



BANKING & FINANCE LITIGATION UPDATE

Issue 66

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DOMESTIC BANKING

BANK OF ENGLAND

1. One of the three deputies at the Bank of England, Paul Tucker, has resigned and will leave his post early. His appointment was due to run until February 2014 but he will leave in the autumn, after providing support to the new governor, Mark Carney, who starts at the end of June.

Guardian, 14 June 2013

2. Paul Fisher, executive director for markets at the Bank of England, has said that the recovery of the economy over the next three years will be "gentle" at best because of existing debts in household, government, bank and corporate balance sheets. He called for interest rates to remain low and an increase in quantitative easing to work through the debt.

Telegraph, 25 May 2013

BARCLAYS

3. Barclays Infrastructure Funds Management has had an offer for a buyout from the listed private equity company 3i.

Telegraph, 25 May 2013

CO-OPERATIVE BANK

4. The Co-op has named Richard Pym, who runs the bailed out banking divisions of Bradford & Bingley and Northern Rock for the government, as its chairman and the finance director of supermarket chain Morrisons, Richard Pennycook, as interim finance director.

Guardian, 5 June 2013

5. The Co-operative Bank sought nearly £1 billion in loans from the Bank of England after it realised that there was a big hole in its balance sheet. Co-op insiders suggested that there was no direct connection between the loans and the bank's trouble and that the timing was a coincidence.

Times, 4 June 2013

6. Veteran HSBC banker Niall Booker has been made chief executive of the Co-operative Bank and will be taking up his post in June, replacing Barry Tootell.

Independent, 28 May 2013

HSBC

7. Sir Jonathan Evans, who earlier in 2013 resigned as Director-General of MI5, is to join the board of HSBC in August, as the bank looks to combat financial crime. The advisory committee that reports to the Prime Minister and rules on the appropriateness of the new jobs of Britain's most senior former civil servants, has signed off on the appointment.

Times, 1 June 2013

8. Douglas Flint, chairman of HSBC, has pledged to reduce its business with tax havens around the world. Mr Flint said that the bank was planning to "significantly reduce" activities in places like Bermuda and the British Virgin Islands.

Times, 25 May 2013

LLOYDS BANKING GROUP

9. City recruitment company Korn/Ferry Whithead Mann has been appointed by Lloyds Banking Group to begin the search for a new chairman for the bank. The move is seen as the first sign that Lloyds is preparing to privatize its TSB unit at the start of 2014.

Telegraph.co.uk, 9 June 2013

10. The Swiss private bank Union Bancaire Privee has paid £100 million for Lloyds Banking Group's Geneva-based private banking arm. In another deal, Lloyds also sold the Miami office of its private bank to Banco Sabadell for £8 million as it continues to implement its plan to exit international banking.

Telegraph, 30 May 2013

11. As part of its attempt to raise capital and improve its balance sheet, Lloyds Banking Group will auction off \$8.7 billion of US mortgage bonds, the same bonds which initiated the financial collapse in 2008 but which have now significantly risen in value.

Telegraph.co.uk, 28 May 2013

12. Lloyds Banking Group is to form a partnership with its subsidiary Scottish Widows to provide finance for the Government's infrastructure projects, such as social housing and hospitals. The combination of the two businesses will mean that projects can be funded from construction through to operations.

Times, 28 May 2013

13. The International Monetary Fund (IMF) has urged the government to set out a "clear strategy" to return the state-owned banks, Lloyds Banking Group and The Royal Bank of Scotland ("**RBS**"), to private ownership. The IMF also encouraged the chancellor, George Osborne, to use taxpayers' money if either of the banks requires more capital.

Guardian, 23 May 2013

THE ROYAL BANK OF SCOTLAND

14. Following the resignation of Stephen Hester, RBS has appointed the City recruitment company MWM Consulting to find a successor, indicating that a new chief executive for the bank has not already been identified.

Telegraph, 14 June 2013

15. RBS is to restructure its investment banking arm, saying it plans to focus on core fixed income products. The move will see RBS withdraw from equity derivatives and structured retail investor products and is likely to result in up to 2000 redundancies.

Times.co.uk, 13 June 2013

16. The chief executive of the RBS will stand down by the end of 2013 after running the bank since November 2008. Stephen Hester, who had previously indicated that he wished to see the bank through the privatisation process, has been asked to leave to facilitate the sale of the Government's 81pc stake in the lender by the end of 2014.

Daily Telegraph, 13 June 2013

17. Plans to split RBS into two banks, with its toxic assets held by a "bad bank", may be scuppered by new EU rules which come into force on August 1. The new rules on bailouts mean that shareholders and junior bondholders must experience loss before the EU will give approval for government assistance in bailing out a bank in trouble.

Financial Times, 11 June 2013

18. Ulster Bank, the subsidiary of the RBS which operates mainly in the Republic of Ireland, has received approximately £10 billion from the Government as part of a bailout, three times more than the £3.25 billion that Parliament agreed to provide as a direct loan in 2010.

Times, 10 June 2013

19. Wholly-owned RBS subsidiary, NatWest, has experienced the latest in a line of problems with its mobile banking app on a day on which many of its customers were paid. The glitch was acknowledged in a tweet from its customer service account following customer complaints that the app was not loading up effectively on mobile phones.

Telegraph.co.uk, 31 May 2013

20. RBS has informed US private equity firms JC Flowers and Apollo that their joint bid for the 315 branches the lender must sell has been unsuccessful. It is anticipated that RBS will get in touch with other bidders shortly. Still in the running is a bid from a number of Britain's largest investment firms led by Andrew Higginson as well as a bid from US private equity firms Corsair Capital and Centerbridge Partners. RBS has not yet responded to Virgin Money's bid.

Guardian, 31 May 2013

21. A former top director at the Financial Services Authority ("**FSA**") has been recruited by RBS for the new role of head of conduct and regulatory affairs in response to concerns over ethics in the financial services industry. Jon Pain will join RBS from KPMG in August 2013.

Telegraph, 27 May 2013

22. RBS has created a new fund worth £150 million aimed at small companies in the leisure sector who want to borrow money to buy new equipment or refurbish their premises. Loans will be administered via RBS branches in Scotland, and NatWest branches in England and Wales.

Times, 20 May 2013

DOMESTIC GENERAL

23. A preliminary investigation into the foreign exchange market has been launched by the UK markets watchdog following the receipt of complaints alleging that banks traded in advance of customer orders and tried to manipulate the benchmark.

Financial Times, 13 June 2013

24. With high street lenders looking to reduce the risk of money-laundering, dozens of small financial groups are finding themselves losing their banking facilities. Barclays recently told three-quarters of the money-service companies that use its accounts that their custom is no longer wanted, whilst customers at RBS are being reviewed more often to ensure compliance standards are being met. Money service businesses, generally, have been identified as a money-laundering risk by the UK Serious Organised Crime Agency. But the businesses, which are legally required to use bank accounts to hold customers' money, have claimed that they are being left in limbo by banks.

Financial Times, 13 June 2013

25. A parliamentary banking standards commission cross-party report on raising standards and making the banking industry more competitive, will urge the country's banks to make switching an account to a rival institution easier for customers. The commission believes that better competition would be a major factor in stopping the type of consumer scandals that have damaged the sector. The Payments Council has made preparations for the introduction in September of procedures that will allow current accounts to be switched from one bank to another in seven days.

Financial Times, 12 June 2013

26. The latest figures from the Bank of England have revealed more disappointment from its flagship initiative aimed at boosting lending, putting some of the country's biggest banks on the defensive. The figures show that, in the first three months of 2013, credit actually shrank by £300 million. This was an improvement on the £2.4 billion decline in the last quarter of 2012 but, overall, 40 banks in the Funding for Lending scheme, representing £1.36 trillion in outstanding UK loans, have cut lending since the end of June 2012 by £1.79 billion.

Independent, 4 June 2013

27. The next bank mis-selling scandal could be current accounts that customers have to pay for. A record number of customer complaints have been received by the Financial Ombudsman Service over issues such as insurance deals attached to such accounts which are unsuitable and accounts being switched from free to paid-for without the knowledge of customers.

Daily Telegraph, 29 May 2013

28. Stephen King, group chief economist at HSBC, has said that senior bankers should be required to sign up to a business version of the Hippocratic Oath and face the possibility of going to jail if they do not perform their duties properly. He also stressed the critical importance of restoring trust in the banking system.

Times, 18 May 2013

EUROPEAN BANKING

BANK OF IRELAND

29. The only Irish bank not to be nationalised as a result of the financial crisis, Bank of Ireland, is to issue its first senior unsecured bond since 2008 and has appointed Deutsche Bank and RBS, amongst others, to manage the issue.

Times, 29 May 2013

30. The Bank of Ireland has reversed its decision to increase the tracker mortgage rate of 1,200 of its customers following a review of customer complaints. The bank had announced in February that it would increase the rate for 13,500 UK customers who hold tracker mortgages with the bank from 1 May this year. This decision has now been reversed.

Guardian, 25 May 2013

COMMERZBANK

31. In order to pay back part of a 2009 bail-out, Commerzbank has raised €2.5 billion (£2.1 billion) from the sale of 556 million new shares. Soffin, the German bank rescue fund, will be given €1.6 billion and insurer Allianz will be given €750 million.

Telegraph, 30 May 2013

CREDIT SUISSE

32. Credit Suisse is mulling over a sale of part of its wealth management business in Germany as it attempts to increase the profitability of its onshore operations in western Europe.

Financial Times, 7 June 2013

33. A decision on BlackRock's proposed takeover of Credit Suisse's exchange traded funds business, which was agreed at the beginning of 2013, has been delayed after the Office of Fair Trading said it required further time to evaluate the deal.

Times, 23 May 2013

DEUTSCHE BANK

34. Deutsche Bank has opened a safe deposit in Singapore that is capable of holding as much as 200 tonnes of gold. The move is in response to the growing demand from wealthy investors for precious metal vaults so they can have direct access to physical bullion as opposed to holding futures or options on the metals.

Financial Times, 11 June 2013

EUROPEAN CENTRAL BANK

35. In a blow to some market hopes that ambitious action would be taken, the European Central Bank ("ECB") is moving away from any "big" style intervention aimed at reviving Eurozone lending. Despite calls for action, the ECB sees the issue as being one of weakened balance sheets blocking lending, a situation that does not warrant the ECB's direct intervention in the SME borrowing process.

Financial Times, 4 June 2013

SANTANDER

36. Swedish start-up iZettle has received an investment of €5m from Santander as the Spanish lender seeks methods to encourage small businesses to take payments by card. For a flat 2.75 per cent fee merchants can receive payments via iZettle's card readers which attach to tablets and smartphones.

Financial Times, 11 June 2013

UBS

37. In what will be the largest privatisation in the UK for two decades, the government has appointed UBS and Goldman Sachs as the lead banks to run the Royal Mail flotation. The banks will be joint global co-ordinators as well as joining Barclays and Bank of America Merrill Lynch as joint bookrunners.

Financial Times, 30 May 2013

EUROPEAN GENERAL

38. International lenders have agreed to allow Ireland to delay its banking stress tests, due to be undertaken in autumn 2013, until next year. The next round of tests will now be delayed until the first six months of 2014, despite warnings from Fitch, the ratings agency, that the Irish banking system still has "significant risks"

Financial Times, 14 June 2013

39. All progress that had been made since the launch of the euro towards integration of the Eurozone bloc's debt markets has been wiped out by the extent to which the banks in the bloc have cut cross-border holdings of government and corporate bonds. The "re-domestication" of bond markets in the Eurozone is a significant side effect of the financial turmoil of the last six years.

Financial Times, 11 June 2013

40. The domestic overhaul of the scandal-hit London interbank offered rate (Libor), overseen by the head of the UK Financial Conduct Authority ("FCA"), Martin Wheatley, is in danger of being overshadowed by moves from the European Union. The European Commission has drafted a regulation that would bring an end to the era of self-regulation and would see the Libor rate come under the supervision of the Paris-based European Securities and Markets Authority. Both providers of benchmarks and their users are concerned about the intrusiveness of some of the proposed new rules, which cover thousands of benchmarks that are used in trillions of dollars' worth of contracts and financial instruments.

Financial Times, 7 June 2013

41. At the end of May the Swiss government put forward a bill that would allow the country's banks to sidestep Switzerland's bank secrecy laws and enable them to give business records to the authorities in the United States. The move was an attempt to settle the long running tax dispute between the two countries, and would have enabled lenders to reach individual settlements over their alleged role in helping rich Americans avoid tax. However, the plan has run into trouble following the decision by the Swiss parliament not to debate the deal until it is provided with more information on what the implications could be for Swiss banks.

Financial Times, 6 June 2013

42. With the recent privatisation of a 14 per cent stake that had been held by the Russian government, Norway's sovereign wealth fund has become the second biggest investor, in Russia's state bank, VTB. The sale was the second bank stake sold as part of plans announced in June 2012 to privatise Russian banks, following the sale of a 7.6 per cent stake in Sberbank by the central bank in September, which left the government owning 50 per cent plus one share.

Financial Times, 29 May 2013

43. BaFin, the German financial regulator, has said that the country's seven largest banks still have a capital shortfall, though this has been reduced from €32 billion in the second half of 2012 to around €14 billion now, leaving them with further still to go. The introduction of stricter bank safety rules by the end of 2018 was agreed by international regulators, and under the Basel III accord banks must have a core tier-one ratio of 6 per cent by 2019.

Times, 29 May 2013

44. According to a Bank of Spain internal estimate, as much as €10 billion in extra provisions will need to be put aside by Spanish banks in order to cover loans that borrowers will struggle to repay. More than €200 billion in loans was rolled over by the country's banks before they expired according to recent data, in many cases due to corporate borrowers being unable to repay the debt on time and in full. The estimate from the Bank of Spain is the first official assessment of what the impact could be of the central bank's new approach to such loans.

Financial Times, 24 May 2013

45. State bailouts for troubled banks are to have more stringent conditions attached to them by Brussels, which will mean shareholders and junior bondholders incurring losses before taxpayers are asked to foot the bill for any rescue. As part of the new rules Brussels will have to give agreement to bank restructuring plans before state support is issued. The bailouts of Spanish banks will be used as a template for the revision of the EU state aid controls.

Financial Times, 23 May 2013

46. Proposals to further widen the planned EU bonus cap will curb the ability of investment banks' to reward their junior traders with bonuses worth many times their salaries. This is a result of the broadening of the definition of staff affected by the cap to now include anyone in receipt of a bonus of over €75,000 that is worth at least three-quarters of their salary. This expansion is on top of the confirmed new rule including anyone earning over €500,000.

Financial Times, 22 May 2013

INTERNATIONAL BANKING

BANK OF AMERICA

47. Bank of America has been instructed by Telefonica to run the sale of its subsidiary O2 Ireland. It is hoped the deal will be concluded by the end of July.

Sunday Times, 9 June 2013

GOLDMAN SACHS

48. Goldman Sachs has set up a committee reviewing the bank's dealings with customers. The bank has also revealed that there will be a closer link between bankers' pay and bonuses and their ability to protect the reputation of the bank. This follows a lengthy project undertaken by the bank to rehabilitate its reputation following the 2008 financial crisis.

Financial Times, 24 May 2013

JP MORGAN

49. Ashley Bacon has been appointed as chief risk officer at JP Morgan in place of John Hogan.

Times, 14 June 2013

50. Russia's Ministry of Finance has announced that it has chosen JP Morgan as the investment bank to lead the attempt by the country to promote its position with credit ratings agencies in a bid to reduce the costs of borrowing in Russia.

Times, 25 May 2013

51. The FCA has fined the private banking arm of JP Morgan in London £3 million for putting its customers at risk of making bad investments as a result of systems and controls failings between January 2010 and February 2012.

Times, 24 May 2013

52. A proposal by shareholders that Jamie Dimon's role, as both chairman and chief executive at JP Morgan, should be split, received only 32 per cent of the vote at the bank's annual meeting, attracting less support than a similar proposal at the same meeting last year.

Independent, 22 May 2013

NATIONAL AUSTRALIA BANK

53. National Australia Bank chief executive Cameron Clyne is thought to be on a list of prospective candidates to succeed Stephen Hester as Chief Executive of RBS.

Telegraph, 27 May 2013

NOMURA

54. Steve Ashley, head of global markets at Nomura, said fixed-income and equities traders in its London, Hong Kong and New York offices will move to combined trading floors in the next few months. He also said the bank was exploring the possibility of merging its electronic broker, Instinet, with its fixed-income electronic trading platform.

Financial Times, 27 May 2013

INTERNATIONAL GENERAL

55. The Bank for International Settlements, the so-called central bankers' bank, has cautioned that markets are "under the spell" of central bankers, warning that an abundant supply of cash due to quantitative easing, as well as low interest rates, has seen asset prices driven to record highs by investors despite their being very little sign of a serious recovery in the global economy.

Financial Times, 3 June 2013

56. New research from Barclays has revealed that big global banks are so poor at predicting whether or not borrowers will default that they are miscalculating, by an average of 13 per cent, the riskiness of their balance sheets.

Financial Times, 31 May 2013

PRESS RELEASES

57. Announcement of LIBOR changes

The British Bankers Association (BBA) has announced that following the recommendations set out in the Wheatley Review, the publication of individual bank's submissions to LIBOR will be embargoed for 3 months with effect from 1 July 2013. The BBA also announced that the publication of "same day" EURO LIBOR rates for 1 week and 1 month, will cease from 31 July 2013. These 2 rates were supplemental to the "spot" EUR LIBOR rates for all seven LIBOR tenors, which will continue as usual.

British Bankers' Association, 12 June 2013

<http://www.bba.org.uk/media/article/announcement-of-libor-changes/press-releases/>

58. Payments Council announces customer guarantee for new current account switch service

The Payments Council has reached a major milestone by making public the Current Account Switch Guarantee and Trustmark that will be used by all participating financial institutions, from the launch of the new service in September. The new Guarantee and Trustmark are designed to give consumers trust and confidence when switching current accounts. The new service aims to increase competition in banking by making it simpler and hassle-free for customers to switch their current account. The switching process will be completed within seven working days – a substantial improvement on the current process that can take between 18 and 30 days.

Payments Council, 11 June 2013

http://www.paymentscouncil.org.uk/media_centre/press_releases/-/page/2563/

59. PRA/FCA Mortgage Lenders and Administrators Statistics published

The Bank of England and the FCA have published the latest Mortgage Lenders and Administrators Statistics for the United Kingdom covering the period Q1 2013.

Prudential Regulation Authority/Financial Conduct Authority, 11 June 2013

<http://www.bankofengland.co.uk/publications/Pages/news/2013/074.aspx>

60. Prudential Regulation Authority: Board appointment

The Court of the Bank of England has appointed Nick Prettejohn, Chairman of Brit Insurance Holdings NV, and a Director of Legal and General plc, to the Board of the Prudential Regulation Authority ("PRA"). He will take up his appointment on 10 June. The appointment has been approved by the Chancellor of the Exchequer. Before taking up the appointment Mr Prettejohn will resign from the Board of Legal and General.

Bank of England, 6 June 2013

<http://www.bankofengland.co.uk/publications/Pages/news/2013/071.aspx>

61. Banking executives' remuneration in the UK - Commons Library Standard Note

This Standard Note briefly describes the main elements of the directors' remuneration packages and provides information on the amount of these packages for the Chief Executives, Chairmen and highest paid directors of the United Kingdom's 5 largest retail banks. It also includes details of the remuneration of the five highest paid non board member executives of these banks.

House of Commons Library, 4 June 2013

<http://www.parliament.uk/briefing-papers/SN06204>

62. Bank of England and HM Treasury Funding for Lending Scheme – usage and lending data – 2013 Q1

The Bank has published updated data on the use of the Funding for Lending Scheme (FLS). The publication shows for each group participating in the FLS the amount borrowed from the Bank and the net quarterly flows of lending to UK households and businesses for the first quarter of 2013.

Bank of England, 3 June 2013

<http://www.bankofengland.co.uk/publications/Pages/news/2013/070.aspx>

63. Strengthening the Code of Practice on taxation for banks consultation

The Code was introduced in 2009 and strengthened by the Government in 2010. The Government feels it is now time to further strengthen the Code to ensure that the Code remains as effective as possible for the future. This consultation closes on 16 August 2013

HM Revenue & Customs, 31 May 2013.

<https://www.gov.uk/government/consultations/strengthening-the-code-of-practice-on-taxation-for-banks>

64. J.P. Morgan International Bank fined for systems and controls failings in its wealth management business

The FCA has fined J.P. Morgan International Bank Limited £3,076,200 for systems and controls failings relating to its provision of retail investment advice and portfolio investment services. The failings persisted for two years and were not corrected until the FCA brought them to the firm's attention in the course of its thematic review into wealth management firms and the suitability of their advice. The FCA identified a number of issues with JPMIB's processes and an inability to demonstrate client suitability from its client files.

FCA 23 May 2013

<http://www.fca.org.uk/news/jp-morgan-international-bank-fined-systems-controls-failings>

65. Prudential Regulation Authority statement on bank capital

The PRA is taking forward with the major UK banks the adjustments to capital positions identified by the Financial Policy Committee (FPC) relating to expected future losses, conduct costs and prudent risk-weighting. The PRA has set out the capital requirements for Lloyds Banking Group and RBS. The two banks have advanced their plans to a position where disclosure is appropriate. Once discussions have concluded with all banks, more information will be provided along with confirmation that, where necessary, banks will take appropriate steps to ensure that they meet the FPC's recommendation on capital.

PRA, 22 May 2013

<http://www.bankofengland.co.uk/publications/Pages/news/2013/066.aspx>

66. Taxpayers and savers last in line to save banks

The Economic and Monetary Affairs Committee has approved the European Parliament's negotiating position on draft rules on saving struggling banks, and agreed that taxpayers and savers must be the last people called upon to bail out banks. The text rules out using deposits below €100,000 and says that even deposits above €100,000 should be the last to be called in. The Committee also voted against using deposit guarantee funds for resolution actions and set out strict conditions for using taxpayers' money.

European Parliament, 21 May 2013

<http://www.europarl.europa.eu/news/en/pressroom/content/20130520IPR08551/html/Taxpayers-and-savers-last-in-line-to-save-banks>

LEGISLATION

67. SI 2013/1189 Cash Ratio Deposits (Value Bands and Ratios) Order 2013

The percentage of eligible liabilities required to be deposited under the cash ratio deposit (CRD) scheme is changed from 3 June 2013. Eligible financial institutions will see an increase in the CRD rate from 0.11% to 0.18% and an increase in the CRD threshold from £500 million to £600 million.

http://www.legislation.gov.uk/ukxi/2013/1189/pdfs/ukxi_20131189_en.pdf

CASE LAW

68. Tort of malicious prosecution extends to civil claims

This appeal to the Privy Council concerned two related torts:

- Abuse of process (the abuse of civil proceedings for a predominant purpose other than that for which they were designed); and
- Malicious prosecution (the launch of ultimately unsuccessfully proceedings instituted with malice and without reasonable or probable cause).

Background

In 2004 Hurricane Ivan badly damaged a residential development called "the Village" on Grand Cayman. The development was insured by Sagicor General Insurance (Cayman) Limited ("**Sagicor**"). Sagicor appointed a loss adjuster, Mr Paterson ("**P**"), and on his recommendation advance payments of CI\$2.9m were made to a company called Hurlstone ("**H**") which had been appointed to effect repairs.

A Mr Delessio ("**D**") later joined Sagicor as Senior Vice President. He had a history of difficult relations with P. He was concerned about the advance payments made to H and appointed another loss adjuster to value the work completed by H. This loss adjuster valued the work for which Sagicor was responsible at only CI\$0.7m. D said that he intended to drive P out of business and destroy him professionally.

Sagicor sued P and H claiming damages for fraudulent misrepresentation, deceit and conspiracy. D notified the local press and considerable damage was caused to P and H's reputations.

P and H defended the proceedings and P counterclaimed for unpaid fees.

During the proceedings H disclosed documents which showed extensive payments to subcontractors and suppliers and which supported H and P's case. Sagicor was obliged to discontinue the action and was ordered to pay P and H's costs on an indemnity basis. P was granted leave to amend his counterclaim to include a claim against Sagicor for abuse of process and the court treated this amendment as relying alternatively on malicious prosecution.

Decision

P's counterclaim was dismissed at first instance in the Cayman Island courts. Although he had established all the necessary elements for the tort of malicious prosecution in that:

- Prior proceedings had been determined in his favour;
- Allegations of fraud and conspiracy had been made maliciously and without reasonable cause; and
- As a result of the allegations he had suffered substantial financial loss and significant other damage;

the House of Lords had observed in *Gregory -v- Portsmouth City Council* [2000] I AC 419 ("**Gregory**")

that the tort of malicious prosecution is confined to criminal proceedings and cannot be extended to civil proceedings.

This first instance decision was upheld on appeal to the Cayman Islands' Court of Appeal.

On appeal to the Privy Council, the Judicial Committee unanimously held that Sagicor was not liable for abuse of process but, by a majority of 3 to 2, that it had committed the tort of malicious prosecution and that P was entitled to substantial damages.

Reasons for the Privy Council decision

The claim for abuse of process had to fail because the legal process had not been used for any purpose for which it was not designed.

With regard to the malicious prosecution claim, the common law originally recognised that malicious prosecution extended to both criminal **and** civil proceedings. As a matter of public policy wrongs should be remedied. There was no evidence that the tort of malicious prosecution would deter the honest bringing of litigation or that it would lead to interminable litigation. Claimants already face formidable hurdles in bringing claims for malicious prosecution as they must demonstrate both malice and the absence of a reasonable or probable cause for the launch of the proceedings. Imposing a further condition that there must be a public function dimension was unnecessary.

A defendant can suffer substantial damage to his reputation due to false allegations made in civil proceedings long before his reputation is restored by vindication at trial. There was no other tort which could remedy the wrong in this case and so the observations of the House of Lords in *Gregory* should not discourage the application of the tort.

The two dissenting judges, Lord Neuberger and Lord Sumption, considered that the tort of malicious prosecution has been confined to the abuse of criminal proceedings since its inception. The distinction between civil proceedings and criminal prosecutions is neither arbitrary nor unsatisfactory. A malice based tort makes no sense in the context of private litigation where the claimant is not exercising any public function. The precise ambit of malicious prosecution will be both uncertain and potentially very wide and will offer litigators the opportunity to prolong disputes.

Crawford Adjusters and Others (Appellants) -v- Sagicor General Insurance (Cayman) Limited and Another (Respondents) Privy Council, 13 June 2013

69. Obligations owed on termination of Lease Purchase Agreement

Lombard North Central plc ("**Lombard**") entered into a Lease Purchase Agreement ("**LPA**") with a company called Waterfront Corporation Ltd ("**Waterfront**") in respect of machinery situated in a factory. Three directors of Waterfront, Mr Nugent, Mr Clark and Mr Crabtree ("**Defendants**"), entered into joint and several guarantees in respect of all sums due from Waterfront under the terms of the LPA.

The LPA terminated in October 2006 when joint administrators were appointed to Waterfront. As at that date, the outstanding balance under the terms of the LPA was £143,884.08.

Between October 2006 and January 2011, the machinery remained on site in the factory, which was occupied first by Drink Pac Ltd (until it entered into a creditors' voluntary liquidation) then by Drink Pac UK Ltd (until it went into administration). During that period, £39,600 was paid to Lombard by way of rent.

In January 2011 Lombard sold the machinery for £42,500 plus VAT.

In December 2011 formal demands were made under the guarantees and in January 2012 Lombard commenced proceedings to enforce the liability under the guarantees.

Issues

The Defendants accepted the validity of the guarantees but raised a number of defences.

First, they claimed that the machinery included in the LPA consisted of seven or more machines not just the single filling machine contended for by Lombard.

Second, they argued that the rent received and sale proceeds were too low and that Lombard should have taken steps to sell the machinery in early 2007 to Mr Clark at the settlement figure. In essence they argued that Lombard owed an equitable duty equivalent to the duty of a mortgagee who sells mortgaged property to take reasonable care to obtain market value and that there was an equivalent duty to obtain the true market rental value and to ensure rental payments were paid. Lombard had failed to mitigate its loss by failing to obtain the best price. Had a proper price been paid for the machinery, it would have been sufficient to discharge any liability under the guarantee..

Decision

Having considered the evidence, the court concluded that a reasonable man would have understood the parties to have been referring only to the single filling machine in the LPA. That was the ordinary meaning of the words and serial number in the agreement and there was no reason to depart from it.

The case was not governed by the law relating to mitigation of damages. Waterfront was not in breach of contract and the LPA was not terminated as a result of breach of contract. The machine was not held as security by Lombard and it was unnecessary to bring in equitable obligations such as arise between mortgagor and mortgagee.

The disposal clause in the LPA did, however, impose on Lombard an obligation to try and sell the goods on termination. It was implicit in such a clause that the proceeds of sale would be credited to the account of the lessee. There was an implied term that Lombard would take reasonable care to obtain the true market value of the goods. Equally, if Lombard chose to lease the goods pending sale, there would be an implied term that Lombard would take reasonable care to obtain the true market rental value of the machine and to ensure that rental payments were made.

Insofar as the Defendants could show that there was any breach of these implied terms, Waterfront would be able to set off or counterclaim for any loss it suffered against the sums otherwise due.

Lombard had not been in breach of the implied term by not accepting Mr Clark's offer in early 2007. Mr Clark had unreasonably required a reply to his offer within 14 days when Lombard had made it clear that at that juncture that there was a dispute with Drink Pac Ltd about Lombard's title. Mr Clark should have followed up his offer after the 14 days expired. In any event, the judge was satisfied that Mr Clark did not himself have the funds to pay the £143,984 anyway so no loss would have been suffered from the alleged breach even if it had been made out.

If Lombard had sold the machine in October 2006 for the market price, the net proceeds of sale would have amounted to £53,750 which was more than the £42,500 ultimately received in 2011. However, Lombard would not then have received £39,600 in respect of rent between 2007 and May 2010. It was therefore too simplistic simply to compare market price in 2006 with the price ultimately received.

Although the rental agreed by Lombard of £1,000 per month plus VAT was significantly less than market rent, in order to have achieved the full market rent, Lombard would have had to dismantle the machine from the line at considerable cost and would have incurred the costs of storage and marketing until a suitable tenant could be found. It was not therefore unreasonable to accept the lower rent.

Lombard had not however taken adequate steps to collect rent owed to it by Drink Pac Ltd and Drink Pac UK Ltd. If further steps had been taken then an additional 13 months' rent could have been recovered. Waterfront and the guarantors were therefore entitled to set off £15,275 against the sums otherwise due under the guarantee.

Judgment was entered for Lombard for £39,071.58.

Lombard North Central plc v (1) Nugent (2) Clark (3) Crabtree, Queen's Bench Division, Leeds District Registry, 6 June 2013

Andrew Horton of DLA Piper acted for Lombard in this case.

70. Interest rate swaps - assessment requirements under Directive (EC) 2004/39

In two sets of Spanish proceedings brought by Genil 48 SL and Comercial Hosteleria de Grandes Vinos SL ("**Claimants**") against Bankinter SA and Banco Bilbao Vizcaya Argentaria respectively, the Claimants had sought to have certain swap agreements, intended to protect them against the variation of interest rates on financial products, declared void ab initio because the defendant banks had failed to carry out risk assessments pursuant to art.19(4) and (5) of Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments ("**Directive**").

The Spanish court referred a number of questions to the Court of Justice of the European Union. In particular it sought clarification of the meaning of the term "investment advice" pursuant to art. 4(1)(4) of the Directive, for which risk assessments under art. 19(4) and (5) have to be carried out, and clarification of the meaning of art. 19(9) which provides that risk assessments under art.19(4) and (5) do not need to be carried out in cases where "an investment service is offered as part of a financial product" which is already subject to risk assessments and information requirements under other EU legislation or common European standards.

The court held that as art. 19(9) of the Directive provides a derogation from the general scheme for providing risk assessments its provisions have to be interpreted strictly.

An investment service is "offered as part of a financial product" only when it forms an integral part thereof at the time when the financial product is offered to the client.

When a national court considers whether a financial service is integral to a financial product, if the duration of the financial instrument is greater than that of the financial product, if a single financial instrument applies to different financial products or if the instrument and product are in different contracts then this indicates that the service does not form an integral part of the financial product.

There is however, no requirement that the risk assessment and/or information requirement under alternative EU provisions or European Standards has to be similar to the obligations provided in art 19(4) and (5). However, in order for an investment service to be exempted from the obligations under art 19(4) and (5), the alternative provisions or standards under art.19(9) have to enable there to be a risk assessment of clients and/or include information requirements which also encompass the investment service which formed an integral part of the financial product on question.

The question as to whether an investment service constitutes "investment advice" within the meaning of art. 4(1)(4) depends on the manner in which the financial instrument is offered to the client or potential client. The offering of a swap agreement to a client in order to cover the risk of variation of interest rates on a financial product for which that client has subscribed will constitute investment advice provided that the recommendation to subscribe to such a swap agreement is made to the client in his capacity as an investor, is presented as suitable for that person or is based on a consideration of the circumstances of that person and is not made solely through distribution channels or intended for the public.

In the absence of EU legislation on the point it is for the internal legal order of each Member State to determine what the contractual consequences will be where an investment firm offering an investment service fails to comply with the assessment requirements laid down in art.19(4) and (5), subject to observance of the principles of equivalence and effectiveness.

Genil 48 SL and another v Bankinter SA and another, European Court of Justice (Fourth Chamber) 30 May 2013

71. Bankrupt's application to restrain creditor from pursuing US proceedings refused

In this case the High Court refused to grant a bankrupt an anti-suit injunction to prevent one of his creditors from suing him in the United States (US).

In 2008 Barclays granted Mr Kemsley ("**K**") an unsecured personal loan of £5m. In 2009 K's business collapsed and he moved to the US. In March 2012 he was adjudicated bankrupt in England. Shortly before that Barclays had started proceedings against him in New York under the loan agreement ("**NY Proceedings**").

In August 2012 one of K's joint trustees in bankruptcy applied in the US Bankruptcy Court under Chapter 15 of the US Bankruptcy Code for recognition of the English Bankruptcy as a "foreign main proceeding". Barclays objected to that application.

The NY proceedings were adjourned pending the decision of the US Bankruptcy Court.

In the meantime, in November 2012, Barclays started further proceedings in Florida ("**Florida Proceedings**") seeking to set aside transfers of property in Florida as fraudulent transfers designed to defeat the interests of creditors.

K sought an anti-suit injunction from the English Court seeking to restrain Barclays from pursuing both the NY and Florida proceedings.

K argued that Barclays' actions would avoid the operation of the British bankruptcy regime under which he would be released from his bankruptcy debts on his discharge from bankruptcy (a year after he was adjudicated bankrupt). From that point onwards any property which he might acquire would be free from Barclays' claims under the British regime. In contrast, if Barclays was able to obtain a judgment in the NY Proceedings that judgment would be enforceable for 20 years in the US.

K also argued that Barclays was trying to obtain an advantage for itself as a creditor over the equitable distribution among creditors which is fundamental the British bankruptcy regime.

The Court refused K's application.

The UNCITRAL Model Law on Cross-Border Insolvency ("**Model Law**") provides a framework to assist in situations where an insolvency debtor has assets or debts in more than one jurisdiction. The US has adopted the Model Law as Chapter 15 of the US Bankruptcy Code.

It is a key concept of the Model Law that insolvency proceedings commenced in one state should be recognised in another. Where recognition of proceedings is requested foreign proceedings will be recognised as:

- "Foreign main proceedings" if they take place where the debtor has his Centre of Main Interest ("**COMI**");
- "Foreign non-main proceedings" if the debtor does not have his COMI there but has an establishment in that jurisdiction.

If the foreign proceedings are recognised as "foreign main proceedings", then a mandatory stay will be placed on proceedings in the courts of the state granting recognition. If the proceedings are recognised as "foreign non-main proceedings" then a stay is available on a discretionary basis.

The English court made no finding as to K's COMI. It did however state that if K's COMI was in England then an anti-suit injunction was unnecessary. In such a case the US Bankruptcy Court would be obliged to stay the NY Proceedings and entrust the realisation of K's assets to K's English Trustees in Bankruptcy. If the NY Proceedings were stayed Barclays might not be able to pursue the Florida proceedings as they founded on the same debt. An anti-suit injunction was only necessary if K's COMI was found to be in the US.

If K's COMI was not in England it must (on the circumstances of this case) be in the US.

Factors which might be taken into account when granting an anti-suit injunction in insolvency proceedings include:

- The connection of the creditor with the relevant jurisdiction in which the proceedings are being taken or proposed;
- Principles of comity; and

The conduct of the creditor.

The authorities showed that the jurisdiction to grant an anti-suit injunction ought to be exercised with caution. There must be a good reason why the decision to stop the foreign proceedings should be made in England rather than in the foreign jurisdiction.

On the facts of this particular case an anti-suit injunction would be wholly inappropriate. It would not be "oppressive or unfair on in any way improper" for Barclays' right to pursue proceedings in a New York court to be decided by the New York court.

The fact that the New York court might not apply the approach of the British insolvency statute did not mean that its approach would be so contrary to some fundamental English public policy that the court should take the exceptional step of preventing creditors from invoking the New York court's jurisdiction.

Barclays had made it clear that it was not seeking to obtain an advantage for itself over other creditors and had given an undertaking to pass over any assets realised in the US to the trustees in bankruptcy (after deduction of its reasonable costs). Its conduct was a far cry from the underhand conduct of the creditors in *Bloom -v- Harms Offshore GmbH & Co* [2009] EWCA Civ 632, where the Court of Appeal had allowed anti-suit injunctions to restrain certain actions of German creditors of an English company in the US District Court. The creditors' improper conduct in that case had been a significant factor in the Court allowing the injunction.

K's application was dismissed.

Kemsley -v- Barclays Bank Plc and Others, Chancery Division, 15 May 2013.

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