Financial Litigation roundup

December 2015

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 Asia, as well as regulatory developments in those jurisdictions

English judgments

Worthing and Another v Lloyds Bank plc more›
Crestsign Limited v National Westminster Bank Plc and Another more›
Suremime Limited v Barclays Bank Plc more›
Thornbridge Ltd v Barclays Bank Plc more›
JSC BTA Bank v Ablyazov more›
MTR Bailey Trading Limited v Barclays Bank Plc more›
Property Alliance Group Limited v The Royal Bank of Scotland Plc more›

Ongoing cases

UBS AG and another v Kommunale Wasserwerke Leipzig GmbH more›
The RBS Rights Issue Litigation more›

Hong Kong

Legal advice privilege for corporates more›
Anti-money laundering – "Stocktake" 2015-16 more›
Hong Kong Monetary Authority circulates guidance on cyber security risk management more›
Memorandum of regulatory cooperation on the mutual recognition of funds between mainland China and Hong Kong more›

Singapore

Proposal to enhance regulatory safeguards for investors in the capital markets more›

Key contacts

Tom Hibbert
Partner
+44 20 3060 6445
tom.hibbert@rpc.co.uk

Simon Hart
Partner
+44 20 3060 6671
simon.hart@rpc.co.uk

Rupert Boswall
Senior Partner
+44 20 3060 6487
rupert.boswall@rpc.co.uk

Andy McGregor
Partner
+44 20 3060 6188
andy.mcgregor@rpc.co.uk

Parham Kouchikali
Partner
+44 20 3060 6189
parham.kouchikali@rpc.co.uk

English Judgments

Worthing and Another v Lloyds Bank plc[1]

Summary: The High Court clarified the duties owed by financial institutions when providing regulated investment advice and conducting subsequent reviews of that advice.

Mr and Mrs Worthing were high net worth individuals seeking compensation for investment losses. They claimed that Lloyds Bank plc (Lloyds) had acted negligently in advising them to invest approximately £700,000 in a medium-risk investment portfolio, breaching its contractual duties, the COBS Rules and the statutory duties under FSMA.

The investment advice followed a series of meetings in which the Worthings provided Lloyds with information about their personal finances, objectives and attitudes to risk, and signed documents explaining the risk nature of the proposed portfolio.

The parties subsequently attended a review (the Review) meeting in March 2008, in which the Worthings emphasised to Lloyds that they were experiencing financial difficulties caused by an unpaid overdraft. Lloyds set out a range of options to assist the Worthings with this issue, but ultimately recommended retaining the portfolio. A few months later, the Worthings opted to sell the portfolio regardless, suffering losses of around £43,000.

Proceedings were not brought against Lloyds until March 2013. By this stage, the six year limitation period in relation to the initial advice in January 2007 had already passed. The Worthings accepted that this aspect of their claim was time-barred, but still claimed damages against Lloyds for:

- breaching its continuing obligation to correct the initial advice
- failing to carry out another assessment of their risk profile at the Review
- failing to advise that the investment was no longer suitable at the Review.

The claim was dismissed by the High Court, which found that Lloyds had not given incorrect advice in January 2007 but, even if it had, there would not have been a continuing duty to correct the original advice. The initial advice was not given under contract and, whilst a contract was entered into after the advice, none of its terms and conditions imposed a continuing obligation.

The High Court found that Lloyds had complied with its advisory duties under the COBS rules and the contract, as well as any common law duty to exercise its reasonable care and skill.

The High Court also accepted Lloyds' use of standardised documents to assess customers' attitude to risk and explain potential risks to them. It noted that the use of standardised documentation is now expressly allowed for in COBS 2.2.1R. The court's decision confirmed that had this aspect of the claim not been statute barred, any claim in connection with the initial advice would still have been unsuccessful.

Financial service providers will take comfort from the court's apparent view that there is no on-going duty to actively manage a model portfolio in accordance with the particular investor's (changing) circumstances.

Back to contents>

Hong Kong and Singapore

Jonathan Cary
Partner
Smyth & Co in association with RPC
+852 2216 7173
jonathan.cary@rpc.com.hk

David Smyth
Senior Partner (Asia)
Smyth & Co in association with RPC
+852 2216 7100
david.smyth@rpc.com.hk

Gary Yin
Partner
Smyth & Co in association with RPC
+852 2216 7103
gary.yin@rpc.com.hk

Jonathan Wood
Head of International Arbitration
+44 20 3060 6562
jonathan.wood@rpc.co.uk

Ben Yates
Senior Associate
Smyth & Co in association with RPC
+852 2216 7169
ben.yates@rpc.com.hk

1. [2015] EWHC 2836 QB.

Crestsign Limited v National Westminster Bank Plc and Another[2]

Summary: The Court of Appeal granted Crestsign permission to appeal on two additional grounds.

Crestsign brought proceedings against NatWest and RBS (RBS) alleging that its advice regarding the suitability of an interest rate swap breached its duty of care. The terms of business stated that:

- RBS provided a non-advisory dealing service
- RBS would not advise on the merits of a transaction or provide any personal recommendations in relation to any transaction or account
- the customer should make its own assessment of any proposed transaction.

In December 2014, the High Court found that RBS had, through its terms of business, successfully excluded its duty of care when making its recommendations, notwithstanding that advice had been given to Crestsign. The principle of contractual estoppel was, therefore, given effect in the typical way. The High Court found that the clauses in the terms of business formed the basis of the contract (ie were so-called "basis clauses" defining the parties' relationship) and were not unreasonable exclusion clauses (and so void) under the Unfair Contract Terms Act 1977 (UCTA).

Significantly, on 16 December 2014, Crestsign was granted permission to appeal on the first of three grounds, which questioned whether the judge was right to conclude that the terms of business were not in fact exclusion clauses under UCTA. Although this was only an interim permission decision it does allow for the scope of contractual estoppel to be re-examined by the Court of Appeal.

On 10 March 2015, Crestsign was granted permission to appeal on the two additional grounds. The second ground for appeal was that RBS owed Crestsign a duty to fully explain the different types of interest rate hedging products available, not just the product that RBS wanted to sell. The Court of Appeal found that the ground had a real prospect of success.

The third ground was that judge had wrongly concluded that RBS had discharged its duty of care in relation to providing information about break costs, with the Court of Appeal finding that this too had a real prospect of success.

According to the Court of Appeal's case tracker, the appeal is due to be heard in April 2016. The result of the appeal could have a significant impact on the conduct of litigation in mis-selling claims and on the principle of contractual estoppel in particular.

Back to contents>

Suremime Limited v Barclays Bank Plc[3]

Summary: The High Court allowed Suremime to amend its Particulars of Claim to add two additional claims in tort against Barclays Bank in relation to its alleged mis-selling of interest hedging products.

Suremime alleges that it was mis-sold an interest hedging product (Swap), entered into on 11 June 2008. Subsequently, the Swap became subject to a review by the FCA (FCA Review). Suremime deemed that the Barclays' resulting Offer of Redress was inadequate, and sought to amend its Particulars of Claim to add a further contractual claim and two tortious claims.

2. [2015] EWCA Civ 986.
3. [2015] EWHC 2277 (QB).

Contractual claim

The High Court rejected Suremime's claim that a contract came into being between Suremime and Barclays under which Barclays owed a duty to conduct its review in accordance with the specification it had agreed with the FSA for the conduct of the FCA Review.

The contractual claim was refused due to a lack of consideration: Barclays had made it clear that it would include Suremime's swap in its review process, whether or not it engaged with the fact finding exercise.

Tortious claim

Suremime's claim that Barclays owed a duty of care in tort equivalent to its contractual claim was, however, permitted by the High Court.

White v Jones claim

Suremime was granted permission to pursue a second tortious claim in accordance with the principles explained in *White v Jones*[4]. The claim states that Barclays owed Suremime a duty to implement the review process properly because any failure to do so would place Barclays in breach of its agreement with the FSA in circumstances where the FCA would suffer no loss but Suremime, as the intended beneficiary of the FCA Review, would suffer loss.

The High Court's decision to permit Suremime to include two additional tortious claims in its Particulars of Claim provides two new bases of claims in swaps cases where there is dissatisfaction with the Offer of Redress.

Back to contents>

Thornbridge Ltd v Barclays Bank Plc[5]

Summary: The High Court has found against a Claimant claiming damages for losses arising as a result of the Claimant entering an into an interest rate swap with the Defendant in May 2008.

The Claimant, Thornbridge Ltd (Thornbridge) entered into a loan agreement with the Defendant, Barclays Bank (Barclays) in 2008. Under the agreement Thornbridge borrowed around £5.6m with an interest rate of 1.5% above Barclays' base rate. It was a condition of the loan that either Thornbridge would enter into an interest rate hedge acceptable to Barclays or alternatively, the interest rate would be on a fixed basis for the first five years of the 15 year term of the loan.

Following telephone and email correspondence between Barclays Capital (the investment division of Barclays) and Thornbridge and the provision of a presentation entitled "Interest Rate Risk Management Strategy" by Barclays to Thornbridge, the Claimant entered into a swap agreement on 30 May 2008. Importantly, there was a clause in the swap agreement stating that Thornbridge was not relying on investment advice from Barclays.

Under the swap agreement Thornbridge paid Barclays a fixed amount calculated at the rate of 5.65% per annum and received a floating rate calculated by reference to Barclays' base rate (which reflected the Bank of England base rate). From April 2008 onwards there was a steep decline in the Bank of England base rate, which resulted in the payments from Barclays to Thornbridge decreasing. In effect this meant that the payments due from Thornbridge increased. Barclays made adjustments to the arrangement to ease the burden of the swap payments but the swap still proved expensive for Thornbridge.

4. [1995] 2 AC 207.
5. [2015] EWHC 3430 (QB).

RPC

Between June and October 2009 Thornbridge tried to restructure the loan but was quoted an indicative break cost of £565,000. Thornbridge did not want to pay this amount and the swap continued to maturity.

Thornbridge claimed that Barclays breached its duties in tort, contract and under FSMA 2000 when the swap arrangement was sold to Thornbridge. In brief, Thornbridge's argument was that Barclays provided inadequate information in relation to the swap arrangement.

The first key question the judge addressed was whether or not Barclays had assumed an advisory role in relation to the swap.

Her Honour Judge Moulder stated that under *Hedley Byrne v Heller*[6] a bank does not generally owe a duty of care to advise on the merits of transactions but if they undertake to do so they owe a duty to advise with reasonable skill and care.

In reaching a conclusion on this point the judge had regard to the detailed exchanges between Thornbridge and Barclays, and in particular the telephone conversations which had taken place between the parties.

It was held that Barclays had not provided recommendations or advice or assumed an advisory role. Whilst the bank had provided information and predictions in relation to the swap, that was not the same as providing formal advice. There is a distinction between a salesperson and an advisor and in this case, Barclays did not cross the line from sales to advice. Of relevance to this decision was the fact that Barclays did not receive a fee for the information it supplied, which would be expected if it were performing an advisory role. This decision was not affected by the fact that Thornbridge corresponded with someone at Barclays with the job title "Corporate Risk Advisor".

The judge also considered the effect of a clause in the swap agreement stating that Thornbridge did not rely on any advice from Barclays when entering the transaction. It was held that even if Barclays had assumed an advisory role, the Claimants would be contractually estopped from asserting that Barclays assumed an advisory relationship. This was because the clause in question was not an exclusion clause; rather it was a was a so-called "basis clause" that set out the basis on which the parties were entering the contract. The judge noted that if she was wrong and the clause was in fact an exclusion clause the provision would be reasonable under UCTA 1977 and therefore would be enforceable.

Thornbridge claimed that even if Barclays had not assumed an advisory role and therefore did not owe a duty to explain the nature and effect of the proposed arrangement "if the bank does give an explanation or tender advice, then it owes a duty to give that explanation or tender fully, accurately and properly" (*Bankers Trust International plc v PT Dharmala*[7]). The Claimant pointed to the high profile judgment in *Crestsign v Royal Bank of Scotland*[8] in which it was decided that where a bank undertook to explain a hedging product it did owe a duty to explain it fully, accurately and properly.

In this case the judge held that Barclays owed no positive duty to explain the derivative fully, accurately and properly. Barclays' only duty was not to provide inaccurate or misleading information. This is a significantly more narrow approach than that adopted in Crestsign. However, the judges in both Crestsign and the present case noted that each case must depend on the facts. Her Honour Judge Moulder distinguished the present case from Crestsign in a

6. [1964] AC 465.
7. [1996] CLC 518.
8. [2014] EWHC 3043 (Ch).

number of ways, for example, it was noted that in Crestsign there was no realistic prospect of timely access to adequate expert advice, which was not the case for Thornbridge.

Thornbridge attempted to assert rights under the FSA rules on the basis that they were incorporated into the contract by the following clause in Barclays' terms of business:

"1.4 ... this Agreement and all transactions are subject to Applicable Regulations. If there is any conflict between this Agreement and any Applicable Regulations the latter will prevail. Further, if there is any conflict between this Agreement and the terms of any Transaction, the latter will prevail ...

12.1 ... "Applicable Regulations" means each of the following, as in force from time to time:

(a) FSA Rules or any other rules of a relevant regulatory authority;

(b) the Rules of the relevant Market; and

(c) all other applicable laws, rules and regulations."

The judge held that this clause did not incorporate the FSA rules into the contract. If the contract is interpreted to incorporate the FSA rules, it must also incorporate "all other applicable laws, rules and regulations" which would make the contract uncertain and unworkable. The judge held that an interpretation of this clause to the effect that only the relevant sections of the FSA rules form part of the contract would strain the interpretation of the contract. In the view of the judge, the clause is intended to deal with conflict; it is not intended to "introduce into the contract an open ended right for the other party to rely on other provisions of domestic law where no such right exists independently".

Further, Thornbridge had no direct right of action under the Conduct of Business rules as it is not a "private person" as defined in FMSA 2000.

The judge considered whether or not the information provided to Thornbridge by Barclays was inaccurate or misleading and came to the conclusion that it was not, with the exception of one incorrect comment contained in the presentation provided to Thornbridge. In the event it was held that this inaccuracy was not relied upon and therefore did not cause any loss to Thornbridge.

This case provides another example of the difficulties claimants face in litigation against banks concerning the sale of derivatives prior to the 2008 economic crash.

Her Honour Judge Moulder specifically stated in her conclusion that this was a case "based on hindsight". The product provided to Thornbridge was not unsuitable in the context of pre-crash 2008, although clearly, as it turned out, the product did not in fact operate with the economic consequences the parties had intended it to at the time it was sold.

Back to contents>

JSC BTA Bank v Ablyazov[9]

Summary: The Supreme Court found that the proceeds of a loan agreement qualify as an asset for the purposes of the new standard Commercial Court freezing order.

The appeal arose in the context of long running proceedings between JSC BTA Bank (JSC) and Mukhtar Ablyazov. Between 2005 and 2009 Ablyazov was the chairman and majority shareholder of JSC. JSC claims that, during his time as chairman, Ablyazov was responsible for the misappropriation of US$10 billion of JSC's money for his own personal benefit. It successfully obtained judgments against Ablyazov for a sum of US$4.4 billion – none of which has yet been paid – and a freezing order on 12 November 2009 (the Freezing Order).

Ablyazov entered into a series of loan agreements in 2009-2010 and used the funds to pay for legal and corporate services and a property, to which JSC objected. The relevant wording of the freezing order was as follows:

"4. Until judgment or further order ... the respondent must not, except with the prior written consent of the Bank's solicitors –

a. Remove from England and Wales any of his assets which are in England and Wales ... up to the value of £451,130,000 ...

b. In any way dispose of, deal with or diminish the value of any of his assets in England and Wales up to the value of ... £451,130,000 ...

c. In any way dispose of, deal with or diminish the value of any of his assets outside England and Wales unless the total unencumbered value ... of all his assets in England and Wales ... exceeds £451,130,000 ...

5. Paragraph 4 applies to all the respondents' assets whether or not they are in their own name and whether they are solely or jointly owned and whether or not the respondent asserts a beneficial interest in them. For the purpose of this Order the respondents' assets include any asset which they have power, directly or indirectly, to dispose of, or deal with as if it were their own. The respondents are to be regarded as having such power if a third party holds or controls the assets in accordance with their direct or indirect instructions."

The Supreme Court held that the loan proceeds were "assets" within the meaning of the extended definition of paragraph 5 of the Freezing Order, because Ablyazov had the power "directly or indirectly to dispose of, or deal with [the proceeds] as if they were his own". This interpretation of the Freezing Order relates to the more recent wording of the standard Commercial Court freezing order. In older freezing orders, loan proceeds cannot generally be defined as assets.

Back to contents>

MTR Bailey Trading Limited v Barclays Bank Plc[10]

Summary: The Court of Appeal has granted MTR Bailey permission to appeal on a number of grounds, one of which will lead the full Court of Appeal to consider the meaning of "private person" as set out in regulation 3 of the FSMA (Rights of Action) Regulations 2001 for the purposes of s.150 (now s.138D) of FSMA.

9. [2015] UKSC 64.
10. [2015] EWCA Civ 667.

The meaning of "private person" was considered in *Titan Steel*[11] and *Camerata*[12] and had been treated as settled law. However, counsel for MTR Bailey submitted that these cases were wrongly decided and their "effect is to rob [s.150/138D FSMA] of its substance".

By virtue of s.138D, claims can be brought against an authorised person for breach of a PRA or FCA rule, but only at the suit of a "private person". Regulation 3 states that "private person" means an individual (ie a natural person) or any person who is not an individual (ie a legal person) unless the loss complained about is suffered "in the course of carrying on business of any kind".

In *Titan Steel*, the court interpreted regulation 3 broadly to exclude companies which engage in financial transactions even on a one-off basis. In *Camerata*, the court held that even a company which was a consumer for the purposes of the Unfair Contract Terms Act 1977 (UCTA) would not have rights of action under s.150 FSMA (what is now s.138D). This has made it very difficult for any company to bring a claim under s.138D.

MTR Bailey contended that it was a private person within the definition of regulation 3 as it did not enter into the transaction in the course of its business because its business dealt in vehicles and property and not in complex financial products. This was rejected by the High Court on the basis of *Titan Steel* and *Camerata*.

MTR Bailey also argued that, even if it had no statutory right of action, it had a cause of action in contract. Its contract with Barclays stated that it was "subject to applicable regulations" which MTR Bailey argued incorporated applicable COBS rules into its contract with Barclays. The High Court judge rejected this contention on the facts, finding that the COBS rules were not incorporated into the contract.

At an oral permission hearing, the Court was persuaded that both issues required the consideration of the Court of Appeal and so allowed the appeal.

If the Court of Appeal overturns the meaning of "private person" as interpreted in *Titan Steel* and *Camerata*, this will leave the door open to a wide range of claims under s.138D FSMA that previously could not succeed. Furthermore, even if *Titan Steel* and *Camerata* are not overturned, if the Court of Appeal determines that the client agreement incorporated the applicable COBS rules into the contract, thus creating a contractual claim against Barclays, this could result in a number of claims being made against financial institutions.

Back to contents>

Property Alliance Group Limited v The Royal Bank of Scotland Plc[13]

Summary: The High Court has ruled that legal advice privilege is not restricted to actual legal advice, but can extend to factual information exchanged between lawyer and client in the course of giving advice. It also gave guidance on the applicability of without prejudice privilege in communications with the FSA (the predecessor to the FCA).

11. *Titan Steel Wheels Limited v RBS* [2010] EWHC 211 (Comm).
12. *Camerata Property v Credit Suisse* [2012] EWHC 7 (Comm).
13. [2015] EWHC 3187 (Ch).

RPC

Legal advice privilege
In an earlier case between the parties, *Property Alliance Group Limited v The Royal Bank of Scotland Plc*[14], the Royal Bank of Scotland Plc (RBS) asserted privilege in various categories of documents prepared by its external lawyers relating to meetings of the bank's Executive Steering Group (ESG), which was a special committee formed by the bank to oversee the regulatory investigations in relation to LIBOR misconduct and related litigation, and to liaise with the bank's lawyers.

In his judgment on that case, Birss J was not satisfied that the claim to privilege was correctly made. He ordered that the ESG documents should be reviewed by the court to determine whether the claim to privilege in each document had been made out.

Snowden J was appointed as the inspecting judge. The documents fell into either of two categories:

- confidential memoranda in the form of tables, which informed and updated the ESG on the progress, status and issues arising in the regulatory investigations. Many of the relevant entries in the body of documents were no more than a brief factual recital of a recent event that had occurred or which was scheduled that would not, by their nature, have attracted privilege
- confidential notes/summaries concerning the discussions between the ESG and its legal advisors at the ESG meetings. These notes reflected the external lawyers' views on the regulatory investigations, as the firm ultimately determined the information to be included in the notes.

Snowden J upheld RBS' claim to legal advice privilege in respect of both categories of documents. He noted that the areas of debate as to the proper extent of legal advice privilege have arisen from two sources: firstly, over the years, solicitors have tended to offer their clients a range of what might loosely be described as "business" services; and secondly, that not all communications between a solicitor and his client will necessarily be for the purposes of giving or obtaining legal advice.

The court was entirely satisfied that the external lawyers were engaged by RBS in a "relevant legal context" and that both categories of document formed part of "a continuum of communication and meetings" between lawyer and client, the object of which was the giving of legal advice as and when appropriate.

The judge considered that the first category of documents constituted "information ... passed by the solicitor or client to the other as part of the continuum aimed at keeping both informed so that advice may be sought and given as required" as they were entirely focused on providing the information concerning the regulatory investigations which the ESG needed to know.

As for the second type of document, the summary minutes showed that the lawyers from different jurisdictions supplemented the contents of the tables with reports and references to meetings and communications that they had with regulators on behalf of RBS. Importantly, the lawyers gave their impressions of those matters, responded to questions as to RBS' position and gave their suggestions as to what the bank should do next in the context of the investigations.

14. [2015] EWHC 1557 (Ch).

Snowden J did also comment, however, that he could see that, depending on the facts, a court might not uphold a claim to privilege in respect of the minutes of a business meeting simply because the minutes were taken by a lawyer, or to press cuttings provided from its own library to a client for a board meeting where the client's own public relations department could not find them. This would be because the lawyer was not "being asked qua lawyer to provide legal advice".

For completeness, Snowden J considered whether the communications within the ESG documents fell within the policy underlying the justification for legal advice privilege. He concluded that they did; there is a clear public interest in regulatory investigations being conducted efficiently and in accordance with the law. That public interest will be advanced if the regulators can deal with experienced lawyers who can accurately advise their clients how to respond and co-operate. Such lawyers must be able to give their client candid factual briefings as well as legal advice, secure in the knowledge that any such communications and any record of their discussions and the decisions taken will not subsequently be disclosed without the client's consent.

This decision confirms that legal advice is not restricted to actual legal advice, but also includes factual information communicated between lawyer and client in the course of giving legal advice.

Without prejudice privilege

The bank had claimed without prejudice privilege in its communications with the FSA regarding negotiations prior to the issuing by the FSA of its Final Notice in relation to LIBOR manipulation. Birss J held that, although in principle a right to rely on an analogous privilege applied in connection with those negotiations, in this case the bank had waived that privilege by relying on the issues underlying the Final Notice in its Defence: once the basis on which the Final Notice was decided was put into issue, the court required the communications leading to the Final Notice to be disclosed.

The decision is helpful for businesses faced with regulatory investigations, where legal advice and decision making may be based on the information provided by investigations and other third parties. Ultimately, however, the question of privilege will always be fact-dependent. The case therefore serves as a reminder that businesses will need to be alive to the issue of privilege in setting up their lines of communication.

Back to contents>

Ongoing Cases

UBS AG and another v Kommunale Wasserwerke Leipzig GmbH

UBS was granted permission to appeal the High Court ruling that dismissed its lawsuit against German water company Kommunale Wasserwerke Leipzig (KWL) over payments linked to derivatives deals. The appeal has not yet been listed.

The original judgment, handed down in November 2014, said the case was a "sorry story of greed and corruption" and a "case study in how not to conduct investment banking in an honest and fair way".

UBS had claimed it was owed around $140m (£92m) from contracts with KWL in April 2014. During the trial KWL alleged that a UBS banker booked strippers for consultants from Value Partners Group and went on an African safari with them.

The trial lasted 14 weeks and was presided over by Mr Justice Males. Males J found that "neither UBS or KWL emerges with credit from this saga", adding: "It is apparent, however, that for many years KWL was run by a criminal who was able to plunder the company for his personal gain."

"It is to be hoped that the events described belong to a bygone era. As most of the main participants have moved on, and many of them are no longer employed in the banking industry, there is room to believe that to be so" Males J added.

Back to contents>

The RBS Rights Issue Litigation

In a judgment of 26 November 2015, Mr Justice Hildyard delayed the trial in the long-running dispute between RBS and shareholders by three months – until 6 March 2017 – despite his "very great reluctance to do so".

The bank, seeking to delay the trial, submitted their application for an adjournment on the basis of practical impossibility, having been swamped by a disclosure exercise involving approximately 25 million documents. Hildyard J accepted that the enormous disclosure process was the "root of the problem" but was nevertheless critical of the bank's approach, stating:

"the [bank's] response to disclosure and in particular the identification of search terms and custodians appears not to have been informed by any sufficient early attempt to grasp what would truly be involved, and their approach to the process of disclosure has, as it seems to me, been diffuse ... too much emphasis, it seems, has been placed by the Defendants on a "bottom up" approach to disclosure, without clear evidence that efforts have been made to apply a "top down" approach also ... which would have sped up the process overall."

The judge found that the bank had not sufficiently assisted its solicitors in the disclosure process and in particular in explaining how the Prospectus was built up and "what the essential documentation comprises and its whereabouts".

Back to contents>

15. [2014] EWHC 3615 (Comm).
16. [2015] EWHC 3433 (Ch).

Hong Kong

Legal advice privilege for corporates

In a judgment of significant importance, not just in the context of financial disputes, the Court of Appeal in Hong Kong clarified in June 2015 the ambit of legal advice privilege as regards corporate clients and introduced a new "dominant purpose test". The judgment is *Citic Pacific Ltd v Secretary for Justice (No. 2)*.[17]

The judgment arises out of a dispute over claims to privilege in documents seized by the police pursuant to certain search warrants in connection with a high profile criminal investigation in Hong Kong. The plaintiff company is a well-known energy and financial services business (among other things).

The three key principles arising out of the judgment are as follows:

- the test to be applied in deciding whether a confidential communication between a client and legal adviser is protected by legal advice privilege (also known as "solicitor-client privilege") is now a "dominant purpose test". Therefore, a confidential communication (including, a document) is privileged where it is created for the sole or dominant purpose of obtaining legal advice
- the much criticised definition of corporate client adopted by the English Court of Appeal in *Three Rivers District Council & Ors (No. 5)*[18] has been rejected. In *Three Rivers No. 5*, the court took a restrictive view that the "client", whose communications may be protected by legal advice privilege, was a narrow group of individuals within the corporate who had specific responsibility for coordinating communications with external lawyers
- on this basis, legal advice privilege now extends to confidential internal communications passing between a corporate client's employees which are created as part of the information gathering process in order to obtain legal advice (within the corporate entity or from its external lawyers).

In an environment of increasing concerns about lawsuits and regulatory oversight, corporations and their in-house lawyers should be the ultimate beneficiaries of *Citic Pacific (No.2)*. Corporate clients and their in-house lawyers (or the equivalent) still need to be careful as to how they protect the confidentiality of communications and the flow of information generally with their external lawyers. They also need to have suitable protocols and practices in place and be mindful of the different applicable laws that may apply in cross-border disputes or transactions.

Citic Pacific (No. 2) says much for the Hong Kong Court of Appeal's treatment of a fundamental right (the right to confidential legal advice) and the judgment has been very well received.[19] Indeed, *Citic Pacific (No. 2)* confirms what many corporations' in-house lawyers already took the position to be in practical terms. It also leaves the position in England somewhat out on a limb and adds substantial weight to the opinion that a review is required to lift the uncertainty surrounding this area of English law.

Back to contents>

17. [2015] 4 HKLRD 20. The Court of Appeal's judgment also gives "Guidance on the procedure to be adopted" with respect to claims to privilege in the context of materials seized pursuant to the execution of a search warrant by a law enforcement agency (see paragraphs 69-76).
18. [2003] Q.B. 1556. A judgment that has received much criticism and, following trends in other common law jurisdictions (such as Australia and Hong Kong), looks decidedly questionable.
19. At the time of writing, no appeal to the Court of Final Appeal of Hong Kong is evident.

Anti-money laundering – "Stocktake" 2015-16

Anti-money laundering (AML) issues have again featured large in Hong Kong this year, particularly for banks and financial institutions. Next year is expected to be the same, particularly as Hong Kong moves towards its next Financial Action Task Force's (FATF) mutual evaluation in the fourth quarter of 2017 or early part of 2018.[20]

"Highlights" this year include:

- at the end of the third quarter of this year, the number of suspicious transaction reports (STR) received by the Joint Financial Intelligence Unit (JFIU) in Hong Kong was just over 30,000.[21] Therefore, Hong Kong looks as if it will break a "personal best" for STR made in any one year.[22] Of the STR made in Hong Kong, over 80% are by banks. This increase in STR should be viewed against the following background. First, the Anti-Money Laundering and Counter-Terrorist Financing (Financial Institutions) Ordinance (Cap 615 – AMLCTFO) which came into effect in Hong Kong on 1 April 2012. The AMLCTFO provides for stringent customer due diligence and record-keeping requirements for financial institutions in Hong Kong, breaches of which can result in serious criminal offences. While there have been few prosecutions (so far) under the AMLCTFO,[23] such is the concern about the risk of a money laundering related prosecution some banks or other financial institutions may be over-doing their customer due diligence. Second, it would be fair to state that the risk of prosecution for failing to report knowledge or suspicion that property represents the proceeds of crime[24] has also resulted in a fair amount of "defensive reporting" by the banks (a phenomenon not unique to Hong Kong). Such prosecutions are rare but most banks and financial institutions usually err on the side of caution. In the run-up to 2017-18 and the FATF's next mutual evaluation of Hong Kong it would not be a surprise to see investigative agencies and regulators turn more of their attention to non-financial institutions, such as company service providers and auction houses, and to the so-called "shadow banking" industry
- the prominence of prosecutions for allegedly dealing with property knowing or having reasonable grounds to believe that it represents the proceeds of an indictable offence.[25] Rather than focus on the "failing to report" offence, prosecutions have concentrated on the so-called "dealing" offence. Things will come to a head in 2016 when the Court of Final Appeal will be asked to determine (among other things) whether, in respect of a charge that a person had reasonable grounds to believe that the property being dealt was the proceeds of crime, the prosecution needs to prove that the proceeds are in fact the proceeds of crime[26]
- *Interush Ltd v Commissioner of Police*.[27] An important case, which at the time of writing is headed for appeal to the Court of Appeal and which will consider whether the application of the police's "no consent" regime with respect to STR contravenes Articles 6 or 105 of Hong Kong's Basic Law (ie the protection of private property).[28]

Back to contents>

Hong Kong Monetary Authority circulates guidance on cyber security risk management

Recognising the recent trend towards ever-more sophisticated cyber-attacks in Hong Kong and worldwide, on 15 September 2015 the Hong Kong Monetary Authority (HKMA) issued a circular to authorised institutions (AIs) advising them to review their cyber security risk management controls. Where, following that review, those controls are founding wanting, the HKMA expects AIs to demonstrate "concrete progress" in controls by early 2016.

20. FATF (the inter-governmental body) tasked with (among other things) setting standards for and promoting implementation of legal, regulatory and operational measures in order to combat money laundering and terrorist financing.
21. 30,028 as at 30 September 2015. The JFIU is jointly run by staff of the Hong Kong Police Force and the Hong Kong Customs & Excise Department. It manages the STR regime in Hong Kong. The JFIU's role is to receive, analyse and store STR and, where appropriate, to liaise with investigative agencies.
22. 37,188 in 2014.
23. One example being HKSAR v Mak Kit Ping [2015] CHKEC 1501 (Chinese Judgment).
24. Section 25A(1) of the Organized and Serious Crimes Ordinance (Cap. 455 – OSCO).
25. Section 25(1) of OSCO.
26. This is a simplification of the issue. *HKSAR v Yang Sigai*, FAMC 22/2015 and *HKSAR v Yeung Ka Sing*, FAMC 29/2015; all decisions of Appeal Committee of the Court of Final Appeal (CFA), in August 2015, granting leave to appeal to the CFA in respect of a number of important money laundering issues. The final appeals are likely to be heard in May 2016 (although, this could change).
27. [2015] 4 HKLRD 706 and subject to appeal to the Hong Kong Court of Appeal (CACV 230/2015).
28. Section 25A(2)(a) of OSCO. The constitutionality of this provision was upheld at First Instance. Assuming the appeal proceeds, the stakes are likely to be high.

The key points are as follows:

- the HKMA repeatedly stresses the responsibility of the Board and senior management in ensuring that customers' sensitive information is protected, sending a clear signal that senior management will be held accountable for any failure to manage technology risks adequately
- AIs are urged to establish adequate controls across all business lines, contractors, service providers, and other offices of their banking group, and all relevant users should cultivate a "strong security awareness" and culture
- senior management should periodically evaluate the adequacy of the AI's controls, adopting a "credible benchmark" endorsed by the Board. The HKMA has opted not to prescribe a benchmark, but instead has put the onus on the AI to establish one by reference to the risks it has identified in its own business operations
- recognising the need to commit resources to combat those threats effectively, the HKMA urges senior management to establish a clear implementation plan for cyber security controls. Those controls should be supported by "adequate staffing and financial resources"
- senior management should report to the Board periodically on the implementation of cyber security controls. Recognising the constantly-evolving nature of cyber security threats, the HKMA states that AIs should regularly test their incident response mechanisms and business continuity plans, and submit to regular independent assessment. AIs with processes and services that are more important to members of the public or the functioning of the financial systems of Hong Kong should conduct periodic penetration tests
- AIs should "explore opportunities to collaborate" with other institutions and the Police in sharing and gathering cyber threat intelligence.

The full circular can be viewed on the HKMA's website.

Back to contents>

Memorandum of regulatory cooperation on the mutual recognition of funds between mainland China and Hong Kong

22 May 2015 marked the signing of a Memorandum of Regulatory Cooperation on the Mutual Recognition of Funds between Mainland China and Hong Kong, following two years of market expectation. Signed by the Securities and Futures Commission (SFC) and the China Securities Regulatory Commission (CSRC), the Mainland–Hong Kong Mutual Recognition of Funds (MRF) was launched on 1 July 2015.

The MRF will allow Mainland and Hong Kong funds that meet the eligibility criteria to benefit from streamlined procedures for the purpose of gaining authorisation or approval for offering funds to retail investors in each other's markets.

The CSRC's "Provisional Rules for Recognised Hong Kong Funds" and SFC's "Circular on Mutual Recognition of Funds between the Mainland and Hong Kong" establish the eligibility criteria, application procedure, operational requirements and the regulatory arrangements for funds to be distributed in the Mainland and Hong Kong respectively.

The MRF represents a further step towards the liberalisation of the Mainland's financial markets, and is important not only for what it represents, but in practice. It is hoped that the scheme will further the integration and development of the Asian asset management industry and it should help to ensure that both Mainland and Hong Kong investors are afforded equal protection.

Back to contents>

Singapore

Proposal to enhance regulatory safeguards for investors in the capital markets

In September 2015, the Monetary Authority of Singapore released a response to feedback received on its consultation paper issued on 21 July 2014 setting out proposals to enhance regulatory safeguards for investors in the capital markets. The response confirmed that the majority of the proposals will be implemented. A separate response will be issued on the necessary legislative amendments.

In summary, the main proposals to be implemented are:

- the extension of the capital markets regulatory framework in order to provide more robust safeguards for investors in non-conventional investment products. The framework will be extended to investment products sharing features similar to capital markets products
- regulatory safeguards applicable to retail investors will now be available to Accredited Investors (AI). New AI-eligible customers will be treated by financial institutions as retail investors, unless they opt-in to be treated as an AI. Existing AI customers must be notified of their AI status, and be informed of their right to opt out of AI status
- a change in classification of investors. It is suggested that an individual will qualify as an AI if their net financial assets exceed S$1 million, and a corporation will be treated as AI-eligible if its shareholders are AI-eligible investors. The definition of institutional investors has also been expanded.

These legislative amendments will be tabled for Parliament in 2016 and implemented by way of amendments to the Securities and Futures Act.

Back to contents>

This roundup is intended to give general information only and may be of general common law or regulatory interest. It is not a complete statement of the law. It is not intended to be relied upon or to be a substitute for legal advice in relation to particular circumstances. Specific circumstances require specific advice.

About RPC

RPC is a modern, progressive and commercially focused City law firm. We have 78 partners and over 600 employees based in London, Hong Kong, Singapore and Bristol.

"... the client-centred modern City legal services business."

At RPC we put our clients and our people at the heart of what we do:

- Best Legal Adviser status every year since 2009
- Best Legal Employer status every year since 2009
- Shortlisted for Law Firm of the Year for two consecutive years
- Top 30 Most Innovative Law Firms in Europe

We have also been shortlisted and won a number of industry awards, including:

- Winner – Law Firm of the Year – The British Legal Awards 2015
- Winner – Competition and Regulatory Team of the Year – The British Legal Awards 2015
- Winner – Law Firm of the Year – The Lawyer Awards 2014
- Winner – Law Firm of the Year – Halsbury Legal Awards 2014
- Winner – Commercial Team of the Year – The British Legal Awards 2014
- Winner – Competition Team of the Year – Legal Business Awards 2014
- Winner – Best Corporate Social Responsibility Initiative – British Insurance Awards 2014

Areas of expertise

- Banking
- Commercial
- Commercial Litigation
- Competition
- Construction
- Corporate
- Employment
- Insurance
- Intellectual Property
- Media
- Outsourcing
- Pensions
- Private Equity
- Real Estate
- Regulatory
- Reinsurance
- Tax
- Technology

15534

Tower Bridge House
St Katharine's Way
London E1W 1AA
T +44 20 3060 6000

Temple Circus
Temple Way
Bristol BS1 6LW
T +44 20 3060 6000

11/F Three Exchange Square
8 Connaught Place
Central Hong Kong
T +852 2216 7000

8 Marina View #34-02A
Asia Square Tower 1
Singapore 018960
T +65 6818 5695

RPC