



BANKING DISPUTES

QUARTERLY

Q2 2014

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.

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ON THE HORIZON

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

■ Progress towards a European Account Preservation Order

Progress has been made on the European Commission's proposal for a European Account Preservation Order (EAPO). The proposal provides a Europe-wide mechanism in cross-border cases to prevent debtors from removing or dissipating funds held in European bank accounts whilst procedures to obtain and enforce a judgment against them are ongoing.

Both the European Parliament and the General Affairs Council have now adopted the same final text for the proposed Regulation. The next step will be publication of the EAPO Regulation in the Official Journal. The Regulation will then enter into force 20 days after publication and will apply 30 months thereafter.

Although the EAPO Regulation will be directly applicable in EU Member States, the UK and Denmark are currently opted out. It remains to be seen whether they will now opt-in.

■ New Payment Systems Regulator

The Financial Services (Banking Reform) Act 2013 required the FCA to establish a new regulator for payment systems in the UK, with three main objectives: to promote competition; to promote innovation and to ensure that payment systems operate in the interests of their users. In March, the FCA published a *Call for Inputs* to gather views and information from stakeholders and participants in UK payment systems on various issues, including competition, access, governance, ownership and innovation. Responses were requested by 15 April 2014, with formal consultations on the regulatory framework and content to follow later in the year. It is expected that the Payment Systems Regulator will become fully operational in April 2015.

■ Speeding up Cheque Payments: Legislating for Cheque Imaging

The Government has been consulting on plans to modernise cheque payments. It proposes to change the law to allow banks to process certified digital images of

cheques rather than the original paper cheques.

This should speed up cheque clearing times and give customers greater convenience and choice in how they deposit cheques, including the option of paying in cheques via smartphone or tablet. The changes could provide financial institutions with opportunities to innovate and develop new services.

The current cheque system is inefficient and expensive as it involves the physical transportation of original paper cheques from bank branches to the clearing centres of collecting banks, then to an exchange centre, then on to the clearing centre of the paying bank. This adds delay and expense to the clearing process.

The government hopes that its proposals could reduce the current clearing cycle from six days to as few as two. Cheque imaging could also result in considerable efficiency savings for banks as whole sections of the payment journey after deposit could be digitised, thus eliminating transportation costs.

The Government's consultation closed on 7 April and it is currently analysing the feedback it received. We will advise you of further developments in due course.

Bad practice by a minority of regulated Claims Management Companies (“CMC’s”), mainly operating in the financial services sector, has resulted in poor outcomes for both consumers and financial services providers and has substantially increased costs for defendant businesses. Existing enforcement powers to vary, suspend or cancel a regulated CMC’s authorisation have not been sufficient to deter

The proposed scheme envisages a process whereby the Claims Management Regulator (the “CMR”) will investigate potential breaches and then give the CMC written notice of any penalty it intends to impose together with reasons for the CMR’s decision and a summary of the evidence relied on. The CMC will then have opportunity to make written submissions which the CMR will take into account before reaching a final decision.

The level of the CMC's turnover will also be relevant in determining the level of the fine. Regulated CMC's with a turnover of less than £500,000 could be fined up to £100,000 for a serious breach, whereas those with a turnover of over £500,000 could be fined up to 20% of their turnover.

The image shows a digital display of stock market data. It features several columns of numbers, some of which are highlighted in green or red to indicate price changes. The numbers are arranged in a grid-like pattern, with some rows showing a sequence of values. The overall appearance is that of a financial data screen, possibly from a trading floor or a public display.

RECENT DEVELOPMENTS & CASES

In this section, we take a more in-depth look at some the cases and other developments affecting the banking and financial industry in recent weeks.

SIGNIFICANT BANKING LITIGATION CASES SETTLED

Three significant banking litigation cases have been settled since the last issue of our Banking Disputes Quarterly:

- First, the trial of a US\$100m CDO dispute between **JP Morgan** and **Berlin's public transport provider, BVG**, has settled some seven weeks into its trial in the Commercial Court in London. As reported in the Q1 2014 edition of *Banking Disputes Quarterly*, the case was one of the first concerning derivatives concluded by a European public body to get to trial, and its outcome therefore had the potential to influence dozens of lawsuits over losses on swap agreements between banks and local governments/utilities across Europe.
- Secondly, **Barclays** has settled its dispute with **Dahabshiil Transfer Services**, a money transfer business with significant operations in Somalia and the Horn of Africa. As reported in the Q1 2014 edition of *Banking Disputes Quarterly*, the Chancery Division had

granted an interim injunction back in November 2013 to prevent Barclays from withdrawing banking services from three businesses, including Dahabshiil, pending a full trial later in 2014. The case had generated a lot of publicity, both for its importance to remittance businesses and end-users in the Horn of Africa region, and as an illustration of the impact of ever-tighter anti-money laundering regulation on international transfers.

- Thirdly, **Barclays** has also settled the mis-selling claim brought against it by **Graiseley Properties Limited** (the operator of **Guardian Care Homes**), which had been widely publicised as a test case for LIBOR manipulation claims, and which had been listed for trial at the end of April.

As reported in the Q4 2013 edition of *Banking Disputes Quarterly*, the Graiseley Case and the similar case of *Deutsche Bank AG v Unitech Global Limited* were heard together in October last year by the Court of Appeal, which granted the applications by Graiseley

and Unitech to amend their statements of case to include arguments of misrepresentation by the banks in relation to their conduct in fixing the LIBOR rate. That decision led to speculation that a deluge of similar amendments to existing mis-selling claims, or fresh LIBOR manipulation claims against the banks, would follow.

Whilst the case involving Barclays has now settled, the Unitech claim is understood to be proceeding and may yet set a precedent for similar claims. However, it is worth noting that the Court of Appeal's decision to allow Unitech to amend its pleadings was only an interim decision, and its significance to the outcome of the Unitech claim may have been overstated. The application to amend only had to satisfy the relatively low threshold that the allegation as amended was sufficiently arguable to have a real prospect of success at trial. Whether Unitech, or other claimants in a similar position, will be able to convert that arguable case into a ruling in their favour is another matter.



Whilst little attention has been paid to this aspect of the claim in the press coverage to date, Unitech still faces a number of difficult legal hurdles, particularly in relation to reliance, loss and causation, where it will be necessary to prove that the alleged LIBOR manipulation by the bank at the relevant time (which may have been a particular day, or a period of time during which the rate and bank's submissions may have varied considerably) led to a quantifiable loss suffered in relation to a particular LIBOR-linked loan or other product entered into with the bank.

It therefore remains to be seen whether the Unitech claim will establish any precedent for similar LIBOR manipulation claims against the banks, and further developments are awaited with interest.

COURT OF APPEAL CONFIRMS FOS COMPLAINANTS CAN ONLY HAVE ONE BITE OF THE CHERRY

By Hugh Evans (Partner), Paul Smith (Legal Director) and Krystle Wright (Associate).

The Court of Appeal delivered its long-awaited judgment in *Clark & Anr v In Focus Asset Management & Tax Solutions Ltd* [2014] EWCA Civ 118 in February, clarifying the final and binding nature of awards made by the Financial Ombudsman Service (“FOS”) after conflicting High Court decisions. The Court of Appeal has confirmed that, where a complaint to FOS and any related court claim are based on the same cause of action, claimants cannot obtain a FOS award and then pursue a civil claim for losses over and above the sum awarded by FOS.

Background

FOS was established to provide an avenue for consumers to resolve disputes with providers of financial services at no cost to the consumer. Consumers can choose whether to accept a determination by the FOS or reject it. If the determination is accepted it is “binding and final”.

The potential downside of this scheme for the consumer is that there is a statutory maximum amount which FOS can award (currently £150,000, but £100,000 at the time of the complaint in the *Clark* case). Although FOS can

recommend that the complainant be paid more than the statutory maximum, such recommendations are not binding or enforceable.

This begs the question as to whether a successful FOS complainant is entitled to pursue any additional losses not compensated by the award through the civil courts? Can a complainant, on the same set of facts which relates to the same complaint, have another bite of the cherry?

The Financial Services and Markets Act 2000 (“FSMA”) is silent on the point. The decision of the High Court which was appealed in *Clark* suggested that a complainant could indeed obtain a FOS award and then have another bite of the cherry, using the compensation awarded by FOS to fund subsequent court proceedings against the Defendant. On the face of it, the ability to pursue a claim following a FOS award would be inconsistent with the very premise of FOS and the role it performs in assisting the consumer; however, the High Court decision in *Clark* was inconsistent with another decision of the High Court in the case of *Andrews v SJB Benefit Consultants* [2011] PNLR 577. The Court of Appeal's ruling in *Clark* has therefore provided a degree of clarity on a point of principle which, left unaddressed, would have created significant practical implications for the financial services industry, complainants as well as FOS itself.



Mr & Mrs Clark's complaint

Mr and Mrs Clark made a complaint to FOS in respect of negligent investment advice given by In Focus Asset Management & Tax Solutions Ltd (“**In Focus**”). They claimed losses in excess of £300,000. FOS upheld their complaint and made a determination in their favour. It recommended that they be paid compensation in accordance with a formula which would place them back in the position they would have been had the advice not been given. However, the statutory maximum which FOS could award under this redress scheme at the time was £100,000. FOS could not make a *binding* award for any compensation over that amount.

The Clarks accepted the FOS determination. Although the FOS decision was stated to be binding and final, they indicated on their acceptance form that they reserved the right to pursue the matter further through the civil court. In Focus paid only £100,000 to the Clarks.

The Clarks then initiated proceedings in the Chichester County Court in an attempt to recover their full loss. The Circuit Judge dismissed their claim, citing previous case law, *Andrews v SJB Benefit Consultants* [2011] PNLR 577, as authority for the proposition that once a complainant accepts a determination by the ombudsman, any cause of action that the complainant has (i.e. an entitlement to obtain a remedy from the court based on those facts) is

extinguished. Although the complainant can bring an action to enforce the FOS award, that is all that he can do. He cannot bring a fresh set of proceedings to pursue his cause of action even if FOS awarded him less than he was entitled. This is referred to as the “doctrine of merger”.

On appeal to the High Court, Cranston J allowed the appeal. He decided that the complainants’ acceptance of the FOS decision was “binding and final” but only in the sense that it marked the end of the FOS process, and it was still open to the Clarks to pursue civil proceedings for the remainder of their loss. Their cause of action had not merged in the judgment since FOS considers *complaints* not causes of action, the doctrine of merger therefore should not apply to FOS, and the decision in *Andrews* was therefore held to be wrong.

In Focus appealed the High Court decision to the Court of Appeal.

The Court of Appeal's Decision

Although the decisions in the lower courts had focused on the doctrine of merger, In Focus had also argued that the common law doctrine of *res judicata* should apply, which provides that where a court or tribunal has already adjudicated on a matter this precludes a party from bringing another set of proceedings based on the same issue. The Court of Appeal therefore had to consider whether the doctrine of *res judicata* was applicable to FOS,

and whether the statutory provisions of FSMA which underpin the FOS dispute resolution scheme had excluded the operation of the doctrine.

The Court of Appeal concluded that *res judicata* is applicable to FOS and that a FOS award is a judicial decision for the purposes of the doctrine. A complaint to FOS can consist of or include facts which also constitute a cause of action in subsequent proceedings, and the court must therefore compare the substance of what occurred before FOS to the new proceedings. The fact that the remedy available through FOS may not be the same as available through the courts is irrelevant, as is the fact that FOS determines complaints by reference to what is “fair and reasonable” in the circumstances, rather than by applying strict legal principles alone.

The Court of Appeal did however include in its judgment the caveat that complainants will not always be prohibited from pursuing a court claim following an acceptance of a FOS award. Whether a complainant can do so will depend on whether the substance of the proceedings before the court are the same as the complaint pursued before FOS. The burden of showing that the requirements for *res judicata* are satisfied will fall on the party defending the complaint.

As Black LJ noted, whilst it may seem unfair to prevent a claimant pursuing legal proceedings, in fact “*the claimant*



himself holds many of the cards". A complainant can choose to reject the award by FOS and pursue the court route; however if the FOS award is accepted, the complainant will have benefited "*from a practical scheme which he has been able to use without risk to costs*". Indeed bringing such a claim at court after accepting a FOS award may amount to an abuse of process.

The Court of Appeal also held that FSMA did not disapply the doctrine of *res judicata* in relation to the FOS scheme. As a matter of statutory interpretation, where Parliament is silent on an issue then common law doctrines will continue to apply. Thus the decision of the High Court, where Cranston J had sought to apply the relevant provisions of FSMA so as to further Parliament's purpose of consumer protection, did not give sufficient regard to the fact that Parliament had set a limit on the amount which could be awarded under the FOS regime: if Parliament had intended complainants to be able to recover losses in excess of the limit, it was difficult to see why it would have imposed the limit in the first place.

Conclusion

The Court of Appeal decision represents a reassertion of the public policy consideration of finality in litigation and that a defendant should not have to face the same claim twice. The decision is good news for those in the financial services industry whose anecdotal evidence suggests that there has been an upturn in customers accepting FOS adjudications and then bringing court claims.

It is now clear that acceptance of a FOS award can preclude a complainant from pursuing court proceedings. Whether *res judicata* will in fact preclude a claim will depend in each case upon whether the complaint to FOS was based on facts which constitute the same cause of action in the subsequent court proceedings. When faced with such a scenario the court will have to "*consider the true substance of things and ... assess the true subject matter of the prior complaint and determination*".

The Court of Appeal's decision in *Clark* makes it clear that the FOS scheme is not intended to replicate or replace formal litigation, or to act as a springboard to court proceedings. It remains the case that if a complainant is successful in securing a FOS award, it is up to the complainant whether to accept or reject that award. However, in the light of this decision, the inherent risks of litigation and potential costs exposure may act as a deterrent to complainants rejecting FOS awards.

COMMERCIAL COURT UPHOLDS PARTIES' CHOICE OF FORUM

By Jeremy Andrews (Partner) and Alex Price (Senior Associate). This article first appeared in the Butterworths Journal of International Banking and Financial Law in February 2014.

In *Nomura International Plc v Banco Monte Dei Paschi Di Siena SpA* [2013] EWHC 3187 (Comm), the Commercial Court exercised its discretion not to grant a stay of proceedings under art 28(1) of Council Regulation (EC) 44/2001 (the Brussels Regulation), despite the existence of prior proceedings which amounted to a "related action" in another EU state. The existence of an exclusive jurisdiction clause in favour of the second-seised English court was found to be a "*very significant factor*" in declining to grant the stay, as parties' contractual choice of forum should be upheld wherever possible.

Background

The applicant, the Tuscan bank Banca Monte Dei Paschi Di Siena SpA (BMPS), began proceedings in the Italian courts on 1 March 2013 against its former directors and the respondent, Nomura International Plc (Nomura), in relation to an asset restructuring gone wrong. In 2005, BPMS had subscribed for €400m so-called Alexandria notes, the value of which had collapsed following the onset of the financial

crisis in 2008. BMPS alleged that its former directors had tortiously colluded with Nomura to conceal the resultant losses, by entering into a complex series of agreements (the agreements) to put into effect a restructuring. These agreements were each subject to English governing law, with some (including a 1992 ISDA Master Agreement) providing for the English court's exclusive jurisdiction and others providing for the non-exclusive jurisdiction of the English courts.

Also, on 1 March 2013, but after the Italian proceedings had been commenced, Nomura issued proceedings in the English Commercial Court seeking declarations that the agreements were valid and binding. It was common ground between the parties that the Italian court had been first-seised for the purposes of art 28 of the Brussels Regulation. The Commercial Court was called upon to decide whether it should stay the English proceedings in accordance with art 28(1) of the Brussels Regulation, which provides: *"Where related actions are pending in the courts of different member states, any court other than the court first seized may stay its proceedings"*.

A key consideration in whether to grant such a stay was whether the Italian and English proceedings were "related actions" in the art 28(1) sense. Nomura advanced two main arguments that the actions were not so related, such that a stay should not be granted.

- Nomura argued that the jurisdiction clauses in the agreements made it impossible for Nomura's claims in the English proceedings to be heard and determined in the Italian proceedings. The court held that, in the absence of clear authority, the focus of art 28(3) is what, in principle, is *"expedient in the sense of genuinely desirable"*, not what is *"capable or possible"*; the presence of an exclusive jurisdiction clause went to the latter not the former and did not of itself mean that proceedings commenced in the court second-seised, may not be *"related"* to proceedings in another court for the purposes of art 28(3).
- Nomura argued that the two sets of proceedings were not *"related actions"* for the purposes of art 28(3), because they were not sufficiently closely connected to give rise to the risk of irreconcilable judgments. The court also rejected this argument; it was necessary to look not just at the claims alone, but at the claims and defences. In its defence to the English proceedings (yet to be filed), BMPS would likely rely on the matters it had raised in the Italian proceedings, in support of its argument that the agreements were not valid and binding. On this basis, it would be expedient to hear the two actions together, so as to avoid the risk of inconsistent judgments.

Court's discretion

Having determined that *"related actions"* were indeed pending before the courts of different member states for the purposes of art 28(1), the English court considered whether it should exercise its discretion to grant a stay.

While the proceedings were related and this carried with it an inherent and undesirable risk of overlapping and irreconcilable decisions, the fact the parties may become subject to issue estoppels (preventing an issue already litigated from being re-litigated), upon which they could rely in whichever jurisdiction reached judgment second, would mitigate the risk of inconsistent judgments. Adoption in the ISDA Master Agreement of an exclusive jurisdiction clause also meant that, even if a stay were granted, some issues would remain to be considered by the English courts, which would be undesirable given the considerable time the Italian proceedings would likely take to resolve. Most significantly though, the fact the parties had elected for the exclusive jurisdiction of the English courts in their ISDA Master Agreement *"strongly fortified"* the case against a stay, and was also a *"very significant factor"* against a stay in relation to the other agreements containing non-exclusive English jurisdiction clauses, since the court should *"give effect to the parties' bargain and be very slow indeed to exercise a discretion in a manner the effect of which would be to destroy such bargain"*.

This case provides welcome clarification of the interpretation and operation of art 28 of the Brussels Regulation. It is also a reminder that the English courts will respect parties' contractual choice of jurisdiction wherever possible and that the existence of an exclusive jurisdiction clause may operate to prevent a stay of proceedings by a court that is second seised. The position with a non-exclusive jurisdiction clause is less predictable.

NO KNOCKOUT BLOW IN AUSTRALIAN BANK FEES CLASS ACTION

The recent Australian Federal Court decision of *Paciocco v Australian and New Zealand Banking Group* [2014] FC 35 calls into question whether late payment fees charged on credit card accounts for failure to meet payment deadlines are properly to be classified as penalty clauses. This decision is a further departure by the Australian courts from the well-established narrow application of the law on penalty clauses in England (see the Bank Charges decision in *Office of Fair Trading v Abbey National Plc and 7 Others* [2008] EWHC 875 (Comm) affirmed on appeal for other reasons in [2009] UKSC 6). This raises the possibility that consumer groups will lobby for the position on bank charges in England to be reviewed and may encourage would-be claimants to bring another test case.

In *Paciocco*, the Federal Court extended the reasoning of *Andrews v Australian and New Zealand Banking Group* [2012] HCA 30, a High Court of Australia decision regarding bank fees. In that case, the High Court held that although late payment bank fees were not charged by ANZ upon breach of contract, this did not render the fees incapable of characterisation as penalties.

The Court in *Paciocco* found that the late payment fees ANZ charged Mr Paciocco on his consumer credit cards constituted a penalty at common law and in equity, even where the liability to pay did not arise upon a breach of contract. For further detail on the Australian position, please click here (<http://www.dlapiper.com/~media/Files/Insights/Publications/2014/02/litandregupdateaus19FEB.pdf>) to see DLA Piper Australia's recent Litigation update in this regard.

The *Paciocco* and *Andrews* decisions referred to above cite with approval the law of penalties as set out in the leading English authority of *Dunlop Pneumatic Tyre Co Ltd v New Garage and Motor Co Ltd* [1914] UKHL 1, but extend it so that where there is a liability to pay a fee that is collateral (or accessory) to a primary stipulation (which in *Paciocco* was to make payment of the credit card debt by a particular date), the fee is capable of being characterised as a penalty despite there being no breach of contract.

The English courts have previously refused to extend the English law on penalty clauses in this way (see *Export Credits Guarantee Department v Universal Oil Products Co* [1983] 1 WLR 399 at 323). However, it remains to be seen whether the more recent borrower/customer friendly trends in the English courts and among English regulators in the wake of the financial crisis will lead to a change in the law when next the issue of bank charges comes before the English courts.

SPOTLIGHT ON...

OUR BANKING LITIGATION PRACTICE IN THE NETHERLANDS

The banking litigation team in Amsterdam represents many significant players in the Dutch and international banking and financial services sector, in both civil disputes and regulatory matters. The legal landscape in which banks and other financial institutions operate is continuing to change rapidly, and our lawyers are able to address all areas of financial law, including disputes on market conduct supervision, licence applications, structured products, general liability, duty of care issues, financing, securities and insolvency matters.

In the retail banking sector, we are frequently involved in disputes between financial institutions and their customers relating to issues such as the termination of the banking relationship, consumer credit issues, savings, bank payments and settlements, customer due diligence and liability claims resulting from poor asset management or advice. Recently, we successfully defended ING Bank in the Amsterdam Court of Appeal against class action proceedings initiated by Stichting Restschuld Eerlijk Delen based upon the alleged mis-selling of mortgage-backed products to customers in 2008-2009.

In the commercial/corporate banking sector, we have extensive experience in a wide range of banking and financial disputes, such as termination of loan agreements, enforcement of security rights, pre-judgment

attachments, netting, funds transfers, fraud and asset tracing, EVA registrations, directors' liability and duty of care issues. As an example of our recent experience, we successfully represented a major Dutch bank in Supreme Court litigation against bankruptcy administrators to determine issues including the pledging of receivables by power of attorney and the non-assignability of receivables by contract, which were both issues of significant importance to the Dutch banking sector as a whole. We also successfully defended Staalbankiers in the Hague Court of Appeal against a claim brought by former holders of Lehman notes. We are also representing several clients in relation to claims arising from the fixing of market benchmarks such as LIBOR.

Our banking litigation team in Amsterdam frequently works alongside teams in DLA Piper's other offices on multi-jurisdictional disputes, and in cross-practice teams (particularly in collaboration with our specialist restructuring and finance & projects lawyers) and our specialists are frequent commentators on current affairs and legislative and judicial developments in both the legal press and wider media.

For further information about our banking litigation practice in the Netherlands, please contact [Paul Hopman](#) or [Ewald Netten](#).

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