BANKING LITIGATION

General Editors

CHARLES HEWETSON

NICHOLAS ELLIOTT QC

SWEET & MAXWELL

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Third Edition

Charles Hewetson

Reed Smith LLP

Nicholas Elliott QC

3 Verulam Buildings

SWEET & MAXWELL

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List of Contributors

General Editors

Nicholas Elliott QC, 3 Verulam Buildings
Charles Hewetson, Partner, Reed Smith

Principal Contributors

Adrian Beltrami QC, 3 Verulam Buildings
Gautam Bhattacharyya, Reed Smith
Alex Burton, Reed Smith
Richard Edwards, 3 Verulam Buildings
William Edwards, 3 Verulam Buildings
James Evans, 3 Verulam Buildings
Rob Falkner, Reed Smith
Clive Freedman, 3 Verulam Buildings
Simon Hart, Reed Smith
Rosanne Kay, Reed Smith
Gregory Mitchell QC, 3 Verulam Buildings
John Odgers, 3 Verulam Buildings
Rob Purves, 3 Verulam Buildings
David Quest, 3 Verulam Buildings
Keith Wallace, Reed Smith

Preface

It is now six years since the second edition of this work was published. What was said about the book in the preface to the first edition was:

> "What the book does is look at the banking industry in the United Kingdom, identify the areas of significant development and set down those developments, the issues which arise in consequence and, where appropriate, advise as to how bankers might respond. It is not a step by step practical guide to the conduct of a particular piece of litigation. Rather it identifies contemporary issues, seeks to contribute to the continuing debate on such issues and tenders guidance for the future."

It was this approach which we had hoped would enable the book to find a niche in the market and anecdotal evidence since has suggested to us that the work has perhaps "filled a gap" in publications in relation to banking litigation. This appeared to be confirmed when Sweet & Maxwell/Thomson Reuters approached us with a request that we consider producing a third edition.

After jointly editing the first two editions, David Warne has gracefully stepped down ahead of the third edition and been replaced by Charles Hewetson. Notwithstanding this, David has kindly maintained his watching brief over the syndicated lending chapter (Chapter 5), given his great experience in that area.

In this third edition, not only have we brought the existing chapters, on their different topics, up to date (by reference to significant developments in those areas since the publication of the second edition), but we have incorporated two new chapters and substantially re-worked three other chapters. One of the additional chapters relates to multiple claims against banks, an increasing phenomenon in recent years. The other is a new chapter on external interference with bank accounts, into which we have inserted some updated material from the second edition and some new material. As to the substantial re-working, Chapters 9, 10 and 11 from the second edition have been substantially re-written and replaced with Chapters 11 and 12 in this edition. We will return to these new or amended chapters later, by way of comment.

We set out below a very brief summary of the key updates and new areas covered, although of course such a summary is no substitute for referring to the substantive text itself.

In Chapter 1, banks have continued to face claims on the basis of constructive trust and the law in this area has continued to develop. We consider the elements involved in claims in restitution as set out in *Rowe v Vale of White Horse DC*, the guidance on the defence of change of position provided in *Abou-Ramah v*

Abacha, and the risks to banks in receipt of CHAPS payments as illustrated by *Jones v Churcher*. The test as to dishonesty, as explained in *Twinsectra*, has continued to tax the courts and we deal with the developments that have occurred as a result of the decisions in *Barlow Clowes v Eurotrust, Abou-Ramah*, and *Starglade Properties Ltd v Nash*.

In Chapter 2, we note the further consideration by the Courts of the issue of whether there is a general duty for banks to advise their customers on transactions; we conclude that the principle of no general duty has broadly been reaffirmed and is likely to continue to apply both for larger business customers (see *Springwell Navigation* and other mis-selling cases) and personal customers and micro enterprises (pursuant to the new bank lending code); we cover significant issues arising from the full implementation of the Data Protection Act in 2007; and we look briefly at the potential impact of Lord Justice Jackson's report into costs in the litigation system.

In Chapter 3, we have added small sections on credit default swaps and deposit insurance; we have reviewed the Court's attitude to " (a popular practice at least for a short time in the mid 2000's) in the context of contributory negligence; and we have reviewed the important *Kapoor* case in the context of banks protecting themselves against undue influence claims.

Chapter 4 is a new chapter dealing with multiple claims against banks. There we reflect on the tremendous increase in multiple claims against banks in relation to the same subject matter, where the value of individual claims is low, but the value of all claims when aggregated is often very substantial. We focus particularly on claims relating to bank charges, payment protection insurance and the Consumer Credit Act 1974. We look at the drivers behind these developments and the ways in which banks can or should organise themselves in order best to manage the defence of such claims.

In Chapter 5, we refer to the important Court of Appeal decision in *Helmsley Acceptances* indicating a lack of sympathy for Defendants seeking to suggest that lead banks cannot successfully claim on behalf of their syndicates for the followers' losses. We also review the likely difficulty for following banks in evading standard non-reliance clauses in the context of attempted claims for misrepresentation (following the *Springwell, Raffeissen* and *IFB v. Goldman Sachs* decisions).

In Chapter 6, we cover the directive implementing MiFID, further FSA directions pursuant to this and a fuller treatment of "fiduciary type" risk. We also comment on the impact of the Lehman's insolvency on the global custody industry.

In Chapter 7, we report on UCP600 which came into effect in July 2007 and the important Court of Appeal decision in *Fortis Bank v Indian Overseas Bank* which gave guidance as to how UCP600 should be interpreted. We also cover an important recent Court of Appeal consideration of the test for Summary Judgment in the context of letters of credit.

In Chapter 8, we cover the Payment Services Regulations of 2009; we deal with the impact of online banking via bank's websites and we review the European Communities (Electronic Money) Regulations 2011 which seek to provide a level playing field for all payment services providers.

Chapter 9 is a new chapter dealing with external interference with bank accounts. Into this, we have inserted some updated sections on freezing injunctions and money laundering which were previously in Chapter 2 of the second edition and we have added a new section on financial sanctions, again an issue of growing importance for banks over the last few years.

In Chapter 11, we cover the regulation of banking and investment business, and the common law of claims against banks in respect of their investment business activities, highlighting recent decisions, in particular the defence of contractual estoppel as illustrated in *Peekay Investments v Australia and New Zealand Banking Group*, and *Springwell*. The regulatory developments covered in this chapter include the implementation of the Markets in Financial Instruments Directive (MiFID) and the coming into force of the FSA's Banking Conduct of Business Sourcebook (BCOBS).

In Chapter 12, we cover the new Financial Services Act 2010 and several recent judicial authorities including as to how the Courts may exercise their discretion to permit the enforcement of agreements entered into by unauthorised persons; the extent to which the FSA is obliged to give cross undertakings for damages to banks for losses which may result from the grant of injunctive relief sought by the FSA; the introduction of statutory provisions for consumer redress schemes; and the extent to which the FSA principles for business may give rise to obligations upon banks to pay compensation to customers, or give rise to disciplinary sanctions.

So that is what we have done and we hope that it meets with approval. We said in the second edition that we very much hoped the readers of the book would find it of great benefit, both at the level of providing information and in terms of tendering practical advice and we repeat that expression of hope.

The law is stated as at 31 July 2011, although efforts have been made to update the published text since that date.

We recognise that substantial changes are afoot in relation to the financial regulatory regime. We have anticipated those where appropriate, but we recognise that developments in the next year or so may make certain material or references obsolete. Our sense is that it is more likely that the organisations controlling and enforcing the regime may change, but that the underlying regulatory regime will remain. Hence, we have not allowed this prospect to delay the publication of this book.

Many people have contributed to this book, and whilst the majority of them have been recorded at the beginning, there are some whose names do not appear. We would like to take this opportunity of thanking them for their assistance.

First, we thank Aamir Khan at Lloyds Banking Group for the time he spent reading and commenting on the new chapter on multiple claims against banks. Few people are as well placed as Aamir to comment on such claims, given his position as the head of retail litigation at one of the UK's largest clearing banks.

Secondly, we thank Neil Donovan, formerly of Reed Smith, for his assistance with the same new chapter.

Thirdly, we thank Linsey Macdonald, George Hoare, Nikki Chu and Kathryn Bond of Reed Smith for their tireless work supporting the authors of a number of chapters.

Fourthly, we thank our various collaborators at [Sweet and Maxwell/Thomson Reuters], in particular Melanie Purdie, Jo Bott and Parisa Zare.

Finally, the book has also enjoyed considerable support and encouragement from many senior figures at both 3 Verulam Buildings and Reed Smith.

Nicholas Elliott QC

Charles Hewetson
September 2011

TABLE OF CASES