MACFARLANES

BANKING AND FINANCE DISPUTE RESOLUTION

LITIGATION, ARBITRATION, INVESTIGATIONS AND FINANCIAL CRIME

QUARTERLY UPDATE : NEW YEAR EDITION

Welcome to the latest issue of our Quarterly Update, in which we look at some of the recent highlights and developments in banking and finance disputes and financial crime.

Once again, contractual interpretation has featured significantly in the final quarter of 2016, including the meaning of Default Rate under the ISDA Master Agreements, and the meaning of “close of business”. We also look at our own success in the Court of Appeal, in December 2016, involving a landmark ruling on negligent misrepresentation under section 2(1) of the Misrepresentation Act 1967, and the much anticipated judgement in the *Property Alliance Group v RBS* case, involving claims in respect of LIBOR.

There have also been two recent decisions on legal advice privilege – timely reminders for in-house counsel of the limitations of legal advice privilege, particularly in the context of investigations.

Finally, we provide a brief update on Libyan Sanctions and the Criminal Finances Bill.

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NOTABLE CASES AND DEVELOPMENTS

LANDMARK RULING BY THE COURT OF APPEAL ON THE MISREPRESENTATION ACT 1967

Macfarlanes successfully represented the appellant bank, Roskilde, in the case of *Taberna Europe CDO II plc v Selskabet AF 1 September 2008 (In Bankruptcy) (formerly known as Roskilde Bank A/S)* [2016] EWCA Civ 1262.

In a landmark decision on 8 December 2016, the Court of Appeal unanimously overturned Mr Justice Eder at first instance, following an eight day trial in 2014, in relation to s 2(1) of the Misrepresentation Act 1967 (negligent misrepresentation), as well as in relation to standard disclaimers in written publications issued by the Bank.

Roskilde was the largest retail bank in Denmark and the first to collapse in the financial crisis. The Bank had issued subordinated notes which were purchased in the secondary market by Taberna (a European property fund) from Deutsche Bank in February 2008, for just over EUR €26m. Taberna alleged eight counts of misrepresentation by Roskilde at trial, but only one was successful - a representation in respect of the level of Roskilde's non-performing loans.

The Court of Appeal disagreed with Eder J's conclusion that negligent misrepresentation under s 2(1) of the Misrepresentation Act 1967 extended to loss sustained as a result of contracting with a third party (Taberna – Deutsche Bank), but which did not arise under the contract with the representor (Roskilde). As a consequence of the judge's novel interpretation of the wording of s 2(1), representations made in publications issued by financial institutions which are designed for the primary market, on and before an issue of subordinated debt, could be actionable by secondary market purchasers, long after the publications were first issued.

The judge's finding that the disclaimer wording included in some of Roskilde's publications afforded it no protection was also overturned.

As a result of the Court of Appeal's judgment, Taberna was not entitled to recover damages against Roskilde under s2(1).

SWAPS MISSELLING AND LIBOR SETTING CLAIMS REJECTED

On 21 December 2016, in *Property Alliance Group Ltd (PAG) v The Royal Bank of Scotland plc* [2016] EWHC 3342 (Ch), the Court rejected all of the claims made by PAG against the Bank, including PAG's claims that wide-ranging representations by the Bank about LIBOR should be implied into the contractual relationship between the parties.

Between October 2004 and April 2008, in connection with loans which it had taken out with the Bank, PAG entered into a number of swaps intended to hedge its exposure to interest rate fluctuations. It was common ground that the Bank did not owe PAG a general duty to advise on the swaps which it sold to PAG. On the facts, the judge found that the Bank had taken reasonable care about the accuracy of what it told PAG, and that it did not owe any wider duty, including a duty to provide details of break costs (which was not market practice at the relevant time). Nor did the generic description, "hedges", bring the Bank within the realms of misrepresentation, which PAG could not have relied on in any event due to express non-reliance provisions in the contractual documentation. Furthermore, PAG was not induced to enter into the swaps by any such pre-contractual representations. Finally, so far as these misselling claims were concerned, the judge rejected arguments that there should be terms implied into the swap contracts that: (1) the swaps were suitable for hedging interest rate risk; (2) the Bank would act in good faith and in accordance with principles of fair dealing; and (3) the Bank would not withhold information. Such terms were contrary to express provisions in the facility agreements, which excluded equitable and fiduciary duties, and were unnecessary between sophisticated commercial counterparties.

PAG also alleged that the Bank had made wide-ranging implied representations in relation to LIBOR, including that: (1) at all times prior to entry into the swaps, LIBOR represented the inter-bank borrowing rate as defined by the British Bankers' Association (BBA); (2) the Bank had no reason for believing anything else; and (3) the Bank had not itself made false or misleading submissions of rates into the daily LIBOR calculation process. PAG also alleged, in the alternative, that similar terms should be implied into the swap contracts. However, the judge found that implied representations had to be founded upon conduct, and there was no relevant conduct on the part of the Bank on which to base such implied representations. In any event, the judge would have limited any representation to the particular tenor and currency applicable to the swaps (3 months GBP LIBOR), and PAG had failed to prove either reliance on any specific representation or relevant impropriety by the Bank.

The judge was prepared to imply one term into the swaps contracts, namely that 3 months GBP LIBOR (i.e. the tenor and currency applicable to the swaps) would be calculated in accordance with the BBA definition of LIBOR, such that the Bank had made proper daily submissions into the 3 months GBP LIBOR calculation process. However, the fact that the Bank had previously made admissions of misconduct in connection with CHF and JPY LIBOR was irrelevant.

PAG had also complained that the transfer of its customer relationship from the relevant relationship management personnel to the Bank's internal Global Restructuring Group, constituted a breach of an implied right to be managed only by the original team. This argument was rejected, as were PAG's further claims that: the Bank had an obligation to comply with the relevant contracts in good faith; and that the Bank's calling (twice) for a valuation of PAG's property portfolio was a discretionary right to be exercised in good faith, and not capriciously. The judge held that there is no general duty of good faith under English law, and that the Bank had an absolute right, rather than a discretion, to call for valuations of PAG's property portfolio.

The judge's findings in respect of LIBOR are significant. In particular, a bank does not make any representation about LIBOR merely by offering to enter into a contract based on LIBOR. However, it remains to be seen whether others will try to make something of the judge's acceptance that there may be an implied representation that proper submissions of rates in the specific tenor and currency applicable to the contract(s) have been made by the submitting bank. In another case involving the Bank (*Hocking v Royal Bank of Scotland Plc*), Asplin J recently deferred the trial, due to take place in January 2017, pending the judgment in the PAG litigation. Although the cases are both fact sensitive, Asplin J considered there was sufficient overlap between *Hocking* and *PAG* that it would be appropriate, in terms of potential time and costs savings, to delay the trial.

THE MEANING OF DEFAULT RATE UNDER THE ISDA MASTER AGREEMENTS

In *Lomas and others v Burlington Loan Management Ltd and others* [2016] EWHC 2417 (Ch) (Waterfall IIC), the Court has provided its interpretation of the provisions of the ISDA Master Agreements on interest payable following the close-out of transactions upon early termination. In both the 1992 and 2002 ISDA Masters, interest on sums due by the defaulting party is due at the Default Rate, which is defined as *"a rate per annum equal to the cost (without proof or evidence of any actual cost) to the relevant payee (as certified by it) if it were to fund or of funding the relevant amount plus 1% per annum."*

The Court held that "*relevant payee*" means the original contracting party and so does not include any person who has acquired the right to payment under s6 of the ISDA Master as assignee under s7. Therefore, it is the cost to the original counterparty of funding the relevant amount which must be certified irrespective of whether that original counterparty has sold its debt in the secondary market.

At the same time, it was held that the phrase *"[c]ost…if it were to fund or of funding the relevant amount"* only covers the cost to the relevant payee of borrowing the relevant amount, and not the cost of raising equity, or the cost of raising money beyond that required to fund the relevant amount.

GUIDANCE ON DISCRETIONARY VALUATIONS AND THE MEANING OF "CLOSE OF BUSINESS" IN DEFAULT SCENARIO

In *Lehman Brothers International (Europe) v ExxonMobil Financial Services BV* [2016] EWHC 2699 (Comm), Mr Justice Blair provided a helpful reminder of the test to be applied upon the discretionary valuation of financial assets, as well as guidance as to the meaning of "*close of business*".

Rationality over reasonableness in discretionary asset valuations - the Socimer test

Lehman Brothers International (Europe) (LBIE) had failed to honour a repo transaction under the standard form Global Market Repurchase Agreement (2000) (GMRA). As security for financing provided by ExxonMobil Financial Services (EMFS) in the amount of US$250m, LBIE had provided a diversified portfolio of securities consisting of equities and bonds, which LBIE was to buy back on 16 September 2008 (effectively with interest). Following LBIE's default (entering into administration) the day before (15 September 2008), EMFS served a notice of default on LBIE, stating that the repurchase had become immediately due.

In accordance with the Default Valuation Notice Procedure (DVNP) in the GMRA, it fell to EMFS to value the portfolio upon LBIE's default. In essence, the valuation exercise prescribed under the GMRA involved:

1. taking into account the net proceeds of sale for securities that were sold by EMFS;

2. calculating the average of quotations received for other securities (where at least two quotations have been obtained); and

3. in respect of securities outside (1) and (2), stating EMFS' reasonable opinion as to the amount which represented fair value.

This valuation exercise, which had to be undertaken by EMFS in a very short time frame (five dealing days), was challenged by LBIE.

A question arose, therefore, as to the effect to be given to a contractual discretion such as that required to be exercised under the DVNP. In this regard, the judge emphasised the Court of Appeal's decision in the leading authority, *Socimer International Bank Ltd v Standard Bank London Ltd* [2008] EWCA Civ 116:

"When a contract allocates only to one party a power to make decisions under the contract which may have an effect on both parties...[the] decision maker's discretion will be limited, as a matter of necessary implication, by concepts of honesty, good faith, and genuineness, and the need for the absence of arbitrariness, capriciousness, perversity and irrationality. The concern is that the discretion should not be abused." (Per Rix LJ at [60] and [66]).

In other words, the decision maker must act reasonably in the public law (*Wednesbury*) sense, and not according to the objective common law standard of reasonableness.

The meaning of "close of business" for a commercial bank

EMFS had to serve the default valuation notice by close of business on the fifth dealing day after the event of default occurred. The repo contract stated that if a notice was received after close of business, or on a day on which commercial banks are not open for business, it would be regarded as received on the next business day. However, the contract did not provide a definition of "close of business".

EMFS served its default valuation notice on LBIE by fax on 22 September 2008. The fax was received in full at LBIE's London offices at 6.02pm.

LBIE argued that "close of business" meant 5.00pm, and so the notice was late. EMFS said that "close of business" meant the typical close of business for commercial banks, which was 7.00pm.

Blair J agreed with EMFS. He found that, in the context of a repo financing between a major oil company and an international investment bank, a reasonable person might be surprised to hear that business closes at 5.00pm, especially where the business does not in fact close at 5.00pm.

The Judge also said that the repo contract could easily have imposed an express cut-off time, but it did not do so. By using the less precise term "close of business", the contract gave a "*useful flexibility*".

Some practical implications arise from this part of the Judgment. Although many people may (perhaps optimistically) regard close of business as 5.00pm or 5.30pm, this may not be the commercial reality. The courts will look at the nature of the contract and the parties' businesses to work out when close of business actually takes place. This is perhaps not surprising, and essentially reflects the courts' existing approach to interpreting contracts.

However, it emphasises the point that parties to a contract should be explicit wherever possible on times and notice periods. Phrases like "close of business" and "end of day" have no legal meaning. They are open to interpretation and (as in this case) can lead to disputes.

Instead, where a deadline for serving notices is critical, the contract should refer to a specific time and day. If the parties' addresses for service are located in different time zones, it would also be sensible to state whether any time deadlines are in local time, or a single, specified time zone.

THE LIMITS OF LEGAL ADVICE PRIVILEGE

Two recent decisions by the High Court highlight the limitations of legal advice privilege (LAP).

In *Astex Therapeutics Ltd v AstraZeneca AB* [2016] EWHC 2759 (Ch), the Court has held that LAP exists only between a lawyer and his client, and not the client's employees.

AstraZeneca AB (AZ) conducted an investigation in which external and in-house lawyers interviewed employees. It later claimed LAP over the notes of those interviews. However, the Court found that LAP applies only to communications between a lawyer and client. If a company seeks legal advice, its employees will be "clients" only if they are among the people instructing the lawyers. In this case, the employees of AZ who were interviewed were merely providing information. They were not among those persons constituting the "client". AZ could not claim LAP over the interview notes, except in the cases where the interviewee was also instructing AZ's lawyers on the matter.

Similarly, in the *RBS Rights Issue Litigation* [2016] EWHC 3161, lawyers conducted an internal investigation which involved interviewing employees. Hildyard J considered that the attendance notes of those interviews were not privileged because the relevant employees were not the lawyers' clients.

The Bank argued that an employee should be treated as being the client if that employee had been specifically authorised to provide information to lawyers. Hildyard J rejected this argument as being inconsistent with the Court of Appeal's decision on the subject, in the *Three Rivers* litigation.

Hildyard J also rejected the Bank's arguments that (1) the attendance notes were lawyers' working papers which, if disclosed, would reveal the lawyers' train of enquiry, and (2) they should therefore be protected by privilege. The judge said that the test was not whether the notes would reveal the lawyers' train of enquiry but whether they would *"betray or at least give a clue as to the trend of advice being given"*.

Hildyard J suggested that only individuals who are part of the directing mind and will of a corporation could qualify as the "client". This is unhelpful, as senior management are typically not part of the internal group of employees conducting an investigation and instructing external lawyers.

Nevertheless, these decisions are important reminders for lawyers. Although they do not raise issues where employees approach in-house counsel for advice, where the employee will usually be the client, they are relevant where lawyers (in-house or external) make notes of interviews with employees in order to provide legal advice to another person. Such notes in themselves are unlikely to attract LAP.

BANK ENTITLED TO KNOW THE IDENTITY OF THE CLAIMANT'S FUNDER

In *Wall v The Royal Bank of Scotland Plc* [2016] EWHC 2460, the Court found that the Bank could compel the claimant (W) to disclose the identity of the claimant's third party funders (TPF), where there was good reason to believe that the claimant had received funding in exchange for a stake in the outcome.

Since it was not open to the Bank to apply for security for its costs against W, it asked W to disclose the identity of his TPF, so that it could make an application for security for costs against the funder.

An application for security for costs can be made against a third party funder under CPR 25.14(2)(b) where the funder has contributed or agreed to contribute funding in exchange for a share in any proceeds recovered in the litigation. On that basis, the Court found that it also had an inherent power to compel W to disclose the identity of his funder, in order to facilitate the making of an application for security for costs by the Bank against it.

THE PRICE OF A BAD BARGAIN

In *Libyan Investment Authority v Goldman Sachs International* [2016] EWHC 2530 (Ch), the Court dismissed the well-publicised claim brought by the claimant (LIA) against the Bank (GSI).

LIA claimed that GSI had asserted undue influence over LIA's employees, resulting in improper investment by LIA, which in turn caused losses of US$1.2bn. GSI denied the claims and successfully established that: (i) the relationship between the parties did not go beyond that of an ordinary relationship between a bank selling investment products to a wealthy client; and (ii) as a sovereign wealth fund, the LIA was a more sophisticated investor than it claimed to be.

Nine particular synthetic derivative trades were challenged by LIA (the Disputed Trades). In all of the Disputed Trades, LIA paid a lump sum by way of a premium. In return, it gained exposure to shares in an underlying company. The Disputed Trades were leveraged so that LIA gained exposure to a greater number of shares than it could have purchased with the premium. No shares were actually purchased. If the price of the shares in the underlying company had risen by the maturity date of the trade, GSI was to pay the difference between the share price at the trade date, and the price on maturity, multiplied by the total number of shares.

LIA sought to rescind the Disputed Trades and obtain repayment of the premiums. First, it was claimed that GSI had procured LIA to enter into the Disputed Trades by the exercise of undue influence, and that LIA was an unsophisticated institution. Secondly, LIA claimed that the Disputed Trades constituted unconscionable bargains on the basis that: (i) they were priced unfairly and GSI earned excessive profits from the Disputed Trades; (ii) the nature of the Disputed Trades was entirely unsuitable for LIA; and (iii) GSI improperly influenced LIA to enter into the Disputed Trades by offering LIA an internship at GSI.

LIA further alleged that a relationship of trust and confidence had grown up between the parties and that GSI crossed the line of the usual relationship between a bank and its client. LIA asserted that through various means, GSI had essentially become LIA's in-house bank, and LIA trusted GSI to act in LIA's best interests.

LIA's claim that the Disputed Trades were the result of undue influence exerted by GSI was dismissed. The judge found that:

1. There was nothing about the Disputed Trades that would raise a presumption of undue influence. The level of profits earned on the Disputed Trades was not disproportionate

given their nature and the work that went into winning them. Although the Disputed Trades may be regarded as unsuitable for LIA, they were no different in this regard from many other investments LIA made over the same period.

2. There was no protected relationship of trust and confidence established between the parties. The relationship did not go beyond that of a normal mutually beneficial relationship between a bank and its client. GSI did not become a trusted advisor for LIA.

3. The main motivation to offer the internship was a belief that the relevant LIA individual might be chosen to lead LIA's new office in London and it would therefore be beneficial for future business projects. It may have contributed to a *"friendly and productive atmosphere"* during negotiation of the Disputed Trades, but it did not have a material influence on LIA's decision to enter into them.

It followed that the claim to set aside the Disputed Trades on grounds that they were unconscionable bargains also failed.

This case reinforces the position that English law will expect sophisticated contracting parties to look after their own interests. The courts will rarely intervene where one such party enters into what turns out to have been a bad bargain.

INVESTORS ARE REQUIRED TO TAKE RESPONSIBILITY FOR THEIR OWN INVESTMENT DECISIONS

In *O'Hare and O'Hare v Coutts & Co* [2016] EWHC 2224 (QB), the Court considered whether the Bank had failed to exercise reasonable skill and care when giving the claimants advice about making certain investments. In doing so, it held that the relevant test is whether the adviser made the investor aware of any material risks involved in any recommended investment, and of any reasonable alternatives (*Montgomery v Lanarkshire Health Board* [2015] UKSC 11) (the Montgomery Test).

The claimants suffered substantial losses as a result of investments made on the advice of the Bank between 2007 and 2010. They claimed that the Bank gave negligent advice since the investments were unsuitable. In determining the point, the Court departed from the common Bolam Test (i.e. whether the adviser had advised *"in accordance with a practice accepted as proper by a responsible body of [financial advisers]"*), which, in the financial context, is taken to mean that the recommended investment must be "suitable". Instead, the judge focused on what the claimants, as an "informed investor", would expect to be told.

The Court held that there must be proper dialogue and communication between investment adviser and client, *"to ensure the client understands the advice and the risks attendant on a recommended investment"*. The test for the financial adviser to satisfy is the Montgomery Test. Expert evidence at trial indicated that there was little consensus in the industry about how to manage the risk appetite of clients, which had a bearing on the judge's decision to depart from the Bolam Test in the relevant context.

This decision suggests that the giving of investment advice is not simply an exercise of professional skill. Rather, an informed investor, like a medical patient, is entitled to choose the risks that he is willing to take and has to take responsibility for his own mistakes, just as he takes the benefit associated with such risks. The case clarifies that the duty of the adviser is to ensure that the customer is made aware of any material risks, instead of being required to comply with a disparate body of opinion as to what a financial adviser should do. The greater certainty provided by this ruling about what is required of the adviser, where informed investors are concerned, is likely be welcomed by banks and financial advisers providing investment advice.

LITTLE AMUSEMENT FOR EITHER PARTY FROM NEGLIGENT VALUATIONS

In *Barclays Bank plc v Christie Owen & Davies Ltd (trading as Christie & Co)* [2016] EWHC 2351 (Ch), the Court examined the Claimant Bank's reliance on property valuations provided in connection with a property investment and development loan. It found that although the reports issued by the Defendant Valuer (COD) were negligent, the bank was not entitled to full recovery on account of its own contributory negligence.

The loan was used to finance the purchase and/or improvement of three amusement arcades. COD issued two valuation reports, and the Bank advanced a loan to the borrower (Thurston UK Limited) in February 2007. The purchase and the improvement works proceeded, but, by October 2010, the borrower was placed into administration. The arcades were sold in March 2011, and the Bank incurred a significant loss as a result.

In its claims against COD for professional negligence, the Bank contended that the true value of the properties was much lower than that provided by COD in its valuation reports. For example, in relation to two of the arcades, the Bank alleged overvaluations of 29 per cent and 50 per cent.

The Court held that COD had been negligent because it had not valued the properties on an EBITDA basis, and that the Bank had reasonably relied upon COD's valuations. However, on the evidence, the judge also determined that the Bank had contributed to the loss by its own negligence: it had failed to record that the borrower had failed to comply with the conditions of sanction of a previous loan, which, had it done so, would have called into question the integrity of the borrower. It would also (at least) have led the Bank to carry out more thorough due diligence on the financial position of the borrower. Accordingly, the judge ordered a noteworthy deduction of 40 per cent on the sum sought by the bank.

As a point on practice, the judge noted the unfortunate absence of the Bank's relevant lending policy in its disclosure, even though this was referred to by its witnesses. As such, he indicated that he had subjected the witness evidence to *"a degree of critical appraisal … commensurate with the fact that it cannot be tested by reference to examination of the contents of these documents."*

PAYMENTS UNDER A LETTER OF CREDIT RESTRAINED BY FRAUD EXCEPTION

In *Petrosaudi Oil Services v Novo Banco and others* [2016] EWHC 2456 (Comm), the Court approved an application to prevent a bank making payment under a letter of credit, governed by English law, in favour of the beneficiary.

The claimant, POS, supplied oil rig drilling services to a company named PDVSA Services SA (PDVSA), the Second Defendant. As required by the contract, a standby letter of credit was issued by the First Defendant Bank (NB) in favour of the Claimant for security against payment of its invoices. The Claimant rendered invoices for approximately £130m in connection with services provided between July 2015 and June 2016. These were disputed by PDVSA.

The contract between POS and PDVSA, which was governed by Venezuelan law, included provisions whereby:

1. if PDVSA did not dispute (with reasons) an invoice within 15 days of receipt, it was deemed to have irrevocably accepted the invoice as being correct, due and owing; and

2. where PDVSA disputed an invoice, PDVSA had to pay POS the disputed amount, which would be reimbursed (with interest) should PDVSA prove, or POS accept, that the amount was not payable.

At a preliminary arbitral hearing, the above clauses were found to be null and void under Article 141 of Venezuelan law. In the case of a dispute, the invoices fell due when payment was approved or an arbitral tribunal so awarded.

PDVSA contended that as a result of the decision at the preliminary arbitral hearing, the invoices were not due. It was not obliged to pay them until after the substantive arbitral hearing, which was due to take place in December 2016. POS disagreed, arguing that it was entitled to make a presentation under the Letter of Credit and request payment by NB of the full sums outstanding. Following presentation by POS, NB stated its intention to pay, and PDVSA made an application to restrict NB from doing so on the basis that POS' demand for such payment was fraudulent.

Agreeing with PDVSA, the Court held that the effect of the findings of the preliminary arbitral hearing was that POS could not rely on those clauses to compel payment immediately. Under the Letter of Credit, POS had to certify that the amount demanded was due and owing under the contract. The effect of Article 141 meant that the invoices were not payable until either they were approved, or an arbitral tribunal so awarded.

In accordance with the autonomy principle, NB had a duty to comply with the presentation, independent of the underlying contract, and any related disputes, unless PDVSA could show that the presentation was fraudulent. Having considered evidence from POS' general counsel, the Court found that he could not have honestly believed that the sums were due and owing, and therefore the fraud exception applied. NB was restrained from paying out the sums requested under the presentation.

UPDATE: This decision has been overturned by the Court of Appeal. A summary of the Court of Appeal decision will be included in our next eBulletin.

FINANCIAL CRIME

HIGH COURT CLARIFIES THE SCOPE OF FINANCIAL SANCTIONS ON LIBYA POST-GADAFFI

In *Libyan Investment Authority v Maud* [2016], EWCA 788, the appellant (LIA) successfully appealed against a High Court decision, which had set aside its statutory demand against the respondent individual. The respondent had given a guarantee in respect of a loan from the appellant to a third party. It was common ground that, by giving the guarantee, the respondent had accepted a primary debt obligation to the appellant. However, the respondent had argued that payment of the guarantee would breach Regulation (EU) No. 204/2011 (the EU Regulation), which implemented the sanctions imposed on Libya by UN Security Council Resolution 1970 (2011).

The latter resolution had been amended following the fall of Colonel Gadaffi, so as to lift the prohibition on the appellant obtaining new funds and economic resources outside Libya after 16 September 2011. The EU Regulation had also been amended to reflect this change by: (i) removing the appellant from the scope of Articles 5(1) and (2); and (ii) inserting a new Article 5(4). The following extracts from the EU Regulation are most relevant:

- Article 1(b): "freezing of funds" means preventing any move, transfer, alteration, use of, access to, or dealing with funds in any way that would result in any change in their volume, amount, location, ownership, possession, character, destination or other change that would enable the funds to be used, including portfolio management;
- Article 5:
  - (1): All funds and economic resources belonging to, owned, held or controlled by [the appellant] shall be frozen.
  - (2): No funds or economic resources shall be made available, directly or indirectly, to or for the benefit of [the appellant].
  - (4): All funds and economic resources belonging to, owned, held or controlled by the following on 16 September 2011… and located outside Libya on that date shall remain frozen. [The appellant was listed.]

At first instance, the Court had found that: (i) the definition of "funds" under the EU Regulation (Article 1a) included guarantees; (ii) payment under the guarantee would involve "dealing with" it, within the definition at Article 1(b) above; and (iii) such dealing would breach Article 5(4). The Court had also allowed the respondent's considerably late application, citing the strong public interest in ensuring proper observance of the sanctions regime (and had found against the appellant on a further point of lesser importance). On that basis, the Court set aside the statutory demand under Rules 6.5(4)(b) and (d) of the Bankruptcy Rules.

However, the Court of Appeal held that the EU Regulation must be read consistently with the UN Security Council Resolutions, which (as amended) were intended to allow the appellant to deal with assets outside Libya acquired after 16 September 2011, and to obtain new assets free of sanctions. On that basis, payment under the guarantee would not be dealing with it, but merely performing the obligation to which it gives rise, thereby providing new funds. Since the appellant had been removed from the scope of Articles 5(1) and (2) (and consistent with various other provisions) it was entitled to receive new funds pursuant to debts arising from frozen assets. Moreover, those new funds did not need to be paid into frozen accounts. The statutory demand was therefore reinstated.

FRUITFUL AUTUMN FOR THE CRIMINAL FINANCES BILL

In October, the Criminal Finances Bill was presented and debated in Parliament, and is progressing at pace through the necessary stages. This new legislation is intended to amend the Proceeds of Crime Act 2002 to further assist with the fight against money laundering and corruption and to counter terrorism financing. Its hallmark innovation is to introduce a new corporate offence of *"failure to prevent facilitation of tax evasion"*. We discussed the proposals for this in June 2016 and, following the publication of the Criminal Finances Bill, have prepared an updated briefing to address the rules as drafted and the accompanying guidance from HMRC.

Modelled on s7 of the Bribery Act, the offence applies where a person associated with a corporation (which includes any body corporate or partnership) has facilitated the evasion of tax by another person, and the corporation failed to put in place reasonable measures to prevent it. The test for whether a person is "associated" is broad and is not reliant on there being a formal relationship with the corporation. Rather, it is determined on the basis of all the surrounding circumstances. It is also worth emphasising that the offence can apply where there has been a failure to prevent the facilitation of foreign, and not just UK, tax evasion offences. Please click here for some practical tips to prepare your business for the implementation of this legislation.

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