

# Finance Update

Welcome to Taylor Wessing's September 2006 update summarising what we think are the more interesting recent legal developments in banking and finance.

## Property Finance: RICS issues guidance on service charges

On 26 June, the RICS, supported by five leading property industry bodies, launched a guidance note addressing service charges in commercial property, updating the previous guidance which was seven years old. The code targets managers of all types of commercial or mixed-use property, their owners, investors and occupiers. Some thought that the predecessor to the code was too focused on shopping centres and was not relevant to other property sectors but the scope has been considerably broadened.

The new code sets out best practice and is supported by a technical section containing further notes on specific subjects together with four appendices that illustrate how best practice should be employed. The technical section looks at the methodologies for apportionment and the ways of dealing with changes of use and mixed-use development. It also discusses the methodology for calculating management fees and what can and cannot properly be included within these in respect of the service charge. It also recognises that, in order to meet the higher service standards, management fees may have to increase to reflect the additional work involved. The Code will apply to service charges commencing on or after 1 April 2007. Please click [here](#) to read the Code in full.

## Money Laundering: When can a Bank freeze an account?

The Court of Appeal has confirmed that where a bank had a suspicion that the money in its customer's account was criminal property so that transferring it would be an offence contrary to the Proceeds of Crime Act 2002 s.328, the court could not and should not compel the bank by interim injunction to act illegally by complying with its customer's payment instructions.

**The Facts:** The Bank's customer, K had entered into transactions to purchase a consignment of mobile phones and to sell the same phones to a Swiss company. The Swiss purchaser had paid the agreed sale price into K's account with the Bank from an account in the Netherlands Antilles and on the same day K instructed the Bank to pay the purchase price to the seller. The Bank refused to make the payment on the ground that to do so would mean that it would become concerned in an arrangement that it suspected would facilitate the use of criminal property by K within s238 of the Proceeds of Crime Act 2002. K applied for an interim injunction requiring the Bank to comply with its instructions.

**The Decision:** Since the law made it a criminal offence to honour K's mandate in the circumstances the bank found itself, there could be no breach of contract for the Bank to refuse to honour its mandate and there could, equally, be no invasion or threat of invasion of a legal right by the Bank (which was required before K could apply for an injunction). The existence of suspicion was a subjective fact. There was no legal requirement that there should be reasonable grounds for the suspicion. The relevant bank employee either suspected or he did not. If he did suspect, he had to inform the authorities either himself or through the bank's nominated officer. Furthermore, there was no breach by the Bank of K's Human Rights.

**Comment:** This decision should provide comfort to banks that find themselves in the unenviable position of becoming suspicious of a customer's activities in that, although they might alienate their customer, they should at least not be held liable for acting on their suspicions.

K LTD (Appellant) v NATIONAL WESTMINSTER BANK PLC (Respondent) & (1) REVENUE & CUSTOMS (2) SERIOUS ORGANISED CRIME AGENCY (Interveners) (2006) [2006] EWCA Civ 1039

## Capital Adequacy: Basel II

The Bank for International Settlements has issued a consolidated framework consisting of the June 2004 Basel II framework, the elements of the 1988 Accord that were not revised during the Basel II process, the 1996 Amendment to the Capital Accord to Incorporate Market Risks and the November 2005 paper on Basel II. No new elements have been introduced in this compilation.

Click [here](#) for the consolidated framework.

## Banking: Assignment of Professional Reports

Reliance on professional reports is an important aspect of most real estate finance and their assignability is of particular interest where a facility is syndicated and therefore likely to be transferred to other financial institutions along with the benefit of the security and all relevant reports and opinions. Practitioners therefore welcomed a recent decision of the Court of Appeal on the assignability of a report on a development site.

The facts: A report prepared by Technotrade for the then owner of the property (the "Vendor") on the physical condition of a sloping development site stated that the site was satisfactory for the proposed residential development. The Vendor then sold the land to Larkstore. During the development, a landslip occurred that damaged the properties of adjoining landowners who made a claim against Larkstore. The Vendor then by deed of assignment assigned to Larkstore its rights and benefits under the report and the right to sue Technotrade. Larkstore promptly sued Technotrade for breach of contract.

Technotrade claimed that the only losses that Larkstore was entitled to claim were the losses that the Vendor could itself have recovered from Technotrade at the time of the assignment and that as the damage occurred after the Vendor had sold the site but before the assignment of the cause of action to Larkstore, the Vendor and therefore Larkstore had no right to claim and recover substantial damages for loss resulting from the landslip. The judge at first instance disagreed and held that Larkstore, as assignee, would be entitled to recover substantial damages. Technotrade appealed.

The Decision: The Court of Appeal agreed with the judge and found that Technotrade was liable. The assignment of the cause of action by the Vendor to Larkstore was a delayed consequence of the earlier sale of the land. If the Vendor had not sold the land to Larkstore it would not have assigned the cause of action against Technotrade to Larkstore and it could have recovered substantial damages against Technotrade for the landslip. What had been assigned by the Vendor to Larkstore was a cause of action for breach of contract against Technotrade and the legal remedies for it. It was not an assignment of a "loss". The assignment included the remedy in damages for the cause of action. The remedy in damages for breach of contract was not in principle limited to the loss suffered as at the date of the accrual of the cause of action or as at any particular point of time thereafter.

Comment:

In some ways this decision goes against the principle that an assignee cannot recover more than the assignor. However, the Court of Appeal considered that this principle did not assist on the facts of this case as the purpose of the principle was to protect the contract breaker or debtor from being prejudiced by the assignment in having, for example, to pay damages to the assignee that he would not have had to pay to the assignor had the assignment never taken place. The principle was not intended to enable the contract breaker or debtor to rely on the fact of an assignment in order to escape all legal liability for breach of contract which was what Technotrade was arguing here.

In most instances any assignment will occur at the same time as the sale or transfer and therefore the situation described in this case is unlikely to apply. However, where such an assignment is delayed or overlooked, it is reassuring for the assignee to know that its remedies will remain available. The case also serves as a reminder to ensure that all such reports are assignable.

TECHNOTRADE LTD v LARKSTORE LTD (2006) [2006] EWCA Civ 1079

## Consumer Credit: Unfair Contract Terms

Both the Office of Fair Trading and the Financial Services Authority have powers in relation to unfair contract terms under the Unfair Terms in Consumer Contracts Regulations 1999 (UTCCRs), and have issued a revised framework setting out how they co-ordinate enforcement action in this area. The revised framework is set out in a new Concordat signed between the organisations which comes into effect on 31 July 2006.

The Concordat provides that the FSA will consider the fairness under the UTCCRs of standard terms in financial services contracts issued by authorised firms or their appointed representatives for regulated activities. This will include contracts for mortgages and the selling of mortgages; insurance and the selling of insurance; bank, building society and credit union savings accounts; pensions; investments; and long term savings.

Click [here](#) to read the concordat itself.

## Further information

For further information or advice other than in relation to insolvency matters please contact either the person at Taylor Wessing with whom you generally deal or:

### Rodney Dukes

E-mail: [r.dukes@taylorwessing.com](mailto:r.dukes@taylorwessing.com)  
Tel: +44 (0)20 7300 4189

### Paul Harrison

E-mail: [p.harrison@taylorwessing.com](mailto:p.harrison@taylorwessing.com)  
Tel: +44 (0)20 7300 4191

### Dominic Ross

E-mail: [dl.ross@taylorwessing.com](mailto:dl.ross@taylorwessing.com)  
Tel: +44 (0)20 7300 4282

### Martin Yells

E-mail: [m.yells@taylorwessing.com](mailto:m.yells@taylorwessing.com)  
Tel: +44 (0)20 7300 4113

### Bob Gayford

E-mail: [b.gayford@taylorwessing.com](mailto:b.gayford@taylorwessing.com)  
Tel: +44 (0)20 7300 4192

### Simon Lovell

E-mail: [s.lovell@taylorwessing.com](mailto:s.lovell@taylorwessing.com)  
Tel: +44 (0)20 7300 4605

### Peter Shepherd

E-mail: [p.shepherd@taylorwessing.com](mailto:p.shepherd@taylorwessing.com)  
Tel: +44 (0)20 7300 4141

### Akmal Ghauri

E-mail: [a.ghauri@taylorwessing.com](mailto:a.ghauri@taylorwessing.com)  
Tel: +44 (0)20 7300 4740

### Marke Raines

E-mail: [m.raines@taylorwessing.com](mailto:m.raines@taylorwessing.com)  
Tel: +44 (0)20 7300 4181

### Graham Wedlake

E-mail: [g.wedlake@taylorwessing.com](mailto:g.wedlake@taylorwessing.com)  
Tel: +44 (0)20 7300 7157

For further information or advice relating to insolvency and contentious matters please contact:

### Alison Goldthorp

E-mail: [a.goldthorp@taylorwessing.com](mailto:a.goldthorp@taylorwessing.com)  
Tel: +44 (0)20 7300 4891

### Michael Frawley

E-mail: [m.frawley@taylorwessing.com](mailto:m.frawley@taylorwessing.com)  
Tel: +44 (0)20 7300 4849

### Nick Moser

E-mail: [n.moser@taylorwessing.com](mailto:n.moser@taylorwessing.com)  
Tel: +44 (0)20 7300 4866

### Shane Gleghorn

E-mail: [s.gleghorn@taylorwessing.com](mailto:s.gleghorn@taylorwessing.com)  
Tel: +44 (0)20 7300 4242

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