When banking amounts to a 'cardinal sin': a case commentary on Allianz Global Investors GmbH v Deutsche Bank AG London [2022] CAT 44

Withdrawing cash overseas should be straightforward. But it can be a pricey business. In the UK banks generally permit cash to be withdrawn from debit accounts without applying charges. They are not so generous on customers who want to withdraw cash overseas.

The act of converting one currency to another, whilst quietly taking a healthy margin, has long been a profitable element of banking. Indeed, modern banking was built on foreign exchange fees. In the early modern Florence in the 14th Century, the Florentine banks faced a difficulty that they could grant loans to clients but charging interest rates on the same was (literally) a cardinal sin and prohibited by law. The solution was to lend or accept a bill of exchange in one currency before collecting the accrued debt in another. The currency exchange element crucially enabled the banks to build in a hidden commission to the transfer. This (theologically approved) strategy enabled the Medici family's banking empire to grow.

Old habits die hard. And customers are now more vigilant in policing whether their foreign exchange transactions have funded the purchase of Sandro Botticelli's 'Birth of Venus'. In *Allianz Global Investors GmbH v Deutsche Bank AG London* [2022] CAT 44 various investment or pension funds are alleging that a number of large and well-known banks engaged in anti-competitive manipulation of benchmark foreign exchange rates between 2003 and 2013. Such manipulation is said to have been organised in part through 198 online chat rooms, including the 'Essex Express', 'Sterling Lads' and most mystifying (at least to me) 'Three Way Banana Split'. The names of these chat rooms will surely, in due course, be fertile ground for cross-examination.

But were the antics of the Sterling Lads ancient history that, for legal purposes, might as well have taken place in 14th Century Florence? A group of new defendants have argued that this is the case and, in a recent hearing, sought to persuade the Competition Appeal Tribunal to grant a preliminary trial on limitation issues.

The claim

The claimants in these proceedings comprise some 175 claimants, grouped into 11 claimant groups, all of which were investment or pension funds.[1] From 2003 to 2013, the claimants invested substantial sums of money into the foreign exchange ("*FX*") markets. During this period a number of well-known banks (Barclays, Citibank, HSBC, JPMorgan, RBS and UBS) are alleged to have engaged in manipulating the FX markets contrary to the completion law rules. The claimants this conduct caused them to suffer substantial losses.

Proceedings were first issued in 2018 against a number of banks. Following a major disclosure exercise, including trading records and chat room transcripts, the claimants alleged that they had identified further chat rooms which had not been mentioned in the European Commission's decisions of 2019 and 2021. The claimants allege that these chat rooms evidenced misconduct by additional banks: Deutsche Bank, Goldman Sachs, Morgan Stanley, Bank of America, BNP

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Paribas, Société Générale, Standard Chartered, and Royal Bank of Canada.[2]

The claimants then commenced fresh proceedings against these banks. In doing so, they accepted that their claims are prima facie time-barred, but have sought to rely on section 32 of the Limitation Act 1980 (LA 1980), which permits an extension of time in cases of concealment. The new defendants applied for the limitation questions to be tried as a preliminary issue, claiming that it would require a three-week trial to be dealt with.

The Tribunal's ruling

In an important strategic win for the claimants, Mr Justice Jacobs dismissed the Defendant's application for a preliminary issue trial. Much of the Tribunal's reasoning provides useful lessons for practitioners in the competition sphere and in complex group actions generally:

First, when considering the case management implications of ordering a preliminary issue, the Tribunal ruled that it would not be appropriate to consider the new proceedings in isolation from the original proceedings. In the present case, there was the closest possible connection between the two sets of proceedings, as the Claimants were materially identical, the claims involved the same conduct infringing the same competition laws, and the Defendants and the banks included in the original proceedings were, alleged to be, jointly and severally liable. The tribunal found only one difference:

> "*…[t]he only material differences between the claims made in the New Proceedings and the Original Proceedings are the Defendants who are sued in them, and the dates on which the claims were brought (and hence the limitation issues arising).*"[3]

Accordingly, the Tribunal stated that it must "*consider … the predictable pros and cons of ordering a preliminary issue*" in the context of managing the both sets of proceedings. It concluded that if the two sets of proceedings proceeded independently this could lead to a duplication of work and inconsistent findings. On this point, the Tribunal referred to *The Merchant Interchange Fee Umbrella Proceedings* [2022] CAT 31 where it was held that it was preferable to avoid independent case management of similar proceedings if this could lead to a duplication of work or inconsistent outcomes. This approach also aligned with the rationale behind the CAT's *Practice Direction 2/2022; Umbrella Proceedings*, and, as the Tribunal acknowledged, was particularly relevant to the present case where the allegation concerns the same underlying conduct.[4] However, the Tribunal did acknowledge that, in exceptional cases, it may not be possible to dismiss a preliminary issue application where cases are commenced so far apart in time, although it went on to say that this was not relevant in the present case.

Second, the Tribunal considered that the scale of the disputes of fact and law would mean that any preliminary trial would take a considerable period of time, and might generate appeals. The time needed to carry out this process would delay the progress of the proceedings against the original claimants. Indeed, the scale of the dispute meant that it was neither straightforward nor easily determinable. Issues which do not fall into these categories are rarely strong candidates for preliminary issue trials, leaving aside the need for imaginative and robust case management this would entail.

Third, the Tribunal concluded that it was at least possible that, even if the defendants were to succeed on a limitation defence, this might not be the end of the proceedings against them. It concluded that in such a scenario there is a real prospect that the banks from the original proceedings may commence contribution proceedings against the Claimants. In other words, the preliminary issue trial might prove to be a very expensive and time-consuming boomerang for the defendants.

Fourth, the Tribunal also noted that it would not reduce the issues to be considered at an eventual trial because the

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Claimants had advanced a claim against the banks from the original proceedings for joint and several liability for the infringements carried out by all participants, including the new defendants.

Overall, the Tribunal ruled that a preliminary issue trial would lead to a lengthy and unacceptable delay to both sets of proceedings.

Concluding remarks

This judgment has provided guidance on the parameters of satisfying an application for the trial of a preliminary issue within the CAT. The bar has been set high. A Tribunal will be slow to order a preliminary issue trial where this will impact negatively on the timetable for resolving another set of closely connected proceedings and where the issues at hand are complex. The CAT is keen to avoid the risk of a duplication of work or inconsistent findings between closely connected proceedings. The effect of the ruling is that (unless the claims settle) the substantive factual and legal issues will be fully ventilated at a single trial. Therefore, time will tell whether the banks' conduct followed the spirit of the Medici family or whether the conduct amounted to the modern cardinal sin of collusion.

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[1] ibid, [3].
[2] ibid, [2].
[3] ibid.
[4] ibid.

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