

# The heavyweight

Comprehensive coverage of this month's banking and insolvency law

August 2010

## Looking forward

### Developments scheduled for the months ahead

Date	Item
10 September 2010	<b>Deadline for response to the review of the Lending Code.</b>
16 September 2010	<b>Deadline for response to consultation paper on the amendments to the guidelines on common reporting.</b>
30 September 2010	<b>FSA Mortgage Market Review - Responses to questions about interest-only mortgages and non-deposit taking lenders must be received; responses to all other questions must be received by 16 November 2010.</b>
1 October 2010	<b>Comments to guidelines to Article 122a of the Capital Requirements Directive.</b>
18 October 2010	<b>Consultation closes on the Insolvency Service proposals for a restructuring moratorium.</b>
29 October 2010	<b>Consultation on implementation of EU Dir 2009/44/EC on settlement finality and financial collateral arrangements closes.</b>

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# Basel

## BBA statement

### Basel Committee's capital and liquidity reforms

Further steps to bolster banks against future financial problems were welcomed by the UK industry.

<http://www.bba.org.uk/bba/jsp/polopoly.jsp?d=145&a=18023>

BBA, 27/07/2010

# Client money

## Impact of insolvency

### Lehman v CRC Credit Fund Ltd & ors

In The Matter Of Lehman Brothers International (Europe) (In Administration) Sub Nom (1) CRC Credit Fund Ltd (2) Lehman Brothers Inc (3) Lehman Brothers Finance Ag (4) Lehman Brothers Holdings Inc v (1) GLG Investments Plc Sub-Fund:European Equity Fund (2) Hong Leong Bank Berhad

[2010] EWCA Civ 917 CA (Civ Div) (Master of the Rolls, Arden LJ, Sir Mark Waller) 2/8/2010

The statutory trust imposed by Chapter 7 of the Client Assets Sourcebook made under the Financial Services and Markets Act 2000 s.139 applied to client money on receipt by an investment firm and not only when the money was placed in a segregated account. When client money was pooled following failure of a firm the pool included not only moneys in segregated accounts but also all identifiable client money in the firm's house accounts, and that pool should be distributed on a claims basis and not a contributions basis. Client money did not include sums due and payable by the firm to its clients but not yet appropriated for that purpose.

# Company

## Enviroco v Farstad appeal

### CA 2006 definitions of "subsidiary" and "holding company"

Enviroco Ltd v Farstad Supply A/S [2009] EWCA Civ 1399

The Supreme Courts lists show the hearing date for Enviroco's appeal in *Enviroco v Farstad* has been changed from 20 October 2010 to 19 January 2011. Readers might remember the stir caused by *Enviroco* and the importance of the difference where a holding company controls a subsidiary through "membership" as opposed to voting rights. The case considered whether a particular company was a subsidiary that fell within the scope of an indemnity. In considering that, it 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.

[http://www.supremecourt.gov.uk/current-cases/CCCaseDetails/case\\_2010\\_0008.html](http://www.supremecourt.gov.uk/current-cases/CCCaseDetails/case_2010_0008.html)

For background see <http://banklawblog.wordpress.com/2009/12/24/enviroco-share-charges-and-subsidiaries/>

## Competition

### Confidentiality agreements

#### "Confidentiality clause is ruled to be in breach of competition"

Jones v Ricoh UK Limited

The High Court has handed down a ruling on an application for summary judgment in a claim centred on breach of a confidentiality agreement in the case of *Jones v Ricoh UK Limited*. One clause in that agreement was found to have an anticompetitive object and effect, in breach of Article 101 TFEU (the prohibition on anticompetitive agreements). In this case, the claimant took his complaint to the High Court, which can move swiftly to make interim judgments and in due course award damages for breach of the competition rules. Complaints can separately be made to the OFT and European Commission, which have powers to require agreements to be amended and to impose fines of up to 10% of worldwide turnover for breach of the competition rules. Companies can also bring damages claims based on decisions of the OFT and European Commission.

The scope of the clause in question went beyond that which could reasonably be required to protect the claimant's confidential information and was unlimited in terms of both geography and time. In essence, it prevented the defendant and all its international affiliates from dealing with a very wide range of customers for as long as any of them continued to hold any confidential information belonging to the claimant.

This case highlights the importance of ensuring that restrictions imposed by confidentially agreements do not extend beyond those which are reasonably required to protect the disclosing party's confidential information.

<http://www.law-now.com/law-now/2010/confidentialityclause2august2010.htm>

Law-Now [www.law-now.com](http://www.law-now.com) 2 August 2010

# Consumer

## Corrections to implementing Regulations

### The Consumer Credit (Amendment) Regulations 2010/1969

These Regulations correct errors in three of the five sets of regulations that were made in March 2010 to implement the Consumer Credit Directive:

- (The Consumer Credit (EU Directive) Regulations 2010/1010
- The Consumer Credit (Disclosure of Information) Regulations 2010/1013
- The Consumer Credit (Agreements) Regulations 2010/1014

They do not change the policy intention of those implementing regulations.

<http://www.legislation.gov.uk/uksi/2010/1969/made/data.pdf>

Date in force: 26/08/10

## Advertisements

### The Consumer Credit (Advertisements) Regulations 2010/1970

These Regulations revoke and replace the Consumer Credit (Advertisements) Regulations 2010/1012, which have not yet come into force, to address certain defects in the drafting of that instrument.

<http://www.legislation.gov.uk/uksi/2010/1970/made/data.pdf>

Date in force: 1/02/11

## Implementing the Consumer Credit Directive

### Guidance on the regulations

Guidance has been published on the principal changes that have been made to the CCA and other legislation. It is intended to be a plain English guide to the new requirements to help businesses identify and understand changes that affect them. The guidance will be reviewed every 24 months.

Long version: <http://www.bis.gov.uk/assets/biscore/consumer-issues/docs/c/10-1053-consumer-credit-directive-guidance>

"Quick start" guide: <http://www.bis.gov.uk/assets/biscore/consumer-issues/docs/r/10-1072-consumer-credit-directive-quick-guide>

# Contract

## European Contract Law

### Evidence sought for UK response

The Government, the Scottish Government and the Northern Ireland Executive are seeking evidence and views to inform the United Kingdom's response to the European Commission's Green Paper on policy options for progress towards a European Contract Law for consumers and businesses. The Call for Evidence runs until 26 November 2010.

<http://www.justice.gov.uk/consultations/call-for-evidence-180810.htm>

# Custody

## Prime brokerage services

### "Custody, prime brokerage and right of use: a problematic coalition?"

This article comments there is nothing new about the need to structure agreements carefully, and to ensure that the parties understand the implications of the terms agreed. It seeks to draw attention to certain issues which may arise where there is a lack of clarity regarding the scope of prime brokerage services and a 'right of use', particularly in combination with custody services.

M Yates: 2010, BJIB&FL, 25(7), 397 10.31.024

## City of London Law Society

### Reply to March 2010 FSA consultation

#### Consultation Paper 10/09 - Enhancing the Client Assets Sourcebook

The City of London Law Society has replied to the consultation by the FSA (March 2010) on enhancing client asset protection (CP10/9). They ask for a clearer scope of the proposals and definition of "prime brokerage services". They comment that the proposal for a summary of a prime brokerage agreement's contractual re-hypothecation provisions will lead to more expense for prime brokers, but give no significant benefit to clients. They ask for what needs to be disclosed under the proposed daily reporting requirements to be made clearer. They comment it might not be practicable to disclose information in relation to e.g, the location of safe custody assets and institutions holding client money. They say the FSA's proposal to restrict the placement of client money in client bank



accounts, held with institutions within the same group, to 20% of the firm's total client money held in client bank accounts, is not well founded. As an alternative, the CLLS propose reinstating a client-money rule that existed before the implementation of MiFID. They think the proposal to prohibit the use of general liens in custodian agreements is likely to be unworkable and suggest how lien terms could be more clearly disclosed.

<http://www.citysolicitors.org.uk/FileServer.aspx?oID=830&lID=0>

CLLS, 30 June 2010

## Disclosure

### Electronic disclosure

#### "eDisclosure in England & Wales"

Electronic disclosure is a fundamental part of litigation, and the rules regarding e-disclosure require a greater degree of cooperation between lawyers than hitherto. This article briefly sets out the requirements relating to e-disclosure in England and Wales, illustrating the practical and procedural issues that arise in relation to e-disclosure.

S Mason: 2010, CTLR, 16(4), 83 10.31.020

## Documentation

### Guarantees

#### "Abolishing the Statute of Frauds 1677 section 4"

This article considers whether s.4 Statute of Frauds 1677 (which a majority of the Law Reform Commission recommended for repeal as long ago as 1937) should be repealed. It concludes it should, because it makes an arbitrary distinction between guarantees and indemnities. Also, the courts have consistently limited the application of s.4 by: (1) seeking to distinguish between a guarantee given as the immediate object of a contract and one which is only incidental thereto, and (2) seeking to distinguish between a guarantee which comprises an original promise and one which is merely collateral. The courts have liberally construed the concept of a note, or memorandum, of the guarantee simply in order to satisfy s.4. Finally, the continued presence of s.4 can work considerable hardship, as the case of *Actionstrength Ltd (t/a Vital Resources) v International Glass Engineering IN.GL.EN SpA* [2003] UKHL 17 shows.

G S McBain: JBL, issue 5.10, 420 10.33.073

# Financial Crisis

## Financial Reporting Council

### Lessons from Credit Crisis and Formation of Advisory Group

The Financial Reporting Council has launched a project to examine the lessons to be learned from the credit crisis and other market developments as they impact corporate reporting, accounting and auditing of non-financial services companies. The FRC expects to publish a discussion document in the Autumn.

30 July 2010

# Insolvency

## "Unable to pay its debts"?

### BNY Corporate Trustee Services Ltd v Eurosail-UK 2007-3bl Plc & 7 Ors

[2010] EWHC 2005 (Ch) Ch D (Sir Andrew Morritt (Chancellor)) 30/7/2010

In the context of this case that dealt with loan notes, and the securitisation of sub-prime mortgages, the court set out the proper interpretation of the Insolvency Act 1986 s.123(2). Under the section, a company is deemed unable to pay its debts if "the value of [its] assets is less than the amount of its liabilities, taking into account its contingent or prospective liabilities".

The court looked in detail at what this means in practice. The assets to be valued were the present assets of the company. There was no question of taking into account any contingent or prospective assets. The requirement "to take account of contingent and prospective liabilities" could not require such liabilities to be aggregated at their face value with debts presently due. "Taking account of" a prospective liability would involve consideration of the relevant facts of the case, including when the prospective liability fell due, whether it was payable in sterling or some other currency, what assets would be available to meet it and what, if any, provision was made for the allocation of losses in relation to those assets.

# Lending

## Intercreditor agreement

### Interpretation of "Enforcement Action"

Trimast Holding Sarl v Tele Columbus Gmbh [2010] EWHC 1944 (Ch) (28 July 2010)

This case has shown how the LMA definition of Enforcement Action under an intercreditor agreement is likely to be construed by the courts. The document in question was not an LMA standard but the definition analysed by the court is virtually identical to the equivalent provisions used in the definition of Enforcement Action under the standard LMA intercreditor agreement.

<http://www.bailii.org/ew/cases/EWHC/Ch/2010/1944.html>

## Property values

### Ageing and asset prices

This BIS paper investigates how ageing (of humans) will affect house prices. A small model is used to show that economic and demographic factors drive asset, and in particular house, prices. Calculations combined with the results of UN population projections suggests that ageing will lower real house prices substantially over the next forty years.

<http://www.bis.org/publ/work318.pdf?noframes=1>

BIS Working Paper No 318: Bank for International Settlements, August 2010

# Payment

## Settlement finality and FCAs

### Consultation on implementation of EU Dir 2009/44/EC on settlement finality and financial collateral arrangements

HM Treasury have opened this consultation on the implementation of Directive 2009/44 which seeks to make further provision for linked or "inter-operable" systems, and to ensure that credit claims may be used as financial collateral. The consultation invites comments on the proposed *Financial Markets and Insolvency (Settlement Finality and Financial Collateral Arrangements) (Amendment) Regulations*, and on an impact assessment. Member states have until December 30, 2010 to adopt and publish their

implementing measures, which are to apply from June 30, 2011. The consultation closes on 29 October 2010.

[http://www.hm-treasury.gov.uk/consult\\_amending\\_directive\\_implementation.htm](http://www.hm-treasury.gov.uk/consult_amending_directive_implementation.htm)

HM Treasury, August 2010

## Regulation

### "A discussion of best practice in the regulation of payment services: Part 1"

This article explores a best practice framework for the regulation of payment services. It will discuss and assess some models as potential law reform concepts to be further developed. Like any regulatory regimes, they are intended to promote social goals such as improving financial inclusion or addressing market failures.

R Bollen: 2010, JBLR, 28(8), 370 10.32.008

## Cross-border use

### "International expansion and adequate payment systems"

This article explains that international merchants conducting business online need access to local payment systems as well as alternative payment options. Choosing a service provider to process payments for an online business is not an easy process and the article shows why the task can be daunting, at best.

T Lines Hill:E-finance & payments law & policy, 07.10, 12 10.32.053

# PPI

## Competition Commission

### Retail PPI—CC consults on measures

The Competition Commission is consulting on changes to the way retail payment protection insurance is sold. The CC outline changes that will see clearer information provided to customers on the cost of retail PPI cover and their rights; 'unbundling' PPI from merchandise cover and a requirement for providers to supply information to the new Consumer Financial Education Body for its price comparison tables.

<http://nds.coi.gov.uk/content/Detail.aspx?ReleaseID=414748&NewsAreaID=2>

Competition Commission, 29/07/2010

# Regulation

## Re-hypothecation

### “The (sizable) Role of Rehypothecation in the Shadow Banking System”

Rehypothecation is the practice that allows collateral posted by, say, a hedge fund to its prime broker to be used again as collateral by that prime broker for its own funding. In the United Kingdom, such use of a customer's assets by a prime broker can be for an unlimited amount of the customer's assets while in the United States rehypothecation is capped. Incorporating estimates for rehypothecation (and the associated re-use of collateral) in the recent crisis indicates that the collapse in non-bank funding to banks was sizable. We show that the shadow banking system was at least 50 percent bigger than documented so far. We also provide estimates from the hedge fund industry for the “churning” factor or re-use of collateral. From a policy angle, supervisors of large banks that report on a global consolidated basis may need to enhance their understanding of the off-balance sheet funding that these banks receive via rehypothecation from other jurisdictions.

<http://www.imf.org/external/pubs/ft/wp/2010/wp10172.pdf>

IMF Working Paper Monetary and Capital Markets Department, Manmohan Singh and James Aitken July 2010

# Restructuring

## Outstanding derivative transactions

### “Derivatives issues to consider at the outset of a restructuring”

This article says advisers to a corporate undergoing a solvent restructuring need to consider the terms of any outstanding derivative transactions in order to avoid triggering the termination provisions which may result in the corporate being liable for significant mark-to-market termination payments, and may lead to cross-defaults under other financing arrangements. This article briefly analyses the events of default and termination events that could potentially be triggered by a solvent restructuring and suggests that, in the context of a credit-related restructuring, corporates should also be mindful to avoid the moral hazard of being involved in an arrangement which may amount to a 'manufactured credit event'.

N Shiren & A Damianova: 2010, BJB&FL, 25(7), 418 10.31.026

# Security

## Registration of company charges

### “Registration of charges over intangible assets”

This article observes that over the past four years, since the enactment of the Companies Act 2006, there has been a flurry of legislative activity providing revised rules for the registration of company charges in the UK. In each case, the legislative body responsible for enacting the new rules has assumed that little or no distinction should be made between tangible and intangible – particularly financial – assets in this context. The article highlights some pitfalls that may be encountered by the unwary legislator who makes this assumption and, in particular, the difficulties that may be encountered in accommodating two European measures which are applicable to many charges over financial intangibles.

J Perkins: L&FMR, 07.10, 360 0.32.045

## Local Land Charges Rules

### The Local Land Charges (Amendment) Rules 2010 No 1812

These Rules amend the Local Land Charges Rules 1977 (SI 1977/985) by removing from Schedule 3 (fees) the whole of the entry for item 5 (personal search in the whole or in part of the register in respect of one parcel of land or, where the search extends to more than one parcel, those parcels). The fee is incompatible with the Environmental Information Regulations 2004(a) which implement Council Directive 2003/4/EC(b) on public access to environmental information. The Explanatory note is available at:

[http://www.opsi.gov.uk/si/si2010/em/uksi20101812\\_en.pdf](http://www.opsi.gov.uk/si/si2010/em/uksi20101812_en.pdf)

[http://www.opsi.gov.uk/si/si2010/pdf/uksi\\_20101812\\_en.pdf](http://www.opsi.gov.uk/si/si2010/pdf/uksi_20101812_en.pdf)

Coming into force in accordance with rule 1

# Tax

## Banking code of practice on taxation - an update

In a follow-up article to their 2009 analysis of the draft code of practice on taxation for the banking sector, the authors weigh up the implications of recent changes to the scope and content of the code.

(A Blakemore & O Iliffe: FITAR, 06.10, 2) 10.30.055



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