Recent Developments in Banking Law

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1. Banking litigation has occupied a significant proportion of the English court docket in recent years as the judiciary has grappled with the consequences of the financial crisis. Considerable time has been devoted, in particular, to claims regarding the alleged mis-selling of complex financial products including swaps. The reception given to these claims has not been especially warm, and many such claims have fallen victim to the developing doctrine of contractual estoppel.

2. Nonetheless, three recent decisions have suggested a greater willingness on the part of the courts to entertain such claims. First, a High Court decision has raised the possibility of a 'mezzanine' duty between the duty to advise and the duty not to misstate, which may be more readily established. Secondly, the Court of Appeal has acknowledged that allegations of LIBOR manipulation may provide a viable route to rescission of financial instruments. Finally, the Commercial Court has provided guidance on a bank's responsibility for the acts of an intermediary; where wrongdoing on the part of an intermediary can be established, a financial instrument may be rescinded irrespective of the success of any related mis-selling claim.

3. Another notable development during the past year concerns the scope of a bank's confidentiality obligations. Two cases with very different facts demonstrate the importance of using confidential information in an appropriate manner.

4. This talk will also address further decisions of note: the Court of Appeal's consideration of when a bank can prioritise its own commercial interests; the Chancery Division's consideration of claims to privilege by a bank in relation to regulatory investigations and exchanges with the regulators; and the clarification provided by the Supreme Court as to the proprietary consequences when fiduciaries receive bribes or secret commissions.

Contractual Estoppel

5. Mis-selling claims have not enjoyed much success over the past decade. Claimants have struggled to establish actionable misrepresentations. For example, in *Cassa di Risparmio della Repubblica di San Marino SpA v Barclays Bank Ltd* [2011] EWHC 484 (Comm), Hamblen J found that Barclays had not made any relevant representation as to the default risk, or its opinion of the default risk, of the structured notes sold to the claimant.

6. Many claims have proceeded on the basis that the relevant bank had a duty to advise which was breached prior to entry into the product in question. However, it is very rare for banks to be found to have assumed such a duty. See, for example, Gloster J's judgment in *JP Morgan Chase v Springwell Navigation* [2008] EWHC 1186 (Comm) and HHJ Waksman QC's judgment in *Green & Rowley v Royal Bank of Scotland plc* [2012] EWHC 3661. The courts will look at the facts of each individual case, but it is unlikely that a bank will be found to have acted such that an advisory relationship arose.

7. Moreover, the Court of Appeal in *Green & Rowley* ([2013] EWCA Civ 1197) dismissed the argument that the bank had a duty at common law to comply with the relevant Conduct of Business Rules ("COB rules"). Tomlinson LJ noted that Parliament had provided a remedy for private persons for a breach of statutory duty under the Financial Services and Markets Act 2000 and that there was "*no feature of the situation which justifies the independent imposition of a duty of care at common law to advise as to the nature of the risks inherent in the regulated transaction*" (paragraph 23). Permission to appeal was refused by the Supreme Court.

8. However, even if a duty to advise would otherwise be established on the facts, the doctrine of 'contractual estoppel' has been employed by the courts to negate any such duty. Contractual estoppel was explained by Moore-Bick LJ in *Peekay Intermark Ltd v Australia and New Zealand Banking Group Ltd* [2006] EWCA Civ 386:

> "There is no reason in principle why parties to a contract should not agree that a certain state of affairs should form the basis for the transaction, whether it be the case or not. For example, it may be desirable to settle a disagreement as to an existing state of affairs in order to establish a clear basis for the contract itself and its subsequent performance. Where parties express an agreement of that kind in a contractual document neither can subsequently deny the existence of the facts and matters upon

> which they have agreed, at least so far as concerns those aspects of their relationship to which the agreement was directed. The contract itself gives rise to an estoppel…"

9. The principle was subsequently endorsed by Aikens LJ in *Springwell Navigation Corp v JP Morgan Chase Bank* [2010] EWCA Civ 1221 (para 144). It has been applied in a number of decisions including *Titan Steel v RBS* [2010] EWHC 211 (Comm) and *Raiffeisen v RBS* [2010] EWHC 1392 (Comm).

10. Two recent cases underline the significance of the doctrine. First, *Crestsign Ltd v National Westminster Bank* [2014] EWHC 3043 (Ch) was a rare case where the judge, Tim Kerr QC, found that a duty to advise was plausible on the facts. Crestsign, a family company which dealt in commercial property, engaged in refinancing discussions with NatWest in early 2008. In order to obtain the proposed loan facility, NatWest required Crestsign to enter into an interest rate management product. Following discussions with NatWest, Crestsign entered into a ten year swap product.

11. Crestsign alleged that the swap was manifestly unsuitable because it hedged 100 per cent of the debt, was inflexible, hedged beyond the term of the loan which might not be renewed or adequately refinanced, placed nearly all the risk on Crestsign and little on RBS because of its cancellation option, exposed Crestsign to adverse interest rate conditions for seven of the ten years, and exposed Crestsign to high break costs.

12. The judge found as follows regarding the relationship between Crestsign's director and NatWest's representative:

> "if I were to leave out of account the bank's documents which sought to exclude a duty of care, I would find that the relationship between Mr Gillard and Mr Parker was such as to satisfy the requirements set out in Lord Morris' speech in *Hedley Byrne* at 502-3, quoted above. The disparity in knowledge and expertise and the respective roles of the two men was such that it was reasonably to be expected that Mr Parker would rely on Mr Gillard's skill and judgment and, aside from the documents, it would be reasonable for him to do so..." (paragraph 111)

13. Nonetheless, the statements in the documentation that no advice was given were sufficient to negate any duty to advise (paragraph 114). In light of this documentation,

Crestsign was contractually estopped from asserting the existence of a duty to advise (paragraph 119).

14. The Unfair Contract Terms Act 1977 provided no assistance because the statements in the documentation were held to be 'basis' clauses (i.e. clauses that went to the basis on which the parties engaged, and which preclude the duty from arising in the first place), rather than exclusion clauses (see paragraph 119).

15. The judge provided helpful guidance, in the event that a duty to advise had been established, as to the scope of that duty. He noted that the duties under COBS and common law duties to advise are not co-terminous. Breach of a COBS duty is not necessarily common law negligence. But breach of COBS duties, whilst not actionable as such at the suit of a party such as Crestsign, can still constitute negligence at common law. The COBS duties are likely to be relevant to determining the standard of care required of a reasonably careful and skilled adviser, since a reasonably skilled and careful adviser would not fall short of the standard required to meet relevant regulatory requirements (see paragraphs 126 to 127).

16. Nonetheless, having established contractual estoppel, the bank was able to avoid any finding of breach of duty.

17. The second important case in this context is the decision in *Creditsuisse International v Stichting Vestia* [2014] EWHC 3103 (Comm). Here, the contractual estoppel doctrine was applied not to the existence or otherwise of a duty to advise, but rather to the capacity of one of the parties. In this case, a Dutch social housing association argued that it had lacked capacity to enter into certain swap transactions with the bank. However, that did not affect its liability under an ISDA master agreement because it had given representations about its capacity which gave rise to a contractual estoppel.

18. The court held that contractual estoppel is not limited to past or present events. Andrew Smith J considered the basis for the doctrine and concluded that it could apply to future conduct (see paragraphs 307 to 309):

> "In his formulation of the doctrine of contractual estoppel in *Peekay* Moore-Bick LJ said that parties are able to agree upon "a state of affairs [that] should form the basis for the transaction". In most of the subsequent cases that have considered the doctrine, the parties had agreed about a present or past state of affairs and made their contract on the deemed basis that that state of affairs obtained or had obtained. But I can see no reason of authority, principle or policy that the doctrine should be confined to agreements of that kind, or that the law should adopt a different approach where parties have made an agreement about a state of affairs in the future, whether or not the label contractual estoppel should be attached in those circumstances…
>
> As for principle, I could understand that the doctrine might be confined to statements about a past or present statement of affairs if it were really about a form of estoppel, but to my mind, while the term "contractual estoppel" has been adopted as a convenient label, it is no more than that: a defining characteristic of estoppels is detriment in some form or other, and, as I have said, contractual estoppel does not require detriment. This is the view of Wilken and Ghaly, *The Law of Waiver, Variation and Estoppel* (3rd Ed, 2012) at paragraph 13.22, whose analysis I would adopt. The authors explain (at paragraph 13.24) the true nature of the doctrine:
>
> > "*Peekay*, if it cannot be justified by recourse to an estoppel, has to be justified by other means. The most obvious means is contractual. Since the parties have agreed X to be the case, then the party which denies that X is in fact the case is in breach of contract. The Courts will not permit a party to benefit from its own wrong – including its own breach of contract. The *Peekay* contractual estoppel would be a reflection of that principle...""

19. It appears therefore that the doctrine is justified on the basis that a party cannot rely on its own breach of contract or take advantage of its own breach. Andrew Smith J noted further that "*the separate (but perhaps related) policy against circuity of action…also applies*" (paragraph 310).

20. It may be questionable as a matter of principle whether appropriate wording should suffice to exclude a duty of care irrespective of the strength of the facts indicating that an advisory relationship has been entered into. This is particularly so where the contractual estoppel is in relation to future conduct. It has been noted in *Banking Litigation* (3rd Ed.) that:

> "such contractual estoppels may be vulnerable to another species of estoppel: namely estoppel by convention. If a party to a contract acts upon a false understanding of its rights and obligations and the other party acquiesces in that performance, the latter

> may be estopped 'by convention' from relying on their original agreement if this would be unjust or unconscionable. Thus if a bank deals with its customers in a manner which (contrary to the contractual disclaimers) encouraged the customer to rely on the bank's expertise or representations and knew (contrary to the contractual non reliance provisions) that the customer did in fact rely on that advice or those representations, the effect might be that the bank is estopped by convention from asserting that those terms formed part of the true agreement if that would lead to consequences that might be considered unjust or unconscionable…"

21. This argument was advanced in *Standard Chartered Bank v Ceylon Petroleum Corporation* [2011] EWHC 1785 (Comm) but was rejected by Hamblen J on the evidence (paragraphs 535 to 546). There is no reason of principle why an earlier contractual estoppel could not be displaced by convention arising thereafter where the underlying facts showing the existence of an advisory relationship are strong enough.

22. Nevertheless, the contractual estoppel doctrine is here to stay. As the judge in *Crestsign* noted, "*While the result may seem harsh to some, it is not the role of the common law and the court to act as a regulator*." It is clear that any banking counterparty seeking to establish a duty to advise will need to consider the facts very carefully – and should not expect an especially warm reception.

<u>A 'mezzanine' duty</u>

23. Despite the establishment of contractual estoppel, the judge in *Crestsign* proceeded to consider the possibility of a separate duty owed by the bank. It was common ground that the bank had a duty not to misstate. However, Crestsign argued that there was a further 'mezzanine' duty situated between the duty to advise and the duty not to misstate – namely, a duty when providing information to ensure that the information was both accurate and fit for purpose.

24. NatWest argued that this duty was excluded by the decision in *Green and Rowley v Royal Bank of Scotland* [2013] EWCA Civ 1197. However, the judge concluded that this duty was not put to the courts in *Green and Rowley*, either at first instance or on appeal.

25. Crestsign's case rested on two authorities:

a. In *Cornish v. Midland Bank plc* [1985] 3 All ER 513, a bank manager took it on himself to explain the effect of a mortgage transaction to the plaintiff; the bank was found to be liable because the manager negligently failed to explain to her that the security would extend to unlimited future borrowing by her husband.

b. In *Bankers Trust International plc v. PT Dharmala Sakti Sejahtera* [1996] CLC 518, sophisticated investors in derivatives failed on the facts to establish any breach of a duty on the part of the bank not to mislead them when negotiating the relevant contracts. Nonetheless, Mance J explained at p.533:

> "a bank negotiating and contracting with another party owes in the first instance no duty to explain the nature or effect of the proposed arrangement to that other party. However, if the bank does give an explanation or tender advice, then it owes a duty to give that explanation or tender that advice fully, accurately and properly. How far that duty goes must once again depend on the precise nature of the circumstances and of the explanation or advice which is tendered."

26. The judge in *Crestsign* held that it was immaterial that this duty may overlap with those arising under COBS (paragraph 146). Anchoring himself in Mance J's statement of the law, Tim Kerr QC explained that the banks owed in the first instance no duty to explain the nature and effect of the proposed transactions to Crestsign. However, once they chose to do so, they had a duty "*to give that explanation or tender that advice fully, accurately and properly*". The judge provided guidance on the information that had to be supplied (paragraphs 153 to 154):

> "In my judgment, he came under a duty to explain fully and accurately the nature and effect of the products in respect of which he chose to volunteer an explanation, but I do not think he came under a duty to explain fully other products that Crestsign might have wanted to purchase but which he did not wish to sell, such as an interest rate cap product. An explanation of such other products, for the purpose of presenting a balanced picture, would be the territory of an advice-giving duty, which was excluded on the documents as I have already found…
>
> ...he came under a duty to explain their effect accurately, without misleading, but I do not think his duty extended as far as a "duty to educate" in the sense of giving a comprehensive "tutorial" and satisfying himself that Mr Parker understood every

aspect of each product, including a detailed account of the risks associated with each which, again, would stray into the territory of advice giving."

27. Ultimately, the judge found that there was no breach of this duty on the facts. The bank came closest to a breach in the context of break costs, which were described simply as "*substantial*":

> "That language might well have invited further enquiry. What was the formula for calculating break costs? How much might they be on various assumptions, from the lowest end to the highest end of the likely range? I have come to the conclusion that the provision of full and non-misleading information about the products on offer from the banks, did not extend to proffering that level of detail in the absence of such an enquiry being made of them. If Mr Parker had asked: "Are we talking about tens of thousands or hundreds or thousands?" Mr Gillard would have come under a duty to say that it could well be in the hundreds of thousands. But Mr Parker did not ask." (paragraph 167)

28. The impact of this *obiter* reasoning from a deputy high court judge is not yet clear. There has been no further authority on the point. However, this 'mezzanine' duty may provide a more fruitful route for counterparties, and a concerning development for banks.

<u>LIBOR Manipulation</u>

29. Further hope for counterparties can be found in the Court of Appeal's decision on a conjoined appeal concerning LIBOR manipulation in November 2013.

30. LIBOR is defined by the British Bankers' Association as "*the rate at which an individual contributor panel bank could borrow funds were it to do so by asking for and then accepting interbank offers in reasonable market size just prior to 11.00 am London time.*"

31. As is well known, bank regulators in various jurisdictions have investigated a number of banks for attempted manipulation of LIBOR interest rates over the period 2005 to 2010. The manipulation took the form of submitting LIBOR indications that did not in fact represent the rate at which a panel bank could borrow from other panel banks. The general aim appears to have been to produce a LIBOR rate different from the actual rate at which the banks would be prepared to lend to one another because (a) that suited the panel banks because it reduced their obligations under derivative contracts to which they

were parties and which were priced by reference to LIBOR and/or (b) during the financial crisis of 2008 to 2009, lower submissions tended to reduce the apparent cost to panel banks of financing their balance sheets thus improving confidence in the financial integrity of the bank concerned.

32. Findings have been made and fines levied against various banks by the Financial Services Authority (now the Financial Conduct Authority) in the United Kingdom and by the United States Department of Justice and Commodities Futures Trading Commission.

33. A significant number of interest rate hedging products are benchmarked against LIBOR. The activities identified by the US and UK authorities open up the possibility of a claim for fraudulent misrepresentation by those who have entered into such products.

34. The English courts first dealt with such claims in late 2012. In *Graiseley Properties Limited and others v Barclays Bank Plc* [2012] EWHC 3093 (Comm), the claimants sought to rescind derivative contracts benchmarked to LIBOR. In October 2012, Flaux J granted the claimants permission to amend their claim to include misrepresentations relating to LIBOR, concluding that the claim for fraudulent misrepresentation was "*clearly and properly arguable*" (paragraph 14).

35. However, in *Deutsche Bank AG v Unitech Global Ltd* [2013] EWHC 471 (Comm), a similar application to amend was refused by Cooke J on the basis that the allegations had no reasonable prospect of success.

36. Both decisions were appealed and the Court of Appeal dealt with them together in November 2013 ([2013] EWCA Civ 1372). Longmore LJ, with whom the other judges agreed, reversed Cooke J's decision and concluded that the implied representations in both cases were arguable and that they should be allowed to progress to trial.

37. The law on implied representations was summarised by Hamblen J in *Cassa di Risparmio della Repubblica di San Marino SpA v Barclays Bank Plc* [2011] EWHC 484:

> "in relation to implied representations the "court has to consider what a reasonable person would have inferred was being implicitly represented by the representor's words and conduct in their context": per Toulson J in IFE v Goldman Sachs [2007] 1 Lloyd's Rep 264 at para. 50. That involves considering whether a reasonable

representee in the position and with the known characteristics of the actual representee would reasonably have understood that an implied representation was being made and being made substantially in the terms or to the effect alleged."

38. In *Graiseley Properties*, the claimants relied upon the following implied misrepresentations:

    a. On any given date up to and including the date of the Swap and the date of the Collar, LIBOR represented the interest rate as defined by the BBA, being the average rate at which an individual contributor panel bank could borrow funds by asking for and accepting interbank offers in reasonable market size just prior to 11.00 am on that date. ("Representation 1")

    b. Barclays had no reason to believe that on any given date, LIBOR had represented, or might in the future represent, anything other than the interest rate defined by the BBA, being the average rate at which an individual contributor panel bank could borrow funds by asking for and accepting interbank offers in reasonable market size just prior to 11.00 am on that date. ("Representation 2")

    c. Barclays had not on any given date, up to and including the date of the Swap and the Collar:

        i. made false or misleading LIBOR submissions to the BBA; and/or
        ii. engaged in the practice of attempting to manipulate LIBOR, such that it represented a different rate from that defined by the BBA, viz a rate measured at least in part by reference to choices made by panel banks as to the rate that would best suit them in their dealings with third parties; ("Representation 3") and

    d. Barclays did not intend in the future to:

        i. make false or misleading LIBOR submissions to the BBA; and/or

ii. engage in the practice of attempting to manipulate LIBOR, such that it represented a different rate from that defined by the BBA. (“Representation 4”)

39. These representations can be argued to be implicit because without them the reference to LIBOR would not in practice mean what the reasonable recipient would expect it to mean, i.e. that the payment of the rates under the hedging product would be determined by reference to the ‘neutral’ LIBOR benchmark as defined by the BBA rather than by reference to a different and manipulated rate (and, in the case of Representations 3 and 4, a rate manipulated by the bank itself).

40. The Court of Appeal expressed some reservation as to Representation 1 in *Graiseley Properties Ltd and others v Barclays Bank Plc* [2013] EWCA Civ 1372. It was noted at paragraph 31 that the Banks “*can say with considerable force that the proposed representations amount to statements about the conduct of banks other than themselves and no one could expect any statement to that effect to be made by one bank proposing LIBOR*”. On the other hand, Longmore LJ considered it *“surprising that the banks do not appear to be prepared to accept” even the “limited proposition” that “at the very least, they were representing that their own participation in the setting of the rate was an honest one”* (paragraph 27).

41. Ultimately, all of the representations were allowed to go to trial. *Graiseley Properties* was designated as the “test case” but it settled on confidential terms in April 2014 shortly before the trial was due to start. Other LIBOR cases are proceeding through the courts that may end up testing these issues: for example, *Property Alliance Group v RBS*, to which I shall refer again below and which is down for trial in June 2016.

42. In order to succeed in proving actionable misrepresentation, a counterparty would need to establish not only the implied representations above, but also that these representations induced their participation in the hedging product. Further, in order to demonstrate fraud by a corporation it is necessary to identify an individual at the corporation (whose knowledge falls to be attributed to the corporation) who knew that the misrepresentation was being made and who knew that it was false.

43. As Flaux J acknowledged in *Graiseley Properties* (paragraph 16), the United States Department of Justice found in its Statement of Facts (expressly accepted by Barclays, as is recorded by the Department of Justice) that certain derivatives traders and rate submitters who had engaged in efforts to manipulate LIBOR and EURIBOR submissions were well aware of the basic features of the derivative products tied to these benchmark interest rates. Accordingly, they understood that to the extent they increased their profits or decreased their losses in certain transactions from their efforts to manipulate rates, their counterparties would suffer corresponding adverse financial consequences with respect to those particular transactions. Flaux J concluded at paragraphs 21 to 22 that it was:

> "surely seriously arguable that senior management within Barclays had the same degree and extent of knowledge...any senior manager who had given the matter a moment's thought would surely have appreciated that customers who were dealing with the bank would assume and would be entitled to assume that LIBOR was being set in accordance with the BBA definition as an independent benchmark and was not being manipulated by Barclays or any other bank for its own personal interest or gain".

44. Flaux J also found that it was:

> "fully arguable in the present case that the implied representations alleged were authorised by Barclays. Such authority or authorisation is arguable on two grounds. The first ground is that the bank as an entity has to take responsibility as a matter of law for those people who have any guilty knowledge and whose knowledge is to be imputed to the bank. The second ground is that there was arguably sufficient implied or ostensible authority given to those people within the bank who were responsible for issuing the relevant contracts and negotiating them with the claimants, to make the implied representations alleged." (paragraph 25)

45. Flaux J was required to determine only whether the claim had a real prospect of success such that it should be allowed to proceed to trial. A higher threshold would obviously need to be met at trial.

46. If fraud is established, it is not possible to rely on any exclusion clauses to defeat the claim: an exclusion clause which purports to exclude liability for fraudulent misrepresentation is invalid.

47. No LIBOR manipulation claim has reached trial to date. However, if and when such a trial proceeds, it will be very interesting to see how the court responds.

<u>Responsibility for intermediaries</u>

48. The last case to note in the financial crisis context is the decision of Males J in *UBS AG (London Branch) & Others v Kommunale Wasserwerke Leipzig GmbH* [2014] EWHC 3615 (Comm). In that case, Males J held that the Leipzig municipal water company (KWL) was entitled to rescind a series of single tranche collateralised debt obligations (STCDOs) which it had entered into with UBS.

49. The facts of the case – described by Males J as "*a sorry story of greed and corruption*" – were surprisingly colourful. [Discussion of the facts of the trial including the witnesses, the approach of the court etc] However, the case provides important guidance for banks on the consequences of inappropriate behaviour by an intermediary.

50. First, the Court held that Value Partners, KWL's Swiss financial adviser and agent, was also UBS's agent as a matter of law. UBS and Value Partners had worked together to ensure the conclusion of the STCDOs regardless of KWL's interests. Whilst no agency contract had been agreed, the relationship between Value Partners and UBS was consensual and it was appropriate to impose the consequences that resulted from agency (paragraphs 591 to 606). Value Partners had acted wrongfully in paying a bribe to one of KWL's officers. This wrongful behaviour occurred in the course of its employment as UBS's agent and it followed that UBS was responsible for the consequences of the bribe irrespective of its knowledge of the bribe (paragraphs 615 to 620).

51. Second, the Court held that the STCDOs were voidable because UBS knew that Value Partners was acting inconsistently with KWL's interests (paragraphs 625 to 641). Where a bank knows that an intermediary is acting inconsistently with the interests of its principal, any resulting agreement will be voidable unless fully informed consent is obtained from the principal. It is not necessary for the purposes of this argument to demonstrate that the intermediary was also an agent of the bank. There must, however, be evidence not only that the intermediary wishes to do further business with the bank but also that it would compromise this counterparty's interests in order to do so.

52. Whilst the facts of this case may not be typical, the case of an intermediary acting contrary to the best interests of its principal in order to obtain further work with a particular bank may be more common. Banks need to ensure that they tread carefully in any situation where a conflict of interest may emerge. Even where a bank has no knowledge of a given wrongful act, it may be fixed with that knowledge if the intermediary is deemed to have become its agent.

Legal Professional Privilege in the context of Regulatory Investigations

53. On 8 June 2015, in *Property Alliance Group Limited v the Royal Bank of Scotland Plc* [2015] EWHC 1557 (Ch), Birss J handed down an important judgment on disclosure and privilege in this test case brought by the Property Alliance Group against RBS. The case involves claims relating to LIBOR manipulation as well as the conduct of the notorious (and now disbanded) RBS Global Restructuring Group (GRG).

54. The LIBOR claims arise out of the revelations in February 2013 that RBS (along with a number of other banks) had been engaged in the manipulation and inter-bank coordination of LIBOR (the London Interbank Offered Rate). RBS has admitted misconduct in relation to the Japanese Yen and Swiss Franc LIBOR rates and has received substantial fines from a number of regulators, including the FSA (as it then was), the US Department of Justice, and the CFTC. However, there has to date been no public finding against RBS in relation to the manipulation of the GBP or USD LIBOR rates, which are the rates that are most commonly used in over the counter (OTC) and exchange traded derivatives contracts.

55. LIBOR-related disclosure had already been the subject of a number of earlier interlocutory judgments in this case: [2014] EWHC 4308, [2015] EWHC 321, and [2015] EWHC 322. Essentially, at a CMC in November 2014, Birss J ordered RBS to disclose any internal reports, reviews or summaries that set out the results of investigations into its LIBOR misconduct. RBS duly carried out a search for such documents, but objected to providing inspection and sought to assert privilege in a variety of different forms.

56. The categories of documents in relation to which RBS objected to providing inspection included the following:

(1) Documents relating to the work of its rate-setting investigation Executive Steering Group, in relation to which RBS asserted legal advice privilege ("**the ESG Documents"**);

(2) Communications between RBS and the FSA in the period leading up to the publication of the FSA Final Notice dated 6 February 2013, in relation to which RBS asserted without prejudice privilege (**"the Without Prejudice Documents"**); and

(3) Documents in relation to which RBS continued to assert legal advice privilege and litigation privilege despite the fact that they had been provided or shown to a number of regulators in the US and Japan (**"the Non-Waiver Documents"**).

57. PAG challenged each of these claims to privilege and that challenge was upheld by Birss J, who found that:

(1) RBS had failed to provide sufficient information about the role of the ESG and the documents over which privilege had been claimed in order to enable the Court to understand the basis on which legal advice privilege was asserted. The Court would therefore have to inspect the ESG Documents for itself in order to determine whether any of the claims were well made or whether it was possible for any of the documents to be provided in redacted form.

(2) The subject of an FCA investigation has the right to withhold inspection of communications that were part of genuine settlement discussions between that firm and the FCA. That right arises by analogy with the without prejudice rule, and it is convenient to use that expression to refer to it, but it is not identical to the normal rule in civil litigation. However, in this case, RBS had positively relied on the regulatory findings in its Defence (and, in particular, on the absence of any findings of misconduct in relation to GBP or USD LIBOR) and, in these circumstances, it would be unjust for it to be able to withhold disclosure of the communications that led to the publication of those findings.

(3) RBS was entitled to maintain its claim to privilege in the documents that had been provided or shown to regulators, notwithstanding the fact that the regulators had extensive powers to use or publish those documents. Confidentiality and privilege in the documents would not be lost unless and until the regulators actually exercised their powers to use or publish the information in the documents. However, as with its communications with the FSA, RBS had waived privilege in these documents as a result of its reliance on the regulatory findings in its Defence: *"RBS really cannot have it both ways. It cannot on the one hand rely on the absences from the regulators' findings as indicating the limits of its misconduct and yet on the other hand seek to maintain as privileged what it put to them."*

58. The decision will be of interest to all those who have to consider making and challenging claims to privilege in the context of regulatory investigations and it appears to be the first occasion on which a court has had to consider whether communications with a regulator could ever be subject to without prejudice privilege.

Permission granted in IRHP Redress Judicial review

59. Following a full day hearing, on 24 April 2015, the Administrative Court (Kenneth Parker J) granted permission for a judicial review challenge to the process followed by an ‘independent reviewer’ appointed to oversee the exercise of a redress scheme operated by Barclays Bank in respect of mis-sold Interest Rate Hedging Products (‘IRHPs’).

60. In 2012, following the discovery of serious and widespread failings in the sales of IRHPs by a number of large United Kingdom banks, the Financial Services Authority (now the Financial Conduct Authority), reached an agreement with the banks to provide appropriate redress where mis-selling had occurred.

61. Pursuant to the agreement, each of the banks agreed to establish a redress scheme under the oversight of an ‘independent reviewer’ approved by the FCA as a “skilled person” pursuant to section 166 of the Financial Services and Markets Act 2000.

62. The Claimant, Holmcroft Properties Ltd, sought permission to bring judicial review proceedings challenging the process which was followed by the ‘independent reviewer’ (in this case, KPMG LLP) in respect of its review of the redress proposed by Barclays in respect of consequential losses caused by the mis-sale to Holmcroft of certain IRHPs.

63. The Independent Reviewer, supported by the Financial Conduct Authority and Barclays, resisted the grant of permission for the claim to proceed.

64. In his judgment, Kenneth Parker J found the Claimant’s claim that the Independent Reviewer was amenable to judicial review, and that the process which was followed was unfair and/or unlawful, to be sufficiently arguable to justify the grant of permission. The matter will now proceed to a substantive hearing.

Confidentiality

65. Two significant cases about confidentiality arose in the banking context in 2014. The decision in *CF Partners (UK) LLP v Barclays Bank Plc & Others* [2014] EWHC 3049 (Ch) underlined the importance of confidentiality obligations arising in the course of deal finance discussions.

66. CF Partners, an advisory and investments firm which specialised in the energy markets, claimed to have identified a confidential and valuable business opportunity to acquire Tricorona, a Swedish carbon company, by way of a leveraged buy-out. Tricorona's main asset was its carbon credit portfolio. CF Partners approached Barclays to finance the deal and provided Barclays and Tricorona with detailed information relevant to the opportunity.

67. CF Partners' deal did not proceed, but Barclays subsequently went on to acquire Tricorona for its own account. CF Partners alleged that Barclays did so by misusing confidential information that it had received from CF Partners. CF Partners also alleged that Tricorona had misused its confidential information. Barclays and Tricorona denied that any information they received was confidential, and also denied misuse.

68. Hildyard J held that both Barclays and Tricorona had misused CF Partners' confidential information in order to establish a strategic relationship between them which paved the way for Barclays' acquisition of Tricorona. In essence, the confidential information was the identification to Barclays of an overlooked acquisition target which had been undervalued (see especially paragraphs 898 to 921).

69. A confidentiality agreement had been made between IVC (a company through which CF Partners approached Barclays) and Barclays. Whilst CF Partners could not rely on this agreement, the contractual arrangements informed the equitable duties (paragraph 888). The Court held that Barclays knew that the information was confidential: it was not passed on until an agreement was in place; Barclays circulated an internal compliance summary emphasising the confidential nature of the information and set up a Chinese wall; and the information was marked 'strictly private and confidential' (paragraph 885).

70. The duty of confidentiality could only subsist for so long as the information provided retained its quality of confidence. However, it was not limited to the one year term in the IVC confidentiality agreement (paragraphs 892 to 897).

71. The information transferred here was found to be influential and valuable. In particular, it caused Barclays to become more receptive to Tricorona (see especially paragraphs 979 to 980). Nonetheless, it was necessary to demonstrate misuse of the confidential information. Rather than simply being influenced in its view, the bank needed to have acted upon the information (whether consciously or subconsciously) (paragraphs 982 to 983). The strategic relationship between Barclays and Tricorona and the eventual acquisition of Tricorona satisfied this requirement (paragraphs 985 to 1046).

72. Hildyard J provided helpful guidance on the importance and relevance of "Chinese Walls". The judge addressed the legal principles at paragraph 476, noting in particular:

    a. Whilst a bank's internal procedures are not enforceable directly by any client or third party, conscious or reckless breach of internal procedure may affect the measure and basis of damages or compensation.

    b. The internal procedures are also relevant to whether or not a bank did regard or should have regarded the information provided as confidential. If the criteria for the adoption of procedures designed to ensure protection of confidentiality are satisfied, the inference is that the bank did accept its confidential quality.

    c. The internal Chinese Wall procedures are relevant to whether or not the information was in fact misused. It may support an inference of misuse if a bank should have set up a Chinese Wall and policed it properly, but did not.

    d. Crucially, Hildyard J explained that "*the purpose of Chinese Walls is to enable an entity to conduct business which it would not otherwise be permitted to undertake lest it breach an obligation of confidence or other duty: the breach of an internal regulatory requirement to set up and observe effective Chinese Walls raises a strong inference that such information influenced all those having it in their attitude towards and their dealings with Tricorona: such is the human mind that anyone having information relevant to its dealings with another will be influenced*

by it in those dealings. Chinese Walls provide insulation to enable those on one side to deal without having the information available to those on the other side: insulation provides protection, the lack of it exposes the institution to the risk of having to demonstrate that there has been no misuse."

73. The judge also considered the scope of the Chinese Walls. Barclays argued that Chinese Walls were required only for listed securities, and not to demarcate confidential information more generally within the bank. It was suggested that their purpose was to prevent insider trading, rather than to protect confidential information (paragraph 477). Hildyard J rejected this argument, noting that there was "*no warrant for restricting the application of the Global Chinese Walls Policy to the context of dealings in securities*" (paragraphs 489 to 493).

74. Another pertinent element of the decision was the assessment of damages. The judge awarded *Wrotham Park* damages i.e. damages based upon the likely outcome of a hypothetical negotiation between the parties to release Barclays and Tricorona from their obligations of confidence. Hildyard J referred (at paragraph 1204) to the explanation of *Wrotham Park* damages set out by Arnold J in *Force India Formula One Team Ltd v 1 Malaysia Racing Team Sdn Bhd* [2012] RPC 29:

> "(1) The overriding principle is that the damages are compensatory: see *Attorney-General v Blake* at 298 (Lord Hobhouse of Woodborough, dissenting but not on this point), *Hendrix v PPX* at [26] (Mance LJ, as he then was) and *WWF v World Wrestling* at [56] (Chadwick LJ).
>
> (2) The primary basis for the assessment is to consider what sum would have been arrived at in negotiations between the parties, had each been making reasonable use of their respective bargaining positions, bearing in mind the information available to the parties and the commercial context at the time that notional negotiation should have taken place: see *PPX v Hendrix* at [45], *WWF v World Wrestling* at [55], *Lunn v Liverpool* at [25] and *Pell Frischmann v Bow* at [48]-[49], [51] (Lord Walker of Gestingthorpe).
>
> (3) The fact that one or both parties would not in practice have agreed to make a deal is irrelevant: see *Pell Frischmann v Bow* at [49].
>
> (4) As a general rule, the assessment is to be made as at the date of the breach: see *Lunn Poly* at [29] and *Pell Frischmann v Bow* at [50].

(5) Where there has been nothing like an actual negotiation between the parties, it is reasonable for the court to look at the eventual outcome, and to consider whether or not that is a useful guide to what the parties would have thought at the time of their hypothetical bargain: see *Pell Frischmann v Bow* at [51].

(6) The court can take into account other relevant factors, and in particular delay on the part of the claimant in asserting its rights: see *Pell Frischmann v Bow* at [54]."

75. Hildyard J noted further (paragraph 1205):

"The assessment is ultimately an objective one, albeit that the hypothetical negotiation may be informed by evidence as to what factors and negotiating arguments the parties say (subjectively) they would have advanced."

76. The Court found that, taking into account all the relevant factors, the parties would have agreed a figure of €10 million, and awarded CF Partners damages in that amount. Hildyard J noted two "cross-checks" in support of that figure. First, the original fee that Barclays had quoted CF Partners for debt financing and corporate advice had been £15 million, later reduced to €8 million; these figures indicated "*a contemporaneous assessment by both CFP and Barclays of what in their estimation could be absorbed within the price and still make the prize attractive*" (paragraph 1299). Second, Barclays had made a profit of between €35 and €50 million from acquiring and on-selling Tricorona. In light of these figures, €10 million appeared to be within the parameters of what might reasonably have been negotiated as a proper price for the release of Barclays from its confidentiality obligations.

77. There are several important points to note following this decision. First, even where the relevant parties do not enter into a confidentiality agreement, an equitable duty of confidentiality may nonetheless arise. Second, it is crucial that banks comply with their internal policy regarding Chinese Walls in all contexts and not just in relation to listed securities: whilst breach of these internal policies is not actionable *per se*, failure to comply will strengthen any claim for misuse of confidential information.

78. Third, where a bank has entered into discussions regarding a takeover bid, its obligations of confidentiality may persist after the collapse of those discussions. Finally, it would be sensible for banks to seek to resolve the position regarding any ongoing confidentiality

obligations at the point when discussions are terminated. Whilst the courts award damages based on a hypothetical negotiation, the sum payable at the time, without the benefit of hindsight, may be significantly lower in practice.

79. The handling of confidential information in a banking context was also at issue in *Primary Group (UK) Limited & Others v RBS and Direct Line Insurance Group* [2014] EWHC 1082 (Ch). Primary Group operated an online retail insurance business and sought to increase its borrowing facilities with RBS in 2005 in order to expand that business. An agreement was reached in January 2006, including a clause permitting RBS to disclose information provided by Primary Group in limited circumstances.

80. Shortly after drawdown of the new facilities, Primary Group's business was revealed to be in serious difficulty. Its projected profits for 2005 were significantly reduced. RBS was concerned by these developments and required the appointment, at Primary Group's expense, of KPMG to assess the business and advise as to its future. KPMG produced a series of reports on the business.

81. KPMG's reports contained information about the company, acquired both from public records and from discussions with the directors. They also contained detailed financial information about Primary Group. There was no dispute at trial as to the confidentiality of this information.

82. RBS owned Direct Line, a major player in the insurance business. RBS decided to obtain advice from Direct Line as to Primary Group's prospects. RBS shared the KPMG reports with two individuals at Direct Line for this purpose, albeit whilst impressing upon them the need to maintain confidentiality. However, no Chinese walls were erected and no written agreement was produced. RBS failed to seek or obtain Primary Group's consent to the sharing of this information.

83. The Court of Appeal in *Tournier v National Provincial and Union Bank of England* [1924] 1 KB 461 established, by way of an implied term, a general duty of confidentiality owed by a bank to its customers. Banks LJ held (at p.473) that the duty was subject to four specific exceptions: "*(a) where disclosure is under compulsion by law; (b) where there is a duty to the public to disclose; (c) where the interests of the bank require disclosure; (d) where the disclosure is made by the express or implied consent of the*

customer." Scrutton LJ formulated (c) in terms of what was "*reasonable and proper for its own protection, as in collecting or suing for an overdraft*" (at p.481) and Atkin LJ in terms of what was "*reasonably necessary for the protection of the bank's own interests*" (at p.486).

84. Arnold J found that the confidentiality provision in Primary Group's agreement with RBS displaced the implied term in *Tournier* (paragraph 189). That provision did not permit disclosure in the circumstances so RBS was in breach of its obligation of confidentiality (paragraph 191).

85. Nonetheless, the judge went on to consider the position in the event that he were wrong about the contractual provisions, such that the *Tournier* obligations were applicable. RBS argued that it was reasonably necessary for it to share information with Direct Line in order to obtain an industry perspective on Primary Group's business, enabling it to make an informed decision as to whether to continue to support the business. However, Arnold J held that RBS did not need to obtain Direct Line's views on the matter (paragraph 192):

> "First, RBS could (and did) obtain advice from Direct Line regarding such matters as Primary's position in the market and general insurance questions based on Direct Line's own knowledge and expertise without disclosing any of Primary's information to Direct Line. Secondly, RBS had access to all the insurance restructuring and valuation expertise it reasonably needed from KPMG at great expense to Primary. (RBS was also aware of the FPK valuation, but I do not regard that as material.) Thirdly, Mr Gilbert had no relevant expertise that it was reasonably necessary for RBS to obtain. As explained above, he had only two years' experience in the insurance industry. Although he had apparently had some experience in insurance business valuation, he was not an expert in that field, and certainly no more expert than KPMG's team. Fourthly, SLS made no use of Mr Gilbert's review. Nor do they appear to have made any significant use of the advice they received from either Mr McKee or Mr Houghton. Fifthly, I was left with the clear impression by the evidence of both Mr Birch and Mr Sach that the only reason why SLS undertook the exercise at all was because Mr Sach regarded it as an automatic step to take whether it was needed or not. Sixthly, SLS failed to obtain clearance from Compliance. Seventhly, SLS failed properly to address the concerns raised by Ms Court via Mr McKee. Eighthly, RBS failed to obtain proper confidentiality protection from Direct Line. Ninthly, particularly in the absence of proper confidentiality protection from Direct Line, RBS was not justified in exposing Primary to the risk that a large amount of Primary's confidential information might be misused by Direct Line, even if only subconsciously."

86. In assessing damages, Arnold J also concluded that the correct approach was to consider what RBS would have paid for the right to share the information with Direct Line in a hypothetical negotiation with Primary Group. Even though no misuse of confidential information had been established, Primary Group was entitled to compensation on the assumption that it was exposed to the risk that the information might be misused. The judge considered the time spent considering the reports by the individuals at Direct Line, and summarily assessed the damages in the sum of £5,000 (paragraphs 204 to 205).

87. The claim against Direct Line did not succeed. Arnold J found that whilst the information had the necessary quality of confidence, Direct Line did not breach its equitable duties when advising RBS. The individuals involved believed and had reasonable grounds to believe that RBS was permitted to disclose the information for the limited purpose of obtaining advice (paragraph 259).

88. This decision underlines the importance of restricting confidential information to individuals within the bank, rather than sharing it with subsidiaries or others within its group. It also indicates that banks would be well-advised to obtain specific rights to share confidential information from its customers widely, including with external advisers, in the event of deteriorating credit.

89. The basis upon which *Wrotham Park* damages were calculated here is open to question. It is far from evident that the time that the individuals at Direct Line spent assessing the KPMG reports (the measure suggested by RBS) is indicative of the hypothetical sum that would have been agreed. In particular, given that Direct Line was a competitor of Primary Group, it seems likely that Primary Group would have demanded a significantly larger sum in light of the risks posed by the disclosure. It is evident that in other circumstances a bank could be subject to a considerably larger liability where it has shared confidential information with a third party, and particularly with a customer's competitor.

Commercial interests

90. In *Barclays Bank plc v Unicredit Bank AG* [2014] EWCA Civ 302, the Court of Appeal considered when it is legitimate for a bank to prioritise its own commercial interests over those of its counterparty.

91. In order to meet its regulatory capital requirements, Unicredit transferred the credit risk in some of its assets to Barclays by means of three guarantees. Pursuant to the guarantees, Unicredit paid fees and quarterly premiums to Barclays and Barclays made quarterly payments to Unicredit based upon relevant portfolio losses.

92. The lifetimes of the three guarantees were 11 years, 11 years and 19 years respectively, but there were provisions entitling Unicredit to bring them to an end after periods roughly equivalent to the weighted average life of the loans in the portfolios, which were expected to be in the region of five years. Barclays could therefore expect to earn five years of premiums and fees under the guarantees.

93. Clause 12.1 of the guarantees granted a right of optional termination upon the occurrence of four separate events, two of which required Barclays' prior consent. The clause stated, "*such consent to be determined by [Barclays] in a commercially reasonably manner*".

94. In June 2010, Unicredit sought Barclays' consent to an early termination as a result of a regulatory change which had the effect that the guarantees no longer provided the desired capital relief. Barclays refused to consent to early termination on the basis that "*this would deprive Barclays of a significant proportion of the overall revenue that it had bargained for and thus result in material economic detriment to Barclays*".

95. At first instance ([2012] EWHC 3655 (Comm)), Popplewell J held that Barclays' refusal to consent was not to be regarded as a refusal to consent on any terms but as a statement that "*it would not consent unless it was paid the balance of its fees for five years*" (paragraph 43). Withholding consent on this basis was found to be commercially reasonable (paragraph 70).

96. This decision was upheld by the Court of Appeal. Longmore LJ held (at paragraphs 15 to 16):

> "It is from Barclays that consent is to be obtained and it is Barclays who has to determine whether that consent is to be given, albeit in a commercially reasonable manner. It is the manner of the determination which must be commercially reasonable; it does not follow that the outcome has to be commercially reasonable

> although, if it is not, that would no doubt cause one to look critically at the manner of the determination.
>
> One then has to ask whether, in determining whether or not to consent to early termination, Barclays can take account of its own interest in preference to the interest of Unicredit. To my mind the answer is that it can, because any commercial man whose consent to a course of action is required but to whom the determination (whether to give that consent) is entrusted would think it commercially reasonable to have primary regard to his own commercial interests."

97. Unicredit submitted that the purpose of requiring the determination to be made by Barclays in a commercially reasonable manner was to require Barclays to have regard to the interests of Unicredit as its counterparty in order that a mutually satisfactory outcome could be achieved. However, Longmore LJ concluded that it was "*impossible to see how it could work in practice*" (paragraph 17):

> "Bankers, as commercial men, have a keen instinct for where their own interests lie. But if they are asked to have regard to the interests of the other party to the contract, how do they begin to assess what those interests are, let alone weigh those interests in comparison to their own interests? If the clause is to work in the way Mr Knowles suggests, there would have to be some method of discovering and assessing the counterparty's interests. The obvious way to do so would be to ask the counterparty what their interests were. But is Barclays to be expected to take the answer at face value? That might be beneficial to the counterparty but not be a balanced or accurate assessment of the counterparty's interest. Could Barclays ask that the counterparty's account of its own interests be backed up with documentary evidence? If so, it might be a long process; if not, it might lead to an unfair result. If this sort of exercise were envisaged, one would expect a neutral third party to be allotted the task of determining whether consent should be given but that is not what the clause says."

98. Longmore LJ explained that it was not easy to express a test for commercial reasonableness but that he would "*tentatively express it by saying that the party who has to make the relevant determination will not be acting in a commercially reasonable manner if he demands a price which is way above what he can reasonably anticipate would have been a reasonable return from the contract into which he has entered and which it is sought to terminate at an early date*" (paragraph 19).

99. The Court of Appeal's conclusions are not particularly surprising. Nonetheless, they provide helpful clarification as to the meaning of 'commercially reasonable', which will be applicable in a wide range of contexts.

Secret commissions and bribes

100. Another case of note is the decision of the Supreme Court in *FHR European Ventures LLP v Cedar Capital Partners LLC* [2014] UKSC 45. In that case, Cedar Capital Partners LLC ("Cedar") had acted as the agent of FHR European Ventures LLP ("FHR") in relation to its purchase of a company, Monte Carlo Grand Hotel SAM. Cedar also entered into an agreement with the vendor whereby it was to receive a EUR 10 million fee following a successful conclusion of the sale. This agreement was not disclosed to FHR and informed consent was not obtained.

101. The question for the Supreme Court was whether Cedar had a proprietary right in the EUR 10 million fee, or merely a right to equitable compensation.

102. The Court of Appeal addressed the nature of a principal's claim in respect of funds or assets acquired in breach of fiduciary duty in *Sinclair Investments Ltd v Versailles Trade Finance Ltd* [2012] Ch 453. In that case, the Court of Appeal followed the House of Lords' decision in *Lister & Co v Stubbs* (1890) 45 Ch D 1, rather than the more recent Privy Council decision in *Attorney General for Hong Kong v Reid* [1993] UKPC 36, and held that the principal was entitled to equitable compensation only. However, in *Cedar* itself, the Court of Appeal distinguished *Sinclair Investments* and *Lister & Co v Stubbs* and held that a proprietary interest arose.

103. The Supreme Court resolved the uncertainty and held that any benefit acquired by an agent as a result of his agency and in breach of fiduciary duty is held on trust for the principal. Lord Neuberger concluded that "*the law took a wrong turn in [Metropolitan Bank v Heiron (1880) 5 Ex D 319] and Lister, and that those decisions, and any subsequent decisions…at least in so far as they relied on or followed Heiron and Lister, should be treated as overruled*" (paragraph 50).

104. It was stated that this rule has the benefit of simplicity (paragraph 35). It is also supported by wider policy considerations: bribes and secret commissions undermine trust

in the commercial world, and "*one would expect the law to be particularly stringent in relation to a claim against an agent who has received a bribe or secret commission*" (paragraph 42).

105. The Supreme Court rejected the argument that awarding a proprietary remedy would prejudice the agent's other creditors, reasoning that the bribe or secret commission should never have become part of the agent's estate in the first place. Moreover, the bribe will very often have reduced the benefit received by the principal and it may therefore fairly be said to be his property (paragraphs 43 to 44).

106. This decision has important remedial consequences. First, in the event of the fiduciary's insolvency, the principal's proprietary claim will have priority over the fiduciary's unsecured creditors. A right to equitable compensation, conversely, would rank equally with the unsecured credits. Second, unlike a claim for equitable compensation, a proprietary claim entitles the principal to trace the bribe or commission and follow it in equity.

107. In light of this decision, it is important that banks and financial institutions, when acting in a fiduciary capacity (usually either as agent or trustee), ensure that any benefits received from any third party in connection with that role are fully disclosed to the principal in advance.

LMA interpretation point

108. See *Tael One Partners Ltd v Morgan Stanley & Co* [2015] UKSC 12 as to construction of 11.9(a) of Loan Market Association standard terms and conditions.

Concluding thoughts

109. Since the financial crisis, the courts have imposed high hurdles upon those seeking to evade the terms of a bank's boilerplate. The emergence and expansion of the contractual estoppel doctrine has made it very difficult for counterparties to seek rescission or damages for losses associated with complex financial products. However, the recent authorities suggest that the courts are becoming more receptive to these claims. It will be important to observe how matters develop over the course of the next year or two, but it

seems possible that counterparties may have an increasing set of viable claims from which to choose and that banks will need to think carefully about the best responses to them. Meanwhile, the evolving case law on confidentiality provides a new frontier for counterparties to pursue, and further exposure for banks that have not employed appropriate internal controls. All in all, banking looks set to generate significant litigation in London for some time to come!

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