FINANCIAL SERVICES BRIEFING

Banking litigation: a round-up of 2018 and looking ahead to 2019

A number of key decisions from the English and EU courts in 2018 illustrate the litigation trends that are likely to have implications for financial institutions in 2019 and beyond (*see box "Banking cases to watch in 2019"*).

Banking duties

Several cases considered the scope of duties owed by banks.

In *Property Alliance Group Ltd v Royal Bank of Scotland Plc*, while the Court of Appeal found that, on the facts, there was no evidence that Royal Bank of Scotland had manipulated sterling LIBOR, it did indicate that an implied representation by a sterling LIBOR panel bank that it was not manipulating and did not intend to manipulate sterling LIBOR would probably be inferred from a mere proposal of the swap transaction (*[2018] EWCA Civ 355; see News brief "Mis-selling and LIBOR: Court of Appeal test case", www.practicallaw.com/w-013-8904*).

In *Ehrentreu v IG Index,* the Court of Appeal found that, absent very clear express words, a spread-betting operator, IG Index, had no contractual obligation to protect the customer from deliberately inflicting economic harm on himself (*[2018] EWCA Civ 79*). The court also held that IG Index was not in breach of the client's best interests rule in the Financial Conduct Authority's Conduct of Business sourcebook (COBS 2.1.1).

In *Parmar v Barclays Bank Plc*, Barclays successfully defended the first swap mis-selling claim brought to full trial by an individual alleging breach of statutory duty (*[2018] EWHC 1027 (Ch); www.practicallaw.com/w-015-3933*).

The High Court found that Barclays had not advised on the sale of the relevant products to the claimant and, in any event, the products were both suitable and appropriate. Notably, however, if Barclays had advised on the sale, it would not have been able to rely on a clause that restricted liability to private persons as this would be in breach of COBS 2.1.2, which prevents firms from seeking to exclude or restrict any duty or liability that they owe to a client.

Liability for acts of rogue individual

A number of decisions have considered the liability of organisations where losses have been caused by rogue individuals.

In *Singularis Holdings Ltd v Daiwa Capital Markets Europe Ltd*, the Court of Appeal held that a bank, Daiwa, could not rely on the customer's, Singularis', alleged illegality to escape liability nor could the fraud by an individual who was a director and sole shareholder of Singularis be wholly attributed to Singularis (*[2018] EWCA Civ 84; www.practicallaw.com/w-013-3648*). The Supreme Court will hear Daiwa's appeal in July 2019.

In *Frederick v Positive Solutions*, the Court of Appeal held that a principal is not vicariously liable where the agent's activities are wholly attributable to the conduct of the agent's own independent business, even if there is a degree of connection between that business and the agent's work for its principal (*[2018] EWCA Civ 431*). The Supreme Court will hear an appeal in February 2019.

In *Wm Morrison Supermarkets plc v Various Claimants*, the Court of Appeal held that Morrison was vicariously liable for its employee's misuse of data, despite Morrison having done as much as it reasonably could to prevent the data misuse and the fact that the employee's intention was to cause reputational or financial damage to Morrison (*[2018] EWCA Civ 2339; see News brief "Morrisons' liability for rogue employee: an apple of discord", www.practicallaw.com/w-017-7358*). Morrisons has applied for permission to appeal.

Financial transactions

Several decisions have provided guidance on standard clauses in master agreements.

In *Lehman Brothers Special Financing v National Power Corp and another,* the High Court held that, when calculating the close-out amount on early termination under a 2002 Derivatives Master Agreement, the determining party must use procedures that are objectively commercially reasonable to produce a result which is objectively commercially reasonable (*[2018] EWHC 487 (Comm); www.practicallaw.com/w-014-5040*). In *LBI EHF v Raiffeisen Bank International AG,* the Court of Appeal held that the non-defaulting party has wide discretion in assessing fair market value in the termination of valuation of bonds used in repo trades covered by Global Master Repurchase Agreements (2002 version) and is required only to act rationally and not arbitrarily or perversely (*[2018] EWCA Civ 719*).

In the *State of the Netherlands v Deutsche Bank AG,* the High Court confirmed that a 1992 International Swaps and Derivatives Association (ISDA) Master Agreement and Credit Support Annex (CSA) did not oblige Deutsche Bank to pay negative interest on deposits where the State of the Netherlands would be paying the interest if there was a positive interest rate (*[2018] EWHC 1935 (Comm); www.practicallaw.com/w-016-7043*). This finding should encourage counterparties to any existing unamended legacy CSAs to negotiate and incorporate the 2014 ISDA Collateral Agreement Negative Interest Rate Protocol or equivalent provisions. An appeal is listed for April 2019.

Jurisdiction

Governing law and jurisdiction issues continue to occupy both the English and EU courts.

In *Löber v Barclays Bank Plc*, an investor sought, through the Austrian courts, to recover losses resulting from her reliance on a bond prospectus (*C-304/17*). The European Court of Justice held that, for the purposes of Article 5(3) of the Brussels Regulation (*44/2001/EC*), the fact that she had suffered financial consequences is not enough in itself to establish jurisdiction in her country of domicile. However, as the damage consisted exclusively of financial loss which materialised directly in the claimant's bank account and as all the claimant's dealings had been through Austrian banks, the Austrian courts had jurisdiction. This decision will continue to be relevant under Article 7(3) of the recast Brussels Regulation (*1215/2012/EU*), which is materially the same as its predecessor.

The Court of Appeal provided welcome clarification that claims brought under the terms of a swap contract will be governed by the jurisdiction clause in that contract and will

not be determined by the terms of the wider relationship between the parties (*Deutsche Bank AG v Comune di Savona [2018] EWCA Civ 1740*). The court held that the English courts had exclusive jurisdiction because the dispute fell under a swap agreement which contained an English exclusive jurisdiction clause rather than an advice agreement which had an Italian exclusive jurisdiction clause.

Contractual interpretation

Two cases provided a stark warning to those seeking orally to modify written contracts. In *Rock Advertising v MWB Business Exchange Centres Ltd*, the Supreme Court held that "no oral modification" (NOM) clauses are effective in precluding parties from varying agreements orally (*[2018] UKSC 24, see News brief "Contract variation: does it need to be in writing?", www.practicallaw.com/w-014-9282*). Notably, however, the court observed that, if a party acted on an oral variation, despite the NOM clause, the doctrine of estoppel may be effective to prevent unfairness.

In *Edgworth Capital (Luxembourg) v Aabar Investments*, the High Court emphasised that the absence of a contemporaneous written record by those with business experience may count heavily against the existence of an oral contract, particularly as communications nowadays typically leave some form of electronic footprint (*[2018] EWHC 1627 (Comm)*).

Privilege

In *The Director of the Serious Fraud Office v Eurasian Natural Resources Corporation Ltd*, the Court of Appeal held that documents produced during an internal investigation into potential criminal conduct were protected by litigation privilege, even before any contact between the Serious Fraud Office (SFO) and ENRC (*[2018] EWCA Civ 2006; see News brief "ENRC privilege decision: welcome news but difficulties remain", www.practicallaw.com/w-016-7167*). The SFO has confirmed that it will not appeal.

In *Financial Reporting Council Ltd v Sports Direct International plc*, the High Court held that the defendant could not withhold documents on grounds of privilege where they were demanded by a regulator (*[2018] EWHC 2284 (Ch); www.practicallaw.com/w-017-1300*). The Court of Appeal is due to hear an appeal by the end of October 2019.

In *R(AL) v SFO,* the High Court held that privilege does not apply to first interview notes where there is no litigation privilege and the interviewee is not the client of the interviewing lawyer (*[2018] EWHC 856*). However, given comments by the courts in both the *RBS Rights Issue Litigation* and *ENRC* concerning the application of legal advice privilege to interview notes, this is unlikely to be the end of the debate (*see News brief "Legal advice privilege: who is the client?", www.practicallaw.com/3-638-0479*).

In *WH Holding and another v E20 Stadium*, the Court of Appeal clarified the meaning of "conducting litigation" for the purposes of litigation privilege (*[2018] EWCA Civ 2652; see News brief "Litigation privilege: Court of Appeal refuses to widen scope", this issue*). The decision is a reminder that litigation privilege does not necessarily extend to all communications pertaining to a piece of litigation.

Other cases of interest

In *R (KBR) v Director of the Serious Fraud Office*, the High Court held that the SFO's power to require a person to produce relevant documents for an SFO investigation extends to foreign companies in respect of documents held abroad provided that there is a sufficient connection between the company and the UK (*section 2(3), Criminal Justice Act 1987*) (*[2018] EWHC 2368 (Admin)*).

In *Banca Nazionale del Lavoro SPA v Playboy Club London Ltd and others*, the Supreme Court confirmed that a bank which provided a financial reference for a customer was only liable to the party to whom the reference was addressed, not to its undisclosed principal (*[2018] UKSC 43; see News brief "Bank references: liability to an undisclosed principal", www.practicallaw.com/w-016-3610*).

CMOC Sales and Marketing Ltd was notable because it was the first worldwide freezing order granted in respect of bank accounts against "persons unknown" and also because the High Court permitted service through a number of innovative methods including Facebook and virtual data rooms (*[2018] EWHC 2230 (Comm)*).

In *R (Holmcroft Properties Ltd) v KPMG LLP,* the Court of Appeal held that a private body acting as a skilled person in a customer remediation context, KPMG, was not exercising a public function that was amenable to judicial review but was offering assistance in relation to a dispute about private law rights in a private law context (*[2018] EWCA Civ 2093; www.practicallaw.com/9-628-4088*).

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Banking cases to watch in 2019

In light of *Property Alliance Group Ltd v Royal Bank of Scotland Plc*, a number of stayed LIBOR-related claims are now afoot, including *Deutsche Bank AG v Unitech Ltd* (*[2018] EWCA Civ 355*). In addition, the Federal Deposit Insurance Corporation is attempting to bring a claim against various banks and the British Bankers' Association for fraudulent misrepresentation connected with LIBOR-rate setting. If the litigation moves to trial, it will be an interesting one to watch.

The appeals in *Frederick* and *Wm Morrison* will be of interest for all firms in terms of vicarious liability. The claim in *Banca Nazionale del Lavoro* is to be restarted as a deceit claim following details which emerged during trial that the employee who gave the reference had previously given a reference without authority and was dismissed by the bank.