DLA PIPER

BANKING DISPUTES

QUARTERLY

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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.

ON THE HORIZON

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

Brexit: What impact might leaving the EU have on the UK's financial services industry?

By JP Douglas-Henry (Partner), Alix Kamerling (Partner) and Camilla Macpherson (Senior Lead PSL)

No sooner has talk of a Greek exit from the Eurozone dropped off the front pages than another possible EU shake-up is hitting the headlines, with Prime Minister David Cameron announcing that a referendum on the UK's membership of the EU might take place as early as June 2016.

The European Union Referendum Bill, currently progressing through Parliament, states the all-important question that voters will be asked: "Should the United Kingdom remain a member of the European Union?"

Most business leaders think that UK should stay in the EU (84% of them, according to a 2013 MORI poll for CityUK), but the outcome is far from a foregone conclusion. In a YouGov poll of voters in September 2015, only 38% of those surveyed said Britain should remain a member of the EU, compared with 40% who said it should not. On both sides of the debate there is still everything to play for.

We consider below the impact that the UK's exit from the EU (colloquially known as a Brexit) might have on the financial services industry.

Passporting

At the moment a range of authorised businesses, such as banks, insurance companies and asset managers, are able to operate across the EU as long as they have a base in the UK. This is called "passporting".

Passporting means that a British bank can provide services across the EU from its UK home. Importantly, it also means that a Swiss or an American bank can do the same from a branch or subsidiary established in the UK. Goldman Sachs and JPMorgan have both given evidence to the Parliamentary Commission on Banking Standards flagging up the importance of the UK's EU membership in providing a base from which non-EU businesses can passport across the EU.

Passporting into the EU from the UK would not be possible following a Brexit (unless a special arrangement could be negotiated). Financial services businesses wanting to continue to provide services across the EU would have to establish subsidiaries in mainland Europe.

According to CityUK, 37% of financial services companies say they are very likely or fairly likely to relocate staff if the UK left the EU. This would have a huge impact on London.

Red tape

Financial services is a highly regulated industry. Much of this regulation emanates from Brussels. Perhaps, the argument goes, a post-EU UK would be less constrained by red tape.

In reality, regulation is unlikely to lessen in the event of a Brexit, and potentially it might increase. Regulation of financial services is also not unique to the EU – regulators and regulation have become a part of business life across the globe.

If the UK wants to continue to do business with the remaining EU Member States following a Brexit, it will almost certainly need to comply with EU regulations in order to do so. Yet if it comes out of the EU, it will no longer be able to negotiate, influence or challenge those regulations. Banks will be faced with having to comply with UK as well as EU legislation, which may well diverge over time or at minimum be applied inconsistently.

This would be a pity. In recent years, the UK has frequently exercised its influence within the EU in relation to banking matters. For example, it successfully called for the introduction of a double majority voting system in the European Banking Authority. This means that any European Banking Authority measure requires a majority both of Eurozone members and those outside the Eurozone. As a result, Eurozone states (which now form a majority of Member States) cannot take precedence over non-Eurozone states. It has also brought several judicial challenges to proposed EU financial services regulations (including in relation to bankers' bonus caps, plans for a financial transactions tax and the location of clearing-houses). The results have been mixed, but the UK has at least had a place at the table. This would not be the case from outside the EU.

Continuing the UK's relationship with the EU

Various models have been proposed for how the UK and the remaining Member States of the EU might manage their relationship following a Brexit. Could the UK be the new Norway (by becoming a member of the EEA and EFTA)? Or Switzerland (accessing the EU by way of bilateral agreements)? Or Turkey (which has a customs union with the EU)?

Much can be said about the advantages and disadvantages of these and other options. Focussing solely on the financial services perspective, however, none is appealing.

The EEA and EFTA States have struggled to deal effectively with financial services and the gulf between the EEA and the EU in the financial services area is likely to widen over time.

Switzerland's 120+ bilateral agreements with the EU require constant renegotiation. None of these agreements allows Switzerland full access to the EU's internal market for financial services. As a result, Switzerland tends to do banking business by passporting – often from the UK.

Turkey's customs union is limited to trade in goods. It does not extend to trade in services (financial or otherwise) and is intended as a pre-cursor to EU membership, not an alternative to it.

It is likely therefore that, if the UK does leave the EU, it will be looking to set up a bespoke arrangement going forward. The terms on which it will be able to negotiate such an arrangement is another question, particularly as other Member States may use the opportunity of a Brexit to strengthen their own financial services industries.

Legal framework

The UK's legal system has become tightly enmeshed with that of the EU over a period of forty years. The unravelling process would be a long and expensive one. Which European legislation and regulation does the UK like or need and therefore want to keep? What should be replaced? Where are the gaps? New UK legislation might also be incompatible with EU legislation. Over time, it is almost inevitable that the two banking environments would drift apart.

There will also be an impact on existing contracts. For example, contractual parties will be asking:

- Will a contractual requirement to comply with a particular piece of EU legislation still be binding following a Brexit?
- What principles of EU law will still influence English courts?
- How will a judgment from an EU Member State now be enforced in the UK?
- How will a choice of English law be interpreted if EU law was part of English law at the time the contract was made but not by the time of performance?

Comment

The Brexit debate is full of uncertainty. Will the UK be more prosperous or less following a Brexit? How far will GDP fall, if at all? Will the UK become more regulated or less? No-one can be certain. It may be that the outcome of the referendum is decided (like the Scottish referendum is said to have been) on the basis of this uncertainty, with voters choosing the status quo over fear of the unknown.

In the meantime, a 2015 survey by EY indicates that 31% of investors will either freeze or reduce investment until the outcome of a referendum is known. An investor currently reflecting on whether to expand in the UK may well consider potentially safer options elsewhere in the EU. Perhaps the only certainty is this – that a growing unease about the UK's future will soon become a highly relevant decision-making factor in business.

For more information on any of the facts and figures in this piece, please contact the authors.

Pros of a Brexit	Cons of a Brexit
It would allow UK banks to set their own capital requirements (within (lower) limits set by/agreed with the PRA) and be less encumbered by burdensome legislation emanating from Brussels (such as bonus caps and the European Commission's proposals for a Financial Transaction Tax). This could make UK banks more competitive when compared with Asia or the US.	It would make movement/re-location of banking professionals within Europe more difficult.
Switzerland has managed to operate a very successful banking industry outside the EU – why couldn't the UK do the same?	It would arguably reduce banking stability, as a banking crisis would be managed on a UK basis with limited European input/oversight.
The UK has the strongest Financial Services sector in the EU and, by reason of history, timezone, language, concentration of skillsets and the general cultural appeal of London, there is good reason to think this might continue even if the UK was outside the EU.	It might inhibit growth/competition in the Financial Services sector, as it would inevitably take longer for Financial Services businesses to establish themselves across Europe.
Market forces would continue to operate and strong/ innovative UK firms would have every reason to believe that discerning European customers would still deal with them.	It would undo over 40 years of Financial Services regulation and send Financial Services regulatory professionals across Europe back to the drawing board.

England creates new financial markets court

By Jamie Curle (Partner) and Charles Allin (Associate)

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

The decision to create a new, specialist financial markets court for high-value cases, or those with international importance, is to be welcomed: it will enhance London's position as the forum of choice in which to litigate financial disputes.

Background

The Commercial Court in London has long been regarded by the international financial and legal community as among the most predictable and reliable of the available venues in which to resolve financial disputes, with only the Southern District of New York challenging its status. That reputation is well-founded: the Court is presided over by incorruptible, commercially-minded and formidably expert judges, many of whom have spent their practising and judicial careers fighting or deciding complex, international financial disputes. However, the position of the Commercial Court is under threat from international arbitration, including the excellent alternative and expertise offered by P.R.I.M.E Finance, and from Courts in the Dubai International Financial Centre, Singapore and elsewhere.

Those threats are compounded by the current state of the Commercial Court list. In the immediate post-*Mitchell v News Group Newspapers* world, the Court was flooded by a spate of applications which significantly slowed the speed at which cases were proceeding to trial, which is only now showing signs of improvement. It is now not unusual to wait six or more weeks for a hearing on a simple application (longer for hearings of a day or more) and disillusionment has resulted among users of the Commercial Court.

Against this backdrop, the Lord Chief Justice, Lord Thomas, confirmed on 8 July 2015 the creation of a new Financial List for financial services claims of £50 million or more, or for complex disputes that raise issues concerning the domestic and international financial markets. The Court will be presided over by ten judges: five from the Commercial Court and five from the Chancery Division, each with particular expertise in financial disputes.

Which disputes will be eligible?

The Financial List will include disputes:

- worth £50 million or more and relating to loans, project finance, banking transactions, derivatives and complex financial products, financial benchmarks, capital or currency controls, bank guarantees, bonds, debt securities, private equity deals, hedge fund disputes, sovereign debt, or clearing and settlement; or
- which require particular expertise in the financial markets or raise issues of general importance to the financial markets.

The Court will have the power to order cases falling outside these two categories into the Financial List, from other lists.

How will it differ from the Commercial Court?

A key aim of the Financial List is to retain the efficiency of the Commercial Court, but to improve flexibility and judicial continuity. As a result:

- the Financial List rules will mirror, in large part, those of the Commercial Court (which are tried and tested for heavy and complex cases);

- all Financial List cases will be allocated to a designated judge, who will preside over all case management decisions from the beginning of the case until the end;
- the parties will be able to transfer cases to and from the Commercial List; and
- in response to "the risks inherent in the markets" starkly highlighted by the global financial crisis, the Financial List will introduce a pilot "market test case procedure" scheme, which will permit financial markets issues requiring immediate relevant and authoritative English law guidance to be brought before the Court by interested parties with opposing interests, even absent an actual dispute between them. The parties to the procedure would bear their own costs.

When will it be set up?

The Financial List will become operational from 1 October 2015 with new court rules and practice directions coming into effect on that date.

Comment

The creation of the Financial List is a positive move. It signals to the financial markets that the High Court in London is serious about retaining its pre-eminent position for financial disputes and reflects the important contribution of financial services to the UK economy. Judges with deep expertise in such disputes have been pooled into one Court. Qualifying disputes should be heard more quickly and efficiently than in the Commercial Court, and the continuity offered by the new allocation system removes the need for different judges to familiarise themselves with the background and papers.

The innovative "market test case procedure" scheme is particularly welcome, as it provides parties (and, by extension, the broader financial markets) with the ability quickly to obtain commercial certainty on pressing financial issues without the need to commence formal proceedings. Initiatives of this nature differentiate London from its competitors. It is hoped that the pilot is successful and that the scheme becomes a permanent feature.

It remains to be seen whether the Court of Appeal will embark upon a similar process of specialisation, not to mention London's competitors in the disputes field. Watch this space.

Securitisation – court of appeal to hear landmark valuer's negligence claim in October

By Jeremy Andrews (Partner) and Paula Johnson (Senior Professional Support Lawyer)

In September 2014 the Commercial Court ruled that Colliers International (UK) PLC ("Colliers") was negligent in its valuation of property used as collateral for a securitised loan. The case was regarded as significant because it was the first decision by an English court on the issue as to whether an issuer of commercial mortgage-backed securities ("CMBS") can pursue a negligence claim against valuers in respect of their advice to the original lender at the time of the loan. The issues are due to be re-examined in October 2015 when the case, *Titan Europe 2006-3 plc v Colliers International UK plc* [2014] EWHC 3106 (Comm), heads to the Court of Appeal.

Background

The valuation related to a commercial property which Colliers valued for Credit Suisse. Relying on the valuation, Credit Suisse used the property as security for a loan in December 2005.

In June 2006 the loan was transferred to Titan Europe 2006-3 plc ("Titan") as part of a particularly complicated securitisation. Essentially the securitisation packaged into transferable securities 18 loans together with securities for the loans which took the form of mortgages over 40 commercial properties. Titan issued securities in the form of Commercial Mortgage Backed Floating Rate Notes ("Notes") in which investors ("Noteholders") subscribed. Titan used the subscription to fund the acquisition of the loans from Credit Suisse.

Titan later sued Colliers but the Noteholders did not. It is not clear from the judgment why the Noteholders chose not to sue.

Issues

One of the key issues for the court was whether Titan was the right claimant.

Colliers argued that Titan was not entitled to bring the claim because as a non-recourse issuer of the securities it had suffered no loss. Colliers argued that the Noteholders should bring the claim as they were the ones who had sustained loss and had directly or indirectly relied on the valuation.

In contrast, Titan argued that it was the party to whom the loan and the security for the loan were transferred at the time of the securitisation and therefore it had incurred loss and had the right to sue. Any claim by the Noteholders would face "intractable" difficulties because:

- any duty of care which Colliers might have owed to the Noteholders was negated by the structure of the securitisation and in particular by warnings and disclaimers about relying on any valuation set out in the Note Term Sheet, the Offering Circular and a CD ROM attached to it. These disclaimers would have made it unreasonable for the Noteholders to have relied on the valuation in deciding to purchase the Notes;
- there would be a host of practical difficulties for Noteholders in making good a claim, including difficulties in: ascertaining who the class of Noteholders should be; quantifying loss; proving causation; and working out how to deal with the priorities of different classes of Noteholders.

The judge noted that whilst, from an economic perspective, it was the Noteholders who suffered the loss (with Titan in essence acting as an economically neutral conduit between the Noteholders and the debt in which they were investing), Titan nevertheless suffered a loss itself at the moment when it purchased the loans which made up the asset base for the securitisation. This was because it acquired a chose in action worth less than the price it had paid for it. Titan's right to bring a claim did however depend on it being able to show that it was contractually obliged to distribute any sums it received from the litigation to the Noteholders in accordance with the payments waterfall set out in the transaction documents. Provided that that was the case, the fact that the finance scheme had the effect of spreading the loss did not "affect the incidence of the basic loss".

The fact that Titan received funds from the Noteholders which were used to fund the purchase of the loan assets was irrelevant, as was the fact that the securities were issued on a non-recourse basis.

Titan was awarded damages of €32 million.

Comment

Apart from the size of the award, the case is notable because it opens the gate for further negligence claims involving securitised loans. In the past there has been considerable uncertainty about whether such claims are viable. Issuers, investors, servicers and CMBS professionals generally will therefore await the Court of Appeal's decision with keen interest. Though much depends on the particular contractual terms in question, any further clarification from the Court of Appeal about claims in this area will be welcomed.

RECENT DEVELOPMENTS & CASES

Sanctions: Accounts held by non-designated persons may be frozen where there is reasonable suspicion that they are controlled by designated persons

By Stewart Plant (Partner), John Forrest (Partner Equivalent) and Nicola Higgins (Legal Director)

The significant threats posed to the world by terrorism are reflected in the increasingly onerous obligations placed upon banks requiring, amongst other things, a high degree of scrutiny of the activity on customer accounts to avoid breaching any sanctions regime in place.

A failure to take required steps can amount to a criminal offence. Against that backdrop, it is hardly surprising that banks are taking an increasingly cautious approach in their relationships with customers. However when that cautious approach leads to the curtailment of banking services to customers, there is obvious scope for challenge.

Hmicho decision

The recent decision of *Elaine Hmicho -v- Barclays Bank plc* [2015] EWHC 157 is an example of one such challenge. The case concerned an application by Mrs Hmicho for interim injunctive relief against Barclays Bank (the "**Bank**") relating to the Bank's decision in May 2015 to freeze three of her bank accounts.

Mrs Hmicho was a UK resident whose husband was a Syrian national. Mr Hmicho had been the subject of financial sanctions since March 2015 and was a "*designated person*" for the purposes of the relevant UK legislation. Consequently his own accounts with the Bank were frozen in May 2015 (which decision was not the subject of challenge). Mrs Hmicho, however, sought to challenge the validity of the Bank's decision to freeze the three accounts held in her sole name (the "**Accounts**").

The Bank's position

The Bank asserted it was required to freeze the Accounts. It relied in particular upon regulations 3, 4 and 5 of the Syria (European Union Financial Sanctions) Regulations 2012 which provide, amongst other things, that a bank must not:

- deal with funds or economic resources belonging to, or owned, held or controlled by, a designated person if the bank knows, or has reasonable cause to suspect, that it is dealing with such funds;
- make funds available, directly or indirectly, to a designated person if the bank knows, or has reasonable cause to suspect, that it is making the funds so available; or
- make funds available to any person for the benefit of a designated person if the bank knows, or has reasonable cause to suspect, that it is making the funds so available.

It was the Bank's case that although the Accounts were in Mrs Hmicho's name it had "reasonable cause to suspect" that the funds in the Accounts belonged to, or were owned, held or controlled by Mr Hmicho and, that if the funds within the Accounts were released, it would be making them available to Mr Hmicho in breach of its obligations. The Bank's terms and conditions also permitted it to choose not to follow a customer's instructions in such circumstances.

The Bank thought the following facts suspicious:

- the source of the monies in the Accounts (a large number of credits appearing to have come directly from Mr Hmicho);

- the timing of receipts into the Accounts (coming very shortly after Mr Hmicho's being named as a designated person in March 2015);
- the unusual value of recent deposits and withdrawals; and
- the inconsistency of the recent transactions with past account activity.

The Bank argued that, on the basis of its suspicions, it was concerned it would be committing a criminal offence were the Accounts to be unfrozen and funds allowed to be released. In the circumstances, the Bank was contractually entitled to ignore Mrs Hmicho's instructions.

Mrs Hmicho's position

Mrs Hmicho disputed that the Bank had "reasonable cause to suspect". She argued that there were important differences between the words *"belonging to"*, *"owning"*, *"held"* and *"controlled by"*. As the Accounts were held solely by Mrs Hmicho, they could not belong to Mr Hmicho. The monies deposited were gifts to allow Mrs Hmicho to meet various family-related expenses, including school fees for their children, and therefore these monies were not owned by Mr Hmicho. Moreover, there was insufficient evidence either for the assertion that he held them or that he controlled them. The activity on the Accounts in fact showed that it was Mrs Hmicho who controlled them. Although Mr Hmicho had certain abilities to deal with the Accounts (e.g. online banking), he had never exercised them.

Mrs Hmicho argued that the court's focus should not be on where funds had come from (past activity) but rather on the present and her explanations as to what she would be using the monies for. There was a serious issue to be tried and Mrs Hmicho argued that the court could, on the merits of the parties' positions, have the necessary high degree of assurance that if it allowed the application, she would later be able to establish at trial that requiring the Bank to unfreeze the Accounts was the right decision. Further, when balancing the consequences for the Bank of not freezing against the *"dire state of affairs"* faced by Mrs Hmicho, given the impact on her family and personal life if the Accounts remained frozen, the balance of convenience favoured Mrs Hmicho.

Decision

Mrs Hmicho's application was refused. The judge felt that it was *"quite impossible"* at that interlocutory stage to have the "*high degree of assurance"* that she was right and the Bank was wrong. Further, he felt that the Bank might very well be able to demonstrate at trial that it had every reason to be suspicious in relation to the activity on the Account – the invitation to focus on the present rather than the past was unrealistic. The timing and nature of the account activity were important factors in the judge's conclusion that the Bank's suspicions might ultimately be found to be reasonable. While he sympathised with the difficulties caused by the Accounts being frozen, he considered the balance of convenience fell firmly on the Bank's side, because of the risk it faced of committing a criminal offence.

Comment

The case offers some useful guidance on how concepts such as ownership and control may be interpreted. By confirming that accounts "*controlled by designated persons"* may well extend to accounts held by other non-designated parties, such as spouses, the case highlights the very real difficulties banks may face in complying with their duties.

The decision is a welcome one from the banks' perspective and a useful demonstration of how the court balances the conflicting interests of a customer who is unable to access their bank account and a bank which risks committing a criminal offence if it does not restrict or prevent that access.

It is clear however from a number of recent cases in which DLA Piper has been involved, that these conflicting interests, emanating in particular from the imposition of various sanctions regimes, increase the prospect of challenges from customers who have been adversely affected.

Good news for lenders from the court of appeal … or is it?

By Adam Ibrahim (Partner) and Helen Chaplin (Senior Associate)

In July the Court of Appeal handed down its judgment in the case of *NRAM plc v McAdam and Anor* [2015] EWCACiv 751 which considered what should happen when a lender drafts a credit agreement which is not regulated by the Consumer Credit Act 1974 (CCA) but includes standard form wording which refers to consumer credit regulation and sets out rights which are only usually provided under a regulated agreement. In those circumstances does the agreement, as a matter of law, give additional rights to the borrower as if it were regulated? Specifically should a borrower's rights under a regulated agreement to receive periodic statements under section 77A of the CCA apply to an unregulated agreement? The significance of this is that if section 77A applies and is breached by the lender then the borrower has **no** liability to pay any interest and/or sums due in default under the agreement.

Overall the decision was undoubtedly good news for NRAM and lenders in general as NRAM's appeal against the adverse first instance decision was upheld. There was however a potential sting in the tail as the Court left open the possibility that claims could be brought on the basis that lenders may have misled borrowers into believing that they had rights under the CCA when they did not.

Background

The proceedings were initiated by NRAM itself which sought a declaration from the Commercial Court as to the actual rights which its unregulated agreements conferred on its customers.

At first instance Mr Justice Burton held that statements made within the credit agreement that it was regulated by the CCA had the contractual effect of incorporating provisions of the CCA into the agreement. He held that those provisions and the rights given to a borrower by them could be applied to a non-regulated agreement. Therefore, in this case the credit agreement had in fact given the borrower the benefit of additional rights under the CCA, including section 77A, even though it was an unregulated agreement.

Court of Appeal decision

The Court of Appeal disagreed. It held that Mr Justice Burton was wrong to conclude that it was a contractual term of the agreement that the borrower would be treated as if they had the benefit of certain protections under the CCA. Those protections and benefits were only available to borrowers under regulated agreements. Mr Justice Burton had also wrongly concluded that because NRAM had

chosen to include the standard 'regulated agreement' wording in its unregulated agreement that it was then prevented from denying that the borrower had the benefit of various CCA protections.

The Court of Appeal judgment provided NRAM with the comfort it set out to obtain when it commenced its declaratory proceedings in the Commercial Court and enabled many lenders faced with similar documents to breathe a collective sigh of relief.

Commenting on the company's website, Richard Banks, Chief Executive Officer of UK Asset Resolution Ltd (which was established in 2010 to facilitate the management of the closed mortgage books of both Bradford & Bingley (B&B) and NRAM) says that:

"NRAM is committed to acting in full accordance with the law and to treating customers and taxpayers fairly. For this reason, we sought clarification of the law by conducting a case in the High Court and subsequently the Court of Appeal. The Court of Appeal ruled in favour of NRAM, confirming that customers who took out unsecured loans of more than £25,000 under agreements that incorrectly stated these loans were regulated under the CCA, are not entitled to the same rights and remedies as those customers who took out loans that were regulated under the CCA."

For many other lenders who have also adopted the common practice of including 'regulated agreement' wording within their unregulated agreements this decision is good news.

Possible sting in the tail

Towards the end of its judgment the Court of Appeal commented that a lender, having represented to a borrower that an agreement conferred certain benefits and protections on the borrower when in fact it did not, might face a claim for misrepresentation and/or a claim for breach of contractual warranty by the borrower. Effectively, a borrower could claim that they had been misled by the lender when they entered into the agreement.

A successful claim for misrepresentation would allow a borrower to bring the agreement to an end and pursue a claim for damages and losses incurred as a result of the misrepresentation.

Comment

As yet we have not seen any claims of this nature being brought by claims management companies or consumer-focused law firms. This is probably because, rather than the straightforward claim they could have brought had the Court of Appeal found against NRAM, any claim they might bring would face the following significant hurdles:

- limitation issues – any breach will have occurred at the date the agreement was entered into so many claims will by now be statute-barred;
- difficulty in establishing reliance – any borrower bringing such a claim would need to establish that they relied on any misrepresentation (ie prove that they would not have entered into the loan agreement had it not stated that CCA protections would apply), which might prove difficult; and
- difficulty in proving actual loss as a result of entering into the agreement as opposed to, for example, entering into another loan agreement where such misrepresentations were not made.

It is hoped that these potential obstacles will dissuade claims management companies from seeking to track down and pursue these claims. Although with some claims management companies actively looking for new income streams, it would be wise to be watchful, identify any claims swiftly and adopt a robust strategy for resisting them on the grounds set out above.

Swaps mis-selling claims: New lines of attack?

By Hugh Evans (Partner) and Paula Johnson (Senior Professional Support Lawyer)

Recent decisions from the Administrative and Mercantile Courts have stirred things up in the swaps mis-selling arena, potentially opening up two new fronts of litigation.

In the past customers have sued for damages for negligent misrepresentation, breach of contract and/or negligent advice or negligent provision of information in relation to the original sale of the swap. Individuals have also sued for breach of statutory duty under section 138D of the *Financial Services and Markets Act 2000 (FSMA)* (such claims can only be brought by "private" persons and not small and medium sized businesses, although that is an issue due to be considered by the Court of Appeal in 2016).

Claims are rarely straightforward and are often met with the defence of contractual estoppel. This effectively prevents parties who have agreed in their contractual documentation that they are transacting on a particular basis (for example on the basis that no advice is being given or that no representations have been made) from arguing otherwise, even when the agreed stated position is at odds with reality. This defence often proves insurmountable.

Given the cost and difficulties in pursuing conventional claims, disgruntled customers have sought cheaper and easier ways to resolve their disputes.

In 2012, having identified failings in the way that 9 major banks had sold interest rate hedging products to SME's, the FSA (now the FCA) introduced an alternative redress scheme – the FCA Review. Under this scheme, the banks and the FCA entered into agreements which stipulated that the banks should carry out past business reviews of their sales to unsophisticated customers going back as far as 2001 and, where appropriate, make offers of redress. The scheme was designed to deliver fair and reasonable redress to customers quickly and cheaply.

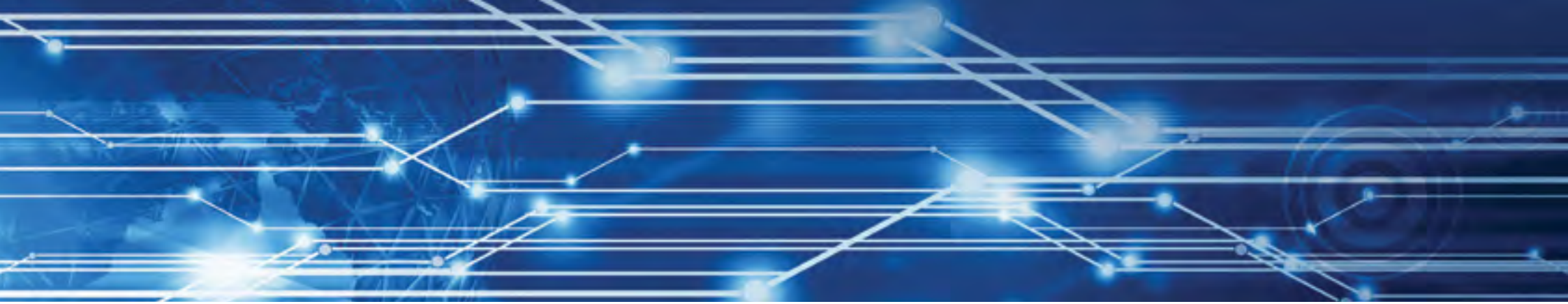
The take up rate was high – 89% of identified customers chose to participate in the scheme. To date around 12,600 customers have accepted a redress offer and some £2 billion is currently being paid out to them.

Not all customers are satisfied though. 10% of redress offers have not been accepted and in some quarters there has been criticism of the review. What can these customers do if they consider that the amount of redress they have been offered is inadequate?

Public law rights?

Earlier this year, in *R. on the application of Holmcroft Properties Ltd* [2015] EWHC 1888 (Admin), the Administrative Court gave a customer permission to bring judicial review proceedings of an independent reviewer's assessment of a redress agreement on the basis that it was arguable that the arrangements put in place by the FCA Review had a sufficient public law dimension to make the Skilled Person amenable to judicial review.

The matter will not come on for a full hearing until January 2016 so we must wait until then to see whether the court, having reviewed the arguments in greater depth, is convinced that the conduct of the independent reviewer should indeed be open to a public law challenge. However, given that the redress agreements between the FCA and the banks were entered into voluntarily and the banks'



obligations under them are essentially contractual, surely they should not be amenable to judicial review? Customers already have alternative private law remedies to sue for mis-selling so why should they need public law remedies too?

Private law rights?

In the meantime, in a separate case a judge in the Mercantile Court has given a customer permission to advance a case that it has private law rights of action to sue a participating bank for failing to carry out the FCA Review properly.

In *Suremime Ltd v Barclays Bank plc* [2015] EWHC 2277 (QB), Suremime had participated in the FCA review but was dissatisfied with its offer of redress. It had already issued a swaps mis-selling claim against Barclays in relation to the original sale. As well as claiming damages for negligent misrepresentation, breach of contract and/or negligent advice or negligent provision of information, Suremime also claimed that it was entitled, by virtue of section 1 of the Contracts (Rights of Third Parties) Act 1999, to enforce the agreements made between the FSA and Barclays under which the FCA Review was instituted because it was a third party upon whom the agreements purported to confer a benefit. Ultimately, however, Suremime had to abandon this particular limb of its claim when it transpired that the agreements between the FSA and Barclays expressly excluded any such third party rights.

Instead Suremime applied to amend its claim to include 3 new claims for Barclays' alleged breach of contract and/or negligence in conducting the redress scheme.

These new claims were advanced on the following lines:

- **breach of contract** – a contract had come into being between Suremime and Barclays as a result of the bank offering to review the sale of the swap and Suremime agreeing to participate in the review and incurring expense in engaging in a fact-finding exercise with the bank's solicitors. Barclays owed Suremime a contractual duty to conduct the review in accordance with the specification it had agreed with the FSA for conduct of the FCA Review;
- **breach of a duty of care in tort –** by agreeing to provide redress in accordance with the specification for the conduct of the FCA Review, Barclays owed Suremime a duty of care in tort; and
- **breach of a *White v Jones* type duty** – Suremime argued that its position was akin to that of the "disappointed beneficiaries" in *White v Jones.* There the court imposed a duty of care on a firm of solicitors who negligently failed to draw up a will before their client testator died, with the result that two intended beneficiaries lost their inheritance. The court imposed a duty on the solicitors in order to plug a legal gap which would otherwise mean that no one could advance a claim. The testator could not sue as he had suffered no loss and the beneficiaries had no obvious basis of claim. Suremime argued that there was a similar lacuna in its case. The bank owed Suremime a duty to implement the review process properly because any failure to do so would place the bank in breach of its agreement with the FCA but the FCA would suffer no loss. Suremime, as intended beneficiary of the FCA Review, would suffer loss.

In deciding whether to let these new claims proceed the judge had to decide whether they had a "real prospect of success" or whether there was some other compelling reason why they should be considered at a trial.

The judge dismissed the contract claim as unsustainable due to lack of consideration. The bank was going to include the claimant's swap in the review process regardless of whether Suremime engaged in the fact-finding exercise. Suremime was therefore denied permission to introduce that claim.

Suremime was however given permission to amend its claim to include the new tort claims. This was because the judge thought them "*more than merely arguable*". He was reluctant to "*throttle such claims at birth*" when he could not be confident that all the relevant facts were known and had been deployed at this early juncture.

He did not think that the fact that the claimant might be able to assert public law remedies of the *Holmcroft Properties* type, or the fact that it could sue for the original mis-selling, should necessarily be a bar to a private law duty of care being owed. The *White v Jones* principles might have potential application in Suremime's case as whilst the FCA might be able to enforce compliance with the FCA Review through the Independent Reviewer, the FCA would still suffer no loss if the bank fell short in implementing the specification of the review.

The judge was mindful that many other cases would share the same factual matrix in which the new and alternative bases of claim arose. It was right to take into account the wider landscape rather than just the facts of this case. Although Suremime was not time-barred from bringing a claim, many other customers had stayed their hand and not sued for mis-selling in the hope of getting a satisfactory result from the FCA Review process. Unless those customers had agreed a standstill their mis-selling claims might now be time-barred and they might be left without any remedy. These were compelling reasons as to why the tort claims merited full argument at trial.

Comment

Neither the decision in the *Holmcroft Properties* case nor the decision in the *Suremime* case is finally determinative of the issues. The thresholds which the claimants had to meet in order to secure permission to proceed were relatively low as all they needed to establish was that their points were sufficiently arguable. It is therefore quite possible that once the arguments have been properly ventilated the courts will find the customers' arguments untenable.

If the cases succeed, however, they could offer many customers easier options than have been available in the past. In particular, the *Suremime* line of attack may prove attractive to customers as a means of circumventing the usual contractual estoppel defences and avoiding having to prove mis-selling altogether.

Many customers who have participated in the FCA Review are barred from bringing claims in relation to the original mis-selling because the limitation period for bringing such claims has passed. The review extended to products sold as long ago as 2001. If such customers are dissatisfied with their offers of redress they could potentially be given a second bite of the cherry by being able to bring claims related to the conduct of the review (which obviously happened much later) rather than the original mis-selling. In *White v Jones* the court was concerned to ensure that the disappointed beneficiaries were given a remedy where one would not otherwise exist. In Suremime, the judge has

opened the door to a variation on a claim which did once exist but has since been lost by virtue of the Limitation Act, a piece of legislation which exists for sound policy reasons.

In addition, in bringing those claims, customers will have to prove that the review was not carried out by the bank concerned to the requisite standard of care which is something different to proving that the hedging product was mis-sold in the first place. That has the potential to increase costs for all concerned if there is little overlap between a traditional mis-selling claim and a Suremime claim.

One thing seems sure – considerable litigation in this area is set to continue.

SPOTLIGHT ON...
DLA PIPER'S BANKING DISPUTES IN CANADA

The Canadian Banking Industry has received high praise and developed a reputation for its stability. The World Economic Forum, in its annual global competitiveness reports, has identified Canadian banks as the soundest in the world for the past seven years in a row. In addition, in its Financial Development Report, the World Economic Forum ranked Canada's banking system sixth among 62 countries in terms of its breadth, depth and efficiency.

The stable character of the Canadian banking system carried it through the global financial crisis. Maintaining a policy of solid funding and fiscal restraint regarding consumer lending proved essential to the system's performance during the crisis. Canadian regulators pushed back when faced with pressure from bank executives to loosen lending restraints during the economic boom. As a result, Canadian banks thankfully found themselves in a favorable position when the global financial crisis finally hit.

The strong position enjoyed by the Canadian banking system has made it an asset to the economy at home and abroad. The contribution made to the economic growth of Toronto in particular is significant. Toronto houses the head offices of Canada's five largest domestic banks and 41 of the 50 foreign-based banks operating in Canada. Almost half of employment in Toronto's financial sector is attributable to Canadian banks. In *The Banker's* 2014 report on international financial centres Toronto ranked sixth overall and among the world's top 10 for total bank assets.

The Canadian banking system continues to establish itself on the global stage. In 2014, five Canadian banks were among the world's largest 50 banks by market capitalization, and three of these – Royal Bank of Canada, Toronto-Dominion Bank and Scotiabank – placed in the top 25. The focus on innovation in the Canadian banking system is a testament to the system's continued commitment to growth.

DLA Piper (Canada) LLP has banking lawyers situated in Toronto, Calgary, Montreal, Edmonton, and Vancouver. Major clients include most of the five major banks, the largest two credit unions in Western Canada, and a number of foreign banks – chiefly US and Japanese entities – seeking expansion in the Canadian retail market or participation in syndicated and structured lending.

From a disputes perspective, the practice focusses on fraud and asset recovery and investigations. The team recently secured a CAD $650 million judgment for a bank against its management employees and their families, who had been perpetrating a long-running fraud on the bank and laundering the proceeds in Canada and elsewhere. Members of the banking

disputes team have also recently advised two major banks on corruption-related matters as well as on matters involving banking identity theft, anti-trust matters, IT contractual disputes, and securities class actions.

Contacts for banking disputes include Jeff Horswill and David Neave in Vancouver, Dana Schindelka in Calgary, Lisa Constantine in Toronto, and Hubert Sibre in Montreal.

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