

Bank held to owe duty of care to secondary market bondholders in “Golden Belt” Islamic bond case

In **Golden Belt v BNP Paribas [2017] EWHC 3182 (Comm)**, Males J. held that BNP Paribas, the arranger and lead manager of a Sukuk, owed a duty of care, which it breached, to a number of investment funds who purchased certificates in an after-market.

The Fortress Group and Cyrus Partners LLC all purchased certificates in the Sukuk (a form of Islamic bond, structured so as to avoid the charging of interest which is prohibited by Shariah law). However, when the Sukuk defaulted, the funds found that they could not recover under a promissory note, which formed a crucial part of the Sukuk documentation in that it gave the funds a right through an SPV to secure judgment through the commercial court in Saudi Arabia. This was because the promissory note was not compliant with Shariah law: it had not been signed in “wet ink” and it was not appropriately witnessed.

The trial, which took place in October and November 2018 before Mr Justice Males in the Financial List of the Commercial Court, concerned whether BNP Paribas, as arranger and lead manager of the Sukuk, owed a duty of care to the funds to take reasonable steps to ensure that this key document in the Sukuk was properly executed.

Males J. held that BNP Paribas did owe such a duty to the funds on the specific facts of the case. BNP Paribas had assumed a duty to take reasonable steps to ensure that the promissory note was properly executed. It took it upon itself to arrange for the signing of the promissory note and it had been advised that the slightest discrepancies in the promissory note could jeopardise the entire transaction.

BNP Paribas breached that duty. In the Judge’s words, BNP Paribas “dropped the ball” when it came to the arrangements for the execution of that vital document. It had failed to take reasonable care in making the signing arrangements with the upshot that the promissory note came to be signed with no BNP Paribas oversight. As events transpired, the promissory note was not enforceable in the Saudi courts, because it had been signed by an inkjet printer not in “wet ink” by the hand of the promisor.

BNP Paribas unsuccessfully sought to rely on various disclaimers in the Sukuk documentation because they did not relate to the arrangement of the promissory note itself, a task for which BNP Paribas had assumed responsibility and had agreed to perform. BNP Paribas also failed in its arguments that it could not owe a duty to certificate holders because they were “secondary purchasers”, i.e. they were too distant as buyers in an after-market.

The issue of duty of care (although not breach or causation) is now going to the Court of Appeal. If the funds uphold the Judgment, a second trial on quantum will follow.

Jeremy Brier was junior counsel for the successful funds, instructed by Stewarts Law, and led by Nigel Tozzi QC.