The Law of Finance

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Introduction

Book One
Principles of the Law of Finance

Part 1: An Ordering of the Law of Finance

Part 1 aims to set out what is meant by “the law of finance” and the manner in which the rest of the book is structured. This includes an analysis of the synthesis between substantive law and regulatory norms, such that the latter informs the development of the former.

Chapter 1: The components of the law of finance
- The ambit of finance
  - The definition of “finance”
  - Finance as the wherewithal to act
  - From domestic banking to cross-border transactions
- Constructing a law of finance
  - Contract, property and tort
  - A synthesis of law and regulation
  - The scope of substantive statute and case law
  - Domestic and international legal norms
  - Law supplemented by market practice
- The six categories of finance
  - The usefulness of the division
  - Banking
  - Lending
  - Stakeholding
  - Refinancing
  - Proprietary finance
  - Collective investment
- Themes in the international law of finance
  - Risk
  - Power
  - Globalisation
  - Dematerialisation
  - Privatisation of dispute resolution

[15 pages]
Chapter 2: The legal nature of money and of financial instruments

The nature of money
Cash
Money in bank accounts
The particular context of electronic bank accounts
Telegraphic bank transfers across borders
Money as a means of establishing value
Market value
The foreign exchange context
Intrinsic value
Financial instruments
What is a financial instrument
Financial instruments as property

[10 pages]

Chapter 3: The relationship between substantive law and financial regulation

The distinction between law and regulation
How regulatory norms may inform legal norms
The actions of the reasonable banker
What bankers can be deemed to know
Bankers’ liability for clients’ wrongdoing
The importance of this synthesis in the development of the law of finance

[10 pages]

Part 2: Substantive legal concepts in the law of finance

Part 2 sets out the fundamental concepts on which the law of finance will be built: in effect a marriage between contract, property and tort (and other wrongs). Of particular significance is the discussion of “fiduciary fund management” which will cover the liabilities fund managers generally, portfolio investment strategies, and other activities by intermediaries. The law relating to fiduciaries – including the general law on trustees’ and agents’ obligations – is particularly significant in this context. Finally, the core principles of private international law, as they relate to global financial markets, are set out. All of these discussions are intended to facilitate the teaching of finance law by setting out core principles at the outset; they are intended to assist practitioners by collecting core principles in one place and so to facilitate ease of reference. This beginning is then continued in Parts 4 through 6.

Chapter 4: Fundamental legal concepts: contract, property and wrongs

That English law is built on fundamental concepts applied in particular contexts
The law of contract
The law of property
The law of tort and of wrongs more generally

[10 pages]

Chapter 5: Fiduciary fund management

Definition of a “fiduciary”
The context of portfolio fund management
Circumstances in which financial institutions may be fiduciaries
The obligations of fiduciary officers in general terms
   Rule against unauthorised profits
   Constructive trust of secret profits
   Bribes
   Authorisation
   Confidential information
   Corporate opportunity doctrine
Self-dealing principle
Conflicts of interest of market makers
The obligations of trustees
   The irreducible core content of trusteeship
   The investment obligations of trustees under the Trustee Act 2000
      The general power of investment
      The statutory duty of care
      Standard investment criteria
      The obligation to take professional advice
      Express trust provisions
      Delegation of trustees’ responsibilities
   The limitation of trustees’ liabilities
The obligations of agents
   The nature of agency
   The liability of the principal for the acts of the agent
   Actual and ostensible authority
   The limitation of agents’ liabilities
Themes in fiduciary fund management

Chapter 6: Conflict of laws
   The significance of private international law in global financial markets
   Choice of law
   Proper law of a contract
   Actions in relation to movable property
   Jurisdiction

PART 3: COMPLIANCE WITH REGULATORY NORMS IN FINANCE

Part 3 considers the principal regulatory norms established by the Financial Services and Markets Act 2000 and the FSA Rulebooks which govern financial activity in the UK in general. This book does not propose to deal with regulation in detail – instead it is a book which focuses primarily on substantive law – but it will outline the key concepts in this Part 3. There is also a contextual discussion of EC and International initiatives to regulate financial activity as it informs the practice of that activity.
Chapter 7: The Financial Services and Markets Act 2000 regime
The economic objectives of the FSMA 2000
The establishment of the Financial Services Authority
The general duties of the FSA
The powers of the FSA
Regulated activities under FSMA 2000

Chapter 8: Client management
FSA Conduct of Business Rules
The need to allocate clients into appropriate categories
Suitability
  Suitability of the treatment of a client
  Suitability of the product for the client
Client money

Chapter 9: Money laundering
The context of money laundering regulation
“Know your client” regulation
Recovery of laundered money under substantive law

Chapter 10: Financial promotion
The context of marketing investment products
The FSMA Financial Promotion regime
Liability for unlawful financial promotion

Chapter 11: Market abuse and insider dealing
The FSMA Market Abuse regime
The FSMA Tribunal
Insider dealing

Chapter 12: EC regulation
The principles underpinning EC regulation
Banking Co-ordination Directives
Investment Services Directives
Solvency Ratio Directives
Capital Adequacy Directives

Chapter 13: International regulation
The context of international financial regulation
Basle
PART 4: CONTRACT

Part 4 marries the discussion in Parts 2 and 3 and then considers them in terms of the substantive law of contract. Most of the substantive law relating to financial transactions is concerned with the law of contract in some way. The discussion is organised in such a way that legal principles are identified as relating to specific problems in the practice of the law of finance: this will enable discussions of specific financial products in Book Two to refer back to these principles and so keep those later discussions concise.

Chapter 14: Formation of contracts

The contractual negotiation process
   Between market counterparties
   Between professional and retail client
Offer and acceptance
Consideration
Hierarchies of express contractual terms
Implied terms
Good faith in the creation of contracts
Time and place of the creation of a contract
Standard form contractual terms

Chapter 15: Validity of contracts

Invalidating factors at general law
   Mistake
   Misrepresentation
   Fraud
   Illegality
   Gaming contracts
   Insurance contracts
Capacity and powers of the parties
   Individuals
   Companies
   Partnerships
   Trusts
Contracts conducted through agents
Unfair contract terms
Unconscionable bargains
Chapter 16: Performance of contracts
- Proper performance of contractual obligations
- Frustration of contract
- Specific performance of contracts
- Remedies for breach of contract
- Payment netting

Chapter 17: Termination of contracts
- Express contractual provisions effecting termination
- Recovery of payments made
  - Actions for money had and received
  - Actions for damages
  - Actions for compensation
  - Rescission
- Recovery of property
  - Actions to assert title
  - Tracing claims (cf. Ch. 21)
- Recovery of loss in general terms

PART 5: PROPERTY

As with Part 4, only Part 5 considers specifically the manner in which the substance of financial transactions will constitute property in themselves and, particularly significantly, how participants in financial transactions take security. This latter topic is of particular importance in practice and remains a key feature of many postgraduate courses.

Chapter 18: Ownership of money
- The legal nature of money
- The particular problem of taking proprietary rights in electronic money
  - Certainty of subject matter
  - Loss of the right to trace
- Calculating loss in relation to currency

Chapter 19: Ownership of financial instruments
- Financial instruments as choses in action
- Complex financial instruments as bundles of choses in action
- Taking title in choses in action
- Taking title in the benefits to flow from a financial instrument

Chapter 20: Taking security and insolvency in financial transactions
- The fundamental techniques of taking security in financial transactions

[25 pages]

[35 pages]
Retention of title
Fixed charge
Floating charge
Charges over book debts
Express trust
Quistclose trust
Pledge
Collateralisation and pre-payment (cf. Ch 41)
Guarantee
The nature of insolvency English law (in outline)
Set-off on insolvency

Chapter 21: Tracing and proprietary claims
Actions to recover property or to claim substitute property
Specific restitution
Tracing at common law
Tracing in equity
Equitable claims and remedies
   Constructive trust
   Lien
   Equitable charge
   Subrogation

Chapter 22: Fraud and constructive fraud
Deceit
Fraudulent misrepresentation
Undue influence
Duress

Chapter 23: Negligence
Negligent misstatement
Mispredictions
Liability of financial intermediaries

Chapter 24: Breach of trust
Breach of fiduciary duty
   Liability of trustee for breach of trust

PART 6: WRONGS

As with Part 4, only in relation to tort and to other wrongs (such as breach of trust and equitable fraud).

Chapter 22: Fraud and constructive fraud
Deceit
Fraudulent misrepresentation
Undue influence
Duress

Chapter 23: Negligence
Negligent misstatement
Mispredictions
Liability of financial intermediaries

Chapter 24: Breach of trust
Breach of fiduciary duty
   Liability of trustee for breach of trust
Breach of trust as a fund manager
Breach of fiduciary duty generally
Personal liability to account for participation in a breach of trust
   The two heads of liability
   Extent of the liability to account
   Requirement of a breach of trust
Dishonest assistance in a breach of fiduciary duty
   Assistance
   Dishonesty
Knowing receipt of property in breach of fiduciary duty
   Receipt
   Knowledge
Liability for breach of trust generally in the corporate context
   Liability of a financial institution for the actions of an employee
   Liability of employee for actions of another
Tracing (cf Ch. 21)

[30 pages]
[Maximum 480 pages in total in this Book One]

Book Two
Modern Financial Techniques in Legal Context

Part 7: Banking

Part 7 is concerned with what might be termed traditional English banking law, together with a consideration of the particular issues which arise in relation to cross-border banking. The discussion divides between the relationship between banker and customer (including the maintenance of accounts), then the nature of assets used by banks, then the various methods by which payments are made in banking transactions, and finally cross-border banking.

Chapter 25: Banker and customer relationship
   The nature of the contract between banker and customer
      The debtor-creditor relationship
      Implied terms
      Exclusion clauses
   The banker’s duty of confidence
   The banker as a trustee
   Bank accounts
      Current accounts
      Deposit accounts
      Issues relating to joint accounts
      Overdrafts and loan accounts
   Banker’s rights relating to the treatment of moneys
      The banker’s lien
Chapter 26: Negotiable instruments, cash and bills of exchange
  Negotiable instruments
  Cash
  Bills of exchange

Chapter 27: Payment methods
  Payment methods
  Cheques
  Debit cards
  Credit cards
  Electronic payment systems

Chapter 28: Corporate cross-border banking
  Letters of credit
  Regulation of banks acting across borders
  Protection of customers
    Access to assets in different jurisdictions
    Injunctions in the international context

PART 8: LENDING

Part 10 considers a range of transactions concerned with lending of money, whether under an ordinary contract of loan or by means of the issue of a security in relation to that loan. Lending in this context relates to ordinary bank lending as well as to syndicated lending from a number of lenders. Foreign exchange transactions considers the particular context of lending money in different currencies from sterling.

Chapter 29: Ordinary lending
  The contract of loan
  Loan covenants

Chapter 30: Syndicated lending
  The nature of syndicated lending
  Documentation issues
Chapter 31: Bonds
- The commercial nature of bond and Eurobond issues
- Eurobonds admitted to the Official List
- Official listing of securities (cf Ch 35)
- The role of the Eurobond trustee
- Covenants in Eurobond issues
- The nature of debentures

[20 pages]

Chapter 32: Foreign exchange transactions
- Issues relating to loans in foreign exchange markets
- Cross-currency borrowing
- Cross-currency swaps

[15 pages]

PART 9: STAKEHOLDING

Part 11 is concerned with the situation in which an individual acquires an ownership stake in the asset acquired – the specific example considered here being the ownership of shares in an ordinary company.

Chapter 33: Rights of shareholders in ordinary companies
- The legal personality of a company
- The purposes of shareholders in ordinary companies
  - Institutional fund managers
  - Return on capital by way of dividend
  - Speculative return on sale of the capital asset
  - Shell and holding companies
- The rights of shareholders in ordinary companies
  - The right to participate on a winding-up
  - The right to receive a dividend
  - The competence of directors in relation to the conduct of the company’s affairs
  - The vires of the company
  - The rights of minority shareholders and the rule in Foss v Harbottle

[20 pages]

Chapter 34: Issues of shares
- The manner in which shares are issued
  - Types of share issue
  - Marketing securities
  - Promoters
- Civil liability for the preparation of a prospectus
  - The golden rule in relation to prospectuses
  - Rescission in relation to issues of shares
  - Compensation under s 90, FSMA 2000
- Criminal liability for the preparation of a prospectus
Chapter 35: Official listing of securities

The offer of securities to the public
EC Directives on the listing of securities
Listing Rules and the role of the Competent Authority
Admission to listing
  The application procedure
  Sponsors and listing agents
  Refusal of listing
  Admission to the Official List
Listing particulars
  The requirement for a prospectus or listing particulars
  Publication of the prospectus
  The contents of a prospectus
  The obligation of disclosure
  Authorisation to omit information
  Persons responsible for the prospectus
Obligations imposed on the issuer by the Listing Rules
The Model Code
Discontinuance and suspension of listing

Chapter 36: Financial derivatives

The basic techniques of derivatives
  Forwards
  Options
  Swaps
  Innovation based on these techniques
The commercial purposes of derivatives
The documentation architecture
  Confirmations
  Master Agreements
  Events of default and termination events
  Taking security (cross-reference to Ch. 41)
Liability of sellers of complex derivatives products

PART 10: REFINANCING

Part 12 is dubbed “refinancing”, as will be explained in Ch 1, on the basis that it enables the contracting parties to alter some existing financing obligation. So, for example, interest rate swaps (in the financial derivatives discussion) permit the recalibration of obligations to pay interest, and asset securitisation enables the borrower to use income receivables to generate a capital gain.
Case study: the local authority swaps cases [40 pages]

Chapter 37: Asset securitisation

The structure of a securitisation transaction
- Loan to acquire receivables
- Credit
- Saleability
- True sale
- Further legal limitations on securitisations

Documentation
- Funding loan documentation
- Transfer agreement
- Administration agreement
- Credit enhancement structure
- Security trust deed

Specific legal issues
- Assignability of the receivables
- Characterisation of the security for the transaction
- The solvency of the seller [30 pages]

Part 11: Proprietary finance

Part 13 considers a range of financial transactions which are loosely organised around the acquisition of identified items of property, where the “finance” refers to the wherewithal to acquire that asset by means of mortgage or asset financing; or alternatively to the use of assets to provide speculative or other return, as with stock-lending or repo transactions; or the use of assets to provide security for some underlying transactions, as with collateralisation or margin credit.

Chapter 38: Mortgages

The nature of a mortgage
Mortgages of land under the Law of Property Act 1925
Mortgages of chattels (cf. Ch 39)
Equitable mortgage
The equity of redemption
Mortgagee’s remedies
  Possession
  Sale
Undue influence
  Misrepresentation
  Actual undue influence
  Presumed undue influence
  Vitiating consent or unconscionability
  Setting aside the mortgage
Unconscionable transactions
Chapter 39: Asset leasing
The nature of asset leasing
The similarity to mortgages and problems with re-characterisation
Retention of title
Sale and leaseback
  Structure of sale and leaseback transaction (cf Ch 40)
  Documentation
Finance leasing
  Regulation
  Warranties by manufacturer of asset
  Leveraged leases
  Guarantees
  Sub-leasing
  Documentation
Hire purchase (in outline)

Chapter 40: Stock-lending and “repo” transactions
The nature and purpose of stock-lending transactions
The possible structures of stock-lending or “repo” transactions
  Outright transfer with right to receive property of like kind
  Obligation to maintain specific asset transferred
  Outright transfer with credit enhancement or collateralisation
Documentation

Chapter 41: Collateralisation
The structure of collateralisation agreements
  Trust
  Pledge
  Registrable charge
Issues with the use of securities as collateral
  The nature of securities issued under a global note
  Settlement of securities
  Delivery of securities
  Certainty of subject matter
The netting and risk management benefits of collateralisation structures
The efficacy of collateral agreements as security arrangements
**PART 12: COLLECTIVE INVESTMENT ENTITIES**

Part 14 is concerned with the entities used by ordinary retail clients when seeking to invest their own money. In essence, it cherry-picks these areas from my *The Law on Investment Entities* (Sweet & Maxwell, 2000). The theory is that all investment entities are built on combinations of property rules (especially trusts) and contract rules (e.g. partnerships) to construct means of holding investment capital in common. This has led to ordinary companies, unit trusts, friendly societies and co-operatives in English law.

**Chapter 42: The use of trusts, partnership and companies in investment**
- The nature of “investment”, as opposed to the conduct of a business
- The use of contract and property to achieve investment goals
- The distinction between investment, property management and a business
- The development of companies from trust and partnership
- The rights and liabilities associated with trusts
- The rights and liabilities associated with partnerships
- The rights and liabilities associated with companies

[15 pages]

**Chapter 43: Collective investment schemes**
- The definition of “collective investment schemes”
  - The UCITS Directive
  - The FSMA 2000
- Unit trusts
  - The commercial structure of the unit trust
  - The unit trust as a trust
  - The obligations of the scheme manager
  - The obligations of the trustee
  - The rights of participants
- Open-ended investment companies
  - The commercial structure of the open-ended investment company
  - The obligations of the Authorised Corporate Director
  - The obligations of the depositary
  - The rights of participants
- Overseas schemes

[30 pages]

**Chapter 44: Friendly societies**
- The historical development of friendly societies
- Unincorporated associations in general terms
  - Founded on contract, not trust
  - The ownership of scheme property
  - Winding up unincorporated associations
- The commercial development of friendly societies
- Unincorporated friendly societies
  - The definition of a “friendly society”
The relationship between the members and the society
The management of friendly societies
Winding up
Incorporated friendly societies after 1992
The process and effect of incorporation
Conversion of existing friendly societies
The purposes and powers of a friendly society
Winding up a friendly society
Registration as a friendly society
Regulation of friendly societies by FSA
The ambit of FSA regulation
The maintenance of prudent management
The conduct of investment business
The conduct of insurance business

[15 pages]

Chapter 45: Co-operatives and credit unions
Industrial and provident societies
IPS as co-operatives
The requirement of activities for the benefit of the community
The rights of members
The duties of officers
Credit unions
The nature of a credit union
The common bond
The rights of members
The duties of officers
Control of assets by members without ownership of any thing
The future for co-operatives and credit unions

[15 pages]

Chapter 46: Occupational pension funds
The nature of an occupational pension fund scheme
The relationship between the parties
The rights of the beneficiaries
Beneficiaries are not volunteers
The relationship of the employer to the beneficiaries
The relationship of the employer to the trustees
The obligations of the trustees
The obligations to perform the trust
The duty to act in the best interests of the beneficiaries
The duty to act with reasonable care
Duties in relation to the management of the scheme
The duty to invest
The Minimum Funding Requirement
Equal treatment
Title to surpluses
Penalties for mismanagement
The role of OPRA
Powers of amendment
Termination of an occupational pension scheme

[30 pages]

[Maximum 480 pages total for this Book Two]