Guildhall CHAMBERS

Newsletter

COMMERCIAL NEWS SUMMER 2013

IN THIS ISSUE

EDITORIAL

This edition of Commercial News features three pairs:

The first pair are two Commercial Law Updates from our pupils, Jay Jagasia and Oliver Mitchell, featuring two recent cases on that hardy perennial, contractual interpretation.

The second pair are two articles concerning recovery of market fall damages in tort and contract: John Virgo provides a Financial Services Update, reviewing a significant recent Court of Appeal authority on the allocation of losses arising from investments which were both mis-sold, and affected by the financial crisis; Hugh Sims provides a Professional Negligence Update, reviewing a significant recent Court of Appeal authority on the recovery of market fall losses arising from a breach of contract by a construction professional.

The third pair comprises Banking and Consumer Credit Updates: We see the return of Neil Levy's Banking Update covering finance related cases decided since the start of 2013. This ties in with the launch of the Bank Notes website which Neil has recently developed and can be found at www.banknotesuk.com. This new site provides similar brief digests of cases decided since 2012 which may be of interest to banking and finance lawyers. Digests are arranged under easily accessible subject headings and many are linked to full transcripts published on Bailii. Neil hopes to include digests of cases which might not otherwise be widely published, so if you have been involved in a recent case with a finance angle and would like to suggest that a digest is included in Bank Notes, feel free to send a brief case summary to Neil to consider: neil.levy@guildhallchambers.co.uk. I understand that contributions used will be acknowledged in a comment linked to the case digest. Neil and Jo Broome, our marketing manager, are also interested to receive any other feedback about the Bank Notes website.

In addition Lucy Walker provides a Consumer Credit Update, outlining the new Financial Conduct Authority's takeover of consumer credit legislation from the Office of Fair Trading.

If you have any queries please do not hesitate to contact me or the Commercial Team clerk.

Gerard McMeel

COMMERCIAL SEMINAR 2013

REGISTER NOW!

The team are delighted to announce they will be hosting their sixth annual half-day seminar on the morning of **Thursday 17th October 2013** at The Watershed in Bristol with the Hon Mr Justice Cooke, Judge in charge of the Commercial Court, attending as a keynote speaker. The seminar will focus on damages: the underlying principles, overcoming practical difficulties in quantification, and their use to fund claims under damages based agreements. The programme will include presentations and practical case studies and is a date not to be missed!

Please mark this date in your diaries now – registration details and a full programme will be available in due course.

To register your interest please email seminars@guildhallchambers.co.uk.

The Relegation of Regulation 7(2) of the Unfair terms in Consumer Contracts Regulations 1999

In *A.J. Building and Plastering Ltd v Turner* [2013] EWHC 484 (QB) The Mercantile Court of Wales rejected claims by a sub-contractor for payment direct from three different householders for insurance repairs in circumstances where the contractor went into administration. In dismissing the test cases, the judge importantly decided that as a tool of contractual interpretation, the provisions of reg.7(2) of the Unfair Terms in Consumer Contracts Regulations 1999 go no further than the *contra proferentem* rule, and should only be applied as a last resort where the normal canons of construction do not yield a clear conclusion.

Facts

The three cases were factually similar. In each case, the defendant householders had suffered insurable damage and the insurer ("Zurich") agreed to pay for the remedial works. Zurich instructed a contractor ("Rok") to carry out the works, and Rok in turn engaged the claimant sub-contractor to do the works. There was no contractual relationship between the claimant and Zurich. Once the works were completed, Zurich paid Rok, but before passing on the payment to the claimant, Rok went into administration. The claimant asserted, relying on the terms of a mandate letter signed by each of the defendants before the works commenced, that it had a direct contractual relationship with the defendants and was entitled to be paid directly by them. Although there were differences between the mandates signed by the defendants, the mandate terms most favourable to the claimant's case provided: "(1) I/We hereby agree to employ [the claimant] to undertake the works as detailed in their estimate/schedule of works; (2) I/We authorise our insurance company to make payment direct to [the claimant] upon completion; (3) I/We understand that I/we remain responsible for payment of any policy excess or any monies due for work authorised by me/us, which is not paid by my/our insurer...".

Decision

The cases were principally argued on the basis of the correct interpretation to be given to the mandate terms (and particularly paragraph (3)): did they oblige the defendants to pay for insured works? The judge summarised the *"well established"* common law principles ("the normal principles") of contractual interpretation in the following terms: "If the language of the contract, when read against the relevant background, leads clearly to the conclusion that one particular construction is the correct one, the court must give effect to it. But if there is more than one possible construction, the court is entitled to prefer the construction that best accords with commercial common sense, even though another construction would not produce an absurd or irrational result".

Reg.7(2) is a statutory tool of contractual interpretation which owes its existence to Art.5 of Directive 93/13/EEC on unfair terms in consumer contracts. In near identical terms to Art.5, Reg.7(2) provides that "if there is doubt about the meaning of a written term, the interpretation which is most favourable to the consumer shall prevail...". On the face of it, the terms of reg.7(2) are very similar in appearance to the *contra proferentem* rule which holds that any doubt as to the meaning of contractual words will be resolved by construing them against the party that put them forward. The *contra proferentem* rule is an interpretive tool of last resort, used only where the normal principles do not yield a clear conclusion. The key question which arose was, therefore, does reg.7(2) have primacy over the normal principles, or should it be relegated (like the *contra proferentem* rule) to tie-breaker status? In the face of conflicting authority in *Lewison on the Interpretation of Contracts* which advances the possibility that reg.7(2) goes beyond the *contra proferentem* rule, the judge preferred the latter approach and held that:

"The fact that the contra proferentem rule is a matter of common law whereas regulation 7(2) is a creature of statute is no reason to differentiate between their applications; the 1999 Regulations give wholesale effect to a European Directive and it is unnecessary to suppose that they were intended to affect the common law relating to contractual interpretation...If the normal principles of construction lead to a firm conclusion as to the meaning of a document, there is no room for regulation 7(2) to apply. However, if the process of construction does not lead to a firm conclusion, but the court is left with two or more interpretations that it cannot reject on other grounds, regulation 7(2) will operate as a tie-breaker."

"... the judge was able to reach his decision that the mandates only required the defendants to pay the claimant for any uninsured costs by applying the normal principles without recourse to reg.7(2) or the contra proferentem rule."

In the result, the judge was able to reach his decision that the mandates only required the defendants to pay the claimant for any uninsured costs (e.g. the policy excess and any additional works requested by the defendants and not covered by the insurance) by applying the normal principles without recourse to reg.7(2) or the *contra proferentem* rule. The judge was influenced to a large extent by the background circumstances and made it clear that even if the mandates extended to payment for insured repairs, the pre-administration payment from Zurich to Rok was sufficient to discharge any payment liability. Various subsidiary defences were also raised but they were not necessary to dispose of the cases.

Commentary

The judgment cannot be faulted on the grounds of fairness. The defendants all had legitimate claims under their coverage with Zurich and knew nothing about the contractual chain that existed between Zurich, Rok and the claimant. As is the norm in the context of insurance repairs, the defendants had no control over contractor selection and did not play any role in agreeing a price for the remedial works. As the judge explained, the decision caused him no regret because "the claimant's position... has amounted to the contention that the risk of the payment by Zurich effectively disappearing in Rok's hands should be borne by the defendant, who knew nothing of the interposition of Rok, rather than by the claimant, who of course knew well that Rok stood between it and Zurich but had drafted the mandate in a manner that did not make that clear to the defendants". The claimant had taken the risk of entering into commercial arrangements which took on a degree of credit risk because of the interposition of Rok, and the judge was not prepared to allow it to circumvent such risk by relying on the ambiguous terms of the mandates.

Although purely *obiter*, the judge's relegation of reg.7(2) to the status of *"tie-breaker"* effectively means that the provisions add nothing to domestic law, where it has long been accepted in the form of the *contra proferentem* rule (which has general application) that ambiguous terms should be resolved by construing them against the party that advanced them. Consumers are not, therefore, entitled to any greater protection as a result of the existence of reg.7(2). The decision will certainly have taken some practitioners by surprise. Lewison on the Interpretation of Contracts will need to be revised in the light of it. The judge's view was that reg.7(2) is simply the product of the transposition of Art.5 of the Directive, and that it was not intended to alter the normal principles of contractual interpretation. Art.8 (which the judge did not refer to) makes it clear that the Directive is intended to provide a minimum baseline of protection for consumers. Within this backdrop, can it be said that the judge was right to conclude that reg.7(2) is an interpretative tool of last resort? The judge's approach of confining the application of reg.7(2) to the rare circumstances where the normal principles do not resolve any ambiguity effectively means that reg.7(2) can only be used where there is "real doubt" (rather than just "bare doubt"). Following this decision, there is no scope for reg.7(2) to apply where the normal principles are capable of resolving any ambiguity, even if the preferred interpretation is less favourable to the consumer. By relegating reg.7(2) in this way, consumer protection has correspondingly been diluted. Whether this approach meets the minimum standards of protection demanded by the Directive is a question that has, rather conveniently, been left to another day.

Jay Jagasia, Commercial & Property Pupil

(Gerard McMeel represented the Defendants)

AGGREGATION AND INSURANCE

Aioi Nissay Dowa Insurance Company Ltd v Heraldglen Ltd

Those who attended Guildhall's Commercial seminar last November will have heard Nicholas Briggs and RPC's Simon Chandler deliver a talk on insurance and corporate fraud, which included discussion of aggregation clauses. The talk was introduced with an example question relating to the September 11th 2001 terrorist attacks in the United States: would the individual attacks on the North and South Towers of the World Trade Center be aggregated for insurance purposes?

In February of this year, Field J in the Commercial Court handed down judgment in *Aioi Nissay Dowa Insurance Company Limited v Heraldglen Limited* [2013] EWHC 154 (Comm), an appeal from an arbitration in which this question had been considered.

With regard to the wording of the specific clause in issue in this case, as Field J put it (paragraph 2 of his judgment), the arbitrators were required to decide "whether the losses sustained by the Defendants on 10 ("inward") reinsurance contracts arising out of the 9/11 attack on the Twin Towers of the World Trade Center were caused by one or more occurrences or series of occurrences "arising out of one event" for the purpose of applying policy limits and deductibles in four retrocession excess of loss reinsurances". They answered this question in the negative.

Field J dismissed an appeal against the arbitral award and concluded that the *Dawson's Field* unities test developed by Michael Kerr QC, and considered by Rix J (as he then was) in *Kuwait Airways Corporation v Kuwait Insurance Co SAK* [1996] 1 Lloyd's Rep. 664, had been properly applied.

Upholding the approach of the tribunal in the face of a variety of criticisms, Field J considered that the arbitrators had not erred in the reasoning used to reach their conclusion that losses arising from the hijackings of two of the four airliners and the subsequent attacks on the North and South Towers resulted from two separate occurrences arising out of separate events. It had, the Court held, been open to the tribunal to decide that each hijacking and attack was, from the viewpoint of an independent and fully informed observer in the position of the insured, separate. Based on a legally sound consideration of the unities test, the arbitrators' conclusion that there was insufficient unity of cause, location and timing for aggregation under the relevant clause, notwithstanding the existence of a coordinated plot, had been validly reached.

This decision of Field J is, of course, limited to reviewing and rejecting the criticisms made of the arbitrators' award, and is not a *de novo* consideration of the question of aggregation. However, in vindicating their approach to the unities test in the face of a range of challenges, it provides an indication of the potential for judicial approval of a restrictive analysis of aggregation in the case of clauses of the type considered.

Oliver Mitchell, Commercial & Property Pupil

Market Fall Damages & Professional Negligence

The Achilleas revisited and rationalised following the decision of the Court of Appeal in *John Grimes Partnership Ltd v Walter Gubbins* [2013] EWCA Civ 37

Introduction

The Spring 2009 Edition of Guildhall Chambers' Commercial Newsletter contained an article by Ross Fentem entitled *"The shield of The Achilleas: A market-based approach to assessment of contractual damages"*. Such is the generosity of Guildhall Chambers Commercial Team that this article is still available in the resources section of our website. Given that the decision of the House or Lords (reported as *Transfield Shipping Inc v Mercator Shipping Inc ("The Achilleas")* [2009] 1 AC 61) is now over 4 years old it is worth considering whether the "re-fashioned shield" as Ross described it, has proved to be a successful additional line of defence for the defendant. Further and in particular I consider below to what extent it has been deployed successfully in the sphere of professional negligence cases since 2008. I conclude that at a practical level a lawyer can test whether *The Achilleas* is likely to have any practical impact in a professional negligence context by considering whether the exclusion of the type of loss in question could be said to be implied from the contract, on the basis of the modern approach to implication of terms. Consistent with that conclusion, in a recent case in which I acted for a (counter) claimant, called *John Grimes Partnership Limited v Walter Gubbins* (unreported, 16 March 2012, HHJ Cotter QC) decided in the Exeter Technology & Construction Court, the (counter) claimant obtained a finding that he was entitled to market fall damages consequent upon delay in realisation of real estate caused by a negligent construction professional, notwithstanding the decision in *The Achilleas*. This decision was upheld by the Court of Appeal in a judgment handed down on 5 February 2013 (neutral citation reference: [2013] EWCA Civ 37), where I was led by Adrian Palmer QC. The judgment of Sir David Keene in particular contains a useful review of the relevant principles, and may be said to provide some support to the "implied term" approach to remoteness in contract cases, at least as a rule of thumb.

Damages and remoteness – the traditional approach pre *The Achilleas*

The starting point is the classic statement in *Hadley v Baxendale* 156 ER 145 Ex Ct and the passage in the judgment of Alderson B when he stated:

"…where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract is such as may fairly and reasonably be considered either arising naturally, ie according to the usual course of things, from such breach of the contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it. "

Thus the traditional analysis of *Hadley v Baxendale* was that there were two limbs:

- The "usual course of things" limb – the first limb; and
- The "reasonable contemplation" limb – the second limb.

The second limb has generally been viewed as facilitating a wider basis for recovery than the first limb; so that if specific facts were known to the contract breaker when the contract was formed then it might be argued that this allowed for a greater recovery than might otherwise be the case if only the first limb was relied on.

In time, and following the judgment of Lord Reid in *Czarnikow v Koufos* (The Heron II) [1969] 1 AC 350, the traditional analysis became refined so as to refer to one test, namely whether the loss was of a kind which the defendant at the time of the contract ought to have realised was "not unlikely" to result from the breach. This does not require probability on an even chance, but simply something easily foreseeable or not unusual.

So far so good, in the sense that the remoteness test is still focused on consideration of what was objectively reasonably foreseeable at the time, rather than a consideration of what the parties are to be assumed should objectively be recoverable.

A taste of things to come - SAAMCO

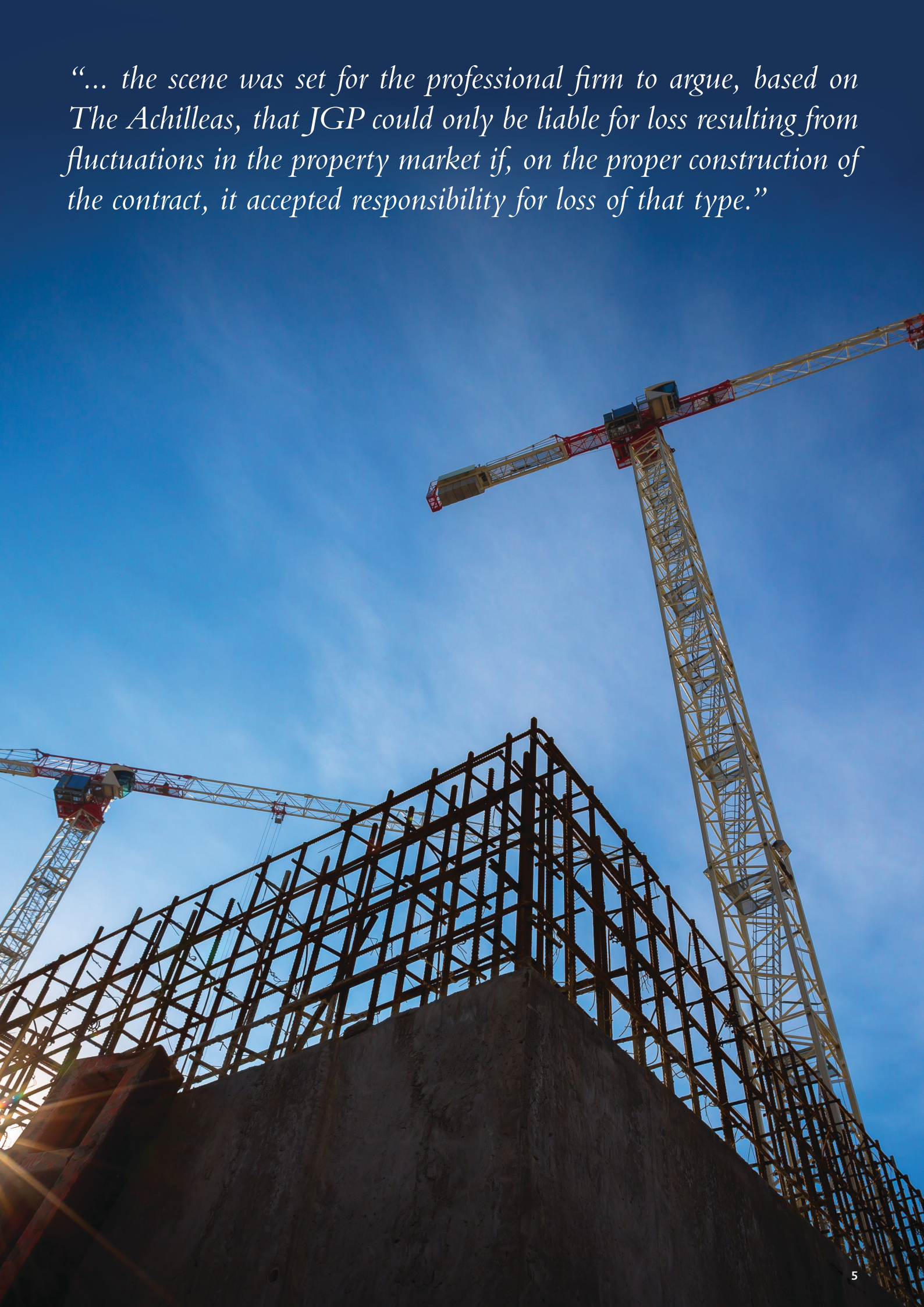
Professional negligence lawyers have become used to considering issues of recoverability of losses for market fall following the decision of the House of Lords in *South Australia Asset Management Corp v York Montague Ltd* [1997] AC 191 (also known as SAAMCO), and in particular the speech of Lord Hoffmann. That case emphasised the need to consider whether or not the loss complained of fell within the scope of the duty. In SAAMCO negligent surveyors overvalued a property which was to be security for a loan and the lender's loss was exacerbated by a fall of the market. It could not be said that the market fall was unlikely, but that loss was held to be of a kind in respect of which the surveyor did not owe a duty to the lender. Following that case many professional negligence cases have become categorised into information cases (such as the surveyor's negligent overvaluation cases) and advice cases; the latter connoting a greater degree of responsibility.

Nevertheless, the remoteness of damages test remained untouched, or so we thought. Subject to the conclusion that the category of case was not simply an "information" type case, but instead an "advice" type case (or a case which fell within neither category), the scope of duty argument did not invade recovery and remoteness of damages considerations.

The Achilleas

And then came *The Achilleas*. In short, there was late re-delivery by the charterers. The owners had a lucrative follow on fixture which they faced losing and which they renegotiated down. In due course the owners sought the whole of their losses for the period of the follow on fixture. The charterers claimed their loss should be limited to the period of loss associated with the few days overrun, and only by reference to the difference between the contract rate and the market rate. Applying conventional remoteness principles all the Courts up to the House of Lords allowed for a recovery based on the full losses, on the basis that it was not unlikely that losses of this kind would be suffered. The House of Lords said no: the industry expected damages to be assessed on the basis of the difference between contract and market rate and that industry expectation should prevail.

"... the scene was set for the professional firm to argue, based on The Achilleas, that JGP could only be liable for loss resulting from fluctuations in the property market if, on the proper construction of the contract, it accepted responsibility for loss of that type."



"If the necessary and obvious implication from the contract is that there was no assumption of responsibility for a particular type of loss then it may be excluded."

As Ross Fentem noted in his earlier article referred to above the different speeches arrived at this unanimous conclusion by different routes, but the speeches of Lord Hoffman and Lord Hope were the notable ones in that they suggested that when considering remoteness the question of whether the damages sought were of a kind "not unlikely" to occur was not the only thing to consider, but it must also be considered whether on a proper consideration of the commercial background and terms of the contract the contract breaker is taken to have assumed responsibility or risk for the type of damage claimed.

Thus the "scope of duty" or "assumption of responsibility" approach was not limited to the start (the duty stage) or the end (damages within scope of duty; and thus not the end), but also is said to come into play on the issue of remoteness. That said there was a danger of the decision being misconstrued, or overplayed. It was not authority for the proposition that market fall losses could not be recovered; indeed market fall losses were recovered, but simply on a more limited basis than was awarded in the Courts below.

Commentary at the time was divided as to how important this decision would be. Did it have any real relevance outside shipping disputes, where there was a specialised market and rules in play? In particular what potential relevance could it have in the field of professional negligence above and beyond the principles already laid down in SAAMCO?

Decisions since *The Achilleas*

Most first instance decisions since *The Achilleas*, particularly in the field of professional negligence, have remained untroubled by its reasoning and application. The traditional *Hadley v Baxendale* approach has continued to be applied, on the basis that the heavily market based approach of *The Achilleas* has little significance in professional negligence disputes.

There is one noteable Court of Appeal decision however which has taken up the spirit of *The Achilleas* albeit with unexpected consequences: in order to serve to reinforce an entitlement to damages due to assumption of responsibility even where the type or kind of damage might properly be considered to be unusual and quite a remote possibility.

That is the decision of the Court of Appeal in *Supershield Limited v Siemens Building Technologies FE Limited* [2010] EWCA Civ 7. This case did not concern a claim for market fall losses. Instead it concerned a claim for damages caused by overflowing water from a sprinkler tank. It also happened that the drains were blocked. The argument which was run in the Court of Appeal was that flood damage was not damage which would occur in the usual course of things, or was in the reasonable contemplation of the parties, since it would be expected that the drains would remove any flood water. The blockage of the drains was said to be an unfortunate and unexpected occurrence, or coincidence. Toulson LJ rejected this argument. Instead he held, following the speeches of Lords Hoffmann and Hope in *The Achilleas* that the underlying rational for remoteness of damages was that it was based on presumed intention of the parties, and to give effect to that presumed intention, but not to contradict it. In this case he held that there was an assumption of responsibility on the part of the construction professional for the design of the sprinkler tank system and they could not escape liability simply because an additional safety feature (or fail safe feature) had also failed to function. So the commercial background allowed for a greater recovery than would have applied if the test had simply been what would have occurred in ordinary circumstances.

Toulson LJ concluded that whilst the rule in *Hadley v Baxendale* remains a standard rule, it is to be read as having been rationalised on the basis that it reflects the expectation to be imputed to the parties in the ordinary case.

Whilst the decision in Supershield is obviously right on its facts, I question whether it could have been made on traditional *Hadley v Baxendale* principles without recourse to "assumption of responsibility" principles. It is doubted whether this attempt to rationalise, or reconcile, *Hadley v Baxendale*, and the view of Lords Hoffmann and Lord Hope in *The Achilleas* is necessarily helpful from the point of view of commercial certainty. If parties wish to have commercial certainty in a contractual context, they can write their own rules. If they fail to write their own rules, and SAAMCO does not provide a limit on recovery, then why add another layer to the *Hadley v Baxendale* test? Furthermore whilst a contract might clearly contemplate a loss being recoverable even though it was not a usual event, because the unusual event was the specific target for the services or work provided, why should it be used to take away a right to damage absent an express indication to that effect?

Perhaps *The Achilleas* should be read as adding nothing more than the modern approach to implication of terms (following the decision in *Equitable Life v Hyman* [2000] UKHL 39). If the necessary and obvious implication from the contract is that there was no assumption of responsibility for a particular type of loss then it may be excluded. Thus *The Achilleas* can readily be understood as falling within that category of cases where there is an industry custom. However absent the conditions for an implication of that sort the rule in *Hadley v Baxendale* remains. This would allow for a market fall loss to be recovered where it was a not unlikely occurrence absent an implication that the parties must be considered to have excluded it as a recoverable loss.

The decision in *John Grimes Partnership Limited v Walter Gubbins* at first instance

In the above case the counterclaimant claimed damages associated with the fall in market value of development land, caused by the delay associated with engineering design work necessary to commence construction work on site. The consulting engineers, John Grimes Partnership Limited ("JGP") resisted the claim on a number of grounds including the ground that the losses based on the market fall were

"too remote as they are were not in the reasonable contemplation of the parties at the time of contract formation and/or on a true construction of the contract the Claimant did not assume responsibility for such losses".

So the scene was set for the professional firm to argue, based on *The Achilleas*, that JGP could only be liable for loss resulting from fluctuations in the property market if, on the proper construction of the contract, it accepted responsibility for loss of that type. They contended they could not be held liable on the basis that, amongst other things, the quantum of liability was disproportionate to the scale of the transaction, the potential loss would be unquantifiable and unpredictable, and to allow a claim in relation to property development would open the floodgates. JGP submitted that property market risk was at the heart of the property development business, and is a risk that is fundamentally borne by the developer that cannot be passed to a construction professional simply by virtue of a standard engagement to provide professional services. They submitted, viewed objectively, the parties would have understood that.

HHJ Cotter QC rejected those submissions on the facts of the case. He started by considering remoteness on traditional grounds, and concluded the type of loss in question (market fall) was reasonably foreseeable. He then went on to consider the issue of contractual intention, as required by the decision in *The Achilleas* (as analysed, or rationalised, by Toulson LJ in Supershield). He concluded that objectively understood having regard to the factual background the contractual intention did not require such losses to be excluded. Of significance were the following factors:

- The professional did not agree terms in writing at the outset of the contract; the engagement letter might have provided a sound basis on which to conclude that market fall losses could or should be excluded, but that was not open to the professional to allege in this case;
- The substantial loss claimed was substantially linked with the substantial delay by the professional; if substantial delay was in contemplation at the outset it could not necessarily be said that substantial market fall losses would not also be contemplated;
- There was no sufficient basis to conclude that the construction market was such that the developer could not pass the risk of market movement to a construction professional simply by virtue of an engagement to provide professional services; even more so on the facts of this case where the engagement was not a standard one and the developer could not be said to be a professional party in the same industry as the professional;
- A client employing a professional may very well wish to have the threat of substantial market fall damages hanging over a professional's head as an incentive for them to comply with any agreed deadline.

He concluded by noting that his interpretation of the judgment of Lord Hoffman in *The Achilleas* was that only if on consideration of the commercial background to the contract, the standard approach would not reflect the expectation or intention reasonably to be imputed to the parties would losses not be recoverable. He concluded on the facts, having considered the commercial background to the particular contract, that there was no reason to limit liability.

John Grimes Partnership Limited v Walter Gubbins in the Court of Appeal

JGP were not content with the decision at first instance and appealed.

On 5 February 2013 the Court of Appeal (Laws LJ, Tomlinson LJ, Sir David Keene) handed down judgment in *John Grimes Partnership Ltd v Walter Gubbins* and upheld the decision below. They found that JGP was liable to pay damages to Mr Gubbins for the diminution in the market value of the development, whose completion had been severely delayed by JGP's breach of contract. The Court of Appeal held that the loss had been reasonably foreseeable as not unlikely to result from the breach at the time of contract and there was no basis to displace the standard approach to remoteness. The Court emphasised that the conventional rules as regards remoteness would apply absent evidence demonstrating a particular market understanding or other special circumstance.

The judgment of Sir David Keene contains some useful and pithy observations as to the current state of law as to remoteness in contract, in particular in relation to market fall loss cases. In particular:

At paragraph 24 he observed that: *"If there is no express term dealing with what types of loss a party is accepting potential liability for if he breaks the contract, then the law in effect implies a term to provide the answer. Normally, there is an implied term accepting responsibility for the types of loss which can reasonably be foreseen at the time of contract to be not unlikely to result if the contract is broken. But if there is evidence in a particular case that the nature of the contract and the commercial background, or indeed other relevant special circumstances, render that implied assumption of responsibility inappropriate for a type of loss, then the contract-breaker escapes liability"*

This approach suggests that a limitation on the conventional recovery might apply where the market practice is akin to a customary practice (which might otherwise justify an implied term), or where the restriction may be said to be an obvious part of the (unexpressed) intention of the parties (applying the objective bystander test).

At paragraph 27 he noted that the market had fallen by c. 14% in just over a year and therefore could not be said to be an unusually volatile market (a matter of some debate in *The Achilleas*). He concluded (at paragraph 28) that it was the engineer's egregious delay which gave rise to the substantial losses suffered, not any unusually volatile market, and that whilst a great disparity between the fee charged by the professional and the losses suffered could be a potential pointer to the conclusion that the parties did not intend liability for losses of the type suffered, it was only one potential indicator to be weighed in the balance, and would usually not be enough (on its own).

In a concurring judgment Tomlinson LJ also questioned (at paragraph 34) whether losses flowing from extremely volatile market conditions were, axiomatically, irrecoverable, and left that particular point open for decision on a future case.

Laws LJ agreed with both judgments (at paragraph 35).

Concluding comment

It is probably going a step too far to say that as a matter of law *The Achilleas* only has application (so as to displace the usual remoteness principles) where the test for implication of a term is satisfied. However the decision of HHJ Cotter QC at first instance and of Sir David Keene in the Court of Appeal suggest that as a matter of practical application if the implied term tests are unlikely to work, then that will be a good rule of thumb for practitioners. So the default rule (implied by law) in contract cases, where the contract does not speak on the issue, is the contract breaker has "responsibility for the types of loss which can reasonably be foreseen at the time of contract to be not unlikely to result if the contract is broken". But where there is a market understanding (akin to a customary practice) or circumstances such that it is obvious the parties must have intended a more restricted (or expanded approach), then the Court will modify the default rule, and give effect to the (objective) intention of the parties.

If no cogent case can be made out for an implied term then in a professional negligence context the professional is unlikely to find fertile ground in *The Achilleas*. They might be better advised to spend time on their engagement letter. But that is for another article.

The decision in *John Grimes Partnership Ltd v Walter Gubbins* also demonstrates that in the context of professional negligence cases market fall losses can be recovered and may be recoverable depending on a number of factors including:

- The type of engagement, and what express terms were agreed in relation to that engagement;
- The fee paid, though on its own this will usually be insufficient to determine the matter either way, and at best may only be said to be a possible pointer;
- The industry background and whether the two parties shared knowledge in relation to that industry background;
- The expectations of the client seeking to maintain high standards of conduct from a professional as against the desire on the part of the professional (or their insurers) to limit their liability.

Finally, for those who have cases concerned with losses suffered due to volatile market conditions the judgment of Tomlinson LJ in *John Grimes Partnership Ltd v Walter Gubbins* pays careful reading.

Hugh Sims

(Adrian Palmer QC and Hugh Sims represented Mr Gubbins in the Court of Appeal)

Rubenstein v HSBC Bank Plc

All investments carry risks. In recommending an investment to a private customer or retail client[1] the duty of the financial adviser is both to identify those risks and to evaluate them for the client.

The source of the duty lies in the adviser's responsibility to comply with detailed Rules specified by the Financial Services Authority in the Conduct of Business Rules (the COB Rules) and the Conduct of Business Sourcebook (the COBS Rules).[2] In the case of a private customer the duty was specified by COB 5.4.3 R which provided that 'a firm must not make a personal recommendation of a transaction for a private customer unless it has taken reasonable steps to ensure that the private customer understands the nature of the risks involved'.

In the case of a retail client the duty arises under COBS 9.2.2 R which requires the adviser to 'obtain from the client such information as is necessary for [him] to understand the essential facts about [the client] and have a reasonable basis for believing, giving due consideration to the nature and extent of the service provided, that the specific transaction to be recommended… (a) meets [the client's] investment objectives; (b) is such that he is able financially to bear any related investment risks consistent with his investment objectives; and (c) is such that he has the necessary experience and knowledge in order to understand the risks involved in the transaction…'.

In both instances the function of compliance with the COB and COBS Rules is to ensure that the investment recommended for the customer is a 'suitable' one.[3]

In *Rubenstein v HSBC Bank Plc*[4] the Court of Appeal had to consider the relationship between the scope of a financial adviser's duty to identify and evaluate the risks posed by a recommended investment and the adviser's legal responsibility for losses experienced by the customer who relied on the recommendation. The case provides important guidance on the parameters of the scope of the duty and on determining the type of loss which will be recognised as having been caused by a breach of that duty. Scope of duty and causation are seen to be intimately linked concepts[5].

Rubenstein – the facts

The facts of *Rubenstein* may be shortly stated: Mr Rubenstein sought advice from an investment adviser employed by HSBC, Mr Marsden in connection with a suitable product in which to invest the sale proceeds of his matrimonial home whilst he and his wife looked for a new property. Mr Rubenstein's objectives were to find an investment (if possible) that provided a higher interest rate than a standard bank deposit but importantly he emphasised that he could not afford to take any risk to his capital at all. Mr Marsden recommended investing the available sum (£1.25m) in an AIG Bond placed in a particular fund – the Enhanced Variable Rate Fund ('the EVRF') – a type of unit linked fund.

The objective of avoiding risk to capital was apparent from a specific enquiry raised by Mr Rubenstein with Mr Marsden. In particular he asked the following question: *'We can't afford to accept any risk in the investment of the principal sum. Can you confirm what – if any – risk is associated with this product?'* Mr Marsden responded: *'We view this investment as the same as cash deposited in one of our accounts'.*

This was a mis-description of the risk posed by the investment in that the EVRF was not the same as a deposit. The risk the creditor of a deposit would take is primarily with the creditworthiness of the deposit taker – a solvency risk[6]. Unless the solvency risk eventuates, the creditor is entitled to the return of his deposit, with interest.

In contrast, an investor in the EVRF was not entitled to the return of his investment, only to its value at the time of request, which could fluctuate on a daily basis. Value there depended on the underlying assets held within the EVRF which could vary between cash and short-dated securities to longer dated securities and complicated derivative products, including "sub-prime" assets. Unfortunately for Mr Rubenstein, when he requested the return of his investment the EVRF had been suspended following a run on the fund prompted by a well-founded rumour in the U.S. financial markets that AIG was going to go bankrupt (as may have happened if it had not received support from the U.S. Federal Reserve). In due course he was able to withdraw a depleted capital sum and thus experienced at first hand the difference between a 'deposit fund' and a unit linked fund.

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1 For transactions between 1 December 2001 and 30 November 2007, see the customer classification duty in COB 4.1.4R (before conducting designated investment business with or for any client, a firm must take reasonable steps to establish whether that client is a private customer, intermediate customer or market counterparty); for transactions from 1 December 2007 see COBS 3.4R, 3.5 and 3.6 and the revised customer classifications of retail and professional client or eligible counterparty.

2 Both the COB Rules (relevant to transactions between 1 December 2001 and 30 November 2007) and the COBS Rules (relevant to transactions from 1 December 2007) are enforceable by an action for breach of statutory duty under s150 of the Financial Services and Markets Act 2000 by a 'private person'; In the Financial Services and Markets Act 2000 (Rights of Action) Regulations 2001 SI 2001/2256 the term 'private person' is defined as '(a) any individual, unless [immaterial proviso] … [he suffers the loss in question in the course of carrying on — any regulated activity; or any activity which would be a regulated activity apart from any exclusion made by article 72 of the Regulated Activities Order (overseas persons)' and '(b) any person who is not an individual, unless he suffers the loss in question in the course of carrying on business of any kind'; it follows this statutory duty is not owed to corporate customers (see *Titan Steel Wheels Ltd v The Royal Bank of Scotland plc* [2010] 2 Lloyd's Rep 92) and is to be noted therefore the definitions of 'private customer', 'retail client' and 'private person' do not wholly overlap.

3 See the 'suitability' requirement in COB 5.3.5R and in COBS 9.2.1 R.

4 [2012] EWCA 1184.

5 Although concerned with the COB Rules rather than the COBS Rules there is no reason to think the reasoning inapplicable to both regimes.

6 Other risks include a risk of low awards of interest; the risk of any capital and accrued interest being eroded by inflation and a risk of fraud leading to loss of deposits.

The first instance decision

At first instance[7] the judge found that the bank had been negligent in the advice which it gave, and was in breach of inter alia COB 5.4.3 R. He also found that the investor relied on the bank's advice. Despite these findings, the judge went on to hold that the loss suffered by Mr Rubenstein was not caused by the HSBC's negligence or breach of COB duties: it was caused by unprecedented market turmoil in 2008 which was unforeseeable and too remote. The basis for that view lay in an acceptance of evidence to the effect that the actuarial experts at trial were agreed that although the constitution of the EVRF was very different from a cash deposit nonetheless in September 2005, when the investment was made, the risk inherent in the EVRF was only marginally or slightly higher than that of a conventional deposit. The idea that one of the world's largest insurance companies might go bankrupt was unthinkable in September 2005. The concept of a run on AIG was, the judge accepted, so remote that no financial adviser would have been required to point it out as posing a risk to capital. The judge concluded that what happened to the EVRF on 15 September 2008 and the days following was wholly outside the contemplation of the bank or any competent financial adviser in September 2005.

This led to the finding: 'The damage which eventuated, namely, the closure of the fund and a substantial loss of investors' original capital, was triggered by subsequent events. If those were not events of a kind which were foreseeable when the investment was made, I do not think that it can be said that the structure of the product truly caused the loss… the loss was not caused by any negligence on the part of Mr Marsden in making the recommendation … the loss was not reasonably foreseeable by HSBC and is too remote in law to be recoverable as damages..'.[8]

On appeal

In focusing on the market events of 2008 and their immediate linkage to the depletion in the capital value of Mr Rubenstein's investment the Court of Appeal held the judge had confused two separate risks: (1) the risk of default of the institution to which Mr Rubenstein entrusted his money – the 'default risk' and (2) the risk that arose from market movements – the 'market risk'. Mr Marsden's duty was to identify an investment that was 'suitable' in protecting his money from both risks as far as possible. In fact, there was no 'default' by AIG in paying what was due under the Bond i.e. the value of the fund on

[7] [2011] EWHC 2304

[8] Ibid [109, 116]

encashment which reflected the underlying value of the assets held in the EVRF. The risk faced by Mr Rubenstein was the risk of market movement – a risk about which Mr Marsden had not adequately warned him and which had been obscured by the misleading description of the investment as being the same as cash deposited in an HSBC deposit account.[9]

In pointing to the unforeseeable market turmoil of 2008 the Court of Appeal accordingly held that judge had identified the wrong cause of Mr Rubenstein's losses. As Rix LJ explained: 'Against the background of the facts found and … and the scope of HSBC's duties, what connected the erroneous advice and the loss was the combination of putting Mr Rubenstein into a fund which was subject to market losses while at the same time misleading him by telling him that his investment was the same as a cash deposit, when it was not. Therefore, the correct selection of the cause of Mr Rubenstein's loss was the loss in value of the assets in which the EVRF … was invested. … It was the bank's duty to protect Mr Rubenstein from exposure to market forces when he made clear that he wanted an investment which was without any risk (and when the bank told him that his investment was the same as a cash deposit). It is wrong in such a context to say that when the risk from exposure to market forces arises, the bank is free of responsibility because the incidence of market loss was unexpected'.[10]

Thus, scope of duty, causation and loss came to be logically aligned.

Discussion

The judgment of the Court of Appeal can be seen as throwing interpretive light on a number of pervious cases and as establishing a sound jurisprudential framework for analysis. In particular it is suggested there will always be three critical questions to answer: (1) What was the scope of the duty undertaken? (2) Was the loss suffered of a type that was foreseeably likely to arise from a breach of that duty? And, (3) Was the loss in fact caused by the breach of duty?

The application of this three stage analysis may be exemplified by *Camerata Property Inc v. Crédit Suise Securities (Europe) Ltd (No 2)*.[11] In that case, the claimant was advised to invest in a Note issued by a Lehman Brothers subsidiary. The investment was the subject of a total loss due to the issuer's default. The claimant brought two separate actions alleging initially that he ought to have been advised to disinvest once the financial adviser had or ought to have entertained doubts over the solvency of Lehman Brothers – and later that the Note was too risky an investment ab initio. In the first action, Andrew Smith J held that there had been no negligence, but that in any event, even if advised to sell, the claimant would have retained the note. The second action was struck out on the basis that the findings at the first trial made the claim impossible. Flaux J commented that the claim would have been bound to fail for the following reason, namely that even if the defendant had been at fault, the 2008 collapse of Lehman Brothers had been unforeseeable in 2007[12]: 'Even if Camerata could establish its general wrong advice case and even if it could show that it would not have invested in the Note had it been given the right advice, the claim for damages would still fail because the actual cause of the loss was issuer default as a consequence of the collapse of Lehman Brothers, which was wholly unexpected and unforeseeable…. In other words, the only reason why Camerata has suffered any loss at all, as opposed to making a substantial profit, is because of the collapse of Lehman Brothers, which was unforeseeable'.

The point was that in so far as it was part of the defendant's duty to warn as to the risk of issuer default, no competent adviser would have contemplated there was any serious risk of a Lehman Brothers' collapse and so there was no breach of duty of the given scope. It could thus not be said that the loss suffered was of a type that was foreseeable (loss flowing from any real risk of issuer default). Further, there was no linkage between the loss experienced and any breach of duty.

This may be contrasted with *Brown v. KMR Services Ltd*[13] in which the Court of Appeal considered a claim by a Lloyd's name against his members' agents for exposing him to membership in syndicates which reinsured catastrophe excess of loss without warning him of the high risk nature of his participation. At trial, the judge, Gatehouse J, found that no one had anticipated the size and frequency of the various disasters that occurred between 1987 and 1990. Nevertheless, the claimant recovered for breach of the agents' duty on the basis that if he had been warned he would have limited his exposure. As Hobhouse LJ observed[14]: 'If it was the duty of the defendants to protect the plaintiff from losses of the kind which he subsequently suffers, how can it be just or appropriate to say that, because those losses are larger than either party anticipated, the plaintiff must bear those losses not the defendants?'

Again, we see that the Court considered it to be within the scope of the defendant's duty to warn as to the risk of a particular type of loss (liability for excess loss); the loss was foreseeable in kind if not magnitude; but for the breach of duty the claimant would not have made the relevant investment and so the breach of duty could be said to have caused the resultant loss.

The analysis may be seen as consistent with the modern approach to assessment of damages laid out in *The Achilleas*.[15] The question was whether a charterer who redelivered the chartered vessel to her owner late, in breach of contract, should be liable for only a conventional rate of damages representing any increase in the market rate for the vessel over and above the charter rate for the period of the overrun, or should be liable for the full extent of the owner's undoubted loss where, due to the late redelivery, the owner had lost a new fixture at the higher market rate. It was held that the owner was limited to the former. Lord Hoffmann stated the relevant principles as follows: 'It is generally accepted that a contracting party will be liable for damages for losses which are unforeseeably large, if loss of that type or kind fell within one or other of the rules in *Hadley v Baxendale*… That is generally an inclusive principle: if losses of that type are foreseeable, damages will include compensation for those losses, however large. But … it may also be an exclusive principle and that a party may not be liable for foreseeable losses because they are not of a type or kind for which he can be treated as having assumed responsibility… What is the basis for deciding whether loss is of the same type or a different type? It is not a question of Platonist metaphysics. The distinction must rest upon some principle of the law of contract. In my opinion, the only rational basis for the distinction is that it reflects what would reasonably have been regarded by the contracting party as significant for the purposes of the risk he was undertaking'.[16]

Overall, *Rubenstein* provides a clear set of principles within which to analyse questions of loss caused to investors by the provision of defective investment advice.

John Virgo

(Adrian Palmer QC and John Virgo represented Mr Rubenstein)

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9 [2012] EWCA 1184, per Rix LJ [71, 72].

10 Ibid, [118].

11 [2012] EWHC 7 (Comm), [2012] PNLR 15.

12 Ibid, [68, 102].

13 [1995] 2 Lloyd's Rep 513.

14 Ibid, [557].

15 [2009] 1 AC 61.

16 Ibid, [21, 22]

Banking Update

Neil Levy offers a selection of finance related cases decided since the start of the year. These and similar brief digests of many other recent cases of interest to banking and finance lawyers are collected together on a new website edited by Neil which can be found at **www.banknotesuk.com**.

Consumer finance

Robertson v Swift [2012] EWCA Civ 1794, 15/1/13

A contract for the removal of goods fell within the Cancellation of Contracts made in Consumer's Home or Place of Work etc Regs 2008 because it had been signed at the consumer's home. It did not matter where the earlier negotiations had taken place or that the trader had first visited the consumer at the consumer's request. As the trader failed to give the consumer notice of his right to cancel, the contract was unenforceable and the trader had no right to charge the consumer a charge for cancelling it. But as the consumer had not served notice to cancel, the contract was still alive and the consumer had no right to recover the deposit.

Santander UK Plc v Harrison [2013] EWHC 199 (QB), 7/2/13

The capitalisation of mortgage payment arrears did not amount to the provision of "credit in the form of a cash loan" within art 4(1) Consumer Credit Act 2006 (Commencement No. 4 and Transitional Provisions) Order 2008 so the arrangement did not bring the agreement within the scope of CCA regulation. Even if the lender had assigned the loan, it was entitled to bring the claim because notice of the assignment had not been given to the debtor so as to perfect a legal assignment under s 136 LPA 1925 so the lender still had legal title. Notice under s 136 must be express notice in writing. The fact that the lender had provided information to the debtor as a result of a Data Protection Act request was not sufficient.

VFS Financial Services Ltd v J F Plant Tyres Ltd [2013] EWHC 346 (QB), 26/2/13

In s 29 Hire-Purchase Act 1964 "disposition" requires a transaction in return for money. A transaction in return for the release of a liability is not sufficient. So the sale of a car in settlement of debts owed by the seller to the buyer did not transfer title to the buyer because the car had been held by the seller on HP.

Contract

Bank Of New York Mellon (London Branch) v Truvo NV [2013] EWHC 136 (Comm), 5/2/13

Contains a useful brief summary of the approach to interpretation of commercial contracts at [43], and observations on the meaning of subordination at [57].

Lloyds TSB Bank Plc v Crowborough Properties Ltd [2013] EWCA Civ 107, 12/2/13

A Tomlin Order was rectified. The parties had mistakenly assumed that security held by the bank covered both the liabilities of the principal debtor company and guarantors of the company's liabilities, so that the security would remain in place to secure the company's liabilities even after the guarantees were released in return for an agreed payment. In fact the security had only covered the guarantors' liabilities, so it would be discharged by the agreed payment. The parties could have achieved the intended result without the grant of new security but by agreeing that the security would be sold and the proceeds applied to discharge the company's borrowing.

A J Building & Plastering Ltd v Turner [2013] EWHC 484 (QB), 11/3/13

Regulation 7(2) of the Unfair Terms in Consumer Contracts Regulations 1999 (which requires doubt as to the meaning of written contract terms to be resolved by preferring the interpretation most favourable to the consumer) applies to all terms of a consumer contract, not just those challenged as unfair. In effect it applies the contra proferentem principle and like that principle is to be applied as a last resort if no firm conclusion can be reached as to the meaning of the term.

Corporate veil

VTB Capital Plc v Nutritek International Corp [2013] UKSC 5, 6/2/13

A claimant which loaned money to a company would not be permitted to amend its pleadings to assert a claim that the corporate veil could be pierced to render the company's owner and controller personally liable as a party to the loan contract along with the company. The principle of piercing the corporate veil had been subject to criticism and it would be inappropriate to extend it to render an individual personally liable as if he were a contracting party.

Loan default

Cinema Holdings 2 Ltd v Irish Bank Resolution Corp Ltd (Ch D), 19/2/13

A loan was expressed to be repayable on a number of events of default, including where any of the security was in jeopardy. The fact that a compulsory purchase order was likely to be made which would have a detrimental effect on the value of the security meant the security was in jeopardy so the lender was entitled to demand payment.

Guarantees

Butterfield Bank (UK) Ltd v Philip, QBD (Merc), 15/3/13

An allegation by a guarantor that a bank had sold property at an undervalue was not supported by the evidence. The guarantee prevented set-off of cross-claims. Errors in the calculation of the debt and an issue as to the correct default rate were not material because the errors had been corrected and the default rate was not relied on. The defence had no prospect of success and the bank was granted summary judgment.

Lender Negligence

Gatt v Barclays Bank Plc [2013] EWHC 2 (QB), 14/1/13

A bank was not liable for breach of contract, negligence and defamation for filing reports with credit reference agencies describing an account as delinquent. The account had been overdrawn in excess of an agreed limit.

Zaki v Credit Suisse (UK) Ltd [2013] EWCA Civ 14, 1/2/13

A bank had arranged credit for the claimant in connection with designated investment business within COB 7.9.3R although the loan had been made by an associated company. To comply with COB 7.9.3R, suitability of the loan had to be considered not just at the outset but each time the loan was drawn. Failure to make an assessment of a customer's financial standing within COB 7.3.9R was a matter of process and did not necessarily mean the bank had not taken reasonable steps to ensure suitability. The same applies under COB 5.3.5R in relation to suitability of advice. But the test of suitability under COB 7.9.3R is narrower than under 5.3.5R because the latter only applies when a personal recommendation has been made. A lending arrangement could be suitable even if a personal recommendation was not. On the facts the lending arrangements were suitable so the claim failed. Even if the lending should not have taken place, that would not necessarily have made the bank liable for all the claimant's losses.

Smeaton v Equifax Plc [2013] EWCA Civ 108, 20/2/13

The claimant's credit file with the defendant wrongly showed the claimant was bankrupt, when the bankruptcy order had been rescinded. The claimant claimed compensation from the defendant under s 13 Data Protection Act 1998 on the basis that he had been unable to raise finance for his company. The claim failed principally for lack of causation because the credit file contained other items of adverse information correctly registered. But the defendant had not breached its duty to take reasonable care to ensure the accuracy of its data. Current legislation does not provide for advertisement of annulments and rescissions of bankruptcy orders and it was unreasonable to expect credit reference agencies to lobby for change. Nor do credit reference agencies assume a duty of care in tort to persons whose data they hold.

AL Sulaiman v Credit Suisse Securities (Europe) Ltd [2013] EWHC 400 (Comm), 1/3/13

A claimant who had borrowed to invest in structured notes failed to satisfy the court that the transaction and its risks had not been sufficiently explained. The claimant would have invested in any event, and her loss had been caused by her refusal to provide additional collateral by way of margin when it had been required.

Solicitor negligence

AIB Group (Uk) Plc v Mark Redler & Co Solicitors [2013] EWCA Civ 45, 8/2/13

Solicitors had committed a breach of trust in relation to a remortgage advance by releasing the funds without the necessary third party undertakings to discharge an existing charge, so completion could not be said to have taken place. The breach of trust was committed in relation to the entirety of the remortgage funds, not just the sum wrongly paid to the borrower which should also have been applied in discharge of the existing charge. But in calculating equitable compensation it was right to take into account the fact the lender had obtained a second mortgage and the sum awarded to the lender was rightly limited to the sum wrongly paid to the borrower.

UCB Home Loans Corp Ltd v Soni [2013] EWCA Civ 62,12/2/13

A partner in a solicitor's firm fraudulently misrepresented to a mortgage lender that he was carrying on business in partnership with the defendant under the name of a firm at a particular address. Although the two were in partnership, they traded from a different address. The defendant had not known or allowed that misrepresentation to be made and could not therefore be liable to the lender under s 14 Partnership Act 1890.

Clack v Wrigleys Solicitors LLP [2013] EWHC 413 (Ch), 11/3/13

Solicitors retained to prepare a loan agreement and charge on shares as security, were negligent in failing to obtain the share certificate and to ensure the shares were registered to the chargor. A legal charge on shares is incomplete until the shares are registered in the chargor's name. In the absence of evidence that the chargor had given value for the shares, it could not be said that the chargor had an equitable interest because equity will not aid a volunteer. It was doubtful that the existence of a transfer signed by the chargor was sufficient to evidence the security, but in any event the company could not lawfully gift shares to a volunteer.

Security

Meah v Ge Money Home Finance Ltd [2013] EWHC 20 (Ch), 18/1/13

A property had not been properly marketed by a mortgagee and had been advertised at too low an asking price. But the price for which the property had been sold was a proper market price so a claim against the mortgagee for selling at an undervalue failed.

Highbury Pension Fund Management Co v Zirfin Investments Ltd [2013] EWHC 238 (Ch), 14/2/13

A bank enforced by sale a first charge on a company's property to satisfy the company's borrowing and its liabilities to the bank under guarantees of loans by the bank to associated companies. The claimant, a holder of second and third charges on the property, was entitled under the doctrine of marshalling to a declaration that when all sums due to the bank had been

repaid, the claimant would be entitled to the benefit of charges held by the bank on assets of the associated companies which the bank had not enforced. Although those assets had become the subject of a restraint order in favour of the SFO, the claimant's rights were unaffected by the restraint order because they existed before the restraint order was made.

TFL Management Services Ltd v Lloyds Tsb Bank Plc (Ch), 28/2/13

A bank was not liable in restitution to compensate a company for legal costs which the company had incurred in seeking to recover monies from a third party which were ultimately held to be book debts charged to the bank. Although the company had mistakenly believed it had the right to payment under an asset sale agreement, the bank had not been a party to the proceedings taken by the company against the third party and any benefit to the bank of the proceedings was not a direct benefit but only incidental. In those circumstances the bank could not be said to have been unjustly enriched by the action taken by the company.

Garwood v Bank Of Scotland Plc [2013] EWHC 415 (Ch), 4/3/13

The bank was entitled to be re-registered as proprietor of a charge which it had cancelled by mistake not realising that its charge in fact secured another loan in addition to the loan which had been repaid. The cancellation of the charge was a voluntary disposition which would be set aside for mistake.

Trust & Accessory Liability

FHR European Ventures Llp v Mankarious [2013] EWCA Civ 17, 29/1/13

A secret commission paid by the seller of an hotel to the buyer's agent was held on constructive trust for the buyer. It could not be traced into the agent's hands, because when the seller paid the purchase price it had intended the buyer to obtain legal and beneficial title to the money. But the agent had been a fiduciary and had taken advantage of an opportunity belonging to the buyer, because the buyer might have delayed contracting if it had known that the commission was to be paid to the agent from the purchase money, or the buyer might have negotiated down the fee it paid to the agent thereby reducing the overall cost of the transaction to the buyer.

Jeremy D Stone Consultants Ltd v National Westminster Bank Plc [2013] EWHC 208 (Ch), 11/2/13

A bank which had operated accounts for a company which had operated a fraudulent investment scheme, and the bank manager responsible for the company's accounts, were not liable to investors for dishonest assistance as they had not been aware of the fraud, nor had they been party to a conspiracy to injure the investors. There was no claim for unjust enrichment against the bank because the bank had been liable to the company for the funds which it received for the company's account. The bank had only acted in a ministerial capacity and would also have had a defence of change of position. Nor had the bank manager acted incompetently or assumed any responsibility for information he gave so as to give rise to a claim in negligence.

Challinor v Juliet Bellis & Co [2013] EWHC 347 (Ch), 25/2/13

Money paid by investors into a solicitor's client account had not been intended to be loans to a company. In the absence of a written agreement the terms on which the money had been provided were too uncertain to conclude that they had been provided in escrow. Although stipulation of an exclusive purpose was usually necessary to give rise to a Quistclose trust, the solicitors had held the funds on an analogous type of resulting trust for otherwise there would have been no good reason for the requirement to pay the funds into a client account. The solicitors had acted in breach of trust by releasing the funds to the company without receiving unequivocal instructions to do so from the beneficiary of the trust.

IG Index Plc v Colley [2013] EWHC 478 (QB), 7/3/13

An employee of a spread-betting company was liable for breach of fiduciary duty and fraud for dishonestly manipulating the company's trading prices to enable clients to place spread bets at artificially low prices so as to make unjustified profits. Certain of the clients were liable for dishonestly assisting him and for fraud. Fraudulent conduct does not necessarily require there to have been a misrepresentation. Here accounts were used by the clients as a vehicle for defrauding the company. The bets were also void by reason of a provision in the company's terms allowing it to avoid bets for manifest error. An error resulting from fraud could be a manifest error.

Neil Levy

Reform of the Consumer Credit Act 1974

On 6th March 2013, the Financial Services Authority ("**FSA**") and HM Treasury respectively published their long awaited consultation documents on the future of the Consumer Credit Act 1974, (the "**CCA**").

Why?

The consultation documents form part of the wide ranging reform of financial services regulation prompted by the 2008 financial crisis. With effect from 1st April 2014, responsibility for the oversight and enforcement of the CCA would transfer from the Office of Fair Trading ("OFT") to the new Financial Conduct Authority, ("FCA").

As a result of the proposed transfer, the opportunity has been taken to consider the scope and shape of the consumer credit regulatory regime. The Government intends that the Financial Services and Markets Act 2000, (the "FSMA") will replace the provisions of the CCA which address licensing and the overall framework for regulation of consumer credit. The powers to authorise, supervise and enforce against firms carrying on consumer credit activity will therefore derive from the FSMA.

The transfer of power and the change in statutory authority represents a major shift. The regulatory regime enacted pursuant to the FSMA is a handbook – based, rules and guidance regime. However, the consumer credit regime currently overseen and enforced by the OFT is a statutory regime dictated by the prescriptive provisions of the CCA itself and the regulations made under that Act. It follows that the two regimes operate in a very different manner.

Whilst both the FSA and Treasury consultation documents cover common ground, the Treasury document describes, in overarching terms, the model

"Firms which carry on high risk consumer credit activity will be subject to a comprehensive authorisation and supervision regime."

and approach for regulating consumer credit under the FCA and contains draft regulations. The FSA document contains more detail on how, in practical terms, the FCA will exercise its new functions and powers, as well as describing the parameters and scope of the new regulatory regime.

Why is this important?

The consultation heralds a fundamental transformation in the way in which consumer credit is overseen and enforced. The OFT will cease to exist with effect from 1st April 2014 and all persons and firms carrying on consumer credit business will need to be authorised and regulated by the FCA by 1st April 2016. (Transitional provisions are proposed to cover the period between April 2014 and April 2016.)

In order to facilitate the transfer of supervision, carrying on consumer credit business (which includes making available consumer credit and consumer hire facilities and carrying on ancillary credit business such as credit broking, debt collecting and debt adjusting) will become regulated activity for the purposes of the FSMA. Nevertheless, it should be noted that certain important provisions of the CCA will remain on the statute book.

Key proposed changes include:

- The abolition of the Consumer Credit licensing system so that persons carrying on consumer credit business must be authorised and regulated by the FCA by 1st April 2016. Applicants for authorisation will therefore be subjected to tougher and more intrusive initial scrutiny.
- The recognition of 'low risk' and 'high risk' consumer credit activity so that a proportionate supervisory regime may be applied to 'low risk' consumer credit businesses.
- Low risk activity includes consumer hire; consumer credit lending where no interest or charges are levied; consumer credit broking as a secondary activity (for example, car dealers who act as credit brokers); and not - for - profit debt counselling and debt advisory services.
- High risk consumer credit activities include consumer credit lending where interest is charged; the provision of overdraft facilities; the provision of credit card facilities; pawnbroking; the provision of hire purchase and conditional sale facilities; pay day lending; credit broking; debt adjusting; debt collection; debt counselling; and credit information services.
- Firms which carry out only low risk consumer credit activity will be able to apply for a 'limited permission' to cover low risk consumer credit activity. Less intrusive authorisation requirements and lower fees will apply to firms carrying on only low risk consumer credit activity.
- Upon authorisation, firms with a limited permission will be subject to a lesser degree of supervision which is anticipated to be more reactive in nature and low risk firms will need to report only basic information to the FCA.
- Firms which carry on high risk consumer credit activity will be subject to a comprehensive authorisation and supervision regime. Persons running the firm must pass the 'fit and proper person' test.
- High risk firms will be required to meet the threshold conditions for authorisation as set out in the FSMA. However, minimum prudential capital requirements will not be required of consumer credit firms, save for debt management firms which will have to comply with certain prudential standards.
- It is proposed that a bespoke and proportionate regime will apply to consumer credit firms with regard to the vetting and pre-approval by the FCA of personnel performing controlled functions and holding positions of significant influence within consumer credit firms.
- Firms which are not lenders or credit reference agencies have the option of becoming an authorised representative of a lender. The authorised representative and introducer authorised representative systems currently contained in the FSMA will apply in an equivalent way to consumer credit firms. An authorised representative must contract with a principal who takes regulatory responsibility for the acts and omissions of its authorised representative.
- It will not be possible for a lender to be an authorised representative of another lender.
- It is proposed that operating a peer to peer lending platform will become regulated consumer credit activity for the purposes of the FSMA. It is also proposed that lead generation might become regulated consumer credit activity for the purposes of the FSMA.
- The biggest change for firms and persons carrying on consumer credit business relates to conduct. Firms will need to comply with both the high level standards contained in the Principles, ("PRIN") General ("GEN") and Systems and Controls ("SYSC") chapters of the FCA Handbook in addition to the specific consumer credit conduct rules and guidance contained in the relevant consumer credit chapter proposed to be added to the FCA Handbook.
- It is proposed that the detailed consumer credit conduct rules will be based on the statutory provisions as to conduct currently contained in the CCA. It is also proposed that the rules and guidance for consumer credit to be contained in the FCA Handbook should seek to replicate current OFT guidance such as the OFT Guidance for Credit Brokers and Credit Intermediaries and the OFT Guidance on Irresponsible Lending. If these proposals are enacted, it would obviously represent a major shift in terms of elevating previously non binding guidance into potentially binding rules.
- The Government will consult on the detailed consumer credit conduct rules and guidance in the autumn of 2013. It is presently proposed that the final rules and guidance will be made by March 2014, with a deadline for compliance of April 2014.
- Consumer credit complaints will continue to fall within the jurisdiction of the Financial Ombudsman Service, ("FOS") although the need for a separate consumer credit jurisdiction will fall away.
- Consumer credit advertising will fall within the FSMA financial promotions regime.
- The FCA will have extensive powers of enforcement and intervention, together with the power to impose financial penalties.

Significantly however, whilst the consumer credit regime as it relates to authorisation, supervision and regulatory enforcement will be transformed, the customer - facing elements of the CCA will remain on the statute book and thus, in full force and effect.

In practical terms, this means that the detailed and prescriptive provisions of the CCA relating to the entry into and the form and content of CCA regulated credit and hire agreements are unaffected. Similarly, the provisions of the CCA relating to the supply of post contract information; the post contract administration and enforcement of regulated credit and hire agreements; and the provisions of the CCA which confer rights on the consumer, such as the right of withdrawal and the right to repay a credit agreement early, are also largely unaffected.

Lenders and litigators alike will note that s.56 CCA, s.75 CCA and the unfair relationships provisions at s.140A CCA will also remain on the statute book. However, the Government has made it clear that a review of the retained provisions of the CCA will be conducted by 1st April 2019 with a view to assessing whether or not they may be repealed without causing consumer detriment.

Next steps

Comments and responses to the consultation are invited by 1st May 2013. As noted above, a further consultation on the detailed rules will take place in the autumn.

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