COVINGTON

English Banking Litigation: Top 10 Cases Of 2017

January 17, 2018

Litigation and Investigations

We summarise below what we see as the 10 most significant English Court judgments for financial institutions. The overriding theme to arise from these cases is that, when financial institutions look after their own interests and protect themselves, those protections will be upheld by the English Court and their contractual arrangements will be respected. Financial institutions will find themselves at risk, however, when they do not protect themselves carefully under their contracts, or where they go further in their conduct than their contracts intended.

Against that backdrop, the year was less one of breaking new ground, but rather affirming old ground. Much-commented on cases concerning privilege and interpretation in fact reaffirmed the existing law (and also that it is easier to apply in theory than in practice). Half of the top 10 cases selected concerned banks' duties to their customers and counterparties. The broad lesson of these is that at the point of inception of the relationship or transaction, financial institutions should carefully reflect on the nature of the work they are doing—understand what liabilities and duties they are assuming and monitor accordingly. As long as additional duties are not assumed, the Court is generally even-handed and true to the contract, meaning results are often favourable to financial institutions. A further two cases concern jurisdiction and applicable law, including how to deal with situations where contracts clash with mandatory law and the effect of asymmetric clauses. These also emphasise the importance of clearly-worded and consistent agreements. Last, but by no means least, class actions in the financial services sector have definite green shoots.

Are Notes of Interviews with Employees, Conducted in the Context of Internal Investigations, Subject to Legal Advice Privilege?

Re The RBS Rights Issue Litigation[1]

This case confirms that the English law on legal privilege remains relatively restricted. While a restricted group of those at the company, who request and receive legal advice, qualify as a client for legal advice privilege purposes, other employees do not. This is something to consider carefully in relation to investigations where matters may not have become adversarial enough to confer the benefits of wider litigation privilege on interactions with employees and former employees.

Background

This decision is part of a long-fought case where the central allegation was that the prospectus to a 2008 Rights Issue by RBS did not contain accurate information.

As part of its investigations into the matter, RBS had produced two sets documents (the "Interview Notes") which comprised of transcripts and records of interviews between employees/ex-employees of RBS, and either RBS's in-house lawyers or external counsel. The claimants wished to see these documents, but RBS resisted disclosure on the grounds that the Interview Notes were subject to legal advice privilege. No claim was made that they were covered by litigation advice privilege.

The Judgment

The Court found that the Interview Notes were not subject to legal advice privilege and needed to be disclosed. This was because legal advice privilege only covers communications between the lawyer and the actual client for the purposes of giving/receiving legal advice. "*Client*" is narrowly defined to include only those employees who are authorised to seek and receive legal advice, and not those just authorised to communicate with lawyers. Employees/ex-employees authorised to communicate with the company's lawyer but no more than that are not viewed as the client and, therefore, communications between such persons and lawyers for the purpose of gathering information (such as those contained in the Interview Notes) could not be considered as covered by legal advice privilege. While the Interview Notes could, in principle, be covered by the "*lawyers' working papers*" privilege, being notes made by lawyers, that would only apply to documents that provide a clue to the lawyers' advice or reveal the trend of advice being given. In this case, the Interview Notes were essentially verbatim transcripts of what had been said in the interviews and therefore were not privileged as lawyers' working papers.

RBS also argued that U.S. law was applicable because most of the interviews were conducted in the U.S. If U.S. law had applied, it appears that the documents would have been considered privileged. However, the Court found that English law, as the law of the forum, applied to questions of privilege.

---

[1] [2016] EWHC 3161 (Ch)

Comment

This is one of three substantive cases on privilege in 2017 that reiterate and reaffirm the English law position on legal advice privilege—that mere information-gathering, absent a real, substantial or impending threat of litigation or regulatory action, is not protected by privilege unless it is between the limited 'client' group and a lawyer. It is important to note that this decision does not change the law on legal advice privilege nor on litigation privilege but emphasises their limited application in the context of investigations.

If you have any questions concerning the material discussed above, please contact the following members of our firm:

Jonathan Benjamin +44 20 7067 2301 jbenjamin@cov.com

Is The Law On Contractual Interpretation Becoming More Literal?

Wood v. Capita Insurance Services Limited[2]

The Supreme Court considered competing interpretations of an indemnity provision in a share purchase agreement. It upheld a relatively narrow interpretation of the relevant indemnity provision, reasoning that the words would need to be stretched to include the claim in question and there were other clauses that evidenced an intention that the words should not be so stretched.

Background

In 2010, Capita agreed to purchase the share capital of Sureterm Direct Limited, a specialist insurance broker, from Mr. Wood. Following the purchase, an internal investigation revealed that Sureterm had mis-sold insurance to customers. Sureterm notified the FSA (the predecessor of the Financial Conduct Authority) and agreed to a remediation plan involving the payment of compensation to affected customers.

Capita sought to recover its losses from Mr. Wood under an indemnity clause in the sales and purchase agreement (SPA), which provided that he would indemnify Capita against: "*all actions, proceedings, losses, claims, damages, costs, charges, expenses, and liabilities suffered or incurred, and all fines, compensation or remedial action or payments imposed on or required to be made by the Company following and arising out of claims or complaints registered with the relevant Regulator*".

The key issue was that no claim or complaint had been submitted to the regulator; the company had self-reported to the FSA. Capita argued that the requirement for a complaint or claim only qualified the second part of the clause, which required indemnification in respect of "*all fines, compensation or remedial actions or payments imposed on… the Company*". On this construction, Capita could still make a valid claim under the categories of loss listed in the first part of the clause, which covered "*actions, proceedings, losses, claims, damages, costs, charges, expenses and liabilities*". Mr. Wood argued that the requirement for a complaint or claim qualified the whole clause and that, as a consequence, Capita was precluded from recovering under the indemnity.

The Judgment

The Supreme Court dismissed Capita's appeal. When interpreting the clause, the Court considered the language used and the commercial context in which the clause was drafted. The Supreme Court ascribed weight to the SPA's wide-ranging warranties which also protected Capita against losses deriving from the mis-selling of insurance products, but which were more limited in time and quantum. The Court held that it was necessary to construe the scope of the indemnity in light of those warranties and, in doing so, inferred that Mr. Wood and his co-sellers had clearly intended to minimise their exposure to those losses upon the expiration of the warranties. The Supreme Court emphasised that there is a strong business case for parties to

---

[2] [2017] UKSC 24

agree wide-ranging warranties which are subject to a time limit, as well as an additional indemnity, which is not limited in time, but is triggered only in limited circumstances.

Comment

In arriving at its decision, the Supreme Court emphatically rejected the argument that the case of *Arnold v Britton*[3] had recalibrated the English Court's approach from a purposive or commercial approach to interpretation to a more literal one. It stated that textualism (i.e. focussing on the words themselves) and contextualism (i.e. focussing on the factual matrix) were merely tools for the Court to use in ascertaining the objective meaning of the language used in a contract, and that the extent to which each tool will assist the Court in its task will depend on the circumstances of the case. However, if the words are clear and a narrow interpretation may make commercial sense, then parties should not expect Courts to give wider interpretations.

If you have any questions concerning the material discussed above, please contact the following members of our firm:

Matthew Beech +44 20 7067 2310 mbeech@cov.com

3 [2015] UKSC 36

Will Class Actions Become the "New Normal" in English Competition Law Claims?

***Walter Hugh Merricks CBE v. Mastercard Incorporated*[4]**

Class actions were introduced in England in 2015, with great fanfare and speculation about U.S.-style mega-claims. Whilst this £14 billion claim promised to fuel that speculation, the Tribunal's response has dampened (but not wiped out) the excitement.

Background

Walter Merricks (former Chief Ombudsman of the Financial Ombudsman Service) brought the largest ever claim to be filed in the English Courts, and only the second to be filed under the opt-out class action mechanism introduced in 2015[5]. On July 21, 2017, the Competition Appeal Tribunal ("CAT") issued a judgment in which it refused to grant a collective proceedings order ("CPO"), essentially dismissing the claim at the first hurdle.

The claim arose out of the EU Commission's Decision of 19 December 2007, which found that MasterCard and others had infringed Article 101 of the Treaty on the Functioning of the European Union by fixing the rates of intra-EEA fallback multilateral interchange fees ("MIFs" - being fees charged by a cardholder's bank to a merchant's bank for each sales transaction at a merchant outlet with a payment card). Mr Merricks argued, in this case, that MasterCard's fixing of European MIFs increased the rate of the UK MIFs, and that these higher charges were ultimately passed on to consumers (i.e., merchants had to sell products to consumers at higher prices to compensate for the higher fees charged to them by their banks).

The proposed claimant class was "*Individuals who between 22 May 1992 and 21 June 2008 purchased goods and/or services from businesses selling in the UK that accepted MasterCard cards, at a time at which those individuals were both (1) resident in the UK for a continuous period of at least three months, and (2) aged 16 years or over*." The class was estimated to comprise over 46 million consumers.

The CAT noted that certification of a CPO involves two aspects: an applicant needs to show that the claims (i) raise "*common issues*"[6]; and (ii) are suitable for collective proceedings[7]. The CAT's judgments provide some guidance as to the applicable thresholds for these tests, noting that an "*application for a CPO is not a mini-trial and the Applicant does not have to establish his case in anything like the same way that he would at trial*", but citing the Supreme Court of Canada in *Pro-Sys Consultants Ltd v Microsoft Corp*., which also held that "*the expert methodology must be sufficiently credible or plausible to establish some basis in fact for the commonality requirement*."

The Judgment

The CAT rejected Mr Merrick's claim that the individual claims in the class would be "*largely identical*". In particular, the CAT noted the following differences between the proposed class

4 [2017] CAT 16, 2017 WL 03128998
5 Section 47B Competition Act 1998
6 Strictly, "the same, similar or related issues of fact or law" under section 47B(6) Competition Act 1998
7 Citing Section 47B(6) Competition Act 1998 and Rule 79(1) of the CAT Rules

members' individual claims: "(i) *for each merchant at which the claimant purchased goods and services, the degree to which that merchant passed through those overcharges and the percentage impact on its prices;* (ii) *the amount that the claimant spent at each of those merchants;* (iii) *if the claimant held a MasterCard credit card, what if any interest payments were made and what if any benefits were received under that credit card.*"

On the question of whether the claim was suitable for collective proceedings, the CAT rejected the methodology proposed by the applicant to calculate aggregate damages, which sought to calculate a weighted average pass-through percentage, in order to overcome the difficulty caused by the differing amounts of pass-through between individual claims. Applying the Canadian test set out above, the CAT was "*unpersuaded on the material before* [it] *that there is sufficient data available for this methodology to be applied on a sufficiently sound basis*". The CAT also found that, even if it was possible to come to an aggregate amount of damages on this basis, it was "*impossible in this case to see how the payment to individuals could be determined on any reasonable basis*". Damages would not be distributed by reference to an individual's actual loss, which would be in breach of the "*governing principle*" that damages should be compensatory.

The judgment also provided *obiter* guidance on funding arrangements for collective claims. In particular, the CAT found that proceeds undistributed at the conclusion of a successful class action may be used to provide a litigation funder's investment return. This will give the litigation funding industry comfort that a return can be made on such cases in England.

Comment

The case is a useful indicator as to how the CAT will apply the tests for a CPO, including how it will be guided by similar regimes in other jurisdictions. Mr Merricks has both sought permission to appeal from the Court of Appeal and sought a judicial review in the High Court, on the basis that it is legally uncertain which route is appropriate to challenge the decision of the CAT.

There are many stakeholders who are eager to see the new class action regime working in practice. However, this case (and the *Gibson* case before it) shows that the CAT will not simply wave through prospective claims without scrutiny, and will cause claimant law firms to think carefully about what claims are suitable for collective proceedings.

If you have any questions concerning the material discussed above, please contact the following members of our firm:

Oliver Grazebrook	+44 20 7067 2286	ograzebrook@cov.com

Can a Bank be Liable For Transferring Client Monies on the Orders of a Director of the Client?

Singularis Holdings v. Daiwa Capital Markets Europe Ltd.[8]

The Court has reaffirmed the scope of the *Quincecare* duty of care that applies to financial institutions handling client money. This requires institutions handling client money to pause before accepting and executing orders to transfer monies, in particular where they know that the client in question is a company facing serious financial difficulties.

Background

Daiwa Capital Markets Europe Limited ("Daiwa") held client monies belonging to Singularis Holdings Limited ("Singularis").

On the instructions of Mr Al Sanea, Singularis' sole shareholder and one of its directors, Daiwa paid USD 204 million from Singularis' account to other accounts. Those accounts were connected to Mr Al Sanea, but they were not connected to Singularis. Singularis subsequently entered into liquidation, and the liquidators sought to recover the funds that Daiwa had paid pursuant to Mr. Al Sanea's instructions.

The liquidators noted that there were several factors which indicated that Mr. Al Sanea's instructions were intended to fraudulently misappropriate Singularis' funds. Accordingly, they argued that Daiwa had violated the duty of care set out by the Court of Appeal in *Barclays Bank Plc v. Quincecare*[9]:

"[…] [A] *banker must refrain from executing an order if and for as long as the banker is 'put on inquiry' in the sense that he has reasonable grounds (although not necessarily proof) for believing that the order is an attempt to misappropriate the funds of the company* […]."

In its defence, Daiwa argued, among other things, that the claim was precluded by the fact that it was being pursued by the Singularis liquidators for the ultimate benefit of the company's creditors. In that regard, Daiwa contended that a duty owed to a company, Singularis, is not owed to the creditors of that company, so the liquidators' claim could not succeed.

In addition, Daiwa asserted that Singularis was essentially a one-man company, represented by Mr Al Sanea as sole shareholder. On that basis, Daiwa argued that Mr Al Sanea's conduct could be attributed to Singularis, so that his illegal acts should be treated as the illegal acts of Daiwa, and thereby defeat the liquidators' claim.

The Judgment

With regard to the scope of the *Quincecare* duty, Singularis accepted that the duty was not owed directly to the company's creditors, but the Court noted that it was the company's liquidators — not the creditors — bringing the claim against Daiwa. The fact that a damages award would be used to benefit the creditors did not prevent the liquidators from pursuing the claim: "*There is no principle of law which requires or entitles the court to consider what a party*

---

[8] [2017] EWHC 257 (Ch)
[9] [1992] 4 All ER 363, *per* Steyn J at 376

who has a valid cause of action for a loss intends to do with the money he or she recovers if successful in proceedings based on the same cause of action."

In relation to the alleged breach of the *Quincecare* duty, the High Court held that it had "*no hesitation in finding that Daiwa was in breach of the duty of care that it owed to Singularis*". In particular, Rose J concluded that "[a]*ny reasonable banker would have realised that there were many obvious, even glaring, signs that Mr. Al Sanea was perpetrating a fraud on the company when he instructed that the money to be paid to* [sic] *other parts of his business operations*".

For example, "[t]*here was plenty of evidence to put* [Daiwa] *on notice that there was something seriously wrong with the way that Mr. Al Sanea was operating the Singularis account with Daiwa*". This included "*the appearance of $80 million in the Singularis account* […] *shortly after Mr. Al Sanea's and Saad Group's other bank accounts had been frozen.*"

With regard to the argument that Mr Al Sanea's acts could be attributed to Singularis, the High Court rejected Daiwa's characterisation of Singularis as a one-man company, as there were other directors, including "*professional and experienced businessmen who were not relatives of Mr. Al Sanea*". Although Mr Al Sanea was the *"dominant influence over the affairs of the company, it had a board of reputable people and a substantial business.*" Accordingly, Mr Al Sanea's illegal acts could not be attributed to Singularis.

The High Court quantified damages arising from Daiwa's negligence and breach of contract to be more than USD 203 million, but reduced the award by 25 per cent to reflect Singularis' contributory negligence.

Comment

The first instance decision is subject to a pending appeal, which is due to be decided in 2018. As stated above, the judgment reaffirmed the scope of the *Quincecare* duty of care that applies to financial institutions handling client money. As Rose J put it, the *Quincecare* duty of care "*does require a bank to do something more than accept at face value whatever strange documents and implausible explanations are proffered by the officers of a company facing serious financial difficulties*".

It is also critically important for financial institutions to ensure that employees handling client accounts are aware of their responsibilities. As Rose J noted, several senior Daiwa executives agreed on the need for caution when handling requests relating to the Singularis account, yet "*no one in fact exercised care or caution or monitored the account themselves and no one checked that anyone else was actually doing any exercising or monitoring either.*"

Finally, the judgment confirms that a financial institution may face a claim from a client's liquidator in relation to any violation of duties owed by the financial institution to that client. This remains the case even if the ultimate beneficiaries of the action are the client's creditors.

If you have any questions concerning the material discussed above, please contact the following members of our firm:

Ian Redfearn	+44 20 7067 2116	iredfearn@cov.com

When Does a Close Bank-Client Relationship Become Undue Influence?

The Libyan Investment Authority v Goldman Sachs International[10]

The English Courts have consistently found in favour of Goldman Sachs in this long-running litigation, which is now at an end. Allegations that Goldman Sachs exercised "*undue influence*" over the Libyan Investment Authority ("LIA"), said to render the resulting agreements rescindable, have been rejected.

Background

In October 2017, the Court of Appeal refused an application for permission to appeal made by LIA. This followed the High Court's October 2016 detailed rejection of LIA's claims against Goldman Sachs International ("GSI"). The LIA claimed that that derivatives deals between it and GSI were transacted under the auspices of a protected relationship that went beyond the usual arm's length relationship between a bank, as counterparty, and a client.

LIA argued that, such was the nature of the protected relationship, GSI exercised undue influence over LIA in encouraging LIA to enter into the transactions. As a result, the transactions should not be enforceable. The LIA also argue that the transactions should be set aside on the basis that they were unconscionable bargains.

LIA alleged that, such was its lack of sophistication and its reliance on GSI, that it was in a position of reliance, dependence or vulnerability and GSI was in a position of ascendancy, dominance or control: so much so that they were in a relationship of trust and confidence. That relationship meant that GSI owed LIA a duty to take fiduciary care of LIA and to act with candour and fairness. Candour and fairness in this sense means that the burden would be on the party seeking to enforce the transaction to establish that the complainant entered into it not merely understanding its effect, but as the result of full, free and informed thought about it. LIA argued that GSI exploited this protected relationship and LIA's lack of expertise in order to induce GSI to enter into a series of trades that, it alleged, subsequently caused it to lose a considerable sum of money. As part of this inducement, LIA argued GSI had given an internship to the younger brother of the LIA's deputy chairman.

The Judgment

The High Court rejected LIA's claims in their entirety:

1. It found no basis for the "*protected relationship*" alleged by LIA. The relationship between GSI and LIA was not out of the ordinary, and indeed resembled the type of relationship LIA had with other banks. LIA's claim that it lacked sophistication was also rejected on the basis that its key decision-makers had extensive experience in finance and banking.
2. With respect to the disputed internship, the Court found that this was not a significant factor in LIA's decision to enter into the disputed trades. Whilst the internship may well

---

[10] [2016] EWHC 2530 (Ch)

have been intended to "*sweeten the atmosphere*", the Court concluded that it would be unrealistic to suppose that LIA was induced to enter into trades worth millions of Euros on this basis.

3. The Court also rejected LIA's claim that the transactions were unconscionable bargains.

LIA sought to appeal the High Court's decision on three principal grounds, all of which failed:

1. That the Court had incorrectly assessed whether GSI sought improperly to influence LIA's decision-making process. LIA argued that the Court had implicitly found sufficient evidence that GSI's "*subsidiary motive*" was to exercise undue influence, which ought to have been sufficient. The Court of Appeal held that, in order for this argument to succeed, GSI would have to show that the High Court's decision was clearly incorrect, and that no reasonable judge would have reached the same conclusion. In the circumstances, there was no basis for such a finding;
2. That the Court erred in law in adopting conflicting legal tests when considering whether GSI's alleged undue influence had caused LIA to enter into the relevant trades. LIA also argued that there ought to be a rebuttable presumption that GSI's undue influence had caused GSI to enter into those transactions. Given that there was no merit to LIA's argument that there was undue influence, as the High Court has found there was no such undue influence, this issue was moot. However, the Court of Appeal briefly considered the merits of this argument and held that, even if undue influence had been found, there was no error in law, and therefore no grounds for allowing an appeal on this basis.
3. A previously-unpleaded case that GSI's dealings with LIA officials constituted bribery. The Court of Appeal rejected LIA's attempts to advance a new case at the appeal stage, particularly in light of the Court's finding that there had been no undue influence.

As a consequence of these findings, the Court of Appeal held that LIA's case had no reasonable prospect of success, meaning the application to appeal was refused, spelling the end of the line for this long-running claim.

Comment

The case gives further comfort to financial institutions that English Courts will carefully analyse all evidence available (including extensive documentary disclosure and written and oral witness evidence) to reach a conclusion on allegations of impropriety by a bank. In the absence of clear evidence of unconscionable behaviour, such claims will fail.

If you have any questions concerning the material discussed above, please contact the following members of our firm:

Tom Jackson	+44 20 7067 2184	tjackson@cov.com
Chloe Lyons	+44 20 7067 2304	clyons@cov.com

Is The s.39 FSMA Principal-Appointed Representative Relationship More Burdensome Than The Common Law Principal-Agent Relationship?

Anna Ovcharenko & Yury Moskaltsov v Investuk Ltd & Anglo-Sino Capital Partners Ltd[11]

The High Court refused applications by the second defendant, Anglo-Sino Capital Partners ("ASCP"), to set aside a default judgment entered against it by the two claimants, and to stay the Court proceedings pursuant to section 9 of the Arbitration Act. The case provides some pointers on the appointed representative regime under section 39 of Financial Services and Markets Act 2000 (FSMA).

Background

Section 39 provides for an exemption from the general prohibition on unauthorised persons carrying out FSMA-regulated activities. This applies when a person authorised by the FCA (a "*principal*") appoints another person as its appointed representative ("AR") for identified regulated activities and accepts responsibility for that AR's performance of the regulated activities. Under section 39(3), the principal is responsible for AR's conduct "*for anything done or omitted by the representative in carrying on the business for which he has accepted responsibility.*"

Anglo-Sino appointed InvestUK as its AR pursuant to an appointed representative agreement ("ARA") for the provision of investment advice. Pursuant to a contract, InvestUK arranged investments for the claimants in a company that turned out to be, and to have been, loss-making. The claimants alleged that InvestUK, among other things, breached the contract by making inaccurate statements about the investment and failing to conduct proper due diligence. While InvestUK filed an acknowledgement of service and contested the Court's jurisdiction on the basis that the dispute was subject to an arbitration agreement, ASCP also filed an acknowledgement but did not file any application or any defence. As a result, default judgment was entered against ASCP. ASCP applied to set aside the default judgment and to stay the proceedings in favour of arbitration.

The Judgment

ASCP argued that it had a real prospect of defending its claim because the AR had exceeded the limitations put on its activities in the principal-AR agreement. In other words, InvestUK acted outside the scope of the ARA and therefore Anglo-Sino should not be liable for InvestUK's actions.

The Court considered this position "*unarguable*", because the purpose of section 39(3) was to ensure a safeguard for clients so that they have "*a long stop liability target*" - i.e. that they can go after the principal. In the Court's view, section 39(3) was "*a clear and separate statutory route to liability.*" The limitation in the ARA regulated the position between ASCP and Investuk and had no bearing on the claimants' ability to pursue an action against ASCP. To construe it otherwise would mean that any time there was any default by an AR, that very default would

[11] [2017] EWHC 2114

automatically not only take the AR outside the scope of the ARA, but would also take the principal outside the scope of section 39(3).

The Court also ruled that ASCP could not rely on the arbitration clause in the agreement between InvestUK and the claimants, because the section 39 regime was regulatory and did not create a common law agency relationship between ASCP and InvestUK. Its purpose was to allow persons, not otherwise entitled to carry out certain forms of investment business, to do so because of their connection with the party that makes the ARA with them. It did not make them agents for all purposes of the other party. The Court acknowledged that in some instances an AR could also be an agent, but that was not the case here.

Comment

This case suggests that the Appointed Representative regime imposes the disadvantages of the common law principal-agency relationship - such as essentially strict liability for the actions of the agent, regardless of the contract (and ambit of the agent's authority) between the principal and agent - without conferring the benefits, in this instance, benefits such as the principal being able to recover fees owed to the agent or taking advantage of an arbitration clause.

If you have any questions concerning the material discussed above, please contact the following members of our firm:

Andris Ivanovs +44 20 7067 2288 aivanovs@cov.com

When There Is No Advisory Relationship, How Far Can The Banker's Duty Of Care Extend?

Philip Thomas & anr v Triodos Bank NV[12]

The ordinary duty of care owed by a bank to its customers when providing information is (in addition to any regulatory duties, such as those imposed by COBS rules) simply a duty not to misstate. However, this case demonstrates that it is relatively easy for the duty to extend to a duty to explain all the consequences of a course of action, even where there is no advisory relationship.

Background

The claimants were farmers who took out a number of loans. The claimants switched a portion of their borrowing from a variable rate to a 10-year fixed rate. They asked the bank whether early redemptions of the fixed rate loans would incur penalties of £10,000-20,000 but the bank did not answer or correct this even though the figure would be around £95,000. This became apparent when interest rates began to fall and the claimants wished to redeem early and restructure their debt.

The claimants alleged that the bank had a duty to explain the financial consequences of redemption before the expiration of its term (an "information duty"), and that the bank misrepresented the financial consequences by failing to correct the claimants' figures when asked.

The Judgment

Traditionally the position is that where a bank is providing information only, and not advice, then only a *Hedley Byrne* type of duty (not to misstate) applies.

In this case it was found that there had been no assumption of an advisory role on the part of the bank. However, the Court held that there was nothing in previous case law precluding a finding of an intermediate duty of care in certain circumstances where no advisory role had been assumed. The Court considered that there were circumstances that suggested that an intermediate duty should be owed.

The bank had signed up to a voluntary code of conduct known as the BBC (Business Banking Code) and had advertised accordingly to their customers. The BBC contained a provision which stated that "*if the bank was asked about a product, it would give the customer a balanced view of the product in plain English with an explanation of its financial implications.*" There were no exclusion clauses that would indicate that the bank was not willing to assume responsibility for promises contained in the BBC.

The Court decided that because of this fairness commitment, the bank had assumed a higher duty of care with regard to the provision of information. This led the Court to conclude that "*when the claimants inquired about the fixing rate the bank owed them more than a duty not to mislead or misstate. The duty of care that the bank owed was to explain the financial*

[12] [2017] EWHC 314 (QB)

implications of fixing the rate." Tempering the duty somewhat, the Court held that the bank's duty was a duty *"only owed in response to the claimants' inquires because that is what the bank had signed up to in the BBC. It was not a duty to volunteer information if not asked.*"

Comment

This judgment gives teeth to voluntary codes of conduct such as the BBC by using them as a standard that consumers can expect and imposing a higher duty of care on banks who subscribe to them. It is likely however that the judgment may well result in banks becoming more wary when signing up to voluntary codes of conduct out of fear of incurring a greater duty of care and exposing them to potential liability. At the very least, banks will be keen to consider the cross-over between voluntary codes that they are observing and the specific terms and conditions or products that they offer (such as ensuring the adequacy of exclusion clauses).

If you have any questions concerning the material discussed above, please contact the following members of our firm:

Martin del Gallego +44 20 7067 2134 mdelgallego@cov.com
Katharine Kinchlea +44 20 7067 2303 kkinchlea@cov.com

Is An Asymmetric Jurisdiction Clause An "Exclusive" Clause?

Commerzbank Aktiengesellschaft v Liquimar Tankers Management[13]

Despite the popularity of asymmetric jurisdiction clauses (which allow one party to sue in a specified jurisdiction only but the other to sue in any jurisdiction), debate continues in Europe as to their validity and enforceability. The English High Court has now confirmed that an asymmetric jurisdiction clause is an "exclusive" choice of jurisdiction for the purposes of the Brussels Recast Regulation[14]. In fact, the judge went further and (perhaps surprisingly) indicated that such clauses may also be considered exclusive for the purposes of the Hague Choice of Court Convention[15].

Background

Commerzbank entered into shipping loan agreements and related guarantees, by which it advanced loans to ship-building companies under Liquimar's control, and under which Liquimar was guarantor. The agreements contained asymmetric jurisdiction clauses, by which Liquimar was obliged to commence proceedings only in England, and Commerzbank could sue in any court of competent jurisdiction - a typical example of an asymmetric jurisdiction clause. Such clauses are common in international financial documentation - the Loan Market Association standard form being one example - providing comfort to the lender, who may need to pursue the recovery of debt against assets in any number of jurisdictions worldwide.

Following events of default under the agreements, Commerzbank threatened to commence proceedings in England, but Liquimar launched proceedings in Greece first. Commerzbank then initiated proceedings in England, and Liquimar applied to the English High Court for a stay of the proceedings in England until the Greek Court had ruled on its own jurisdiction under the *lis pendens* principle articulated in Article 29 of the Brussels Recast Regulation.

Liquimar argued that:

1. an asymmetric jurisdiction clause does not qualify as an exclusive jurisdiction clause within Article 31(2) of the Brussels Recast Regulation, as it expressly permits one party (in this case, the bank) to bring proceedings in any court of competent jurisdiction;
2. the application of the *lis pendens* principle under Article 29(1) of the Brussels Recast Regulation requires the English Court, being a court other than the court first seised (i.e., the Greek Court), to stay its proceedings until the Greek Court has ruled on its own jurisdiction; and
3. asymmetric jurisdiction clauses are incompatible with Article 25 of the Brussels Recast Regulation, which requires parties to identify the jurisdiction under which a defendant can expect to be sued.

---

13 [2017] EWHC 161 (Comm)

14 Regulation (EU) No 1215/2012 on jurisdiction and the recognition and enforcement of judgment in civil and commercial matters (recast)

15 Convention of 30 June 2005 on Choice of Court Agreements

The Judgment

Cranston J, sitting in the English Commercial Court, acknowledged that there was no EU jurisprudence on whether asymmetric jurisdiction clauses should be considered exclusive jurisdiction clauses enforceable under the Brussels Recast Regulation. Rejecting Liquimar's arguments, Cranston J held that:

1. an asymmetric jurisdiction clause does qualify as an exclusive jurisdiction clause under Article 31(2). Cranston J considered that it would otherwise undermine the agreement of the parties and "*foster abusive tactics*";

   the wording of Article 29 makes it expressly clear that it is subject to the operation of Article 31(2). It would "*make a nonsense*" of Article 31(2) if the English Courts were required to stay the English proceedings, no matter how far advanced the Greek proceedings were; and

2. Article 25 does not state that a valid exclusive jurisdiction clause must exclude all other courts; it is enough that it makes clear that the defendant must sue in a designated jurisdiction (in this case, England).

Comment

The majority of jurisprudence in EU national Courts to date has reached the same conclusion as the English Court in this case but this decision does conflict with at least one French decision (*Mme X v Rothschild*[16]). The position will not be certain unless and until there is binding EU authority on the point, but this decision is helpful in the interim in confirming the view of the English Court.

Interestingly, Cranston J also considered the Hague Choice of Court Convention, to which the EU is also party and which also relates to "exclusive" choice of Court agreements. It has widely been assumed that the Hague Choice of Court Convention does not apply to asymmetric clauses, both because of its definition of "*exclusive choice of court agreement*" and because an accompanying report suggests that it does not apply to asymmetric clauses[17]. However, Cranston J took all of this into account and concluded that, "*[t]here are good arguments in my view that the words of the definition of exclusive jurisdiction clauses in art 3(a) of the Hague Convention cover asymmetric jurisdiction clauses.*" This Convention may rise to prominence after Brexit, as the UK intends to join in its own right, and so it would apply to UK-EU27 court relations. This decision therefore gives some comfort that the Convention may have wider application than may have previously been thought.

If you have any questions concerning the material discussed above, please contact the following members of our firm:

Louise Freeman	+44 20 7067 2129	lfreeman@cov.com
Ramon Luque	+44 20 7067 2290	rluque@cov.com

---

[16] Mme X v Socieìteì Banque Priveì Edmond de Rothschild 13 Case No 11-26022 (26 September 2012, unreported)
[17] The Explanatory Report to the Hague Convention (2013) by Professors Trevor Hartley and Masato Dogauchi noted (at paras 105-106) that asymmetric jurisdiction clauses are not exclusive choice of Court agreements for the purposes of the Convention.

When Do Mandatory Provisions Of Another Law Override An Express Choice of Law?

Dexia Crediop S.p.a. v. Comune di Prato[18]

The English Court of Appeal has considered the interpretation of the Rome 1 Regulation on the law applicable to contractual obligations and applied a restrictive interpretation of Article 3(3), which allows mandatory provisions to override a law chosen by the parties.

Background

Dexia Crediop S.p.a. (an Italian bank) entered into an ISDA Master Agreement in 2002 with the Comune di Prato (a local authority). Pursuant to the Master Agreement, interest rate swap contracts were then entered into in the following years. Payments were made to Prato in the early years but in June 2009, for the first time, Prato had to make a payment to Dexia. After making two such payments, it ceased to make any further payments and purported to exercise its rights to "administrative self-redress" by annulling the resolution to enter into swaps.

The ISDA Master Agreement contained an English choice of law and jurisdiction clause. Dexia brought a claim before the English Court for money owing under the swaps. Prato relied on a series of defences under Italian law. Some of these were questions of capacity, which both parties agreed would always be questions of Italian law and which ultimately failed. Others would only apply if Article 3(3) of the Rome 1 Regulation was engaged.

Article 3(3) provides that, as an exception to the application of a law chosen by the parties (in this case, English law), where "*all other elements relevant to the situation at the time of the choice are located in a country other than the country whose law has been chosen, the choice of the parties shall not prejudice the application of provisions of the law of that other country which cannot be derogated from by agreement*". The question arose as to whether Article 3(3) was engaged on the facts of this case.

The Judgment

The Court of Appeal concluded that Article 3(3) was not engaged, giving the exception provided for in it a narrow interpretation. By reference to earlier English authority, the Court held that in determining whether all other elements are located in a country other than the country whose law has been chosen, the scope of enquiry is not just the elements that are local to another country, but also elements that point from a purely domestic to an international situation. It concluded that, in this case, the use of standard international documentation and the use of routine back-to-back contracts concluded with banks outside of Italy, meant that this was such an international situation and not a purely domestic one. The Court said that to decide otherwise would mean that there was a real risk that back-to-back security would become illusory. For example, if the law of the foreign country (here, Italy) requires a right of withdrawal from a loan for a seven day period to be given, and that applies as a mandatory provision of local law despite not being the law chosen by the parties, and a law of another country has no such requirement (being the mandatory law applicable to the back-to-back contract) the back-to-back

[18] [2017] EWCA Civ 428

contracts could cease to be useful. As a result, Article 3(3) was not engaged and mandatory provisions of Italian law did not apply in this case.

Comment

This case indicates that Article 3(3) will be interpreted as a very narrow exception to contractual choice of law, which is treated as paramount under the Rome 1 Regulation. There will be few substantial transactions in European financial markets that have no international element at all, such that they can be said to be purely domestic in the sense that the Court of Appeal considered necessary for Article 3(3) to apply.

If you have any questions concerning the material discussed above, please contact the following members of our firm:

Louise Freeman	+44 20 7067 2129	lfreeman@cov.com

When Do “Words of Comfort” Become Legally Binding Promissory Estoppel?

Clydesdale Bank Plc v Gough[19]

The High Court found that the line between “words of comfort” and promissory estoppel had not been crossed in this case, after extensive (and costly) review of the evidence.

Background

Mr Gough obtained financing from Clydesdale Bank plc (the "Bank"), secured by way of a legal charge over two properties from which Mr Gough ran his farming and holiday lettings businesses. His wife gave a personal guarantee in favour of the Bank. The Bank agreed various extensions to an overdraft and subsequently demanded repayment of sums outstanding of approximately £7 million. The Bank called in the personal guarantee from Mrs Gough which amounted to approximately £5 million. Receivers were appointed and the Bank sought possession of the two properties, after the Goughs failed to repay the sums due.

In their defence, the Goughs made the following points:

1. Mr Gough argued that the appointment of receivers was inconsistent with what he had agreed with the Bank. Mr Gough alleged that it had been agreed that, in the event that the Bank was not prepared to continue to support his business, he would have the opportunity to reduce his indebtedness to a sustainable level by the sale of assets. Mr Gough asserted that this prior agreement gave rise to a promissory estoppel which prevented the Bank from exercising its powers to appoint receivers and seek possession of the two properties.
2. Mrs Gough asserted that the personal guarantee was a credit agreement or linked transaction within section 140C(1) of the Consumer Credit Act 1974 and that the relationship between her and the Bank was unfair. However, she accepted at trial that she had received independent legal advice and had signed the personal guarantee.

The Judgment

Lance Ashworth QC (sitting as a Deputy High Court Judge) , having reviewed all of the relevant contemporaneous evidence on the issue, found that the reassurances given in this case were "*a long way from asserting a clear and unequivocal promise that strict legal rights will not be insisted upon*". Nor was there any common understanding, as alleged by Mr Gough, that the Bank would not enforce its charges without giving Mr Gough a reasonable period within which to sell assets to reduce indebtedness.

The Bank's case was that it had made clear from the start that an asset sale may become necessary, albeit that any such sale would likely be done on a consensual basis, with Mr Gough presented as the seller so as to "*avoid the perception of a forced or distressed asset sale*". The Bank’s evidence also suggested that they had said to Mr Gough that any reasonable proposal as to the sale of assets would be "*unlikely to be rejected*". As such, the bank had offered assurances that a level of cooperation would occur in the event of the need for an asset sale,

---

[19] [2017] EWHC 2230 (Ch)

and that Mr Gough could put forward his proposals on the matter which would be considered. However, the evidence overwhelmingly showed that the bank intended to enforce its rights under the charges if necessary, and that Mr Gough knew this at the time of entering into the agreement.

Ultimately, the terms on which the Bank was prepared to lend were governed by the terms and conditions in the underlying contractual documentation, pursuant to which the lending was made available. Accordingly, Mr Gough's estoppel defence failed.

Mrs Gough's defence also failed. She had obtained independent legal advice and so the Bank was not under an obligation to advise her of any onerous features of the personal guarantee.

The Court ordered the defendants to pay the sums due under the agreements and guarantee. A possession order was made in respect of the two properties.

Comment

The key point established by this case is that there must be very clear evidence that a lender has agreed not to insist on its strict legal rights to enforce its security when a debtor fails to pay. Lenders will welcome this decision and the approach that the Court took when faced with a common argument advanced by borrowers, namely that the lender had agreed not to enforce its security. It is also a reminder of the importance of ensuring that those who provide personal guarantees receive independent legal advice, and the benefits of doing so.

If you have any questions concerning the material discussed above, please contact the following members of our firm:

Colette Manches	+44 20 7067 2365	cmanches@cov.com
Chloe Lyons	+44 20 7067 2304	clyons@cov.com

This information is not intended as legal advice. Readers should seek specific legal advice before acting with regard to the subjects mentioned herein.

Covington & Burling LLP, an international law firm, provides corporate, litigation and regulatory expertise to enable clients to achieve their goals. This communication is intended to bring relevant developments to our clients and other interested colleagues. Please send an email to unsubscribe@cov.com if you do not wish to receive future emails or electronic alerts.