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Introduction

Welcome to the latest edition of our financial litigation roundup. In this edition, we consider recent judgments and ongoing cases from the banking and financial world in the UK and Hong Kong, as well as legal developments across those jurisdictions.

RPC continues to build on its status as one of the few premier tier banking and finance litigation specialists which is able to assist market counterparties of all descriptions in disputes against the largest banking institutions due to our predominantly conflict free position. The practice goes from strength to strength and has earned the recognition of Chambers and Legal 500 as being in the highest bracket of conflict free firms operating in the financial markets disputes sector, together with many well-deserved individual rankings and reviews for our partners. In May 2018, Simon Hart took up the role of Head of Financial Disputes, with Tom Hibbert continuing in his role as Global Head of Commercial Disputes and a senior partner in our Financial Disputes team

We thoroughly recommend following our Twitter feed at @conflictfreeRPC for up-to-the-minute topical updates, news and views on financial markets and financial markets disputes.

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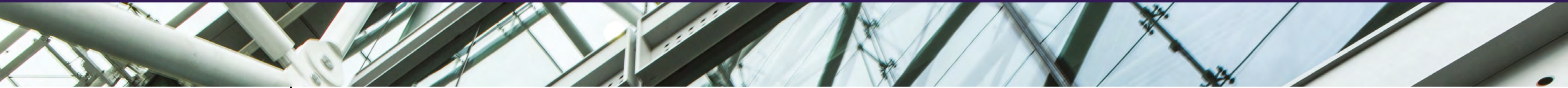

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Developments of note

- In May, it was announced that Dana Gas (see case report below, and past issues) had reached agreement on a restructuring proposal with a majority of its creditors under its disputed sukuk structure, which Dana Gas claims was no longer Shari'ah compliant. The necessary supermajority consent from the holders was received in June. The settlement reportedly gives investors an option to exit with a 9.5% haircut (with no payment of outstanding sums due), or alternatively to exchange into a new sukuk, which will give investors a 4% profit rate (reduced from the 7% or 9% payable under the disputed structure).

- Currency manager ECU Group's pre-action skirmishing with HSBC over FX front-running allegations continued. Press reports state that an application was made in March by the ECU Group alleging that HSBC had breached the terms of an order it had obtained for pre-action disclosure (see case report below). The application reportedly asserted that such pre-action disclosure as had been given by HSBC provided evidence that at least one of the trades the ECU Group is concerned about had been front run by a senior HSBC trader (previously convicted of front-running other trades in a DoJ criminal prosecution).

- The scandal over the activities of the HBOS Impaired Assets Division in Reading branch continues to run under close parliamentary, regulatory and prosecutorial scrutiny. The established fraudulent activities involved confected referrals of SMEs to the distressed lending unit in the period from 2002-2007. An external turn-around consultant business acting in collusion with HBOS's Head of Impaired Assets Division would then extract excessive additional lending from HBOS, extract inflated fees from the client and asset strip the client company assets. Criminal convictions of six individuals were secured in 2017. The current leg of the scandal concerns the wider internal knowledge within HBOS – and after the takeover, Lloyds – of the existence of the fraudulent activity, with allegations that it was covered up by management. In late June, the All Party Parliamentary Group on Fair Business Banking (APPG) released a copy of a draft internal Lloyds report widely referred to as the 'draft Project Turnbull report'. Rumours about the draft report and its contents have been circulating for some years. It sets out details of evidence which, following an internal investigation, a Senior Manager in Lloyd's Risk Division provided to Thame Valley Police in connection with their inquiries. It sets out a range of conclusions that are very serious indeed. A copy can be found on the APPG's website.

- Perhaps the most prominent alleged victim of the HBOS fraud is the former DJ and TV presenter Noel Edmonds. Mr Edmonds is reported to have obtained litigation funding from Therium, the well-known litigation funder, for a claim of up to £60m against Lloyds. Reports suggest (but we cannot confirm) that Mr Edmonds' "Lloyds Victims Radio Station" webcast may be a source of more information (click here).

- A £1.1bn damages claim against Barclays by a UK subsidiary of a US credit card operator continues to work its way through the courts after Barclays failed to strike out the claims. *CCUK Finance Limited v Barclays Bank PLC* concerns the purchase by CompuCredit (now Atlanticus) of the Monument sub-prime credit card business from Barclays in 2007. The sale terms included an indemnity from Barclays in respect of PPI mis-selling claims. The parties subsequently agreed that CCUK would process PPI claims and make compensation payments, which would be reimbursed by Barclays. Barclays ceased paying CCUK under the indemnity, alleging that CCUK was paying compensation to cardholders who were not entitled to compensation (including, it says, where the cardholder was not sold a PPI policy). CCUK is seeking damages and orders that either Barclays takes over the compensation procedure itself, or that CCUK's compensation practices are approved.

- Judicial appointments and retirements: the make-up of the UK Supreme Court is set for significant change this year, as three of the full bench of 11 Justices come up against the statutory retirement age of 75. Lord Mance retired in June, and Lord Hughes and Lord Sumption are set to retire in August and December respectively. Lady Arden has been appointed to the vacancy left by Lord Mance. Changes too in the Court of Appeal with the appointments of Lady Justices Nicola Davies, Rose, and Simler and Lord Justices (Jonathan) Baker, Green, Haddon-Cave and Males to fill vacancies arising from Supreme Court appointments and the retirement of Beatson LJ, Jackson LG and Gloster LJ. Five appointments of High Court judges have also recently been made, with the most relevant for financial cases being the appointments of Waksman J and Murray J. Five further appointments from this round are due to be revealed in coming months.

- The SFO's prosecutions in relation to Barclays' capital raising from Qatari entities in 2008 continues, although charges against the two Barclays corporate entities were dismissed by the Crown Court on 21 May 2018. The SFO says that it is considering its position in relation to that ruling. Reporting restrictions apply. In early July, the SFO also announced that it was ending its long-running probe into alleged LIBOR manipulation by Lloyds Banking Group/HBOS, on the basis that there was insufficient evidence to prosecute individuals or the institutions.

- For more regular day-to-day updates, news and views on banking and financial litigation issues and related financial markets developments, please do follow our Twitter account @conflictfreeRPC. It may well be the only financial litigation twitter account, but in our not-so-neutral view, it's definitely the best.

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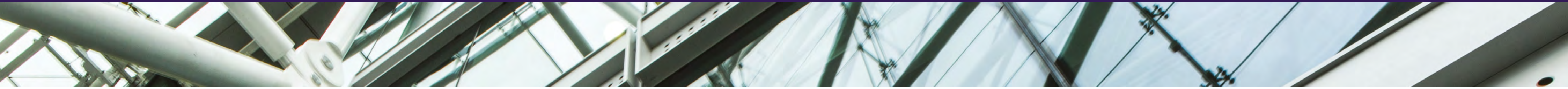

First Tower Trustees Ltd & Intertrust Trustees Limited v CDS (Superstores International) Limited [2018] EWCA Civ 1396

This Court of Appeal case stemmed from a property dispute, but has broken new ground in a topic of fundamental importance in banking litigation: so-called contractual estoppel.

The dispute concerned a failure by the appellant landlords to disclose the existence of asbestos issues to a prospective tenant. In replies to formal conveyancing enquiries, the landlords had said they were not aware of any environmental issues. They were under a duty to update that information if anything changed. They were then told by a contractor that there were hazardous asbestos issues, but did not inform the respondent prospective tenant. The leases were then entered into, which contained "no reliance" clauses to the effect that the respondent had not relied on any representations by the appellant landlords before entering into the leases. For one of the units, this clause had an exception for the formal inter-solicitor conveyancing enquiries but for the others, there was no such exception.

At first instance it was held that the landlords were liable, and the judge, Michael Brindle QC sitting as a deputy High Court judge, gave judgment against them for £1.4m plus interest. Following the dual characterisation in *Springwell Navigation Corporation v JP Morgan* (a case led by our Tom Hibbert[1] with Michael Brindle QC as leading counsel) found that these non-reliance clauses were in character "exclusion clauses" rather than merely "basis clauses", and therefore had to be assessed for reasonableness under the Unfair Contract Terms Act 1977. He then proceeded to find that it was unreasonable to attempt to exclude liability for representations made in the form of formal answers to conveyancing inquiries.

The Court of Appeal dismissed the appeal by the landlords against that decision, and in the process of doing so went further. In particular, Lord Justice Leggatt (whose judgment was approved by the other judges) held that:

"whenever a contracting party relies on the principle of contractual estoppel to argue that, by reason of a contract term, the other party to the contract is prevented from asserting a fact which is necessary to establish liability for a pre-contractual misrepresentation, the term falls within section 3 of the Misrepresentation Act 1967. Such a term is therefore of no effect except in so far as it satisfies the requirement of reasonableness as stated in section 11 of UCTA."[2]

This decision is very welcome in restoring certainty to how non-reliance clauses should be treated. It makes it clear that parties cannot evade the statutory controls on limitations of liability by adopting a contractual fiction that nothing happened to attract liability, notwithstanding that in fact it did.

It is of course important also to recognise that the assessment of UCTA reasonableness in the context of financial markets will be carried out on the basis that sophisticated counterparties are capable of determining and agreeing allocations of risk and limitations of liability. However, that is an exercise which will now be carried out in the round against the full factual backdrop available to the court at trial, not simply as an abstract exercise based solely on words written on the face of standard terms and conditions of the party seeking to rely on them. That is, in our view, a hugely welcome development.

The judgment can be found here.

1. The Court of Appeal judgment can be found here.
2. Click here for Lewison LJ at paragraph 111.

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Property Alliance Group Ltd v The Royal Bank of Scotland Plc [2018] EWCA Civ 355

In March the Court of Appeal handed down its much anticipated judgment on mis-selling and LIBOR manipulation brought by the Property Alliance Group (PAG), which was treated as a de facto test case for the principles of liability stemming from the sale of products affected by a bank's manipulation of LIBOR submissions.

PAG's appeal against the unfavourable first instance decision was dismissed in full. There is no question that this was a victory for RBS and other banks caught up in the LIBOR submission scandal, but it was not an unqualified victory, and the Court of Appeal set out some helpful guidance on the principles which apply, not just in respect of LIBOR manipulation activity but also, by extension, to the standards of conduct which can legitimately be expected from financial markets participants.

To recap the facts of this case: Property Alliance Group Limited (PAG) is a property investment and development company which contracted with the Royal Bank of Scotland plc (RBS) on a number of loan facilities between May 2003 and July 2014. PAG also entered into a number of swaps transactions referenced to three-month GBP LIBOR, and it was these transactions (and subsequent break costs to PAG of £8.261m) which were the subject of the litigation.

Proceedings first initiated by PAG in 2013 were dismissed by the High Court in 2016. In 2017, leave to appeal was granted on the basis that consideration by the Court of Appeal would provide "a useful vehicle for determining what are likely to be central issues in most similar cases". The key findings of the Court of Appeal were:

- On LIBOR, the Court of Appeal found (contrary to the High Court) that in selling the LIBOR-linked swaps products, RBS had made an implied representation that it was not seeking to manipulate the LIBOR reference rate, and that it did not intend to do so in future. However, the Court of Appeal decided that PAG could not prove that the representation had been false, in particular because although RBS had admitted (to US regulators) that it had manipulated Yen and Swiss franc LIBOR, there was no such admission in relation to GBP LIBOR. The Court of Appeal held that the implied representation made in the sale of GBP LIBOR swaps was limited to a representation about non-manipulation of GBP LIBOR, not other LIBOR benchmarks. The first instance judge had found as a matter of fact that PAG had not established any manipulation by RBS of the GBP LIBOR rate, and the Court of Appeal was not persuaded there was any reason to overturn that finding of fact.
- The Court of Appeal disapproved of the line of first instance cases which had sought to develop a concept of a so-called 'mezzanine' or intermediate duty of care in the context of banking relationships, said to be more than a duty not to misstate or misrepresent, but less than a full advisory duty. Unless there are special circumstances or a specific advisory relationship, the Court of Appeal held that a bank does not owe a duty to explain the potential consequences of a transaction to its customer (especially in circumstances where that customer is 'sophisticated'). A bank's duty in a non-advisory context is therefore limited to the duty not to misstate unless one of the traditional tests for establishing a duty of care can be satisfied.
- Finally, the Court of Appeal considered arguments over an exercise by RBS of a right to appoint a valuer and to charge PAG for the valuation. PAG's relationship had been transferred into RBS's (rather notorious) GRG distressed debt unit, and in 2014 RBS indicated that it did not wish to continue extending funding to PAG. PAG's complaint was that RBS had appointed the valuer in 2013, despite having made up its mind by that point not to continue funding. It argued that the seemingly absolute right to appoint a valuer conferred on RBS under the relevant agreement was qualified by a *Socimer*[3] style restriction on the discretionary exercise of that right, which meant that it was not intended that the Bank could commission a valuation for a purpose unrelated to its legitimate commercial interests or could do so in a way which could not rationally be thought to advance its interests. The Court of Appeal agreed that the Bank was entitled only to consider its own interests when considering appointing a valuer, but also held that discretion was subject to a rationality requirement along *Socimer* lines. Accordingly, the power had to be "exercised in pursuit of legitimate commercial aims rather than, say, to vex PAG maliciously". As a matter of fact, it was found that PAG had not shown that RBS had abused its power in such a way.

The judgment was undoubtedly a victory for RBS and other LIBOR submission banks who have been guilty of manipulation of submissions. However, it was a qualified victory. A finding that there is an implied representation of honest conduct in respect of benchmarks (and presumably by extension also underlying transactions and assets) is a welcome development, even if that was narrowly cast. The proposition that an offer to sell a product linked to a benchmark carries with it an implied representation that the seller is not wrongfully trying to abuse and manipulate that same benchmark might seem like it should be uncontroversial. However, until this Court of Appeal judgment, that was in fact a very controversial issue for English civil law as the hard fought battle in the PAG matter showed.

The full detail of the Court of Appeals decision in respect of each of these claims can be found in the final judgment here.

3. See the Court of Appeal's judgment in *Socimer International Bank Ltd v Standard Bank London Ltd* [2008] EWCA Civ 116.

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JSC BTA Bank (Respondent) v Khrapunov (Appellant) [2018] UKSC 19

This Supreme Court decision arose from the sprawling litigation between JSC BTA Bank and its former chairman, Mr Mukhtar Ablyazov. BTA has been seeking the return of US$6 billion of assets which it alleges Mr Ablyazov had misappropriated while in control of BTA.

BTA obtained an asset freezing and disclosure order against Mr Ablyazov in 2009, and then secured appointment of receivers in 2010 followed by a series of search and disclosure orders against third parties. These revealed wide-spread evasion of the asset freezing and disclosure order. Mr Ablyazov was found in contempt of court and sentenced to 22 months in prison, but had fled the jurisdiction. An unless order was made against him, to the effect that his defences to the substantive claims would be struck out unless he surrendered and purged his contempt. He did not, and default judgment was given against him.

Mr Khrapunov is Mr Ablayazov's son-in-law. BTA sought to bring proceedings against Mr Kraphunov, alleging that he had entered into a combination or understanding with Mr Ablyazov to assist him in dissipating and concealing his assets, in knowing breach of the asset freezing and disclosure order. In particular, BTA argued that this represented a conspiracy to cause BTA harm by the unlawful means of furthering the contempt of court by Mr Ablyazov.

The Supreme Court found for BTA in this respect, holding that the contempt of court as a criminal act did constitute an unlawful means. Furthermore, it held that the English courts had jurisdiction over this economic tort claim because the alleged agreement to hide and launder the assets had been made in England, where Mr Ablayzov was then resident. As the actual steps taken to obfuscate assets were taken in offshore jurisdictions, this was an important finding for BTA.

The judgment has added a powerful new weapon in the English litigators' armoury when seeking to enforce against parties who have engaged in attempts to hide their assets from the purview of the English courts.

The full judgment is available here.

Post-script

Subsequently, the Bank made an application to cross-examine Mr Khrapunov as to his disclosure obligations under a freezing order granted against him, having established a good and arguable case that he had not complied with his disclosure obligations. That order was granted, and Mr Khrapunov applied for permission to be cross-examined via a videolink from Switzerland (where he is resident) claiming that he feared being extradited to Ukraine if he came to England for the cross examination. Mr Khrapunov cited the example of *Polanski v Conde Nast Publications Ltd* [2005] 1 W.R.R. 637 in which Roman Polanski was given permission to give evidence via videolink from France due to his fear of extradition to the USA on infamous charges.

This application made as far as the Court of Appeal, at which it was rejected. The Court of Appeal accepted that there was some risk of extradition proceedings being visited on Mr Khrapunov if he attended a hearing in England, but to the extent this risk to Mr Khrapunov was a material factor it was outweighed by the importance of cross-examination in person. Any risk of unfairness to Mr Khrapunov would be a matter, if it arose, to be dealt with by the court seized with any such extradition proceedings.

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Singularis Holdings Limited v Daiwa Capital Markets Europe Limited [2018] EWCA Civ 84

In February the Court of Appeal handed down judgment in the case of *Singularis Holdings Limited v Daiwa Capital Markets Europe Limited*. Singularis was a company that had been set up to manage the personal assets of its sole shareholder, Mr Al Sanea, and the litigation is an offshoot of the long-running and multi-limbed Al Sanea/Al Gosaibi litigation which has been ongoing since the collapse of the Saad Group and AHAB in 2009.

Prior to those issues erupting, Daiwa had entered into a GMSLA with Singularis, through which the latter acquired an equity portfolio valued at over US$10bn. As the Saad Group imploded in 2009, there were a raft of signals of distress from the Saad Group. Singularis sold down its equity holdings, realising a profit of over US$200m. Over the course of June-July 2009, Mr Al Sanea then directed Daiwa to transfer sums of money to other arms of his businesses. Daiwa approved and completed these transfers despite their knowledge of the Saad group's and Mr Al Sanea's on-going financial difficulties. In August 2009 Singularis went into liquidation. In 2014 Singularis issued a claim against Daiwa for US$204m, being the total amount it had transferred out of Singularis' account in June-July 2009 on Mr Al Sanea's instructions. Singularis's liquidators brought the proceedings on the unsurprising basis that in making these payments out Mr Al Sanea had been acting dishonestly in his own interests and not those of Singularis, as Daiwa should have known.

The High Court held that Daiwa did owe a *Quincecare* duty to Singularis, and that Daiwa had acted in breach of that duty by actioning the transfers directed by Mr. Al Sanea in June-July 2009. Daiwa asserted a defence that Mr Al Sanea's illegal actions were to be attributed to Singularis, such that the latter could not assert claims against Daiwa in respect of its own illegal conduct. The High Court rejected this defence on the basis that Mr Al Sanea's actions could not be attributed to Singularis, but did reduce the amount of damages payable by Daiwa to account for contributory negligence by Singularis.

Daiwa's appeal primarily concerned the rejection of its illegality defence (as well as other defences). It did not seek to challenge the fundamental findings that it owed or breached a *Quincecare* duty of care to Singularis.

The Court of Appeal upheld the High Court's determination that Mr Al Sanea's fraud could not be attributed to Singularis. In so doing, it followed, and elucidated upon, the Supreme Court's judgment in *Bilta (UK) Ltd v Nazir*[4], in which the Supreme Court refused to follow the prior leading House of Lords authority of *Stone & Rolls Ltd v Moore Stephens*[5]. The Court of Appeal noted that whilst Mr Al Sanea was the sole shareholder of Singularis, he was not the sole director, and held that Daiwa would have had to establish that all of its directors were complicit in the fraud for there to be any chance of attributing knowledge of the fraud to the company. Moreover, even then, the company had a legitimate trading history and had not been created for the purpose of carrying out the fraudulent activity as it had been in Stone & Rolls. The latter, to the extent it has any precedent value at all, is now confined to those narrow circumstances.

This is the only known case in which a bank has been found liable under a *Quincecare* duty not to make payments out of a company account on fraudulent instructions from an authorised signatory. As Sir Geoffrey Vos concluded the (unanimous) decision of the Court of Appeal in Singularis: "As Steyn J said in *Quincecare*: trust, not distrust, is the basis of a bank's dealings with its customers; and full weight must be given to this consideration before one can conclude that the banker had reasonable grounds for thinking that the order was part of a fraudulent scheme to defraud the company. He continued by saying that the law should guard against the facilitation of fraud, and exact a reasonable standard of care in order to combat fraud and to protect bank customers and innocent third parties. I respectfully agree."

In the right, albeit narrow, circumstances, this is a valuable avenue of redress for creditors of companies which have been the victim of fraudulent by their directors.

The judgment is available here.

4. Click here to view.
5. Click here to view.

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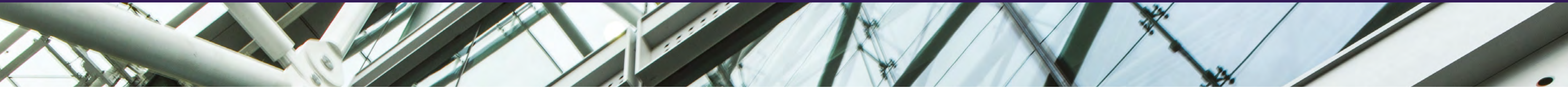

The Golden Belt litigation [2017] EWHC 3182

As noted in previous editions of this publication, this case also stemmed from the collapse of the Saad Group, and concerns a $650m Sukuk transaction entered into with Mr Al-Sanea.

The Trustee (Golden Belt 1 Sukuk Company) and various hedge fund investors sued BNP Paribas, as arranger, manager, and bookrunner, for damages arising from its alleged failure to obtain a signature on the deal documentation from Mr Al-Sanea in the "wet ink" form necessary to make it binding in Saudi law, with the result that Saudi proceedings against Maan Al-Sanea are unlikely to give any recovery.

Judgment was handed down in the case against BNP Paribas, with the investor claimants succeeding in their claim for damages against BNP Paribas, although it was established that no duty of care was owed by BNPP to Golden Belt as the Trustee and Issuer.

The High Court found that BNP Paribas did owe a duty in tort to investors in the sukuk (including those who had purchased their interests in the secondary market) to ensure that the transactional documentation had been executed properly. The judge concluded that BNP Paribas had "dropped the ball" when making arrangements for the execution of the Promissory Note, by not ensuring that that it was signed with the necessary formalities to make it enforceable under Saudi law.

BNP Paribas has been granted permission to appeal.

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Dana Gas PJSC v Dana Gas Sukuk Ltd & Ors [2018] EWHC 277, [2018] EWHC 278

As previously reported, the High Court handed down substantive judgment on a preliminary issue of law in the Dana Gas dispute in November 2017, in so doing holding that Dana Gas was liable to its Islamic financing sukuk 'bondholders' in English law, and finding that any alleged non-compliance of the sukuk structure with Shari'ah law was irrelevant to the operation of a key English law governed Purchase Undertaking. That judgment was handed down after a battle of anti-suit injunctions between the English and UAE courts, leading to an undefended hearing in which Blackstone as a leading 'bondholder' took over the conduct of the hearing.

Shortly after the English judgment was handed down, the UAE Court of Appeal lifted the UAE anti-suit injunction, permitting Dana Gas to seek to reopen the English proceedings. Dana Gas then issued an application under CPR r.39.3, requesting that the November judgment be set aside or in the alternative, for permission to appeal the decision. Re-visiting Dana Gas's arguments on construction, mistake and public policy, the High Court dismissed these applications, and ordered Dana to withdraw its legal proceedings and injunctions in the UAE.

Those judgments can be found here and here.

In March Dana Gas released a public statement to the effect that an application for permission to appeal the dismissal of its application had been refused. Subsequently, it issued a further statement to the press saying that UAE court had prohibited it from withdrawing proceedings in the UAE or abandoning UAE court orders which had been made in its favour, and ordering that enforcement of the English court's orders in the UAE be suspended while they "are referred to the UAE judiciary to resolve their enforceability". According to press reports in April, Dana Gas was subjected to an injunction preventing it from paying out a $75m dividend to its shareholders, and was ordered instead to pay those monies into court.

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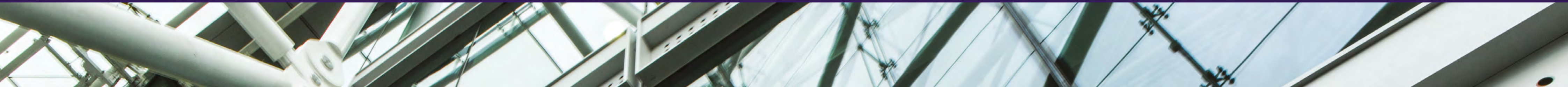
LBI ehf v Raiffeisen Bank International AG [2018] EWCA Civ 719

Icelandic bank LBI ehf (LBI) appealed against the High Court decision in its case against Raiffeisen Bank International AG (RZB) regarding the interpretation of the term "fair market value" in the close-out provisions of a repo agreement made on the terms of the Global Master Repurchase Agreement 2000 edition (the GMRA).

LBI had gone into receivership following the collapse of the Icelandic banking system, which triggered the close out provisions on open repo trades it had with RZB. Under the close-out provisions the assets held by the non-defaulting party (in this case RZB) are valued and that valuation determines the final close out payment. In this case the value of the assets fell to be determined by reference to their "fair market value".

At first instance, LBI had argued that "fair market value" meant the market value of the relevant asset in conditions where there was "a willing buyer, willing seller, knowledge of the asset in question and a lack of compulsion". Practically, this would mean that during periods where the relevant market was distressed or illiquid (as was the case at the time of RZB's valuation) it was not permissible to rely on actual market prices. LBI argued that instead the valuation should be based on what the assets would be worth in 'normal' market conditions. LBI was unsuccessful with this argument and appealed.

The main bases of LBI's appeal were that its definition of "fair market value" was consistent with the contractual construction of the GMRA and aligned with the interpretation of "fair market value" in the Australian and Canadian courts. RZB submitted that the wording of the GMRA gave a very wide discretion to the non-defaulting party and the only constraint on this discretion was the *Socimer* style requirement to act rationally and not arbitrarily or perversely. RZB also referred to the case of *Lehman Brothers International (Europe) v Exxonmobil Financial Services BV* [2016] EWHC 2699 (Comm), another GMRA case, which had proceeded on the basis that the non-defaulting party was entitled to determine "fair market value" by reference to the actual market conditions at the time, notwithstanding the fact the market was distressed following the collapse of Lehman Brothers.



Considering the arguments before it, the Court of Appeal did not agree with LBI's contractual interpretation and was not persuaded by foreign jurisdiction cases cited as their factual contexts were quite different. Agreeing with RZB's submissions the court dismissed the appeal.

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Citibank NA, London Branch v Oceanwood Opportunities Master Fund & Ors [2018] EWHC 305, [2018] EWHC 448

In this case, Citibank brought a Part 8 claim in relation to financing arrangements for the distressed Norske Skog group. Citibank's claim sought directions from the court as to whether it was entitled, as Security Agent and Note Trustee of loan notes issued by Norske Skog, to follow directions given by Oceanwood Opportunities Master Fund as the majority holder of those loan notes.

The issue arose because an Intercreditor Agreement contained a provision which provided for the majority noteholders to be able to give directions to the Security Agent and Note Trustee. However, there was a provision in the Indenture disentitling any noteholder which had control of Norske from having its vote counted. A fund having a minority interest in the loan notes, Foxhill Capital Partners, raised the Indenture provision, asserting that it precluded Citibank from acting on the instructions of Oceanwood. Foxhill sought to challenge the jurisdiction of the English courts over Citibank's claim on the basis that the dispute arose under the Indenture which was governed by New York law. That application was dismissed, and Foxhill took no further part in the proceedings save for outlining their position in correspondence (preferring to save their powder for New York proceedings).

The English court moved quickly to reach a decision. At the hearing, Citibank delegated the task of arguing the points which appeared to have been made in correspondence by Foxhill to its own junior barrister – arguing against its own position in order to leave less room for attack on the legitimacy and thoroughness of the English hearing.

The High Court decided in favour of Citibank. The central issue was whether Oceanwood was a "person directly or indirectly controlling" Norske Skog and so should be disqualified from voting on decisions to give instructions to Citibank. Foxhill had advanced several arguments:

- The first was simply that Oceanwood held 51% of the notes. It was alleged this meant that Oceanwood by definition had control after an event of default transferred power to the secured noteholder creditors. The High Court rejected this argument, finding that to prevent a majority noteholder from voting on how to instruct a Security Trustee to deal with the notes' security after an event of default would be absurd and non-commercial.
- Instead, the judge held that the degree of 'control' which leads to disqualification from voting has to be something derived from the factual matrix, outside of the terms of what had been agreed in the loan note documentation. In particular, the judge went on to find that the "control" in question has to stem from some form of control of the Issuer which is not sourced from rights under the notes in question. It had to be something extrinsic to the powers and rights the noteholder has as a creditor under the notes, and it has to be "pervasive". Neither of these conditions was found to be satisfied.

The full judgments can be found here and here.

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Lehman Brothers Special Financing Inc v (1) National Power Corp; (2) Power Sector Assets and Liabilities Management Corp

This is an important decision of the High Court in relation to the calculation of close-out amounts under a 2002 ISDA following an event of default. NPC and LBSF had an open currency forward at the point of LBSF's insolvency. NPC submitted its close-out calculation based on a firm quotation for a replacement trade received a few days after the termination date (as at which date the close-out amount was to be determined), on which it traded. However, NPC made an error in failing to deduct an accrued but unpaid coupon due to LBSF. Later, NPC sought to re-do its calculation based on a more expensive (and hence, for the purpose of the close-out calculation, more favourable) indicative quotation it received on the termination date. LBSF sought to rely on a mark-to-market valuation of the trade which was favourable to it.

The court held that NPC has completed its obligation and right to make its determination first time round and that, even in the cases of manifest numerical errors, once a determination had been made it was (absent agreement) for the court to decide whether a determination was compliant and, if not, what a compliant determination looked like. The court also held, contrary to NPC's submissions, that the obligation under the 2002 ISDA to use "commercially reasonable procedures in order to produce a commercially reasonable result" imposed an objective standard of reasonableness, rather than a less onerous rationality standard along the lines of the implied limitation on a decision maker's discretion imposed in *Socimer International Bank Ltd v Standard Bank London Ltd (No 2)* [2008] EWCA Civ 116. However, the court stressed that an obligation to conduct an objectively reasonable valuation did not mean there was a single right answer, and decided that NPC's first calculation using the firm quotation it ultimately traded on was commercial reasonable (subject to the accrued coupon error).

The full judgment can be found here.

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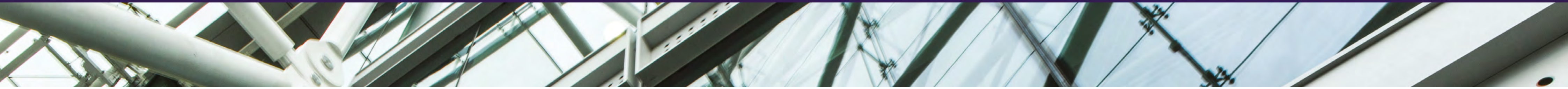

(1) Goldman Sachs International (2) Guardians of New Zealand Superannuation Fund v Novo Banco SA [2018] UKSC 34

This Supreme Court decision arose from lending made to Banco Espirito Santo prior to its collapse and state rescue by an entity called Oak Finance Luxembourg SA. Oak lent Banco Espirito Santo US$835m under a facility agreement which provided for English law and jurisdiction. Banco Espirito Santo made just one repayment, before the Central Bank of Portugal stepped in to protect depositors' funds. The Central Bank created Novo Banco as a "bridge institution tool" under Directive 2001/24/EC on the Reorganisation and Winding up of Credit Institutions (the Reorganisation Directive), and purported to transfer the liability under Oak's facility agreement to Novo Banco. However, subsequently, the Portuguese Court ruled that this purported transfer was unlawful and of no effect, because the Portuguese statute prohibited any liability to an entity holding more than 2% of the shares of Banco Espirito Santo, as Oak did.

The appellants were assignees of Oak's rights, and sought to sue Novo Banco (as the "good bank") under the facility agreement, on the basis that it had been transferred to Novo Banco by the Central Bank of Portugal, at which point Novo Banco had become party to the English law and jurisdiction facility agreement. This, it was said, mean that the Portuguese court had lacked jurisdiction to quash the transfer of the liability to Novo Banco.

The first instance judge found for the creditors, but that was reversed by the Court of Appeal. The Supreme Court dismissed the appeal, holding that the effect of the decision of the Portuguese court was that the liability had never been transferred to Novo Banco. Accordingly, Novo Banco had never been subject to the English jurisdiction clause in the facility agreement.

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BNP Paribas v Trattamento Rifiuti Metropolitani SPA [2018] EWHC 1670

This case is another instance of a jurisdictional tussle between London courts and the home courts of continental European finance counterparties.

Trattemento Rifiuti Metropolitani (TRM) contracted to provide a waste to energy plant for the city of Turin, pursuant to which it entered into a Finance Agreement with BNPP. The Finance Agreement contained a Turin jurisdiction clause, but also stipulated TRM would enter into interest rate hedging transactions with BNPP under standard ISDA terms. TRM and BNPP did so, with losses for TRM ensuing under those swap arrangements.

BNPP issued proceedings in London under the ISDA Master agreement, seeking declarations of non-liability. TRM issued in Italy under the Finance Agreement, seeking damages for breach of that agreement and of alleged associated advisory duties.

The Finance Agreement stated that in the event of any conflict between it and the other finance documents it would prevail. In the usual way for European transactions, the ISDA Master agreement incorporated English law and non-exclusive jurisdiction.

A key bone of contention (and one of the primary reasons why BNPP would have been keen on English jurisdiction) is that the ISDA Master agreement and associated transaction documentation contained extensive disavowals of any advisory duty, non-reliance on representations and so on. In English law, these would give strong defences of contractual estoppel in relation to entry into the swaps, which would negate any possibility of liability in respect of the wider relationship.

Knowles J found that part of the intention of parties entering into ISDA transactions was to have the certainty that disputes under those transactions would be dealt with by the English courts under English law (or in the silent alternative, New York courts under New York law). He found that the issues of liability under the swaps transactions and issues of liability under the Finance Agreements could be severed and dealt with properly by different courts. As such, it found that there was no conflict between the jurisdiction clause in the ISDA documentation and that in the Finance Agreement. In the process it refused to follow the case of Commune di Savona in which HHJ Waksman QC (recently appointed as a High Court judge himself) found that because the effect of determining the English law defences based on contractual estoppel, etc, would be to preclude the claimant from running its wider advisory duty case in Italy, the whole matter should be referred to the Italian court to be determined in the round.

Much as we are in favour of the English courts having jurisdiction over financial disputes, the issue of the proper way to resolve the tension between competing law and jurisdiction clauses in circumstances where a narrowly focused English law case will knock out a wider foreign law claim deserves in our view some closer scrutiny by the appeal courts. It remains to be seen if TRM will appeal, as seems quite likely given the presence in its case of a contractual provision which in effect states that the Turin jurisdiction provisions would prevail in the case of a conflict.

The full judgment can be found here.

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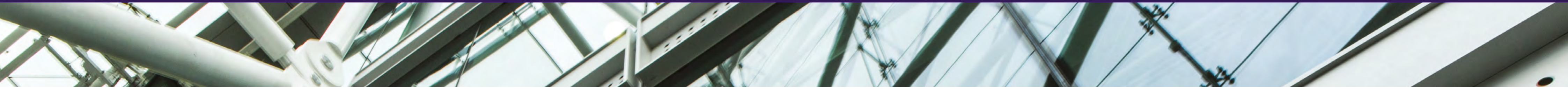

The ECU Group plc v HSBC Bank plc [2017] EWCH 3011

In a pre-action application in *The ECU Group plc v HSBC Bank plc*, the High Court held that HSBC, the prospective defendant, had to provide pre-action disclosure of Bloomberg messages, emails, trading data and compliance documents. This was despite the fact that the claimant's potential claim arising out of alleged front-running by HSBC was many years out of time unless it could show, as alleged, that HSBC had deliberately concealed a relevant fact from it.

In 2006 ECU had suspected that HSBC had been engaging in front-running its trades, and wrote to HSBC demanding an explanation. In March 2006 HSBC responded that it had conducted a full investigation and denied any suggestion of front-running or other wrongdoing. ECU felt that it was not in a position to take the matter further at that time on the information available to it.

However, in the course of 2016, HSBC and two of its senior FX traders were then prosecuted by the US Department of Justice for FX front running. This prompted ECU to review its earlier complaints, following which it sought pre-action disclosure from HSBC of records relating to the trades of concern.

In arriving at a decision as to whether to grant an application for pre-action disclosure a court will consider whether the parties are parties who would be likely to be involved in any subsequent proceedings, and whether the proposed defendant's duty by way of standard disclosure would extend to the documents sought (if proceedings had already been started). A court will also consider whether pre-action disclosure is desirable to dispose fairly of the proceedings, assist the dispute to be resolved without proceedings or save costs.

In this case, the court held that the relevant threshold had been reached. It was conceivable that HSBC could be liable for the matters alleged, given the circumstances, and if there were proceedings HSBC would clearly be more than a likely party to them. There was also a real prospect that if pre-action disclosure was ordered, it would be likely to shed direct light on whether there was in fact front-running of ECU's trades. Either way, the disclosure would assist the prospects of a swift and cost-effective resolution.

As a result (and on the standard basis that ECU would pay HSBC's costs of the pre-action disclosure and the application), the court ordered for the disclosure of Bloomberg messages, emails, relevant trade data and compliance documents relating to HSBC's internal investigation of the FX front running issues.

This case is a useful reminder of the power of pre-action disclosure applications. This has been reinforced in recent years as the courts have swung away from applying *Rose v Lynx Express*[6] in which the Court of Appeal held that an applicant for pre-action disclosure had to show a "properly arguable" case with a "real prospect of success" to even qualify for disclosure. That restrictive approach has been supplanted by the more flexible approach later taken by the Court of Appeal in *Smith v Secretary of State for Energy and Climate Change*[7] in which the existing merits of an applicant's currently provable case is simply a factor to be weighed up in the court's exercise of discretion, rather than a hard-edged jurisdictional hurdle.

6. [2004] EWCA Civ 447.
7. [2013] EWCA Civ 1585.

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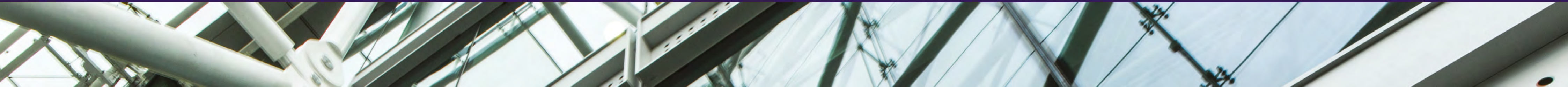
First Abu Dhabi Oil Bank v BP Oil [2018] EWCA Civ 14

This case considered the interaction between a warranty in a receivables financing contract that specified that one party was not prohibited from disposing of the receivable, and a clause expressly prohibiting assignment without the other party's consent in the underlying sale and purchase agreement (SPA).

BP had entered into an umbrella agreement with a customer, SAMIR, for the sale and purchase of crude oil. BP's contract with SAMIR incorporated its standard term and conditions, including a non-assignment provision preventing either party from assigning rights without the other party's consent (not unreasonably to be withheld).

BP then entered into a purchase letter with First Abu Dhabi Bank (FADB) under which FADB advanced payment of 95% to BP, and BP would pay any sums it received from SAMIR to FADB. BP had not sought SAMIR's consent to the purchase letter, which provided that BP would give an assignment if legally possible, and that if it was not, FADB would be subrogated to BP's rights and that BP would hold any amounts received from SAMIR on trust for FADB. In essence this amounted to a synthetic assignment, to be perfected if legally possible. FADB advanced US$67m to BP under this letter. SAMIR then filed for insolvency, at which point FADB requested an actual assignment of BP's rights under the SPA, to which BP responded that this would require consent from SAMIR. FADB issued proceedings for breach of a warranty in the purchase agreement that BP "was not prohibited by any … other agreement, to which it is a party, from disposing of the Receivable".

The first instance decision was the second judgment handed down in the Shorter Trial Scheme – there was a one day hearing, very limited disclosure, no witness statements and no oral evidence. That was of course all facilitated by the fact the dispute turned on the contractual construction issue as to whether BP was able to assign its rights or not. At first instance, the judge held that BP's representation that it was not prohibited from disposing of its interest in its contract with SAMIR was false, and gave judgment for FADB.



The Court of Appeal overturned the decision. It accepted that the non-assignment provision in the SPA prohibited legal or equitable assignment of rights without the other party's consent, but found that this was not what was affected by the terms of the purchase letter. The purchase letter contemplated BP holding receivables on trust, FAB being entitled to a sub-participation and being subrogated to the rights of BP. Only if it was legally possible to assign was BP obliged to do so. As such, it held that the terms of the purchase letter were not in breach of the SPA and did not therefore breach the warranty. In the course of her judgment, Lady Justice Gloster expressed her "intellectual disappointment" at not being in a position to decide the case on the more radically simple basis that an assignment prohibition in a contract between party A and party B cannot prevent an equitable assignment from party B to party C[8].

8. Which she could not do because the opposite principle was set down by Lord Browne-Wilkinson in the House of Lords in *Linden Gardens Trust v Lenesta Sludge Disposal* [1994] 1 AC 85

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Rock Advertising Limited v MWB Business Exchange Centres Limited [2018] UKSC 24

This was a real estate dispute, but it is worth briefly noting here because it is an important decision from the Supreme Court on the efficacy of contractual clauses which provide that future variations can only be made in writing, as are standard in the boilerplate provisions of financial contracts (known as no oral modification or "NOM" clauses). The Court of Appeal had thrown this into question by finding that parties could, in agreeing a supervening oral contract, waive an earlier written NOM clause. However, in the Supreme Court, Lord Sumption's judgment (who is due to retire in December of this year) held that the parties could agree to regulate the way in which their future relations could be adjusted, in interests of certainty, and so held that the NOM clause meant that a subsequent oral modification was not effective variation of contract.

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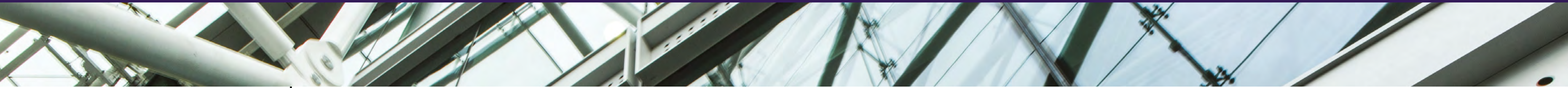

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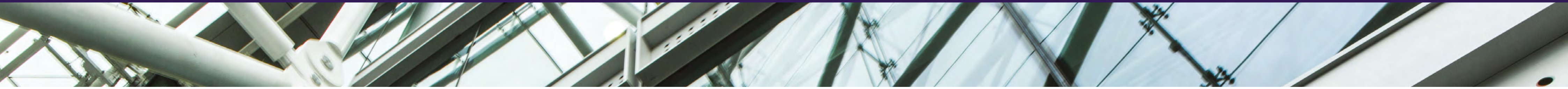

Developments of note

- On 1 January 2018, revised terms of reference for Hong Kong's Financial Dispute Resolution Scheme came into effect, increasing the value of claims that can be brought under the scheme by individuals and sole proprietors and increasing the range of resolution methods available. On 1 July 2018, the further expansion of the FDRS to small enterprises will take effect. See our previous blog post for a summary of the key amendments.
- **Third Party Funding for Arbitration in Hong Kong** – As noted in the Winter 2017 Financial litigation roundup, the *Arbitration and Mediation Legislation (Third Party Funding) (Amendment) Ordinance* was passed by the Legislative Council in June 2017. While most of the new legislative provisions have come into effect, key provisions (confirming that the tort and crime of champerty and maintenance do not apply to third party funding of arbitration) are expected to come into effect by the end of 2018. The new legislative provisions provide for a *Third Party Funding Code of Practice*, in keeping with the initial light regulatory approach to third party funding for arbitration. At the time of writing, the *Code of Practice* is due to be the subject of a public consultation, before taking effect by a notice published in the government Gazette. The progress of the *Code of Conduct* is the responsibility of an "authorised body" made-up of experienced individuals (and appointed by the Secretary for Justice).

For readers wanting more on this subject, please refer to the previous edition of this roundup, including the link to – Third Party Funding Developments – Hong Kong and Singapore".

- **Important final appeal concerning use of fraudulent means with respect to overseas listed securities**: ***Lee Kwok Wa & Ors v Securities and Futures Commission*** – On 6 March 2018, the Court of Appeal granted three individuals leave to appeal its decision in *Young Bik Fung & Ors v Securities and Futures Commission to the Court of Final Appeal (CFA)*. The individuals were the subject of orders under sections 213 and 300 of the Securities and Futures Ordinance, upheld by the Court of Appeal, concerning use of fraudulent means with respect to overseas listed securities. Civil and criminal insider dealing under section 270 and 291 of the Ordinance covers dealing in Hong Kong-listed shares only. For more on this development, see below.
- **Moody's "red flags" report** – Following Moody's unsuccessful appeal in the Court of Appeal, on 7 February 2018 Moody's was granted leave to appeal to the CFA. The CFA will determine whether the publication of Moody's "red flags" report constitutes misconduct within the definition in s.193 of the Ordinance. The CFA has set down Moody's appeal for hearing in September 2018. See our Winter 2017 Financial litigation roundup for a summary of the case.

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High Court rejects challenge to SFC's provision of information to Chinese regulator – Tang Hanbo v Securities and Futures Commission & Anor

On 8 December 2017, the Court of First Instance (CFI) dismissed a judicial review application by a Mainland Chinese individual resident in Hong Kong (Tang). Tang, who is subject to an investigation by the Securities and Futures Commission (in this section referred to as the "SFC") had lodged an application to quash – (i) an SFC search warrant issued by a Magistrate against him (the Warrant); and (ii) the SFC's subsequent decision to transmit some of the seized materials to the China Securities Regulatory Commission (CSRC).

The CFI's decision re-affirms the SFC's power to share information it has gathered in its investigation with overseas regulators, even where that information was originally obtained for the SFC's own investigation under warrant and the SFC did not notify the magistrate of the existence of the foreign investigation.

The decision also provides useful insight into the SFC's increasingly close cooperation with the CSRC following the launch of Shanghai-Hong Kong Stock Connect and Shenzhen-Hong Kong Stock Connect.

Background

- In June 2016, the CSRC first sought the SFC's assistance to obtain certain information and documents in Hong Kong concerning Tang's trading in the shares of a company listed on the Shanghai Stock Exchange. At the time, Tang was subject to a CSRC investigation for market manipulation in Mainland China (the CSRC Investigation).
- At around the same time the SFC initiated its own investigation into Tang and his wife concerning their trading of shares in companies listed on the Hong Kong Stock Exchange (the SFC Investigation).
- The SFC obtained the Warrant for the purpose of the SFC Investigation. In the supporting application, the SFC did not disclose the CSRC Investigation to the Magistrate, nor did it mention the CSRC's interest in Tang or the materials to be seized.
- During the execution of the Warrant, the SFC officer tried to get Tang to speak on the phone to the CSRC's officer. The SFC subsequently kept the CSRC informed as to what had been seized and what appeared to be in the documents.
- After the search, the CSRC asked the SFC to transmit materials to it. The SFC transmitted the responsive materials to the CSRC, including materials seized during the SFC's search.
- On 2 March 2017, Tang and his accomplice were convicted in Mainland China of stock market manipulation with penalties of RMB1.2bn imposed by the CSRC.
- Tang issued a judicial review application to challenge the Warrant on the basis that it had been obtained by material non-disclosure. He alleged that the true purpose, or at least a significant purpose, was to assist the CSRC Investigation.

Decision

The judge concluded there had been no material non-disclosure, that the SFC was merely conducting its own investigation and cooperating with the CSRC concurrently, and that there was no joint task force in place (as Tang had contended). The judge also commented that there was nothing sinister in sharing intelligence and information with the CSRC given that the SFC has broad statutory power to do so under s.186 SFO.

The CFI's decision reminds any individuals or companies subject to an SFC enquiry or investigation (or who have been asked by the SFC to provide assistance voluntarily) that documents or information provided to the SFC might be transmitted to overseas regulators. They should seek legal advice promptly to protect their positions to the extent legally permitted.

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Important final appeal concerning use of fraudulent means with respect to overseas listed securities

Of late, the Securities and Futures Commission has been active in policing market misconduct. Insofar as insider dealing is concerned, the main offence is covered by section 291 of the Securities and Futures Ordinance. However, this provision only relates to securities (or their derivatives) listed on a recognized stock market operated by a recognized exchange company under the Ordinance.

Section 291 does not apply where the impugned transactions relate to (among other things) securities listed on an overseas stock exchange. However, section 300 of the Ordinance makes it an offence (among other things) to employ a fraudulent or deceptive device in a transaction involving securities and this section is not limited to securities listed on an exchange in Hong Kong.

Lee Kwok Wa & Ors v Securities and Futures Commission is thought to be the first case to test the parameters of this offence in Hong Kong. In a first instance judgment and that of an appeal court, the principal defendants were found to have breached section 300 with respect to transactions involving securities listed on the Stock Exchange of Taiwan.

A number of defendants have recently obtained permission to appeal to the Court of Final Appeal (Hong Kong's top court).

The final appeal is important given that it involves the Commission's ability to use civil proceedings, pursuant to section 213 of the Ordinance (as opposed to proceedings before the market misconduct tribunal), to target impugned transactions with respect to securities listed on an overseas stock exchange (in addition to securities listed on a stock exchange in Hong Kong). While section 300 does not have extra-territorial effect, the final appeal is expected to clarify the ambit of the section and the nature of the conduct caught by it.

At the time of writing, the date of the final appeal is yet to be fixed but judgment is not expected until next year. Once the judgment is handed down it will be of significant interest, particularly given the incidence of trading in overseas listed securities in an international financial centre like Hong Kong.

If the appeal is unsuccessful (and the findings of lowers courts are not overturned) the Commission can be expected to make more use of section 300 contraventions in order to launch civil proceedings against alleged transgressors in Hong Kong, with a view to obtaining declaratory reliefs and restorative orders (not to mention the recovery of significant legal costs).

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SFC expands effort to obtain orders for restitution

As noted in the Winter 2017 Financial litigation roundup, the Securities and Futures Commission has been very active in using civil proceedings pursuant to section 213 of the Securities and Futures Ordinance to seek redress for investors. Section 213 proceedings are like a representative action commenced by the Commission in order to seek compensation on behalf of certain counterparties to impugned transactions.

One of the more recent and prominent related judgments is *Securities and Futures Commission v Qunxing Paper Holdings Co Ltd*. This judgment confirms that the Commission can seek restorative orders not only against parties to impugned transactions but also against individuals who aid or abet them or who are otherwise involved. The judgment also deals with a novel issue affecting section 213 restorative orders – namely, common law "reliance" on misstatement and the proportionality of relief for individual investors.

For more detail on this subject, please click here to see our article first published by International Law Office.

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Hong Kong regulatory developments

Updated Guidance Note on Cooperation with SFC
In December 2017, the Securities and Futures Commission published a new Guidance Note on Cooperation with the SFC (the Cooperation Guidance Note) replacing the previous version issued in March 2006.

The Guidance Note elaborates on the Commission's approach to cooperation in disciplinary proceedings and contains a new section on cooperation in civil proceedings and the Market Misconduct Tribunal (MMT) proceedings. It does not apply to criminal proceedings, which are subject to the unfettered discretion of the Department of Justice.

The Guidance Note clarifies (among other things) that:

- Cooperation means going above and beyond mere compliance with statutory or regulatory obligations. This may include (among other things):
  - reporting breaches to the Commission voluntarily and promptly (although, immediate reporting of material breaches is required by paragraph 12.5 of the Code of Conduct),
  - voluntarily disclosing or facilitating the production of documents and witnesses from outside Hong Kong, to the extent legally permissible,
  - voluntarily waiving legal professional privilege over documents (although a refusal to do so will not be considered uncooperative), and
  - commissioning a third-party review based on a proposal agreed by the Commission (about which see our summary of the Instinet investigation below).
- If cooperation has been demonstrated at an early stage, the Commission will be more willing to enter into a settlement agreement under s.210 SFO. As a general principle the Commission may reduce the sanction by:
  - 30% if the agreement is reached up to the time the Notice of Proposed Disciplinary Action (NPDA) is issued
  - 20% if the agreement is reached between the issue of the NPDA and the deadline for the response to it, and
  - 10% if the agreement is reached between the deadline for responding to the NPDA and the issue of the Decision Notice.
- Further reduction may be available for 'exceptional' or 'substantial' cooperation, but the Commission is unlikely to consider any settlement offer made on a "no admission of liability" as it considers such offers contrary to the public interest.
- Cooperation with the Commission is possible in civil proceedings and Market Misconduct Tribunal proceedings, by executing an agreed statement of facts and the proposed orders for consideration by the court/tribunal.

Securities and Futures Commission sets out its enforcement priorities for 2018

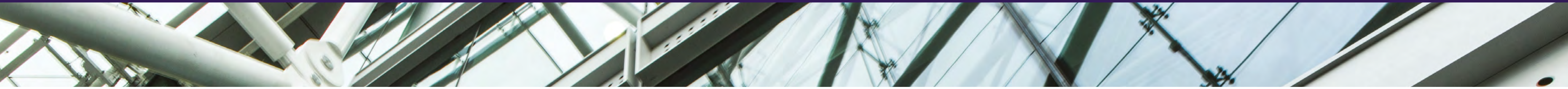
- On 26 February 2018 the Commission released the third edition of its new series of the Enforcement Reporter. The communication outlines the Commission's key enforcement priorities for the coming year and highlights significant recent enforcement actions. The Enforcement Reporter follows similar themes as previous editions and is a useful indication to the market of the Commission's key concerns. In particular, tackling corporate fraud remains top of the agenda, with insider dealing, misconduct by intermediaries and sponsors, and money laundering also on the Commission's radar. For further detail, see the summary of the publication produced by Jonathan Crompton, available here.

The Securities and Futures Commission has also taken high profile action in line with its enforcement priorities

- **Intermediary misconduct** – On 8 February, 13 March and 21 March 2018, the Commission sanctioned three global financial institutions and a leading securities and investment firm for breaches of regulatory obligations. The sanctions against the financial institutions included each of their Hong Kong/Asia securities trading entities.
- **Sponsor due diligence**
  - On 26 March 2018, the Commission announced that its thematic inspection of sponsor work had found continued deficiencies in the work of listing sponsors on the Main Board of the Hong Kong Exchange and the Growth Enterprise Market.
  - On 17 May 2018, the Commission announced that it had reprimanded and fined Citigroup Global Markets Limited (CGML) HK$57m (approx. US$7.26m) for failing to conduct adequate and reasonable due diligence on customers of Real Gold Mining Limited (Real Gold), and failing properly to supervise its staff, when carrying out sponsor work on Real Gold's listing application.
- **"Corporate fraud"** – On 10 April and 15 May 2018, the Commission announced it had issued MMT proceedings against two listed companies and several directors on 28 and 29 March 2018 respectively for alleged failures to disclose inside information as soon as reasonably practicable under Part XIVA Disclosure of Inside Information of the Securities and Futures Ordinance.

Securities and Futures Commission sanctions Instinet Pacific Limited for electronic trading and dark pool activities

- **The Sanction** – On 13 March 2018, the Commission reprimanded and fined Instinet Pacific Limited (IPL) HK$17.3m for regulatory failures involving IPL's electronic and algorithmic trading systems and its alternative liquidity pool (ALP). The Commission found (among other things) that IPL had failed to prioritise customer orders over proprietary orders, and had failed to keep a sufficient record of failings in its electronic and algorithmic trading systems and ALP.
- **Previous fines** for ALP failures have included HK$15m against BNP Paribas Securities (Asia) Limited in August 2015, and HK$3m against J.P. Morgan Broking (Hong Kong) Limited in December 2015 (part of a total sanction on the broking entity of HK$15m for ALP and other failures). Earlier this year, the Securities



and Futures Commission reprimanded and fined Interactive Brokers Hong Kong Limited HK$4.5m for failures concerning its electronic and algorithmic trading systems.

- **Use of independent reviewers** – Notably, the IPL fine was imposed after independent reviewers had been appointed jointly by the Commission and IPL in November 2016 to review IPL's electronic and algorithmic trading systems and ALP. The Commission has recently required the appointment of independent reviewers in agreeing or imposing several regulatory sanctions and the appointment of an independent reviewer is a factor the Commission will take into account in considering whether a person deserves credit for cooperating. IPL is now the fourth regulatory sanction imposed in 2018 resulting from the appointment of an independent reviewer (after sanctions imposed on Credit Suisse, Interactive Brokers, and CLSA). This highlights the need to consider carefully the benefits and consequences of appointing an independent reviewer, and to delineate the reviewer's terms of reference clearly.

Securities and Futures Commission prohibits an ICO to the HK public

On 19 March 2018 the Commission announced that it had halted an initial coin offering (ICO) promoted by Black Cell Technology Limited (Black Cell), in which purchasers of digital tokens would be eligible to redeem equity shares in Black Cell. The Commission decided that making the tokens available to Hong Kong investors constituted "potential unauthorised promotional activities and unlicensed regulated activities" and that the proposed sale of digital tokens through a website accessible by the Hong Kong public "may constitute a [collective investment scheme] under the circumstances". For further information and an analysis of the Commission's action, see our blog post written by Jonathan Crompton. The Commission has generally been cautious in its approach to ICOs so far – see our blog by Jonathan Cary which considers the regulator's recent warnings regarding cryptocurrencies.

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Hong Kong Anti-Money Laundering update 2018

In the run-up to the next joint mutual evaluation by the two inter-governmental bodies (the Financial Action Task Force and the Asia Pacific Group on Money Laundering) in the autumn of 2018, for reporting in June 2019, the Hong Kong SAR Legislative Council earlier this year enacted two laws aimed at improving Hong Kong's anti-money laundering and counter-financing of terrorism framework:

- **Anti-Money Laundering and Counter-Terrorist Financing (Financial Institutions) (Amendment) Ordinance 2018** – The Anti-Money Laundering and Counter-Terrorist Financing (Financial Institutions) (Amendment) Bill was passed on 24 January 2018 and came into effect on 1 March 2018. As mentioned in our last roundup, this Ordinance (among other things) amends the principal anti-money laundering ordinance and various professional "regulatory ordinances" to extend statutory client due diligence and record-keeping (that already apply to financial institutions) to other professions, including lawyers, accountants, estate agents and trust or company service providers (TCSPs). Non-compliance may result in disciplinary sanctions imposed by the relevant authority or regulatory body. The Ordinance also requires TCSPs to apply for a license and prove that both the company and its ultimate owner are fit and proper to carry on such services.
- **Companies (Amendment) Ordinance 2018** – Simultaneously with the AML Amendment Ordinance amendments to the Companies Ordinance took effect requiring companies incorporated in Hong Kong to ascertain all natural persons and legal entities which have significant control over the company and to maintain a "significant controllers register" (SCR). Hong Kong listed companies are exempt as they are already subject to a stricter regime under the Securities and Futures Ordinance. "Significant control'" includes directly or indirectly holding more than 25% of the issued share capital, and/or directly or indirectly having the right to appoint or remove a majority of the board of directors. The explicit and repeated reference to "indirect" control makes it clear that companies are required to investigate up their company structure beyond direct shareholders, making the SCR register a register of significant beneficial owners. There is no obligation to identify significant controllers publicly and SCRs are not public documents. They must be kept at the company's registered office or a prescribed place and companies must allow law enforcement officers to inspect them and make copies on demand. Failure to comply with the new requirements renders the company and each of its responsible persons guilty of an offence.
- The passage of two laws featured prominently in the HKSAR Government's April 2018 Money Laundering and *Terrorist Financing Risk Assessment Report*, alongside amendments to the *United Nations (Anti-Terrorism Measures) Ordinance* which come into operation on 31 May 2018.

In the meantime, as has become customary for the Hong Kong section of the Financial Litigation Roundup, we include a summary of number of suspicious transaction reports (STRs) made to the Joint Financial Intelligence Unit (effectively, the police) for the year up to 31 May 2018. The JFIU's website confirms that the number of STRs received during this period was 38,272. At this rate, Hong Kong could again be on course for a record number of STRs in a calendar year; reflecting both a significant degree of "defensive reporting" by businesses (in particular, financial institutions) and a heightened awareness of reporting obligations generally.

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