HERBERT SMITH FREEHILLS

BANKING LITIGATION UPDATE

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Welcome to the Spring 2023 edition of our biannual Banking Litigation Update, in which we highlight the most important cases and developments affecting UK financial institutions over the past six months.

In our last update, we discussed the increased risk of disputes arising from sanctions against Russian individuals and entities in light of the invasion of Ukraine. These developments pose many and varied legal issues for banks and we are now starting to see guidance emerge from the court. The Court of Appeal had the opportunity to consider whether a force majeure clause was engaged as a consequence of US sanctions imposed on a party's parent company in *MUR Shipping* (see case 21 in the update). Although force majeure clauses are a creature of contract, and each case will turn on the specific drafting and relevant factual matrix, the court took a pragmatic approach and found that payment in a currency other than US dollars (which was specified in the contract, but would have resulted in delay and difficulties because of the US sanctions) would achieve the same result under the contract. In the important *Mints* decision (see case 22), the High Court confirmed that UK sanctions do not prevent the courts of England & Wales from entering a judgment on a pre-existing (i.e. pre-sanctions) claim brought by a sanctioned person, and that there is no need for an Office of Financial Sanctions Implementation (**OFSI**) licence. This decision will have wide implications for litigation involving sanctioned entities, although we note that the High Court has granted permission to appeal. More recently, the court has looked at the impact of sanctions on payment obligations in trade finance documentation, which is likely to be of significant interest to all parties to transactions which are impacted by sanctions issues (*Celestial v UniCredit*, banking litigation blog post coming soon).

Since our last update, the global financial system has faced significant challenges, with the failure of three US banks and the sale of Credit Suisse to UBS. It seems clear that these events will give rise to disputes, with news reports that a claimant law firm has issued proceedings against the Swiss authorities already, on behalf

Table of Contents

Duties in Financial Services 5

Contractual Construction 8

ISDA Master Agreement 13

Securities Litigation / Class Actions 15

Sanctions 18

Cryptoassets...19

Disclosure and Privilege 21

Procedural Developments 25

Other Significant Developments............27

Banking Litigation Contacts 28

Related links

Herbert Smith Freehills banking litigation blog

Herbert Smith Freehills banking litigation podcasts

Herbert Smith Freehills

Herbert Smith Freehills financial services disputes latest thinking homepage

Dispute resolution insights

of Credit Suisse AT1 bondholders. While these developments may give rise to legal issues for banks across the broader financial system, there will be an inevitable delay before we see any substantive court decisions.

The so-called *Quincecare* duty continues to be a hot topic, in part because its parameters remain unclear and in part because of the potential for broad application of the duty to any situation where a financial institution is instructed by its customer to transfer payments out of the customer's account. In February 2023, the Supreme Court heard an important appeal in the *Philipp v Barclays* case, and it is possible that the highest court will use this opportunity to overhaul the duty completely. While this judgment is awaited, we continue to monitor all other decisions considering this controversial duty of care. In our update we consider the recent judgment in *Stanford International Bank v HSBC* (see case 2), and an interesting judgment handed down by the Hong Kong Court of Final Appeal (**CFA**) on this topic. While not binding on the courts of England and Wales, the leading judgment was delivered by Lord Sumption (a former Justice of the UK Supreme Court who was sitting as a Non-Permanent Judge of the CFA) and is likely to have influence within this jurisdiction.

Securities class actions remain an increasingly significant area of law and procedure, with growing numbers of claims being brought by large groups of claimant shareholders against listed corporates. For those monitoring the risk profile of claims under s.90A of the Financial Services and Markets Act 2000 (**FSMA**), we have considered below a recent case management decision in the *Serco* litigation (see case 20), which includes some interesting observations made by the defendant and the court on the critical question of reliance, which has become a central battleground in such claims. The procedural regimes for bringing group litigation are also important to understanding the risks faced by large corporates. Accordingly, we have also included in this edition our thoughts on *Marks & Clerk* (see case 19), in which the High Court adopted a liberal approach to the "same interest" requirement to bring a representative action under CPR 19.8 (formerly CPR 19.6), allowing the claim to proceed on an "opt-out" basis (typically favoured by claimants because individual class members do not need to be identified). Another highlight to note in this area, is the launch of the second edition of our text *Class Actions in England and Wales*, which has become the seminal handbook in this jurisdiction for comprehensive guidance for those looking to bring or defend class action litigation.

Over the past year or so, we have seen an uptick in the number of financial services cases looking at the issue of contractual discretions (i.e. the right to make an assessment or choose from a range of options) versus contractual rights (i.e. a unilateral right to make a binary decision). The distinction between the two is not always straightforward to draw, with mixed terminology in both the case law and in contracts themselves. The distinction is particularly important in a financial services context, because it will determine the approach that the bank, as contractual decision maker, should take to exercising the contractual provision in question. If the clause gives the decision maker a discretion rather than an absolute contractual right (which is a matter of contractual interpretation), then that discretion may be subject to an implied duty to act in good faith or to refrain from acting in a way which was arbitrary, capricious or irrational (i.e. the *Braganza* duty). We consider some recent cases considering these issues below.

In terms of key procedural developments, during the last period there has been a veritable torrent of decisions considering the issue of privilege. We have included links to our analysis of the key judgments below. One of the most topical updates, is the decision in *Loreley v Credit Suisse* (see case 28), in which the Court of Appeal confirmed that the identity of those instructing lawyers is not generally protected by litigation privilege. The 12 to 16-week trial of this claim began at the beginning of the Easter term. Another procedural nugget to draw your attention to, is one of the first cases post-Brexit in which an anti-suit injunction has been granted by an English court restraining proceedings in an EU member state. Prior to Brexit, the English court could not grant an anti-suit injunction in respect of EU proceedings, as this would have been contrary to the Brussels regime. We have included a link to our discussion of this interesting development in the update.

We hope you find our update useful and, as ever, please feel free to contact one of us or your usual Herbert Smith Freehills contact if there are any topics which you would like to discuss further.

Table of Contents

Duties in Financial Services

1. Key Supreme Court insolvency ruling clarifies stance on creditor duties
2. Supreme Court strikes out *Quincecare* claim where no loss suffered by insolvent Ponzi scheme
3. Court of Appeal rejects novel duty of care on banks to protect employees from economic loss arising from a criminal conviction in the performance of duties
4. Hong Kong court provides novel and influential analysis of the *Quincecare* duty

Contractual Construction

5. Interpreting ICC standardised rules in trade finance disputes: courts take an international perspective
6. High Court considers contractual construction of irrevocable letter of credit incorporating UCP 600
7. Contractual duties of good faith: Court of Appeal confirms context is king
8. Court of Appeal finds settlement agreement released unknown fraud claims despite lack of express words to that effect
9. Court of Appeal finds limitation period may start to run before deadline for payment of debt
10. High Court finds lender's exercise of absolute contractual right is not subject to implied *Braganza* duty
11. High Court considers enforcement of security by way of appropriation under the Financial Collateral Arrangements (No 2) Regulations 2003 (FCARs)
12. Supreme Court finds no entitlement to payment in circumstances not addressed by express contractual terms

ISDA Master Agreement

13. High Court finds no continuing event of default under ISDA Master Agreements once administration of counterparty terminates
14. High Court confirms interest rate swaps entered into with Italian municipal authority were valid, lawful and binding on the parties
15. High Court finds that bank's notice of event of default under section 5(a)(i) of the 2002 ISDA Master Agreement is valid

Securities Litigation / Class Actions

16. Herbert Smith Freehills launches new edition of *Class Actions in England and Wales*
17. Green credentials: walking an advertising tightrope
18. Court of Appeal confirms reflective loss rule will bar claims of former shareholders of a dissolved company because the principle must be determined at time of alleged loss
19. High Court allows claim in respect of secret commissions to proceed as "opt-out" representative action under CPR 19.6 (now 19.8)
20. High Court considers reliance in s.90A FSMA claims in context of split trial application

Sanctions

21. Court of Appeal finds party was required to accept non-contractual performance in exercising reasonable endeavours to "overcome" force majeure event
22. High Court finds UK sanctions do not preclude entry of judgments in favour of Russian sanctioned parties

Cryptoassets

23. What the Crypto Winter means for insolvency
24. High Court orders delivery up of stolen Bitcoin against crypto exchange
25. Information orders granted against cryptocurrency exchanges to help trace stolen cryptocurrency
26. Is the decentralised governance of Bitcoin a myth? Court of Appeal finds real issue to be tried as to whether developers owe fiduciary duties to Bitcoin owners

Disclosure and Privilege

27. No privilege for original version of document simply because comparison to final version would reveal legal advice
28. Court of Appeal confirms identity of those instructing lawyers not generally protected by litigation privilege
29. High Court finds reference to legal advice in witness statement engaged cherry-picking rule
30. High Court directs party to identify which current and ex-employees have been asked for/given consent to search for documents on their personal devices
31. High Court decision shows need for clear evidence if trying to prevent use of privileged material disclosed in error
32. European Court expands scope of legal professional privilege under EU law
33. High Court underlines need to consider scope of agency in considering whether documents to which agent has access are in principal's control

Procedural Developments

34. Anti-suit injunction granted restraining proceedings in an EU member state
35. UK government consults on joining Hague Judgments Convention 2019
36. Court orders contempt proceedings to be brought in respect of possible breaches of embargo on draft judgment
37. Court of Appeal finds disclosure to party's US lawyers breached embargo on draft judgment, but no further steps taken

Other Significant Developments

38. Global Bank Review 2022: Banking on People
39. Will publication of synthetic USD LIBOR impact the litigation risks of transition?
40. A litigator's yearbook 2022 (England and Wales)

Duties in Financial Services

1. Key Supreme Court insolvency ruling clarifies stance on creditor duties

***BTI v Sequana* [2022] UKSC 25**

A much-anticipated Supreme Court judgment confirmed the position as to when directors owe obligations to consider the interests of creditors, dismissing an appeal against the Court of Appeal decision in this case.

This decision will be of interest to financial institutions involved in turnarounds and restructurings as a majority of the Supreme Court:

- affirmed the existence of the duty to consider the interests of creditors;
- clarified that it is engaged where the directors know, or ought to know, that the company is insolvent or bordering on insolvency or that an insolvent liquidation or administration is probable;
- explained that where interests of creditors are engaged and diverge from those of shareholders:
    - liquidation is inevitable, creditors' interests are paramount; and
    - prior to that, there will be a fact sensitive balancing exercise to weigh up the competing interests by reference to the degree of distress.

For more information on the decision and its practical implications, see this briefing prepared by our Restructuring, Turnaround and Insolvency team.

^ Back to top

2. Supreme Court strikes out *Quincecare* claim where no loss suffered by insolvent Ponzi scheme

***Stanford International Bank Ltd (In Liquidation) v HSBC Bank PLC* [2022] UKSC 34**

The Supreme Court upheld the Court of Appeal's decision to strike out a claim brought by the liquidators of a Ponzi scheme against its correspondent bank, alleging that the bank breached its so-called *Quincecare* duty to take sufficient care that monies paid out from the accounts under its control were being paid out properly.

This is the second case considering the *Quincecare* duty to reach the Supreme Court, the first being *Singularis Holdings v Daiwa Capital Markets* [2019] UKSC 50 (see our blog post). While the present Supreme Court judgment did not consider the scope of the *Quincecare* duty expressly, it highlights that the court will consider the question of whether any pecuniary loss has been suffered in such cases with a critical eye. It also demonstrates that the court is prepared to deal with *Quincecare* claims on a summary basis where appropriate, in contrast with some recent unsuccessful applications (see our blog posts here and here). Finally, the judgment places heavy emphasis on retaining the narrow boundaries of the *Quincecare* duty, so that it does not unduly interfere with commercial certainty and the ability of a bank to act upon the payment instructions given to it by its customer promptly and without fear.

The appeal concerned £116m paid to genuine investors (directly or indirectly) from the bank's account, in the period between when the claimants said the bank should have recognised the "red flags" and stopped processing its customer's payments (thereby exposing the fraud), and the date upon which the accounts were eventually frozen by the bank. The precise scope and content of the *Quincecare* duty was not critical for the present appeal. Assuming (for the purpose of the strike out application) that the bank owed and breached the duty, the appeal considered whether that breach gave rise to any recoverable loss suffered by the claimant. The claimant argued that it had lost the chance of discharging the debts owed to investors who were wise or lucky enough to redeem their investment early, for a few pence in the pound, rather than those investors being paid out in full.

By a majority of 4:1 (Lord Sales dissenting), the Supreme Court held that the claimant had no claim in damages because it suffered no loss. The Supreme Court considered the nature of the chance that the claimant had lost. In the counterfactual scenario where the bank had complied with its *Quincecare* duty and disobeyed the claimant's instructions, the claimant would have had an extra £116 million to its credit. However, even if this

meant that all the customers received the same dividend (i.e., there was no longer any distinction between those investors who redeemed their investment early and those who did not), no additional customer indebtedness would be paid off.

The dissenting judgment of Lord Sales provided some interesting (*obiter*) commentary on the *Quincecare* duty, suggesting that (in principle) the formulation of the duty covers payments made to creditors where a company is in a situation of "hopeless insolvency", just as much as any other kind of misappropriation. However, this is likely to have limited impact since banks are not expected to police the solvency of their customers, and the test of "hopeless insolvency" is such a stringent one that examples in practice will be rare.

For further information, please see our banking litigation blog post.

The judgment also provides further clarity on the circumstances in which a distressed or insolvent company may seek to make claims against its directors, which colleagues in our RTI team have considered in further detail in our Restructuring, Turnaround and Insolvency Legal Briefing.

^ Back to top

3. Court of Appeal rejects novel duty of care on banks to protect employees from economic loss arising from a criminal conviction in the performance of duties

***Benyatov v Credit Suisse (Securities) Europe Ltd* [2023] EWCA Civ 140**

The Court of Appeal dismissed the appeal of a bank employee, finding that the bank did not owe a novel duty to take reasonable care to avoid the risk of the employee being convicted, and that there was no implied term of the employment contract that the bank would indemnify the employee against loss of future earnings suffered as a result of his conviction. In doing so, the Court of Appeal upheld the decision of the High Court for essentially the same reasons.

The Court of Appeal refused to draw an analogy with the audit duty found in *Rihan v Ernst & Young Global Ltd* [2020] EWHC 901 (QB) (see our banking litigation blog post). In *Rihan*, the established duty on the defendant auditor was to conduct the audit ethically and without misconduct. In the view of the Court of Appeal, this had no application to the circumstances of the present case, where the duty alleged had nothing to do with the bank avoiding wrongdoing, but was an alleged duty to protect the claimant against the wrongdoing/unjust acts of another third party.

The decision demonstrates the court's conservative approach to establishing a novel duty of care, providing some helpful analysis on the correct approach in law. The Court of Appeal applied well-established principles, taking the incremental approach endorsed in *Robinson v Chief Constable of West Yorkshire Police* [2018] UKSC 4. This will involve consideration of the three-stage *Caparo* test (namely, (i) foreseeability, (ii) proximity, and (iii) fairness, justice and reasonableness) to the extent that those factors are in issue. The Court of Appeal acknowledged that assumption of responsibility may be a useful analytical tool, but its usefulness will depend on the issues in the particular case. The most decisive factor in the present case was foreseeability, and assumption of responsibility added nothing, because the bank could not have assumed responsibility for risks that were not reasonably foreseeable.

In relation to the contractual indemnity argument, it was common ground that it was an implied term of the claimant's employment contract that the bank would indemnify him against some forms of harm suffered in doing his job. However, in the Court of Appeal's view, there was no support in the English authorities for a general principle that if a person acts on the instruction of another, they are entitled to be indemnified against all losses, of any kind, suffered as a result of doing so, irrespective of any fault on the part of the employer. It commented that a general indemnity of this kind would "wholly subvert the way in which both the common law and legislation have addressed the issue of the obligations of employers".

For further information, please see our banking litigation blog post.

^ Back to top

4. Hong Kong court provides novel and influential analysis of the *Quincecare* duty

***PT Asuransi Tugu Pratama Indonesia TBK (formerly known as PT Tugu Pratama Indonesia) v Citibank N.A.* [2023] HKCFA 3**

A judgment handed down by the Hong Kong CFA provides some important analysis of the so-called *Quincecare* duty of care. While not binding on the courts of England and Wales, the leading judgment was delivered by Lord Sumption (a former Justice of the UK Supreme Court who was sitting as a Non-Permanent Judge of the CFA) and is likely to have influence within this jurisdiction.

The most important observations in the judgment relate to the scope of the *Quincecare* duty, the question of limitation in claims of this type and the availability of a claim for contributory negligence to reduce the sum payable by a bank, where it has been found liable.

1. **Scope of the *Quincecare* duty**. Lord Sumption cast the *Quincecare* duty as one side of a coin, suggesting that there are two juridical sources for a bank's duty in making payments out of its customer's account. The first side of the coin is the classic *Quincecare* duty, where the bank owes all the ordinary duties to be expected from an agent of its customer, including the duty to exercise reasonable skill and care when performing its obligations. The second side of the coin involves the bank's duty only to make payments out of its customer's account when authorised to do (i.e. when the authorised signatory, as the customer's agent, is acting within the parameters of their actual or apparent/ostensible authority). In a novel approach to this area of the law, Lord Sumption suggested that the source of the duty was not critical and that the standard of duty under both is the same. Regardless of whether one looks at: (a) the law relating to the bank's duty of care to exercise reasonable skill and care (i.e. the *Quincecare* duty); or (b) whether the bank can rely upon the ostensible authority of the authorised signatories on an account; the critical question is what constitutes notice so as to require a bank to make inquiries before paying out in accordance with the mandate. Framing *Quincecare* in this way strongly suggests that the duty will be limited to where instructions to a bank have been given by an agent of its customer. It will be interesting to see if the Supreme Court agrees with this proposition in the appeal of *Philipp v Barclays Bank UK plc* [2022] EWCA Civ 318, given that this agency requirement was rejected by the Court of Appeal.
2. **Limitation**. Lord Sumption suggested that, if a bank has debited an account without authority, the customer is entitled to disregard the debit and require the account to be reconstituted as it should have been. In that case, what is reconstituted is simply the bank's records (i.e. the bank's liability to the customer remains unaffected by the unauthorised debits). The customer will have a claim in debt for the full reconstituted balance of the account, which is payable on demand. In Lord Sumption's view, the clock will not start to tick for the purpose of the limitation period until the customer demands payment from the bank for the reconstituted balance. The potential effect is that *Quincecare*-type claims could be deferred indefinitely by the customer until the time of making a demand.
3. **Contributory negligence**. Lord Sumption's analysis of *Quincecare*-type claims as an action in debt (rather than a claim for damages for breach of a duty of care), has important implications for the availability of a contributory negligence argument, as ordinarily a party cannot claim contributory negligence in response to a debt claim. Interestingly, Lord Sumption rejected the suggestion that a claim of this type should be viewed as based on negligence, since the debt arises only because of the bank's failure to make the inquiries that a reasonable and prudent banker would have made, commenting that this did not convert a debt claim into a claim for "damage".

For further information, please see our banking litigation blog post.

^ Back to top

Contractual Construction

5. Interpreting ICC standardised rules in trade finance disputes: courts take an international perspective

Herbert Smith Freehills LLP published an article in *Butterworths Journal of International Banking and Financial Law* on interpreting International Chamber of Commerce (**ICC**) standardised rules in trade finance disputes.

Banking practice in areas of trade finance such as demand guarantees and letters of credit is standardised by a collection of contractual rules published by the ICC. The application of domestic contractual interpretation principles may risk inconsistency in the way such rules are construed between jurisdictions. However, in relation to the most commonly used rules (the Uniform Customs and Practice for Documentary Credits 600 (**UCP 600**)), which apply to letters of credit), several courts (including the English courts) have tried to ensure that the rules are interpreted consistently with reference to their international consequences, as opposed to strictly in accordance with the governing law of the contract.

In our article we examine a number of decisions demonstrating a trend towards construing other sets of ICC standardised rules in the same way as the UCP 600 and the broader implications for ICC standardised rules.

The article can be found here: **Interpreting ICC standardised rules in trade finance disputes: courts take an international perspective**. This article first appeared in the October 2022 edition of JIBFL.

^ Back to top

6. High Court considers contractual construction of irrevocable letter of credit incorporating UCP 600

Heytex Bramsche GmbH v Unity Trade Capital Ltd **[2022] EWHC 2488 (Ch)**

In the context of a trade finance dispute, the High Court considered the contractual interpretation of an irrevocable letter of credit incorporating the commonly used code in the UCP 600, published by the ICC. In particular, the court held that the issuer's interpretation of the letter of credit would, in practice, render the instrument revocable, which was inconsistent with the UCP and therefore not the proper construction. Finding that there was no real or substantial dispute that the issuer of the credit was liable, the court held that a winding up petition presented by the beneficiary succeeded against the issuer.

One of the key issues considered in this case was whether or not the documents presented as part of the demand were compliant with the terms of the letter of credit, which required the documents to be signed by "all sides of [the letter of credit]". The court roundly rejected the issuer's contention that its own signature was required, emphasising the need to consider letters of credit as a whole and – as far as possible – to read the contractual terms consistently with the UCP. In the court's view, the issuer's construction would have resulted in the letter of credit becoming revocable, because the issuer could have chosen simply to withhold its signature from the demand. This would have created a fundamental internal inconsistency in the terms of the letter of credit and a very significant departure from the UCP 600.

The court also rejected the issuer's proposition that the letter of credit incorporated its own "credit norms", modifying and prevailing over the UCP 600. Assuming the issuer's interpretation of the effect of those credit norms was correct, incorporation would have resulted in a dramatic departure from the scheme of the UCP 600 and from the commercial essence of a letter of credit. The court said that to have successfully incorporated these provisions into the credit would have required very clear notice, the equivalent of Denning LJ's (as he then was) "red hand" in *J Spurling Ltd v Bradshaw* [1956] 1 WLR 461 (CA) 466. Alternatively, even if the credit norms were incorporated, they did not have the effect argued for by the issuer, which undermined a number of characteristics fundamental to the function of credits.

The present decision continues the trend of decisions considering the UCP 600 in which the courts have consistently favoured an international focus on the question of interpretation. We considered the interpretation of ICC standardised rules in trade finance disputes across a number of commonly used codes, including UCP 600, in the above mentioned article (see case 5) published in *Butterworths Journal of International Banking*

and Financial Law: **Interpreting ICC standardised rules in trade finance disputes: courts take an international perspective**.

For further information, please see our banking litigation blog post.

^ Back to top

7. Contractual duties of good faith: Court of Appeal confirms context is king

***Re Compound Photonics Group Ltd; Faulkner v Vollin Holdings Ltd* [2022] EWCA Civ 1371**

The Court of Appeal allowed an appeal against a finding that the majority shareholders of a company had engaged in unfairly prejudicial conduct by removing from office two directors with minority interests, in a case which provides important clarification around the scope and construction of contractual provisions obliging the parties to act in good faith.

The decision emphasises that good faith clauses must be interpreted by close reference to the particular context in which they appear, and that authorities interpreting similar clauses in other legal or commercial contexts cannot be straightforwardly applied to other situations.

In particular, the Court of Appeal rejected the proposition that it was possible or appropriate to divine from the case law a set of minimum standards that would apply in every case in which a duty of good faith is inserted into a contract, beyond the "very obvious" point that the core meaning of an obligation of good faith is an obligation to act honestly – though it also rejected the argument that a good faith obligation cannot be breached other than by acting dishonestly.

On a practical level, this case serves as a reminder that parties proposing to include an express duty of good faith should define the scope of the duty as clearly as possible within the agreement, including, where feasible to do so, identifying actions that are (or are not) required to satisfy it.

For further information, please see our litigation blog post.

^ Back to top

8. Court of Appeal finds settlement agreement released unknown fraud claims despite lack of express words to that effect

***Maranello Rosso Ltd v Lohomij BV* [2022] EWCA Civ 1667**

The Court of Appeal upheld the High Court's decision that a release clause in a settlement agreement included unknown claims based on dishonesty and fraud, despite the terms of the release not expressly referring to such claims.

The Court of Appeal endorsed the judge's approach to the construction of the settlement agreement. It was necessary to take into account the "cautionary principle" that, in the absence of express words, the court will not readily conclude that a reasonable person would understand a release to encompass claims for fraud or dishonesty. However, there is no rule of law requiring express words in order to release such claims. Accordingly, where the court concludes that on ordinary principles of contractual construction fraud is included in the release, the court will give effect to that intention.

The court recognised that, in some cases, the courts have recognised a possibility that a release might be rendered ineffective where a party has been guilty of "sharp practice" – namely by taking advantage of the other party's ignorance of certain claims by obtaining a broad release which surreptitiously settled those claims. However, the court expressed some scepticism as to whether the "sharp practice" principle could have any application where the court had construed a release as covering unknown claims in fraud.

More generally, this case serves as a reminder to settling parties that they need to consider carefully what claims or potential claims they wish to release. Although it may be difficult to negotiate in practice, parties may wish to consider including express language to deal with claims for fraud or dishonesty, making it clear whether these fall within or outside the scope of the release clause.

For further information, please see our litigation blog post.

9. Court of Appeal finds limitation period may start to run before deadline for payment of debt

***Consulting Concepts International Inc v Consumer Protection Association (Saudi Arabia)* [2022] EWCA Civ 1699 [Bailii link not available]**

In a claim for payment of a debt in respect of the provision of services, the Court of Appeal held that time started to run from the date the work was done, not from the contractually agreed deadline for payment. While the agreed time for payment was a procedural bar to the creditor seeking to enforce its claim before that date, this did not postpone the date the cause of action accrued, at which point time started to run. The result was that the claim was time-barred, as it was issued more than six years after the work was done.

The decision is a helpful reminder that time may start to run for limitation purposes as soon as the relevant services are provided and not merely when an invoice is issued or payment is due. It is a question of construction whether the terms of the agreement produce a different result. Where an agreement contains a requirement e.g. for the service provider to issue an invoice, the critical question will be whether that requirement is a condition precedent to the right to payment arising (such that time only begins to run when it is satisfied) or merely a condition precedent to the right to bring proceedings for payment (in respect of which time will already have started to run).

Service providers should ensure their contract terms are clear as to when the right to payment arises, and therefore when time begins to run for limitation purposes. If there is any doubt when they need to bring a claim for payment, they should assume the clock started as soon as the work was done.

For further information, please see our litigation blog post.

^ Back to top

10. High Court finds lender's exercise of absolute contractual right is not subject to implied Braganza duty

***Sibner Capital Ltd v Jarvis* [2022] EWHC 3273 (Ch) [Bailii link not available]**

The High Court (Chancery Appeals Division) allowed a lender's appeal of a District Judge's decision to set aside statutory demands made against two guarantors, following a borrower's default under a loan facility.

This decision will be of interest to financial institutions seeking to exercise a contractual discretion or right following an event of default. The decision highlights that a financial institution's exercise of its discretion/right will not necessarily be subject to an implied duty to act in good faith or to refrain from acting in a way which was arbitrary, capricious or irrational (as per *Braganza v BP Shipping Ltd* [2015] UKSC 17), particularly where the documentation confers an absolute contractual right in favour of the financial institution.

In the present case, the court was satisfied that there was no realistic prospect of the guarantors establishing that the lender was under some sort of duty of good faith or other *Braganza* style duty in deciding whether or not to accept payment of less than the full amount of a tranche on the due date. The court underlined that the relevant clause in the facility agreement contained no qualification, and indeed went out of its way to say that the lender had an absolute right whether or not to accept less than it was entitled to.

For further information, please see our banking litigation blog post.

^ Back to top

11. High Court considers enforcement of security by way of appropriation under the Financial Collateral Arrangements (No 2) Regulations 2003 (FCARs)

***ABT Auto Investments Ltd v Aapico Investment PTE Ltd & Ors* [2022] EWHC 2839 (Comm)**

The High Court dismissed a claim made by a borrower that a lender's appropriation of certain shares secured by a charge, upon default in a loan arrangement, was invalid and that the valuation of the appropriated shares was commercially unreasonable.

The decision is interesting for two reasons:

- It considers the validity of the appropriation of shares in a private company under the Financial Collateral Arrangements (No 2) Regulations 2003 (the **FCARs**) and their valuation; and
- It is an addition to the growing body of case law considering the threshold to be satisfied when exercising contractual discretions in the context of a borrower's default. You can find our previous blog posts considering similar issues here.

The FCARs introduced the concept of a "security financial collateral arrangement" into UK law, which in the context of security arrangements disapplies various formalities and provisions of UK insolvency law in relation to the taking and enforcing of security over cash, financial instruments and credit claims, where such arrangements are made between entities other than individuals. They also provide for remedies on security enforcement which are different from those usually seen in UK law, including, most notably, the enforcement technique of appropriation. They are most frequently used in the financial markets, and there are relatively few cases on their application. There is some long-running academic debate on various aspects of the FCARs, including their scope of application to certain categories of parties and assets.

In the present case, the court considered the validity of the appropriation of the shares by the lender (which is a relatively novel self-help remedy in UK law), and their valuation in a "commercially reasonable manner" as required by Regulations 17 and 18 (respectively) of the FCARs. The court was satisfied both that the appropriation was valid, and that the valuation of the appropriated shares had been made in accordance with the FCARs.

The court underlined that the FCARs imported an objective standard in valuing the shares. In the current context, the word "commercially" indicated that the standard to be applied was that of reasonable participants in the relevant financial market. In other contexts, the manner of valuation must be one which conforms in that context to "the reasonable expectations of sensible businessmen". However, it specifically did not have to consider the effect of the special value that the shares in a joint venture (**JV**) company would have to one of the JV partners as part of the overall valuation.

For further information, please see our banking litigation blog post.

^ Back to top

12. Supreme Court finds no entitlement to payment in circumstances not addressed by express contractual terms

Barton and others v Morris and another in place of Gwyn Jones (deceased) **[2023] UKSC 3**

The Supreme Court, by a majority, allowed an appeal against a Court of Appeal judgment (considered here) that granted an award for unjust enrichment where a property was sold for less than the value required to entitle the claimant to a fee under the express terms of the contract.

By providing that payment would be made if the property was sold for a particular value and remaining silent as to what would happen if the property was sold for less than that value, the contract had excluded any obligation to pay the claimant in such a scenario.

There was no basis on which a term could be implied in fact or by law requiring the claimant to receive reasonable remuneration for his service if the property sold for a lower price. The claimant had agreed to receive a fee that was significantly higher than reasonable if the property was sold for a particular value, but had also taken on the contractual risk of receiving nothing should the property be sold for less than that value.

A claim for unjust enrichment could not step in to mend the bargain that the claimant had made. In any event, the Supreme Court rejected the claimant's argument that there had been a "failure of basis" as a result of the property not being sold for the stated value, so as to found a claim in unjust enrichment. The fact that the contract provided for payment to be made if the property was sold for a particular value did not necessarily mean that the contract was based on the property being sold for that value.

The judgment raises a number of interesting points regarding the extent to which the courts will assist parties whose contract does not include comprehensive terms for payment. The parties' dispute probably would have been avoided if the contract between them had fully addressed, in express terms, the different scenarios in

which a fee should or should not be paid to the claimant. This underlines the importance of drafting contracts as clearly as possible, with a view to minimising uncertainty.

For further information, please see our litigation blog post.

^ Back to top

ISDA Master Agreement

13. High Court finds no continuing event of default under ISDA Master Agreements once administration of counterparty terminates

***Grant & Ors v FR Acquisitions Corporation (Europe) Ltd & Anor (Re Lehman Brothers International (Europe))* [2022] EWHC 2532 (Ch)**

The High Court allowed an application for directions made by the administrators of an investment bank concerning the construction and effect of various standard form events of default provisions which were included in the 1992 and 2002 versions of the ISDA Master Agreements (multi-currency cross border versions) in relation to certain swaps entered into between the bank and a group of companies.

This decision will be of interest to financial institutions trading in derivatives based on standard form ISDA documentation. It appears to be the first case where the court has been involved in a contextual interpretation as to whether there was a continuing event of default under section 2(a)(iii) of the 1992 and 2002 ISDA Master Agreements. The decision is likely to be reassuring for financial institutions as it highlights the court's willingness to uphold contractual obligations to make payments due under swap agreements where there is no longer any continuing event of default which suspends such contractual obligations, such as the termination of an administration.

In the present case, the court was satisfied that under section 2(a)(iii) the test to be adopted is whether the identified event or state of affairs which constituted the event of default is continuing, rather than whether creditors' rights have been significantly and permanently altered or continue to be affected. In the court's view, none of the events of defaults or alleged events of defaults relied on by the group companies were such that it had a substantive adverse effect on them or their rights in relation to the swaps. Further, their credit risk was not increased or adversely affected by any of them, nor would it be.

In December 2022, the High Court allowed the defendants' application for permission to appeal. The Court of Appeal hearing is fixed for 20 June 2023.

For further information, please see our banking litigation blog post.

^ Back to top

14. High Court confirms interest rate swaps entered into with Italian municipal authority were valid, lawful and binding on the parties

***Dexia Crediop SPA v Provincia Di Pesaro E Urbino* [2022] EWHC 2410 (Comm)**

The High Court allowed a summary judgment application by an Italian bank seeking declarations to the effect that certain interest rate swaps entered into with an Italian municipal authority were valid, lawful and binding on the parties.

This is an interesting decision for financial institutions trading in derivatives based on standard form ISDA documentation, particularly given the summary determination. It is the latest in a line of authorities relating to interest rate swap transactions entered into by foreign municipal authorities, in which parties have sought to unwind or set aside the transactions on the basis that they were invalid under certain foreign laws alleged to be applicable to the transactions. The English court has, once again, taken a robust approach to granting declaratory relief and the decision is likely to be welcomed as further evidence of the English court's emphasis on construing commercial contracts, and in particular standard form ISDA documentation, in order to achieve market certainty and predictability.

In the present case, the court was satisfied that the transactions were governed by English law notwithstanding Article 3(3) of the Rome Convention, which provides that where a law is chosen to govern a contract but all the other elements relevant to the situation are connected with another country, the choice of law will not prejudice the application of the mandatory rules of that other country. Further, the court held that there was no real prospect of the municipal authority successfully contending that the transactions did not comply with certain Italian laws on the basis that they: (i) were a form of indebtedness; (ii) had not been authorised by the relevant provincial authority; or (iii) did not meet the economic convenience (i.e. they were not "economically advantageous") requirement.

For further information, please see our banking litigation blog post.

^ Back to top

15. High Court finds that bank's notice of event of default under section 5(a)(i) of the 2002 ISDA Master Agreement is valid

***Macquarie Bank Limited v Phelan Energy Group Limited* [2022] EWHC 2616 (Comm)**

The High Court summarily determined that a bank's default notice of an event of default to an energy company, for failure to pay monies due under a foreign exchange (**FX**) swap, was valid under the terms of the 2002 ISDA Master Agreement governing the transaction.

The decision will be of interest to financial institutions trading in derivatives based on standard form ISDA documentation. It provides guidance on what constitutes a valid notice of an event of default by a non-defaulting party under section 5(a)(i) of the 2002 ISDA Master Agreement. The decision is also a reassuring one for financial institutions as it highlights that where there is a dispute over the terms of a transaction, such as the amount or currency of a swap, this does not necessarily mean that the default notice is automatically invalid, as long as it complies with the contractual provision in the transaction documentation requiring the notice.

In the present case, the court was satisfied that it was not necessary for the amount stated in the bank's default notice to be correct for it to be valid. The court emphasised that it was clear that the default notice served by the bank met the requirements of section 5(a)(i) of the 2002 Master Agreement. It would have been immediately and unambiguously clear to the company that: (i) the bank was complaining of a failure to make the payment due to it under the FX swap; (ii) the company had made no payment under the FX swap; and (iii) on the face of the documents, it was obliged to pay a certain sum to cure the default to remedy that failure.

For further information, please see our banking litigation blog post.

^ Back to top

Securities Litigation / Class Actions

16. Herbert Smith Freehills launches new edition of Class Actions in England and Wales

A second edition of our text, *Class Actions in England and Wales*, co-authored by Herbert Smith Freehills lawyers, was published in the UK by Sweet & Maxwell. It has been edited by Damian Grave, Maura McIntosh and Gregg Rowan and co-authored, in addition, by partners Greig Anderson, Neil Blake, Simon Clarke, Julian Copeman, Kim Dietzel, Harry Edwards, Rupert Lewis, Andrew Taggart, Howard Watson, Alan Watts and Stephen Wisking.

Class actions have become an increasingly significant area of law and procedure, with growing numbers of claims being brought by large groups of claimants. This text will provide a comprehensive source of guidance for those looking to bring or defend class action litigation in England and Wales.

The second edition has been updated to reflect significant decisions and developments affecting class actions since the first edition was published in 2018. It also includes four new chapters on the following topics: data protection claims, product liability, insurance, and employment.

For more information, please see our litigation blog post.

17. Green credentials: walking an advertising tightrope

In October 2022, the Advertising Standards Authority (**ASA**) ruled for the first time that a bank had misrepresented its green credentials and engaged in so-called "greenwashing". In this blog post, we consider how banks and financial services institutions can fall within the remit of the ASA's advertising codes and the potential risks associated with making "environmental" claims.

For further information, please see our banking litigation blog post.

^ Back to top

18. Court of Appeal confirms reflective loss rule will bar claims of former shareholders of a dissolved company because the principle must be determined at time of alleged loss

***Burnford & Ors v Automobile Association Developments Ltd* [2022] EWCA Civ 1943**

The Court of Appeal upheld a decision of the High Court to strike out a claim by the former shareholders of a dissolved company against an investor on the basis that all the losses claimed were barred by the reflective loss principle.

As a reminder, the Supreme Court in *Sevilleja v Marex Financial Ltd* [2020] UKSC 31 confirmed that the reflective loss principle is a bright line legal rule, which prevents only shareholders from bringing a claim based on any fall in the value of their shares or distributions, which is the consequence of loss sustained by the company, in respect of which the company has a cause of action against the same wrongdoer (see our blog post).

In the present case, the Court of Appeal agreed with the High Court that although the company had been dissolved, the claimants' claim fell within the ambit of the reflective loss principle. The decision puts the time at which the reflective loss rule falls to be assessed beyond doubt: it is the time when the claimant suffered the alleged loss and not at the time proceedings were brought.

This timing point has been the subject of uncertainty following the decision of Flaux LJ (as he then was) in *Nectrus Ltd v UCP plc* [2021] EWCA Civ 57. Sitting as a single judge of the Court of Appeal, Flaux LJ refused permission to appeal in *Nectrus* and in doing so held that the claim of an ex-shareholder was not barred by the reflective loss principle, finding that the rule should be assessed when the claim is made. Although the Board of the Privy Council in *Primeo Fund v Bank of Bermuda (Cayman) Ltd* [2021] UKPC 22 found that *Nectrus* was wrongly decided, the High Court in the present case considered that it was bound by the decision (albeit distinguishing the present case from *Nectrus* on the facts). On appeal, the Court of Appeal took the opportunity to set the record straight, confirming that the Privy Council's decision in *Primeo* is the correct view.

For further information, please see our banking litigation blog post.

^ Back to top

19. High Court allows claim in respect of secret commissions to proceed as "opt-out" representative action under CPR 19.6 (now 19.8)

***Commission Recovery Ltd v Marks & Clerk LLP and another* [2023] EWHC 398 (Comm)**

In what appears to be a major departure from previous case law, the High Court adopted a liberal approach to the "same interest" requirement to bring a representative action under CPR 19.6 (which we note has now been renumbered as CPR 19.8 pursuant to the Civil Procedure (Amendment) Rules 2023), allowing a claim in respect of secret commissions to proceed on behalf of all clients and former clients of the defendants in respect of whom a commission was received.

The decision is one of the first to consider the "same interest" requirement for a representative action in light of the Supreme Court's seminal decision in *Lloyd v Google* [2021] UKSC 50, considered in our blog post here. In that case, the Supreme Court held that a claim for damages under the Data Protection Act 1998 could not be brought as a representative action, as such a claim required proof of material damage or distress which

would have to be assessed individually for each claimant – though it suggested that the claim could have been brought using a "bifurcated" process in which the representative action procedure was used to determine truly common issues (such as whether there has been an actionable breach), leaving any individual issues to be dealt with subsequently.

In the present case, the court appears to have accepted that some elements of the claim might differ depending on class members' individual circumstances, and that some information or decisions (e.g. as to remedy) might be needed from them in due course. However, it did not see this as an impediment to allowing the representative action procedure to be used, as there was no conflict of interest between the claims of class members. The decision does envisage that some aspects of the claims might in due course need to be dealt with through individual arrangements outside CPR 19.8 (formerly 19.6), but it is not clear that this is envisaged for all aspects which depend on individual circumstances.

The decision is particularly interesting in suggesting (somewhat tentatively) that the court might be able to find a way to allow those funding the action to be paid out of recoveries before distribution to class members, without the need for their consent, similar to the court's jurisdiction to allow an insolvency practitioner to be paid out of assets recovered. However, the court emphasised that the point did not have to be decided at this stage, commenting that it was really a question for the claimant and its funders to worry about as it would not affect the defendants' potential liability.

The court refused permission to appeal at a consequentials hearing in this case, but the defendants applied for permission directly from the Court of Appeal.

Subject to any appeal, this decision may pave the way for more claims than previously thought to proceed on a representative basis, despite the presence of differences between the claims of class members, so long as there is no actual conflict of interests. However, it leaves many questions unanswered, including the extent to which individual issues can be examined as part of the representative action or must be left over to separate proceedings – and, significantly, the question of whether and in what circumstances those who fund such actions will be able to obtain payment out of recoveries absent the consent of class members.

The case also raises interesting questions as to the nature of a claim for a secret commission and whether the assignment of such a claim can be seen as an assignment of property, so that it is outside the rules of maintenance and champerty (the ancient rules against "trafficking" in litigation) which control the assignment of a bare right of action.

For further information, please see our litigation blog post.

^ Back to top

20. High Court considers reliance in s.90A FSMA claims in context of split trial application

***Various Claimants v Serco Group plc* [2023] EWHC 119 (Ch)**

A recent judgment handed down by the High Court will be of interest to financial institutions following developments in securities class actions.

The decision considers the identity of sample claimants, for the purpose of a split trial order. For those monitoring the risk profile of claims under s.90A of the FSMA, the most interesting aspects of this judgment are the observations made by the defendant, and the court, on the critical question of reliance, which has become a central battleground in such claims.

The judgment reveals that the shape of the *Serco* litigation has changed significantly since the first case management conference (**CMC**) last year. During this period, the court handed down judgment in the first s.90A FSMA case to come to trial in this jurisdiction, in *ACL Netherlands BV & Ors v Lynch & Ors* [2022] EWHC 1178 (Ch) (otherwise known as the *Autonomy* litigation; see our banking litigation blog post). In the *Autonomy* judgment, the court confirmed that reliance must be upon a statement or omission, rather than, in some generalised sense, on a piece of published information (e.g. the annual report for a given year).

The defendant suggested that the *Autonomy* judgment has had the following impact on the scope of the claims against it in the *Serco* litigation: (i) cases based on direct reliance are now much more limited; (ii) a material

number of claimants have dropped out; and (iii) those claiming on the basis of indirect reliance have great difficulties because of the clarification of reliance in *Autonomy*. These are interesting (although not unexpected) developments, given that the requirement for a claimant to show what it relied upon will make it more difficult to bring a successful s.90A claim.

The present judgment also confirms that the claimants in the *Serco* litigation are now relying on two categories of indirect reliance as follows:

- **Market reliance**: i.e. a decision, including an automated decision to acquire, continue to hold or dispose of shares in the market at the (inflated) price at which they were in fact acquired and held.
- **Price reliance**: i.e. market reliance in circumstances in which the claimant was also aware of the price of the shares, and believed the published information to be true, complete and accurate.

The court accepted that (in some respects) the developments which have occurred since the first CMC have been significant, and the fact that no claimant seeks to advance a direct reliance case based on specific statements in the defendant's published information is "material". However, in the context of the application relating to the identity of sample claimants, the court was not persuaded to move away from the sampling approach ordered at the first CMC, and it rejected the defendant's move to include all of the indirect reliance cases in the second trial.

For further information, please see our banking litigation blog post.

^ Back to top

Sanctions

21. Court of Appeal finds party was required to accept non-contractual performance in exercising reasonable endeavours to "overcome" force majeure event

***MUR Shipping BV v RTI Ltd* [2022] EWCA Civ 1406**

The Court of Appeal held, by a majority, that a shipowner was not entitled to rely on a force majeure clause in a shipping contract where its charterer's parent company became subject to US sanctions.

Although set in a non-financial context, the decision will be of interest to financial institutions as it turned on the wording of the force majeure clause, which required that the force majeure event could not be "overcome by reasonable endeavors" on the part of the affected party. The High Court had held that, in exercising reasonable endeavours, the shipowner was not obliged to accept anything other than contractual performance (see our post on that decision).

The Court of Appeal disagreed, finding that the clause required the shipowner to accept a proposal involving payment in an alternative currency, which did not extend to full contractual performance, but which achieved precisely the same result as it: (i) fulfilled the underlying purpose of the relevant obligation; and (ii) caused no detriment to the shipowner. However, it was clear that, had these criteria not been met, the shipowner would have been entitled to rely on the force majeure clause.

The court emphasised that each case will turn on the drafting of the relevant clause as applied to the factual matrix. Parties must therefore be cautious in seeking to rely on previous decisions regarding the interpretation of a force majeure clause.

For further information, please see our litigation blog post.

^ Back to top

22. High Court finds UK sanctions do not preclude entry of judgments in favour of Russian sanctioned parties

***PJSC National Bank Trust v Mints* [2023] EWHC 118 (Comm)**

The High Court considered the impact of the UK sanctions against Russia on various aspects of litigation involving a sanctioned party.

The judgment raises important questions of law with wide implications for litigation involving sanctioned entities. The court's key finding was that the UK sanctions do not prevent the English court from entering judgment on a pre-existing (i.e., pre-sanctions) claim brought by the sanctioned person. There is no need for a licence from the OFSI in order to enter judgment. OFSI can, however, license a sanctioned party to (i) pay an adverse costs order, (ii) satisfy an order for security for costs and (iii) pay damages awarded in respect of a cross-undertaking in damages, which means that ongoing proceedings involving a sanctioned party do not necessarily prejudice the non-sanctioned party.

As part of an interesting obiter discussion of what constitutes "ownership" or "control" for the purposes of the UK sanctions regulations, the court expressed the view that this does not include control by virtue of a sanctioned person's political office, as opposed to personally (including through a trust structure) or (potentially) via a corporate officeholding.

In view of the importance of the issues raised, the High Court gave permission to appeal the judgment to the Court of Appeal. The Court of Appeal has allocated a hear-by date of 12 February 2024.

We discuss the UK sanctions regime in further detail in our previous blog post. You can also follow the latest developments in the sanctions space here.

For further information, please see our litigation blog post.

^ Back to top

Cryptoassets

23. What the Crypto Winter means for insolvency

There has been no shortage of high-profile insolvencies in the crypto market in recent months across a range of market participants and geographies. These include the US Chapter 11 and Bahamas provisional liquidation of FTX as well as the US Chapter 11 filings of BlockFi, Singapore-based crypto hedge fund ThreeArrows Capital, US-based lender Celsius Network, US-based lender Voyager Digital, US-based crypto mining data centre Compute North and Germany-based crypto bank Nuri.

While the number of insolvencies poses questions about the risk management and governance of crypto businesses, this briefing by our Restructuring, Turnaround and Insolvency team addresses what it means legally and practically for users, lenders and other market participants when a crypto custodian falls into distress and even an insolvency process.

^ Back to top

24. High Court orders delivery up of stolen Bitcoin against crypto exchange

***Jones v Persons Unknown* [2022] EWHC 2543 (Comm) [Bailii link not available]**

The High Court held, on an uncontested summary judgment application, that the crypto exchange controlling the wallet into which the claimant's stolen bitcoin was transferred sat in a position of constructive trustee as against the claimant. It ordered delivery up of the bitcoin as against the fraudsters as well as the exchange.

The court's finding that the defendant crypto exchange should be treated as a constructive trustee in relation to the wallet containing stolen bitcoin is of interest not only for those investing in cryptoassets, but also for crypto exchanges and custodians that may control wallets operated by fraudsters.

The court also gave permission to serve the orders on the defendants out of the jurisdiction, and for alternative service including by means of a non-fungible token (**NFT**) air drop to bring the order to the defendants' attention expeditiously. It is worth noting that, as a result of rule changes that came into force at the beginning of October 2022, the court's permission is no longer needed to serve an order (or other court document) out of the jurisdiction where the claim form was served on the defendant out of the jurisdiction with permission, or the court's permission was not required for service.

For further information, please see our litigation blog post.

^ Back to top

25. Information orders granted against cryptocurrency exchanges to help trace stolen cryptocurrency

***LMN v Bitflyer Holdings Inc* [2022] EWHC 2954 (Comm)**

In a further decision demonstrating the English court's ability to apply the law flexibly to novel issues arising in relation to crypto assets, the High Court granted information orders against various foreign cryptocurrency exchanges requiring the provision of information and documentation to help identify those who hold accounts into which stolen cryptocurrency was allegedly transferred, and what had since become of the cryptocurrency.

This is another in a string of decisions in which the English court has been prepared to treat cryptocurrency as a form of property, and to make orders aimed at assisting the recovery of stolen cryptocurrency.

The decision is also of interest as one of the first cases in which the court has granted permission to serve proceedings out of the jurisdiction under the new gateway for information orders, which, as mentioned above, was introduced in October 2022 in order to facilitate the making of *Norwich Pharmacal* and *Bankers Trust* applications against defendants overseas. It applies where there is an application for disclosure in order to obtain information regarding the true identity of a potential defendant and/or what has become of the claimant's property, with a view to issuing proceedings that are intended to be commenced in England and Wales.

Herbert Smith Freehills acts for one of the cryptocurrency exchange defendants to the application.

For further information, please see our litigation blog post.

^ Back to top

26. Is the decentralised governance of Bitcoin a myth? Court of Appeal finds real issue to be tried as to whether developers owe fiduciary duties to Bitcoin owners

***Tulip Trading Limited v Wladimir van der Laan and ors* [2023] EWCA Civ 83**

In the latest development in a line of cases involving Dr Craig Wright, who claims to be the creator of the Bitcoin system, the Court of Appeal held that there is a realistic argument that Bitcoin developers, while acting as developers, owe fiduciary duties to the true owners of that property, which could include taking active steps to introduce code so that an individual owner's Bitcoin can be transferred to safety.

While the effect of the judgment is not to decide whether such a duty exists, in general or in this specific instance, it means that the question will need to be determined at trial, once the relevant facts have been established. If a duty is found to exist, it would in the words of Lord Justice Birss "involve a significant development of the common law on fiduciary duties".

At the heart of the judgment is a debate about the true nature of decentralisation in the context of the blockchain and, particularly, how the role of software developers fits into that. The Court of Appeal identified the key factual question of whether software developers should be considered a large and shifting class who cannot impose changes to the software, because those could be rejected by miners who would refuse to run them, potentially leading to a fork in the blockchain. In its *obiter* comments, the court suggested that, if the decentralised governance of Bitcoin really is a myth, then there is much to be said for the argument that Bitcoin developers, while acting as developers, owe fiduciary duties to the true owners of that property.

For further information, please see our litigation blog post.

^ Back to top

Disclosure and Privilege

27. No privilege for original version of document simply because comparison to final version would reveal legal advice

***University of Dundee v Chakraborty* [2022] EAT 150**

The Employment Appeal Tribunal ordered a party to disclose the original version of a report following an internal investigation, where the report had subsequently been amended in accordance with legal advice and the final version disclosed.

The Tribunal rejected the submission that a non-privileged document could later acquire privileged status simply because it had become the subject of legal advice and a comparison with the final version would allow the content of the advice to be inferred. The decision shows that there are limits to the well-established principle that a document will be privileged to the extent that it betrays the content or the trend of legal advice.

Although this was a Scottish case, the Tribunal noted that there is no difference between English and Scottish law for these purposes.

For further information, please see our litigation blog post.

^ Back to top

28. Court of Appeal confirms identity of those instructing lawyers not generally protected by litigation privilege

***Loreley Financing (Jersey) No 30 Ltd v Credit Suisse Securities (Europe)* [2022] EWCA Civ 1484**

The Court of Appeal held that the identity of those instructing lawyers on behalf of a corporate client are not generally protected by litigation privilege. In doing so it largely agreed with the reasoning of the High Court, as summarised in our blog post on that decision.

The court rejected the notion that litigation privilege protects all information falling within a “zone of privacy” around a party’s preparation for litigation. Instead, it emphasised that privilege attaches to communications (including secondary evidence of those communications) rather than information or facts divorced from them. Accordingly, there is no general principle that the identity of those giving instructions to a lawyer for the purposes of litigation will be protected.

The court recognised an exception, where the disclosure of the relevant individual’s identity would inhibit candid discussion with the lawyer and therefore affect the client’s ability to prepare its case – eg because it might tend to reveal something about the content of the communication with the lawyer or the litigation strategy being discussed. But that would have to be explained as the basis for the claim to privilege.

Note that following the Court of Appeal's judgment, the High Court considered a matter relating to disclosure in this case (see case 33).

For further information, please see our litigation blog post.

^ Back to top

29. High Court finds reference to legal advice in witness statement engaged cherry-picking rule

***Clements v Frisby* [2022] EWHC 3124 (Ch)**

The High Court held that there was a collateral waiver of privilege where a claimant referred to the time taken by his solicitors in progressing his claim against the defendant, and the reasons for that, to explain his delay – a point which was potentially relevant to the substantive merits of the case.

The principle of collateral waiver, also known as the cherry-picking rule, means that a party who relies on privileged material to support its claim may be required to disclose other privileged material relating to the

same issue or transaction. The principle is designed to avoid unfairness, and the risk of the opponent and the court being misled.

The decision illustrates the court's continued move away from the distinction between reliance on the "contents" of a privileged communication and its "effect" – where the former, but not the latter, was thought to give rise to the risk of waiver. In the present case, having reviewed the authorities, the judge rejected the idea that a reference to the subject matter of a privileged communication, as opposed to details of its contents, is unlikely to be viewed as a waiver.

The question of whether the collateral waiver principle has been engaged is a fact sensitive one as to whether there has been reliance on a privileged communication to advance the party's case on an issue the court has to decide. As a practical matter, therefore, parties should be cautious in relying on any privileged material in legal proceedings, as the waiver may be held to extend further than intended.

For further information, please see our litigation blog post.

^ Back to top

30. High Court directs party to identify which current and ex-employees have been asked for/given consent to search for documents on their personal devices

***The Republic of Mozambique v Credit Suisse International and Others* [2022] EWHC 3054 (Comm)**

This High Court decision illustrates the extent of the court's powers where potentially relevant documents are contained on the personal devices or email accounts of current or ex-employees and the employment relationship is governed by foreign law.

The court's jurisdiction to order disclosure under both Part 31 of the Civil Procedure Rules and under Practice Direction (PD) 57AD (previously the Disclosure Pilot under PD 51U) extends to documents within the "control" of the parties to the litigation. As the judge in this case noted, under English law, a court will readily find that a party has control over documents contained on personal email accounts or devices of a current or former employee or office holder who used those email accounts or devices routinely to receive and send electronic communications for the party in question.

If the relationship between the party and third party is governed by foreign law, expert evidence may establish that no such right, and therefore no control, exists as a matter of foreign law. However, in the absence of evidence to the contrary, the judge is generally entitled to assume that the relevant foreign law is the same as English law. As the judge in the present case noted, any other approach could mean that foreign law evidence regarding the existence of control became routine in international or cross border litigation, given the increase in the use of personal devices and email accounts to make business communications in recent years – with obvious cost implications.

The present decision shows that, where the question of control is still to be determined, the court can nonetheless order a party to identify which current or former employees it has asked for consent to search for and disclose documents on their personal email accounts or devices, and the extent to which consent has been given. This is an exercise in case management, to avoid troubling non-parties to litigation with duplicate requests and incurring unnecessary costs.

The decision also acts as a reminder that, where such consent has been requested and given, the documents will be in the party's "control" for the purposes of disclosure, even if under the relevant foreign law there would have been no such control in the absence of consent.

For further information, please see our litigation blog post.

^ Back to top

31. High Court decision shows need for clear evidence if trying to prevent use of privileged material disclosed in error

***Flowcrete UK Ltd v Vebro Polymers UK Ltd* [2023] EWHC 22 (Comm)**

The High Court refused an injunction to prevent the claimants' use of privileged material which the defendants claimed to have disclosed in error.

While the court can intervene to prevent use of privileged documents where they have been provided to the opponent in error in the course of a disclosure exercise, it will not generally do so unless disclosure was procured by fraud or was an obvious mistake. The present decision highlights that the burden is on the disclosing party to establish both that the documents were provided by mistake and that the mistake was obvious, and the court may take a strict approach in deciding whether that burden has been met.

The decision also acts as a reminder that, even where an obvious mistake has been made, the court may refuse injunctive relief where the documents disclose wrongdoing or inappropriate conduct (as the court did in *Pickett v Balkind* [2022] EWHC 2226 (TCC), considered here). The threshold appears to be lower than for a finding that the material was not privileged in the first place under the "iniquity principle" (ie that there is no privilege for communications made in furtherance of a crime, fraud or equivalent conduct). In the present case, had the court considered an injunction otherwise justified, it would have refused relief in respect of one category of documents which the court said raised questions as to whether a witness statement of one of the defendants contained his own independent evidence.

Finally, the decision is of interest in confirming that litigation privilege is not restricted to communications between a party or its lawyers and third parties – a point that is sometimes questioned. While the point was conceded, it is clear that the court agreed with the concession.

For further information, please see our litigation blog post.

^ Back to top

32. European Court expands scope of legal professional privilege under EU law

***Orde van Vlaamse Balies v Vlaamse Regering* (Case C-694/20) ECLI:EU:C:2022:963**

In a ruling on a preliminary reference, the Court of Justice of the EU (**CJEU**) clarified that legal professional privilege under EU law applies to legal advice in general, such as regulatory or commercial advice, as opposed to only advice that is prepared in the context of the client's rights of defence in legal proceedings.

The ruling extends the definition of EU legal professional privilege as set out in previous EU caselaw. It does not however affect the definition or scope of legal professional privilege under English law, for which there is a different test. For information on English law privilege, see our Handy Client Guide to privilege, which can be accessed as an interactive PDF or a web-based app.

Based on the *AM&S* and *Akzo* cases (considered here), both of which arose in the context of competition law dawn raids, it was generally recognised that EU legal professional privilege only applies to written communications between external lawyers and a client, relating to the subject-matter of the proceedings at hand, that:

- were made for the purpose and in the interest of a *client's right of defence*
- by an external lawyer qualified to practice in an EEA Member State

The recent judgment finds, importantly, that EU legal privilege covers legal advice in general, not just relating to rights of defence. However, it does not affect the requirement for the advice to be provided by an external lawyer as that point did not arise.

For further information, please see our competition blog post.

^ Back to top

33. High Court underlines need to consider scope of agency in considering whether documents to which agent has access are in principal's control

***Loreley Financing (Jersey) No 30 Ltd v Credit Suisse Securities (Europe) Ltd* [2023] EWHC 548 (Comm)**

The High Court held that the documents of a claimant's creditor were not in the claimant's control for the purposes of disclosure. Although two employees of the creditor acted as the claimant's agent in conducting the litigation, that did not mean that all the documents to which they had access in their capacity as the creditor's employees were in the claimant's control.

This adds to a line of judgments in recent years considering the question of when a third party's documents are in a litigant's control and therefore subject to its disclosure obligations. The courts have taken a relatively broad view, finding that there is no need for an enforceable legal right to obtain the documents; it is sufficient that there is a continuing arrangement or understanding that in practice provides the litigant with a right of access.

However, there are limits. The present decision shows the court's approach where it is argued that a principal has control over documents on the basis that its agent can access those documents. The question comes down to the scope of the agency. While a litigating party will have control over the documents of its agents, acting in that capacity, it will not have control over documents which the agents can access in a separate capacity (here, as employees of a creditor).

In some cases, the more appropriate route for parties seeking documents held by a third party may be an application for non-party disclosure under CPR 31.17. That allows the court to order disclosure of documents that are likely to support or adversely affect the case of any party, if such disclosure is necessary to dispose fairly of the claim or to save costs. However, such orders are generally seen as "exceptional, or at least not normal", as the court commented in the present case.

Note that the Court of Appeal in this case previously considered a matter relating to privilege (see case 28).

For further information, please see our litigation blog post.

^ Back to top

Procedural Developments

34. Anti-suit injunction granted restraining proceedings in an EU member state

***Ebury Partners Belgium SA/NV v Technical Touch BV, Jan Berthels* [2022] EWHC 2927 (Comm)**

The Commercial Court granted an anti-suit injunction restraining Belgian proceedings brought in breach of an exclusive English jurisdiction clause.

This appears to be one of the first cases post-Brexit in which an anti-suit injunction has been granted by an English court restraining proceedings in an EU member state.

Prior to Brexit, the English court could not grant an anti-suit injunction in respect of EU proceedings as this was considered by the CJEU to be an interference with the jurisdiction of the other EU court, and contrary to the Brussels regime. It was exclusively for the court of the member state to determine whether or not it had such jurisdiction. Depending on the jurisdiction concerned, that could take some time.

In the *Ebury* case, it was common ground that anti-suit relief is now available from the English court, as shown by an earlier decision granting an anti-suit injunction in support of an arbitration agreement (*QBE Europe SA/NV v Generali Espana de Seguros Y Reaseguros* [2022] EWHC 2062 (Comm)).

As with non-EU countries, therefore, a court will exercise its discretion to restrain the pursuit of proceedings brought in an EU member state in breach of an English exclusive jurisdiction clause, unless the defendant can show strong reasons for refusing the relief (which it could not in this case).

For further information, please see our litigation blog post.

^ Back to top

35. UK government consults on joining Hague Judgments Convention 2019

In December 2022, the UK government launched a consultation seeking views on its plan for the UK to become a contracting state to the Hague Convention of 2019 on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters (**Hague 2019**).

The EU and Ukraine recently became the first states to accede to or ratify Hague 2019, as discussed here, which means that the Convention will apply to the enforcement of judgments between EU member states (other than Denmark) and Ukraine where proceedings leading to the judgment are commenced on or after 1 September 2023.

If the UK joins Hague 2019, it will apply also as between the UK, on the one hand, and the EU (other than Denmark) and Ukraine, on the other. However, there is a 12 month delay before Hague 2019 enters into force for any new contracting state, to give each existing contracting state a chance to (in effect) opt out of the application of the Convention between itself and the new state. So, assuming the UK joins, the Convention will only apply to the UK where the proceedings leading to a judgment are commenced after the entry into force date, which will be sometime in 2024 at the earliest.

Hague 2019 does not apply where the court which gave the judgment took jurisdiction under an exclusive jurisdiction clause, as in that case the 2005 Hague Convention on Choice of Court Agreements would generally take precedence.

The consultation closed on 9 February 2023. Although Hague 2019 is not a complete substitute for the Lugano Convention – which the UK has to date been unable to re-join due to the European Commission's opposition (see our previous blog posts here and here) – it would be helpful in expanding the ready enforceability of English judgments in the EU and elsewhere, in cases which are not covered by the 2005 Convention as there is no exclusive English jurisdiction clause.

For further information, please see our litigation blog post.

^ Back to top

36. Court orders contempt proceedings to be brought in respect of possible breaches of embargo on draft judgment

***Wright v McCormack* [2022] EWHC 3343 (KB)**

The High Court decided on its own initiative to issue contempt proceedings on the basis that certain posts on the Slack messaging platform and the forwarding of an email may have disclosed the substance of a judgment while it was still under embargo.

Where a court is to hand down a reserved judgment, the usual practice is to provide a copy of the judgment to the parties and their legal representatives a few days in advance on confidential terms. This is usually referred to as providing a judgment under embargo.

The courts have become concerned that violations of the embargo are becoming more frequent, and Sir Geoffrey Vos MR in *R (on the application of Counsel General for Wales) v Secretary of State for Business, Energy and Industrial Strategy* [2022] EWCA Civ 181 made clear that, in future, embargo breakers could expect to be the subject of contempt proceedings (see this post on Practical Law's Dispute Resolution blog).

This decision underlines the need for caution in making any communications which may be seen as relating to a draft judgment, before it is handed down, even if the communication is phrased as a hypothetical and the case and/or judgment are not referred to expressly.

For further information, please see our litigation blog post.

In a subsequent judgment in this case, reported on Westlaw at [2023] 4 WLUK 54, a Divisional Court (Warby LJ and Nicklin J) held that it was no longer in the public interest to pursue the contempt proceedings against Dr Wright. Although it considered that there was still a case to answer, more complex legal issues had since arisen since the proceedings were initiated. The claimant had apologised for his actions and it was unlikely that he would breach any further embargo, and therefore it was likely that any sanction imposed for contempt would be limited. In those circumstances, the cost of the process outweighed any tangible benefit to the interests of justice.

37. Court of Appeal finds disclosure to party's US lawyers breached embargo on draft judgment, but no further steps taken

***InterDigital Technology Corporation v Lenovo Group Ltd* [2023] EWCA Civ 57**

The Court of Appeal held that, where a judgment was provided in draft to parties and their legal representatives under embargo in advance of being handed down in public, neither the judgment nor the outcome could be disclosed to foreign lawyers, even though they had been involved to some extent in the proceedings. Such disclosure was a breach of the embargo, potentially punishable by contempt proceedings.

The court also considered, although it did not have to decide, that strict liability may apply to a breach of the embargo, so that there may be a contempt even where there has been no intention to flout the embargo.

On the facts of this case, however, including that the party in breach accepted responsibility and apologised to the court, the court considered that further proceedings would be disproportionate to any need to uphold the court's authority. This is in contrast to the decision in *Wright v McCormack* [2022] EWHC 3343, considered above (see case 36), where the High Court decided on its own initiative to issue contempt proceedings**.**

In some cases, there may be uncertainty as to who can be sent a draft judgment. In those circumstances, it would be advisable to apply to court under para 2.7 of Practice Direction (PD) 40E, which provides that if the parties or their legal representatives are in any doubt about the persons to whom copies of the draft judgment may be distributed, they should enquire of the judge.

For further information, please see our litigation blog post.

^ Back to top

Other Significant Developments

38. Global Bank Review 2022: Banking on People

In October 2022, we announced the launch of the 2022 Global Bank Review: Banking on People.

Surveying the current landscape of the financial sector, it is hard to avoid the sense of an industry once again facing a severe squeeze. One thing is certain: global finance is currently facing mounting pressure to invest long-term for a low-carbon, high-tech world in the decades to come, while bracing itself for intense economic headwinds and volatility on the immediate horizon.

Those conflicting pressures can be seen in almost all aspects of the industry, but perhaps none more so than in the life blood of finance: its people. Against this backdrop, 'Banking on People' delves deeper into the people-centric strategic issues banks are grappling with, including the industry's ability to attract and retain talent; the risks and reward of AI-assisted banking; the rise of activism; and the increased regulatory scrutiny on culture and conduct. We also feature insights from bank GCs on the evolving role of in-house legal teams, including:

- **Sharon Cook,** Group Executive, Legal and Commercial Services at National Australia Bank
- **René du Preez,** Group Chief Legal Officer at Standard Bank Group
- **Barbara Levi,** Group General Counsel at UBS

You will find all of these challenges and more explored in this year's Global Bank Review, our sixth annual review drawing on a wealth of sector experience from across our network. Getting through the squeeze will require insight, judgement, and a keen grip on a changing risk environment. We hope this edition helps you navigate the journey.

The publication can be accessed here: 2022 Global Bank Review – Banking on People.

^ Back to top

39. Will publication of synthetic USD LIBOR impact the litigation risks of transition?

Despite numerous warnings from the Financial Conduct Authority (**FCA**) that "firms shouldn't be relying on…a "synthetic" US dollar LIBOR as we have given for sterling and yen" (see the speech by the FCA's Edwin Schooling Latter on 8 December 2021), the regulator confirmed that it would allow market participants to do just that.

In our banking litigation blog post, we explore how this recent development may impact the litigation risks of LIBOR transition, in particular from a conflicts of laws perspective.

^ Back to top

40. A litigator's yearbook 2022 (England and Wales)

In December 2022, we published an article looking back at what 2022 had in store from the perspective of the commercial litigator, and outlining key developments relating to the following topics:

- Class actions
- Cryptoassets
- Contract
- Jurisdiction and enforcement
- Court practice
- Witness evidence
- Disclosure and Privilege
- Judgments and orders
- Alternative Dispute Resolution (ADR)
- Costs and funding

To access the article, please see our litigation blog post.

^ Back to top

Banking Litigation Publications

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You can also subscribe to our Financial Services Disputes & Regulation podcast channel, for regular bite-sized podcasts. These include our bi-monthly update podcasts covering recent judgments likely to be of interest to financial institutions, as well as special edition episodes providing detailed coverage of key banking litigation topics of interest. You can listen on Buzzsprout, Apple or Spotify.

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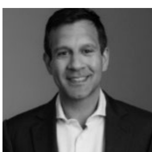

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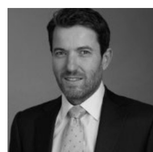

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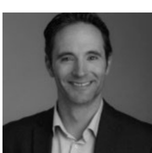

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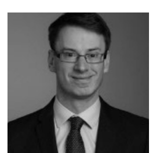

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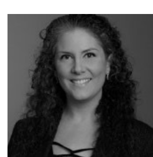

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