MACFARLANES

FINANCIAL SERVICES AND MARKETS DISPUTE RESOLUTION

LITIGATION, ARBITRATION, INVESTIGATIONS AND FINANCIAL CRIME

QUARTERLY UPDATE: JUNE 2017

Welcome to our Quarterly Update, in which we look at some of the recent highlights and developments in Financial Services and Markets disputes, investigations and financial crime.

Of particular interest are the recent observations of the High Court about legal professional privilege in the context of internal investigations.

In regard to AML, the FCA has signalled an intention to look for opportunities to make greater use of its powers of criminal prosecution. Meanwhile, the powers of HM Treasury, through the Office of Financial Sanctions Implementation, to impose civil monetary penalties for breaches of financial sanctions have come into effect.

Finally, the Supreme Court has provided further guidance on contractual interpretation, and ruled on the order in which liabilities of Lehman Brothers International (Europe) and its administrators should be paid.

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IN THIS ISSUE WE LOOK AT:

INTERNAL INVESTIGATIONS AND PRIVILEGE

Following hot on the heels of *Astex Therapeutics v Astra Zeneca* and the *RBS Rights Issue litigation*, the High Court has recently delivered further guidance on legal professional privilege (LPP). In *Serious Fraud Office (SFO) v Eurasian Natural Resources Corporation Ltd (ENRC) [2017] EWHC 1017*, the SFO has successfully challenged claims by ENRC to both litigation privilege (LIP) and legal advice privilege (LAP) in the context of an internal investigation. In its recent ruling, the Court found that:

- lawyers' notes of interviews are not protected by LAP;
- a criminal investigation may not be treated as adversarial litigation for the purposes of establishing LIP;
- reasonable contemplation of a criminal investigation does not, therefore, necessarily, equate to the reasonable contemplation of proceedings for the purposes of LIP;
- certain reports created by ENRC's external lawyers were not privileged because they were part of a fact-finding exercise; and
- whether communications with external counsel are privileged depends upon the authority of the relevant employee / in-house counsel as a matter of fact.

In 2011, ENRC commenced an internal investigation into possible bribery and corruption in its overseas activities as part of self-reporting to the SFO. During the course of its internal investigation, external lawyers for ENRC conducted interviews, created reports based on their fact-finding, and made presentations to the Board. In addition, forensic accountants engaged by ENRC conducted a books and records review with a focus on compliance and remediation in anticipation of an external investigation, which the SFO eventually commenced in April 2013. The SFO sought a declaration that none of the materials created by the external lawyers and accountants was protected by LPP.

In making the declaration, the Court rejected ENRC's claim to LIP during its internal investigation, because ENRC could not show that litigation with the SFO, namely prosecution proceedings rather than an investigation, was more likely than not. Furthermore, even if a criminal prosecution had been in reasonable contemplation, none of the documents in issue was created for the dominant purpose of obtaining legal advice in relation to such anticipated proceedings; they were created as part of fact-finding and to inform next steps, including remediation in anticipation of a SFO investigation.

In regard to LAP, the Court found that lawyers' working papers were not privileged unless they evidenced the trend or tenor of the legal advice being given. Therefore, interview notes taken by external lawyers, and underlying materials used to prepare factual reports and presentations, were not protected by LAP. Only slides and directly related materials prepared as part of a presentation to the Board, and which contained the lawyers' findings and advice, were privileged.

A particular point of concern in this area remains the make-up of the "client" for privilege purposes, and the Court's view that the client consists only of those persons expressly or impliedly authorised to seek legal advice from external counsel exacerbates the concern. The Court considered that the question of whether in-house counsel (or any other employee) had the authority to obtain legal advice from external lawyers, was a question of fact on the evidence. In this case, exchanges between ENRC's Head of Mergers and Acquisitions, a qualified lawyer and former head of legal, were found not to be privileged because he was communicating as a "man of business", and so did not have the requisite authority.

COMMENT

ENRC has sought permission to appeal to the Court of Appeal. Even so, unlike the RBS Rights Issue litigation, in which the appeal fell away, the facts of this case are not ideal for a reconsideration of LPP.

In the meantime, this case highlights the importance of being able to show that legal proceedings, and not just an external investigation, are in contemplation during the course of an internal investigation. The basis for having proceedings in contemplation should be documented at an early stage, and updated on a regular basis. At the same time, careful thought at the outset must be given to the identity of the "client", namely those who are to have the authority to obtain legal advice on behalf of the corporate entity, as well as to clear internal guidelines on both internal and external communications.

ENFORCEMENT FOCUS

AML – "THEY ARE COMING…"

Recent events make it clear that money laundering will not only continue to be the subject of intense regulatory focus, but also a target for more criminal prosecutions over the next few years.

In its recent Business Plan for 2017/2018, the FCA has stated that whilst it will generally use its civil powers, it will use its criminal powers to prosecute firms or individuals where AML failings are "*particularly serious or repeated*".

On the back of the early responses to the Financial Crime Data Return rolled out to firms in 2016, the FCA is making sure that it is focusing its supervision on the right firms. At the same time, the FCA will also refer cases to other law enforcement agencies such as the National Crime Agency where it identifies suspected money laundering.

Over and above the FCA's powers of criminal prosecution in respect of breaches of the Money Laundering Regulations, there remains the real prospect of a new corporate criminal offence in due course of failure to prevent money laundering. The outcome of the Government's Call for Evidence earlier in the year is likely to produce a consultation paper which may confirm that "failure to prevent" is the Government's preferred model in regard to money laundering (as well as fraud and false accounting), as under the Bribery Act 2010 and the Criminal Finances Act 2017 (the facilitation of tax evasion - in force from September).

In the meantime, the FCA has continued to work closely with the Treasury on AML policy issues during the process of transposing the 4th Money Laundering Directive (4MLD) into UK law by the end of June.

A significant difference from 3MLD is the imposition under 4MLD of a positive duty on firms to undertake a risk assessment to identify and assess the risks of money laundering and terrorist financing. Firms will have to put in place policies, controls and procedures to mitigate threats of money laundering and terrorist financing at the Union, Member State and firm level to accompany such risk assessments. Despite the requirement for proportionality, these policies and procedures will have to be approved by the firm's senior management, as well as being continuously monitored.

All in all, the area of money laundering is set to remain a critical focus of interest for the UK and overseas enforcement agencies for the foreseeable future.

FCA IMPOSES LARGEST FINANCIAL PENALTY FOR AML CONTROLS FAILINGS TO DATE

On 30 January 2017, the FCA fined a bank (B) £163m for failing to maintain an adequate AML control framework between 1 January 2012 and 31 December 2015. This is by far the largest financial penalty to date in this area.

As a result of serious deficiencies throughout B's AML control framework, the front office of B's Russian-based subsidiary was able to execute between 2,400 and 5,600 so-called "mirror trades" through B's London branch. These involved a Russian customer buying liquid securities from B (Moscow) for roubles, and a connected non-Russian customer selling an identical amount of the same securities to B (London) for US dollars. As a result, unidentified customers were able to convert roubles into US dollars, and transfer an estimated $10bn (of unknown origin) from Russia to offshore bank accounts in Cyprus, Estonia and Latvia. Unsurprisingly, the FCA found this to be suggestive of financial crime.

In particular, the FCA considered that B had exposed the UK financial system to the risks of financial crime by failing properly to oversee the formation of new customer relationships and the booking of global business in the UK. B's Corporate Banking and Securities division in particular was considered to have failed to perform adequate customer due diligence, to have used flawed customer and country risk rating methodologies, and to have had an inadequate AML IT infrastructure.

Therefore B had breached Principle 3 of the FCA's Principles for Businesses (taking reasonable steps to organise the firm's affairs responsibly and effectively, with adequate risk management systems), and a number of provisions in the Senior Management Arrangements, Systems and Controls (SYSC) rules.

B agreed to settle at an early stage of the investigation and, therefore, qualified for a 30 per cent discount (however this discount did not apply to the £9.1m in commission generated from the suspicious trades).

CHANGES TO SETTLEMENT OPTIONS UNDER FCA ENFORCEMENT PROCEDURE

With effect from 1 March 2017, the FCA's settlement discount scheme for early resolution is only available at Stage 1 in the enforcement process. Settlement discounts at Stage 2 (20 per cent following representations to the RDC), and Stage 3 (10 per cent upon receipt of the Decision Notice), are no longer available.

Stage 1 is the period from commencement of an investigation until the FCA has a sufficient understanding of the nature and gravity of any breach(es) to make a reasonable assessment of the appropriate penalty, communicated that assessment to the firm / individual, and given time for the firm / individual to agree. This would be no later than the post-investigation Warning Notice. The maximum available discount is 30 per cent, but only if there is full agreement as to at least both the facts and liability. Otherwise, discretionary discounts may be available for: full agreement of the facts only at Stage 1 (15-30 per cent); or partial agreement as to the facts, liability and penalty (leaving a narrower set of issues in dispute) (0-30 per cent).

FCA IMPOSES FIRST RESTITUTION ORDER FOR MARKET ABUSE

On 28 March 2017, the FCA published a final notice requiring Tesco plc (Plc) and Tesco Stores Limited (TSL) (together Tesco) to pay compensation to investors who suffered loss as a result of market abuse. This is the first time that the FCA has used its restitution powers to require a listed company to pay compensation for market abuse. It is also the first time the FCA has issued a final notice whilst co-ordinating with the SFO in regard to a Deferred Prosecution Agreement (DPA).

On 29 August 2014, Plc published a trading update in which it stated that it expected a trading profit for the six months ending 23 August 2014 of c. £1.1bn. On 22 September 2014, before trading opened, Plc published a further trading update correcting an overstatement of £250m (due to incorrect information received from TSL). Therefore, the August statement had given a false or misleading impression as to the value of Tesco shares and bonds, which Plc knew or could reasonably have been expected to know was a false statement (Section 118(7) FSMA, as it was).

The FCA has estimated that there are around 10,000 investors who may be eligible for compensation and that the total compensation payable is expected to amount to approximately £85m (plus interest).

The FCA decided not to impose a financial penalty for two reasons. First, the FCA recognised that under the DPA with the SFO, TSL had agreed to pay a financial penalty of £129m. In addition, Tesco's co-operation with the FCA's investigation had been "exemplary" - voluntarily disclosing information which was considered to be material to the FCA's enquiries, and generally assisting the FCA in reaching a swift conclusion to its investigation.

Details of the agreed facts underlying the DPA, and any other terms of the DPA, are not presently available due to reporting restrictions. This suggests that the SFO's investigation is continuing in regard to individuals.

RECENT JUDGMENTS

SUPREME COURT'S LATEST DICTA ON CONTRACTUAL INTERPRETATION

In *Wood v Capita Insurance Services Ltd [2017] UKSC 24*, the Supreme Court has provided its latest guidance on the rules of contractual interpretation.

In the only reasoned judgment, Lord Hodge referred to the debate about "purposive" and "literal" approaches to contractual interpretation (although he used the words "textualism" and "contextualism"). The recent decision in *Arnold v Britton [2015] AC 1619* has been interpreted as adopting a more literal approach than in previous Supreme Court cases *(especially Rainy Sky v Kookmin [2011] 1 WLR 2900)*. Lord Hodge denied that there was any inconsistency between those cases or other recent decisions of the Supreme Court: "*the recent history of the common law of contractual interpretation is one of continuity rather than change*".

Lord Hodge stated that "contextualism" (a purposive approach) and "textualism" (a literal approach) are both valid tools. The one approach does not trump the other. The extent to which each "tool" is adopted will depend on the circumstances of each particular case. For example, a textual analysis / literal approach might be more appropriate where there is a sophisticated and complicated contract, which has been drafted with the help of legal advisers.

The claim in this case was made under an indemnity contained in an SPA. However, the claim failed because Lord Hodge construed the indemnity narrowly. He took this narrow approach, in part, because the SPA also contained wide-ranging but time-limited warranties, and the Claimant would have been able to recover its losses under those warranties, if it had made a claim before the deadline expired (which it failed to do). In the judge's view, it made sense for the parties to have agreed both wide-ranging, but time-limited warranties, and a further indemnity, which would not be subject to a time limit, but which would be triggered in narrower circumstances. A different conclusion might have been reached if the losses had not been covered by the warranties (subject to a claim being made on time). This demonstrates that parties who are negotiating warranties and indemnities, should consider how the two sets of provisions tie in with one another because the scope and meaning of one type of provision can have an impact on the meaning and scope of the other.

NOVEL APPROACH TO CLOSE-OUT VALUATION UNDER GLOBAL MASTER AGREEMENTS

In *LBI EHF (in winding up) v Raiffeisen Zentralbank Osterreich AG & Another [2017] EWHC 522*, the Commercial Court has taken a novel evidential approach to the retrospective valuation of securities in a close-out situation. Rather than requiring the non-defaulting party to produce witness evidence as to precisely what it would have done at the relevant time had it followed the correct valuation procedure, the Court accepted a "statement of position" submitted in support of the non-defaulting party's valuation.

Following LBI's default, the Court was required to consider the appropriate Net Value (at the Default Valuation date) to be ascribed by the Defendants (RZB) to open repo trades under the Global Master Repurchase Agreement 2000 (GMRA), and open securities lending trades under the Global Master Securities Lending Agreement 2000 (GMSLA).

LBI had responded to a margin call made by RZB on 7 October 2008, by stating that it could not pay. Therefore, on 8 October 2008, RZB served default notices under both agreements, by facsimile. Although LBI denied that it had received the notices, the Court found that they had been properly sent by facsimile, in legible form, and that a "responsible person" at LBI (being the person manning the fax room), had more likely than not received them.

Under paragraph 10(d)(iv) of the GMRA, "Net Value" was defined as the amount which, in the reasonable opinion of the non-defaulting party, represented the fair market value of the Deliverable Securities or Receivable Securities, having regard to such pricing sources and methods as the non-defaulting party considered appropriate (less transaction costs).

However, RZB, as the non-defaulting party, failed both to serve a Default Valuation Notice (as required by the GMRA) on or before the Default Valuation date (of 15 October 2008), and, as then required by paragraph 10(e)(ii) of the GMRA, to determine the Net Value "as soon as reasonably practicable after the Default Valuation [date]."

In addition, the parties had failed to agree a "generally recognised source" of prices in accordance with the Market Value provisions of the GMRA.

The Court did not accept LBI's contention that the "fair market value" could not be calculated on a forced sale (i.e. distressed) basis, since RZB was entitled to sell the securities, in what might have been a distressed market, and determine the Default Market Value on the basis of prices obtained, provided always that it acted in good faith.

Instead, following the Court of Appeal in both *Socimer International Bank Ltd v Standard Bank [plc] [2008] EWCA Civ 116*, and *WestLB AG v Nomura Bank International plc [2012] EWCA Civ 495*, the Court found that the securities should be ascribed a fair market value in accordance with the opinion which RZB, acting rationally and in good faith, would have formed had it conducted the valuation exercise required by paragraph 10(e)(ii) of the GMRA. This was largely a question of fact.

Somewhat surprisingly, however, although expert evidence was submitted by both sides, RZB did not produce a factual witness to explain what RZB would have done had it complied with the provisions of the GMRA at the relevant time. Instead, the Court, acknowledging that the information available was imperfect, accepted RZB's statement of calculations as representing a rational, honest determination of fair market value as at 15 October 2008, in the exceptional and serious market conditions prevailing, including haircuts. Whilst the expert evidence could not represent what RZB would have done, it served as a useful cross-check.

REFUSAL OF PERMISSION TO ADDUCE EXPERT EVIDENCE IN MIS-SELLING CASE

In the context of a mis-selling case (interest rate hedging products), *London Executive Aviation Ltd v Royal Bank of Scotland plc [2017] EWHC 1037 (Ch)* has provided a helpful reminder that the Court should only give permission for expert evidence to be adduced, where there is "*recognised expertise governed by recognised standards and rules of conduct capable of influencing the Court's decision on any of the [legal] issues which it has to decide"*. By contrast, the extent of a legal duty, such as, for example, under the Conduct Of Business Sourcebook (COBS) rules, is a question of law for the Court, and does not require expert evidence. Therefore, an "expert" simply saying what he or she would have done in the same circumstances is of no value.

The Court noted that there had been a division of opinion and practice amongst judges as to the desirability and appropriateness of expert evidence in mis-selling cases, and it was accepted that each case needed to be approached on its own facts. In this case, it was concluded that there was no need to call expert evidence to expand on the risks related to a product, or to explain the legal standards required by, for example, COBS 9, and so permission was refused.

LETTERS OF CREDIT - ISSUING BANKS HAVE A RIGHT TO REQUEST FURTHER INFORMATION

The High Court has held that the issuing bank (IB) of a letter of credit (L/C) is entitled to be satisfied that the confirming bank (CB) has paid the beneficiary (seller) before reimbursing CB. Therefore, IB may ask for necessary further information before honouring the undertaking contained in the L/C.

In *Deutsche Bank Ag v CIMB Bank Berhad [2017] EWHC 1264,* the Claimant, as CB, sought reimbursement of sums paid under a series of ten L/Cs. The Defendant, as IB, considered that the underlying transactions were sham transactions entered into for the purposes of obtaining payment under the L/Cs. Therefore, IB made a formal request for further information from CB, who contended that IB had no right to the information. CB argued that, as a matter of principle, the issuer of a letter of credit should accept on its face, a statement by CB that it has paid the beneficiary. There was no right to seek further details.

Under Article 7 of the ICC Uniform Customs and Practice for Documentary Credits 600 (UCP600), "*[an] issuing bank undertakes to reimburse a nominated bank that has honoured a complying presentation".* This was interpreted by the Court as entitling IB to ask for further information from the CB in regard to payment. However, the Court noted that such requests should be limited to requests for information that were "*strictly*" necessary. In this case, the width of the requests served by IB had the air of a fishing expedition, and the Court emphasised that it should not entertain requests seeking to unduly investigate CB's arrangement, in the hope that something by way of a defence might turn up.

THE SUPREME COURT RULES ON THE PRIORITY OF DISTRIBUTIONS IN LIQUIDATION: THE LEHMAN WATERFALL

On 17 May 2017, the Supreme Court gave judgment in *Re Lehman Brothers International (Europe) (in administration) and others [2017] UKSC 38*, known as the Waterfall I appeal - the dispute in relation to the distribution of £8bn surplus assets of Lehman Brothers International (Europe) (LBIE), Lehman's main European operating company, which entered administration on 15 September 2008. The judgment has provided clarity in a number of areas in relation to the scope of creditors' entitlement to claim contractual interest on provable and non-provable debts in liquidations and administrations. In its judgment, the Supreme Court determined the following issues in relation to who should receive the surplus funds.

Ranking of subordinated debt: Whether the subordinated loans made to LBIE by LB Holdings Intermediate 2 Ltd should be paid before or after statutory interest and non-provable liabilities of the company. The Supreme Court upheld previous decisions, concluding that statutory interest and non-provable liabilities must be met before any surplus can be used to pay the subordinated loans; statutory interest is plainly an obligation payable in LBIE's insolvency, and an office-holder who pays a non-provable liability of the company is making a payment "in the Insolvency". Accordingly, the holder of the subordinated loans cannot prove for the loans until the statutory interest and non-provable liabilities are paid.

Foreign currency debts: Numerous LBIE creditors have debts denominated in a foreign currency. Their claims were converted to sterling at the official rate on the date LBIE went into administration pursuant to the Insolvency Rules. The foreign currency creditors claimed that they were entitled to receive any contractual shortfall caused by the depreciation in value of sterling between the date the claims were converted and the date they are paid. The Supreme Court held that the creditors were not entitled to payment for currency losses on the basis that the Insolvency Rules are a complete code for currency conversion, and are intended to spell out the full extent of a foreign currency creditor's rights.

Statutory interest in administration: The Supreme Court held that creditors of LBIE who had been entitled to, but had not been paid, statutory interest on debts for the period of the administration, could not then claim such interest in a subsequent liquidation. In a similar vein to its decision on foreign currency debts, the Court held that the insolvency legislation provides a complete statutory code for the recovery of provable debts.

Liability of LBIE members: Since LBIE is an unlimited company, the shareholders are potentially liable to contribute towards its debts and liabilities. The Court held that contributories are liable to contribute to enable non-provable liabilities to be paid in full, but are not liable to contribute to unpaid statutory interest. In addition, the LBIE administrators could not make calls for contributions or set off potential claims which the members may have as contributories against LBIE. The Court also held that the contributory rule (the rule applicable in liquidations that a creditor cannot claim a debt from a company until he has contributed whatever is due by him as contributory) can extend to administrations.

FINANCIAL CRIME

SANCTIONS - NEW OFSI POWERS TO IMPOSE FINANCIAL PENALTIES

On 1 April 2017, Part 8 of the Policing and Crime Act 2017 came into force, which creates new powers for HM Treasury, through the Office of Financial Sanctions Implementation (OFSI) to impose monetary penalties for breaches of financial sanctions.

This new civil enforcement regime provides an alternative to criminal prosecution for breaches of financial sanctions legislation.

Before imposing a penalty, the OFSI must be satisfied on the balance of probabilities (the civil standard rather than the criminal standard), that:

- the person (i.e. individual or corporate entity) has breached a prohibition, or failed to comply with an obligation, that is imposed by or under financial sanctions legislation; and
- that person knew, or had reasonable cause to suspect, that he/she was in breach of the prohibition or had failed to comply with the obligation.

Separate penalties can be imposed on a corporate entity and its officers. It is also possible for OFSI to impose a civil financial penalty on one person, and for another person to be prosecuted under the criminal law (where the maximum sentence for breaches of financial sanctions has been increased to seven years).

The territorial scope of OFSI's new enforcement powers requires there to be a "UK nexus", including: the company being a UK company operating overseas; transactions utilising clearing services in the UK; relevant acts of a foreign subsidiary of a UK company; or relevant acts taking place overseas, but directed from the UK.

OFSI has published detailed guidance on how it will use these new powers.

CRIMINAL FINANCE ACT 2017 TACKLES TAX EVASION AND MONEY LAUNDERING

On 27 April 2017, Royal Assent was given to the Criminal Finances Bill, which is now expected to come into force in September. We will cover the relevant offences in more detail in our next eBulletin.

The headline offences under the new Criminal Finances Act 2017 are the corporate offences of failure to prevent the facilitation of either UK or foreign tax evasion by a third person. Click here to read our note on the failure to prevent tax evasion offence. These new corporate criminal offences come with extensive territorial scope. In particular, where failure to prevent the facilitation of foreign tax evasion is concerned, the corporate entity itself does need to have a UK nexus; as long as a step in the chain of events occurs within the UK (e.g. the use of a UK bank account), the foreign corporate will be susceptible to prosecution in the UK by HMRC.

The Act also brings with it a series of measures designed to assist the prevention and detection of money laundering: Unexplained Wealth Orders and interim freezing orders under which certain individuals, including PEPs or persons reasonably suspected of criminal activity, and who own specified property worth £50,000 or more, may be required to explain the source of the asset(s); rolling extensions by Court Order of the 31 day moratorium under the Suspicious Activity Report (SAR) regime, up to 186 days in total; greater information sharing between regulated entities; and the availability to law enforcement agencies of enhanced information gathering powers.

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