Cooke, Young & Keidan

PRESS RELEASE

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Highland and CYK score major victory against RBS and Linklaters in the Court of Appeal: in an historic development RBS has its £20 million judgment struck down for fraud

Today the Court of Appeal handed down judgment:

(1) Upholding Highland's case that the liability and quantum judgments obtained against it by RBS in 2010 (for approx. £20 million) were obtained by or as a consequence of RBS's fraud and should be set aside; and

(2) Refusing RBS's appeal against the Commercial Court's refusal to grant an anti-suit injunction stopping Highland from suing RBS (and two of its employees) for fraud in the Courts in Texas, where the sum claimed is at least US$ 100 million.

The judgment is the latest, and most significant, in a series of judgments criticising RBS's dishonest and fraudulent conduct, both in the events giving rise to the litigation and, even more seriously, through the litigation itself, including the bank's repeated attempts to deceive the English Court up to and including early 2012. It is believed that this is the first ever case in England where a major UK bank has had a judgment struck down due to it having been obtained by the bank's fraud. It is understood that state-owned RBS has spent many millions, of what are effectively taxpayer funds, in legal fees in dishonestly pursuing, since mid-2009, the litigation in the English Courts against the funds managed by Highland Capital, based in Texas. The failed application for an anti-suit injunction is also believed to be one of the most expensive such applications in English legal history (in terms of the legal fees that RBS spent) and it potentially leaves the way open for Highland to pursue its fraud claims in Texas.

Extract from the Judgment of Lord Justice Aikens:

"178. In my view the Liability judgment was obtained by the fraud of RBS through the misstatement and concealment of facts by [former RBS senior employee Sam Griffiths]. I would therefore allow the cross-appeal of Highland from Burton J's May 2012 judgment on that issue. The Liability Judgment, the Court of Appeal's judgment on Liability and the Quantum judgment must therefore all be set aside.

179. Whether or not that conclusion is correct, the judge was right to refuse to grant RBS an anti-suit injunction restraining Highland and Scott Law from pursuing the Texas proceedings on the ground that [Mr Griffiths'] misconduct in relation to the 2012 trial was sufficiently closely related to the equitable relief sought by RBS. Highland and Scott Law could therefore rely on the defence of "unclean hands" to prevent RBS obtaining the anti-suit injunction. I would therefore dismiss RBS' appeal from Burton J's May judgment on that issue."

Royal Bank of Scotland Plc -v- Highland Financial Partners L.P. and others: Neutral Citation Number: [2013] EWCA Civ 328

Scott Ellington, General Counsel at Highland Capital Management, commented: "*We at Highland could not be more pleased with our litigation team led by CYK. At each stage, they performed admirably against their Magic Circle law firm opposition. They were instrumental in bringing RBS's misconduct to light and obtaining this historic ruling.*"

Philip Young, the partner leading the case at Cooke, Young & Keidan LLP (CYK), representing Highland, commented: "*As far as we are aware, this case is the first time that a major UK bank has ever had a High Court judgment struck down by the English Court on grounds of the bank's fraud. In that respect it is dramatic and unprecedented. We are naturally very pleased to have obtained this superb result for our clients in a hard fought case against the first class lawyers who represented RBS.*"

Marc Keidan, a partner of CYK who also is also acting on the case, added: "*RBS's conduct in this matter from start to finish, including the repeated attempts to deceive Highland as well as the Court, has been nothing short of disgraceful and we are pleased that the Court has fully recognised that. The judgment also demonstrates that clients represented by specialist firms with the requisite expertise, are well able to successfully take on the banks and their Magic Circle advisers in substantial litigation, when the facts support that. I would also take this opportunity to thank our superb barrister team for their sterling efforts.*"

CYK instructed barristers Mr. Stephen Auld QC, Mr. Ben Strong and Mr. Laurence Emmett of One Essex Court.

Highland's successful co-defendant, Scott Law, was represented by directors John Day and Michael Sparkes of boutique firm DaySparkes, who instructed barristers Mr. Graham Dunning QC and Mr. Jeremy Brier of Essex Court Chambers.

RBS was represented by Linklaters partner Andrew Hughes, who instructed barristers Mr. John Nicholls QC and Ms. Louise Hutton of Maitland Chambers. In the earlier stage of the case (up to September 2011), RBS was represented by Herbert Smith partner Damien Byrne-Hill.

A brief summary of some of the background and related developments is set out in the Annex, albeit we would encourage reading the judgment which sets out the background in detail.

Note to the editors:

CYK is a leading boutique litigation law firm based in the City of London and which was founded in January 2009. We specialise in complex and high-value commercial and financial dispute resolution. CYK is one of the few top quality London law firms willing and able to act adverse to the banks on substantial High Court litigation.

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ANNEX

Background

The case concerned the termination by RBS in late 2008 of a CLO "warehouse" of leveraged loans. The CLO warehouse had been set up by entities managed by Highland Capital Management, a large Texan based hedge fund, with a view to issuing a CLO securitisation. RBS had lent sums to enable leveraged loans to be acquired and put into the warehouse.

RBS obtains judgment on liability and the truth subsequently starts to emerge

RBS, at that time represented by Herbert Smith, applied for and obtained judgment on the question of liability in January 2010 and this judgment was upheld by the Court of Appeal in June 2010. A trial to deal with the quantification of RBS's claim was then held in September 2010.

Following the liability judgment being obtained by RBS, upon pressing by CYK, documents and information emerged, in a piecemeal fashion, which set Highland's legal team on a trail which ended up uncovering a pattern of serious dishonest conduct on the part of RBS. It transpired that following the taxpayer bail-out of RBS and after relevant accounting rules (IAS 39) had been changed, on instructions from RBS's senior management, the bank desired to make what it described in internal documents as a "windfall" by transferring some of the loans in the warehouse onto its banking book, by disposing of the balance or, if it could not do so, by putting them onto its trading book. The object of the exercise was to enable RBS to book a substantial profit by reversing losses it had previously put on its trading book.

Pursuant to this scheme, RBS led Highland to believe that having terminated the warehouse it would operate a genuine auction (known as a BWIC "bids wanted in competition"), that it would sell the loans to the highest bidders, that RBS would itself bid in the auction and that it would give the warehouse credit for all the sales, so that the warehouse could repay the loan owed to RBS. RBS subsequently conducted a BWIC. The values allegedly produced by the auction were in many cases substantially lower than those which RBS had internally ascribed to the loans as part of its plan to make a "windfall".

Quantum trial and judgment

In December 2010 Burton J handed down judgment in the Commercial Court after the Quantum Trial. He found that RBS had behaved dishonestly but were nevertheless owed a sum of money in the region of the around £20 million, a much smaller sum than RBS had claimed. He found that "the true position was not revealed at the time by RBS" to Highland and that RBS had a "serious conflict of interest" with its customer Highland. Unknown to Highland, because RBS had already decided to and had taken certain of the loans onto its banking book it was unable to and had no interest in selling those loans to third parties. It did not bid in the auction. Therefore the auction was (as the Court described it) "a sham". Quite apart from RBS having misled Highland as to what was truly occurring, the Court also found in its judgment that RBS had knowingly lied to third parties during the BWIC process.

The Judge criticised the foundation of RBS's case, namely that the BWIC was genuine and was "commercially reasonable" as being untrue. The Judge further observed that the witness statement sworn by RBS's lead witness Mr Griffiths was "disingenuous" and that the true position had only emerged from RBS at trial.

Following the December 2010 Judgment, in early 2011 Mr Griffiths was subject to disciplinary proceedings within RBS. He was given a warning. However, this was accompanied by him being awarded as part of the January "bonus season", an approx. £500,000 bonus, as well as being promoted within the Bank to the role of Managing Director working in the European Credit Special Situations Group.

Texas proceedings and RBS anti-suit injunction application

Following the English Court judgment in early 2011 Highland sued RBS for fraud in Texas claiming a sum of at least US$ 100 million. RBS reacted by applying to the English Court for an anti-suit injunction to block Highland's Texas court proceedings, and was granted the injunction on a temporary basis pending a full hearing. Highland counterclaimed that RBS's original judgment obtained against Highland was obtained by fraud and so should be set aside.

In September 2011 RBS dismissed its lawyers Herbert Smith and replaced them with Linklaters.

The full hearing took place before Burton J over 17 days in early 2012. Judgment was handed down in May 2012. The Judge found that RBS, through Mr Griffiths, had lied yet again in the lead up to and at the trial. As a result of this misconduct, the Judge found that RBS had "unclean hands" and refused to grant the anti-suit injunction sought by RBS. However, he also declined to set aside RBS's earlier judgment for fraud.

Both sides appealed to the Court of Appeal on the points they had lost and the appeal hearing took place over 3 days in November 2012.

Mr Griffiths evidently left RBS at some point in 2012. In late March 2013 Bloomberg reported that he was suing RBS in the employment tribunal for unfair dismissal.

Court of Appeal Judgment – 12 April 2013

The Court of Appeal found, upholding the Judge's decision, that RBS's dishonest conduct meant that the bank was not entitled to an anti-suit injunction and that accordingly Highland was not to be prevented from proceeding with its Texas fraud action. The Court also found, overturning the Judge's initial decision, that the dishonest conduct and the misleading of the Court, meant that RBS's judgments also had to be struck down for fraud.

The Court in so finding referred to RBS having made "deliberately misleading" statements and to its "deliberate, conscious and dishonest" suppression of material facts – see paragraphs 110, 112, 116, 120, 122, 125 and 127 of the leading judgment of Lord Justice Aikens. As regards Mr Griffiths, it was expressly found (paragraph 165) that "his lies and his unsuccessful attempt to explain away his conduct ... at the 2012 trial were themselves grave misconduct. Bluntly, [Mr Griffiths] perjured himself again. His misconduct must be attributed to RBS ...".

RBS has suggested that it will attempt to appeal to the Supreme Court in respect of the refusal to grant the anti-suit injunction. However, RBS has indicated that it is not intending to appeal the finding setting aside the judgment which it obtained by fraud, so that matter may be considered without doubt as final.