Summary

Keirar Anna. **Concept and Signs of Object of the Copyright.** — Article.

Article is devoted consideration of such concepts as object of the right, object of civil legal relationship, object of the copyright. The question of a parity of object of the copyright and concept of product is considered. The article have characterized off the basic signs thanks to which product becomes object of the copyright.

Keywords: object of the right, object of civil legal relationship, object of the copyright, product, creativity, novelty, the objective form of product.

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CIVIL LIABILITY OF THE BANKS IN THE SPHERE OF NON-TRADITIONAL BANKING TRANSACTIONS AND SERVICES (THE EXPERIENCE OF THE UNITED KINGDOM)

The present article examines claims which may be made against banks as sellers of sophisticated and complex products such as non-traditional banking transactions and the author will concentrate also on the civil liability of banks. However, especially against the backdrop of the prevailing financial crisis, some of the instruments have or may result in significant liabilities for buyers. Some corporate buyers may accordingly now be inclined to argue that their treasury or finance departments lacked the detailed knowledge required for a full understanding of these products and that, as a result, reliance was placed on the seller to provide an explanation of the merits of the arrangements [5, 471]. To place the legal category in its proper context, we will begin an outline of the way banking liability is controlled in the United Kingdom.

Banks (and other financial institutions) run the risk of being caught up in the fraud of third parties because of their position as the holders and transmitters of funds. A bank becomes the potential object of litigation where it has provided banking services to the persons behaving in a fraudulent or improper manner. The claim is that the bank has in some way become implicated in the wrongdoing.

One or more banks will almost inevitably be involved in every fraud of any size, if only as the means of money transmission. Funds necessarily move through the banking system. This put banks in the front line. It is a fact recognised by the importance attached to the institutional precautions against money laundering. Banks may also exposed to liability when providing services, if by so doing they are seen to have been in some way accessory to or assisted in the fraud.

Regulations 74–79 of the 2009 Regulations [9] contain various provisions dealing with the liability of the payment service provider in relation to the execution of transactions.

Specifically:

(a) A payment service provider may supply to his user a code (referred to in the

2009 Regulations as a 'unique identifier') for his payment account. Where a transaction is executed in accordance with such a unique identifier, it is deemed to have been correctly executed by the payment service provider, so that it can have no liability to the payer in respect of that transaction. Where the user provides an incorrect unique identifier, the provider is likewise not liable for non-execution or defective execution of the requested transaction. So, if the payer provides an account number and a sort code, the bank has no liability for transferring funds to that account even if the account number does not correspond to the name of the intended payee. The provider must, however, use his reasonable endeavours to recover any funds which have been disbursed, and may charge a fee for such recovery if the framework agreement so permits;

(b) Where a payment transaction is initiated by the payer, his service provider is strictly liable for its execution. The result is that the payment service provider must refund the amount of the transaction to the payer unless it can prove that the amount was actually received by the payee's service provider. In addition to the refund obligation, the payer's service provider must make immediate efforts to trace any payment which appears to have gone astray, and must inform the payer of the outcome;

(c) if, in such a case, it can be proved that the funds reached the account of the payee's service provider, then that service provider must make that amount available to the payee and credit his account accordingly;

(d) The position is little different where the payment order is initiated by the payee, as in the case of a direct debit. The payee's provider is liable for the correct transmission of the payment order within the time limits necessary to secure payment on the due date. Where required the payee's service provider must chase up any missing payment and advise the payee of the outcome. If the payee's service provider can demonstrate that it is not liable under these provisions (i.e. that it sent the correct information to the payer's service provider in order to initiate the payment), then any liability for a failure or defect in the execution of the payment order is placed onto the payer's provider. In that event, the payer's provider must refund the relevant amount to the payer and restore the payer's account to its previous position;

(e) in addition, a payment service provider (usually, that of the payer) will be liable to its user for any charges or interest for which the user becomes liable as a result of the non-execution or defective execution of a payment transaction. It may be noted that there is no cap on this liability, either as to time or as to amount and, since this statutory right to compensation, the usual obligation to mitigate losses in a contractual context will not apply. Nevertheless, it is submitted that the liability of the payment service provider is limited to the interest and charges suffered by the payer until the date on which he notifies the service provider of the defective or non-execution of the payment order and, since the payer is obliged to notify the provider without undue delay when it becomes aware that the transaction has not been executed, this would appear to provide an effective cap on the period of the providers liability. But the payer may become responsible

for significant rates of interest as a result of the non-payment, and it seems that there is no cap on the service provider's liability in this sense;

(f) a payment service provider is allowed a right of indemnity against intermediaries responsible for errors which result in an obligation on the provider to reimburse or compensate his user;

(g) finally, it is not generally possible for an obligation to pay money to be terminated by reason of the application of the doctrine of frustration. However, a payment service provider is specifically absolved from liability in the event of force majeure, that is, when non-performance of an obligation under the above provisions results from '... abnormal and unforeseeable circumstances beyond the person's control, the consequences of which would have been unavoidable despite all efforts to the contrary...'. In addition, a service provider is excused if he is unable to perform an obligation as a result of some countervailing duty under Community or national law (e.g. as a result of the provisions of laws dealing with money laundering or terrorist financing) [5, 108 109].

In fact it is likely that the buyer's or the customer's claim will be formulated under a permutation of the following headings:

1) a breach of contractual duty to advise;

2) negligent misstatement; or

3) breach of fiduciary duty.

It is true to say that the UK law is based on the precedents and the most important case in the sphere of these headings if they were all pleaded is JP Morgan Chase v Springwell Navigation Corp [12]. The approach is consistent with the broader view that a bank does not generally owe a duty to advise the customer on the merits of any transaction which the customer is to enter into with the bank or more usually with a third party with the assistance of funding provide by the bank, unless the bank has expressly or impliedly assumed an advisory obligation [5, 473]. Courts in the United States have also tended to view that statements made in the context of transactions of this kind are more likely simply to describe the product, and are not intended to amount to formal representations on which the client is entitled to rely.

As might be expected, the position differs where the bank is acting as an adviser or manager in relation to the client's portfolio of investments. In such a case, the bank will plainly owe a duty to act with reasonable care [5, 476].

Prof. Hooley reported that a constructive trust claim is often the means by which the defrauded party seeks to hold the bank liable. In theory, other causes of action may be available against a bank, but in practice it is a constructive trust claim that is most likely to be relied on by the defrauded party. Other causes of action include:

• Where a bank still holds funds that represent the proceeds of fraud, the defrauded party may be able to trace those funds in equity and assert a proprietary claim to them. But such a tracing claim is lost where the funds have been paid into an overdrawn account or have been paid away by the bank.

• Where a paper instrument is collected by a bank for a customer with no title,

the bank may be liable in conversion to the true owner of the instrument, although the bank usually has a complete defence to the claim where it can show that it has been negligent and has followed standard banking practice. Furthermore, the tort of conversion does not apply where money are transferred by electronic means.

• As between the paying bank and its own customer, it is doubtful that a constructive trust claim will succeed unless the bank was in breach of its contractual duty of care in executing its customer's payment instruction (in which case a separate claim in constructive trust becomes redundant): and a bank is obliged to follow payment instructions unless on notice fraud.

• As regards a non-customer, there is a general reluctance to impose a duty of care in tort on a bank receiving funds [6, 679].

Prof. Sealy LS defines banks civil liability into two types. The fist type of liability is generally known as liability for 'knowing receipt'. The second type of liability was known as liability for 'knowing assistance' until a change in the law in 1995 made more appropriate to refer to it as liability for 'dishonest assistance'. In both cases liability is personal and not proprietary. These two types of liability are fundamental different.

The basis of liability in a case of knowing receipt is quite different from that in a case of dishonest assistance. One is receipt-based liability which may on examination prove to be either a vindication of persistent property rights or a personal restitutionary claim based on unjust enrichment by subtraction; the other is a fault-based liability as an accessory to a breach of fiduciary duty.

However, until the issue is authoritatively decided upon by the higher courts, the precise relationship between liability under the receipt category of constructive trusteeship and the law of restitution remains unclear and uncertain under the English law.

Liability for dishonest assistance will be imposed on anyone who has dishonesty been accessory to, or assisted in, a disposition of proprietary breach of trust or other fiduciary duty obligation. In such a case the accessory or assister is traditionally described as a 'constructive trustee' and said to be liable to account as a constructive trustee. However, as the accessory or assister does not have to receive any trust property for this type of liability to arise, it seems misleading to describe him as a trustee at all.

There are four requirements for accessory liability to be imposed:

1) there must have been a trust or other fiduciary relationship;

2) there must have been a misfeasance or other breach of trust (dishonest or fraudulent);

3) the person upon whom the liability is to be imposed must, as a matter of fact, have been accessory to, or assisted in, he misfeasance or breach of trust;

4) the accessory must have been dishonest.

In many cases banks will not find it easy to avoid the charge that they were accessory to or assisted in a breach of trust, especially one that involves the fraudulent misapplication of trust funds. The provision of banking services to persons behaving in fraudulent or improper manner often exposes a bank to potential

liability under his head. The misapplied trust funds will usually be held in bank accounts and moved between bank accounts. The bank that hold those accounts, as well as any other bank involved as an intermediary in the funds transfer process, run the risk of being accused of providing assistance to the dishonest fiduciary [6, 683].

The liability of a recipient of property disposed of in breach of trust is generally known as liability for knowing receipt. Liability is personal and is to restore the value of any property received in breach of trust (for the purpose of claiming a contribution from another wrongdoer under the Civil Liability (Contribution) Act 1978 the remedy for knowing receipt is deemed to be 'compensatory') [8].

Ewan Mc Kendrick is being to suggest that there are three requirements, all of which must be met, for liability to arise under this category. First, a disposal of his assets in breach of fiduciary duty, secondly, the beneficial receipt by the defendant of assets which are traceable as representing the assets of the claimant and thirdly, knowledge on the part of the defendant that the assets he received are traceable to a breach of fiduciary duty.

Disposal of assets is concerned with that of the person who receives for his own benefit trust property transferred to him in breach of trust. He is liable as a constructive trustee if he receives with notice, actual or constructive, that it was trust property and that the transfer to him was a breach of trust; or he received it without notice but subsequently discovered the facts. In either case he is liable to account for the property, in the first case as from the time he received the property and in the second as from the time he acquired the notice.

It seems to follow from the above discussion that a sophisticated client will frequently encounter difficulty in establishing recourse to a bank which has sold him a complex financial product, at least provided that the bank has not specifically misrepresented the position to him and he receives documentation which contains a fair and accurate description of the product before he became committed to the transaction. Even if a the bank is found to be in breach of a contractual or other duty, the client may still have to overcome obstacles to demonstrate that such advice was the proximate cause of his loss.

The sphere if bank's liability is also regulated by the Banking Code of the UK, although the legal system of the UK is not codified, the certain types of Codes exist, which are concerned as legal Acts. The Code was created as a result of recommendations made by the Jack Committee which had been established to 'examine the statute and common law relating to the provision of banking services within the United Kingdom to personal and business customers' [1, 122].

The Banking Code plays a great role of self-regulation more generally in the control of the relationship between customer and bank. It has brought advantages for the consumer, as well as allowing a degree of flexibility for the banking industry [7]. The Government has shown its confidence in self-regulation through some provisions of the Enterprise Act 2002 [9].

It is necessary to emphasize that it is not always obvious that breach of provisions of the Banking Code will give rise to civil liability. There will be some cases where

the provisions of the Banking Code may be said to constitute trade usage, or otherwise constitute an implied term of the contract. In other cases, and perhaps more commonly, the Code will have no effect upon the legal responsibilities owed by the bank to consumer. The Code may be taken to represent good practice, but not necessarily to represent, nor even less to create, a legal duty [1, 125].

As it can be seen several matters run through in the above examined article but a lot of points of banks liability still remain unclear and uncertain. Improving civil liability of the banks is unquestionably important, but it should be remembered that there will always be a vital role for regulation where consumers should be aware of the deeds and transactions they conclude with banks.

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Summary

Mykhailiuk G. O. **Civil Liability of the Banks in the Sphere of Non-Traditional Banking Transactions and Services (the Experience of the United Kingdom).** — Article.

The article is devoted to the analysis of civil liability of the banks in the sphere of non-traditional banking transactions and services according to the experience of the United Kingdom. The existing main problems in the sphere of bank's civil liability are stated, the areas, in which priority directions and drafts in this sphere of civil legal regulation are defined. The analysis is conducted with taking into account the existent legal norms in the legislation and case law of the United Kingdom through this question.

Keywords: civil liability, execution of transactions, claim, contractual duty, breach of fiduciary duty.

Анотація

Михайлюк Г. О. **Цивільно-правова відповідальність банків у сфері здійснення нетрадиційних банківських операцій та послуг (досвід Великобританії).** — Стаття.

Стаття присвячена аналізу цивільно-правової відповідальності банків у сфері здійснення нетрадиційних банківських операцій та послуг за досвідом Великобританії. Зазначаються основні проблеми, які існують у сфері цивільно-правової відповідальності банків, окреслюються області, в які повинні бути спрямовані пріоритетні напрями та розробки у даній сфері цивільно-правово-

го регулювання. Аналіз проведений з урахуванням існуючих правових норм у законодавстві та прецедентному праві Великобританії з цього питання.

Ключові слова: цивільно-правова відповідальність, виконання операцій, позов, обов'язки за договором, порушення фідуціарних обов'язків.

Аннотация

Михайлюк Г. О. **Гражданско-правовая ответственность банков в сфере осуществления нетрадиционных банковских операций и услуг (опыт Великобритании).** — Статья.

Статья посвящена анализу гражданско-правовой ответственности банков в сфере осуществления нетрадиционных банковских операций и услуг согласно опыту Великобритании. Указываются основные проблемы, которые существуют в сфере гражданско-правовой ответственности банков, определяются области, в которые должны быть направлены приоритетные разработки в этой сфере гражданско-правового регулирования. Анализ произведен с учетом существующих правовых норм в законодательстве и прецедентном праве Великобритании по этому вопросу.

Ключевые слова: гражданско-правовая ответственность, исполнение операций, иск, обязательства за договором, нарушение фидуциарных обязательств.

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ЖИТЛОВО-БУДІВЕЛЬНИЙ КООПЕРАТИВ ЯК КООПЕРАТИВ СПОЖИВЧОГО ТИПУ

У зв'язку із переходом України до ринкових відносин і приватноправових засад задоволення житлових потреб громадян, в умовах низької середньої забезпеченості житлом та недоступності іпотечного кредитування для широких верств населення з одночасним скороченням обсягів державного фінансування житлового будівництва актуальним є дослідження житлово-будівельного кооперативу як організаційно-правової форми для самостійного, ініціативного вирішення проблеми житла. Застарілість актів правового регулювання житлово-будівельних кооперативів зумовлює необхідність всебічного та ґрунтовного вивчення їх правового становища з позицій сучасних соціально-економічних та правових реалій і розробки пропозицій щодо його вдосконалення.

Хоча висвітленню теоретичних і практичних аспектів функціонування кооперативу, окремих його типів і видів (споживчих, кредитних, сільськогосподарських виробничих та обслуговуючих) присвячено чимало наукових праць (С. Г. Бабенко, О. Г. Волкової, О. В. Гафурової, С. Д. Гелея, Я. З. Гаєцької-Колотило, В. В. Гончаренко, А. В. Зеліско, В. В. Зіновчука, О. Зубатенко, І. М. Кучеренко, В. М. Масіна, Т. П. Проценко, В. І. Семчика, О. В. Сергійко, Ю. С. Шемчушенко, В. Уркевич та інших), житлово-будівельні кооперативи як різновид кооперативів не були об'єктом комплексного дослідження вчених в Україні. Окремі правові аспекти їхньої організації та діяльності досліджували: А. Боровська, І. Величко, М. К. Галянтич, В. Добровський, Н. Доценко-Бєлоус, О. Зубатенко, В. Кобилянський, І. М. Кучеренко, О. Кушина, І. Львова, В. Луцюк,