Practical Law™

3VB'S FINANCE COLUMN: A FRAMEWORK AGREEMENT BETWEEN BANKER AND CUSTOMER?

This document is published by Practical Law and can be found at: uk.practicallaw.com/**w-017-0477**
Get more information on Practical Law and request a free trial at: **www.practicallaw.com**

Rajesh Pillai of *3VB* considers a recent trend for small and medium sized enterprises to accuse their bank of acting fraudulently or in bad faith in breach of a general framework "banking contract" or "customer agreement" which is not in writing and extends beyond the obligations set out in individual transaction documents. This article considers the scope for bringing such arguments and how they have fared in the courts to date.

by *Rajesh Pillai, 3 Verulam Buildings*

RESOURCE INFORMATION

RESOURCE ID

w-017-0477

RESOURCE TYPE

Article

PUBLISHED DATE

17 October 2018

JURISDICTION

England, Wales

A NEW TREND

Readers are used to seeing claims by small and medium-sized enterprises (SMEs) alleging that banks have acted negligently, in bad faith or fraudulently in the way the banker-customer relationship was operated – particularly in times of financial difficulty. Such claims usually relate to the handling of specific accounts, the sale of a financial product or an advisory relationship.

Recent cases have seen an attempt to broaden this type of action. In addition to claims arising out of specific written facility (or other relevant) agreements, SMEs and their proprietors allege that the relationship between bank and customer was contractually underpinned by an overarching banking contract or customer agreement which was not in writing. Rather, such an agreement is said to exist (whether expressly or by implication) as a framework further to which specific facilities were then entered into. I refer to this overarching customer agreement as a "framework" agreement.

The existence of a framework agreement is unorthodox in the banking context where relationships tend to be linked to the provision of a specific facility, for example a lending arrangement or the holding of an account. Such arrangements tend to be recorded in written agreements that contain boilerplate entire agreement, exclusion, no-representation or so-called "basis" clauses. The concept of a "framework" agreement is familiar in other contexts, such as staged construction contracts or long-term supply arrangements.

Why have claimants sought to invoke a framework agreement in the banking context? They have done so as the hook for the implication of various contractual duties of good faith and equitable duties that the bank is then said to have breached. The core factual complaint is usually that the bank did not give careful advice or else called in a debt, refused to extend credit or sought to enforce securities or implement a restructuring that caused the claimant's enterprise to fail.

THREE RECENT CASES

I deal here with three recent cases in which the argument that there was a general framework agreement failed. The defendant banks successfully had the argument struck or it was otherwise not pursued at trial.

Reproduced from Practical Law Finance with the permission of the publishers. For further information visit practicallaw.com or call 0345 600 9355. Copyright © 2018 Thomson Reuters (Professional) UK Limited. All Rights Reserved.

THOMSON REUTERS™

In *Portland Stone Firms and ors v (1) Barclays Bank; (2) KPMG and ors [2018] EWHC 2341 (QB)*, the defendants successfully applied to strike out claims of breach of contract and deceit said to be worth over £10 million. The context to the claim included allegations that Barclays had (by inference) acted in a manner similar to the Royal Bank of Scotland's Global Restructuring Group (per the findings of the Tomlinson and Large Reports). The claimant also applied to add allegations of deceit by amendment and the judgment of Stuart-Smith J is a useful reminder of the strict approach the courts take to such allegations – particularly when raised very late in the day.

For present purposes, it is relevant to note that the claimant initially argued that the relationship with Barclays was governed by a framework agreement. It described this as "an overarching relational agreement" which contained various implied terms including that each party "would cooperate with the other on the basis of mutual trust and confidence and act in good faith towards the other". When the claimant applied to add claims of deceit, it withdrew a number of claims based on this framework agreement. Stuart-Smith J held that even if those claims had not been withdrawn he would have struck them out as disclosing no reasonable cause of action. There was no prospect of advancing a claim for bad faith breach of contract. The Judge found that "the original pleading did not identify terms of either the original Loan Facility or any other contractual agreement, terms or conditions; nor did it identify actual contractual provisions by reference to which it would have been possible to assert the implied terms that were alleged."

In *Standish and others v Royal Bank of Scotland and others [2018] EWHC 1829 (Ch),* RBS successfully struck out a claim alleging it had engaged in an unlawful means conspiracy to maximise its holdings in a company (Bowlplex Ltd) in a manner that minimised the holdings of the claimants in the context of a £22 million share sale. The unlawful means were said to include breach of a duty of good faith and equitable duties by RBS. The claimants said that in addition to various formal agreements between Bowlplex and Natwest and RBS, there was "an overarching 'Customer Agreement' and the formal facility agreements are to be regarded as sub-agreements for particular purposes".

The claimants used that framework or Customer agreement as the springboard for arguing for an implied term that during the course of the relationship the parties would "cooperate with each other and act in good faith". Incidents of this broad implied term including that RBS would perform the Customer Agreement and/or any sub-agreements in good faith and not in a commercially unacceptable or unconscionable way. Importantly this appeared to be a concession that no good faith obligation could be implied into the actual written agreements. That is why the claimants sought to found that obligation at the higher, framework level.

In rejecting the existence of any framework or Customer agreement, the Chief Master made the following findings:

- The court was being asked to conclude that an agreement had come into being which had never been discussed by the parties and was not based on any communications between them (written or oral).
- The claimant had wholly failed to meet the Civil Procedure Rules (CPR) requirements relating to an agreement by conduct (Practice Direction 16, paragraph 7.5) and had not specified the conduct relied upon and by whom, when and where the acts constituting the conduct were done – this was more than technical because it was essential to allow the defendants to understand the case they had to meet.
- The contract failed to meet the necessity test.
- The Customer agreement was "a completely artificial construct that [was] divorced from the commercial realities of the dealings between the parties".

This court's methodical approach laid bare the problems faced by the claimants, who were unable to meet the basic requirements for particularising their case. The Chief Master made two further observations as to the way in which the case was put. The first was that it was common ground that Bowlplex had dealt with Natwest through a series of "standard banking agreements" throughout the period in question. In those circumstances (which are likely to apply in most cases), there was no obvious reason why the court should conclude that there was an additional overarching agreement without express terms that had come into being at some unspecified stage. The second is that the use of this argument was plainly as "a transparent device attempting to circumvent the difficulty in implying a duty of good faith in the operative written agreements."

Reproduced from Practical Law Finance with the permission of the publishers. For further information visit practicallaw.com or call 0345 600 9355. Copyright © 2018 Thomson Reuters (Professional) UK Limited. All Rights Reserved.

Broomhead v (1) National Westminster Bank; (2) Royal Bank of Scotland [2108] EWHC 1574 (Ch) is the first "GRG" related matter to come to trial. The claim was for some £13,78 million in damages. It related to the operation of current and loan accounts for the claimant's business in hiring out heavy plant and machinery. The claim was dismissed on the facts after trial.

It is worth noting because the claimant brought what was described as a "General Relationship Claim". The pleaded premise was that there was a framework agreement, which HHJ Klein described as "some sort of overarching banker-customer (contractual) relationship" beyond the written agreements relating to the current account and loans. The claimant argued that the framework agreement included terms that Natwest would not:

- Exploit [the claimant].
- Take advantage of its own wrong to profit at his expense.
- Fail to exercise reasonable skill and care in [its] dealings with [the claimant] in relation to his loans and facilities.

As in *Portland Stone* and *Standish*, the claimant was using the framework agreement construct as the means of bringing good faith type arguments into issue at trial. At trial, the claimant abandoned the General Relationship Claim on the basis that it added nothing to other claims based on a collateral contract and unfair relationship under the Consumer Credit Act 1974. It seems fair to infer that had the claim been pursued, it would also have failed on the facts.

DO FRAMEWORK AGREEMENT CLAIMS SUCCEED?

The short answer is that such claims are very difficult. The framework agreement appears to be one more way to dress up the "bad faith" claims that are difficult to bring against banks. That remains the case even if the conduct of the bank's agents has plainly fallen short of what a layman (or a court) might expect. In light of the usual series of express written agreements governing the parties' dealings, the scope for implied framework contracts is necessarily limited.

That said, it may well be possible to identify facts giving rise to a framework agreement in the context of a banker-customer relationship. But it depends on the given case. Any claimant attempting to run such an argument must deal head on with the basic pleading requirements. The reason why such claims have failed to date is in part because the claimants were unable to plead an arguable case. The courts are alive to the artificiality of this type of argument and there is currently limited scope for general implication of good faith into banker-customer dealings. The mere existence of potentially debatable facts as to a framework agreement is not enough to get through an application for strike out or summary judgment. Instead, it is likely to be given short shrift by the courts and (even if on the face of the pleadings) have little weight in any settlement negotiations.

It is also worth bearing in mind that if a customer is an individual, there is scope for him or her to allege that the debtor-creditor relationship was unfair because of things said or done (or not done) by or on behalf of the creditor. That is a more difficult cause of action for a bank to counter, save at trial.

As things stand given the usually rigid circumstances surrounding the origination of such relationships and the way in which they are recorded and sanctioned in their commercial context, a successful argument on this basis is likely to be the exception rather than the rule. Banks facing such arguments are likely to pursue summary disposal wherever possible.

Reproduced from Practical Law Finance with the permission of the publishers. For further information visit practicallaw.com or call 0345 600 9355. Copyright © 2018 Thomson Reuters (Professional) UK Limited. All Rights Reserved.