is commercially justifiable and is not intended as a deterrent.

The UFA was one of a number of related financial agreements put in place to raise finance for a subsidiary of Ramblas ("Marme") to purchase commercial property. Ramblas itself was owned by two individual property investors ("M and Q").

The financing arrangements included:

- A senior loan agreement, under which a consortium of banks, including Bank A, made a secured loan to Marme, for €1,575,000,000.
- A junior loan agreement, under which Bank A loaned Ramblas €200,000.
- A personal loan under which Bank A loaned M and Q €75,000,000.

In essence, the UFA provided that, in consideration of Bank A procuring the availability of and arranging and negotiating the terms of the facility for Ramblas, Ramblas would pay Bank A a fee (the "Upside Fee") upon each occurrence of a "Payment Event".

In 2010 Bank A transferred its rights and obligations under the junior loan, the personal loan and the UFA to the Claimants. Subsequent failures by M and Q to make payments under the personal loan triggered cross-default provisions in the junior loan, entitling the Claimants to accelerate the junior loan, which they did. The Claimants then commenced proceedings against Ramblas, seeking, amongst other things payment of the Upside Fee, purportedly due under the UFA.

Two main issues fell to be determined:

- As a matter of construction, could the default under the personal loan which triggered repayment of the junior loan be a Payment Event under the UFA and was the defendant liable to pay the Upside Fee?
- Were the Upside Fee provisions in the UFA equivalent to a penalty and unenforceable?

Construction of the UFA

Applying established principles of contractual interpretation, the court held that the default by M and Q under the personal loan, which triggered cross-default provisions in the junior loan, was clearly a Payment Event for the purposes of the UFA. Ramblas was therefore obliged to pay the Claimants the Upside Fee, amounting to over €100 million.

Were the upside fee provisions a penalty and therefore unenforceable?

The Court considered first whether the rule against penalties applied on the facts of this case. It held that it did not. In particular:

- **The Payment Event that triggered the Upside Fee did not increase Ramblas's overall obligation.** The Upside Fee was always going to become payable at some point, even if Ramblas had performed the junior loan according to its terms. Whilst the triggering event (the Payment Event) brought forward the time for payment of the Upside Fee, it did not increase Ramblas's overall obligation, being more akin to an acceleration clause which is generally not considered penal. It would be perverse if Ramblas was placed in a more advantageous position by breaching, rather than performing, the junior loan.
- **The obligation to pay the Upside Fee was not triggered by a breach of duty *by Ramblas*.** The Court held that the rule against penalties only applies in the event of a breach of duty owed by the party claiming that such rule applies (Ramblas) to the party seeking to enforce the clause in question (the Claimants). Here, the relevant event of default was a breach of duty by M and Q, not Ramblas. M and Q's breach of the personal loan was not "in effect" a breach of the junior loan to which it was a party. The junior loan and personal loan were two separate contractual arrangements, involving different parties.

The Court also considered whether, had it held that the Upside Fee had been triggered by a breach of duty **by Ramblas** such that the rule against penalties **did** apply, there were grounds for considering the Upside Fee penal. Having considered the law as stated in *Dunlop Pneumatic Tyre Co Ltd v New Garage and Motor Co Ltd* and *Makdessi v Cavendish Square Holdings B.V.*, it held that:

- a clause will be a penalty where it is "extravagant and unconscionable with a predominant function of deterrence";
- a clause will not be a penalty if it is a genuine pre-estimate of loss;
- even if it is not a genuine pre-estimate of loss, a clause will not be a penalty where it is commercially justifiable and it can be shown that its predominant function is not deterrence.

In this case, there were grounds for considering that the amount of the Upside Fee was not a genuine pre-estimate of the loss caused by the breach. However that was because the function of the clause was not to provide damages for breach (and therefore act as a deterrence to breach). Rather, it was a charge payable for the provision of the junior loan. There was a clear commercial justification for such a large fee being charged: the financing agreements were concluded in "*challenging commercial circumstances*" just prior to the Lehman collapse and the junior loan was in effect a bridging loan.

Comment

The case provides a neat summary of the law on penalties. It serves as a useful reminder that the rule against penalties may apply to provisions in financing agreements and that careful drafting is required. Clauses which provide for payment of fees in situations which do not amount to breach of contract may prove effective and enforceable even though the sums involved are very large. Even where a clause cannot be a genuine pre-estimate of loss, it may still be enforceable if it is commercially justifiable and there is no intended deterrent effect.

The Court of Appeal has given Ramblas permission to appeal.

In the meantime, an appeal in the *Makdessi v Cavendish Square Holdings B.V.* case will be heard by the Supreme Court in July. This will undoubtedly provide further clarification of the law on penalties.

Allocation of a payment premium under LMA Standard Terms and Conditions

By Jamie Curle (Partner) and Monica Singleton (Senior Associate)

In *Tael One Partners Limited v Morgan Stanley & Co International PLC* (2015) UKSC 12. The Supreme Court has considered how to interpret the Loan Market Association ("**LMA**") standard terms for par (distressed) trade transactions, and in particular how to allocate a payment premium between a buyer and a seller. In doing so, it has highlighted how vital it is to tailor the terms of finance contracts to reflect the intentions of the parties.

Background

Tael One Partners Limited ("**Tael**") participated in a syndicated loan, contributing US$32 million of the total loan facility of US$100 million. The facility provided for a payment premium to be paid by the borrower when the capital was repaid.

During the term of the loan, Tael transferred its rights in respect of $11 million of its total contribution to Morgan Stanley & Co International ("**Morgan Stanley**") pursuant to a contract that incorporated the LMA terms. No specific provision was made in the trade confirmation or pricing letter as to how any payment premium should be dealt with.

When the loan was subsequently repaid, Tael claimed that the terms of the transfer entitled it to payment of the proportion of the premium relating to the $11 million that had accrued prior to the date of the transfer.

The issues

The main issue was whether Morgan Stanley should pay Tael for the proportion of the premium which related to the period before the date of the transfer.

Both parties filed for summary judgment at first instance on this issue, with Tael's application succeeding. This was overturned in the Court of Appeal. The Supreme Court unanimously dismissed Tael's appeal.

The starting point was condition 11.9(a) of the LMA terms which provides as follows:

> *"any interest or fees… which are payable under the Credit Agreement in respect of the Purchased Assets and which are expressed to accrue by reference to the lapse of time shall, to the extent that they accrue in respect of the period before (and not including) the Settlement Date, be for the account of the Seller and, to the extent they accrue in respect of the period after (and including) the Settlement Date, be for the account of the Buyer."*

Such interest and fees are distinguished from other fees, which are defined in condition 11.9(b) as follows:

> *"….to the extent attributable to the Purchased Assets and payable after the Trade Date,…"*

as being *" for the account of the Buyer."*

The Supreme Court held that, although it was arguable that the premium could fall within the definition of ‘interest’ or ‘fees’, a payment premium does not accrue by reference to the lapse of time. It accrues on a defined event, being the prepayment or repayment of the loan. Although interest and time are taken into account when calculating the payment premium, and there is therefore a sense in which it could be said that the payment premium relates to the period before the settlement date, this does not mean that it can be regarded, retrospectively, as having notionally accrued over that period.

The court noted that the commercial context reinforced this view. The LMA terms are intended for use in a market in which loans are traded. Loans can be traded many times. In that context the court would not expect a contract for the sale of a loan to create continuing rights and obligations between the contracting parties. The LMA terms do not provide a mechanism which enables a buyer to notify a seller when its right to any payment premium has vested. It is therefore more natural to expect that any value of the right to receive a premium will be reflected in the price paid for the transfer of the loan.

Comment

The LMA standard terms are used on a daily basis in relation to trades taking place globally. Understanding how they will be interpreted is therefore vital to ensuring their proper use. Parties using the standard terms should understand that, unless they make specific provision regarding the treatment of any payment premium on prepayment or repayment of the loan, the entire premium will be payable to the buyer. Consideration should therefore be given as to what additional terms might be necessary or indeed whether bespoke documents might be more appropriate.

Although the meaning of the standard terms has now been clarified, parties are now confronted with the practical difficulty of having to work out the likely value of any sum payable under a payment premium and either negotiating it into the purchase price or making provision in the trade documents for a proportion of it to be paid to the seller. In practical terms it may not be possible to attribute a value without using a high degree of guesswork. However, unless and until the LMA standard terms are revised, parties will need to be explicit and make specific provision.

SPOTLIGHT ON…

DLA PIPER'S BANKING DISPUTES PRACTICE IN NEW ZEALAND

DLA Piper New Zealand's banking disputes practice is very varied. We handle standard recoveries and securities enforcement, including mortgagee sales of property, and also complex commercial litigation in the wider financial services industry, including frequently in the regulatory and insolvency contexts. We are currently acting in one of the top banking cases currently before the New Zealand courts, and have also assisted several foreign banks establishing operations in New Zealand, recently including China Construction Bank.

The banking environment in New Zealand has been designed, in large part, to accommodate an international market: the great majority of the 25 banks operating there are under foreign ownership, and 10 of those are branches of foreign banks.

As the New Zealand legal system is derived from English common law, the procedures through which justice is served in respect of banking disputes (which are, by and large, dealt with through litigation as opposed to arbitration) are very similar to those for England and Wales. The banking regulatory regimes are equally alike, and therefore investigative processes, both on behalf of banks/lending institutions and the relevant regulators (the Financial Markets Authority and the Reserve Bank of New Zealand) are very similar.

Whilst it has adopted the same system of law, the decisions of English and other courts are not binding however on the New Zealand courts, and certain laws are not developing in the same way. The latest area where the courts could take a different view from their counter-parts in England and Wales is in relation to 'penalty' fees applied by banks. In a claim similar to the case now on appeal to the Australian High Court, *ANZ v Paciocco*, and the English case of *Cavendish Square Holding BV v Tala El Makdessi* (due to be heard later this year), four class action claims were filed in the Auckland High Court against Kiwibank and ANZ (New Zealand) (in March 2013) and against Westpac and the Bank of New Zealand (in 2014). The 'penalties' in dispute include credit card fees, late payment fees, unarranged overdrafts, rejected payments on deposit accounts and fees associated with exceeding credit limits. Despite the fact that these proceedings are stayed pending the decision on the point in the Australian courts, that decision will only be persuasive at best, and the funders will be free to pursue their New Zealand cases regardless.

These claims are of considerable note because (1) notwithstanding the fact that class actions are permissible under the High Court rules in New Zealand, they are rare (the New Zealand High Court rules and procedures dealing with class actions are not

as well developed as the equivalent rules and procedures in other jurisdictions like Canada and Australia), (2) this area is under review in two other common law jurisdictions, and (3) the potential quantum involved is exceptionally high.

While the New Zealand class actions are stayed DLA Piper NZ is acting for the lender in another important test case which may soon have its final hearing in New Zealand's final court of appeal, the Supreme Court. In that case, the New Zealand Commerce Commission has brought proceedings in relation to various fees charged by a lender to retail borrowers for loan establishment, loan account maintenance, and in respect of loan repayment defaults. The Commission has argued that the lender's fees were 'unreasonable' in breach of provisions in New Zealand's Credit Contracts and Consumer Finance Act 2003. A main focus of the case has been the extent to which a lender may recover certain types of fixed and indirect business costs through its fees to borrowers rather than through the rate of loan interest charged. Although the case is directly concerned with provisions of the Act, it raises some more general legal principles which are relevant for the class actions. Even more importantly, the provisions of the Act apply to all banks (as well as all other lenders) making retail loans in New Zealand. Obtaining clarity around the provisions is therefore of great significance given the very large aggregate total amount of loan fees charged in the market. At this stage, the case has progressed through the New Zealand High Court and Court of Appeal. Despite those courts' judgments and amendments to the Act that came into force in early June 2015, it is considered that uncertainty about allowable cost recovery through fees still remains. An application for leave to appeal further is therefore currently before the Supreme Court. DLA Piper NZ is representing the lender in the case.

DLA Piper NZ has also recently obtained a substantial settlement to allow the conclusion of the liquidation of a major second-tier lender, Dominion Finance Group Limited. The lender collapsed in 2008 owing several hundred million dollars to approximately 6000 depositors. Since the collapse, DLA Piper NZ has acted for the receivers and liquidators. The most recent resolution was of a claim by the lender against its former directors and chief executive office, alleging breach of duties and imprudent conduct of the lending business.

DLA Piper NZ's banking disputes and banking teams are led by Iain Thain and Brendan Meech respectively. The teams produce updates and contribute to articles on the latest developments in relation to a wide range of banking, banking disputes and regulatory matters. If you would like to receive any such articles, or would like to discuss our practice further please contact Iain Thain in Auckland (iain.thain@dlapiper.co.nz, +64 9 300 3818).

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