

C/M/S/ Cameron McKenna



The heavyweight

Comprehensive coverage of this month's banking and insolvency law

December 2009

Looking forward

Developments scheduled for the months ahead

Date	Item
1 January 2010	The restructure of Northern Rock takes place.
1 January 2010	Deposit takers without branches deadline to apply for modification of FSA Rule
8 January 2010	Cut-off date for submissions to OFT review of high-cost credit.
14 January	Public Bill Committee on Financial Services Bill to complete.
15 January 2010	Consultation ends on “Disclosure guidelines: Lessons learnt from the financial crisis” by the Committee of European Banking Supervisor.
25 January 2010	LMA launch of combined par and distressed documentation.
1 February 2010	House of Lords request evidence by this date for inquiry into the European Commission’s stance on derivatives markets.
15 February 2010	FSA closes consultation on extending mortgage regulation.
10 February 2010	Deadline for responses to FSA consultation on credit unions.
15 March 2010	Replies to consultation on ban on using bills of sale to secure consumer lending required.
6 April 2010	Coming into force of Insolvency (Amendment) (No 3) Rules 2009.
July 2010	Single Customer View – formal verification required.

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Banking

On demand overdraft

Hall & Ors v Royal Bank of Scotland Plc

QBD (Newcastle) (Behrens HHJ) 2/12/2009

The bank had not breached its duty of care or contractual obligations in refusing to extend the overdraft facilities of a customer where the contract expressly stated that the overdraft was repayable on demand and there was nothing to suggest that the bank's right to demand repayment was restricted, and where the alleged duties were inconsistent with established case law.

Overdraft charges

OFT next steps

The OFT has dropped its investigation into the fairness of current unarranged overdraft charging terms. It will hold discussions with banks and consumer groups on changes it would like to see, from voluntary action to legislative change and aims to report on progress by the end of March 2010.

<http://www.ofc.gov.uk/news/press/2009/144-09>

Overseas cheque

Karafarin Bank v Gholam Reza Mansoury Dara

[2009] EWHC 3265 (Comm) QBD (Comm) (Blair J) 10/12/2009

In this case, the bank was entitled to enforce the cheques given it by the defendant, a former managing director of an Iranian company, as security for loans given. The court held that where a cheque was dishonoured and the governing law of the cheque (Iranian) provided for damages for late payment, damages were recoverable from the party liable on the cheque in English proceedings.

Foreign currency bank accounts

This technical note gives a detailed explanation of proposed legislation to prevent certain capital gains tax losses on foreign currency bank accounts.

<http://www.hmrc.gov.uk/cnr/fcba-technical-note.pdf>

Bonds

Proposed demerger by way of scheme of arrangement

Bank of New York Mellon v GV Films Ltd

QBD (Comm) (Blair J) 15/12/2009 [2009] EWHC 3315 (Comm)

A bank was entitled to summary judgment in respect of sums due under bond issues where it had validly given notice of events of default and accelerated payment.

Contract

Rome I

In effect from 17 December 2009

Law Applicable to Contractual Obligations (England and Wales and Northern Ireland) Regulations 2009 ("Regulations")

The EU regulation ((EC) 593/2008) on the law applicable to contractual obligations, otherwise known as Rome I, came into effect on 17 December 2009. Rome I applies in all EU member states other than Denmark. Rome I is implemented in the UK by the Regulations.

Parties remain free to choose the law that will govern their contract. The Regulations extend the reach of Rome I so that it applies, not only to contracts with an international dimension, but also to intra-UK conflict of law issues i.e. to conflicts between the laws of England and Wales, Scotland and Northern Ireland. The coverage of the predecessor Rome Convention is extended, especially as regards consumer contracts and insurance contracts.

There are circumstances in which an express choice of English law can be displaced. As was the position under the Rome Convention, an express choice of English law is subject to the mandatory laws of any country with which all the other elements of the contract are connected. Now, under Rome I, an express choice of English law will also be subject to:

- mandatory provisions of Community law where all other elements of the situation are located in one or more EU member states; and
- the discretion of the UK courts to give effect to the mandatory provisions of the law of the country where the obligations arising out of the contract are to be performed, insofar as those provisions render performance of the contract unlawful

Article 27(2) of the Regulation requests that the European Commission submit a report to the European Parliament and others on the effectiveness of an assignment or subrogation of a claim against third parties. The report, likely to propose an amendment to the Regulation, is to be completed by 17 June 2010. Although it does not appear on their website, the Ministry of Justice have circulated a discussion paper that can be seen here:

http://www.isda.org/uploadfiles/_docs/Rome_I_Article_14_European_Commission_Review_of_Article_14_A_discussion_paper.pdf

Corruption

Bribery Bill

Progress through Parliament

The Bill was presented to the House of Lords for first reading on 19 November and received its second reading on 9 December.

Export Credits Guarantee Department

A review of ECGD's anti-bribery and corruption procedures

The Export Credits Guarantee Department's report on its revised anti-bribery and corruption procedures concludes that they have operated satisfactorily since they were implemented in July 2006 but has proposed minor drafting changes to ECGD's application forms and standard documentation to clarify the recourse provisions and proposes consultation where ECGD is the reinsurer in a sub-contract situation.

http://www.ecgd.gov.uk/bc_review_document.pdf

ECGD, December 2009

Law-Now

Anti-corruption Zone

Visit this site on CMS Cameron McKenna's Law-Now website. The anti-corruption zone is a "one-stop shop" for legal resources and news on corruption issues.

- An introduction to the Anti-Corruption Zone
- The Evolving Laws on Bribery and corruption in England and Wales
- Prosecution Policy and Trends: Chronology

<http://www.law-now.com/anticorruptionzone/>

Consumer

FSA banking rules

BBA guidance

This guidance outlines ways that firms can meet some of the Financial Services Authority's new high level rules for retail banking, which were introduced last month. The guidance retains provisions from the old Banking Codes, such as helping customers to open basic bank accounts and ensuring they can have an alternative to chip and PIN. It also provides banks and their customers with detailed best practice standards for achieving compliance with the FSAs rules.

<http://www.bba.org.uk/bba/jsp/polopoly.jsp?d=145&a=17040>

BBA, 10/12/2009

Guidance on unfair commercial practices

Application of the Unfair Commercial Practices Directive

The European Commission has published a new guide and Q&As on the application of the Unfair Commercial Practices Directive 2005. The Directive protects EU consumers from unfair trading practices and misleading and aggressive sales techniques. Section 1.5 of the guide deals with the financial services sector. It sets out examples of unfair commercial practices within the sector, explains the relationship of the Directive to financial sector directives and explains that the Directive does not fully harmonise national rules relating to unfair commercial practices in the financial services sector.

http://ec.europa.eu/consumers/rights/docs/Guidance_UCP_Directive_en.pdf

http://ec.europa.eu/consumers/rights/ucp/ucp_qanda_en.htm

Directive (2005/29/EC); SEC (2009) 1666: European Commission, 3.12.09

Physical access

“Called to account over disabled access”

An article on how banks may be required by law to alter the layout of their branches to provide disabled access. This follows a case in the Court of Appeal, 20 November 2009, *Royal Bank of Scotland Group v Mr D Allen*.

W Gordon: Property Week, 18.12.09, 50 09.52.001

PPI

“The future of UK payment protection insurance”

This article notes that a recent decision from the Competition Appeal Tribunal has reconsidered the ban on payment protection insurance, on the basis that this type of financial product could be ‘convenient’ for some consumers. The authors discuss the implications of the Tribunal’s decision on consumers and providers of payment protection insurance.

S Macdonald & N Kingaby: E-finance & payments law & policy, 11.09, 10 09.51.082

Responsible lending and borrowing in the EU

Summary of responses to the public consultation

Some industry representatives and a few Member States have called for greater clarity as to the scope of the initiative on responsible lending and borrowing, particularly with regard to the Consumer Credit Directive. Generally, it is agreed there are areas for improvement in relation to responsible lending and borrowing.

http://ec.europa.eu/internal_market/finservices-retail/docs/credit/resp_lending/feedback_summary_en.pdf

Review of Consumer Credit Licensing Fees

Consultation by OFT

An Office of Fair Trading consultation seeks views on a proposed revision to the charging structure for consumer credit licensing fees to introduce criteria that could differentiate between classes of applicant, including: type of business; type of credit activity; number of categories applied for; size of credit business; and overall size of business.

http://www.offt.gov.uk/shared_offt/consultations/offt1149con.pdf

OFT1149con:[] OFT, December 2009

Review of high-cost credit

Interim research report

This report amongst other things looks at the effect of the recession on consumers and suppliers. The OFT invites submissions to be received by 8 January 2010. The final report is to be published in spring 2010.

http://www.offt.gov.uk/shared_offt/reports/consumer_credit/offt1150s.pdf (synopsis)

http://www.offt.gov.uk/shared_offt/reports/consumer_credit/offt1150.pdf (full report)

Credit crunch

Causes?

“A brief look at the sub-prime crisis”

“Was it a regular business cycle, the result of lax supervision and/or regulatory failure”

This article reflects on the possible causes of the economic crisis.

M F Binney: 2009, Int C.R., 6(6), 382) 09.49.055

“Ten propositions about liquidity crises”

What are liquidity crises? This short paper challenges beliefs that are conventional wisdom. The paper considers ten propositions:

- the distinction between idiosyncratic and systematic elements of liquidity crises;
- the growing reliance on funding liquidity in a market-based financial system;
- the role of payment and settlement systems;
- the need to improve liquidity buffers;
- the desirability of putting in place variable speed limits in the financial system;
- the proper role of deposit insurance schemes;
- the double-edged sword nature of liquidity provision by central banks;
- the role of "monetary base" injections in addressing liquidity disruptions;
- the need to develop principles for the provision of central bank liquidity; and
- the need to reconsider the preventive role of monetary (interest rate) policy.

<http://www.bis.org/publ/work293.pdf?noframes=1>

BIS Working Paper No 293: Bank for International; Settlements, November 2009

Data

Freedom of Information requests

“FOI and the financial services industry - who's on top?”

This article explains the treatment of FOI requests for financial information and suggests why financial institutions can take comfort.

(P Barratt: 2009, *Freedom of Information*, 6(2), 14 09.53.012

“FOI and EIRs exemptions Part 1 - controversial confidentiality”

In the first of a six part series on exemptions in the Freedom of Information Act and Environmental Information Regulations, the author considers confidentiality.

H Grant: 2009, *Freedom of information*, 6(2), 3 09.53.011

Identity theft

“Identity theft: learning from the US experience”

This article considers the speed at which identity theft fraud is growing in the US, triggered the creation of security breach notification legislation, both at federal and state level.

J Antokol: *Data protection law & policy*, 11.09, 14) 09.53.010

Derivatives

ISDA documentation

CDS Physical Settlement Matrix

Version 13

ISDA has published Version 13 of the CDS Physical Settlement Matrix and relevant Confirmation Version. This is effective from 20 December, 2009.

Available on ISDA's website under “Bookstore/Publications” and on the homepage under “ISDA Publications”.

www.isda.org

Hungary: Netting and collateral arrangements

ISDA have announced the Hungarian Parliament have passed amending legislation to the Hungarian Bankruptcy Act, effective as of January 1, 2010, regarding netting and collateral arrangements entered into with Hungarian corporates.

2006 ISDA Definitions

Supplement 18

Supplement 18 is available on ISDA's website under "Bookstore/Publications" and on the homepage under "ISDA Publications". The pre-publication draft of a proposed Supplement 19 to the Definitions is in circulation amongst ISDA members.

www.isda.org

US Emissions Annex

Amendments

ISDA is considering with its members revised wording regarding Abandonment of Scheme/Delivery Disruption Event; Title/Risk of Loss/Indemnity; Physical Exchange Emissions Transaction and the product definitions in the Exhibit.

Master agreement case

BNP Paribas v Wockhardt EU Operations (Swiss) Ag

[2009] EWHC 3116 (Comm) QBD (Comm) (Christopher Clarke J) 3/12/2009

The early termination provisions in an ISDA master agreement were not penal.

Reform of derivatives markets

House of Lords Inquiry

The House of Lords EU Sub-Committee A (*Economic and Financial Affairs and International Trade*) is conducting an inquiry into the European Commission's communications on ensuring efficient, safe and sound derivatives markets. They invite written evidence by 1 February 2010. The communications outline reform to the regulation and supervision of derivatives markets in the European Union. The Lords want evidence on the economic benefits and risks associated with derivatives markets and the activities of central counterparties e.g., as to how clearing might be regulated and responsibility for trade repositories.

<http://news.parliament.uk/2009/12/committee-launch-inquiry-into-derivatives-markets-and-supervision/>

Reforming OTC derivative markets - a UK perspective

A paper has been issued by Her Majesty's Treasury and the FSA proposing a number of measures that need to be implemented and developed to address systemic shortcomings in OTC derivative markets. They propose greater standardisation of OTC derivatives contracts; more robust counterparty risk management; consistent and high global standards for CCPs; international agreement as to which products are 'clearing eligible'; capital charges to reflect appropriately the risks posed to the financial system; registration of all relevant OTC derivative trades in a trade repository; greater transparency of OTC trades to the market and on-exchange trading..

http://www.fsa.gov.uk/pubs/other/reform_otc_derivatives.pdf

FSA/HMT, December 2009

Impact on the Foreign Exchange Market

ISDA (International Swaps and Derivatives Association) have published a report on the impact of the legislation proposed in the US for over-the-counter derivatives on the Foreign Exchange Market. They conclude that legislation would discourage customisation of foreign exchange transactions, increase the cost and difficulty of hedging foreign exchange positions and, as a result, lead to greater credit, settlement and market risk for companies and investors. ISDA also believes that the proposed legislation will deter participants from effectively hedging their foreign exchange risks.

http://www.isda.org/c_and_a/pdf/ISDA-Legislation-Impact-on-FX-Market.pdf

ISDA, December 2009

Insolvency

Authorisation of Insolvency Practitioners

Provision of Services (Insolvency Practitioners) Regulations 2009

No 3081

These Regulations transpose Directive 2006/123/EC with respect to the provision and regulation in Great Britain of services by insolvency practitioners as regards authorisation, training and experience; fees and the security for the proper performance of the IP's functions.

The Explanatory Memorandum is available at

http://www.opsi.gov.uk/si/si2009/em/uksiem_20093081_en.pdf

The full text is available at http://www.opsi.gov.uk/si/si2009/pdf/uksi_20093081_en.pdf

Bank insolvency

Managing investment bank failures

The Treasury has published plans to deal with a failure of an investment bank.

<http://nds.coi.gov.uk/content/Detail.aspx?ReleaseID=409655&NewsAreaID=2>

HM Treasury, 16/12/2009

Client monies

Lehman Brothers

Re Lehman Brothers International (Europe) (In Administration) Sub Nom Lehman Brothers International (Europe) (In Administration) v CRC Credit Fund Ltd & 8 Ors

[2009] EWHC 3228 (Ch) Ch D (Companies Ct) (Briggs J) 15/12/2009

The court determined issues concerning the interpretation, and application to the distribution of client money following the administration of a bank, of the client money rules in the Client Assets Sourcebook.

Developments in 2009

"An overview of developments in corporate insolvency law in 2009"

This article reviews important cases and developments in 2009 and considers possible future reforms:

- third quarter statistics from the Insolvency Service;
- winding up proceedings involving issues of unpaid council tax, voting rights of creditors, and a liquidator's need to obtain sanction before commencing litigation;
- applications for administration orders under the Insolvency Act 1986 Sch.B1;
- the interpretation of company voluntary arrangements;
- the appointment of a receiver and manager under the Insolvency Act 1986;
- the use of the pari passu rule; and
- the promotion of cross-border co-operation.

D Milman: *Company Law Newsletter*, 12.11.09, 1 09.49.058

Distribution

In The Matter Of Equilift Ltd

[2009] EWHC 3104 (Ch) Ch D (Birmingham) (Judge Purle QC) 27/11/2009

It was appropriate for liquidators to act on counsel's opinion and treat funds of an insolvent company as falling within company assets that were available for distribution amongst many creditors generally. It was an unreasonable and disproportionate waste of money to expect further debate on the distribution to be funded out of the relatively modest sums in dispute.

Insurers

Third Parties (Rights against Insurers) Bill

A Government Bill to make provision about the rights of third parties against insurers of liabilities to third parties in the case where the insured is insolvent. It received its second reading in the House of Lords, where it was presented, on 9 December 2009.

<http://www.publications.parliament.uk/pa/ld200910/ldbills/017/10017.i-iihtml>

Set off

Application of Rule 4.90 validated assignment

Enterprise Managed Services Ltd v McFadden Utilities Ltd [2009] EWHC 3222

In this case, the court considered the effect of automatic insolvency set off under Rule 4.90. The liquidators of T Ltd, involved in a utilities maintenance project and now in insolvent liquidation, assigned T Ltd's claims against U Ltd to M Ltd. T Ltd and U Ltd were parties to a contract that expressly prohibited its assignment. U Ltd argued that the purported assignment by the liquidators of T Ltd was invalid but the court disagreed. The contractual prohibition on assignment did prevent assignment of claims under the contract, but those claims were extinguished by the operation of insolvency set off. Automatic insolvency set off had operated to create a net claim in favour of T Ltd against U Ltd and the contractual prohibition did not apply to the net claim, so the liquidators of T Ltd had validly assigned the net claims of T Ltd against U Ltd.

IPSAs

Loosening legislation

The Legislative Reform (Industrial and Provident Societies and Credit Unions) Draft Order 2010

This Order removes a number of burdens relating to maximum shareholdings, annual returns, and years of account imposed by the Industrial and Provident Societies Act 1965, the Friendly and Industrial and Provident Societies Act 1968 and the Credit Unions Act 1979.

http://www.opsi.gov.uk/si/si2010/draft/pdf/ukdsi_9780111488829_en.pdf

Anticipated date in force, 1.7.10

Lending

Bond covenants

Credit Round Table

The Credit Round Table in the USA has been considering the issue of standardisation of bond covenants to “improve the dialogue in the marketplace between issuers and bond investors”. They issued a White Paper on this last year - the reason I mention this now is that it is highly probable that the issue will come under debate again in the UK. Given that the market over the past 12-18 months has shown the primary loan market shrinking, with a very significant increase in the bond market for raising funds, bondholders will want to try again to get standard bond covenants to improve their position.

<http://www.creditroundtable.org/SectionPage.aspx?SID=55>

Banks and micro-enterprises

A Statement of Principles

From the British Bankers' Association, a note on how banks will work with small business customers to meet their finance needs.

http://www.bba.org.uk/content/1/c6/01/50/76/Statement%20of%20Principles_FINAL%20spreads.pdf

BBA, December 2009

Payment systems

Direct Debits

Financial Ombudsman

The difference between direct debits, standing orders and continuous-payment authorities is highlighted in this issue of Ombudsman News, 82.

<http://www.financial-ombudsman.org.uk/publications/ombudsman-news/82/82.pdf>

ECB Glossary

Payment, clearing and settlement terms

The European Central Bank has published a glossary of terms relating to technical aspects of payment, clearing and settlement systems in the European Union. The glossary is expected to ensure the consistent use of terms in publications by the European System of Central Banks. It can be used by other Union institutions for reference purposes.

The glossary was compiled by a committee in the ESCB and was the subject of a public consultation from 30 September 2008 to 1 January 2009.

Glossary:

<http://www.ecb.int/pub/pdf/other/glossaryrelatedtopaymentclearingandsettlementsystems.en.pdf?>

Press notice: <http://www.ecb.int/press/pr/date/2009/html/pr091201.en.html>

Payment Services Directive

“Impact of Payment Services Directive on UK”

The Payment Services Directive, the Directive that creates a harmonised framework for payments in Europe, has been implemented in the UK through the Payment Services Regulations. The author discusses to what extent the PSRs have affected UK payment practices and infrastructures.

R Beaumont: *E-finance & payments law & policy*, 11.09, 04) 09.51.079

SEPA direct debit scheme

“SEPA and EU governments: case analysis and comments”

With the Single Euro Payment Area direct debit scheme a reality, as of 1 November, questions arise as to the willingness of some European Member States to make such

cross-border payment schemes a reality. The author takes a look at some legal and political issues surrounding the implementation of SEPA.

G Hartsnik: E-finance & payments law & policy, 11.09, 14) 09.51.083

Pre-budget report

Extract of key points for banks

- A temporary tax on bonuses between 9 December 2009 to 5 April 2010
- Transparent and standardised mortgage-backed securities markets – to explore options
- UK regulated covered bond market – to consult and develop
- The Government will publish a DP on developing non-bank lending channels.
- Systemically important investment banks - measures to reduce impact of future failure
- Code of Practice on taxation for banks
- Advisory group on professional and financial service
- Islamic finance products - to promote a level playing field
- Governance Code for Building Societies and other mutuals
- Regulatory framework for recognised inter-bank payments systems.

http://www.hm-treasury.gov.uk/d/pbr09_chapter3.pdf

Reform of Banking

ABS loan-level information

Public consultation

The European Central Bank has launched a public consultation on the ongoing availability of information relating to loans underlying asset-backed securities to determine the eligibility of ABSs for the Eurosystem collateral framework.

http://www.ecb.int/paym/pdf/cons/abs/ecb_consultation_on_loan-by-loan_information_for_abs.pdf?8192529c414160ac055c029dd56f2aaf

ECB, December 2009)

Asset Protection Scheme

Accession agreement between HMT and RBS

The Royal Bank of Scotland signed its agreement subject to the approval of shareholders and the European Commission regarding state aid, to participate in the Asset Protection Scheme on 26 November 2009. HM Treasury have published the agreement with detailed information about the APS and a list of the Bank's assets covered by the scheme. It sets out the framework for the new Asset Protection Agency that will administer the APS. Lloyds Banking Group exited from the APS and has continued with plans to raise capital on the markets. .

http://www.hm-treasury.gov.uk/d/aps_accession_agreement.pdf

HM Treasury, December 2009

Asset Purchase Facility

Consultation - corporate bond secondary market scheme

This Bank of England Market Notice proposes an extension to the Bank's Asset Purchase Facility to further aid market liquidity by regularly offering to make sales of corporate bonds as part of its Corporate Bond Secondary Market Scheme.

<http://www.bankofengland.co.uk/markets/marketnotice091203.pdf>

Bank of England, December 2009

Financial Services Bill

Second reading

The Bill has been presented for its second reading in Parliament. Hansard reports that Alistair Darling was questioned on the absence of consumer protection provisions in the Bill, particularly as regards pre-payment of goods and replied that he was conscious more consumer legislation is needed but that he aimed to keep this Bill short (so that it can make it through Parliament before the election). The main purpose of the Bill is to strengthen financial regulation. It is to manage system-wide risks and "tighten" the powers available to the FSA on the remuneration of banks. Mr Darling pointed to clauses 1 to 4 of the Bill that will set up a new Council for Financial Stability, which will be responsible for considering emerging risks to the UK's financial stability. The Bank of England, the FSA and the Chancellor will have a more "formal, transparent and accountable" relationship based on statute (not the memorandum of understanding between the FSA and the BoE of the past ten years). Curiously, Mr Darling says, "we will ensure that the council is established beforehand". Clause 8 will formalise the FSA's existing responsibility to work internationally and to promote effective international regulation. Mr Darling referred Jacques de Larosière's work to establish a new European

systemic risk board and the need for member states to retain fiscal responsibility. The discussion went on for some hours, “living wills” were touched on, with a criticism from an MP that there was not enough detail about them, only to be brushed aside by the Minister that such detail would be dealt with in the Public Bill Committee (which has to conclude by 14 January 2010). The Bill got through the second reading with a majority of 276 to 152. The next Committee Stage will continue on 5 January 2010. The Bill applies to the whole of the UK.

<http://www.parliament.the-stationery-office.co.uk/pa/cm200910/cmhansrd/cm091130/debtext/91130-0010.htm#09113039000001>

Financial Stability

Report: December 2009

The December 2009 edition of the Bank of England's bi-annual Financial Stability Report includes: "where next for UK securitisation?, cross-border capital flows and bank lending, sources of bank profits and capital losses in past financial crises.

<http://www.bankofengland.co.uk/publications/fsr/2009/fsr26.htm>

Issue No. 26: Bank of England, December 2009

Outlook for banking sector

The future financial landscape

David Miles gave this speech at Bloombergs on why the banking sector might become smaller.

<http://www.bankofengland.co.uk/publications/speeches/2009/speech418.pdf>

16 December 2009

Living wills

Recovery and Resolution Plans

Speech by Andrew Bailey, Bank of England explaining in three pages what Recovery and Resolution plans are and why he thinks they should be “critical” tools (“essential”?) for banks, banking supervisors and resolution authorities.

<http://www.bis.org/review/r091204e.pdf>

BIS (04.12.2009 08:03) Andrew Bailey: Recovery and resolution plans; Santander International Banking Conference 17 November 2009

National Audit Office report

Maintaining financial stability across the United Kingdom's banking system

This report by the National Audit Office explains to Parliament the measures taken since the nationalisation of Northern Rock and the role of HMT in them. It finds that the public support provided to banks by the Treasury was justified, given the scale of the economic and social costs if one or more major banks had collapsed. The final cost to the taxpayer will not be known for a number of years.

<http://www.nao.org.uk/idoc.ashx?docId=99ee9a41-99a2-4cbb-b7b1-df61f035e427&version=-1>

HC Paper No.91 (Session 2009/10): TSO, December 2009

Northern Rock

Restructuring on 1 January 2010

The restructure of Northern Rock will take place on 1 January 2010 under the Northern Rock plc Transfer Order 2009. The European Commission approved the proposed restructuring of Northern Rock on 28 October 2009. Northern Rock's business will be split between two companies, to be called Northern Rock plc and Northern Rock (Asset Management) plc. The back book of mortgages is to be managed separately in Northern Rock (Asset Management) plc. The Government believes that the restructuring will strengthen Northern Rock's capital position. As a result of the restructuring, government guarantees in relation to Northern Rock have been restated to apply to the two entities.

http://www.opsi.gov.uk/si/si2009/pdf/uksi_20093226_en.pdf

http://www.opsi.gov.uk/si/si2009/pdf/uksi_20093227_en.pdf

http://www.hm-treasury.gov.uk/press_116_09.htm

8 December 2009

The Northern Rock plc (Tax Consequences) Regulations 2009

These Regulations deal with the tax consequences of a transfer of any securities, or of any property, rights or liabilities, or the grant of a lease, sublease, licence or sublicense between Northern Rock plc, or a wholly owned subsidiary, and Gosforth Subsidiary No.1 plc, or a wholly owned subsidiary, under the Banking (Special Provisions) Act 2008 (the Northern Rock plc Transfer Order 2009).

The full text is available at http://www.opsi.gov.uk/si/si2009/pdf/uksi_20093227_en.pdf

Date in force: (1.1.10)

Strengthening resilience

Basel Committee

The Basel Committee on Banking Supervision approved at its meeting on 8 & 9 December, a package of proposals for consultation to strengthen global capital and liquidity regulations. They aim to promote a more resilient banking sector.

<http://www.bis.org/press/p091217.htm>

BIS 17 December 2009

Treasury Committee

New inquiry: can banks be 'too important to fail'?

The House of Commons Treasury Committee has announced the launch of a new inquiry on the issue of financial institutions being 'too important to fail'.

9 December 2009

Treasury paper

"Risk, reward and responsibility: the financial sector and society"

This discussion document presents the importance of the financial sector to the UK economy alongside the risks it poses to society. The document considers ways in which the financial sector might contribute to the potential costs of any residual risks it poses to taxpayers and to broader social objectives and is intended to inform a paper by the International Monetary Fund that is expected next April.

http://www.hm-treasury.gov.uk/d/fin_finsectorandsociety.pdf

Which?

"Future of Banking"

Which? has launched a Commission which "aims to put the wider interests of society at the heart of a reformed banking system". The Future of Banking Commission will include John McFall, Labour chairman of the Commons Treasury Select Committee, Vince Cable, the Liberal Democrats' Treasury spokesman, and David Davis as chair.

<http://www.which.co.uk/campaigns/banking-crisis/the-future-of-banking-commission/index.jsp>

Regulation

Deposit takers without branches

Modification of Rule

A deposit taker is required to highlight the protection provided to depositors under the Financial Services Compensation Scheme. The FSA has issued a modification by consent of Rule 16.3.1 of the Compensation sourcebook for deposit takers that do not have branches. This will allow such a deposit taker to direct its customers to a telephone number where they can find out information about their FSCS rights. As previously drafted, the rule provided wording referring customers to their local branches. However, for businesses that do not operate any branches, this could be deemed to be giving customers misleading information. COMP 16.3.1R is due to come into force on 1 January 2010. Firms wishing to take advantage of the modification should contact the FSA Central Waivers team by e-mail or in writing.

9 December 2009

Handbook

This lists FSA recently issued publications, gives a timetable for forthcoming publications and details of events and industry training.

<http://www.fsa.gov.uk/pubs/handbook/hb118.pdf>

No 118: FSA, December 2009

Retail

Post Office banking

Consultation on developing the banking and financial services available at the Post Office

This Department for Business, Innovation And Skills consultation sets out what the Post Office already offers in terms of financial services and seeks views on the proposals for new accounts that the Post Office could offer such as current accounts, Children's Savings accounts, Post Office business accounts, and budgeting accounts.

<http://www.berr.gov.uk/files/file53845.pdf>

BERR, December 2009

Security

Bills of Sale

Proposal to ban 'logbook' loans

This consultation seeks to address concerns about consumers where borrowing is secured under a bill of sale. Bills of sale are used for 'logbook' loans secured against the value of the consumer's car. No court order is required in the event of default and enforcement. A government press release says, "They were developed in the days of Charles Dickens and don't meet 21st Century consumer standards." BIAS believes a ban on using bills of sale for consumer lending is likely to be necessary, but has yet to take a final decision on whether alternative options would achieve a better result. The consultation seeks stakeholder views help determine the most appropriate next steps. Replies are required by 15 March 2010.

<http://www.berr.gov.uk/files/file54079.pdf>

<http://nds.coi.gov.uk/content/Detail.aspx?ReleaseID=409777&NewsAreaID=2>

Electronic notification of discharge

Service withdrawal

The facility for lenders to discharge registered charges by way of an electronic notification of discharge via Land Registry Direct will be withdrawn on 3 January 2010. This is to encourage lenders to switch to the Land Registry portal, which provides a single point of entry to all electronic services. The portal will enable lenders to discharge mortgages using an electronic notice of discharge of a registered charge (e-DS1). Unlike an electronic notification of discharge, an e-DS1 operates as a stand-alone application for discharge, which does not require the conveyancer also to submit a paper application.

Financial collateral

"The financial collateral arrangements regulations: some Scottish issues"

This article comments that the Financial Collateral Arrangements (No. 2) Regulations 2003 are technically deficient from the Scottish legal viewpoint – firstly, arrangements regarding Scottish collateral are normally "title transfer financial collateral arrangements" rather than "security financial collateral arrangements" as assumed in the regulations; and secondly, insolvency of Scottish partnerships is not fully dealt with.

H Patrick: L&FMR, 11.09, 532 09.50.121

Guarantee

Cattles Plc v (1) Welcome Financial Services Ltd (2) Royal Bank Of Scotland Plc (3) Party A

EWHC 3027 (Ch) Ch D (Judge David Cooke) 14/12/2009

The court determined a number of issues of construction and law in relation to the debts owed by a financial services company to different classes of creditors, including that under the terms of a guarantee, the company, as borrower, was obliged not to make any claim against its principal trading subsidiary until such time as all obligations to a bank, which was the principal lender, and the other companies defined in the guarantee, had been discharged in full.

Indemnity

Recovering loss arising from your own negligence

MacSalvors Plant Hire Ltd v Brush Transformers Ltd [2009] EWCA Civ 1329

The court held in this case that the defendant had no valid claim for an indemnity. The point at issue was whether the indemnity covered loss caused by a party's own negligence or breach of statutory duty. An indemnity is not usually construed in favour of the indemnified to this effect unless the indemnity is expressed in clear wording to that effect. (There is conflicting case law, an obiter comment versus an unreported case). The *MacSalvors* case concerned an indemnity in the Model Conditions of the CPA agreement for the hiring of plant. It was held that the wording was neither clear nor wide enough to cover liability for negligence or breach of statutory duty. The moral of the case is that if you want to be indemnified for your own negligence, you would do better to spell that out rather than rely on a blanket phrase such as "however caused".

Land Registry policy

"Early completion"

This article examines changes to Land Registry policy for applications by buyers' solicitors to register transfers, to discharge sellers' mortgages and to register a new charge, and notes how these elements have been separated.

[A M Short: PLJ, 30.11.09, 2, 09.52.002](#)

Overseas companies

Companies House guidance note

This note explains how to register an overseas company that opens an establishment in the UK. The document outlines the rules on accounting requirements and sets out

registration requirements under the Companies Act 2006, the Overseas Companies Regulations 2009 and the Overseas Companies (Company Contracts and Registration of Charges) Regulations 2009.

<http://www.companieshouse.gov.uk/about/pdf/gpo1.pdf>

GP01: Companies House, December 2009

Share pledge

Loss of subsidiary status

Enviroco Ltd v Farstad Supply AIS [2009] EWCA Civ 1399

This was a case that considered whether a particular company was a subsidiary that fell within the scope of an indemnity and, in considering that, held that the transfer of legal title to the company's shares by way of security to a bank's nominee caused the company to lose its status as a Companies Act subsidiary.

The problem arose because the holding company in the case did not hold more than 50% of the voting rights in the subsidiary. It controlled voting rights through an agreement with other shareholders but, in order for this to give rise to a holding company/subsidiary relationship, the holding company had to be a "member" of the subsidiary: section 736(1)(c) Companies Act 1985. Because the holding company had transferred legal title to the shares by way of security to the bank's nominee, it was no longer a "member". The Court of Appeal's decision meant that the "subsidiary" could not claim the benefit of the indemnity.

Legal documents often use the Companies Act definitions of "subsidiary" and "holding company" (and sometimes "subsidiary undertaking" and "parent undertaking" which are similar) to capture a shifting population of group companies. In most cases, the intra-group relationships will be based on majority shareholdings, but where the holding company/subsidiary relationship depends on "membership" of the subsidiary, the case warns against allowing registration of shares held by way of security.

The decision gives an opportunity to a holding company to manipulate a corporate structure to its advantage because if it owns 50% or less of the shares in its subsidiary, it could avoid "holding company" status in relation to that subsidiary simply by vesting legal title to the shares in a nominee. In that case, it is no longer a "member".

Although section 736 CA 1985 has now been repealed, the substance of that section has been reproduced in section 1159 of the Companies Act 2006. The decision in *Enviroco* will therefore apply to the interpretation of that section. Where the Companies Act definitions are used, consideration should be given to extending the definitions so that transferring legal title to the shares by way of security to a bank or its nominee or to the holding company's own nominee does not destroy the holding company/subsidiary relationship or any agreements, such as covenants, that might have been given.

Tax

A code of practice on taxation for banks

HMRC has asked banks to establish an appropriate relationship with HMRC, following the principles set out in the Review of Links with Large Business. It asks them to undertake tax planning only to support their business operations, not to achieve unintended and unexpected tax advantages. The updated Code is at Annex A of the first item below. This follows consultation in June 2009.

<http://www.hmrc.gov.uk/pbr2009/tax-banks-0040.pdf>

<http://www.hmrc.gov.uk/pbr2009/tax-banks-suppl-0040.pdf>

And finally ...

And it's "holiday time":

... so I have to include this latest gem of an SI.

The Food (Jelly Mini-Cups) (Emergency Control) (England) Regulations 2009

No 3230

Does anyone know what a jelly mini-cup is and why they have to be controlled on an emergency basis?

These Regulations, which apply in relation to England only, (Scotland, Wales and Northern Ireland are getting their own controlling measures) implement Commission Decision 2004/374/EC which suspends the sale of (deadly) jelly mini-cups for containing too many E numbers to list and for being a choking hazard. The other FSA, the Food Standards Agency, say, "There have been no reported incidents involving these sweets in the UK but anyone who has bought some is advised not to eat them." So, now I know.

http://www.opsi.gov.uk/si/si2009/pdf/uksi_20093230_en.pdf

<http://www.food.gov.uk/news/newsarchive/2004/apr/jellysweetseubannews>

OJ No. L118, 23.4.2004, p.70 in force 20/1/2010



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