ONE ESSEX COURT

RECENT DEVELOPMENTS IN BANKING LAW AND PRACTICE

SONIA TOLANEY QC

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INTRODUCTION

ONE ESSEX COURT

Many recent developments. Some hot topics:

- Disclosure
- Privilege
- Jurisdiction
- Foreign law
- LIBOR
- Close out Amounts
- Tortious and Equitable Duties
- *Braganza* Duties
- Contractual Estoppel
- Limitation

DISCLOSURE – PRE ACTION

ONE ESSEX COURT

ECU v HSBC [2017] EWHC 3011 (Comm), HHJ Waksman QC

- ECU sought PAD pursuant to CPR r.31.16 from HSBC so as to enable it to consider whether any claim against HSBC in relation to front-running of stop-loss orders was viable and whether it could rely on s.32 Limitation Act 1980

- HHJ Waksman QC ordered disclosure of Bloomberg messaging and emails for the traders, underlying data and global market and compliance documents.

- The total estimated cost of retrieving the documents was said to be c.£50,000. Waksman J disagreed with *HSBC* that this was disproportionate.

DISCLOSURE – COLLATERAL USE

ONE ESSEX COURT

The ECU Group Plc v HSBC Bank Plc [2018] EWHC 3045 (Comm)

- HSBC Companies had provided documents to ECU Group plc by way of pre-action disclosure ("the Disclosed Documents").

- It transpired subsequently that ECU had made collateral use of the Disclosed Documents

- ECU made an application seeking prospective and retrospective permission for collateral use.

DISCLOSURE – COLLATERAL USE

ONE ESSEX COURT

The ECU Group Plc v HSBC Bank Plc [2018] EWHC 3045 (Comm)

- Prospective Permission: Prospective permission was sought to use the documents:

  (a) to bring proceedings in the Commercial Court against HSBC Holdings plc, which was not a Respondent in the application for pre-action disclosure;

  (b) for communicating with clients and former clients of ECU as to whether they might join the English proceedings as co-claimants.

  (c) to obtain US legal advice in respect of potential claims in the US against individuals in HSBC Companies.

DISCLOSURE – COLLATERAL USE

ONE ESSEX COURT

The ECU Group Plc v HSBC Bank Plc [2018] EWHC 3045 (Comm)

- Prospective Permission: Decision

  (a) Use of documents to bring proceedings in the Commercial Court against HSBC Holdings plc was agreed between the parties. In any event, Andrew Baker J said that, in his view, permission was not required; this did not constitute collateral use (at [8(i)]).

  (a) Use of documents to communicate with potential co-claimants was also agreed. Andrew Baker J did not express a view on this point.

  (b) Permission was not granted for the use of documents to obtain US legal advice in preparation for potential proceedings in the US. Andrew Baker J said, "*as things stand ECU appears to be able (if so advised) to include in the proceedings **here** any claims it might want to make against HSBC Bank USA, N.A or relevant individuals*" (at [9]).

DISCLOSURE – COLLATERAL USE

The ECU Group Plc v HSBC Bank Plc [2018] EWHC 3045 (Comm)

- Retrospective Permission: Retrospective permission was sought in respect of prior use of the documents:

  (a) in certain communications of ECU with UK and US authorities;

  (b) in certain communications of ECU with US attorneys; and

  (c) by providing a copy of a witness statement made in the proceedings to a journalist at 'FX Week'

DISCLOSURE – COLLATERAL USE

ONE ESSEX COURT

The ECU Group Plc v HSBC Bank Plc [2018] EWHC 3045 (Comm)

- Retrospective Permission: General Principles

  – Retrospective permission for collateral use will "*only rarely be granted*" (at [11]).

  – Whether prospective permission would have been granted, had a timely application been made, is an important consideration although it is neither necessary nor sufficient (at [12]).

  – As a general rule, and in the absence of something unusual in the particular facts of the case, retrospective permission will not be granted unless a timely prospective application would have succeeded (at [12]).

DISCLOSURE – COLLATERAL USE

The ECU Group Plc v HSBC Bank Plc [2018] EWHC 3045 (Comm)

- Retrospective Permission: Decision (1)
  - In respect of the limited communication between ECU and US and UK authorities, HSBC consented to permission being granted. Andrew Baker J considered it relevant that, if prospective permission had been sought, it would have been granted (at [15]).

DISCLOSURE – COLLATERAL USE

The ECU Group Plc v HSBC Bank Plc [2018] EWHC 3045 (Comm)

- Retrospective Permission: Decision (2)
  - In respect of ECU's communications with US attorneys, it was held that:
    - (i) The collateral use prohibition is breached even if one's knowledge or analysis of the content of a document is communicated without sharing the document itself (at [24]).
    - (ii) CPR 31.22(1) operates by reference to the *purpose* for which use was made.
    - (iii) It follows that the "*self-same advice, upon materially the same brief to the external adviser, could have been sought legitimately, without breach for the purposes of the proceedings here*" (at [20]).
    - (iv) On this basis, retrospective permission was granted although on terms which included the condition that the current US attorneys' retainers should be terminated and that they should not be instructed in connection with the subject matter of the same proceedings (at [21]).

DISCLOSURE – COLLATERAL USE

ONE ESSEX COURT

The ECU Group Plc v HSBC Bank Plc [2018] EWHC 3045 (Comm)

- Retrospective Permission: Decision (3)
  - In respect of provision of a witness statement to a journalist:

    (i) This was "*perfectly obviously prohibited collateral use*" (at [5])

    (ii) "*No real explanation*" was offered for why the provision of the witness statement to a journalist should be permissible.

    (iii) Andrew Baker J described this as a "*very serious breach, neither sensibly explicable nor remotely excusable*".

JURISDICTION

ONE ESSEX COURT

Deutsche Bank AG v Commune di Savona [2018] EWCA Civ 1740

- The parties had entered into:
  - First, an agreement by which the Bank agreed to provide advice regarding Savona's derivative commitments – contained an Italian exclusive jurisdiction clause ("the Advisory Agreement").
  - Second, an ISDA Master Agreement – contained an English exclusive jurisdiction clause, non-reliance clause and entire agreement clause ("the Master Agreement").
  - Two swaps on the terms of the Master Agreement, as modified by the parties

- DB sought declaratory relief in England in relation to the validity of the swaps and arising from "basis clauses" in the Master Agreement, including declarations that Savona had not relied on any advice or recommendation from the bank.

- Savona then issued proceedings in Italy, alleging breaches of Italian law in relation to DB's services provided under the Advisory Agreement. Savona also made a partial jurisdiction challenge in England, alleging that some of the declarations fell within the scope of the jurisdiction clause in the Advisory Agreement.

JURISDICTION

ONE ESSEX COURT

Deutsche Bank AG v Commune di Savona [2018] EWCA Civ 1740

HHJ Waksman QC ([2017] EWHC 1013): (distinguishing *Provincia Brescia* [2016] EWHC 3261 (Comm)):

- There is no "rigid rule" that a claim for declaratory relief based on the terms of a contract is within the scope of a jurisdiction clause in the same contract.

- No presumption that the jurisdiction clause in the later agreement (i.e. the Master Agreement) had been intended to cut down the jurisdiction clause in the earlier agreement (i.e. the Advisory Agreement), and each clause had to be interpreted according to its own governing law.

- As a matter of Italian law, the Italian proceedings (which concerned complaints about advice given by the Bank) were within the scope of the Italian jurisdiction clause.

- As the Advisory Agreement was concerned with the bank's role as adviser, and as the swaps were concerned with the bank simply as counterparty, a dispute which was essentially concerned with the bank's role as advisor was much more naturally within the Italian jurisdiction clause than the English jurisdiction clause.

JURISDICTION

ONE ESSEX COURT

Deutsche Bank AG v Commune di Savona [2018] EWCA Civ 1740

Court of Appeal allowed the appeal, holding that the disputes relating to the swap transactions fell within the English Jurisdiction Clause.

Jurisdiction clauses:

- Comparing the two agreements, the demarcation between the two relationships is between the generic relationship set out in the Advisory Agreement and the specific interest rate swap relationship set out in the swap contracts incorporating the Master Agreement. (Longmore LJ, [21])

- The entire agreement clause in the Master Agreement was a "*strong confirmation that the swap contracts are indeed separate contracts and that any dispute relating to them is to come within the jurisdiction clause of those contracts*" (Longmore LJ, [22])

- Further, "it *would be startling if the bank's claims falling squarely under the swap contracts could not be brought in the forum selected by the parties through the jurisdiction clause under those agreements, namely that contained in the ISDA Master Agreement*". So holding would be "*highly damaging to market certainty*" in the ISDA context. (Gross LJ, [38])

EXPERT EVIDENCE – JURISDICTION STAGE

Deutsche Bank AG v Commune di Savona [2018] EWCA Civ 1740

Foreign law expert evidence:

- Savona adduced very detailed expert evidence on Italian law. DB objected to that evidence on the grounds that permission for expert evidence had not been sought or granted. HHJ Waksman QC did not agree that permission was required at an interlocutory stage.
- Longmore LJ rejected that approach, [15]:

> "**I must confess to considerable unease about the proliferation of expert evidence of foreign law on jurisdiction applications which are supposed not to be excessively complicated and to be capable of determination in hours rather than days**... In a case in which the main, let alone the only, issue is as to the construction of a foreign jurisdiction clause as opposed to an English jurisdiction clause, the only relevance of evidence of foreign law is to inform the court of any difference of law in relation to the principles of construction…It is not to have competing arguments as to how the highest court in the foreign jurisdiction would decide the question whether a claim brought in England would (or would not or would also) fall within the foreign jurisdiction clause. The task of the English court is merely to inform itself of any relevant different principles of construction there might be in the foreign law and, armed with such information, look at both jurisdiction clauses and decide whether the English claim falls within the English clause. That should be a comparatively straightforward exercise."

JURISDICTION

ONE ESSEX COURT

Ashley v Jimenez [2019] EWHC 17 (Ch) (Chief Master Marsh)

- Claim based on an alleged oral agreement between the Claimant and the Defendant.

- The oral agreement was that, upon the payment of £3 million by the Claimant, the Defendant would transfer a 5% shareholding in a golf course in France to one of the Claimant's companies.

- Claimant transferred £3 million to a bank account nominated by the Defendant but never received the shares.

- Claimant sought, *inter alia*, rescission of the oral agreement and restitution of £3 million on the basis that the agreement was procured by fraudulent misrepresentations by the Defendant.

JURISDICTION

ONE ESSEX COURT

Ashley v Jimenez [2019] EWHC 17 (Ch) (Chief Master Marsh)

- The Claimant had obtained permission to serve out on the Defendant in UAE.

- The Defendant applied to set aside service and for a declaration that the court had no jurisdiction to hear the claim.

- In support of that contention, the Defendant relied on an agreement dated 17 September 2008 under which disputes concerning the payment of £3 million were referred to the exclusive jurisdiction of the UAE courts.

- The Claimant challenged the authenticity of the 17 September Agreement. The Claimant argued that his signature on that document was forged.

JURISDICTION

ONE ESSEX COURT

Ashley v Jimenez [2019] EWHC 17 (Ch) (Chief Master Marsh)

- Regarding the general principles, Chief Master Marsh said:
  - "*There is no direct guidance in the authorities about the approach the court should adopt where a party relies on a document with an exclusive jurisdiction clause and the authenticity of the document is disputed*" (paragraph 64)
  - "*The validity of the 17 September Agreement is a "material jurisdictional fact" which is not agreed, albeit one of very great significance. It seems to me that the defendants are required to have the better of the argument about the validity of the 17 September Agreement and in applying that test the burden of proof lies on [the defendant]*" (paragraph 66) (emphasis added)

JURISDICTION

ONE ESSEX COURT

Ashley v Jimenez [2019] EWHC 17 (Ch) (Chief Master Marsh)

- Chief Master Marsh concluded that the Claimant had the "*better of the argument*" that the 17 September Agreement was not a genuine document. In reaching that conclusion, he relied on (*inter alia*):

  – Handwriting evidence; the handwriting expert said that there was "*conclusive evidence*" that the Claimant did not sign the Agreement (paragraph 74(1))

  – The timing of production of the 17 September Agreement; the Agreement was not mentioned in pre-action correspondence or in the Defendant's first witness statement (paragraph 74(2))

  – The inherent improbability of the terms of the 17 September Agreement; on jurisdiction and on merits it was "*remarkably generous*" to the Defendant (paragraph 74(5))

  – "*Significant gaps*" in the evidence provided by the Defendant; if the 17 September Agreement was a valid document, its financial terms would be reflected in the Defendant's company's accounts. The Defendant had refused to produce these accounts (paragraph 75)

JURISDICTION

ONE ESSEX COURT

PJSC Commercial Bank v Kolomoisky [2018] EWHC 3308 (Ch) (Fancourt J)

- The Claimant bank brought claims against eight Defendants:
  - First and Second Defendants (Mr Kolomoisky and Mr Bogolyubov) were Ukrainian businessmen, both domiciled in Switzerland;
  - Third to Fifth Defendants were English companies; and
  - Sixth to Eighth Defendants were BVI companies.

- First and Second Defendants were alleged to have misappropriated funds from the Claimant bank.

- Third to Eighth Defendants were said to have procured or assisted in the misappropriation and/or unjustly enriched at the Claimant's expense by acquiring the misappropriated sums.

JURISDICTION

ONE ESSEX COURT

PJSC Commercial Bank v Kolomoisky [2018] EWHC 3308 (Ch) (Fancourt J)

- The claims against the First and Second Defendants were brought in England, pursuant to Article 6.1 of the Lugano Convention 2007, by using the English companies as "anchor defendants".
- Article 6.1 of the Lugano Convention (corresponding to Article 8.1 of the Brussels recast Regulation) provides that:

  > "*A person domiciled in a State bound by this Convention may also be sued… where he is one of a number of defendants, in the courts for the place where any one of them is domiciled, provided the claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings*"

- The First and Second Defendants argued that the claims against the English Defendants were brought with the sole objective of removing the First and Second Defendants from Swiss jurisdiction. This, it was argued, was an abuse of Article 6.

JURISDICTION

ONE ESSEX COURT

PJSC Commercial Bank v Kolomoisky [2018] EWHC 3308 (Ch) (Fancourt J)

- Fancourt J held:
  - "*As a matter of EU jurisprudence, it is now clearly established that Article 6 cannot be used in such circumstances (i.e., domestic defendants being sued with the sole objective of establishing jurisdiction against foreign defendants); but the operation of this principle in the context of a case where there is admitted or found to be a good arguable claim against the domestic defendants is not wholly straightforward*" (paragraph 86)
  - "*[A]ny artificial fulfillment (or apparent fulfillment) of the express requirements of Article 6.1 is impermissible, and this includes a case where the sole object of the claim against the anchor defendant is to remove the foreign defendant from the jurisdiction of domicile. Bringing a hopeless claim is one example of such abuse, but the abuse may be otherwise established by clear evidence. In principle, the fact that there is a good arguable case against the anchor defendant should not prevent a co-defendant from establishing abuse on some other ground, including that the "sole object" of the claim is to provide jurisdiction against a foreign domiciled co-defendant*" (paragraph 93) (emphasis added)

JURISDICTION

ONE ESSEX COURT

PJSC Commercial Bank v Kolomoisky [2018] EWHC 3308 (Ch) (Fancourt J)

- Further, Fancourt J held that:
  - Whether proceedings against the English companies were brought with the sole objective of establishing jurisdiction against the non-domiciled Defendants must be judged at "*the time at which the action was brought, not any later time*" (paragraph 99)
  - The sole reason why the claims were advanced against the English companies was to establish jurisdiction against the foreign Defendants; they were "*mere conduits that have no independent business or purpose or any realisable assets*" (paragraph 95)
- Accordingly, he concluded that the court had no jurisdiction against the First and Second Defendants pursuant to Article 6.1.

FOREIGN LAW

ONE ESSEX COURT

Cornwall Luxembourg SARL v International Game Technology plc [2018] EWHC 42 (Comm)

- Defendant company assumed Italian company's obligations following merger
- Claimant purchased shares prior to merger but elected to exercise "Cash Exit Right" under Italian statute to liquidate its shareholding in exchange for substantial compensation
- Commercial Court had to determine whether shareholder was entitled to dividends declared after the shareholder had exercised its exit right, but before the process of liquidating the shares was complete
- **Held**: payment of the dividend to the shareholder was inconsistent with the shareholder's decision to exercise the statutory exit right and would result in overcompensation

FOREIGN LAW

ONE ESSEX COURT

Cornwall Luxembourg SARL v International Game Technology plc [2018] EWHC 42 (Comm)

- Some key take-away points

- The court focused on the text of the relevant Italian statute, having regard to the overall legislative scheme and purpose

- The Court gained little assistance from the claimant's extensive expert evidence addressing the numerous conflicting Italian court decisions and academic commentary

- Commercial Court remains a popular forum of choice for international litigation

LIBOR

ONE ESSEX COURT

Property Alliance Group Ltd v Royal Bank of Scotland Plc [2018] EWCA Civ 355

- Appeal from first trial of a claim for rescission based on alleged LIBOR manipulation
- RBS sold PAG four swaps between 2004 and 2008.
- Various claims brought by PAG.
- In relation to LIBOR: claims for rescission and/or damages for fraudulent misrepresentations. Alleged implied representations that ([118]):
  - LIBOR complied with the BBA definition (i.e. the average rate at which an individual panel bank could borrow funds)
  - RBS had no reason to believe that LIBOR did not comply with the definition
  - RBS had not made false or misleading LIBOR submissions and did not intend in the future to make false or misleading submissions

LIBOR

ONE ESSEX COURT

Property Alliance Group Ltd v Royal Bank of Scotland Plc [2018] EWCA Civ 355

- Asplin J held no **implied representations**: An assumption that LIBOR had not been manipulated is not the same as a representation; Mere presentation of the Swap agreements linked to LIBOR was insufficient; In any event the representations were too wide and technical

- CA disagreed. Implied representation that RBS was not manipulating and did not intend to manipulate GBP LIBOR ([141]). No representation re other currencies ([136]-[140])

- CA affirmed finding (on the facts) that representations were **not false**: ([157])

- Unnecessary to examine conclusions of **no reliance and no fraud**: ([158-159])

LIBOR

ONE ESSEX COURT

Property Alliance Group Ltd v Royal Bank of Scotland Plc [2018] EWCA Civ 355

Other points (briefly):

- Representations as to suitability of the swaps: failed on numerous grounds (including basis clauses in documentation which excluded advisory duties)

- "Mezzanine" duty (i.e. a duty, if information is provided, to provide a full, accurate and proper explanation): the expression should be avoided ([67])
  - Focus instead on the responsibility assumed in the particular factual context as regards the particular transaction or relationship in issue ([67])
  - Compare ***Thomas v Triodos Bank NV*** **[2017] EWHC 314 (QB)** where such a duty was held to exist (not cited in ***PAG*** EWCA judgment)

- Good faith: Alleged that RBS had breached implied term of good faith in commissioning a property valuation at PAG's cost after RBS had decided not to refinance PAG
  - Asplin J held RBS had "*absolute right to call for the valuation*"
  - CA disagreed: RBS could not commission a valuation for a purpose "*unrelated to its legitimate commercial interests or if doing so could not rationally be thought to advance them*" ([169])
  - Claim failed on the facts - valuation preceded RBS' decision ([174])

LIBOR

ONE ESSEX COURT

Other LIBOR litigation

- **Deutsche Bank v Unitech Limited**
  - Long running claim by DB to enforce a Credit Agreement and a Swap: judgments by Cooke J, Teare J (x2) and the Court of Appeal (x2).
  - In [2013] EWCA Civ 1372 it was held that it was arguable that implied representations as to LIBOR were made (heard with *Graiseley v Barclays Bank*) as a result of the Bank proposing LIBOR-linked transactions.
  - Trial in 2019

- **FDIC litigation**
  - Claim by the Federal Deposit Insurance Corporation (FDIC), as receiver of 39 US financial institutions (the "Closed Banks"), against 9 panel banks and 2 BBA entities. The European arm of US litigation.
  - Principal allegation is that the Defendants engaged in lowballing of USD LIBOR from August 2007 to the end of 2009 and that they did so collusively or by way of agreement/concerted action.
  - Also an allegation that the Defendants made fraudulent representations (to the Closed Banks) in relation to their involvement in LIBOR manipulation.
  - Still at an early stage

LIBOR

ONE ESSEX COURT

R v Pabon [2018] EWCA Crim 420

- Alex Pabon, Barclays trader, convicted for LIBOR manipulation
- Subsequent retrials of two of Mr Pabon's co-defendants revealed that expert evidence relied upon by the prosecution had been seriously flawed. The expert, Mr Rowe, had

  "signally failed to comply with his basic duties as an expert…he signed declarations of truth and of understanding his disclosure duties, knowing that he had failed to comply with these obligations alternatively, at best, recklessly. He obscured the role Mr O'Kane had played in preparing his report…he did not inform the SFO, or the Court, of the limits of his expertise. He strayed into areas in his evidence (in particular, STIR trading) when it was beyond his expertise (or, most charitably, at the outer edge of his expertise) – a matter glaringly revealed by his need to consult Ms Biddle, Mr Zapties and Mr Van Overstraeten. In this regard, he was no more than (in Bingham LJ's words) an "enthusiastic amateur". He flouted the Judge's admonition not to discuss his evidence while he was still in the witness box. We take a grave view of Rowe's conduct; questions of sanction are not for us, so we say no more of sanction but highlight his failings here for the consideration of others." [58]

- The defendants in the re-trials were acquitted. However, Mr Pabon's conviction was not unsafe as the unsatisfactory expert evidence did not go to the material issues of dishonesty.

CLOSE OUT AMOUNTS

LBI EHF V Raiffeisen Bank International AG [2018] EWCA Civ 719

Lehman Brothers Special Financing Inc v National Power Corporation [2018] EWHC 487 (Comm)

- Key issue: rational determination vs commercially reasonable calculation

CLOSE OUT AMOUNTS

ONE ESSEX COURT

LBI

LBI enters into repo transactions governed by Global Master Repurchase Agreement (GMRA)

- Closed out by Raiffeisen in October 2008 when LBI fails
- Close-Out Amount payable to Raiffeisen.
- Definition in GMRA requires Raiffeisen to determine the "*fair market value…having regard to such pricing sources and methods…as [Raiffeisen] considers appropriate*"
- LBI argues that "**fair**" market value requires Raiffeisen to calculate market value of repo transactions in non-distressed scenario
- Court of Appeal firmly rejects LBI's arguments. No support for these arguments in express terms of GRMA.
- Fairness only means that Raiffeisen must have acted rationally, in the *Socimer* sense (i.e. not arbitrarily or perversely).

CLOSE OUT AMOUNTS

ONE ESSEX COURT

- **<u>Lehman Brothers Special Financing: commercially reasonable calculation</u>**
- LBSF's counterparty closed out substantial swap governed by 2002 ISDA
- Counterparty determined the Close Out Amount in January 2009 on basis of third party quotation. In 2016, Counterparty then sought to withdraw its determination and replace it with a new (more favourable) calculation
- Definition in 2002 ISDA requires that Close Out Amount is to be determined by the counterparty in good faith using "*commercially reasonable procedures in order to produce a commercially reasonable result*" (whereas 1992 ISDA requires only a rational determination)
- Knowles J:
  - Counterparty was **not** permitted to replace the original determination of the Close out Amount: "*there is no provision for a second attempt*" [52]
  - Commercial reasonableness requires **more** than just a rational calculation. Reasonableness is an "*external, objective standard*": see [72]-[82]. The calculation must use reasonable methods and arrive at a reasonable result.

TORTIOUS AND EQUITABLE DUTIES

Playboy Club London Ltd v Banca Nazionale del Lavoro SpA [2018] UKSC 43

- Playboy Club wanted to obtain a financial reference from Banca Nazionale in respect of a customer. To preserve the customer's confidentiality, the request was made by Burlington Ltd on the Club's behalf.
- Banca Nazionale did not know the purpose of the reference and provided one addressed to Burlington confirming the customer's credit.
- The Club made losses as a result of counterfeit cheques from the customer and sought damages in negligence from Banca Nazionale.
- At first instance, HHJ Mackie QC held that Banca Nazionale owed a duty of care to the Club in giving the reference. The CA disagreed, held that D owed a duty of care only to Burlington to whom the reference was addressed.

TORTIOUS AND EQUITABLE DUTIES

Playboy Club London Ltd v Banca Nazionale del Lavoro SpA [2018] UKSC 43

- Cs' appeal dismissed (Lord Sumption giving the lead judgment):
  - The principle in *Hedley Byrne* is capable of development, but it is fundamental that the defendant is assuming a responsibility to an identifiable (although not necessarily identified) person or group of persons, and not to the world at large or to a wholly indeterminate group. [7]
  - Where a statement is relied upon by B to whom A has passed it on, the representor must not only know that the statement is likely to be communicated to and relied upon by B. It must also be part of the statement's known purpose that it should be communicated and relied upon by B, if the representor is to be taken to assume responsibility to B. [11]

TORTIOUS AND EQUITABLE DUTIES

Playboy Club London Ltd v Banca Nazionale del Lavoro SpA [2018] UKSC 43

- Rejecting the 'undisclosed principal' argument:
  - The fact that the Club was Burlington's undisclosed principal did not make the relationship between Banca Nazionale and the Club "*equivalent to contract*" with the result that there was a duty of care [11].
  - The relationship between a person dealing with another and the latter's undisclosed principal is not at all analogous to the kind of relationship which will give rise to a duty of care. Whether a relationship is sufficiently proximate to give rise to a duty of care is a question of fact from which the law draws certain conclusions. The liability of a contracting party to his counterparty's undisclosed principal, however, is not a legal conclusion from any factual relationship between them. It is a purely legal construct [14].

BRAGANZA DUTIES

ONE ESSEX COURT

UBS AG v Rose Capital Ventures Ltd [2018] EWHC 3137 (Ch) (Chief Master Marsh)

- This was a dispute arising from a loan of £20.4 million provided by the Claimant to the Defendant pursuant to a mortgage in March 2012.

- Special Condition 23.4 of the mortgage document stated that:

  "*Notwithstanding any other provision of these conditions, [UBS] shall be entitled at our absolute discretion to require repayment in full of the mortgage debt by giving [Rose Capital Ventures Ltd] not less than three months' notice in writing to that effect*"

- Pursuant to this provision, in March 2016, the Claimant demanded repayment of the loan by the Defendant. When the Defendant failed to do so, the Claim was brought.

- The Defendant argued that the Claimant's exercise of its power pursuant to Condition 23.4 was subject to a '*Braganza* implied term' i.e., that the Claimant would not exercise that power irrationally, arbitrarily or capriciously.

BRAGANZA DUTIES

ONE ESSEX COURT

UBS AG v Rose Capital Ventures Ltd [2018] EWHC 3137 (Ch) (Chief Master Marsh)

- The Claimant applied to strike out this part of the Defence.
- It was common ground that the Claimant's power to demand repayment was subject to a duty of good faith (paragraph 34).
- The issue in dispute was whether, pursuant to the Supreme Court's decision in *Braganza v BP Shipping* [2015] 1 WLR 1661, there was a further fetter on the exercise of that power: that the Claimant would not exercise that power for an improper purpose, irrationally, arbitrarily or capriciously.
- Master Marsh concluded that the Claimant's power to demand repayment was not subject to a *Braganza* implied term.

BRAGANZA DUTIES

ONE ESSEX COURT

UBS AG v Rose Capital Ventures Ltd [2018] EWHC 3137 (Ch) (Chief Master Marsh)

- Master Marsh distilled the following principles from the authorities (paragraph 49):
  - Not every contractual power or discretion is subject to a *Braganza* limitation; language of the contract is an important factor;
  - *Braganza* limitations are relevant when one party is given a role in the on-going performance of the contract. This can be contrasted with a unilateral right given to one party to act in a particular way, such as the right to terminate a contract without cause;
  - The balance of power between the parties is a relevant factor;
  - The scope of the term to be implied may vary according to the contract.

BRAGANZA DUTIES

ONE ESSEX COURT

UBS AG v Rose Capital Ventures Ltd [2018] EWHC 3137 (Ch) (Chief Master Marsh)

- Master Marsh concluded that there was no scope for implying a *Braganza* implied term in this case for the following reasons:
  - The language and nature of the contract: the loan was made on an uncommitted basis and was repayable on demand; the loan document did not require a trigger event for repayment; the Claimant was entitled to demand repayment in its "*absolute discretion*" (paragraph 50).
  - The case law on mortgage lending has developed its own set of protections, particularly, through the requirement of good faith. This obviates the need for a *Braganza* term (paragraph 55).
  - The nature of the power: the lender's power to demand repayment is always exercised solely for their benefit; "*it is difficult to see how a decision to demand repayment of loan could ever be in the interests of the mortgagor*" (paragraph 56)

CONTRACTUAL ESTOPPEL

ONE ESSEX COURT

- The principle of contractual estoppel has been continually applied in the context of "*basis clauses*".
- Courts have also considered statutory control of basis clauses under UCTA and s 3 of the Misrepresentation Act.
- Recent case law reveals two main trends:
    - Continuation of the conventional view that it is necessary to distinguish between clauses that exclude liability and those that define parties' primary obligations and duties towards each other;
    - Application of the control mechanism under COBS 2.1.2R without reference to this distinction.

CONTRACTUAL ESTOPPEL

ONE ESSEX COURT

Carney v NM Rothschild [2018] EWHC 958 (Comm)

- Mis-selling claim against Rothchild by two sets of claimants.
- HHJ Waksman QC applied the conventional test.
- He held that it is necessary to distinguish "*exclusion clauses (which might subject to statutory control for example by the UCTA)*" from clauses "*that are merely defining the parties' obligations or duties towards each other in the first place*" (at [73]).
- In deciding whether "*basis clauses*" are in fact exclusion clauses, the Court will consider, *inter alia*, "*the natural meaning of the clause*", "*the particular factual context in which the agreement containing the clauses was made*" and "*the format and location of the clause within the contract*" (at [94])

CONTRACTUAL ESTOPPEL

ONE ESSEX COURT

First Tower Trustees Ltd v CDS Ltd [2018] EWCA Civ 1396 (Comm)

- The conventional distinction also subsequently applied by the Court of Appeal in *First Tower Trustees Ltd*.
- Misrepresentation claim; alleged that the Landlord knew but did not tell the Tenant that the property was contaminated with asbestos.
- Clause 5.8 of the Lease :
  - "The tenant acknowledges that this lease has not been entered into in reliance wholly or partly on any statement or representation made by or on behalf of the landlord."

CONTRACTUAL ESTOPPEL

ONE ESSEX COURT

First Tower Trustees Ltd v CDS Ltd [2018] EWCA Civ 1396 (Comm)

- Following the conventional distinction, Lewison LJ said:

  "*Where, as a matter of interpretation of a non-consumer contract, the impugned term does no more than to describe one party's primary obligations there can be no question of applying the reasonableness test in the 1977 Act*" (at [43])

- Leggatt LJ went one step further. He said that:

  "…*whenever a contracting party relies on the principle of contractual estoppel to argue that, by reason of a contract term, the other party to the contract is prevented from asserting a fact which is necessary to establish liability for a pre-contractual misrepresentation, the term falls within section 3 of the Misrepresentation Act 1967*" (at [111]).

CONTRACTUAL ESTOPPEL

ONE ESSEX COURT

Parmar v Barclays Bank [2018] EWHC 1027 (Ch)

- Cs claimed losses under (inter alia) the Conduct of Business Sourcebook 9 and FSMA s. 138D arising out of their purchase of interest rate swaps and alleged failure to disclose break costs.
- The claim was based mainly on COBS 9.2.1R(1): A firm must take reasonable steps to ensure that a personal recommendation, or a decision to trade, is suitable for its client.
- Among other grounds, the bank relied on the non-reliance provisions contained in its documentation. These provisions stated that the bank was not performing the role of an advisor.
- In that context, and in contrast to *Carney v Rothschild*, the control mechanism under COBS 2.1.2R was applied without reference to the distinction between true basis clauses and basis clauses that were, in substance, exclusion clauses.

CONTRACTUAL ESTOPPEL

ONE ESSEX COURT

Parmar v Barclays Bank [2018] EWHC 1027 (Ch)

- Held (Andrew Hochhauser QC):
  - on the facts, the sale was non-advised, so COBS 9 was not engaged. This conclusion was reached independently of the non-reliance provisions (at [120]-[121]).
  - However, if the sale had been advised, D could not have relied on non-reliance/no advice basis clauses in the swap documentation to exclude liability under COBS 9. This was because COBS 2.1.2 prevents any firm seeking to exclude or restrict any duty under COBS (at [132]-[134]).
  - "…*if a Bank employee is in fact giving advice, having a disclaimer or statement which in effect states that he is not regarded as an advisor, with the effect that COBS 9 does not apply, [the disclaimer] is void [by COBS 2.1.2]*" (at [133])

LIMITATION

ONE ESSEX COURT

Munroe K Ltd v Bank of Scotland Plc [2018] EWHC 3583 (Comm) (Knowles J)

- In November 2008, the Defendant bank had sold three interest rate swaps to the Claimant.
- In relation to these swaps, the bank had undertaken a calculation of its potential future exposure to the Claimants ("**the PFE Calculation**").
- The bank had not disclosed the PFE Calculation to the Claimant.
- The Claimant alleged that this constituted a breach of the bank's duty to exercise reasonable care and skill in advising and providing information to the Claimant.

LIMITATION

ONE ESSEX COURT

Munroe K Ltd v Bank of Scotland Plc [2018] EWHC 3583 (Comm) (Knowles J)

- The bank applied for summary judgment/strike out on the basis that the claim was time-barred; the swaps had been sold in November 2008.
- The Claimant relied on s 14A of the Limitation Act 1980 to postpone commencement of the limitation period.
- The Claimant argued that they did not have the "*knowledge required for bringing an action for damages in respect of the relevant damage*" until they found out about the PFE Calculation in November 2015.

LIMITATION

ONE ESSEX COURT

Munroe K Ltd v Bank of Scotland Plc [2018] EWHC 3583 (Comm) (Knowles J)

- Knowles J rejected the Claimant's contention.
- He said that the Claimant's cause of action was based on the bank's failure to advise or inform the Claimant of its potential liability under the Swaps. The PFE Calculation is only "*a measurement of that liability*" (paragraph 12)
- Knowles J noted that by 2009 (at the very latest), the Claimant knew that it had an actual and significant liability under the Swaps and that the Bank had failed to disclose this to the Claimant (paragraph 13).
- He held that:

> "...*section 14A does not work to extend the limitation period until every last particular of breach is identified... A choice to omit one particular of breach (material enough to satisfy section 14A(7)) in favour of another particular (perhaps later discovered, as with the existence of the PFE Calculation) does not affect the incidence of section 14A*" (paragraph 15 and 16)

LIMITATION

ONE ESSEX COURT

Sixteenth Ocean GmbH v Societe Generale [2018] EWHC 1731 (Comm)

- C and its subsidiaries entered into a loan agreement with D and other banks to finance the construction and purchase of four vessels. C and D also entered into an interest rate swap agreement.
- Iran was then made subject to financial sanctions prohibiting the final drawdown for C's fourth vessel. The vessel was not delivered.
- C refused to pay under the swap on the basis of non-delivery; D terminated the swap rendering C liable for a termination payment.
- The banks subsequently arrested the three other delivered vessels and C's subsidiaries paid all sums including the termination payment. D transferred the payment to its suspense account due to the sanctions on Iran.
- C claimed restitution based on economic duress.
- D applied for strike-out on the basis that the claim was time-barred.

LIMITATION

ONE ESSEX COURT

Sixteenth Ocean GmbH v Societe Generale [2018] EWHC 1731 (Comm)

- Peter Macdonald Eggers QC's judgment offers three key takeaways regarding the application of the Limitation Act 1980 to restitution claims:

  - The primary limitation period is six years from the accrual of the cause of action pursuant to s 5. Although the Limitation Act does not expressly provide a limitation period for restitution claims, s 5 which concerns "*actions founded on simple contract*" is applicable by analogy (at [98]-[99]).

  - Time starts to run from the moment when all the elements of an unjust enrichment claim are established. Here, that happened when D received the termination payment i.e., the point of D's enrichment. Enrichment occured at the point when D received money; there is no requirement that D must have accepted the benefit (at [113]).

  - In relation to the postponement of the limitation period pursuant to s 32(1)(a) of the Limitation Act, Peter Macdonald Eggers QC was inclined to the view that "fraud" for the purposes of s 32(1)(a) is "*common law fraud (in the sense of a deceit*)". A claim based on economic duress, even if duress was accompanied by dishonesty, does not fall within the purview of that provision (at [137]).