FINANCIAL SERVICES LITIGATION BRIEFING

Financial services litigation: the key trends of 2017

A number of key decisions from the English courts in 2017 illustrate the litigation trends that are likely to have ramifications for financial institutions in 2018 and beyond (*see box "Cases to watch in 2018"*).

Banking duties

In *Thomas and another v Triodos Bank NV*, the High Court considered whether a mezzanine duty existed and the circumstances in which that duty would arise (*[2017] EWHC 314 (QB); www.practicallaw.com/4-641-0329*). A mezzanine duty is higher than the *Hedley Byrne* duty to take reasonable care not to misstate any facts on which a customer might be expected to rely, but is not as high as the advisory duty (*Hedley Byrne & Co Ltd v Heller & Partners Ltd [1964] AC 465*).

The court in *Thomas* held that no advisory relationship existed between Triodos and retail customers who had received commercial lending, and that no advice had in fact been given. However, Triodos owed the customers a duty under *Hedley Byrne* to take reasonable care not to mislead them or misstate any facts.

The court also considered whether, in the circumstances, Triodos's duty of care went further than the *Hedley Byrne* duty. As Triodos subscribed to the Business Banking Code, the court found that it also owed the customers a duty to explain in plain English, when asked by the customers, the financial implications of entering into the arrangements. Triodos had breached that duty.

Thomas means that the distinction between the duty that a financial institution owes when advising a customer to buy a product and when only providing information about a product remains blurred. Although the decision has not been appealed, it is likely to be subject to further judicial scrutiny, including by the Court of Appeal in *Property Alliance Group Ltd v The Royal Bank of Scotland plc* in January 2018 (*[2016] EWHC 3342; www.practicallaw.com/4-638-0407*).

Governing law and jurisdiction

As usual, cross-border financial transactions continue to generate litigation. In *Dexia Crediop SPA v Comune di Prato*, the Court of Appeal reversed a High Court decision that had worrying implications for banks concluding international transactions using standard form documents (*[2017] EWCA Civ 428*). Dexia and the Comune had entered into interest rate swaps under an International Swaps and Derivatives Association (ISDA) Master Agreement, which contained English governing law and jurisdiction clauses. Dexia brought proceedings in England seeking payment under the swaps.

The High Court held that, despite the English governing law clause, all elements of the swap pointed to Italy and so, under Article 3(3) of the Rome Convention (Article 3(3)), Dexia had to comply with mandatory rules of Italian law and the swaps were void. The Court of Appeal disagreed, finding that there was no need to establish a link to a specific jurisdiction other than Italy in order to fall outside of Article 3(3), provided that there were elements that lent an international flavour and pointed away from Italy.

In *Deutsche Bank AG v CIMB Bank Berhad,* Deutsche Bank (DB) confirmed letters of credit for a customer of CIMB on presentation of the relevant documents (*[2017] EWHC 81 (Comm); www.practicallaw.com/w-008-7520*). DB then issued proceedings in England against CIMB for reimbursement. CIMB issued various proceedings in Singapore against DB, and its customer and associates, alleging a conspiracy to defraud and seeking declarations that the customer was liable to indemnify CIMB and that CIMB was not liable to pay DB under the letters of credit.

CIMB sought a stay of the English proceedings. The High Court refused, finding that the risk of inconsistent decisions did not point to either court being more appropriate and it was CIMB's decision to issue proceedings in Singapore that created the risk. Either court could determine the compliance of the documents equally well. The crucial enquiry regarding the fraud was whether DB had sufficient knowledge that the documents were forged and that evidence was in London. The court also noted that both proceedings were in their early stages and, although all relevant parties were involved in the Singapore proceedings, this was not decisive. It held that it was inappropriate to stay DB's action so that it could be decided along with CIMB's claims against other parties, which were of no concern to DB.

In *Deutsche Bank AG v Comune di Savona*, DB entered into an agreement to provide advice to the Comune regarding its derivative commitments, with an Italian exclusive jurisdiction clause (the advice agreement) (*[2017] EWHC 1013 (Comm)*). DB also entered into an ISDA Master Agreement, with an English exclusive jurisdiction clause. DB issued proceedings in England seeking declaratory relief under the ISDA Master Agreement, which included a clause that the Comune had not relied on any advice or recommendation from DB. The Comune then issued proceedings against DB in Italy alleging breaches under the advice agreement, and challenged the English court's jurisdiction on the basis that some of the declarations sought by DB fell within the scope of the advice agreement.

Cases to watch in 2018

The most anticipated hearing of 2018 is *SFO v ENRC* on the question of privilege in the context of criminal investigations, which is scheduled to be heard by the Court of Appeal in July 2018.

Other expected developments include the appeal by PAG against the dismissal of its LIBOR claims against RBS in *Property Alliance Group Ltd v The Royal Bank of Scotland plc*, which is due to commence on 29 January 2018. The outcome of UBS's application for permission to appeal to the Supreme Court in *UBS AG v Kommunale Wasserwerke Leipzig GmbH* is also keenly awaited.

The High Court found that there is no rigid rule that declaratory relief based on the terms of a contract is within the scope of the jurisdiction clause in the same contract. There is no presumption that the later clause had been intended to cut down the earlier clause, and so each agreement must be interpreted according to its own governing law. As a matter of Italian law, the Italian proceedings, which concerned complaints about advice given by DB, were within the scope of the Italian jurisdiction clause. As the advice agreement concerned DB as an adviser, and the ISDA Master Agreement concerned DB as a counterparty, a dispute which was essentially concerned with DB's role as an adviser fell more naturally within the Italian jurisdiction clause. This decision is subject to an appeal.

Financial crime

A few cases in 2017 highlighted the risk of financial crime to financial institutions. In *Singularis Holdings Ltd v Daiwa Capital Markets Europe Ltd*, Daiwa, a stock broker, paid monies out of Singularis's client account on the instruction of one of Singularis's directors and its only shareholder (*[2017] EWHC 257 (Ch)*). The instructions were not bona fide and the High Court found that Daiwa had information available to it that should have put it on notice that a fraud was, or might have been, perpetrated against Singularis. The court found that Daiwa was liable to Singularis for allowing payments to be made in circumstances where it had reasonable grounds to believe that funds were being misappropriated.

In *NCA v N and Royal Bank of Scotland plc,* RBS suspected that monies held in an individual's (N) accounts constituted criminal property, so RBS froze the accounts and sought the consent of the NCA to return the funds to N (*[2017] EWCA Civ 253*). N sought an interim injunction requiring RBS to carry out specified past payment instructions. The High Court ordered that the payments be made and declared that, in making the payments, RBS would not be committing a criminal offence under the Proceeds of Crime Act 2002 or otherwise. The Court of Appeal overturned this decision, holding that Parliament's statutory scheme on money laundering could not be displaced merely on consideration of the balance of convenience as between the interests of private parties. The order sought by N could only be justified in exceptional circumstances.

In *UBS AG (London Branch) and another v Kommunale Wasserwerke Leipzig GmbH*, the Court of Appeal considered the effect of dishonest assistance on a party's liability for a bribe and its effect on the enforceability of the contract subsequently concluded (*[2017] EWCA Civ 1567; see News brief "Enforceability of derivatives: whose bribe is it anyway?", www.practicallaw.com/w-011-0507*).

A customer had been advised by its financial advisers to acquire certain complex derivative products from UBS and two intermediaries. KWL defaulted and UBS sought payment. It transpired that the financial advisers had bribed KWL's managing director to enter into the transactions. Although UBS was unaware of the bribes, UBS had reached an undisclosed arrangement with the financial advisers whereby they would advise clients to enter into the derivative transactions regardless of the clients' interests.

The Court of Appeal held that the transactions could be rescinded. Although the general rule is that the contracting party must know about the bribe or the breach of fiduciary duty by its counterparty's agent, there was an exception here because UBS's conscience was affected both by the agreement with the financial advisers (of which it knew) and by any other form of abuse (here, the bribe), which the financial advisers (as agents of the customer) might choose to deploy to conclude the transaction.

Contractual interpretation

In *Wood v Capita Insurance Services Ltd,* the Supreme Court gave further guidance on the proper approach to contractual interpretation, emphasising that interpretation is not a literal exercise focused solely on the wording of the particular clause (*[2017] UKSC 24; see News brief "Contract interpretation: the Supreme Court's last word (for now)?", www.practicallaw.com/1-641-0887*). The court must take into account the whole relevant factual background available to the parties at the time of the contract. Where there are rival meanings, the court can give weight to the implications of competing constructions by reaching a view as to which is more consistent with business common sense.

Privilege

Following *The RBS Rights Issue Litigation*, privilege has continued to be a hot topic (*[2016] EWHC 3161 (Ch); see News brief "Legal advice privilege: who is the client?", www.practicallaw.com/3-638-0479*).

Director of the Serious Fraud Office v Eurasian Natural Resource Corporation Ltd was particularly significant for companies responding to enquiries from criminal prosecutors, but also has broader implications for companies seeking to withhold documents on the basis of litigation privilege (*[2017] EWHC 1017 QB; see News brief "Investigations and privilege: a restrictive scope", www.practicallaw.com/w-008-3720*).

The Serious Fraud Office (SFO) challenged ENRC's claim that certain documents the SFO had requested could be withheld because of privilege. The High Court rejected almost all of ENRC's claims to privilege. It held that a criminal investigation should not be treated as adversarial litigation for the purpose of litigation privilege. Although litigation privilege applies to documents prepared for the sole or dominant purpose of conducting litigation, it does not apply to documents prepared to avoid litigation.

Here, the materials in question included interview notes produced by external lawyers and materials produced by forensic experts during an internal investigation into whistleblower allegations of corruption and throughout the course of ENRC's subsequent engagement with the SFO in a self-reporting process. ENRC has been granted leave to appeal.

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