FI and D&O Liability
February 2012

CLYDE&CO

International review

Keeping you in touch with international developments

Following the credit crunch and subsequent economic downturn we are increasingly seeing the rise of parallel regulatory, civil and criminal proceedings against directors and officers as well as increased co-operation between international regulators.

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Our FI and D&O teams have particular experience in handling international coverage and D&O claims on behalf of the market.

The merger of Barlow Lyde & Gilbert and Clyde & Co adds to our capability to be able to respond to the current climate and to act in relation to claims of all sizes and the most complex related insurance issues.

We are able to offer specialist advice across a number of key jurisdictions including in Europe, the US, Canada, China, and the Middle East.

We are relaunching our Financial Institutions and D&O Liability publication with a more international focus, reflecting the business of our clients.

As ever, we welcome any comments on the Review or any questions relating to the merger.

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Reversal of fortune; Exposure to insurers from US securities class actions against Chinese companies

Chinese companies listed in the US are being targeted by plaintiffs in class action lawsuits alleging fraudulent misrepresentations, inadequate disclosures and improper transactions.

Given the volatility of financial markets since 2008 and decreasing yields on many investments, not to mention concerns about capital preservation, it is no surprise that some investors are attracted by opportunities to "invest" in Chinese businesses that supposedly offer aggressive returns. Bullish investors can invest in the China growth story, Chinese businesses raise vast amounts of money on the publicly traded exchanges in the US and professional advisers receive substantial fees to help structure the deals that result in Chinese businesses being publicly listed.

In some instances, however, these investment opportunities are too good to be true. Investors have seen US$ billions wiped off the market capitalisation of some dubious listed Chinese businesses. In some cases, fraud is suspected. One of the ultimate weapons for these investors is a class action lawsuit in the US against the Directors and Officers (D&O) of the company and its professional advisers. This development calls into question the adequacy of D&O insurance, increases advisers' exposure to risk and raises coverage issues under professional indemnity insurance policies.

Background

A reverse merger is a transaction whereby an existing "shell company" (a public company with few or no operations) acquires a private operating company and the private company effectively takes over the public company. It is a quick and cheap method of obtaining a public listing without having to carry out an initial public offering (IPO), not requiring compliance with US Securities Act registration requirements. Typically, the management of the private company takes over the management of the public company and the shareholders of the private company become the majority of the shareholders in the public company.

In recent years, there has been a surge in Chinese companies accessing the US capital markets in this way. The US Public Company Accounting Oversight Board (PCAOB) has identified 159 companies from the China region that entered into a reverse merger in the US from 1 January 2007 to 31 March 2010. Market capitalisation of these companies was some US$12.8 billion as compared to US$27.2 billion of those Chinese companies that completed IPOs in the US during that period. In the last 12-24 months, there has been a significant increase in regulatory investigations and securities litigation against such companies and their advisers.

What's gone wrong?

Chinese companies have been involved in reverse mergers in the US for over a decade. So why are problems with these companies emerging now?

Short sellers have had a major impact. Short selling is the practice of borrowing securities from a third party with the intention of paying them back at a later date. The short seller profits if the securities fall in value between the date borrowed and repaid. In the last couple of years, a number of short sellers have targeted Chinese companies. The highest profile short seller targeting Chinese companies is Carlson Block who runs Muddy Waters LLC. Muddy Waters and some other short selling companies claim to carry out independent research into Chinese companies listed in the US and produce reports making allegations about the legitimacy of the business in question and its financial position. This trend started in June 2010 when Muddy Waters issued a report on Orient Paper alleging it had overstated revenue and misappropriated funds, and the trend is expected to continue.

Whenever a short seller report is published, the value of the stock of the company in question tends to plummet. Sino Forest is perhaps the best example – its stock dropped by 70 per cent in two days following Muddy Waters' report. Short sellers tend to take a short position in the company's shares before releasing their report invariably making a lot of money as a result of the subsequent drop in the stock.

A surge in US securities class actions has followed in the wake of the short seller allegations. In 2011, investors filed 39 securities class action lawsuits against Chinese companies, accounting for almost 20 per cent of all securities class action filings. These class actions tend to follow the same pattern, relying heavily on the short sellers' report to allege fraudulent misrepresentations and inadequate disclosures regarding discrepancies in financials reported by the company to US and Chinese authorities, improper transactions between related parties and the company's operations and business prospects.

Implications for insurers

Until a few years ago, writing D&O insurance of Chinese companies seemed somewhat of a benign risk. With no class actions in China or Hong Kong, exposure was limited. The US is a totally different environment.

Exposure

Few US securities class actions go to trial; around 35-40% are dismissed and the majority of the rest are settled. It was initially thought (and hoped by D&O insurers) that, due to the lack of substance in the complaints against Chinese companies (which often merely repeat allegations made in a short sellers' report), most of these claims would be dismissed at an early stage. However, based on the limited

number of rulings to date on motions to dismiss involving these types of complaints, this may be unlikely in the majority of cases.

In a case brought against Orient Paper Inc (*Henning v. Orient Paper*, 2011), the US District Court, for the Central District of California, refused to dismiss the plaintiffs' securities fraud claims. Significantly, the court's July 2011 decision found that the plaintiffs could rely upon a short seller's report to support their allegations of securities fraud, and that allegations of related party transactions supported a finding of scienter under the Exchange Act. In a case against China Education Alliance where the plaintiff also relied heavily on a short seller's report, the court reached a similar conclusion in October 2011. Relying on the Orient Paper decision, a different federal judge in the Central District of California found that the facts that the individual authors of the report were not named and that those individuals were self-interested were not grounds for dismissal of plaintiffs' claims. Further, the court found that, viewed "holistically" rather than individually, plaintiffs' allegations (based on an online short seller report) adequately alleged scienter.

These decisions demonstrate that investors' class action lawsuits can survive early strike-out applications. As many of the securities class actions against Chinese companies are based on similar allegations, investors may be able to obtain early settlements from defendants seeking to avoid the publicity risk, cost of discovery and a full length trial (which, if the defendants lose, could set an unhelpful precedent for them).

Two other cases, however, demonstrate that in certain circumstances, complaints can be dismissed at an early stage. In a securities class action brought against China North East Petroleum in the US District Court for the Southern District of New York, the court found in an October 2011 decision that the alleged misrepresentations could not have caused loss because the stock price rose after disclosure of the alleged fraud and plaintiffs had the opportunity to sell their shares at a profit. This ruling would be distinguishable from cases against many other Chinese companies where share prices dropped upon disclosure and did not rebound.

Most recently, a third judge in the Central District of California granted a motion to dismiss a securities class action against China Century Dragon Media. As the plaintiffs' claims under the Securities Act sounded in fraud, the plaintiffs were required to meet the heightened pleading standards applicable. The court found that allegations that the revenue and profit numbers reported to the SEC in the prospectus for the company's US IPO were significantly greater than those it reported to the SAIC in China were insufficient. The differences between the numbers merely raised the possibility that the SEC figures were false, but did not "suffice to make that claim plausible." Notably, this decision was without prejudice and plaintiffs will have another opportunity to plead fraud with sufficient particularity in an amended complaint.

Avoidance

In some cases, the allegations against the Chinese company go back many years. This triggers concerns about non disclosure and misrepresentations and insurers faced with large claims may query whether the insureds knew of the underlying facts relating to the wrong-doing prior to placement. This may be difficult to establish, and some policies contain severability of knowledge or innocent non disclosure wording.

Coverage

In investor and regulatory actions against Chinese companies, the remedy under applicable US securities law may be rescissory damages, disgorgement fines and penalties. Not all of these will fall within the definition of "Loss" in insurance policies, although obviously there is no standard D&O policy used and the terms and conditions vary between insurers. The relevant exclusions to these types of claims are obvious, being, dishonest, criminal or fraudulent acts, unlawful gain or improper personal profit. All of these tend to require a final adjudication, so insurers may still have to fund defence costs in the interim period.

Defence costs

The complexity of the cases, and the difficulties of dealing with transnational litigation, such as collecting evidence overseas or translating Chinese documents, make this type of litigation particularly expensive. If the US courts are unwilling to dismiss these types of claims at an early stage, policy limits could be blown by defence costs alone.

Conclusion

Of course, not all Chinese companies traded on US exchanges, whether by a reverse merger or a traditional IPO, are fraudulent companies, and as demonstrated by the China North East Petroleum and China Century decisions, defendants may have strong arguments for an early dismissal of securities class actions. Nevertheless, Chinese companies are being targeted by plaintiffs and regulators whether or not they are legitimate businesses, and insurers of US listed Chinese companies, their directors and officers and advisors could face significant exposure in defending and resolving securities class actions. If a short seller produces a negative report on a US-traded Chinese company and its share price collapses, a securities claim or SEC investigation is almost inevitable. With almost 500 Chinese companies listed in the US, and now, with Sino Forest, an indication that Chinese companies listed in Canada may be targeted as well, D&O insurers of Chinese companies listed in North America may be in for a rough ride in the coming years.

Antony Sassi and Edward Kirk

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Senior management responsibilities: update on the current UK regulatory approach

The threat of personal liability (involving reputational damage and often financial penalty) is one of the Financial Services Authority's (FSA's) most effective tools of deterrence. The FSA views the targeting of senior management as one of the best methods of creating cultural change within regulated firms. This article looks at recent changes to the approved persons regime and examines some of the themes emerging from recent FSA enforcement cases in relation to individual liability of senior management.

Reform of the approved persons regime

Major policy reviews of the approved persons regime have taken place since 2008 and have led to a number of FSA Handbook changes, and amendments to the application process for those seeking to exercise controlled functions. Most of the FSA's rules and guidance on approved persons are set out in SUP 10 of the Handbook. In addition, there are relevant materials in APER (FSA's Statements of Principle and Code of Practice for Approved Persons), SYSC (Senior Management Arrangements, Systems and Controls sourcebook) and TC (Training and Competence manual).

The FSA published a policy statement on the approved persons regime (PS10/15) entitled "Effective corporate governance, Significant influence controlled functions and the Walker Review" in September 2010 which introduced a new framework for significant influence functions (SIFs) and emphasised the need for robust controls to ensure the right people were placed in the right, high-level roles. The changes introduced under PS10/15 included the creation of six new governing functions and three new systems and controls functions. PS10/15 also set out the FSA's desire to ensure that the assessment and monitoring of SIF competency is something that is conducted on an ongoing basis, and not just at the point of registration for approval.

The table below sets out the new SIF classifications as laid out under PS10/15.

The new regime for SIFs was due to come into force on 1 May 2011, however, due to the FSA being unable to make the necessary changes to its online system, ONA (Online Notification and Applications) by that date, the implementation of SIF changes to the approved persons regime has been deferred "until further notice". The statement issued by the FSA on 25 March 2011 highlighted that the deferral "should not be interpreted as a change of policy on our part and we will ensure firms have two months' notice of the new implementation date". The new framework is expected to enter into force during 2012.

Function	CF	Description
Governing	CF00	Parent entity SIF
	CF2a	Chairman
	CF2b	Senior independent director
	CF2c	Chairman of risk committee
	CF2d	Chairman of audit committee
	CF2e	Chairman of remuneration committee
Systems and controls	CF13	Finance
	CF14	Risk
	CF15	Internal audit

Themes from recent final notices issued to senior management

A shake-up in corporate governance expectations, as well as a tougher approach to controlled function capabilities is apparent in a number of recent Final Notices issued by the Enforcement and Financial Crime Division of the FSA. These examples make clear that the FSA's goal (and that of the new UK regulatory authorities going forward) is to

hold senior management to account for regulatory failures wherever this option is available.

A recent example is that of Alexander Ten-Holter of Greenlight Capital UK LLP, who was prohibited from holding SIF functions CF10 (compliance oversight) and CF11 (money laundering reporting), and fined £130,000 in January 2012 for failing to make reasonable enquiries before effecting an order to sell shares based on inside information, despite his knowledge of suspicious circumstances surrounding the sale. The FSA felt this to be a particularly serious case as detecting and preventing market abuse was a key part of his compliance role. The trader who executed the sale, Caspar Agnew of JP Morgan Cazenove, was also fined £65,000 for failing to exercise due skill, care and diligence in performing the CF30 (customer) function by failing to alert his employer to the suspicious transaction.

In November 2011, compliance officer Dr Sandradee Joseph, holding CF10 and CF11 functions at hedge fund, Dynamic Decisions Capital Management Limited was fined £14,000 and banned from performing any significant influence function in regulated financial services. She was found to have failed to understand the importance of her role and the wider regulatory obligations it brought, having omitted to investigate a fraudulent bond transaction carried out by a senior employee at the firm. She had wrongly relied on her belief that external lawyers would have acted on legitimate concerns raised by investors about the bond in emails on which she was copied, and in so doing breached Statement of Principle 6 requiring her to act with due skill, care and diligence in performing the CF10 role. This case demonstrates the need for those in positions of significant oversight to sufficiently challenge the business (in order to ensure that rules are not being broken); something that requires an appropriate and consistent degree of competence.

Another example of failings where a senior individual provides inadequate challenge and places too much reliance on others is the case of Richard Lindley in July 2011. He was involved in the day-to-day running of a business, A2O, and held the CF1 director function. Although he had no direct responsibility for compliance within the firm, he was nevertheless found to be personally at fault for compliance failings since he had the "capability and capacity to influence the culture and processes" of the firm. The individual (Andrew Ruff) who held the CF10 (compliance) function as well as CF1 and CF11 functions in the same firm was also fined and prohibited.

In August 2011, Anthony Smith of Perspective Financial Management Limited was fined £16,000 and found to be not fit and proper to perform both significant influence functions and customer functions in relation to UCIS sales. The FSA accordingly imposed a prohibition order on him as well. His failings led to a significant risk that customers would receive unsuitable advice in the context of recommending them to invest in UCIS without sufficient knowledge of the applicable promotions regime. This case demonstrates that poor standards of competence and capability in respect of required knowledge of the rules will be punished, in order to uphold the integrity of the industry and ensure that customers are protected from advice failings. Timothy Langman of the same firm was fined £10,500 for failing to comply with Statement of Principle 7 in relation to his performance of SIF functions CF1 and CF30. He was also the firm's Training and Competency Officer during the relevant period. A similar enforcement case arose in July 2011, where Anthony Moss and Paul Banfield were found to be responsible for weaknesses in their firm's systems and controls which similarly had resulted in customers being exposed to the risk of receiving unsuitable advice in respect of UCIS.

And in a June 2011 case, Gary Hexley of Exclusive Asset Management Limited who held CF30 (customer function), was prohibited for making misleading statements to the FSA and for providing unclear information to investors, giving advice without being appropriately qualified to do so and failing to record sufficient information about customers before making personal recommendations. A fine would have also been imposed but for Hexley's bankruptcy.

Final thoughts

As highlighted above, the FSA's approach to approving SIF applications came under wholesale review and subsequent improvement in 2008, as part of its Supervisory Enhancement Programme. An increasingly important aspect of being in a significant influence function is one of having the appropriate level of competence to perform a job to which these rules are relevant, rather than just having the requisite degree of integrity and honesty (standards of which, of course, are still expected to be maintained).

An interesting article in the Guardian in September 2011, described at the time, the latest approach from the regulator as regards keeping a watchful eye on senior management: to send FSA Supervision teams to sit in on board meetings of some of the largest financial institutions in the City. It was a move that was clearly a cause for concern at board level about the freeness of speech and decision-making at those meetings. It is apparently not the FSA's intention to attend every board meeting at relevant 'high impact firms', nor is it its desire to interfere, merely to "monitor" the ways in which firms are managed as another part of its regulatory 'toolkit'. It is another example of the intrusive style of financial services regulation now dominant in the UK, which has also seen increasingly intensive interviewing of executives at approved person level by the FSA before approvals to take up post are given. Whilst the regulator may be undergoing a period of major restructuring, during which responsibility for controlled functions will be split between the new bodies as appropriate, its aggressive approach to personal liability and punishing those individuals who fail the system is unlikely to diminish.

Josie Marwick and James Cooper

Northern exposure – class actions in Canada

In 2012, all signs continue to point to Canada, and particularly Ontario, being an active jurisdiction for securities class actions.

Although Ontario's Class Proceedings Act (CPA) was loosely modelled on American legislation, it has important procedural differences strategically favourable to plaintiffs.

Under the CPA, a class action must be certified by the court in order to proceed. The representative plaintiff (and lead counsel) must satisfy the court that certain criteria have been met, including that the class action is "the preferable procedure" for resolving "common issues". Historically cases stumbled at this stage, but recently the judiciary's approach to the test for certification has been set at a low threshold, with the tendency to allow complex issues to go to trial.

Other aspects favourable to plaintiffs are the earlier availability of discovery in Ontario proceedings than in the US and the Ontario court's willingness to recognise country-wide and global classes of plaintiffs, the latter in contrast to the US following the US Supreme Court's *Morrison* decision.

Coupled with these features are important developments in the substantive law. In addition to common law causes of action for misrepresentation, securities claims have received added incentive by the "secondary market" civil liability regime introduced in 2005 into the Ontario Securities Act ("OSA"), since mirrored in most provincial jurisdictions. The OSA deems reliance by investors on misrepresentations, thereby overcoming one of the difficult aspects bringing a class action.

Judicial control over secondary market claims under the OSA is exercised by a leave requirement. The Court must be satisfied that the action must be "brought in good faith", and there must be "a reasonable possibility" that the plaintiff will succeed at trial.

However, the first case to consider this leave provision, *Silver v IMAX Corporation*, established a "relatively low" threshold for plaintiffs to meet, holding as follows:

- The "good faith" component only requires an "honest belief" on the part of the plaintiff that they have an arguable claim.
- "Reasonable possibility" only demands "something more than a de minimus possibility or chance".
- The court also held that so long as there is a "real and substantial" connection between the claims asserted and Ontario, a global class can be certified even if there are similar proceedings in another jurisdiction.

Leave was granted and the action was certified on the basis of both the statutory and common law claims, and was confirmed by the Divisional Court in February 2011. Other recent cases have followed this trend.

Defendants have the comfort that liability under the secondary market claims is capped, both for directors and the corporations in the absence of fraud. As a result, it is now common to couple in the same action both statutory remedies and common law claims, to which no cap applies

Costs are an important consideration in class actions. Contingency fee arrangements are available. However, the "loser pays" rule applies in most jurisdictions, so. representative plaintiffs can be liable for the entire cost award if the action fails. However, that risk can now be transferred by means of third party funding. In *Dugal et al v. Manulife Financial Corporation* (March 2011), the lead plaintiffs obtained court approval of a funding agreement with an Irish litigation funder and an order declaring that it was binding on the class members.

This is not a purely domestic risk. The Toronto Stock Exchange lists approximately 300 international issuers.

It is perhaps not surprising that the number of securities class actions filed in Canada has been higher in recent years than previously. Data compiled by NERA Economic Consulting show that in 2011, 15 new securities class action cases were filed in Canada, more than in any previous year, and exceeding the previous high of 12 filings in 2008. (Nine of the new 15 cases are "Bill 198" cases which include claims in respect of an issuer's continuous disclosure obligations pursuant to Part XXIII.1 of the OSA and/or analogous provisions of other provincial securities acts.)

Only two cases settled in 2011 for total payments by defendants of $58.6 million (of these one action settled for $55 million and the other settled for $3.6 million). This compares to the NERA database which holds data on 35 Canadian securities class actions and for which the average settlement is $110 million (although this is skewed by a large settlement in the Nortel case) and the median settlement is $12.5 million.

As of 31 December 2011 there were 45 active Canadian securities class actions, representing more than $24.5 billion in outstanding claims (including claims for punitive damages).

These numbers still pale in comparison to the exposures in the US. Nevertheless, it remains a trend worth watching.

Roderic McLauchlan

We gratefully acknowledge the input of Robert Patton and his colleagues at NERA for the statistical analysis presented in this article. For more information see Bradley A. Heys and Mark L. Berenblut, "Trends in Canadian Securities Class Actions: 2011 Update -- Pace of Filings Grows, Pace of Settlements Slows", NERA Working Paper, 31 January 2012.

FI and D&O Liability news section

Duties of non-executive directors of investment funds

The judgment of the Grand Court of the Cayman Islands, *Weavering Macro Fixed Income Fund Ltd (in liquidation) v Peterson and Ekstrom*, contains guidance as to what is expected of non-executive directors of a Cayman Islands fund. An action was commenced by the liquidators against the former directors of the Weavering Macro Fixed Income Fund Ltd (Macro). The fund was put into liquidation following the discovery that a high proportion of the assets on the balance sheet were fictitious. The investment manager was Weavering Capital (UK) Ltd (WCUK), controlled by Magnus Peterson, a relative of the directors, which did not have a substantial track record as an investment manager. It was alleged that the directors were in breach of their duties to Macro. It was accepted that the directors were entitled to rely on the exculpatory provision of the Macro Fund's articles of association which provided that directors would be indemnified by the company in respect of any liability incurred as a result of any act in carrying out his functions unless the liability was incurred by wilful neglect or default. The Court held that "wilful neglect or default" meant knowing or intentional breach of duty, or acting recklessly: not caring whether or not the act or omission is a breach of duty. The Court found that the directors were in breach of duty as they had consciously chosen not to perform their duties despite being aware of them. Amongst other things the breaches found by the Court were:

- At the fund formation stage, the directors failed to satisfy themselves that the overall structure of the Macro Fund was consistent with Cayman Islands' industry standards and that the terms of the service providers' contracts (the administrator and auditor) were reasonable and consistent
- The directors failed to ensure that they properly understood the nature and scope of the work that each of the professional service providers were proposing to do and not to do, and that everyone understood the scope of the directors' supervisory role. The Court rejected submissions that it would be enough that the directors satisfied themselves that the lawyers retained on behalf of the promoter/investment manager had prepared the contracts and other relevant documentation
- The Court found that the directors had done nothing more than rubber stamp what they were told about the fund's performance or carried out administrative tasks such as sign documents at board meetings. They did not prepare agendas, ask for reports to be prepared by the administrator, auditors or investment manager, did not review the financial results of trading or ask to see management accounts. A quarterly report was received from the administrator but the directors did not properly consider the contents. The Court found that if the directors had read the reports then they would have discovered that valuable interest rate swaps were being closed out for no reason and that the counterparty to a number of swaps was another company in which the directors were involved and understood to be dormant
- The directors failed to assess and consider whether the execution of side letter agreements were in the best interests of the fund
- Financial statements were signed by the directors without making any attempt to satisfy themselves that it was appropriate to sign them such as seeking any information from the auditors

The Court noted in particular that not even the bankruptcy of Lehman Brothers and the financial crisis was enough to prompt the directors into convening a board meeting or reading the quarterly reports. The Court found that if the directors had not acted in wilful neglect of their duties then they would have discovered the issues with the fund earlier and it would have been put into liquidation. Damages of US$111 million were granted against the directors. Although the facts of this case were quite extreme, it contains useful guidance on directors' duties in this context.

Limitation period in respect of directors' liability to repay loan

In *Brown and Mayberry v Button and others* (2011), the English High Court considered the question of the relevant limitation period in respect of a claim against directors to repay illegal loans. The liquidators of a company claimed against all three directors in respect of sums due under the loan accounts of two directors, Geoffrey Button and James Button, alleging that all three directors were jointly liable in respect of all sums due. The loans had been made in contravention of section 330(2)(a) of the Companies Act 1985 (as was then in force). As all three directors were aware of and approved the loans they came under a duty to indemnify the company in respect of loss or damage resulting from the loans. However, a key issue was limitation, as the proceedings were issued more than six years after the loan payments were made.

The court found that the directors were fiduciaries, and for the purposes of determining the limitation period a breach of fiduciary duty is treated as analogous to a breach of trust. In general a six-year limitation period will apply to claims against fiduciaries, but this will not apply where the claim is in reality a claim to recover trust property. The court therefore held that Geoffrey and James Button could not rely on a limitation defence in respect of the

loans they received. However, the liquidators argued that as the loans were unlawful all three of the directors were under a continuing duty to seek to recover them, and that this continued until the liquidation. The Court rejected that submission and held that the joint obligation on the directors was that contained in section 341(2)(b) of the 1985 Act to indemnify the company in respect of its losses. That obligation arose when the loans were made, and had become statute barred. Therefore the claim against the third director who had not actually received a loan failed.

Breach of fiduciary duty where company has not suffered a loss

In *Towers v Premier Waste Management Ltd* (2011), the director of a company, Mr Towers, had taken a loan of excavating equipment from a client of the company, Mr Ford. The equipment was in poor condition and Mr Towers did repairs and fittings to the equipment, mainly at his own expense. It was an employee of the company, Mr Rafter, who had arranged the loan. The company claimed that this undisclosed and unapproved loan from the company's customer was a breach of Mr Towers' fiduciary duties to avoid conflicts of interest, and not to make a secret profit. The first instance judge found against Mr Towers and he appealed. Mr Towers' contention was that amongst other things the judge had misapplied the test of "a real sensible possibility of conflict" having regard to the facts of the case.

The English Court of Appeal upheld the judge's finding that there had been a real possibility of conflict and a breach of fiduciary duty. The Court found that the company had been deprived of an opportunity to consider whether or not it objected to the diversion of an opportunity offered by a customer to the company. It held that submissions including that Mr Towers did not make a significant profit from the plant which was in poor condition, it would have been of no value to the company, that Mr Towers had no corrupt motive, or that Mr Towers did not deal directly with Mr Ford were irrelevant. The Court of Appeal found that there should be no relief from liability, as it was unreasonable of Mr Towers not to make disclosure so that his co-directors could consider if they objected to the loan. The company had also been wrongly used to pay for the repair of equipment tracks. The appeal was therefore dismissed.

The FOS consults on new fee structure

The UK Financial Ombudsman Service is currently consulting on a new fee structure. The FOS proposes that for the largest users of its service (complex financial groups that send over 2,000 cases a year to the FOS) it should move towards a fee model that represents the actual cost that the business and its users generate for the FOS. A group account would be established and the group would be charged a quarterly case-related fee in advance, with charges adjusted for actual use. For medium and small size users the number of free cases that could be referred to the FOS would increase from 3 to 25. The FOS is proposing to introduce any changes from April 2013.

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Further advice should be taken before relying on the contents of this summary.

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