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Banking Briefing

Banking and financial services litigation: 2022 in review and 2023 in prospect

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A number of key decisions from the English courts in 2022 illustrate the litigation trends that are likely to have implications for the financial services industry in 2023 and beyond (see box *"Cases to watch in 2023"*).

Litigation arising out of financial crime

Claims centred on alleged breaches of the *Quincecare* duty continued to feature prominently in 2022. In *Federal Republic of Nigeria v JPMorgan Chase Bank, NA,* the High Court held that the claimant had failed to establish that payment instructions given to the bank by senior Nigerian officials, which the bank then executed, had in fact been a fraud on the claimant *(12022] EWHC1447 (Comm); see News brief "Quincecare duty: further guidance for banks and their customers", www.practicallaw.com/w-036-3697*). Even if there had been a fraud, the bank was not on notice of the fraud, and had therefore not breached its *Quincecare* duty.

In *Royal Bank of Scotland International Ltd v JP SPC 4 and another,* the Privy Council confirmed that the *Quincecare* duty is limited to protecting customers and does not extend to a beneficial owner that sits behind the account owner *(12022) UKPC 18*). And in *Stanford International Bank Ltd (in liquidation) v HSBC Bank plc,* the Supreme Court upheld the Court of Appeal's decision to strike out *a Quincecare* claim on the basis that, even if payments to the claimant's creditors had been paid out in breach of the defendant's *Quincecare* duty, the claimant had not suffered a monetary loss *(12022] UKSC 34; see News brief' Quincecare duty: keeping it on the straight and narrow", this issue*).

The courts also considered the liability of banks in the case of authorised push payment (APP) fraud, that is, a victim being deceived into instructing their bank to transfer money from their account into an account controlled by the fraudster. In *Philipp v Barclays Bank UK plc,* the Court of Appeal reversed the High Court's decision to grant summary judgment in favour of the defendant bank, holding that the *Quincecare* duty does not depend on the fact that the bank is instructed by an agent of the customer (*120221 EWCA Civ 318*). The court also held that it is possible, in principle, that a relevant duty of care could arise where a customer instructs their bank to make a payment when that customer is the victim of APP fraud (*www.practicallaw. com/w-035-3199*). Permission to appeal has been granted.

And in a rare case looking at the role of the receiving bank in an APP fraud, in *Tecnimont Arabia Ltd v National Westminster Bank plc,* the High Court held that the receiving bank was not liable for knowing receipt because the funds were not trust property at the time that they were received by the bank, and the bank could not be liable for unjust enrichment because it had not been enriched at the claimant's expense *(120221 EWHC 7772 (Comm)*).

Other decisions of significance arising in the context of financial crime include *FCA v Papadimitrakopoulos and another,* in which the High Court held that it would be an abuse of process for the Financial Conduct Authority (FCA) to use evidence in civil market abuse proceedings if that material had been obtained through a request for mutual assistance from another jurisdiction as part of criminal proceedings; however, the court declined to strike out the proceedings *(120221 EWHC 2792 (Ch)*).

In a first-of-its-kind civil recovery case, the National Crime Agency obtained an order from the High Court permitting a bank to hand over funds believed to represent the proceeds of crime held in a number of accounts without naming the account holders in the proceedings (*http://www.nationalcrimeagency.gov.uk/news/nca-secures-50m-identified-by-barclays-as-the-proceeds-of-crime*).

Claims for breaches of competition law

The past year saw a significant increase in the number of claims for breach of competition law, driven in particular by the availability of opt-out class actions in the Competition Appeal Tribunal (CAT).

In *Michael O'Higgins FX Class Representative Ltd and Mr Phillip Evans v Barclays Bank PLC and others,* the proposed class representatives (PCRs) applied to bring collective proceedings on an opt-out basis against a number of banks seeking damages for alleged losses as a result of illegal and anticompetitive manipulation of the foreign exchange markets in breach of competition laws (*120221 CAT 76*). The CAT refused to certify either action on an opt-out basis, finding that "access to justice should not be forced upon an apparently unwilling class". Both PCRs have appealed.

In *Allianz Global Investors GmbH and others v Barclays Bank and others,* proceedings were issued on behalf of mainly institutional investor claimants in relation to alleged losses as a result of an alleged infringement of competition law in the foreign exchange market by defendant banks between 2003 and 2013. The Court of Appeal struck out the defendant banks' allegation that the claimants' losses had been passed on as a result of redemption of investments in the underlying funds (*120221 EWCA Civ 353*). The claims have since settled.

Proposed opt-in and opt-out collective proceedings were brought against Mastercard and Visa in June 2022 by special purpose vehicles on behalf of all businesses across the UK in respect of multilateral interchange fees for interregional transactions with consumer debit, credit and prepaid cards and commercial card transactions between June 2016 and January 2021. The certification hearing is scheduled for April 2023 (*case nos 7447-7444/7/7/22*).

An application for a collective proceedings order was also issued on behalf of investors in Bitcoin Satoshi Vision (BSV) against a number of cryptocurrency exchanges. The claim alleges that those exchanges had conspired to delist BSV and called on other exchanges to delist it, causing alleged losses to investors in BSV by engaging in an anticompetitive agreement or concerted practice that had as its object or effect the prevention, restriction or distortion of competition (*BSV Claims Limited v Bittylicious Limited and others, case no 7523/7/7/22*).

Derivatives

Derivatives continue to generate litigation, with the English courts still determining claims that arose out of the 2008 global financial crisis.

In CMC *Spreadbet plc v Tchenguiz,* the High Court found that the claimant's decision to close out the defendant's account, in circumstances where the account had a substantial negative balance following a significant drop in the market when the COVID-19 pandemic hit and the defendant declined to meet a margin call, did not breach the claimant's regulatory duty under the FCA's Conduct of Business sourcebook to act honestly, fairly and professionally and in accordance with its client's best interests. It also held that the claimant did not breach its *Braganza* duty in exercising its "sole discretion", under its terms of business, to close the account *(12022) EWHC 1640 (Comm)*).

In *Grants and others v FR Acquisitions Corporation (Europe) and another (Re Lehman Brothers International (Europe)*), the High Court held that a number of events of default under an International Swaps and Derivatives Association Master Agreement would no longer be considered to be "continuing" once Lehman Brothers International (Europe) (LBIE) exited administration, and as a consequence they would be "cured" *([2022] EWHC 2532 (Ch); http://www.practicallaw.com/w-037-7116*). Payments owed by the defendant that had been suspended for over a decade are now due to LBIE.

In *Dexia Crediop SpA v Provincia di Pesaro e Urbino,* the High Court found that English law-governed swap transactions were not void *(12022] EWHC 2470 (Comm)*). The Italian Supreme Court decision in *Banca Nazionale del Lavoro SpA v Comune di Cattolica,* which held that certain interest rate swaps entered into by local Italian authorities were void, principally due to an Italian law prohibition on speculative derivatives, did not apply to issues of capacity (*8770/2020*). Even if that were wrong, the transactions had been entered into for the purpose of hedging interest rate risks and not for speculative purposes. In *Banca Intesa Sanpaolo SpA and another v Comune di Venezia,* the High Court did not follow *Dexia* and, for the first time, the High Court held that an English law-governed swap transaction entered into between two banks and an Italian province was void because the province lacked capacity under Italian law *([2022] EWHC 2586 (Comm)*).

Digital assets

The English courts continue to grapple with novel issues presented by new technology that the financial services industry is embracing.

In *Osbourne v Persons Unknown and another,* the High Court found that there was at least a realistically arguable case that non-fungible tokens (NFT) are property as a matter of English law and proceeded to grant injunctive relief to prevent the NFTs from being dissipated while their ownership was under dispute *([2022] EWHC 7027 (Comm)*). The same position had been adopted for some time in relation to cryptocurrencies.

In *Tulip Trading Ltd v Bitcoin Association for BSV and others*, the High Court rejected the proposition that developers or controllers of blockchain software owe a duty of care to take reasonable steps to protect blockchain users by, for example, re-establishing access to stolen digital assets and reversing known frauds (*[2022] EWHC 667 (Ch); see News brief "Cryptoassets: the scope of blockchain developers' duties", www.practicallaw.com/w-035-6623*). The court did leave the door open to the possibility that other, more restricted, duties may be imposed on such developers or controllers. An appeal was heard at the Court of Appeal in December 2022.

In *D'Aloia v Binance Holdings and others,* the High Court granted permission to serve proceedings on a category of "persons unknown" by NFT airdrop into two digital wallets to which misappropriated cryptoassets had been sent, while also requiring service to take place by way of email (*120221EWHC1723 (Ch); http://www.practicallow.com/w-036-6558*). A number of other cases have since followed suit, including *Jones v Persons Unknown and* others (*[2022] EWHC 2543 (Comm)*).

In *LMN v Bitflyer and others,* the High Court ordered six crypto exchanges to provide customer information relating to accounts into which allegedly misappropriated cryptoassets had been traced, with permission for those orders to be served out of the jurisdiction (*(2022] EWHC 2954 (Comm)*). While the orders granted were not unusual, it is reportedly the first use of the new gateway for service out under Practice Direction 6B 3.1(25) of the Civil Procedure Rules.

Securities litigation

Securities claims are on the rise in the UK, and financial institutions may find themselves on the receiving end of these claims either as the issuer themselves, or in their roles as advisers or underwriters. Judgment was handed down in *Autonomy and others v Lynch and another,* the first case to reach trial considering section 90A of the Financial Services and Markets Act 2000 (FSMA) *U20221 EWHC 7778 (Ch); see News brief' HP's section 90A claim: guidance on liability and ESG class actions", www. practicallaw.com/w-036-0481*). Although the claim was brought in an M&A context, the judgment provides useful guidance on the scope of that provision.

Allianz and others v RSA Insurance Group plc, a case brought on behalf of around 80 institutional investors, settled in September 2022 shortly before trial. In *Allianz Global Investors GmbH and others vG4S* Ltd (*formerly G4S PLC*), the High Court clarified that the meaning of "person discharging managerial responsibility" in Schedule 10A to FSMA extends no further than de jure directors, *de facto* directors and, arguably, shadow directors (*120221 EWHC 1081 (Ch); www. practicallaw.com/w-036-0440*).

Cases to watch in 2023

2023 will see three preliminary issues trials in the *Merricks* proceedings addressing:

- Limitation, applicable law and issues around the exemptible level of multilateral interchange fees.
- The scope of the claim.
- Causation and volume of commerce.

These substantive trials will be the first post-certification trials under the collective proceedings regime *(Walter Hugh Merricks CBE v Mastercard Incorporated and others (case no1266/7/7/16); 12021] CAT 28, see News brief' Mastercard competition damages: CAT establishes gatekeeper role", http://www.practicallow.com/w-032-7592*).

The *Quincecare* duty will continue to be in the spotlight with the Supreme Court due to hear the bank's appeal in *Philipp v Barclays Bank UK plc* in February 2023. In June 2023, the High Court will hear a claim from Dutch housing association, Vestia, which is arguing that certain derivative transactions are void because they were procured by bribery and that Vestia did not have capacity to enter into the transactions (*Stichting Hef Wonen vs BNP Paribas*). Finally, in October 2023, the High Court will hear a number of claims in the so-called "tuna bonds" case (*The Republic of Mozambique v Credit International & others*).

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