The Banking Litigation Law Review

Sixth Edition

Editor

Jonathan Clark

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THE BANKING LITIGATION LAW REVIEW

SIXTH EDITION

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Preface

This year's edition of *The Banking Litigation Law Review* highlights that litigation involving banks and financial institutions shows little sign of slowing. The legal and procedural issues that arise in banking litigation continue to evolve and develop across the globe, in the context of both domestic and cross-border disputes.

The impact of covid-19 continued throughout 2022 with many of the temporary measures enacted becoming permanent features of the litigation landscape. In many jurisdictions, procedural rules have been revised to provide for the use of technology, including in the form of virtual and hybrid hearings. Nevertheless, physical hearings remain an option, especially for complex cases that involve witness evidence and large amounts of oral advocacy.

Financial institutions have also had to adapt to the increasing popularity of crypto-assets. Across the globe, regulators have made efforts to provide clarity on the regulatory framework of digital assets and this will no doubt be an evolving area in the years to come. It remains to be seen how courts will adapt to the unique challenges raised in disputes involving such assets.

Signs of the long-term economic effects of the pandemic, war in Ukraine and inflation are now visible in many parts of the world. From the perspective of the financial sector, these conditions are likely to translate into an increase in loan arrears and defaults, debt restructurings, bankruptcies and insolvencies affecting banks, their customers and counterparties. In a number of financial transactions, there will be winners and losers from the current increase in interest rates following a sustained period of historically low rates. These conditions typically presage an uptick in banking litigation and it seems likely that disputes arising from the current global economic environment will feature in future editions of this *Review*.

A continuing trend this year, as in other recent years, has been the broadening of obligations placed on financial institutions in the name of improving consumer protection. Faced with the challenge of increasing fraud, governments and courts alike have continued to develop the nature and scope of duties imposed on banks to protect their customers, including from their own susceptibility to fraudulent schemes. Claimants, and their funders, are expected to continue testing the limits of these obligations and duties in the courts.

Given the various headwinds and challenges ahead, the high volume and broad nature of litigation in the financial sector looks set to continue.

Jonathan Clark
Slaughter and May
London
November 2022

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Chapter 7

UNITED KINGDOM

Jonathan Clark and Liu Hui[1]

I OVERVIEW

Against a backdrop of political and economic uncertainty on the global and domestic stages, the United Kingdom has maintained its status as a key jurisdiction for banking litigation. The past year has seen a number of key judgments which will shape the future landscape for disputes involving banks and other financial institutions, including in the growing fields of class actions and securities litigation. It has also seen a swift legislative response to events in Ukraine, including extended sanctions and fast-tracked new economic crime legislation. Amid these developments, UK courts have continued to innovate to accommodate new technologies and the demands of increasingly international disputes, proving their continued ability to adapt rapidly while preserving legal certainty and procedural clarity under the auspices of a highly skilled judiciary.

II SIGNIFICANT RECENT CASES

i Class action certification

The previous edition of this *Review* reported that the United Kingdom's first ever opt-out collective action had been granted permission to proceed following a landmark judgment of the Supreme Court in *MasterCard v. Merricks*.[2] That judgment provided long-awaited clarification as to the requirements for 'certification', the process by which the Competition Appeal Tribunal (CAT) grants permission for such actions to proceed by issuing a collective proceedings order (CPO) in accordance with the Consumer Rights Act 2015, which introduced opt-out collective actions in the United Kingdom in competition cases only. The key outcome of the Supreme Court's judgment was to set a relatively low threshold for certification.

Certification decisions in subsequent cases have generally followed suit, with the CAT issuing seven further opt-out CPOs over late 2021 and 2022. The actions certified have generally involved large consumer claims against defendants primarily from the technology and transportation sectors, including both follow-on claims based on competition authorities' findings and stand-alone claims based on free-standing allegations of competition infringements.

1 Jonathan Clark is a partner and Liu Hui is an associate at Slaughter and May. The authors would like to thank associates Elissa Foord and Tatiana Gavriliouk and trainee Edward Beighton for their input on the chapter.

2 [2020] UKSC 51.

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Following the Supreme Court's guidance, the CAT has repeatedly emphasised that the purpose of the collective proceedings regime is to promote access to justice,[3] and has accordingly adopted a relatively flexible approach to what is required of applicants at the certification stage. For example, the CAT has stressed that evidentiary issues should not be fatal and, in particular, that methodology for quantification of losses can only be provisional at this stage.[4] It has also shown willingness to innovate to assist applicants in overcoming practical difficulties (e.g., those relating to the mechanism for distributing any damages to the class).[5] Insofar as CAT decisions have been appealed in these cases, appellate courts have generally afforded the CAT a wide margin of discretion, acknowledging their limited remit to review the judgment of a specialist court in this context.[6]

The CAT's decision in March 2022 on two competing CPO applications arising from the European Commission's 2019 FX cartel decisions came as a notable exception to the recent series of successful applications.[7] In this decision, the CAT refused to grant an order for collective proceedings against various banking groups on an opt-out basis and imposed a stay to permit the applicants to consider whether to apply for a CPO on an opt-in basis.

In refusing an opt-out CPO in this case, the CAT emphasised issues with the 'strength' and 'practicability' of the proposed actions.

In relation to the strength of the actions, both applicants alleged that the infringements set out in the European Commission's FX cartel decisions resulted in market-wide harm in the form of a widening in spreads across the whole of the FX market. This was based on analysis by economic experts as to the likely economic consequences of the infringements. The CAT held that cases of market-wide harm cannot be pleaded solely at the level of economic theory which does not establish an actual causal link between the infringements and the harm. The weakness of the applicants' approach in this regard weighed powerfully against certification on an opt-out basis.

In relation to the practicability of the actions, the CAT noted that the putative class members were commercially sophisticated institutions with significant average claim sizes and were likely to be aware of the infringements. It also noted that a bookbuilding exercise targeting potential claimants had failed. In these circumstances, the CAT concluded that access to justice should not be forced on a class which was able to protect its own interests and appeared to have made a deliberate decision not to pursue an action. The CAT considered some similar factors when certifying an opt-in action arising from the European Commission's 2016 Trucks cartel decision in preference to an opt-out action, for example accepting that the material value of individual claims provided an incentive for class members to opt in.[8]

The decision in the FX actions provides a reminder that, despite the flexibility the CAT has shown in evaluating other applications, it will not certify actions which are inappropriate for the collective proceedings regime. In particular, the emphasis which the CAT placed

3 *Gutmann v. First MTR South Western Trains Ltd and Another* [2021] CAT 31; *Michael O'Higgins FX Class Representative Ltd v. Barclays Bank Plc and Others*, *Evans v. Barclays Bank Plc and Others* [2022] CAT 16.

4 *Mark McLaren Class Representative Ltd v. MOL (Europe Africa) Ltd and Others* [2022] CAT 10.

5 *Le Patourel v. BT Group Plc and Another* [2021] CAT 30.

6 *BT Group Plc and Another v. Le Patourel* [2022] EWCA Civ 593; *First MTR South Western Trains Ltd and Others v. Gutmann* [2022] EWCA Civ 1077.

7 *Michael O'Higgins FX Class Representative Ltd v. Barclays Bank Plc and Others*, *Evans v. Barclays Bank Plc and Others* [2022] CAT 16.

8 *Road Haulage Association Ltd v. Man SE and Others*, *UK Trucks Claim Ltd v. Stellantis NV and Others* [2022] CAT 25.

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on class members' sophistication and claim size may herald a more restrictive approach to applications deviating from the paradigm case of a large consumer class with individually small claims. In addition, the CAT's criticism of the applicants' approach to causation sounds a note of caution to those formulating potential claims. Both applicants have received permission for appeals which will be closely watched.[9]

A total of 22 applications for opt-out actions have now been issued in the United Kingdom. Despite the decision in the FX actions, the recent series of successful applications is likely to prompt further actions against UK corporates, including financial institutions and banks, and ensure continued availability of funding for such actions. The next test for the collective proceedings regime will come as the first cases reach the merits phase.

ii Securities litigation

After a 10-month trial in 2019 to 2020, judgment was given in May of this year against the former chief executive and chief financial officer of software firm Autonomy in a ca. US$5 billion civil fraud case relating to Hewlett-Packard's 2012 acquisition of Autonomy.[10] This is the first case which has gone to a full trial under the United Kingdom's statutory regime imposing civil liability for misleading statements and dishonest omissions in published information relating to securities. In overview, Hewlett-Packard alleged that it was induced to purchase Autonomy by fraudulent statements and omissions in Autonomy's published information and other misrepresentations and breaches by its former CEO and CFO. The court found that the claimants had substantially succeeded in their claims.

The ca. 1,600-page judgment provides important guidance as to how courts will approach claims under this statutory regime. It provides clarification as to what materials are considered 'published information' for the purposes of such claims. It emphasises the importance of context in determining whether such materials are misleading, and places the burden on claimants to prove that they understood the materials in the sense ascribed. It confirms that management needs to have actual knowledge or be reckless as to the misleading statements and omissions. It also establishes that the claimant must show that it considered the specific statements relied on but sets a relatively low bar in finding that the relevant statements need only 'influence' the claimant's judgement.

The case is also notable for the 'dog leg' structure of the misstatements and omissions claim. Only issuers can be liable to compensate investors under the statutory regime. As the issuer in this case, Autonomy, had been acquired by Hewlett-Packard, Autonomy's successor entity admitted liability to Hewlett-Packard and sued the former CEO and CFO for the loss. In its judgment, the court confirmed that there is no conceptual impediment to this novel structure.

Success of the first claim tried under the statutory regime will fortify its standing as a route of recourse for investors in UK-listed companies, including banks. Another case progressing towards trial which is brought by a group of institutional investors in a publicly listed company will provide guidance on the operation of the regime in that setting.[11]

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9 *Michael O'Higgins FX Class Representative Ltd v. Barclays Bank Plc and Others*, *Evans v. Barclays Bank Plc and Others* [2022] CAT 42.

10 *ACL Netherlands BV and Others v. Lynch and Another* [2022] EWHC 1178 (Ch).

11 *Various Claimants v. G4S Plc* [2021] EWHC 524 (Ch).

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iii The Quincecare duty

The *Quincecare* duty, which is one element of the bank's general duty to exercise reasonable skill and care in processing customer payment instructions, has been addressed in previous editions of this *Review*, and over the past year the courts have provided further guidance on its scope.

In the biggest *Quincecare* claim to go to trial in England to date, *Federal Republic of Nigeria v. JPMorgan Chase Bank*, JP Morgan Chase Bank, NA,[12] successfully defended a US$1.7 billion claim brought by Nigeria. The claimant had alleged that the bank breached its tortious and contractual *Quincecare* duty of care when it transferred sums out of the claimant's depository account to a Nigerian company, because it had sufficient grounds for believing that the senior Nigerian officials from whom the bank took instructions were part of a fraudulent scheme. The court dismissed the case on a finding of fact, holding that the claimant was not the victim of a fraudulent and corrupt scheme in respect of the payments and the recipient of the funds had a legitimate entitlement to them. Notwithstanding this, the court considered in detail the scope of the duty, albeit on a non-binding basis.

The judgment emphasises that the *Quincecare* duty is 'narrow and confined' and must be 'carefully calibrated' as it is in conflict with the primary duty of a bank to execute a payment instruction.[13] The judgment confirms the need for a *Quincecare* claim to show that the bank was put on notice (to the relevant standard) of the specific matter 'which vitiated the instruction'[14] and not merely of a general financial crime risk or other different potential risks, such as a connection with past corruption or an unusual transaction structure. The judgment differentiates between the *Quincecare* duty and anti-money laundering risk, concluding that the bank may have in some respects fallen below the standards of the reasonable and honest banker in dealing with anti-money laundering risk given 'the number and magnitude of the red flags relevant to that risk'[15] but that did not of itself trigger the *Quincecare* duty. Note that the judgment underlines the highly fact-specific nature of such claims, so in other contexts that specific distinction may not hold true.

One further point of interest from a risk management perspective relates to the standard of care applicable to the bank. It was common ground that under the relevant contract the standard to be applied was whether the bank had committed gross negligence because the terms of the depository agreement modified the *Quincecare* duty by excluding the bank from liability to the customer unless caused by fraud, gross negligence or wilful misconduct. This is in contrast to the standard which generally applies in *Quincecare* cases, which is whether there has been negligence. The test was originally formulated by Mr Justice Steyn in *Barclays Bank Plc v. Quincecare Ltd*,[16] the case establishing the *Quincecare* duty, as circumstances where 'the banker is "put on inquiry" in the sense that [he or she has] reasonable grounds (although not necessarily proof) for believing that the order is an attempt to misappropriate the funds of the company.'[17] Gross negligence is fact specific but it requires a more fundamental failure than the failure to exercise reasonable care and skill which amounts to negligence.[18] In this

12 [2022] EWHC 1447 (Comm).
13 [154]–[157].
14 [158].
15 [364].
16 [1992] 4 All ER 363.
17 [1992] 4 All Er 363.
18 *The Hellespont Arden* [1997] 2 Lloyd's Rep 547.

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case, the court did consider that there was a risk but held that the gross negligence test was not met. The court did not have to go on to decide whether the bank was 'on inquiry', but it does seem possible that that test might have been met. As such, the judgment illustrates that there is scope for banks to substantially mitigate the risk of a *Quincecare* duty arising though contractual means, in particular, through limitation and exclusion clauses.

In giving its judgment, the court had the benefit of two further *Quincecare* authorities from this year, the first being *Philipp v. Barclays Bank UK Plc*,[19] which was a Court of Appeal decision from March 2022. The first instance decision[20] was covered in last year's edition of this *Review*. In this case, the victim of an authorised push payment (APP) fraud argued that the bank owed and had breached a *Quincecare* duty in failing to protect her from this form of fraud. The bank denied the claim and brought a strike out application. The High Court struck out the claim, finding that the bank did not owe a *Quincecare* duty in these circumstances. Before this case, the authorities in which the *Quincecare* duty has been considered (including the only case to date in which the duty has been found to have been owed and breached, *Singularis Holdings v. Daiwa Capital Markets*)[21] had all involved instructions made by an authorised signatory (acting fraudulently) on behalf of an entity. However, the Court of Appeal disagreed and held that the *Quincecare* duty was not limited to a situation where instructions had been given by an agent or authorised signatory and could, in principle, arise in circumstances where a customer was deceived by a fraudster to transfer money from her account into the fraudster's account. Whether the *Quincecare* duty arose on the facts of the case was a matter for trial. As the court noted in *Federal Republic of Nigeria v. JPMorgan*, the decision in *Philipp v. Barclays Bank UK Plc* recognised (*obiter*) that 'the logic of the principles which establish the *Quincecare* duty indicate that it is applicable whenever a banker is on inquiry that the instruction is an attempt to misappropriate funds'[22] and, as such, the Court of Appeal's decision opens the door to *Quincecare* claims by individuals relating to APP fraud and possibly other contexts.

By contrast, in the decision of the Judicial Committee of the Privy Council from May this year in *Royal Bank of Scotland International Ltd v. JP SPC 4*,[23] the Judicial Committee did not permit a further expansion of the scope of the *Quincecare* duty. The appeal concerned the question of whether a bank owed a duty of care in negligence to a person who is known by the bank to be the beneficial owner of funds held in the account of a customer of the bank and who has been defrauded by the customer. The Judicial Committee stated unequivocally in its decision that there was 'no good reason in this case for incrementally developing the tort of negligence, beyond the well-established *Quincecare* duty of care, so as to impose on a bank an equivalent duty of care to a third party who is not a customer of the bank'.[24] For financial institutions, the Judicial Committee's unambiguous statement will be a welcome clarification that the *Quincecare* duty is not owed to third parties and arises only to their customers. While not binding on the English courts, the decision of the Judicial Committee is indicative of how the Supreme Court might decide the issue. It is worth noting that the Supreme Court considered a similar question in an insolvency context in *Stanford International Bank Ltd*

19 [2022] EWCA Civ 318.
20 *Philipp v. Barclays Bank* [2021] EWHC 10 (Comm).
21 [2019] UKSC 50.
22 [153].
23 [2022] UKPC 18.
24 [80].

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(In Liquidation) v. HSBC Bank Plc. The issue on appeal was whether the *Quincecare* duty should extend to protecting creditors of the bank's customer. Judgment is still awaited and it will be interesting to see whether the direction of travel remains as in *Royal Bank of Scotland International*.

iv Misrepresentation

Claimants in a number of banking litigation cases arising from the London Interbank Offered Rate (LIBOR) manipulation scandal have sought to establish implied fraudulent misrepresentations as a cause of action in an attempt to rescind contracts referencing the LIBOR rate. In last year's update we discussed the decision in *Leeds City Council and others v. Barclays Bank Plc and another*[25] in which the High Court clarified the test for reliance in the context of claims for misrepresentation. In particular, the court focused on whether the claimant in a misrepresentation case had to show, as a necessary element of reliance, that it actively or consciously appreciated at the time that the alleged representation was being made to it. The court held that contemporary awareness of the representation was a necessary element of reliance. Following that decision, the actionability of fraudulent misrepresentation claims on the basis of implied representations looked difficult. In *Crossley and others v. Volkswagen Aktiengesellschaft and others*,[26] another first instance decision handed down in the past year, the High Court took the opposite view. In that decision, it was held that conscious awareness of the alleged implied misrepresentation was not necessary for the claim to have a real prospect of success at trial and the judge refused to grant an application for strike out or a summary judgment on that basis. As a result, provided the alleged implied misrepresentation was sufficiently simple, claimants may be able to establish reliance on it on the basis of an unconscious assumption rather than on the basis of contemporary conscious awareness of the representation.

Crossley related to the group litigation against Volkswagen arising from the Dieselgate emissions scandal. Broadly, the claimants allege implied fraudulent representations by Volkswagen that its cars complied with relevant regulations and were lawful to drive. In a banking context, it is likely that the reasoning from the *Leeds v. Barclays* decision will still be preferred and indeed the judge in *Crossley* noted that *Crossley* could be distinguished from *Leeds* (and other LIBOR claims) because the relevant implied representations in *Crossley* (broadly that the affected vehicles complied with emission standards and that all testing had been carried out properly and honestly) were 'relatively simple'. Nonetheless, this case potentially increases the litigation risk for financial institutions by diluting the requirement for conscious awareness and raising the likelihood that claimants will show renewed interest in using findings by regulators as a means of bringing high-value claims. For the time being, this area of law remains in flux, and further clarity from the courts is awaited.

iv The creditor duty

On 5 October 2022, the Supreme Court handed down its judgment in *BTI v. Sequana*,[27] which confirmed that, in certain circumstances, the fiduciary duty of directors to act in good faith in the interests of the company[28] encompasses a duty to take the interests of creditors

25 [2021] EWHC 363 (Comm).
26 [2021] EWHC 3444 (QB).
27 [2022] UKSC 25.
28 Section 172(1) of the Companies Act 2006.

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into account (creditor duty). This was the first time the Supreme Court (or the House of Lords) had considered the creditor duty. The Supreme Court confirmed the existence of the duty and the majority agreed 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. However, where there is only a risk of insolvency, the Supreme Court held that the duty is not engaged. The judgment has expressly left a number of issues open. Lord Reid commented that this is an area of law which remains in the course of development and, in some aspects, it was only possible to express a provisional view. Many aspects in this area remain controversial and further litigation is likely to follow.

III RECENT LEGISLATIVE DEVELOPMENTS

i Russian sanctions

Russia's invasion of Ukraine in February 2022 prompted the United Kingdom to introduce an extensive array of measures such as trade restrictions, and sanctions against Russian banks and individuals, including wide-ranging measures targeting the freezing of assets. The latter is likely to have a particularly significant effect on English court proceedings involving Russian parties.

The regulations introduced extend the scope of the Russia (Sanctions) (EU Exit) Regulations 2019[29] made under the Sanctions and Anti-Money Laundering Act 2018. The asset freezing provisions restrict access to funds of persons (individuals as well as entities) designated pursuant to the regulations and entities controlled either directly or indirectly by them. The Office of Financial Sanctions Implementation (OFSI) maintains a consolidated list which details all asset freeze targets listed under UK sanctions legislation and UN sanctions, known as 'designated persons'. [30]

Enforcement of monetary judgments is likely to be an area of significant difficulty. While under the regulations OFSI may grant licences to satisfy a pre-existing decision by either a court or tribunal, there appears to be no ground for granting a licence in cases where the decision is handed down after the date of designation. As the sanctions regime is generally limited to the territory of the United Kingdom and to UK persons, it may be possible for such judgments to be enforced outside of the United Kingdom in contexts that involve no UK nexus. Notably, while the European Union has announced similar sanctions measures, the equivalent EU provisions allow licences to be granted to satisfy judgments handed down both prior to and following designation.

While the sanctions regime does not prevent designated persons from being represented in legal proceedings, practical difficulties arise because in order to make payments including in respect of legal fees, court fees and court orders, the designated persons will require authorisation from OFSI. Designated persons or the relevant law firms can apply for a licence for provision of legal fees. However, such licences may take a significant amount of time to procure and can cause delays in proceedings or result in the designated person's legal representatives seeking to come off the record. Even if a designated person has a licence, they may still have difficulties finding representation or a provider of banking services. On 28 October 2022, the OFSI announced a new general licence which allows UK legal firms

29 (SI 2019/855).

30 The list is published online at www.gov.uk/government/publications/financial-sanctions-consolidated-list-of-targets.

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and counsel who have provided legal advice to a designated person to receive payment of up to £500,000 (or an aggregate of up to £1 million where provision of legal services began prior to designation) without a specific OFSI licence provided certain conditions are met which may assist in some circumstances.[31] While the courts generally do not regard a party's lack of representation to be a sufficient reason to permit a party not to comply with applicable deadlines, the courts have been more permissive in a sanctions context and have permitted trials to be adjourned or vacated.[32]

One further legislative development is the introduction of new economic crime legislation strengthening enforcement and expanding prosecutors' powers. The fast-tracked Economic Crime (Transparency and Enforcement) Act 2022 was passed on 15 March 2022 and focuses on three key areas: the introduction of a beneficial ownership register; strengthening sanctions enforcement legislation; and strengthening the unexplained wealth order regime.

ii A new consumer duty

Since the update in last year's *Review*, the Financial Conduct Authority (FCA) has published a further consultation paper[33] on the new consumer duty focusing on outcomes for retail clients. In July 2022, it published the final rules and accompanying non-*Handbook* guidance relating to this new duty. Through a new Principle 12, the duty requires firms to 'act to deliver good outcomes for retail clients'. Implementing the changes required by the introduction of the new Principle 12 has been a significant task for firms. Contrary to the FCA's initial indications, the final rules do not contain a private right of action for breaches of FCA principles or the new duty.

iii LIBOR transition

The LIBOR transition is continuing, with the majority of LIBOR rates having ceased or become non-representative after 31 December 2021.[34] Earlier this year, the FCA carried out a consultation in relation to the cessation of 'synthetic' LIBOR, which has replaced rates that had become non-representative in order to support the transition of certain 'touch legacy' contracts. Following the consultation, the FCA has announced that publication of one- and six-month synthetic sterling LIBOR will permanently cease after the end of March 2023.[35] The consultation also sought views as to when the three-month sterling LIBOR setting can be ceased and information to ascertain the size and nature of remaining US dollar LIBOR exposures and market participants' plans to transition these before the end of June 2023. The FCA is still assessing those responses.

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31 GL INT 2022/2252300.

32 *Navigator Equities Ltd v. Deripaska* [2022] EWHC 1937 and *Maroil Trading Inc v. Cally Ship Holdings Inc* [2022] EWHC 1201 (Comm).

33 CP 21/36.

34 The transition timetable is set out in the FCA's announcement on 5 March 2021: www.fca.org.uk/publication/documents/future-cessation-loss-representativeness-libor-benchmarks.pdf.

35 CP 22/11.

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IV CHANGES TO COURT PROCEDURE

This year has seen the withdrawal of many of the temporary measures introduced in response to the covid-19 pandemic, with a shift towards permanent measures incorporating the new practices which evolved during the pandemic.

The courts' power to hold remote hearings remains rooted in temporary rules whose application has been extended into 2023.[36] However, the introduction of permanent regulations which provide for remote observation of hearings and replace corresponding covid-19 legislation represents a significant step towards codification of the new regime on a permanent basis.[37]

In addition, several courts have permanently adopted remote hearings by default for shorter hearings of less than half a day.[38] There remains some preference for trials and hearings which are longer or involve witness evidence to be conducted in person and the Supreme Court has reverted to conducting all hearings in person other than in exceptional circumstances.[39] Electronic bundles are also increasingly being adopted by default.[40] Overall, courts continue to encourage parties to consider use of technology to improve the efficiency of proceedings. The courts system also continues to develop its technological infrastructure, for example via the launch of its own video hearing platform for selected remote and hybrid hearings.

Another key development this year has been the conclusion of the disclosure pilot scheme (Practice Direction 51U) which had been operating in the Business and Property Courts since 2019 and permanent adoption of the scheme (with minor changes) in the form of Practice Direction 57AD. As described in previous editions of this *Review*, the key feature of the scheme is its inclusion of a range of disclosure models, most of which are less onerous than the traditional 'standard disclosure', which requires all documents relevant to issues in dispute to be disclosed. The judiciary have welcomed the permanent adoption of the scheme as promoting a more focused approach to disclosure. Rulings made under the scheme continue to emphasise the importance of reasonableness and proportionality, reflecting the judiciary's commitment to preserving the efficiency of disclosure amid technological developments which have changed how data is created and held.[41]

36 Practice Direction 51Y: 143rd Update – Practice Direction Amendments (22 March 2022), available online at www.justice.gov.uk/__data/assets/pdf_file/0004/177322/cpr-143-update.pdf (last accessed on 20 October 2022).

37 Remote Observation and Recording (Courts and Tribunals) Regulations 2022, SI 2022/705.

38 *The Chancery Guide 2022 Edition*, Paragraph 14.28; 'Remote hearings guidance to help the Business and Property Courts' (15 September 2021) available online at www.judiciary.uk/guidance-and-resources/remote-hearings-guidance-to-help-the-business-and-property-courts (last accessed on 20 October 2022).

39 Sir Julian Flaux, 'Update on the Chancery Division' (Chancery Bar Conference, 14 January 2022), available online at www.judiciary.uk/wp-content/uploads/2022/01/Chancery-Bar-2022.pdf (last accessed on 20 October 2022); Supreme Court Practice Note (March 2022) available at www.supremecourt.uk/docs/new-practice-note-march-2022.pdf (last accessed on 20 October 2022).

40 *Commercial Court Guide 11th Edition*, appendix 7, Paragraph 1; 'Remote hearings guidance to help the Business and Property Courts' (15 September 2021) available online at www.judiciary.uk/guidance-and-resources/remote-hearings-guidance-to-help-the-business-and-property-courts (last accessed on 20 October 2022).

41 *Michael Wilson and Partners Ltd v. Emmott and Others* [2022] EWHC 730 (Comm); *Flowcrete UK Ltd and Others v. Vebro Polymers UK Ltd and Others* [2022] EWHC 480 (Comm).

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Several court rules of procedure, including the *Commercial Court Guide* and *Chancery Guide*, have been updated this year.[42] As well as aligning with wider reforms and technological developments, the new *Commercial Court Guide* contains a number of significant procedural updates which streamline existing procedure, such as updated guidance on pleadings and witness evidence which warns parties against the use of such documents to advance advocacy. It also contains new provisions on expert evidence as to foreign law and challenges to arbitral awards. The changes to the new *Chancery Guide* bring the Chancery Division's procedure into closer alignment with that of the Commercial Court, promoting greater consistency across the Business and Property Courts.

V JURISDICTION AND CONFLICTS OF LAW

Over the past year, UK courts and litigants have continued to adjust to their new position vis-à-vis the European Union following conclusion of the withdrawal process, as described in the previous edition of this *Review*. Although the rules which apply to jurisdiction and choice of law appear relatively settled for the time being, further developments to the rules for enforcement of judgments are anticipated. At present, English judgments in cases started after 2020 are enforceable in EU member states in accordance with member states' national law (except where the 2005 Hague Convention[43] applies). However, the UK government confirmed this year that it is continuing to make the case for the United Kingdom's accession to the 2007 Lugano Convention,[44] a multilateral treaty regulating enforcement of judgments between the European Union, Switzerland, Norway and Iceland.[45] In addition, ratification by Ukraine and accession by the European Union have triggered the entry into force of the 2019 Hague Convention[46] on 1 September 2023. The 2019 Hague Convention supplements the 2005 Hague Convention by allowing for mutual enforcement of judgments in a much wider range of circumstances. The UK government has previously indicated that it is considering accession to the 2019 Hague Convention,[47] and this development may prompt it to pursue this further.

At the domestic level, the civil procedure rules have been amended to broaden the circumstances in which proceedings can be served on defendants outside the United Kingdom. Under UK procedure, service outside the jurisdiction requires court permission in the majority of cases. A list of jurisdictional gateways specifies the circumstances in which service outside the jurisdiction is permitted. Changes approved this year will expand existing gateways, as well as creating new gateways,[48] such as a new gateway for third-party information claims outside the United Kingdom (including claims for disclosure from overseas financial institutions to assist in asset tracing in fraud cases) and new and widened gateways for cases

42 *Commercial Court Guide 11th Edition*; *The Chancery Guide 2022 Edition*.

43 Convention on Choice of Court Agreements (2005).

44 Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (2007).

45 Letter from Dominic Raab to Daniel Eames, Alberto Perez Cedillo and Hannah Markham (20 July 2022).

46 Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters (2019).

47 HL Deb 17 March 2022, Vol 802, Col 1441.

48 'Minutes of the Civil Procedure Rule Committee: Annual Open Meeting' (13 May 2022) available online at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1083217/cprc-mins-13-may-2022.pdf (last accessed on 20 October 2022).

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involving trusts and fiduciary duties. This is, in part, to accommodate litigation involving crypto-assets and further innovations in this space are under consideration.[49] The changes increase flexibility for claimants to cross-border disputes to serve UK court proceedings on defendants outside the jurisdiction.

VI SOURCES OF LITIGATION

Use of new technology in financial services, particularly distributed ledger technology (which includes blockchain and non-fungible tokens (NFTs)), represents a key growing source of litigation. As discussed above, disputes involving digital assets have driven recent jurisdictional reforms. Decisions in various digital asset fraud cases this year have also clarified other procedural questions raised by such technology. In a case against unknown persons alleged to have fraudulently misappropriated cryptocurrency which they had induced investors to deposit into two named cryptocurrency wallets, a court permitted service by depositing an NFT into the two wallets.[50] This is the first case of service by NFT in the United Kingdom and establishes a precedent which will assist victims of digital asset fraud in issuing proceedings against unknown defendants going forwards.

The courts continue to analyse the duties of participants in the digital assets market. In dismissing a claim arising from an alleged multibillion-dollar hack, a court found that cryptocurrency developers did not owe fiduciary or tortious duties to cryptocurrency owners to restore access to misappropriated cryptocurrency.[51] On the other hand, in another case a court acknowledged that cryptocurrency exchanges could owe duties to victims of fraud as constructive trustees of misappropriated cryptocurrency.[52] This year has also seen the issue of the first class action in the cryptocurrency sector, which was commenced in the wake of *Merricks* against four cryptocurrency exchanges alleged to have engaged in anti-competitive conduct in delisting the cryptocurrency Bitcoin SV.[53]

As these cases have highlighted, the judiciary are highly engaged with developments in financial technology and the need for the legal system to keep pace. Commenting publicly this year, judges have emphasised the challenges which such technology raises for civil litigants, what English law could offer the digital assets sector as a foundation for its governance and the steps which the UK legal system is taking to adapt (including facilitating validation of electronic trade documents, recognising digital assets as property and catering for 'decentralised autonomous organisations' in place of traditional corporate structures).[54]

Climate change litigation is also gathering momentum in the United Kingdom. Climate-related claims against financial institutions are also emerging, such as a claim against a pension fund for failure to implement an immediate plan for divestment from

49 Sir Geoffrey Vos MR, 'Contracts, just smarter. Seizing the opportunity of smarter contracts' (*Launch of Smarter Contracts Report*, 24 February 2022) available online at www.judiciary.uk/wp-content/uploads/2022/02/Speech-MR-to-Smarter-Contracts-Report-Launch-Lawtech-UK-UKJT-Blockchain-Smart-Contracts.pdf (last accessed on 20 October 2022).

50 *D'Aloia v. Person Unknown and Others* [2022] EWHC 1723 (Ch).

51 *Tulip Trading Ltd v. Bitcoin Association for BSV and Others* [2022] EWHC 2 (Ch).

52 *D'Aloia v. Person Unknown and Others* [2022] EWHC 1723 (Ch).

53 *BSV Claims Ltd v. Bittylicious Ltd and Others*.

54 HHJ Pelling KC, 'Issues in crypto-currency fraud claims' (Crypto Disputes Conference, 29 June 2022) available online at www.judiciary.uk/wp-content/uploads/2022/07/CRYPTO-DISPUTES-CONFERENCE.pdf (last accessed on 20 October 2022).

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fossil fuels.[55] Overall, climate change remains a key anticipated source of litigation, with potential for greenwashing claims under the statutory regime for securities fraud or by way of misrepresentation claims, particularly in view of widened climate reporting requirements introduced for financial institutions this year.[56]

There had been a growing trend for representative actions (a form of collective action) on behalf of victims of data breaches. However, the Supreme Court's confirmation late last year that the claim against Google which pioneered this movement would not be permitted to proceed has staunched the flow,[57] with similar claims against YouTube, Facebook, Oracle and TikTok abandoned this year in its wake.[58]

The availability of litigation funding remains a key force shaping the UK litigation landscape, with market feedback suggesting that funders are looking to deploy increased sums.[59] The success of recent applications for opt-out collective proceedings in the CAT is likely to attract funding to this area, perhaps diverting it from data-related representative actions in the wake of the *Google* decision.

VII OUTLOOK AND CONCLUSIONS

Financial institutions in the United Kingdom are likely to face more difficult and uncertain conditions in 2023 due to an economic environment marked by slowing economic growth, rising interest rates and increasing international political tensions. Such circumstances are likely to precipitate litigation affecting banks. The additional sources of litigation addressed above, such as the rise in opt-out CPOs and claims relating to climate change, cryptocurrency and other new technologies, will further add to the litigation burden faced by banks. The increasing growth of the third-party funding market over the past few years is set to continue and likely to fuel litigation against financial institutions. For the time being, litigation funders are not subject to direct statutory regulation and it remains to be seen whether the United Kingdom will be swayed by recent proposals to introduce formal regulation in the European Union, which may in time temper this growth. All in all, the steady flow of banking litigation seen over the past year looks firmly set to continue in 2023.

55 *McGaughey and Another v. Universities Superannuation Scheme Ltd and Others*.

56 *FCA Handbook*, ESG 2.

57 *Lloyd v. Google LLC* [2021] UKSC 50.

58 *McCann and Others v. Google Ireland Ltd*; *Jukes v. Facebook Inc and Another*; *Rumbul v. Oracle Corporation and Others*; *SMO (A Child) v. Tiktok Inc and Others*.

59 Macfarlanes, 'The evolution of the UK litigation funding market – future trends?' (30 June 2022) available online at www.macfarlanes.com/what-we-think/in-depth/2022/the-evolution-of-the-uk-litigation-funding-market-future-trends (last accessed on 20 October 2022).

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Appendix 1

About The Authors

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Jonathan is a partner in Slaughter and May's Disputes and Investigations Group. He has a strong and varied litigation and investigations practice advising a wide range of financial services clients. He has deep experience defending allegations of deliberate wrongdoing, having advised on criminal and regulatory investigations and litigation involving alleged corruption, fraud, cartel activity and tax evasion.

Jonathan's litigation practice includes a focus on banking cases relating to complex derivatives transactions and benchmark manipulation, as well as multi-jurisdictional competition litigation in the financial services and other sectors.

Jonathan is recognised as a 'brilliant lawyer' representing 'high-profile clients in a broad range of contentious banking matters', and as such is a 'leading individual' for Banking Litigation in both *Chambers UK 2023* and *Legal 500 UK 2023*.

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