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English judges prefer bankers to nuns: changing ethics and the Plover bird

Features

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The especial tenderness of the English judiciary towards bankers and banking, as compared, say, with the elderly members of a religious order and their less worldly concerns, and that English law is astute to accord greater protection to the former than to the latter, merits comment.

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KEY POINTS

- There are grounds for the view that financial institutions, that enjoy an “important symbiotic relationship with the law”, receive more favourable treatment by the English courts than is received by ordinary litigants.
- Allegations of dishonesty against banks (even where only in draft form) are treated by the courts as intrinsically more unreasonable than similar claims, pursued to trial, made against a religious order.
- One undesirable effect of that disparity in treatment is that it has a protective effect on banks, acting as a further disincentive to claimants to challenge discreditable conduct.
- That protective tendency augments and reinforces a lack of accountability that is a major systemic problem.
- Paradoxically perhaps, judges' tender treatment of banks has a tendency to negate and subvert good faith, the requirement for which is fundamental.

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The disparity in treatment is eloquent of an unremarked change in institutional values; after all, it is implausible that in the eras of Lords Atkin or Denning a judge of the Court of Appeal would have disparaged their judicial colleagues for espousing “the moral standards of the vicarage” for their allegedly unrealistically exacting demands of fiduciary conduct in the rough and tumble of commerce[2] — a barb that, by the vigorous response[3] it elicited, plainly stung.

THE RISE OF BIG MONEY

Increasingly, English judges, and consequently English law, are concerned with both “Big Law” and “Big Money”; the concern might aptly be characterised as the financialisation of English law. Sir Geoffrey Vos, Chancellor of the High Court, in a Banking Standards Board lecture in March 2018 enthused that “the law and financial services have an important symbiotic relationship” (prompting an image of crocodiles and the Plover bird). It is difficult to imagine Lord Atkin speaking with similar enthusiasm of the important relationship between English law and the soft drinks industry in 1932, following his seminal exposition of how the law imposes duties on those whose actions may foreseeably cause harm to others.

One manifestation of financialisation is that, responsive to banking requirements, English judges this century have come-up with the doubtful[4] doctrine of “contractual estoppel” (*Peekay* and *Springwell*[5]) — hitherto unknown to English law — and have energetically, if uncritically, applied it.[6] (In essence the idea is that parties may contract for a state of affairs that is, or may be, contrary to the actual state of affairs (a “basis clause”). If you think that this is not what contracts are about (promissory or executory obligations) you would be right, but Lord Diplock got there first, 60 years ago[7] — but that has been no hinderance to recent development of the doctrine and its eager enforcement.) The doctrine is odd, not least in that it requires the elision of representations and contractual warranties;[8] but it is also curious in sharing no jurisprudential DNA with its cognates that without exception require reliance or detriment or both. The zeal with which the courts have applied it is redolent of Wills J's now anachronistic statement in *Allen v Flood*[9] that “any right given by contract may be exercised against the giver by the person to whom it is granted, no matter how wicked, cruel or mean the motive may be which determines the enforcement of the right”. This is the mindset that informs what Professor Gerard McMeel has described as the “documentary fundamentalism” of the English judiciary. In part, it is the consequence of the present dominant English legal preference for certainty over fairness, recognised a quarter of a century ago by the former Chief Justice of Australia, Sir Anthony Mason.[10]

Contractual estoppel has enabled banks and other financial institutions to enlist ready judicial assistance in re-allocating risk and thereby escaping legal liability, typically to commercially weaker and less sophisticated counterparties, for misstatements, misrepresentations and bad advice, by the courts facilitating reliance on standard-form boiler-plate contractual terms. The jurisprudential basis for this novelty is nowhere authoritatively articulated and it remains to be considered by the Supreme Court. But the “doctrine” is apt to collide with, and to subvert, the will of parliament as expressed in the Unfair Contract Terms Act 1977 and the Misrepresentation Act 1967. At the end of 2018 that propensity (specifically in relation to the former) was belatedly recognised by the Court of Appeal in a non-bank context in *First Tower Trustees*;[11] but the effect was long ago obvious to a previous generation of distinguished judges, perhaps less susceptible to extrinsic influences and considerations.[12] Where not convenient, legal memory can sometimes be short.

At a structural level, at a time of severe cost-cutting in legal services, when some parts of the English legal system are close to collapse for want of funding, the promotion of Big Law and Big Money by English law is aptly illustrated by the recent establishment of a new English court — the “Financial List”. This is a collaborative venture between the

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Chancery and the Queen's Bench Divisions of the High Court for “Big Claims”. The new court requires particularly well-trained judges. In truth the new court reflects a curial marketing exercise in *forum* competition with the courts of Dubai, Singapore and Hong Kong, markets for legal services to which English courts have been seen to be losing ground[13] (and sometimes judges). There is no analogous “Life and Death List”; so, it is not merely the complexity of the issues that fall for determination by the new court, nor of their wider societal importance. Lord Mansfield, the great eighteenth century architect of a good deal of the common law of trade, did not need a Financial List — but neither was he competing with other jurisdictions — a consideration that he likely would have disdained. More fundamentally, the new court marks final institutional recognition that equity as a coherent independent source of legal obligations is finished — a final dismantling that began with the Judicature Acts over a century ago.

Theologically, the preferencing of financial institutions is revealed by institutional adherence to the judicial *belief* that banks do not provide advice to their customers, absent evidence that advice was expressly contracted for. That is the conviction against which claims that wrong *extra contractual* advice from a bank was relied upon and causative of loss to its customer are measured, and routinely dismissed;[14] it is the polar opposite of the arguably more realistic/factually more responsive position under German law. The Bundesgericht (Federal Court) in the *Bond* decision[15] long ago gave recognition to the fact that banks frequently do provide extra-contractual advice to their customers. The result is that German courts analyse financial mis-selling from the more nuanced/responsive perspective of conflict of interest. A similar position obtains, for example, in the Netherlands where the Hoge Raad (Supreme Court) ruled in *Mees Pierson/Ten Bos*[16] that banks assume a “special duty of care” (*bijzondere zorgplicht*) for investors, and some third parties, in recognition of the important role banks play in society (*maatschappelijke functie*). The destruction and uncompensated harm visited upon small and medium size enterprises (that according to government statistics provide 60% of all private sector employment) by the rigid English legal position, taken together with a routine inability of English courts to apply in a consistent and principled way the Hedley Byrne law on assumption of responsibility in tort,[17] with resulting erosion of trust and public confidence in both the banks and the courts, merits academic study. English financial common law in various respects, and especially in relation to negligent advice,[18] is in a muddle.[19]

It is rare, however, to find the tender treatment of banks (preferencing) by English judges, and the value system that such treatment reflects, more starkly revealed than by the contrasting judicial treatment of the parties in the High Court decisions *Portland Stone Firms Ltd v Barclays Bank and KPMG*[20] and *Chalfont St Peter Parish Council v Holy Cross Sisters Trustees Incorporated*.[21] There are only three available explanations for the remarkable — it might be said, extraordinary — difference in the courts' treatment of the successful defendants in the awards of costs: that one of the judgments is wrong, that the judicial discretion on costs is exercised capriciously (which may amount to the same thing), or that banks and other financial institutions enjoy treatment by the courts more favourable than the treatment of other ordinary litigants, who sit below the salt and do not benefit from an “important symbiotic relationship” with the law to which Sir Geoffrey Vos approvingly referred.

CHALFONT ST PETER PARISH COUNCIL v HOLY CROSS SISTERS

The Holy Cross case arose out of planning permission granted for a development in the grounds of a convent and disused school run by the religious order. The Parish Council launched a claim against sisters of the order at the end of the limitation period without the pre-action protocol conduct required by the rules of court. It had already been unsuccessfully engaged in litigation with the planning authority over the grant of permission that had gone all the way to the Court of Appeal. The new claim, issued in 2016, shifted the target of litigation from the grantor of planning permission to the Holy Cross Sisters as beneficiary of the permission. The council claimed exemplary and compensatory damages to strip the order of any financial benefit derived from the grant.

An application to strike-out the claim, for being without merit and having no real prospect of succeeding, was dismissed by the court. Afterwards, the *New York Post* carried a piece:

> “Catholic nuns in England have committed the cardinal sin of greed — by lying to officials in an attempt to cash in on the sale of their convent, authorities said .... 'This challenge alleges the Sisters fraudulently conspired to misrepresent the historic use of the school playing fields,' ... .”

In due course, the claim for compensatory damages was reduced to £200,000 but a claim for some £5m exemplary damages was maintained. The claim was formulated as unlawful means conspiracy, together with a claim, raised during the council's opening at trial, for unlawful interference with an economic interest, which the judge allowed to be pursued without requiring formal amendment.

The trial took place in the High Court over 11 days. Of the four sisters of the order called to give evidence at trial to rebut the allegations of unlawful conspiracy and having dishonestly made representations, one was 93 and, after demanding various statements to explain why she had not travelled down from the convent she had not left for three years, the judge accepted that she was too frail to give evidence and a Civil Evidence notice was accepted. A second witness was 85 but no case in conspiracy was put to her. A third witness and sister of the order was 79 at the time of giving evidence and was cross-examined at length. The fourth sister of the order to give evidence was in her 70s. The judge in his judgment noted that it was not put to her in cross-examination that she was party to any agreement to deceive and the conspiracy case was not put to her.

The trial judge, Mr Justice Swift, dismissed the claim, including on grounds

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that the claimant council had no basis for claiming loss and damage, irrespective of his conclusion that there was no agreement by the sisters of the order to make false statements dishonestly. There was, in short, the court found *following trial*, no basis for the multiple allegations of fraud, dishonesty and conspiracy made against the named nuns. Unattractive earlier correspondence from the leader of the Parish Council had hinted at an *animus*. At the time of grant of full planning permission he secretly sent an email to a councillor on the planning committee charged with deciding whether to grant planning permission describing the nuns as “... little old ladies with extreme religious views. The guilty party here are their advisers but I'd be careful you don't get sued. This speaks for itself and gives them a nice bitch slap. Maybe they will now be a bit more co-operative”.

Unsurprisingly perhaps, the litigation and the allegations made against them, and the publicity these received, were distressing to the elderly sisters of the order.

PORTLAND v BARCLAYS BANK AND KPMG

In 2010, the Portland group had a strong business and effectively unrivalled market position, quarrying, finishing and selling the famous Portland Stone to the construction industry. It had valuable land available as security. It owned about 25% of the Isle of Portland in Dorset, some 650 acres, together with most of the mineral (limestone) deposits and rights. Its original loan from Barclays of £6m for 12 years had reduced to a balance of some £3.8m. It was not in breach of its covenants and required no overdraft facility. It had many orders for its product and no significant competitor. It needed a further facility of £650,000 for cashflow purposes, including HMRC arrears. Those arrears had arisen due to the group having financed out of cashflow a long-planned move of its manufacturing facility to a new more efficient (24-hour) site at a time when the financial crisis had slowed debt collection. While it could have secured alternative finance, the group first approached Barclays. Barclays, in the face of protest from Portland, insisted that the international accountancy firm, KPMG, were required to assist Barclays to decide whether it could prudently lend to the group. As explained by Barclays and KPMG in a series of emails in July 2010, there were said to be two purposes of KPMG's proposed engagement, that KPMG described as “intrinsically linked”: (i) an assessment of the Group's short-term cashflow requirements; and (ii) a security review to assess whether there was adequate security available to Barclays to recommend supporting the borrowing sought on a standard LTV basis.

In July 2010 a tri-partite (Barclays/KPMG/Portland) letter of engagement (LOE) was sent by KPMG, that KPMG urged Portland to sign and return that day so that they could speak to HMRC. By inference, the issue of further funding was under consideration by Barclays in connection with making a “time-to-pay” arrangement with HMRC, then government policy for SMEs in the wake of the financial crisis. Portland duly signed, but KPMG did not speak to HMRC, who eventually presented a winding-up petition. To pre-empt this KPMG were appointed administrators for the group. A local MP intervened and prevented the fire sale of the group's assets by the administrators to repay Barclays. The group was rescued by sale of a majority shareholding.

Based on the filed defences and on subsequent limited early disclosure ordered by the court, Portland's case was that Barclays had already decided that it would not lend and that this was known to KPMG. As part of the plan, it was alleged that Barclays and KPMG combined deliberately to mislead the Portland group into believing that appointing KPMG to undertake an Independent Business Review, to include the security review for its stated purpose, was the means for Portland to obtain the further funding it sought. The alleged undisclosed object in misleading the group was to gain control of the group and the information required to prepare for KPMG's appointment as administrators with a view to repaying Barclays. Barclays at the time, like other banks, was under pressure to reduce lending in the wake of the financial crisis. The claim was for loss to the shareholders being the only available candidates to fund a rescue under Sch B1 to the Insolvency Act 1986.

On Portlands' July 2018 application — before pleadings had closed — to amend its claim to allege fraudulent misrepresentation and Barclays' and KPMG's cross-applications to claim strike-out/for summary judgment, two circumstances were striking:

- Early disclosure ordered by the court on Portland's March 2018 application revealed two internal KPMG emails, one written on 19 July 2010, the next working day after execution of the tri-partite (Portland/Barclays/KPMG) LOE, the second, dated 2 August; both stated KPMG's understanding that *Barclays would not lend*. Both were written prior to delivery of the first KPMG report, the ostensible purpose of which was to enable Barclays to determine, upon KPMG's recommendation, whether or not to lend. Both were pleaded in Portlands' draft amended claim.
- On the March 2018 disclosure hearing, KPMG had submitted to the court that *no security review had been undertaken* by KPMG of the kind canvassed in the July emails, it being said that none was contractually provided for under the LOE and, further, this was said to be obvious. On the hearing of the July 2018 applications, Barclays submitted that KPMG *had in fact undertaken a security review* of the kind contemplated in the July emails, a submission to the court that KPMG agreed and expressly adopted as its own.

Portland sought to make amendments to an existing claim for unlawful means conspiracy to add claims of fraudulent misrepresentation that Barclays was in principle willing to lend when, by the time of the signing of the LOE, this was alleged not to be true and known not to be (providing an explanation for a security review having been said by KPMG in March *not* to have been undertaken (though Portland had provided evidence of some 81 titles to registered land that KPMG had explained it was under a duty to provide)). At the time of the proposed amendments the primary limitation period had expired.

The material point, for present purposes, is that the allegations of fraudulent misrepresentation had not been formally pleaded at the time of the applications, but were merely *draft proposed amendments* to the claim, founded on circumstances knowledge of which was obtained *after* the claim was issued. None of the individuals involved for either Barclays or KPMG had served witness statements. The only evidence before the court for the defendants was from their solicitors.

Mr Justice Stuart-Smith (co-author of the *The Law of Motor Insurance* (2004)), in a judgment that in five separate paragraphs emphasised there being but *one* document supportive of Portland's contentions (that he construed in favour of KPMG), struck-out Portland's claims holding these to be fanciful and the alleged collusion between a bank and a well-known accountancy firm scarcely worthy of credence. He held that should Portland wish to advance claims against Barclays and KPMG for fraudulent misrepresentation, such claims must be pursued in new proceedings to enable any limitation defence to be taken.

DISPARITY IN TREATMENT OF UNSUCCESSFUL ALLEGATIONS OF DISHONESTY

While Stuart-Smith J expressed the benevolent judicial view from the Royal Courts of Justice that collusion between Barclays and KPMG was scarcely worthy of credence, in fact the propensity for collusion between banks and their insolvency practitioners has repeatedly been the subject of public concern and parliamentary debate over the past 20 years — and serious consideration has been given to whether parliament should legislate to protect against it.[22]

That apart, the judicial discretion on costs is now largely codified by the statutory provisions under procedural rules. These provide that one of the considerations for the court in the exercise of the discretion is the “basis” upon which costs should be awarded to the successful party. The competing bases are “the standard basis” and “the indemnity basis”. The difference is significant because the indemnity basis reverses the *onus* of proof on the issue of whether costs were “reasonably incurred” and “reasonable in amount”, placing the *onus* on the paying party to demonstrate that they were/are not; second, while ordinarily the costs are required to be “proportionate”, on the indemnity basis that requirement is displaced so there is no requirement for proportionality. Typically, the effect of an order for indemnity costs is to increase recoverable costs by between a quarter and a-third. The touchstone for recovery of indemnity costs is “unreasonable” conduct. The unreasonableness is required to be of a “high degree” and such as to take the circumstances of the claim outside the usual run of litigation before the courts — that is, outside the “norm”.

The *Holy Cross* case trial lasted 11 days, with leading counsel for both sides; allegations of unlawful means conspiracy and dishonest conduct were persisted in against the elderly sisters of the order who were required to be called as witnesses and subjected to cross-examination on behalf of the claimant council; new claims were formulated (requiring adjournment) and then abandoned, and there was evidence possibly suggestive of an unattractive *animus* towards the sisters of the order. The judge held there to be no basis for the claim; not only did the court exonerate the sisters from any wrongdoing, but no legally recognisable loss was suffered by the claimant — even had the allegations been established.

Following a hearing on costs, that lasted the best part of a day, Mr Justice Swift rejected the application by Holy Cross for an award of indemnity costs on the basis of the claimant council's seriously unreasonable conduct in its pursuit of the claim, including that the claims against the order had been the subject of widespread and international publicity.

The claim against the nuns, and the way in which it was conducted by the Parish Council, did not, in Swift J's judgment, exhibit the requisite high degree of unreasonableness to merit an award of costs on the indemnity basis.

In the claims made against Barclays and KPMG in *Portland,* Stuart-Smith J adopted a different approach. Following the three-day hearing on the interlocutory applications, he allocated 45 minutes to the parties for argument on costs and permission to appeal. The claims of fraudulent misrepresentation at the time of the applications were in draft form and none of the individuals concerned, subject of the draft claims, had filed any evidence, let alone given oral evidence, pleadings had not closed and disclosure on the standard basis was yet to be given. The judge readily accepted Barclays' and KPMG's submission that Portland's claims, that had attracted some domestic press comment, exhibited the requisite high degree of unreasonableness and were so outside the run of ordinary litigation as to justify an award of costs on the indemnity basis for the entire period of the claim. Stuart-Smith J had no hesitation in awarding an immediate payment of £500,000 on account as 50% of the costs claimed.

WHAT DOES THE DISPARITY IN TREATMENT SUGGEST: “HOLIER THAN THOU”?

Even if one or other judgment is wrong in principle — and it is notoriously difficult (and following the abolition of the right to an oral hearing on permission to appeal to the Court of Appeal, nigh impossible) to successfully appeal judgments on costs — the premise entailed in the disparity of judicial treatment in granting Barclays and KPMG indemnity costs and denying the Sisters of the Holy Cross the same award for the costs they had incurred in defending the allegations *to trial*, so that the claims against them, on any view, constituted a much more sustained attack on their honesty and conduct, is very revealing of judicial attitudes. English judges view allegations of dishonest conduct against banks and financial institutions with particular seriousness and, surprisingly perhaps, domestic media comment is seen as apt to be particularly harmful to their good reputation and standing — and

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certainly to be more damaging than adverse international media comment about a religious order.

Accordingly, allegations of dishonesty against banks (even where the allegation is in draft) are treated by the courts as intrinsically more *unreasonable* than similar claims made against a religious order (pursued to trial). Why should this be so? One undesirable effect is that such disparity in treatment necessarily has a protective effect on banks, acting as a further disincentive to their conduct being challenged by claimants. This inevitably augments and reinforces a lack of accountability that is a major systemic problem, to which the courts unwittingly contribute.

In his Banking Standards Board lecture in 2018, referred to at the start of this article, Sir Geoffrey Vos observed that in a recent Banking Standards Board survey of 35,000 employees in 25 banking institutions, to the statement: “I see instances where unethical behaviour is rewarded”, fully 25% of respondents agreed or neither agreed or disagreed. In similar vein, Professor John Kay has commented that:

> “... in finance, the major conglomerates have recently come to regard restitution for mis-selling and misrepresentation as nothing more than a regular cost of doing business ... It was bad enough that British banks persuaded their customers to spend £20 billion on insurance against loan defaults that few needed: they defended their right to continue doing so through every legal process even after two of them fell under majority state control. A policy of 'naming and shaming' is ineffective if everyone has been named and shamed.”[23]

Sir Callum McCarthy in his forward to the Promontory Report on RBS's operation of its “Global Restructuring Group” wrote that the:

> “... central conclusions are that there was widespread inappropriate treatment of customers by GRG.”

and that:

> "... customers had valid grounds for considering themselves badly treated by RBS and GRG."

He noted that:

> "GRG … saw delivery of its own narrow commercial objectives as paramount: objectives that focussed on the income GRG could generate from the charges it levied on distressed customers. In pursuing these objectives, GRG failed to take adequate account of the interests of the customers ... ."

The Financial Conduct Authority in June 2019 published its own review of RBS's treatment of its customers transferred to GRG.[24] The essential tone of the report is one of helplessness. On one analysis, the FCA's report reflects effective "regulatory capture" by its industry.

In his 2018 lecture Sir Geoffrey Vos commented that:

> "... [p]ublic confidence in the financial and banking system depends on the quality of the scrutiny that judges give to cases involving these institutions."

I venture to disagree. Were the statement to be accurate, which I suggest it is not, the present level of public confidence in the banking system should give the judiciary pause for serious reflection.

Public confidence in banks is not the product of the quality of judicial scrutiny. The collapse in public confidence in banks (reflected in the enormous recent growth in non-bank lending) is more closely tied to public perceptions that banks take the view that the price of misconduct is an ordinary business expense — if caught out — and that, relatedly though more importantly, there is a complete absence of accountability. Sir Vince Cable MP in parliament in 2018 pointed out, in connection with RBS's operation of GRG, that:

> "Management knew or should have known that this [was] an intended, co-ordinated strategy, the mistreatment of business customers was a result of that, and that the head of GRG responsible for that policy, Mr Nathan Bostock, is now chief executive of Santander."[25]

Fines hit bank shareholders, bankers themselves have no "skin in the game"[26] (Nassim Taleb). Apart from, say, LIBOR/EURIBOR rigging, the PPI scandal, and RBS's treatment of customers transferred to its GRG, the Lloyds/HBOS Reading scandal is a paradigm of the problem.

Two individuals (the Turners) were victims of a fraud. In 2013 Ms Sally Masterton, a senior risk officer at HBOS, wrote an internal report known as the "Project Lord Turnbull Report", that is now available online.[27],[28] The report set out in detail the nature of the fraud that Ms Masterton had identified. Eventually the value of the fraud was estimated to have been around £1bn (most of the money went offshore). (The report was provided to the police and the regulator in 2014; the regulator did nothing.) Ms Masterton subsequently complained to Mr Andrew Bailey, CEO of the Financial Conduct Authority, about her treatment by Lloyds, that had acquired HBOS, following production of her report.[29] The Serious Fraud Office declined to investigate. From 2013 Thames Valley Police undertook an investigation of the Turners' allegations and the matters raised in the Turnbull report. Mr Anthony Stansfeld, the Police and Crime Commissioner, is on record as having said that Lloyds Bank, though itself a victim (KPMG were Lloyds' auditors — also auditors of Carillion and the Co-Op Bank), was (neutrally) unhelpful to the police, an unhelpfulness that Stansfeld has said significantly increased the costs of the investigation. Lloyds denied the fraud right up until after six of its employees were convicted of criminal offences at the end of 2017 and sentenced to a total of 47 years' imprisonment. (The police investigation cost about £7m of which Thames Valley eventually recovered £2m — demonstrating the financial disincentives to police investigation of serious fraud.) In that

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time Lloyds, despite being alive to the fraud both from the Turnbull report and numbers of customer complaints, nonetheless repeatedly took re-possession and bankruptcy enforcement action against its customers (that sometimes, it is said, resulted in suicide), themselves victims of the fraud. The Turners were subject to multiple enforcement proceedings despite their having alerted the bank to the fraud.

The judiciary are surprisingly unsympathetic to victims of fraud. It was only in March 2019 that the Supreme Court had to explain that a victim of a judgment obtained by fraud did not have to act with reasonable diligence to set that judgment aside, absent which the judgment so obtained would be upheld and enforced by the courts: *Takhar v Gracefield Developments Ltd*.[30] (The Court of Appeal decision in *Takhar*, that was reversed by the Supreme Court, reflects the contemporary vogue, at all levels of the English courts, for prioritising process and procedure over substance, in the name of the efficient use of court resources.) The actions by Lloyds, in connection with the Reading fraud, are now the subject of an inquiry by Dame Linda Dobbs DBE, a former High Court Judge.

The dangers and risks presented by ineffective regulation on the one hand (John Kay has described this as "policy failure on almost every front"), and a benign legal environment, in which the requisite quality of scrutiny to which Sir Geoffrey Vos aspires is noticeably rare in practice and, on the contrary, the banks are in fact indulged and accommodated by the courts — well-exemplified by the woefully inadequate, insufficiently rigorous, judicial analysis of the subverting effects of "basis clauses"/"contractual estoppel" — are too obvious to state. At a high level of abstraction, one explanation for the benevolence with which the courts treat the banks is that, as Timothy Geithner[31] (former President of the Federal Reserve Bank of New York and a former US Secretary of the Treasury) explained in his memoir *Stress Test*, the objective in the financial crisis was to avoid, *at almost any cost*, the commercial failure of institutions in the banking system. It is a short step from a perception that an institution must not fail to rendering it, and it being, unaccountable. The precise nature of Sir Geoffrey Vos's "symbiosis" at this point might be examined; the Plover bird does not represent much of a threat to the crocodile, but it keeps its teeth clean.

Lord Bingham, a wise judge, in a lecture in 2001 entitled 'The Law as the handmaid of Commerce',[32] commented that:

> "... the legal virtues of clarity, simplicity, intelligibility, uniformity, the alignment of sound market practice and legal principle, purposive interpretation, the overriding requirement of good faith — provide the surest guide in the rapidly changing world in which, businessmen and lawyers, we now live".

Adam Smith made a similar point in *The Theory of Moral Sentiments* (1759) when he advanced the proposition that capitalism works best when there subsists between market participants a high level of trust. When trust diminishes costs increase. Noticeably, English law, unlike most other common law and civil jurisdictions, has resolutely set its face against a worked-through doctrine of good faith in commercial transactions. It is high time it did so.

No amount of regulation, nor the most exacting judicial scrutiny, will promote the good faith and trust that many in the banking industry itself, quite apart from the public, consider to be absent; on the other hand, to benevolently indulge banks, when such indulgence is neither deserved nor desirable, does a disservice to the public thereby disadvantaged.

Judges, including perhaps the Chancellor, will be startled for it to be suggested that their tender treatment of banks actually tends to negate and subvert the overriding requirement for good faith to which Lord Bingham referred — upon which everything else, including public confidence, depends. There may be something, after all, to be said for the "moral standards of the vicarage" derided by Lady Justice Gloster in the *UBS v Kommunale Wasserwerke Leipzig* case.

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Further Reading:

- Disclosure of risk in SME swap transactions: the Court of Appeal wreaks havoc with accepted principles (2018) 5 JIBFL 282.
- Spot the difference?: "Investment advice" under FSMA and at common law (2018) 10 JIBFL 606.
- LexisPSL: Banking & Finance Practice note: The FCA's expectations around culture in financial services firms.

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[1] I am indebted to the necessarily anonymous professional and academic colleagues who kindly read and commented on a draft of this article. They have no responsibility either for it or for its errors, both are mine.

[2] *UBS (London Branch) AG v Kommunale Wasserwerke Leipzig [2017] EWCA Civ 1567* at para [347].

[3] Paragraph [119].

[4] q.v. 'Documentary Fundamentalism in the Senior Courts; the myth of contractual estoppel', Professor Gerard McMeel [2011] LMCLQ 185.

[5] *Peekay v ANZ Banking Group* [2006] 2 Lloyd's Rep 51, *Springwell Navigation Corp. v JP Morgan* [2008] EWHC 1186, [2010] EWCA Civ 1221.

[6] Notably for example in *Crestsign v Natwest and RBS* [2014] EWHC 2882 — a decision frequently cited.

[7] *Lowe v Lombank,* footnote 12 below.

[8] The best single study of engagement with the Misrepresentation Act 1967 is Professor Richard Hooley's *Contractual Estoppel and the Misrepresentation Act 1967* University of Cambridge Legal Studies Research Paper 57/2016: https://www.repository.cam.ac.uk/bitstream/handle/1810/262935/Hooley-2016-Legal_Studies_Research_Papers-VoR.pdf?sequence=1&isAllowed=y.

[9] [1898] AC 1, 46.

[10] *q.v.* Sir Anthony Mason's comments in *'*The Place of Equity and Equitable Remedies in the Contemporary Common Law World*'* (1994) 110 LQR.

[11] *First Tower Trustees Ltd v CDS (Superstores International) Ltd* [2018] EWCA Civ 1396 — where the label for the doctrine was questioned.

[12] *Lowe v Lombank* [1960] 1 WLR 196, Mr Justice Diplock (arguably the greatest contract lawyer of the twentieth century); *Cremdean Properties Ltd v Nash* [1977] 2 EGLR 80, Lord Justice Scarman. (The propensity in relation to the Misrepresentation Act 1967 was dissected in 2016 by Prof. Hooley in footnote 8 above.)

[13] Not helped by decisions such as the controversial aviation mortgage case of *Blue Sky v Mahon* [2001] EWHC 631 (Comm) that resulted in increased costs where English choice of law provisions applied and tended to favour other choice of law provisions — say New York.

[14] For the predictable regularity with which claims that *extra* contractual advice was given by banks fail in the English courts see 'To advise or not to advise' Gregory Mitchell QC (2014) 11 JIBFL 686.

[15] Federal Court judgment of 6 July 1993 XI ZR 12/93 BGHZ 123, 126.

[16] NJ/1999/285 9 January 1998.

[17] If this seems startling, see *Robinson v Chief Constable of West Yorkshire Police* [2018] UKSC 4 (Supreme Court). Also the author's critique of the questionable Court of Appeal decision in *PAG v RBS* [2018] EWCA Civ 355, 'Disclosure of risk in SME swap transactions: the Court of Appeal wreaks havoc with accepted principles' (2018) 5 JIBFL 282. https://www.lexisnexis.co.uk/blog/banking-and-finance/disclosure-of-risk-in-sme-swap-transactions-the-court-of-appeal-wreaks-havoc-with-accepted-principles-in

[18] See Richard Edwards QC's: 'Spot the difference: "Investment advice" under FSMA and at common law' (2018) 10 JIBFL 606: https://www.lexisnexis.co.uk/blog/docs/default-source/loan-ranger-documents/jibfl_2018_vol33_issue10_nov_pp606-609.pdf and 'The Liability for negligent advice: time to go back to basics?' (2019) 1 JIBFL 3: https://www.lexisnexis.co.uk/blog/docs/default-source/loan-ranger-documents/jibfl_2019_vol34_issue1_jan_pp3-5.pdf.

[19] Eg in *LEA v RBS* [2018] EWHC Ch 74, Rose J said, questionably, that "advice" at common law was different from advice in regulatory law. Permission to appeal was refused on the ground that Rose J concluded that no advice had been given, a finding of fact that the CA would be unlikely to disturb. That this was a perhaps surprising conclusion, see Edwards at footnote 18 above.

[20] [2018] EWHC 2341, the writer was counsel for the Portland Group.

[21] [2019] EWHC 1128.

[22] The recent history of the concerns was summarised by Lord McIntosh (spokesman for HM Treasury in the House of Lords) in 1999 during a motion by Baroness Dean calling on the Institute of Chartered Accountants and the other professional bodies to prohibit the practice (*Hansard*: 26 Jan 1999). 14 years' earlier in 1985, it had been the practices during the recession of the early 1980s that had caused Mr Nicholas Lyell MP to enquire of the House of Commons whether the forthcoming insolvency legislation would remove the ability of banks to install their own investigating accountants as a prelude to their subsequent appointment as office-holder over the company: "Will a chartered accountant who is placed by a bank with a debenture in a position of company doctor to advise the company on its financial affairs be capable thereafter of acting as a receiver if the company is subsequently put into receivership or wound up?"

[23] Other People's Money, Profile Books, p 161.

[24] https://www.fca.org.uk/publication/corporate/fca-report-further-investigation-rbs-grg.pdf.

[25] https://www.bbc.co.uk/news/business-42739680.

[26] Perhaps a slightly reduced bonus?

[27] http://www.appgbanking.org.uk/wp-content/uploads/2018/06/draft-Project-Lord-Turnbull-Report-part-1.pdf.

[28] http://www.appgbanking.org.uk/wp-content/uploads/2018/06/draft-Project-Lord-Turnbull-Report-part-2.pdf.

[29] As to how whistleblowers may be treated by banks, see the Barclays case of the steps that Jes Staley took to identify a whistleblower: https://www.ft.com/content/45acc9a0-14a7-311c-9c80-478395531749.

[30] [2019] UKSC 13 reversing the Court of Appeal [2017] EWCA Civ 147 about which I have elsewhere commented: 'Courts as the instrument of fraud', https://www.litigationfutures.com/blog/courts-as-the-instrument-of-fraud.

[31] One of the first to be alive to the fact of LIBOR manipulation.

[32] http://www.sultanazlanshah.com/pdf/2004%20Book%201/SAS_Lecture_16.pdf.