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FINANCIAL SERVICES

ISDA. An Italian local authority entered into interest rate swaps. The Court of Appeal held that a dispute regarding this fell within the English Exclusive Jurisdiction Clause in the ISDA and not the Italian Exclusive Clause in a separate agreement for debt restructuring advice. The issue of evidence of foreign law when considering jurisdiction was also dealt with (*Deutsche Bank AG v. Comune di Savona* [2018] EWCA Civ 1740).

Local Authorities. It is reported that 14 local authorities are bringing proceedings against Barclays Bank over "lender option borrower option" ("LOBO") loans. It is said that they became more expensive as interest rates fell. Issues of LIBOR rigging are also involved.

Jurisdiction. Jurisdiction under the ISDA agreement was conferred on English Courts and not a different financing agreement subject to Italian jurisdiction. The High Court ruled against the Defendant company which had been sued by the bank. It was held that there was enough in the instant interlocutory hearing to recognize the bank's better argument as to jurisdiction (*BNP Parabas SA v. Trattamento Rifiuti Metropolitan SpA* [2018] EWHC 1670 (Comm)).

Assignment. The High Court was asked to confirm the effectiveness of global substitution orders made in respect of the transfer of a large number of consumer debt accounts. The Applicant was part of a group which had acquired another group specializing in the purchase of consumer debts from originating banks. In a 2015 agreement there was an assignment of a portfolio of debts to the Applicant for £118 million paid by way of set off of inter-company loans. There was a need to obtain the consent of the originating banks which was obtained. It was held that the orders had been approved but on the basis of incorrect information and assurances. The process was not administrative but affected substantive rights. There was a real risk that the assignment had been ineffective under Section 136 of the 1925 Act but the Applicant was the equitable assignee. The Court made an order approving and confirming the effectiveness of the orders (*Hoist Portfolio Homes Limited v. Multiple Defendants*, 18th July 2018).

Service. A decision that permission to serve a claim out of the jurisdiction should be limited to the principal sum under a loan agreement and should not extend to interest was confirmed by the Court of Appeal. The loan was to support the creation of a satellite news service in Arabic. The judge had concluded that the claim for the principal debt and breach of an implied term as to interest constituted two claims and there was no good arguable claim in respect of interest. The Court of Appeal said that the claim for interest was accessory to the claim for principal and should not be treated separately. It was necessary to consider the extent to which the law had developed since 1812 when it was decided that interest on a loan could not be recovered unless there was an express provision. Because there was an alternative option, namely that the Claimants intended to benefit from the establishment of the new channel, it could not be inferred that the parties had agreed that interest would be paid and an implied term was not necessary to give business effect to the agreement. The Claimants had no real prospect of succeeding in the interest claim (*Sheikh Mohammad Bin Assa Al Jaber v. Sheikh Walid Bin Ibrahim* [2018] EWCA Civ 1690).

Interest Rate Hedging. The Appellants entered into interest rate hedging products with a bank. The Appellants alleged that the structured collars had been mis-sold but entered into a restructuring and a settlement agreement which included settling complaints etc. The bank agreed with the former FSA to carry out a review of the sale of these products. The Court of Appeal dismissed the grounds of appeal saying that the Judge was not wrong to conclude that the claim in respect of the mis-sold swaps had no reasonable prospect of success and the Judge was correct to refuse the amendment to plead the review agreement given that the acceptance of the revised redress offer gave rise to a contractual relationship. The Court also held that the reliance on the Supply of Goods and Services Act 1982 was misplaced as there had been a failure to demonstrate that the implied terms contended for passed the necessity test. Permission to appeal was refused but, as this was the first occasion on which the Court considered whether a bank owed a contractual duty to its customer in relation to the conduct of a review, permission was given for the judgment to be cited (*Elite Property Holdings Limited v. Barclays Bank Plc* [2018] EWCA Civ 1688).

Shipping Finance. Borrowers under ship finance loan agreements had defaulted together with their guarantors so that the bank was entitled to accelerate the loans and enforce security over the relevant vessels. There was no evidence that there had been some form of agreement about refraining from enforcement. A lender could not be held to have committed abusive conduct by declining to waive its contractual rights to enforce covenants even if other banks had taken a more lenient approach (*HSBC Bank Plc v. Antaeus Shipping Co SA* [2018] EWHC 1733 (Comm)).

Relief from Sanctions. In a shareholders' action group claim, relief from sanctions was refused where the action group had failed to comply with the terms of a consent order including an unless order. The group had failed to meet monetary obligations and this had been serious and significant (*Manx Capital Partners v. RBOS Shareholders Action Group*, 10th July 2018).

Strike Out. A claim was brought that a company was entitled to relief permitting it to obtain redemption of mortgages despite the claim being similar to one previously pursued unsuccessfully and the Court refused to strike it out. The earlier proceedings had

been vitiated by procedural defects which were fundamental and the underlying dispute had not been considered with any finality (*GBQ Investments Limited v. Mortgage Express* [2018] EWHC 2536 (Ch)).

Implied Terms. The Court of Appeal held that a Judge had been wrong to imply into a loan agreement a term concerning the payment. The Appellant had been employed as a broker. He was paid £336,000 under the terms of a loan agreement. There was provision about repayment from partnership distributions and that the unpaid amounts would be written off only if the Appellant had served at least four years. The Appellant resigned within four years. The Judge held that any reasonable person would regard the agreement as being for full repayment of the loan unless four years had been completed. The Court of Appeal held it was not appropriate to apply hindsight to seek to imply a term merely because it appeared fair or because the Court considered what the parties would have agreed if it had been suggested to them (*Robert Bou-Simon v. BGC Brokers LP* [2018] EWCA Civ 1525).

Jurisdiction. The Supreme Court dismissed an appeal against the decision that a Portuguese "bridge bank" was not bound by an English jurisdiction clause in a loan facility. The Appellants had taken assignments of the rights of a finance company which had entered into loan facilities with a Portuguese bank. The bank encountered financial difficulty and applied for emergency liquidity assistance. The Central Bank was designated as resolution authority under Directive 2014/59. The Appellants argued that, although there had been a transfer within Article 66, its legal effect fell to be recognized in England as a "reorganization measure" (*Goldman Sachs International v. Novo Banco SA* [2018] UKSC 34).

Guarantees. The Commercial Court granted summary judgment against the Syrian Arab Republic which had defaulted on loan agreements with the European Investment Bank and the EU had made payments as guarantor. The EU was entitled to summary judgment by way of subrogation (*European Union v. Syrian Arab Republic* [2018] EWHC 1712 (Comm)).

Vehicle Leasing. The ECJ considered the issue of vehicle tax where the lessor was in a different Member State from that of the lessee (*Wind 1014 GmbH v. Skattern In Ist Eriet* Case C-249/15).

Validation Orders. Regulated credit agreements were entered into having been brokered by an allegedly unauthorized timeshare broker. The creditor obtained a validation order from the FCA. The FCA was not aware of allegations made by borrowers relating to consumer detriment. The FCA and the creditor agreed that the Upper Tribunal should remit the matter to the FCA. The Tribunal held that in deciding whether it is just and equitable to allow agreements to be enforced, the FCA is required to consider all relevant factors and conduct a multifactorial assessment, taking into account consumer detriment (*Chickombe v. FCA* [2018] UKUT 258 (TCC)).

Personal Liability. The First Defendant was the sole funder of a company and arranged for loans by a company of which he was the beneficial owner to another company which engaged the Claimant in a construction contract. The employer company went into liquidation and did not pay upon completion of the works. The Claimant claimed for inducing breach of contract, unlawful interference and unlawful means conspiracy against the funder and a director. The allegation of inducing breach of contract succeeded against the funder and the unlawful means conspiracy succeeded against both Defendants (*Palmer Birch v. Lloyd* [2018] EWHC 2316 (TCC)).

Skilled Persons. The Court of Appeal upheld the decision of the Divisional Court dismissing an application for judicial review of a decision of a skilled person (KPMG) being the decision to approve an offer by a bank in respect of missold interest rate hedging products (*R (Holmcroft Properties Limited) v. KPMG LLP and Others* [2018] EWCA Civ 2093).

Solicitor's Fees. The Defendant was held liable for his father-in-law's fees due to a solicitor. It was found that the son-in-law had entered into an oral funding agreement. The defence was that the agreement was an oral one in the form of a guarantee which was unenforceable under the statute of frauds. It was held that the Defendant's obligation to pay the solicitor was not contingent on default. The premise was that the father-in-law would not be able to pay from the outset (*Richard Slade v. Abbhi* [2018] EWHC 2039 (Comm)).

Sale at Undervalue. A bank brought proceedings to recover a shortfall due under a mortgage of a vessel with the Second Defendant being the guarantor. The Second Defendant submitted that the bank had sold the vessel at an undervalue. The Admiralty Court said that ship valuations were difficult and markets fluctuated rapidly. Having regard to the state of the market it was unlikely that a higher price could have been achieved (*Close Brothers Limited v. AIS (Marine) 2 Limited*, 17th September 2018).

Summary Judgment. The Russian Federation brought a claim against Ukraine for the non-payment of money borrowed under Eurobonds. Summary judgment was granted and Ukraine appealed. The Court of Appeal held that Ukraine could rely on the defence of duress and it was arguable that the contract had been made as a result of illegitimate pressure and was therefore not enforceable under English law. However, a defence that there implied terms that Ukraine was not obliged to make repayment in certain circumstances was dismissed (*Ukraine v. Law Debenture Trust Corporation* [2018] EWCA Civ 2026).

Conspiracy. Accountants and a bank made an application to strike out a claim. It was alleged that they had purported to support the group through its financial problems but conspired to destroy it for its own gain. An application was made by the Claimants to amend its claim. The High Court held that the documents did not support the allegations of fraudulent misrepresentation whilst secretly and dishonestly implementing a plan to procure early repayment of a loan. There was no cogent evidence to justify a finding of fraud or deceit. The applications to strike out and for summary judgment were granted. It was reasonably arguable that the proposed amendments were time-barred and would not be allowed (*Portland Stone Firms Ltd v. Barclays Bank Plc* [2018] EWHC 2341 (QB)).

APR. The Court of Justice gave a judgment concerning the interaction between the information requirements of the APR under the first Consumer Credit Directive and the Unfair Terms

in Consumer Contracts Directive. It was held that certain factors were decisive evidence as to whether the credit agreement concerning the APR was drafted in plain intelligible language, namely whether it only gives the information necessary to make the calculation and does not mention the rate of interest. It was the same as failing to mention the APR (*EOS KSI Slovensko v. Danko* (Case C-448/17)).

Pensions. The Upper Tribunal dismissed a reference in respect of FCA prohibition orders and the imposition of a financial penalty in respect of non-compliance with regulatory requirements concerning the transfer into self-invested pension scheme (*Burns v. Financial Conduct Authority* [2018] UKUT 246 (TCC)).

Derivatives. The Netherlands and Deutsche Bank were parties to an agreement using ISDA. The agreed rate was -0.04% for a large part of the time since mid-2014. The question was whether there was a requirement for the bank to pay "negative interest". The High Court held that the claim failed as the agreement did not contemplate any legal obligation to account for negative interest (*Netherlands v. Deutsche Bank AG* [2018] EWHC 1934 (Comm)).

Electronic Signatures. The Law Commission has published conclusions concerning the use of electronic signatures.

EU Partnership. HM Government published a framework for the UK-EU Partnership on Financial Services on 25th July 2018.

Retained Provisions. In August 2018 the FCA published an interim report on the review of retained provisions of the Consumer Credit Act 1974 (DP 18/7).

Credit Cards. In July 20189 the FCA published a research note "Helping Credit Card Users Repay Their Debt: A Summary of Experimental Research".

Global Restructuring Group. The FCA have decided that they would not pursue action in respect of RBS's now defunct Global Restructuring Group unit.

Creditworthiness. In July 2018 the FCA published a policy statement "Assessing Creditworthiness in Consumer Credit" (PS 18/19).

PPI. In July 2018 the FCA published a consultation paper "Guidance on Regular Premium PPI Complaints and Recurring Non-Disclosure of Commission" (CP 18/18).

Claims Management Companies. On 20th September 2018 the FCA published a consultation "Claims Management Companies: Applying the Senior Management and Certification Regime to Claims Management Companies" (CP 18/26).

PPI. On 27th September 2018 the CMA published a provisional decision being the "Review of the Payment Protection Insurance Market Investigation Order 2011".

EU Exit. On 27th September 2018 the Consumer Credit (Amendment) (EU Exit) Regulations 2018 were made.

Credit-Broking. In September 2018 the FCA published a thematic review on the "Impact of Credit Broking Remuneration Models at the Point of Sale" (TR 18/2).

FOOD

Meat. A freedom of information request to the FCA revealed that in total 73 contaminated samples of meat came from retailers including three supermarkets out of total samples of 487.

UNFAIR COMMERCIAL PRACTICES

Energy Efficiency. The ECJ gave a preliminary ruling in respect of unfair commercial practices in the context of the energy performance of vacuum cleaners and their packaging. It was not a misleading omission in not providing consumers with information on the testing conditions. There was also a ruling in respect of labelling and energy consumption (*Dyson Limited v. BSH Home Appliances NV* (Case C-632/16)).

HOUSING

Provision of Services. The Divisional Court have held that the owner of a house in multiple occupation was providing a service for the purpose of the Provision of Services Regulations 2009. The local authority was not entitled to demand that the owner when renewing his licence pay an application fee (*R (Gaskin) v. Richmond-Upon-Thames* [2018] EWHC 1996 (Admin)).

TRAVEL

Personal Injury. In a personal injury case there was an issue as to whether a claim was to be characterised as contractual or non-contractual. If it was contractual English law would apply and the claim would fail. If it was non-contractual Rome II would apply (*Committeri v. Club Mediterranee* [2018] EWCA Civ 1889).

Aviation. The ECJ have ruled that in the case of a long delay the company responsible for paying compensation was not the air company who leased the aircraft but the air company which performed the flight (*Wirth v. Thomson Airways Limited* (Case C-532/17)).

ABATTOIRS

Costs. The Court of Appeal Criminal Division held that an abattoir company could only recover part of its costs of proceedings following a successful appeal against conviction under the TSE Regulations (*Najib v. Crown Prosecution Service* [2018] EWCA Crim 1554).

BUSINESS PREMISES

Trade Fair. The ECJ gave a preliminary ruling in respect of a trader at a trade fair in carrying out his activities for a few days each year and held that this constitutes "business premises" if in the light of all the factual circumstances including the appearance of the stand a reasonably well-informed and reasonably observant and circumspect consumer could reasonably assume that the trader is carrying out his activity there (*Vevraucherzentrale Berlin v. Unimatic Vertriebs GmbH* (Case C-485/17)).

COSMETICS

Sentence. A shopkeeper and director has been jailed for 20 months for selling skin-lightening products.

PRICE

Alcohol. The Welsh Government has issued a consultation seeking views on a proposed minimum unit price of 50p following the Public Health (Minimum Price for Alcohol) (Wales) Act 2018.

FIRE PRECAUTIONS

Fines. A fine of £250,000 was reduced by the Court of Appeal to £150,000 who said that the approach to sentencing in Health and Safety cases could provide a useful guidance (*R v. Butt* [2018] EWCA Crim 1617).

PLANNING

Obstruction. The Divisional Court allowed an appeal against conviction for the wilful obstruction of a planning officer. On the facts there had been no finding that there was any assertion or communication of a request or demand to enter property as of right. There was no doctrine of vicarious liability in the criminal law (*Smart Planning Limited v. Brentwood Borough Council* [2018] EWCA 2372 (Admin)).

PROCEDURE

Group Litigation Orders. An application for an extension of time for service of the Claim Form in Group litigation was refused. There has been a deliberate decision not to serve (*Leicester Viner v. Volkswagen Group* [2018] EWHC 2006 (QB)).

HEALTH AND SAFETY

Work at Height. The Court of Appeal Criminal Division held that there was no inconsistency in the conviction of a company for failing to ensure that work at height was properly planned under the 2005 Regulations and acquitting it of failing to carry out a suitable risk assessment (*R v. Electricity Northwest* [2018] EWCA Crim 1941).

GAMING

References. The Supreme Court has dismissed an appeal by a casino where a bank had negligently supplied to an agent a favourable credit reference in respect of a customer. The bank was not liable as the agent was undisclosed and the relationship was not sufficiently proximate (*Playboy Club London v. Banca Nazionale* [2018] UKSC 43).

Licenses. The Privy Council held that the Applicant could not appeal as of right against a ruling of the Supreme Court of Mauritius refusing its application for judicial review of a decision revoking its gaming licence (*Jacpot Limited v. Gambling Regulatory Authority* [2018] UKPC 16).