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Quinn Emanuel London Continues to Grow

The London office of Quinn Emanuel has seen a period of sharp growth over the past 6 months. Following on from the hire of finance litigator Robert Hickmott last November, Martin Davies joined Quinn Emanuel in February this year, having previously been a partner at Olswang LLP since 2000 and Head of Litigation since 2007. Chambers Directory (London) praised Martin for having an eagle eye for detail, and The Legal 500 calls him a *"charming and effective litigator"*. Legal Business named Martin as one of the ten lawyers to visit in a crisis.

In addition, Quinn Emanuel has promoted Matthew Bunting to partnership. Matthew joined Quinn Emanuel's London office at the time of its opening in 2008, having previously worked as senior associate in the litigation department of Slaughter & May. Matthew is an experienced solicitor advocate with a background in large complex litigation and arbitration, often with a significant cross-border element.

The London office has also expanded its premises by doubling the office space and this expansion has allowed the hire of five new associates in the past 6 months (Alexander Weinberg, Khaled Khatoun, Gillian Sinnott, Duncan Watson and Yasseen Gailani).

Quinn Emanuel is established as the premier business litigation firm in the US and, with its roster of 7 partners and 13 associates, we are well on our way to replicating that success here. Q

QE London Named 2011 Legal Business Award Finalist

The London office of Quinn Emanuel was a finalist at the Legal Business Awards 2011. The firm was shortlisted as *"US Firm of the Year"*. This follows on from Quinn Emanuel's success in 2010 in being shortlisted as a finalist in the Legal Business Awards as *"Dispute Resolution Team of the Year"* and the British Legal Awards as *"Litigation and Regulatory Team of the Year"*. Such recognition is again indicative of the impact which Quinn Emanuel has had since launching in the London market. Q

Case Law Update: Misselling Financial Products

In a recent case, *Cassa di Risparmio della Repubblicca di San Marino SpA* ("**CRSM**") *v Barclays Bank Ltd* ("**Barclays**"), CRSM brought claims in fraud, negligent misrepresentation and breach of contract against Barclays arising out of a bespoke, synthetic CDO deal.

In a careful judgment, the Court has provided a clear summary of the legal principles which apply in CDO misselling claims. In particular, it has underlined that in deciding if a misrepresentation claim has become barred as a result of a contractual disclaimer, the effect of the disclaimer must be analysed closely and placed in context. Only if the disclaimer can fairly be said to exclude the precise representation which the claimant is alleging will the court find that claims based on that representation have been excluded. On the facts, however, CRSM failed to establish that Barclays was liable for its losses. The Court also rejected CRSM's claim that a discrepancy between the risks of investing in the Notes projected by Barclays' internal modelling and those implied by the AAA rating given to the Notes gave rise to a fraudulent misrepresentation.

Facts

In a vivid reminder of the way in which the financial markets embraced structured products during the boom, Barclays sold CRSM four sets of AAA rated, credit linked notes (the "**Notes**") in 2004/early 2005 with a total nominal value of €406 million. The Notes each had a maturity of 5 to 7 ½

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years. In exchange for the principal value of the Notes, CRSM received a coupon of approximately Euribor + 0.95 %. The underlying purpose of the transaction was to provide financing for certain of CRSM's consumer finance subsidiaries, to which CRSM was unable to lend directly because of risk concentration limits prescribed by the Central Bank of San Marino.

The Notes had synthetic CDOs embedded in them giving exposure to a pool of reference assets through a portfolio CDS. The reference assets themselves were synthetic CDOs referenced to approximately 50 individual CDSs. The CDOs to which CRSM was directly exposed were colloquially known as "CDO squared".

The Notes were restructured in 2005 as a result of which various reference entities were substituted and certain structural changes to the CDOs were made in an attempt to make them less risky. Notwithstanding the restructuring, massive losses were experienced.

CRSM's Claims

CRSM's central claim was that although Barclays had sold it the Notes on the basis of an agreed AAA rating which they intended CRSM to rely on and which CRSM did rely on, Barclays knew and intended, through its internal modelling, that the Notes had a probability of default equivalent to B rated instruments. CRSM further alleged that Barclays had deliberately structured the Notes in this way in order to maximise its profits.

Barclays' expert witness testified that this practice—known as "credit ratings arbitrage"—was widespread in the structured finance sector during the boom. In many claims litigated in the US courts, claimants have argued successfully that banks engaging in such practices were acting fraudulently. It will therefore be disappointing for claimants that the Court agreed with Barclays that, on the facts of this case, this aspect of CRSM's claim compared the incomparable. In particular, unlike the Notes' credit rating, the Court held that Barclays' internal projection of the risks associated with the Notes was not concerned with default risk. Instead, its purpose was to derive a market price for the Notes in order to mark its books to market, to hedge against the risks associated with the Notes and for calculating notional profits.

In addition to arguing that CRSM had failed to establish its claims on the evidence, Barclays argued that CRSM's claims were defeated as a matter of contract by the terms and conditions of Notes and the disclaimers in the deal documentation. Here claimants may find themselves somewhat reassured. In particular, the Court noted that although contracting parties may agree that one party has not made any pre-contractual representations to the other, or that any such representations have not been relied upon, clear words will be necessary if a term is to be construed as having this effect. In an appropriate case a bank may also fail to exclude liability for misrepresentation where the misrepresentation relates to the effect of the documents themselves.

Conclusion

Overall this decision will be welcomed by the banks as the latest in a series of decisions in which the claims of investors in complex financial products have been dismissed. That said, claimants will draw comfort from the Court's clarification that misrepresentation claims will only be contractually excluded if the disclaimers relied upon by the bank use clear words. The key implication is that in claims where the evidence is stronger banks will find it difficult to rely on the disclaimers in their documents. What the case law also fails to convey is what is below the surface: where stronger claims have been made the banks have often been quick to settle for fear of setting unhelpful precedents, with the result that only the intrinsically weaker claims make their way to court, adding to the accumulation of precedents favouring the seller of those products.

Balance Sheet Insolvency: The Point of No Return

The decision of the Court of Appeal in *BNY Corporate Trustee Services Limited v Eurosail-UK 2007-3BL plc and others [2010] EWCA Civ 2007,* is good news for distressed companies in need of some breathing space. In this case, the Court of Appeal held that the balance sheet test for insolvency is only intended to apply where a company has reached a *"point of no return"* rather than being used as a *"mechanistic, even artificial, reason for permitting a creditor to present a petition to wind up a company".* The Court upheld the High Court's earlier decision that Eurosail was not insolvent under s123(2) and provided a useful summary of how future and contingent liabilities should be evaluated for the purposes of assessing balance sheet insolvency.

Background to the insolvency test

The test for insolvency under English law is whether the debtor has an *'inability to pay debts'.* The tests for this are set out in the Insolvency Act 1986 ("IA"). Under section 123(2) a company is deemed unable to pay its debts if the value of the company's assets is less than the amount of its liabilities, taking into account its contingent and prospective liabilities. This is the test for 'balance sheet insolvency'. Under section 123(1)(e) of the IA a company is regarded as unable to pay its debts if it is unable to pay its debts as they fall due. This is the test for 'cash flow insolvency'.

The essential difference between the balance sheet test and the cash flow test is that the focus of the former is on 'liabilities' (including contingent and prospective liabilities) which is a much broader concept than just straight "debts". Even if a company could meet its debts as they fall due it would be technically insolvent if its total liabilities exceeded its total assets.

There has, however, been very little judicial consideration of how the balance sheet test is to be applied in practice as the majority of court decisions have focused on the cash flow test which normally forms the basis for winding up/administration applications.

The requirement under section 123(2) to evaluate a company's contingent and prospective liabilities in assessing its solvency was considered in *BNY Corporate Trustee Services Limited v Eurosail-UK 2007-3BL plc and others.*

The Decision

The Court held that a company is not balance sheet insolvent solely because its liabilities exceed the value of its assets. The Court noted that, were this interpretation to be adopted, many companies would find themselves deemed unable to pay its debts and consequently unable to access investment or credit.

Rather, the Court decided that a company becomes balance sheet insolvent only when the size of liabilities (including contingent and future liabilities) as opposed to the value of its assets are such that it has reached the *"point of no return"*. In other words where it becomes clear that a company, although able to pay its debts at the present time, will not be able to meet its future or contingent liabilities.

Valuation and the importance of audited accounts

As to how such future and contingent liabilities should be valued, the Court rejected the argument that section 123(2) requires one to take future and contingent liabilities into account at face value, and decided that a commercial valuation exercise was needed: *"The idea that one has to carry out a valuation exercise in relation to future and contingent debts is supported by commercial common sense".*

The Court concluded that, whilst audited accounts portraying a true and fair view of the company's financial position have *'real force',* these should simply form the start of the valuation exercise as audited accounts will inevitably be historic and often conservative. The valuation exercise should be carried out *'with a firm eye both on commercial reality and on commercial fairness. Clearly, the closer in time a future liability is to mature, or the more likely the contingency which would activate a contingent liability, the more probable it would be that section 123(2) would apply'.*

So was the company insolvent?

On analysis, the Court of Appeal found that the current value of the company's liabilities was in the region of £70 million in excess of the value of its assets. However, several factors needed to be balanced.

- The company had substantial assets, the current asset deficit being only 17%;
- The deficit was largely based on the assumption that exchange rates would remain as they are. The reality was that there was great potential for change in the difference between Eurosail's assets and liabilities due to currency fluctuations; and
- There was a long forward looking period – many of the notes issued by the company, which formed the basis of the claim, had a final redemption date in 2045, and the values of assets and liabilities would inevitably fluctuate over this period.

Comment

Eurosail demonstrates how audited accounts are the starting point, but by no means the end point, when undertaking the valuation exercise required for 123(2): accounting principles are no longer determinative.

A key point is that the balance sheet insolvency test under section 123(2) is not an entirely independent ground for the winding up of a company detached from a company's ability to pay its debts. Instead, it is supplemental to the cash flow test in section 123(1)(e) and is intended to cover situations where a company has reached the point of no return of an incurable deficiency in its assets. In this sense, the cash flow insolvency test appears to have been merged into the balance sheet insolvency test. It remains uncertain how far the balance sheet test for insolvency can now be distinguished from the cash flow test.

Colt Telecom

It should also be noted that the judge's comments in Eurosail echo comments made in *Colt Telecom [2002] EWHC 2815.* Whilst the judge in Colt Telecom was considering the cash flow test, he gave short shrift to speculation over the future health of a company. As the judge put it *"shaky, tentative and speculative peering into*

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the middle-distance is no basis for forcing a company into administration". It was made clear that any allegation of insolvency is a serious matter and one that requires solid foundation.

In Colt Telecom, the judge noted that factors such as the company's ability to refinance and the volatility of the telecoms market meant that the noteholders claim that the company's cash would run out was speculative and unprovable. The parallel is clear, and there is an obvious judicial reluctance to engage in 'crystal ball gazing' when carrying out a valuation exercise of a company's liabilities. Look into the future, yes, but don't try to look too far ahead.

Whilst the Eurosail decision provides welcome (and long needed) guidance from the Court, the difficulty with the flexible approach taken is that it does not provide much certainty for future cases. Given that a net liability position of £70 million was deemed insufficient to render Eurosail's balance sheet insolvent, what disparity is required before a company can be considered unable to pay its debts under section 123(2) of the IA? The judgment clearly allows room to manoeuvre when the company is able to meet its debts but has a liability of uncertain value to meet some 35 years down the future, but what happens if the liability matured in say 15, 10, or 2 years? In light of this uncertainty, it may be that lenders and/or noteholders in future transactions consider including a bespoke insolvency event of default provision which clearly sets out in what circumstances the relevant company will be deemed to have negative net worth and thereby trigger an event of default, instead of relying on a cross-reference to section 123(2) of the IA as did the Applicants in this case.

It remains uncertain whether this case will proceed to the Supreme Court. Until then, the judgment will dissuade many creditors from relying upon an event of default based on section 123(2) of the IA in the absence of other more clear cut events of default.

Commercial Contracts: The Uncertainty of Construction

Although disputes between contracting parties about the meaning of their documents have always been common, such disputes have been particularly prominent of late in the context of complex debt restructurings.

The modern approach to contractual interpretation is derived from the speeches of the recently retired Lord Hoffmann in the *Investors Compensation Scheme* (1998) and *Chartbrook v Persimmon* (2009) cases. In summary, a Court's task when faced with a dispute over the meaning of a contractual provision is to decide what the "reasonable person", having all the background knowledge available to the parties, would have understood the words to mean at the time the contract was entered into.

Although the negotiating history and the parties' subjective intentions in entering into the contract will not be relevant, the background knowledge which the Court can impute to the reasonable person can include *"absolutely anything"* affecting the way the language would have been understood. Crucially, the Court's task in giving effect to the contract under the modern approach is also not limited by the literal meaning of the words used. Accordingly, if the factual background against which the parties contracted would lead the reasonable person to conclude that *"something must have gone wrong with the language"*, the Court is not required to give effect to the literal meaning, and *"there is [no]... limit to the amount of red-ink or verbal rearrangement or correction which the court is allowed"*. Instead, the Court will have regard to the commercial purpose of the contract and give effect to the meaning which best furthers that purpose.

The implications of the modern approach for creditors with divergent interests in complex debt structures are clear. According to Lord Neuberger, contractual interpretation is now an *"iterative process"* which requires *"checking each of the rival meanings against other provisions of the document and investigating [their] commercial consequences"*. So long as an argument for a particular interpretation of the relevant contract can be made in good faith based on the background material or the commercial purpose, a party is therefore legitimately entitled to raise that argument and the court will be required to decide between the alternatives, even if the literal meaning of the contract is clear and, on its face, unambiguous.

Three recent cases in which Quinn Emanuel have been involved provide particularly good examples of the impact that these principles may have in distressed situations.

- *Sigma Finance (2009):* Sigma was an insolvent structured investment vehicle ("**SIV**") which issued short term commercial paper and invested the proceeds in asset backed securities of different maturities. Receivers were appointed to realise and distribute Sigma's assets in accordance with the trust deed. The trust deed provided for a 60-day Realisation Period during which the SIV's assets were to be pooled to meet liabilities falling due during and after that period. Given the collapse in the value of the assets backing the structure, however, the effect of the this provision was to give debts which fell due for repayment during the Realisation Period priority over longer-dated debts. According to the High Court and the Court of Appeal, the meaning of the trust deed was clear and the Receivers were obliged to give priority to the shorter-dated debt, leaving the creditors who held longer-dated debt with nothing. However, applying the modern approach, the Supreme Court overturned the lower courts' decisions and held that the Receivers were obliged to distribute Sigma's assets amongst all creditors on a *pari passu* basis.

- *Cattles v Welcome Financial Services (2010):* Cattles ("**C**") borrowed money from the Royal Bank of Scotland ("**RBS**") on the security of a group cross-guarantee and indemnity before on-lending it to its subsidiaries, including Welcome ("**W**"). C owed RBS £2.6 bn, W owed C £2.9 bn and C was liable to RBS for W's debts. On a narrow construction of the guarantee, it was arguable that W's debts to C could be paid before RBS's, in which case RBS's realisations from the group's estate would have been reduced. However, according to the High Court and the Court of Appeal, the modern approach required the guarantee to be given a broad construction because its commercial purpose was *"obviously to increase the bank's realisations".*

- *European Directories (2010):* The European Directories group borrowed money under a €1.5 bn senior facilities agreement. In return, the lenders took guarantees and security from various group companies. A restructuring was proposed pursuant to which the group holding company, DH7, would be placed into administration and DH7's shares in its Subsidiaries would be sold to a new company. In order to complete the restructuring, the administrators would need to transfer the liabilities of the Subsidiaries. They would also need to release the guarantees and security granted by DH7 *and* its Subsidiaries using a release on disposals clause, but on a narrow construction that clause only permitted the administrators to release DH7's liabilities, not the Subsidiaries'. According to the High Court, the clause only extended to DH7; the purpose of the clause had to be determined from its wording and its scope *"should not be enlarged beyond the ambit of the clause itself"* so as to apply to the Subsidiaries by reference to a priori notions of commerciality. However, according to the Court of Appeal, the clause had to be construed broadly with the result that the administrators' powers extended to the Subsidiaries as well. This was because the commercial purpose of the clause was to maximise the value of the disposal, and in circumstances where a clause was capable of two meanings and neither flouted business common sense, the court should adopt the more commercial construction.

In response to these decisions, many commentators have noted that whilst the lower courts have tended to favour literal constructions and to define purpose narrowly, the higher courts are far more willing to construe documents liberally and will not hesitate to overrule even the most closely reasoned decision where they disagree with the lower courts' views. As a result, there are significant tensions in the case law as to the proper role of commercial purpose in giving effect to a contract, and the true commercial purpose of a given contractual provision may also be highly contentious. In many cases, however, our experience suggests that these difficulties will provide opportunities for creditors with different incentives and conceptions of commercial purpose to challenge majority-led restructurings by advancing rival interpretations of contestable contractual provisions. They also mean that the higher courts will tend to grant permission to appeal more readily than in other types of case, with the result that the commercial backdrop against which the parties might attempt to settle a case is more fluid and unpredictable than it would ordinarily be.

Supreme Court Abolishes Expert Witnesses' Immunity from Suit

In *Jones v Kaney* [2011] UKSC 13, the Supreme Court (by a majority) abolished immunity from suit that expert witnesses have enjoyed in relation to their participation in legal proceedings.

The first rule of law is that a wrong should have a remedy. Any derogation from this rule requires a compelling reason, and the Supreme Court could find no compelling reason to allow expert witnesses immunity from legal claims. As such, litigants who suffer loss as a result of negligence by an expert witness, now have the right to seek damages against that expert.

In making this decision, the supreme justices considered that removing immunity was unlikely to have a "chilling effect" in deterring expert witnesses from giving evidence and would not reduce the number of practitioners willing to give expert evidence. Their view was that all who provided professional services which involved a duty of care were at risk of being sued for that breach of duty. Professionals were accustomed to this and customarily insured against that risk.

The supreme justices also held that there

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was a minimal risk that the abolition of immunity would result in claims by vexatious litigants. Strong, additional expert evidence would be required to make good the suggestion that the previous expert had been negligent. It would not be easy to obtain expert evidence to support a vexatious claim.

This will not seem a surprising decision to many—where a client has paid substantial fees to an expert, why should he not have a remedy if the expert is negligent? Prior to this decision, the answer was to ensure that the expert felt he/she could give their expert evidence to the Court without fear of redress if the client considered that the evidence was not sufficiently supportive of their case. The Court no longer accepted this as a justifiable reason.

In light of this decision, experts will no doubt seek to obtain appropriate professional indemnity insurance and may also seek to exclude or limit their liability by contractual terms.

Time to Pack Up the Phoenix Pre-Pack?

As our readers will know, a pre-pack is the process of selling the business and assets of a company immediately after it has entered into an Insolvency Act administration procedure. Pre-packs are a frequently used mechanism as they ensure that the value of a business does not ebb away through a protracted insolvency sale process. But the advantage of moving fast has to be counterbalanced with the perception the unsecured creditors will inevitably form: that they have been left with an unsecured claim against the rump insolvent entity, whilst the profitable business is hived off to a new company, without their prior knowledge or consent. Although the proceeds of the sale will be paid to the insolvent entity, it seems that there is rarely anything left over for the unsecured creditors after the administrator's fees have been satisfied and any secured lenders paid out.

This perception of sharp dealings is exacerbated where the buyer is, or is connected with, the previous management. The allegation is very often that the business was not properly marketed and its full value not achieved.

Against this background, Ed Davey, the Business Innovation and Skills minister, has announced measures aimed to improve the transparency of, and confidence in, pre-pack sales in administrations. Mr Davey's proposal involves giving a three-day notice period for connected parties to oppose a pre-pack deal before it is implemented.

Under SIP 16, administrators already need to provide an explanation as to why they concluded that a pre-pack sale was the best way of maximizing the return to creditors. Under the new proposals, administrators will also need to a file this explanation at Companies House, putting the information in the public domain. The administrators will also need to confirm in this filing that the sale price represents the best value for creditors.

To date, the industry response towards the proposals has been mixed. Unsecured creditors, such as landlords, have generally welcomed them whereas industry insiders have voiced their concerns. Steven Law, president of insolvency trade body R3, has commented that a by-product of such a law could be to increase numbers of liquidations. *"Three days is a long time in business, and if unable to trade in that period, [a business] is at risk of losing key staff and customers"*. Meanwhile, Richard Fleming, UK Head of Restructuring at KPMG has struck a cautious tone, accepting that "phoenix" pre-packs are open to abuse, but noting that the solution is not to kill them off: *"It would be a step backwards for the insolvency regime if the pre-pack mechanism were lost through best-intentioned efforts to eradicate system abuse"*.

The proposal could become law at the end of this year, and would be applicable to any sales back to connected parties in an administration process where the assets were not marketed.

But how far do these reforms really go, and are they likely to affect significantly the position of unsecured creditors in a pre-pack? Certainly, the new proposals would afford creditors an opportunity to express their concerns, which the administrator would need to consider or, where circumstances justify it, there would even be time to apply to court for an injunction preventing the sale from taking place. However, it is questionable whether 3 days will allow enough time for the unsecured creditors to obtain any meaningful valuation of the company which would arguably be necessary to defeat the pre-pack process. Indeed, whilst landlords have welcomed the government plans, the British Property Federation themselves have stated that 3 days would still not give landlords sufficient time to scrutinize pre-packs and have called on ministers to extend this notice period to one week. This call for an extended period is likely to go unheeded but only time will tell.

Bribery Act 2010 Update: Guidance for Commercial Organizations

The Ministry of Justice has published the long awaited finalized guidance on "adequate procedures" under the Bribery Act 2010. The Act will come into force on 1

July 2011.

The Bribery Act 2010 creates a new offence under section 7 which can be committed by commercial organizations which fail to prevent persons associated with them from "bribing" another person on their behalf. An organization that can prove it has adequate procedures in place to prevent persons associated with it from bribing will have a defence to the section 7 offence. The new guidance published under section 9 of the Act, will help commercial organizations of all sizes and sectors understand what sorts of procedures they can put in place to prevent bribery.

The Guidance emphasizes that, while the Act contains "tough rules", these will be enforced with "common sense", according to a core principle of proportionality. The Guidance does not provide hard and fast criteria; the overriding criteria appears to be, as Secretary of State of Justice, Kenneth Clarke, put it, *"Bribery is one of those things we all know when we see it"*. In other words, the plain language of the statute is extremely wide-reaching. This apparently relies on prosecutorial discretion to pick and choose cases. Companies may feel that this unpredictability is somewhat unsatisfactory.

The Guidance sets out useful illustrations, as opposed to prescriptive criteria. For example, "reasonable and proportionate" corporate hospitality is not a bribe unless spending was intended to induce a person to perform improperly any relevant function (e.g. awarding contracts). As Kenneth Clarke, the Minister of Justice stated, *"under this law, no one is going to try to stop businesses taking clients to Wimbledon or the Grand Prix"*.

The Act has a very wide jurisdiction. Sections 1, 2 and 6 catch offences committed anywhere in the world by any person with a "close connection" to the UK. By contrast, section 7 does not need a UK close connection and catches failure by a company to prevent bribery anywhere in the world by a company which is either: i) formed/incorporated in the UK; or ii) if formed/incorporated elsewhere, carries on business, or part of a business, in the UK. The Guidance clarifies that having a listing on the London Stock Exchange or a UK subsidiary is not, without more, enough for a foreign company to fall within the jurisdiction of the UK courts under section 7.

The Guidance has generally been welcomed by practitioners in this field as providing the clearest clarification to date of the legislation. However, the guidance itself is not legally binding, and many questions such as the jurisdiction of the Act will ultimately turn on the judge's interpretation. Q

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