



BANKING & FINANCE LITIGATION UPDATE

ISSUE 65

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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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If you would like further advice, please contact Paula Johnson on 08700 111 111.

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DOMESTIC BANKING

BANK OF ENGLAND

1. Interest rates have been left at 0.5 per cent amidst indications that Britain's manufacturing sector is improving and the economy growing.

Times, 10 May 2013

2. Mark Carney, the new governor-designate of the Bank of England, has said in a speech that he advocates "forward guidance" in relation to monetary policy and that borrowing rates will continue to be held at very low levels until the economy recovers.

Financial Times, 2 May 2013

3. The Bank of England's Funding for Lending Scheme has been given another year to increase lending to small and medium sized enterprises (SMEs). The Scheme, which will now continue until the end of 2014, will offer SMEs less expensive funding rates from the Bank of England than they would normally get from banks and will possibly be extended to include finance houses as well as banks.

Financial Times, 24 April 2013

BARCLAYS

4. Barclays Wealth is introducing voice recognition technology to replace pin numbers and security questions. The bank asserts that the technology will be able to ascertain the validity of a customer within 30 seconds of a conversation taking place.

Telegraph.co.uk, 8 May 2013

5. Guardian Care Homes' case against Barclays in relation to allegations that the bank mis-sold swaps will not be heard until next year, after Barclays won permission to appeal to some aspects of the case. A provisional trial date has been set for 29 April 2014.

Guardian, 30 April 2013

6. Barclays Bank's first quarter profits have fallen by a quarter from the same time in 2012 to £1.78 billion. The reduction in profits was partly put down to the costs of "Project Transform" - the bank's scheme to restructure and reform itself, announced in February - which are said to be £500 million, as well as to losses stemming from the reduction of its European retail arm.

Telegraph, 25 April 2013

CO-OPERATIVE BANK

7. The Co-op has hired Morgan Stanley to sell or run off its loan book in an attempt to raise more capital to meet a target, imposed by the Bank of England, of holding 7 per cent Basel III Tier 1 capital. The Co-op said in January that it held 6.7 per cent making it the only institution to fall below the regulatory minimum.

Times, 14 May 2013

8. The Co-op's takeover of Britannia Building Society four years ago was meant to produce a "super-mutual" but the deal is threatening to end the idea of the Co-op being a major force in British banking. The recent downgrading by Moody's and the departure of chief executive Barry Tootel following the failure of the deal to take over 632 Lloyds branches can be linked back to the 2009 merger with the Britannia.

Daily Telegraph, 13 May 2013

9. The Co-operative Bank has submitted a rescue plan to the Bank of England that will force the lender to sell parts of its business to plug a £750m black hole in its finances. The bank submitted a capital plan to the Bank of England after results had showed huge losses on commercial property loans. Senior City bankers said that there was no imminent danger of a collapse but the bank's capital levels were below the regulatory minimum.

Sunday Times, 12 May 2013

HSBC

10. HSBC has released its latest quarterly figures, recording its best performance in a quarter since it started publishing quarter-by-quarter results. The bank saw a near doubling of its pre-tax profits for the first three months of 2013 to £5.4 billion, with a year-on-year increase of 95 per cent in pre-tax profits. The increase was driven by a \$1 billion reduction in costs, a fall in bad debt charges and lower provisions for mis-selling claims.

Telegraph, 8 May 2013

LLOYDS BANKING GROUP

11. The price of shares in Lloyds Banking Group has almost reached the minimum "break-even" level set by the government suggesting that the sale of the government's 39 per cent share in the bank could begin within the next few months. The minimum sale price is 61.2p - shares have risen to

60.4p, the first time they have been above 60p in more than 12 months.

Telegraph, 17 May 2013

12. The chairman of Lloyds Banking Group, Win Bischoff, has announced that he will leave the bank before the company's next annual general meeting in 2014, after 5 years in the role. He said that Lloyds was "ahead of the plan" in many areas and that it is a good time for the bank to start looking for his successor.

Guardian.co.uk, 13 May 2013

13. Lloyds Banking Group made its final repayment of £3.5 billion to the European Central Bank (ECB) for the £13.5 billion loan granted to it by the ECB as part of a bail-out package in 2009. The final instalment of the repayment came two years ahead of schedule and signalled the growing strength of the bank's balance sheet.

Independent, 11 May 2013

14. Lloyds Banking Group's first quarter figures for 2013 rose dramatically from £280 million during the same period last year to £2 billion. The bank's pre-tax profits were boosted by £800 million made on the sale of gilts and were higher than analysts had predicted.

Telegraph, 1 May 2013

15. Banco Sabadell, Spain's fifth largest bank, has agreed to buy Lloyds Banking Group's retail and private banking business in Spain in a deal worth up to €100 million. Lloyds will get €20 million in cash over the next five years, plus €84 million worth of shares in the Spanish bank. Lloyds said that the deal was part of its strategy to concentrate on business in the UK.

Telegraph.co.uk, 29 April 2013

16. Lloyds Banking Group will need to find another buyer for the 632 branches it had hoped to sell to the Co-operative Bank after the Co-op withdrew from the year-long talks over the sale. The European Commission is forcing Lloyds to sell the branches by November 2013. The bank's chief executive, Antonio Horta-Osorio, said Lloyds would "proceed with the option to IPO the business".

Guardian.co.uk, 24 April 2013

17. Lloyds has issued 713 million new shares worth £350 million as it continues its attempt to improve its balance sheet. The shares are being swapped for hybrid capital securities held by institutional investors and will increase Lloyds' share capital by just over 1 per cent.

Independent, 23 April 2013

THE ROYAL BANK OF SCOTLAND

18. A share sale by the Government could start in 2014 the chairman of RBS predicted as he stated that the turnaround of the lender was "substantially complete". Sir Philip Hampton's comments came as RBS reported a £826 million pre-tax profit for the first quarter of 2013.

Daily Telegraph, 4 May 2013

19. RBS is looking at up to six bids for the 315 branches it needs to sell as part of EU state aid rules following the collapse of its deal to sell them to Santander in autumn 2012. A decision on the final bidder to go through to due diligence is expected to be made very shortly, and looks to be a choice between two consortiums - the first made up of approximately 20 asset management companies and the second consisting of US private equity groups and a variety of British investment companies. The new business will be rebranded as "Williams & Glyn's", the name of one of the previous incarnations of RBS.

Financial Times, 2 May 2013

20. RBS will seek permission from its investors to sell new "loss-absorbing capital instruments" in accordance with the push by regulators to make sure adequate buffers are in place in the country's biggest banks to withstand any new losses. RBS will ask shareholders for the go ahead to issue new shares which, based on its current share price, could allow it to raise in the region of £4.5bn through the sale of bonds that convert into the bank's own equity.

Telegraph, 27 April 2013

21. The Financial Conduct Authority (FCA) has written to the Court of Appeal to ask to be allowed to take part in a case involving allegations of the mis-selling of interest rate swaps by the RBS. The High Court case was won by the bank and is being appealed by the claimants Paul Rowley and John Green. The FCA is understood to want to participate to outline and clarify its rules relating to interest rate swaps.

Financial Times, 24 April 2013

STANDARD CHARTERED

22. Standard Chartered recorded a 5 per cent fall in profits in the first quarter of 2013. The bank does not release detailed figures in its interim accounts but the bank's finance director, Richard Meddings, is confident that the bank will have another very successful year with a further rise in profits.

Times, 9 May 2013

23. Temasek, a Singaporean sovereign wealth fund and the largest shareholder of Standard Chartered, abstained from backing the re-election of four executive directors to the board at the lender's annual general meeting. Temasek has called for more non-executives to be appointed to Standard Chartered's board and for the number of current managers serving as directors to be reduced. The bank has refrained from doing so.

Telegraph, 9 May 2013

DOMESTIC GENERAL

24. Civil servants from HMRC, Serious Organised Crime Agency, Home Office and GCHQ have held a conference to discuss the security threats and taxation issues that would need to be addressed if the UK were to widely adopt Bitcoin, the unregulated electronic cash system.

Financial Times, 14 May 2013

25. Two of the three current accounts that will be launched later in 2013 by the Post Office will charge a fee. A monthly fee of £8 and £5 respectively will be charged for the Packaged Account and the Control Account. The accounts will first be available via 29 East Anglia branches before being rolled out across the Post Office's 11,500 branch network in 2014.

Financial Times, 13 May 2013

26. With regulators having enlisted Bank of England financial stability experts to assist them in coming up with "doomsday scenarios" UK banks are now closer to facing publishable stress tests that could impact both bonus and dividend payments. The Bank of England and the Prudential Regulation Authority (PRA) were told in April by the UK's Financial Policy Committee to "develop proposals for regular stress testing of the UK banking system" beginning in 2014. The chief executive of the PRA, Andrew Bailey, has said that his team lacks the resources to do anything comparable to the US Federal Reserve's annual public exercise.

Financial Times, 2 May 2013

26. EU member states are moving towards the last stages of talks on national rules to wind up banks that fall into trouble, and with Britain isolated in its opposition to the establishment of a mandatory, pre-financed national fund to pay for bank resolution costs, the chancellor could be forced to put up to £9 billion to one side for a standalone crisis fund for banks. The most recent compromise, would involve getting the industry to pay for a resolution and deposit insurance fund equalling at least 1 per cent of covered deposits.

Financial Times, 1 May 2013

27. The FCA has given the country's largest banks permission to begin the process of contacting customers and paying the estimated £2 billion plus of compensation owed to small firms who were mis-sold derivatives products.

Sunday Telegraph, 28 April 2013

28. Members of the parliamentary banking commission are considering a law under which jail terms could be handed to bankers who have behaved recklessly. A number of those on the commission have argued for a law that would hold bankers liable for any catastrophic losses resulting from their actions. Chancellor George Osborne, who set up the commission under pressure from Labour in the wake of the Libor scandal, will find it hard to reject the recommendations of the group, which is due to issue its final report in May.

Financial Times, 26 April 2013

EUROPEAN BANKING

BANK OF IRELAND

29. Lawyers for the Bank of Ireland borrowers who have had a rate rise imposed on their tracker mortgages are preparing a complaint under the Unfair Terms in Consumer Contracts Regulations 1999 which they will submit to the Office of Fair Trading.

Sunday Times, 5 May 2013

30. Interest rates for over 13,000 borrowers with tracker mortgages with the Bank of Ireland will double from the 1 May. This follows an announcement by the bank in February that it planned to increase its tracker rates even though the Bank of England base rate remains at 0.5 per cent. The move is expected to hit buy-to-let landlords in the main who make up two thirds of those affected.

Telegraph, 1 May 2013

BNP PARIBAS

31. After net income fell 45 per cent in the first quarter of 2013, BNP Paribas has vowed to continue reducing costs and personnel. Analysts had feared the decline in profits would be worse. A plan by the bank to save €2 billion a year by 2015 is in its initial stages.

Times, 4 May 2013

COMMERZBANK

32. Commerzbank's long-running legal battle with more than 100 bankers based in London over €52m (£44m) in unpaid bonuses has come to an end. The bank will not take the case to the Supreme Court following a Court of Appeal ruling in April that it must pay the money to the bankers. Hundreds of millions of euros were pledged to employees at Dresdner Kleinwort just months before its parent was taken over by Commerzbank at the peak of the financial crisis in 2008. Commerzbank argued that it did not have to pay the cash following a multi-billion euro loss after acquiring Dresdner. A High Court ruling however said the bank had a legal obligation to pay the bonuses.

Telegraph, 4 May 2013

CREDIT SUISSE

33. Credit Suisse is involved in a \$500 million court case, facing claims by two offshore companies owned by Georgian businessman Zaur Leshkasheli for its part in the sale of his stake in the Kurovdag oilfield in Azerbaijan in 2008 to Berghoff Trading. The two companies are suing the Swiss bank arguing that it did not act in their best interest during the \$245 million sale, and claiming that they should have received at least \$450 million more for the sale. They allege that Credit Suisse failed to take note of interest from other potential purchasers.

Times, 29 April 2013

DEUTSCHE BANK

34. Deutsche Bank has revealed plans for a share issue aimed at raising €2.8 billion to temper concerns amongst investors regarding the bank's balance sheet. 90 million shares - just under 10 per cent of its equity base - will be placed with institutions. The news came after the bank revealed better than expected first-quarter results, with net income up 18 per cent year on year at €1.7 billion from €9.4 billion of revenues.

Financial Times, 30 April 2013

35. Deutsche Bank is to expand on its small investment banking presence in Birmingham by setting up a trading floor which will double the size of its Brindleyplace office. Most of the bank's 1000 or so employees in the city are involved in back-office processing roles.

Financial Times, 29 April 2013

36. One of the largest legal battles to come before the High Court in London has begun between billionaire investor Alexander Vik and Deutsche Bank. The bank is suing Sebastian Holdings (SHI) to try and recoup £250 million it claims is unpaid for the foreign exchange prime broker services it provided to the offshore company controlled by Mr Vik. SHI is countersuing Deutsche Bank for \$8 billion in damages in New York.

Financial Times, 23 April 2013

EUROPEAN CENTRAL BANK

37. Despite moving to cut its main interest rate by a quarter point to 0.5 per cent, the constraints on further action by the European Central Bank (ECB) have been highlighted by the opposition to the decision by a German official in the inner sanctum of the bank. The ECB president, Mario Draghi, said that the bank remained "ready to act if needed" and that he had an "open mind" over the imposition of negative interest rates. Previously Mr Draghi has expressed caution about such a move and the unforeseen consequences it could have.

Financial Times, 3 May 2013

SANTANDER

38. Santander and three private equity firms apparently plan to list the Spanish banking group's US automotive finance unit in the forthcoming months in a deal which could put the company's financial worth at between \$7bn and \$9bn.

Financial Times, 8 May 2013

39. Profits at Santander were down in the first quarter of 2013, falling 26 per cent across the group from the same time last year. However, pre-tax profits for the UK arm of the Spanish bank fell by just 22 per cent from £363 million to £282 million. The UK bank's chief executive, Ana Botin, said that she expected to see greater stability in the bank's operating environment in the year ahead and that the bank assigned the drop in profits to higher interest rates on saving which were in operation in 2012 to attract investors.

Times, 26 April 2013

40. Santander UK has reduced gross mortgage lending by 41 per cent to £3.3 billion in the first quarter of 2013 compared to the year before. The decline reflects a decision in the last six months by Santander to curtail risky interest-only mortgages.

The Times.co.uk, 25 April 2013

41. The FCA has ordered Santander to get in touch with 270,000 customers who took out mortgages prior to the credit crunch after the lender admitted that it had not been upfront over a change to its mortgage terms. It is anticipated that around 30,000 former Abbey customers will qualify for compensation although there could be many more. Santander has set aside part of a £232m fund for compensation.

Sunday Times, 21 April 2013

UBS

42. UBS has revealed a higher than expected increase in profits, surprising investors. The turnaround, which saw the bank make a profit of SFr1.45 billion in the first quarter of 2013, compared to losses of SFr1.84 billion in the same period in 2012, was driven by profits from wealth management that were stronger than expected and a rise in investment bank profits of 92 per cent.

The Independent, 1 May 2013

EUROPEAN GENERAL

43. Uninsured depositors may be preferred to bondholders when a bank fails following discussions during an EU finance ministers' meeting in which the German finance minister, Wolfgang Schaube, proposed that deposits in Europe should be made safer than bonds. The move is opposed by the UK government.

Financial Times, 15 May 2013

44. The ECB, the Bundesbank, and the FCA were amongst a new group of banks and financial watchdogs that have contacted Bloomberg, the data services business, in relation to claims that the company's journalists had accessed their terminals in an effort to uncover breaking news stories, demanding to know if Bloomberg had seen and used confidential information.

Times, 14 May 2013

45. National Bank of Greece, Alpha Bank and Piraeus Bank are planning to raise €21.7 billion of private

capital in June which will enable the banks to keep their autonomy whilst they search for overseas investors, in line with international creditors' bailout terms. The three banks will be able to regain access to interbank markets, complete agreed mergers with smaller Athens lenders and increase their lending to businesses if the capital raising is a success.

Financial Times, 2 May 2013

46. As part of efforts to get rid of its image as a pre-eminent tax haven, Luxembourg is prepared to share confidential information about the bank accounts of multinational companies with other jurisdictions. Currently only individual taxpayers are covered by information sharing agreements with the EU and US, but Luxembourg's finance minister, Luc Frieden, has said that the country is willing to expand this to include global companies.

Financial Times, 30 April 2013

47. Chancellor George Osborne has opened a rift with Brussels after he revealed that Britain is to contest the proposed new European financial transactions tax at the European Court of Justice. The tax is being pushed for by 11 member states, including France and Germany.

Times, 20 April 2013

INTERNATIONAL BANKING

BANK OF AMERICA

48. The bond insurer MBIA will receive \$1.7 billion in a settlement with Bank of America after MBIA had claimed compensation for loans written by the mortgage lender Countrywide which Bank of America purchased in 2008. The deal will allow MBIA to remain in business.

Financial Times, 7 May 2013

BANK OF CHINA

49. The Foreign Trade Bank of North Korea has had its account closed by the Bank of China following the imposition of sanctions on the Korean bank by the US, which the US accused of supporting the North Korean programme of nuclear testing. However, analysts said that this was unlikely to signal a change in the Chinese policy of supporting North Korea to maintain stability in the region.

Telegraph, 7 May 2013

GOLDMAN SACHS

50. The High Court has ruled that the tax deal between Goldman Sachs and HMRC was legal. The "sweetheart" deal related to a dispute over a tax avoidance scheme, now banned, which Goldman's used to pay bonuses to its staff in the UK by way of an offshore tax haven. It reached an agreement with HMRC to pay only the principal of what it owed - UK Uncut sued the bank saying it should have also paid the interest that was due.

Telegraph, 17 May 2013

JP MORGAN

51. There are further demands on Wall Street for Jamie Dimon's dual role as chairman and chief executive at JP Morgan to be split. The pension fund advisory firm Glass Lewis has joined other shareholders in calling for a change in the bank's leadership structure.

Times, 8 May 2013

52. JP Morgan's co-chief operating officer, Frank Bisigano, is to leave the bank to become the chief executive of First Data Corp. Matt Zames, the other co-chief at JP Morgan, will assume the role as sole chief operating officer following Mr Bisigano's departure.

Times, 29 April 2013

LAZARDS

53. Larry Slaughter is to become vice-chairman of investment banking at Lazards from 3 June, having resigned from JPMorgan in January. His role at Lazards will see him continue to have an industrial client focus, specifically large companies in Europe.

Financial Times, 3 May 2013

INTERNATIONAL GENERAL

54. The Commodity Futures and Trading Commission in the US has asked banks and traders on Wall Street to prove that 1 million derivatives transactions made over the past two years are legal as part of a clampdown on unregulated trading in swaps contracts.

Financial Times, 14 May 2013

55. Several large Chinese banks have stopped processing any cross-border cash transfers with North Korea, a move that goes beyond the UN

resolution passed earlier in 2013 by which China agreed to sanctions against transactions that appeared to contribute to the North Korean nuclear weapons programme. However, some smaller Chinese banks are still processing transactions to North Korea.

Financial Times, 14 May 2013

56. The coming months will see India's third largest private sector bank, Axis Bank, open its first branch in China, showing the closer financial links between the two largest emerging economies in Asia. India's largest private bank, ICICI, is expected to also open its first branch in China at some point in 2013.

Financial Times, 13 May 2013

57. Eight "cashiers" have been charged by prosecutors in the United States for their alleged role in a global cyber-crime ring involving 26 countries, which was responsible for losses of \$45 million from financial institutions. Criminal charges have been filed against them by the Brooklyn US attorney's office, which has alleged that they withdrew \$2.5 million in less than 24 hours from ATMs using stolen prepaid debit card numbers.

Financial Times, 10 May 2013

58. US banks and other big mortgage investors have identified and analysed home affordable refinancing programme (Harp) loans after they were inadvertently tipped off to more loan data than intended by Fannie Mae and Freddie Mac. Having additional information on Harp loans helps identify those loans that could face more obstacles to refinancing, making the pinpointing of them valuable for mortgage investors and traders.

Financial Times, 9 May 2013

59. The New York State Department of Financial Services has come out as an unlikely supporter of attempts by foreign banks to escape a proposal on capital levels from the US Federal Reserve. The regulator has advised that attempts to tighten liquidity and capital requirements should not apply to banks with US assets of less than \$50 billion.

Financial Times, 2 May 2013

60. Russia's second biggest state-run bank, VTB, is to receive new investment from sovereign wealth funds from Qatar, Norway and Azerbaijan. The investment will come via a \$3.3 billion share issue on the Moscow Stock Exchange, which will reduce

Russia's stake in the bank to around 61 per cent from its current 75 per cent. According to VTB, Qatar Holding, Norges Bank Investment Management and the State Oil Fund of Azerbaijan have signed up for over half the offering.

Financial Times, 29 April 2013

61. Michel Barnier, EU Commissioner for financial services, has warned that plans by the US to force foreign banks to hold more capital, risk "a protectionist reaction" and are a threat to peaceful global regulation. The chairman of the Federal Reserve, Ben Bernanke, was told by Barnier that there could be retaliation against US banks if plans to force US subsidiaries of European banks to have higher capital requirements come to fruition.

Financial Times, 23 April 2013

62. Top US regulator Gary Gensler, head of the Commodity Futures Trading Commission, who is overseeing international efforts to reform global financial markets benchmarks, has said that Libor is "unsuitable" and should be replaced as soon as possible. Whilst Mr Gensler has been openly mistrustful of interbank lending rates since last autumn, his latest comments are the strongest indicator yet that the scrapping of the London Interbank Offered rate in its current form, and the finding of an alternative, will be sought by regulators.

Financial Times, 23 April 2013

63. William Dudley, president of the New York Federal Reserve, has warned that unless there is more international co-operation and sharing of inspection data, then the problem of "too big to fail" banks cannot be solved by regulators. Mr Dudley warned that all of the issues where they would need to work together in the face of the collapse of a major international bank have not yet been identified by global regulators.

Financial Times, 23 April 2013

PRESS RELEASES

64. **Payments Council plays key role in launch of revised international financial standard**

ISO 20022, the global standard that ensures the reliable transfer of financial data, has now had a 2013 revision published, thanks to UK banking industry recommendations led by the Payments Council. The series of standards in ISO 20022

describe how to generate and read the messages that form the basis of electronic transactions in the financial industry.

UK Payments Council, 10 May 2013

http://www.paymentscouncil.org.uk/media_centre/press_releases/-/page/2519/

65. **Reforming the structure of the EU banking sector**

The Commission on the Structural Reform of the Banking Sector has issued a consultation on reforming the EU banking sector. It focuses on the key attributes of the structural reform, including the scope of activities, the strength of separation, and the possible institutional scope. The consultation is open until 3 July 2013.

European Commission

http://ec.europa.eu/internal_market/consultations/2013/banking-structural-reform/docs/consultation-document_en.pdf

66. **Bank of England maintains Bank Rate at 0.5% and the size of the Asset Purchase Programme at £375 billion**

The Bank of England's Monetary Policy Committee has voted to maintain the official Bank Rate paid on commercial bank reserves at 0.5%. The Committee also voted to maintain the stock of asset purchases financed by the issuance of central bank reserves at £375 billion.

Bank of England, 9 May 2013

<http://www.bankofengland.co.uk/publications/Pages/news/2013/005.aspx>

67. **Proposal for a Directive of the European Parliament and of the Council on the comparability of fees related to payment accounts, payment account switching and access to payment accounts with basic features**

The European Commission has issued a draft Directive which lays down rules concerning the transparency and comparability of fees charged to consumers on their payment accounts held within the EU and provided by payment service providers located in the Union and rules concerning the switching of payment accounts within the Union; and defines a framework for the rules and conditions according to which Member States shall

guarantee a right for consumers to open and use payment accounts with basic features in the Union.

European Commission 8 May 2013

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2013:0266:FIN:EN:PDF>

68. LIBOR, public inquiries & FSA disciplinary powers - Commons Library Standard Note

This Commons Library Standard Note gives a summary of some of the key points relating to the LIBOR scandal. The Note also looks at the now enhanced role of the FSA's disciplinary powers with respect to 'benchmark' activities. Three banks have so far been fined in the UK.

House of Commons, 2 May 2013

<http://www.parliament.uk/briefing-papers/SN06376.pdf>

69. The FCA publishes findings of review into interest-only mortgages and reaches agreement with lenders to contact interest-only borrowers

The FCA has published its research into consumers' ability to repay their interest-only mortgages when they mature. The findings show that many people should be in a good position to repay their mortgage when it is due for repayment. However many borrowers, particularly those whose mortgage is due to be repaid before 2020, will need to take control of their mortgage repayment planning now. To that end the FCA, the Council of Mortgage Lenders and the Building Societies Association are working together to ensure lenders contact their borrowers in order to prompt them into checking their plan for repayment is on track and considering the options available to them.

Financial Conduct Authority, 2 May 2013

<http://www.fca.org.uk/news/interest-only-mortgages>

Guidance consultation: <http://www.fca.org.uk/static/documents/guidance-consultations/gc13-02.pdf>

70. Government provides Financial Policy Committee with first remit

The Chancellor of the Exchequer has written to the Governor of the Bank of England to provide the new Financial Policy Committee (FPC) with its

first remit. The Financial Services Act 2012, which came into effect on 1 April this year, requires the government to provide the FPC with a written remit and recommendations at least once a year. The creation of the FPC as a strong, macro-prudential authority within the Bank of England addresses a key gap in the previous system of financial regulation, where no authority had clear responsibility for identifying and addressing systemic risks to financial stability.

HM Treasury, 30 April 2013

<https://www.gov.uk/government/news/government-provides-financial-policy-committee-with-first-remit>

71. Bank of England and HM Treasury announce extension to the Funding for Lending Scheme

The Bank of England and HM Treasury has announced an extension to the Funding for Lending Scheme (FLS). This extension builds on the success of the FLS so far, and has three main objectives: to give banks and building societies confidence that funding for lending to the UK real economy will be available on reasonable terms until January 2015; to increase the incentive for banks to lend to small and medium-sized enterprises (SMEs) both this year and next; and to include lending involving certain non-bank providers of credit, which play an important role in providing finance to the real economy.

Bank of England, 24 April 2013

http://www.hm-treasury.gov.uk/press_43_13.htm

72. BBA Consumer Panel will deliver real benefits for bank customers

Banks and consumer groups are to work together to deliver real change for high street banking customers, the British Bankers' Association has announced. The BBA is launching a new Consumer Panel chaired by Citizens Advice Chief Executive Gillian Guy which will meet for the first time in the coming weeks. The aim is to bring together consumer advocates, leading charities and senior bankers to identify areas where banks can improve the service they offer to customers.

British Bankers Association, 24 April 2013

<http://www.bba.org.uk/media/article/bba-consumer-panel-will-deliver-real-benefits-for-bank-customers>

CASE LAW

73. Validity of asymmetric jurisdiction clause

This case concerned the validity of a jurisdiction clause in a facility agreement.

The original facility agreement and associated guarantee were governed by Mauritian law and conferred exclusive jurisdiction on the Mauritian courts. Later however the parties entered into an amended agreement which provided for English law as the governing law. The agreement contained a one way or asymmetrical jurisdiction clause which limited the borrower and guarantor to bringing proceedings in England but enabled the lender to sue in other jurisdictions as well.

The borrower defaulted on repayment of the loan and the lender issued proceedings in England.

The borrower and the guarantor contested jurisdiction, arguing that the English court did not have jurisdiction because:

- The jurisdiction agreement remained subject to Mauritian law and under Mauritian law the jurisdiction clause was invalid because it was one-sided (following the decision of the French Cour de Cassation in *Mrs X v Banque Privée Edmond de Rothschild Europe* ("**Rothschild**") (French Supreme Court, First Civil Chamber, 26 September 2012, No 11-26.022)); or
- If the jurisdiction clause was governed by English law it was too one-sided to be compatible with fundamental principles regarding equal access to justice.

Was the jurisdiction clause governed by Mauritian law?

The judge could find no authority or principle to support the borrower and guarantor's argument that under rules of private international law parties can change the governing law of a jurisdiction agreement by entering into a new agreement but cannot do so by amending an existing one.

In any event, in this case the original facility agreement was replaced by the amended agreement so this was a case of discharge of an old agreement and replacement with a new one. The new agreement was therefore governed by English law.

Even if the jurisdiction clause was governed by Mauritian law there was a good arguable case that it would be treated as valid and effective notwithstanding the decision in *Rothschild*.

Was the jurisdiction clause invalid under English law for being too one-sided?

The borrower and guarantor were wrong in construing the jurisdiction clause as conferring a power on the lender to sue them in any court in the world but not conferring any rights on them to sue in any forum. Under the clause the borrower and guarantor could sue in England, the lender merely preserved a right for itself to also be able to sue in any court which would regard itself as of competent jurisdiction. The clause was not invalid. Such asymmetric provisions have regularly been enforced by the English courts.

In any event, the validity of the jurisdiction clause was in fact irrelevant as the lender had established an in personam jurisdiction by serving proceedings on the borrower and guarantor's designated agent in England. The only question which arose then was whether the court should assume and exercise its undoubted jurisdiction. The borrower and guarantor had failed to show that an alternative forum was more appropriate and their application was therefore dismissed.

Mauritius Commercial Bank Limited v (1) Hestia Holdings Limited (2) Sujana Universal Industries Limited, Commercial Court 24 May 2013

74. Nature of guarantee obligations

This case concerned a guarantee given by two directors of a company ("**CTF**") to the National Merchant Buying Society ("**Society**") which is an industrial and provident society operating for the benefit of companies in the construction industry. The Society is, in effect, a bulk purchaser which enjoys substantial rebates which it passes on to its members. Members order goods from suppliers who invoice the Society. The Society pays the supplier and then the member pays the Society.

The Society specifies a credit limit for each member and protects itself with credit insurance equal to the member's credit limit. Over the years CTF's credit limit reached £200,000. CTF encountered difficulties and its account with the Society fell into arrears. The insurer withdrew its credit protection. The two directors of CTF, M and B, provided the Society with a joint and several guarantee and the insurer re-instated the credit insurance cover.

CTF's credit limit was later increased to £400,000 and the insurer increased its cover to £400,000.

M resigned as a director and left CTF. Although he could have done, he did not revoke the guarantee.

CTF breached its credit limit. Although the Society agreed to increase CTF's credit limit to £700,000, the insurance cover was not increased and the insurer eventually withdrew all cover. CTF went into administration and then liquidation. The balance on its account with the Society was over £330,000.

The issue was whether M was liable under his guarantee. He argued that he was not as after he left CTF there were material variations to the contract between the Society and CTF to which he had not consented, including in particular the increase in the credit limit to £700,000. M argued that his guarantee had been given when he knew that CTF's credit limit was £200,000 and that any increase in that limit without his consent automatically released him from the guarantee. He had agreed to the increase to £400,000 but not any further increase.

At trial, the court found M liable. This was upheld on appeal. The Court of Appeal identified the key issue as being how the guarantee should be interpreted. If it was a guarantee of performance of obligations arising under a "specific contract" that would be the limit of the guarantee obligations. In such a scenario if the parties to the contract varied it then the guarantor would be released because otherwise the variation would expose him to a liability to which he had never agreed.

In contrast, if the guarantee was given in respect of obligations arising out of a "contemplated course of dealing" rather than a "specific contract", then provided that the course of dealing remained within the scope contemplated by the guarantee then any variations in the terms of the contract between principal and creditor would not affect the continuing liability of the guarantor.

It was wrong to treat a guarantee as being in the "specific contract" class simply if, at the time it was given, the relationship between principal and creditor was governed by a contract of which the guarantor knew the terms. That would have the mechanistic effect of turning every guarantee, however expressed, into a "specific contract" guarantee.

The relevant question in every case should be "what is the nature of the guarantee obligation that

the guarantor has assumed?" The answer to this will depend on the interpretation of the guarantee which will involve considering what "the document would convey to a reasonable person having all the background knowledge which would reasonable have been available to the parties in the situation in which they were at the time of the contract" (*Investors Compensation Scheme Limited v West Bromwich Building Society* [1998] 1 WLR 896).

It might be appropriate to have regard to the commercial arrangements in place between the principal and the creditor when interpreting a guarantee but the idea that the interpretation of the guarantee should be conclusively dictated by knowledge that the guarantor alone might have had was wrong.

Here, on the face of the document, the guarantee was a freestanding, "all moneys" guarantee that was not linked to the credit limit to which CTF was then entitled. There was nothing in the surrounding circumstances supporting any implied limitation. If the parties had intended to limit the guarantor's liability the guarantee would have said so but it did not.

M was liable under the guarantee.

National Merchant Buying Society v (1) Andrew Bellamy (2) Stephen Mallett, Court of Appeal, 2 May 2013

75. Supreme Court rules on meaning of "cash flow" and "balance sheet" insolvency tests

Finance documents often refer to a company becoming insolvent within the meaning of s.123 of the Insolvency Act 1986 ("**Insolvency Act**") as an event of default. In this case the Supreme Court considered what it takes for a court to be satisfied that a company is "unable to pay its debts" within the meaning of sections 123(1)(e) and 123(2) of the Insolvency Act.

The statutory provisions

S.123(1)(e) is known colloquially as the "cash flow" test. It provides that a company is deemed unable to pay its debts:

"if it is proved to the satisfaction of the court that the company is unable to pay its debts as they fall due."

S.123(2) is known colloquially as the balance sheet test. It provides that a company is deemed unable to pay its debts:

"...if it is proved to the satisfaction of the court that the value of the company's assets is less than the amount of its liabilities, taking into account its contingent and prospective liabilities."

Which test applies when?

In deciding which test should apply much will depend on how far into the future you need to look.

The court held that the "cash flow" test is not simply concerned with debts that are immediately due and payable but also with debts falling due in the reasonably near future. What the "reasonably near future" means will depend on all the circumstances of the case but especially the nature of the company's business.

Once the court has to move beyond the "reasonably near future" however, then any attempt to apply the "cash flow" test becomes completely speculative. At that point the only sensible test to apply is the balance sheet test which compares present assets with present and future liabilities (discounted for contingencies and deferment).

The balance sheet test is very far from an exact test and the burden of proving it lies with the party asserting balance-sheet insolvency.

The Court of Appeal had described the test of balance sheet insolvency as being as assessment of whether the company had reached "the point of no return" but this was not appropriate. The court must assess whether the company can reasonably be expected to meet all its liabilities, looking at the company's assets and making proper allowance for the nature of prospective and contingent liabilities.

Whether the balance sheet test of insolvency is satisfied will depend on the available evidence as to the circumstances of the particular case. When looking far into the future there may be many imponderables which might affect the company's ability to meet liabilities when they fall due e.g. currency movements, interest rate fluctuations, the state of the economy or the housing market etc. The more distant the liabilities are, the harder it becomes to make predictions and the harder it will be to satisfy a court that a company is balance sheet insolvent.

If a company's liabilities can be deferred for a long period e.g. 30 years and that company is presently paying its debts as they fall due, a court should proceed with the greatest caution in deciding that the company is balance sheet insolvent under s.123(2).

BNY Corporate Trustee Services Limited and Others v Neuberger Berman Europe Ltd (on behalf of Sealink Funding Ltd) and others and BNY Corporate Trustee Services Limited and others v Eurosail UK 2007-3BL Plc, Supreme Court, 9 May 2013

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Leeds: Hugh Evans

T 0113 369 2200

E hugh.evans@dlapiper.com

London: Jean-Pierre Douglas-Henry

T 020 7153 7373

E jp.douglashenry@dlapiper.com

Manchester: Stewart Plant

T 0161 235 4544

E stewart.plant@dlapiper.com

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