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Hogan Lovells Legal and Financial Risk is a bi-monthly newsletter on recent legal developments that will impact upon corporates and financial institutions.

A thorny issue: reconsidering the scope of a bank's duty to its customers

The recent swaps misselling case of *Thornbridge v Barclays* (2015) has provided reassurance for banks about the scope of the duties applicable to sales teams in the swaps context. Unless advice has actively been provided and responsibility for that advice clearly assumed, the only obligation is not to misstate any information provided to customers. The Court specifically declined to find any broader duty to provide full information. In addition, it is open to banks to protect themselves from liability by defining their relationship with customers as non-advisory.

Supreme Court issues landmark judgment on penalty clauses

Businesses will now be more confident in providing for a pre-determined consequence for breach of contract, unless that consequence is wholly disproportionate. The judgment strongly reinforces the continuing reluctance of the courts to overturn clauses in negotiated agreements between sophisticated parties.

Implying contractual terms – it goes without saying

In *Marks & Spencer Plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd* (2015) the Supreme Court held that it was not appropriate to imply a term that a tenant was entitled to a refund of a proportion of rent paid in advance following the early termination of a lease. The Supreme Court considered the law relating to implied terms and emphasised the continuing strict requirements for a term to be implied into a contract, despite some academics and judges erroneously suggesting that those requirements had been relaxed following the case of *Attorney-General of Belize v Belize Telecom* (2009).

Directors behaving badly – the proper purpose rule and the power to issue restriction notices

In *Eclairs Group Limited v JKY Oil & Gas plc* (2015), the Supreme Court considered the application of the proper purpose rule in relation to the exercise of directors' constitutional powers. The Court held that the proper purpose rule applied to the exercise of a constitutional

power to issue a restriction notice to shareholders following a perceived failure to comply with a disclosure notice, and that the power had been exercised for an improper purpose.

Let's get rid of all the lawyers: proposal for a new Online Court to resolve disputes without lawyers

Lord Justice Briggs is carrying out a review into the structure and operation of the Civil Courts. In his Interim Report, published in December 2015, Briggs LJ recommended the creation of a new Online Court to enable civil disputes with a value of up to £25,000 to be resolved without the involvement of lawyers. It may be some years before the Online Court opens its virtual doors, but funding is in place for its design, testing and implementation, so now is the time to give your views on its design.

Simplifying mitigation: when does a benefit obtained by the claimant after breach of contract reduce its recoverable loss?

In *Fulton Shipping Inc v Globalia Business Travel SAU* (2015), the Court of Appeal clarified the law in relation to when a defendant is entitled to credit from a benefit acquired by the claimant after a breach of contract. The principle to be applied is that where the claimant receives the benefit as a result of doing something by way of mitigation which arises out of the consequences of the breach and is in the ordinary course of business, that benefit is normally credited against the claimant's loss.

When is legal advice not legal advice?

In a recent case management decision in *Property Alliance Group v Royal Bank of Scotland* (2015), the Court upheld RBS's claim to legal advice privilege over documents prepared by the Bank's lawyers in the course of regulatory investigations. Legal advice privilege was held to be capable of covering not only direct legal advice, but also information provided by lawyers to their clients to support that advice, including progress updates and meeting summaries.

Regulatory round-up

1. FCA fines in 2015: setting the direction for the future?

According to the FCA's figures, the total financial penalties levelled by the FCA in 2015 fell compared to 2014: last year, the total fines amounted to just over £905m, compared to just under £1.5bn in 2014.

2. Final Rules on the Senior Managers Regime for Overseas Banks

Last August, as covered in this newsletter, the FCA and the PRA published near-final rules on the anticipated application of the new Senior Managers Regime and Certification Regimes to the UK branches of overseas banks. Following the enactment of the necessary legislative changes in November last year, both the FCA and the PRA have now published final rules.

One's mistake is just one mistake...

In *Capita (Banstead) 2011 v RFIB Group Limited* (2015), the Court of Appeal considered the law relating to continuing breach of contract and duty, and held that the obtaining and receiving of advice after a mistake had been made, even if the mistake could be easily rectified, could not mean that an obligation to correct one's mistake or negligence continued to accrue and give a fresh cause of action every day after the mistake had been made.

Court of Appeal considers the duties owed by mortgagees in the context of aircraft sale

In *Alpstream AG v PK Airfinance Sarl* (2015), the Court of Appeal allowed an appeal by a mortgagee of several aircraft who, following the borrowers' default, arranged an auction by which it purchased the aircraft from an appointed owner trustee before transferring them to an affiliated company. The mortgagee had obtained the best price reasonably obtainable at the time of sale and owed no duty to persons without a recognised interest in the property sold, including the junior lender.

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