The Banking Litigation Law Review

Fifth Edition

Editor

Deborah Finkler

The LawReviews

© 2021 Law Business Research Ltd

THE BANKING LITIGATION LAW REVIEW

FIFTH EDITION

Reproduced with permission from Law Business Research Ltd
This article was first published in November 2021
For further information please contact Nick.Barette@thelawreviews.co.uk

Editor
Deborah Finkler

THE LAWREVIEWS

© 2021 Law Business Research Ltd

PUBLISHER
Clare Bolton

HEAD OF BUSINESS DEVELOPMENT
Nick Barette

TEAM LEADERS
Joel Woods, Jack Bagnall

BUSINESS DEVELOPMENT MANAGERS
Rebecca Mogridge, Katie Hodgetts, Joey Kwok

RESEARCH LEAD
Kieran Hansen

EDITORIAL COORDINATOR
Isabelle Gray

PRODUCTION AND OPERATIONS DIRECTOR
Adam Myers

PRODUCTION EDITOR
Felicia Rosas

SUBEDITOR
Jane Vardy

CHIEF EXECUTIVE OFFICER
Nick Brailey

Published in the United Kingdom
by Law Business Research Ltd, London
Meridian House, 34–35 Farringdon Street, London, EC4A 4HL, UK
© 2021 Law Business Research Ltd
www.TheLawReviews.co.uk

No photocopying: copyright licences do not apply.
The information provided in this publication is general and may not apply in a specific situation, nor does it necessarily represent the views of authors' firms or their clients. Legal advice should always be sought before taking any legal action based on the information provided. The publishers accept no responsibility for any acts or omissions contained herein. Although the information provided was accurate as at November 2021, be advised that this is a developing area.
Enquiries concerning reproduction should be sent to Law Business Research, at the address above.
Enquiries concerning editorial content should be directed
to the Publisher – clare.bolton@lbresearch.com

ISBN 978-1-83862-761-4

Printed in Great Britain by
Encompass Print Solutions, Derbyshire
Tel: 0844 2480 112

ACKNOWLEDGEMENTS

The publisher acknowledges and thanks the following for their assistance throughout the preparation of this book:

BGP LITIGATION

CERHA HEMPEL

CLEARY GOTTLIEB STEEN & HAMILTON LLP

GILBERT + TOBIN

KANTENWEIN

PÉREZ-LLORCA

PINHEIRO NETO ADVOGADOS

SÉRVULO & ASSOCIADOS

SLAUGHTER AND MAY

WENGER VIELI AG

© 2021 Law Business Research Ltd

CONTENTS

PREFACE v
Deborah Finkler

Chapter 1 AUSTRALIA 1
Richard Harris, Philippa Hofbrucker, Kasia Dziadosz-Findlay, Dominic Eberl and Bradley Edwards

Chapter 2 AUSTRIA 11
Holger Bielesz and Paul Krepil

Chapter 3 BRAZIL 23
José Luiz Homem de Mello, Pedro Paulo Barradas Barata and Sasha Roéffero

Chapter 4 GERMANY 37
Marcus van Bevern

Chapter 5 HONG KONG 50
Wynne Mok and Kathleen Poon

Chapter 6 PORTUGAL 63
Manuel Magalhães, Mafalda Ferreira Santos, Francisco Boavida Salavessa and Maria José Lourenço

Chapter 7 RUSSIA 76
Dmitriy Bazarov, Anton Pomazan and Ekaterina Smelkova

Chapter 8 SPAIN 88
Javier Izquierdo and Marta Robles

Chapter 9 SWITZERLAND 98
Nicolas Bracher and Meltem Steudler

© 2021 Law Business Research Ltd

Chapter 10 UNITED KINGDOM 107
Deborah Finkler and Chris Wilkins

Chapter 11 UNITED STATES 118
Rishi N Zutshi, Jonathan I Blackman, Pascale Bibi and Vishakha S Joshi

Appendix 1 ABOUT THE AUTHORS 137
Appendix 2 CONTRIBUTORS' CONTACT DETAILS 147

© 2021 Law Business Research Ltd

PREFACE

This year's edition of the *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 covid-19 pandemic continued to loom large in 2021, with judicial systems taking part in a forced experiment of embracing new technology to minimise the disruption caused by pandemic restrictions; in some jurisdictions we may see the permanent adoption of measures taken up in response to the restrictions imposed by the pandemic, as well as a general shift towards the greater use of new technology in dispute resolution. This extends to the increased use of virtual hearings (as well as electronic trial bundles and filing systems), although we can expect that physical hearings will continue to play a prominent role, particularly in complex cases. While it is too early to predict the future with any certainty, it seems likely that some form of hybrid approach is here to stay.

Outside the court room, the effects of the pandemic continue to be felt throughout the wider economy. As various restrictions and financial interventions by governments are scaled back, the early signs of the long-term, negative economic effects of the pandemic are now beginning to emerge 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. These conditions typically presage an uptick in banking litigation and it seems likely that disputes arising from the economic fallout of the pandemic will feature in future editions of this Review.

A continuing trend this year has been the broadening of obligations placed on financial institutions in the name of improving consumer protection. Faced with the challenge of increasing bank fraud and other illicit transactions, governments and courts alike have continued to develop the nature and scope of duties imposed on banks to protect their customers. Claimants will no doubt continue testing the limits of these obligations and duties in the courts.

Last year's preface highlighted the political and economic uncertainty produced by Brexit as the transition period drew to an end. Since then, some welcome clarity has emerged around the foundations of the United Kingdom's new relationship with the European Union, including in the area of jurisdiction and enforcement of judgments. However, the new relationship will take time to bed down, with additional complexities (and potentially disputes) likely to emerge as parties navigate the new reality. That said, there is little evidence that commercial parties, including banks and financial institutions, have been deterred from choosing the United Kingdom as a forum for litigating their disputes.

© 2021 Law Business Research Ltd

While 2021 has been another challenging year for many, there has been some cause for optimism: globally stock markets have continued to perform well as economic recoveries gather pace in many parts of the world, while the roll-out of the covid-19 vaccine has allowed many jurisdictions to emerge from a period of seemingly endless lockdowns and suppressed economic activity. Despite these positive signs, however, the global economy is likely to feel the effects of the covid-19 pandemic for some time and in various (and often unexpected) ways, as highlighted by the recent emergence of a crisis in the global supply chain. At the same time, other global challenges, such as climate change, will increasingly dominate the political and economic agenda. Given the various headwinds and challenges ahead, the high volume and broad nature of litigation in the financial sector look set to continue.

Deborah Finkler
Slaughter and May
London
November 2021

© 2021 Law Business Research Ltd

Chapter 10

UNITED KINGDOM

Deborah Finkler and Chris Wilkins[1]

I OVERVIEW

Following a lengthy and often fraught process, the United Kingdom finally concluded its withdrawal from the European Union at 11pm on 31 December 2020, when the post-exit transition period came to an end. While many questions remain concerning the United Kingdom's legislative and regulatory direction in the post-Brexit world, there is little sign that the prolonged uncertainty resulting from Brexit and the covid-19 pandemic has affected its position as a key jurisdiction for banking and financial services litigation.

II SIGNIFICANT RECENT CASES

i Class action certification

Despite being well established in other jurisdictions, the option for claimants to bring collective actions on an opt-out basis – otherwise known as class actions – did not exist in the United Kingdom prior to the Consumer Rights Act 2015, which amended the Competition Act 1998 to introduce the new regime, which applies only to claims for breaches of competition law. Under that regime, an action can only proceed following the grant of a collective proceedings order (CPO) by the Competition Appeal Tribunal (CAT), a process known as certification. Since then, the regime has not been fully tested by the courts, with claimants who seek to commence such actions persistently failing to overcome strictly applied certification requirements in the CAT.

That has all changed with the latest judgment in the keenly watched case of *Mastercard v. Merricks*,[2] which was covered in previous editions of this Review as it made its way up to the Supreme Court. The key outcome of the ruling is that it sets a relatively low threshold for certification, following which the claim itself has been certified in the CAT as the United Kingdom's first-ever opt-out collective action, and one which is likely to produce a spate of similar actions against UK corporates, including banks and financial institutions.

By way of background, the *Merricks* case concerns a proposed opt-out class of approximately 46.2 million individuals who purchased goods or services from UK businesses that accepted Mastercard payment cards between 1992 and 2008, with claimed aggregate damages amounting to approximately £14 billion – potentially the largest civil damages

---

1 Deborah Finkler is a partner and Chris Wilkins is an associate at Slaughter and May. The authors would like to thank associate Maximilian Campbell and trainees Remi Pfister and Timothy Biasi for their input on the chapter.

2 [2020] UKSC 51.

© 2021 Law Business Research Ltd

claim ever brought in the United Kingdom. The CAT originally refused to grant a CPO in 2017, a decision that was then overturned by the Court of Appeal, prompting Mastercard to bring an appeal to the Supreme Court.

Crucially, in considering how the CAT should approach the legislative test for certification, the Supreme Court decided that the concept of 'suitability' of prospective actions should be determined not in abstract terms, but relatively; that is, whether an action is more suitably brought as collective proceedings than as individual proceedings and, equally, whether an aggregate damages award is more suitable than multiple individually assessed damages claims. The court also emphasised that the courts should not deprive claimants of a trial merely because of the challenges relating to the quantification of harm, and that a lack of correlation between the distribution of damages and actual losses across a class should not be a bar to certification. In other words, the standard compensatory principle that underpins the assessment of damages in English law would not have to be followed rigidly in awarding aggregate damages.

Importantly for potential collective action defendants looking for some comfort from the outcome, the Supreme Court's decision was not unanimous. While not formally dissenting from the decision, Lord Sales and Lord Leggatt put forward their reasons why they would have allowed Mastercard's appeal. In particular, they found the majority's interpretation of the suitability requirement to be untenable, and considered that it did not follow that collective proceedings should be available in any case where the option would be less unsatisfactory than individual proceedings. They also sounded a note of caution about the potential for opportunistic claims, given the significant burdens placed on defendants by the regime. While not binding on the courts, these minority judgments are likely to provide a source of forceful submissions from defendants in future cases.

Following certification of the *Merricks* action in the CAT following this decision, it remains to be seen how the CAT will approach the handful of CPO applications that are currently pending and are expected to progress over the months to come, including two competing applications arising out of the European Commission's 2019 FX cartel decision, whose CPO hearing was paused to await the outcome of *Merricks*.[3] Given that each collective proceeding will be based on very different underlying facts, it should not be assumed that the Supreme Court's decision in *Merricks* will guarantee success in every case. One likely area of differentiation, for example, will be between actions brought on behalf of consumers suffering relatively small individual losses, such as in *Merricks*, and those brought on behalf of sophisticated entities with potentially high-value individual claims. Nevertheless, it is clear that the guidance provided by the Supreme Court in this decision will provide a boost for would-be claimants and a greater challenge for defendants looking to resist applications for certification.

ii Duty of care for professional advisers

In a decision expected to have far-reaching consequences for professional negligence claims, the Supreme Court in *Manchester Building Society v. Grant Thornton UK LLP*[4] has modified the court's approach to ascertaining professional liability.

3 *Michael O'Higgins FX Class Representative Limited v. Barclays Bank PLC and Others*; Case 1336/7/7/19 *Mr Phillip Evans v. Barclays Bank PLC and Others*.

4 [2021] UKSC 20.

© 2021 Law Business Research Ltd

The case arose following the building society's receipt of advice from Grant Thornton that it could prepare its accounts using hedge accounting, which would allow the society to enter into interest rate swap contracts without an associated volatility-driven increase in its capital requirements. Relying on this advice, the society entered a number of long-term interest rate swaps. Years later, Grant Thornton became aware that its advice was incorrect and the society had to restate its accounts. The restated accounts showed substantially reduced net assets and insufficient regulatory capital. Consequently, the society was forced to close the swaps early, resulting in losses of over £32 million.

The Supreme Court held that the losses (minus a reduction for contributory negligence) resulting from the negligent accounting advice were recoverable due to the purpose of the adviser's duty. It was held that to ascertain whether a loss falls within the scope of the duty of care, the correct approach is to see what risk the duty is supposed to guard against and then whether the loss represents the fruition of that risk.

The decision marks a step away from the long-held distinction between 'advice' and 'information' as set out in *South Australia Asset Management Corp. v. York Montague Ltd* (*SAAMCo*).[5] Under the *SAAMCo* principle, where a professional gave advice, they would be responsible for all of the foreseeable losses flowing from the advice being wrong. However, where they only gave information rather than advice, they would not be liable for losses that would still have been suffered if the information had been correct. The Supreme Court in *Manchester Building Society* found that the distinction between advice and information was not always clear cut or helpful. The court ruled that the focus should instead be on identifying the purpose to be served by the duty of care assumed by the defendant. Similarly, the court considered that the *SAAMCo* counterfactual – whether, if the advice or information given by the defendant had been correct, the claimant's actions would have resulted in the same loss – is a useful tool to cross-check but is subordinate to the primary analysis.

The departure from *SAAMCo* follows extensive commentary about the correct way to assess the scope of duty, including by Lord Sumption in *BPE Solicitors v. Hughes-Holland and others*,[6] who also questioned the distinction between advice and information. There is now the potential that claimants in future professional negligence claims will have an easier task of establishing a more extensive basis for loss than previously. The lengthy minority judgments in *Manchester Building Society* and likely uncertainties in the application of this judgment to the facts suggest that the debate on what falls within the adviser's duty is set to continue. For professionals, the practical lesson is to issue up-to-date retainer letters to clarify what duty is within the scope of the engagement and any associated limitations.

iii Dishonest assistance

Dishonest assistance is a form of breach of trust under English law where liability attaches to a third party who has been involved in causing loss to a claimant. The operation of dishonest assistance was considered recently in *Natwest Markets v. Bilta*,[7] a case that concerned a large VAT fraud in the carbon credit trading market. The decision has primarily attracted attention as a rare case of a re-trial being ordered by the Court of Appeal due to the lower court's delay in delivering its judgment, as well as errors in its approach to the factual evidence. However, the Court of Appeal also took the opportunity to give its views on a cross-appeal by the

5 [1997] AC 191.
6 [2017] UKSC 21.
7 [2021] EWCA Civ 680.

© 2021 Law Business Research Ltd

claimant, which argued that dishonesty could be shown, for the purposes of making out a dishonest assistance claim, if the traders had questions and concerns about the trading that they felt should have been raised with the compliance department, but then failed to do so. The Court of Appeal rejected this argument, referring to the standard test in *Manifest Shipping v. Uni-Polaris*,[8] which would necessitate an inquiry into whether the traders suspected the fraud and dishonestly turned a blind eye to it. As such, the decision reaffirms existing legal authorities on the approach to dishonest assistance, in general, and the blind-eye knowledge test, in particular.

iv The *Quincecare* duty

Previous editions of this Review considered the ongoing evolution of the *Quincecare*[9] duty of care, which requires a bank to exercise reasonable care and skill when acting on customer instructions and, specifically, to refrain from executing a payment order where there are reasonable grounds to believe that those instructions might be an attempt to misappropriate the customer's funds. *Quincecare* cases have continued to make their way through the courts this past year, providing further welcome clarification for banks as to the scope of the duty, particularly regarding circumstances where the duty definitely does not apply. While the courts appear reluctant to expand the duty into new areas, uncertainty remains as to when the *Quincecare* duty will apply, and litigation in this area is likely to continue.

In *Stanford International Bank Ltd v. HSBC Bank plc*,[10] HSBC successfully struck out the majority of a claim in negligence that it had breached its *Quincecare* duty to its customer, Stanford International Bank (SIB), by transferring funds out of its customer's accounts to discharge its customer's debts. In finding for HSBC, the court reiterated the position established in previous cases, such as *Singularis Holdings v. Daiwa Capital Markets Europe*,[11] that banks owe the *Quincecare* duty to their customers, not their customers' creditors. In this case, the payments were made effectively by SIB either to itself, in which case there was no recoverable loss, or to investors pursuant to certificates of deposit, which had no effect on SIB's net asset position, as they reduced the liabilities by an equivalent amount.

The narrow scope of the *Quincecare* duty was further highlighted in *Philipp v. Barclays Bank*.[12] In this case, the claimants were victims of a complex authorised push payment (APP) scam, in which they were persuaded to move funds out of their account with the defendant bank. Once the extent of the fraud was discovered, they alleged that the bank had not complied with its *Quincecare* duty by failing to take steps to prevent their loss. In dismissing the claim, the court held that the *Quincecare* duty was ancillary to a bank's primary duty to act on its customer's instructions, and that it would be unduly onerous and commercially unrealistic to expect banks to 'second guess' the reasons for transactions in the manner proposed by the claimants. The court also held that the *Quincecare* duty did not support a legal obligation to have in place internal policies and procedures to protect customers from such fraud.

The *Quincecare* duty was considered again in *Roberts v. Royal Bank of Scotland*,[13] this time in the context of an application for summary judgment by the defendant bank on

8 [2001] UKHL 1.
9 *Barclays Bank plc v. Quincecare Ltd* [1992] 4 All ER 363.
10 [2021] EWCA Civ 535.
11 [2018] EWCA Civ 84.
12 [2021] EWHC 10 (Comm).
13 [2020] EWHC 3141 (Comm).

© 2021 Law Business Research Ltd

limitation grounds. While the court agreed with the defendant bank that the claim was indeed time-barred, it was held that an inference from the mere fact of the payment was enough to show that the claimants had sufficient knowledge to bring their claim.

v Misrepresentation

The High Court recently gave financial institutions some much needed clarity in claims for misrepresentation by confirming that there must be contemporary awareness of the representation purportedly relied on by the claimant. In *Leeds City Council and others v. Barclays Bank plc and another*,[14] the claimants sought rescission of bank loans entered into between 2006 and 2008 that referenced LIBOR. The claims were based on the allegation that the bank had made implied representations that LIBOR would be set honestly and properly, a position clearly undermined by the ensuing LIBOR scandal. The claimants argued that they would not have entered into the loans had they known the alleged representations were false. However, the defendants sought to strike out the claims, arguing, among other things, that the claimants could not show that they had placed reliance on the alleged representations because they failed to demonstrate contemporary awareness of them.

For the purposes of the strike out application, the court assumed that the representations were 'made, false and fraudulent'. However, the court still agreed with the defendants that awareness is an essential part of the reliance prerequisite of an actionable misrepresentation claim. Significantly, the court found that the awareness requirement does not just apply to cases where the representation is expressly made, but also applies to cases where it is implied from words or conduct. The specifics of any particular case dictate what is required to prove awareness, but there is no scope for claimants to merely assume the state of affairs based on conduct to found a misrepresentation claim. As the claimants in *Leeds* failed to demonstrate contemporary awareness of the alleged misrepresentations, the claims were struck out.

In holding that awareness is a key part of reliance, *Leeds* followed in the footsteps of previous cases. Indeed, the court noted that the claim was not being considered in a vacuum and gave particular regard to *Marme Inversiones 2007 SL v. Natwest Markets plc and others*,[15] a case dealing with alleged misrepresentation in respect of EURIBOR loans. In *Marme*, it was stated that claimants had to demonstrate that the representation had been given some 'contemporaneous conscious thought'. Similarly, the court considered *Property Alliance Group Ltd v. Royal Bank of Scotland plc*,[16] in which it was stated that if representations had been made regarding LIBOR rates, the claimants would have needed to have given thought to them in order to rely on them. As the comments in these earlier cases were obiter, the court's binding findings in the *Leeds* case that a relatively stringent awareness test applied to alleged representations in LIBOR loans is significant and will give some comfort to financial institutions that may be facing this type of misrepresentation claim.

vi Parent company liability

While recent case law in this area has been driven primarily by pollution-related claims against natural resources companies, the scope of a parent company's liability for the actions of its overseas subsidiaries is a matter of great importance to any multinational group, including

14 [2021] EWHC 363 (Comm).

15 [2019] EWHC 366 (Comm).

16 [2016] EWHC 3342 (Ch).

© 2021 Law Business Research Ltd

banks and other financial institutions. Building on a previous landmark judgment in *Lungowe v. Vedanta*,[17] the recent high-profile Supreme Court decision in *Okpabi v. Royal Dutch Shell*[18] provides useful guidance on this evolving area of law.

The case was brought in 2015 by approximately 40,000 Nigerians affected by pollution caused by oil spills in the Niger Delta. Their claims in negligence were brought against both the Nigerian operating company of the relevant oil infrastructure and the UK-incorporated parent company, Royal Dutch Shell plc. The parent company sought to strike out the claims on the basis that there was no arguable claim that it owed the claimants a duty of care. The Supreme Court disagreed with the lower courts and decided that the claimants did have an arguable case against the parent company, with the effect that the claims can now proceed in the English courts.

In reaching its decision, the Supreme Court largely followed the reasoning in *Vedanta*, which established the following general principles:

- *a* a parent and its subsidiary are separate legal persons each with responsibility for their respective activities and, accordingly, a parent does not automatically incur a duty of care to those affected by the activities of a subsidiary. Conversely, there is no principled reason why a parent may not, in appropriate circumstances, assume a duty of care;
- *b* a parent will only be found to be subject to a duty of care in relation to an activity of its subsidiary if ordinary, general principles of the law of negligence are satisfied in the particular case; and
- *c* in the context of parent and subsidiary relationships, whether a duty of care arises depends on the extent to which, and the way in which, the parent availed itself of the opportunity to take over, intervene in, control, supervise or advise the management of the relevant operations of the subsidiary.

Naturally, any UK parent of a multinational group reflecting on these decisions will be keen for clear guidance on how to stay on the right side of the line. However, both *Vedanta* and *Okpabi* concerned only the preliminary question of whether such a claim was properly arguable in the English courts, and the Supreme Court did not have to consider whether a duty of care had actually arisen. Helpfully, the Supreme Court did approve a series of examples of situations where a parent could potentially incur a duty of care to third parties affected by the operations of a subsidiary, such as where a parent has in substance taken over the management of the relevant activity of the subsidiary in place of or jointly with the subsidiary's management, or where a parent takes active steps, by training, supervision and enforcement, to see that policies and guidelines are implemented by its subsidiaries.

Given the breadth of circumstances in which a duty of care may arise and the lack of a clear bright line, as well as the demands of multiple stakeholders, it is unlikely to be realistic for multinational groups to focus on managing exposure in this area as the guiding principle of their operations. Banks and financial institutions will also note the clear environmental angle to the existing case law. Nevertheless, the principles in *Vedanta* and *Okpabi* are generally applicable and may continue to evolve as similar cases make their way through the courts.

17 [2019] UKSC 20.

18 [2021] UKSC 3.

© 2021 Law Business Research Ltd

III LEGISLATIVE DEVELOPMENTS

i A new consumer duty

A key development for the financial services industry this past year has been the publication in May 2021 of a consultation paper by the Financial Conduct Authority (FCA) regarding a new consumer duty, to consist of a new consumer principle underpinned by cross-cutting rules and guidance. The proposal aims to provide more certainty about the standards of care that consumers can expect of regulated firms, with a view to making competition work more effectively and delivering better consumer outcomes. Included within the consultation is the proposed introduction of a private right of action for breaches of the FCA Principles (the general high-level principles governing the behaviour of regulated firms in the United Kingdom), including the proposed consumer principle.

Under the current regime,[19] there is a general right of action for private persons in respect of rule breaches by regulated firms, which is subject to various exceptions. Importantly, however, as it stands, contraventions of the FCA Principles expressly cannot give rise to any such right of action.[20]

Given the broad nature of the FCA Principles, the introduction of the proposed private right of action has the potential to trigger an increase in consumer claims against banks and other financial institutions, as it would provide an alternative route to redress for consumers, in addition to, or instead of, the Financial Ombudsman Service (FOS). This alternative route would have the attraction of not being subject to the FOS's compensation limits. Another potentially significant effect of the proposal, if it proceeds, is that it could bring breaches of the FCA Principles in scope of the FCA's power to impose industry-wide redress schemes.

At the time of writing, these proposals remain subject to consultation, and so it will be some time before there is clarity about any precise legislative basis for the proposed private right of action, and even longer before any claims start to materialise. Regulated firms will be watching closely and, if a private right of action for breaches of the Principles is introduced, related developments are likely to feature in future editions of this Review.

ii Replacement of LIBOR and tough legacy contracts

As the UK financial services industry continues its wholesale transition away from LIBOR as the reference rate in contracts, the UK government and the FCA have sought to develop a legislative solution to the disruption associated with tough legacy contracts. The term describes LIBOR-referenced contracts that, for various reasons, cannot be amended or negotiated to reference an alternative benchmark, or incorporate fallback provisions that would be activated when LIBOR ceases to be available. At that point, these contracts would be ripe for litigation, particularly claims of frustration, as the exercise of core obligations becomes disrupted due to the absence of the underlying benchmark rate.

To address the issue, amendments have been made to the UK Benchmarks Regulation (UK BMR) by way of the Financial Services Act 2021, to give certain new powers to the FCA to manage the orderly wind-down of critical benchmarks such as LIBOR. These include the power to designate a 'critical' benchmark where it is no longer considered representative and to require a change in its methodology. This has resulted in the creation of a 'synthetic' LIBOR rate, which certain legacy contracts are permitted to reference. The Critical

19 Section 138D, Financial Services and Markets Act 2000 (FSMA).

20 PRIN 3.4.4R.

© 2021 Law Business Research Ltd

Benchmarks (References and Administrators' Liability) Bill will insert additional provisions into the UK BMR to provide legal certainty as to how contractual references to a critical benchmark should be treated where the FCA exercises powers to provide for the continuity of an unrepresentative critical benchmark, enabling those contracts to continue undisturbed.

IV CHANGES TO COURT PROCEDURE

As highlighted in the previous edition of this Review, the covid-19 pandemic has brought about a swift and dramatic shift towards the use of remote hearings based on audio or video technology. As relative normality returns to the United Kingdom, it is increasingly clear that remote hearings will remain available in some cases, even as physical hearings resume their central role. Indeed, recent guidance from the judiciary indicates that hearings of under half a day will be held remotely by default, but that the mode of any hearing will otherwise be subject to a discretionary judicial decision (although in the case of longer hearings and trials, parties will have the opportunity to express a preference (supported by reasons) to the Listing Office).[21] As such, while it remains uncertain how judges will exercise their discretion in any particular case, it seems unlikely that remote hearings will become established as common practice for larger-scale banking litigation hearings.

While courts and tribunals have adapted to remote hearings and novel methods of considering evidence in light of the covid-19 pandemic, these adaptations have produced some risks for parties, such as from a confidentiality perspective. In particular, it has become easier for attendees to record proceedings, which is prohibited without the court's permission under the Civil Procedure Rules, as highlighted by the BBC's recent fine and contempt of court ruling for (accidentally) broadcasting footage from a remote hearing.[22] The heightened risk highlights the importance of ensuring that appropriate precautions are taken – and warnings heeded – by all attendees at remote hearings. Additionally, in light of the travel disruption caused by the covid-19 pandemic, the courts have adopted a pragmatic approach in allowing parties and their representatives to attend remote hearings from abroad, but only subject to very strict safeguards.[23]

Another key development this year has been the introduction of Practice Direction 57AC in April 2021, which represents an important development in the rules governing factual witness statements in cases before the Business and Property Courts. Driven by a concern in the courts that witness statements were becoming overly long and overly lawyered, the rule changes are intended to ensure that factual witness statements reflect a witness's unvarnished factual recollection focused specifically on the issues of the case and to avoid needlessly long witness statements. The courts' expectations, as set out in a statement of best practice appended to the Practice Direction, make clear that witness statements should not be used to argue the case or to set out a narrative account of events based on the documents.

In terms of practical changes, both the witness and the lawyer are now required to give compliance statements (unless the court orders otherwise). Additionally, lists of documents

21 Remote hearings guidance to help the Business and Property Courts (last accessed on 23 September 2021 at: https://www.judiciary.uk/announcements/remote-hearings-guidance-to-help-the-business-and-pr operty-courts/).

22 CPR 39.9, Civil Procedure Rules; *R (on the application of Finch) v. Surrey County Council* [2021] EWHC 170 (QB) (3 February 2021).

23 *Huber & Anor v. X-Yachts (GB) Ltd & Anor* [2020] EWHC 3082 (TCC).

© 2021 Law Business Research Ltd

shown to witnesses must be annexed to the witness statement. These lists must include privileged documents but these can be identified by category or general description. Beyond these potentially significant changes to current practice in preparation of witness statements, the new Practice Direction otherwise draws together existing rules.

V PRIVILEGE AND PROFESSIONAL SECRECY

While there have been no major developments in the area of legal professional privilege in the past year, recent case law has considered the scope of disclosure obligations on companies and financial institutions in various contexts.

In *R (KBR, Inc) v. Director of the Serious Fraud Office*,[24] the Supreme Court held that a US company that had no fixed place of business in the United Kingdom and that never carried on business in the United Kingdom, but did have UK subsidiaries, could not be forced to comply with a notice to produce documents issued by the Serious Fraud Office (SFO), the United Kingdom's prosecuting authority for complex fraud and corruption. In its judgment, the Supreme Court confirmed that UK legislation is generally not intended to have extraterritorial effect, unless the contrary intention is expressed. The Supreme Court also rejected the lower court's implication into the legislation of a provision that the SFO's powers could be exercised if there was a 'sufficient connection' between the company and the United Kingdom. In overturning a controversial first instance decision, the Supreme Court's judgment marks a return to long-established presumptions regarding how extraterritoriality operates in respect of UK domestic law. At the same time, it provides welcome clarity as to the limits of the SFO's powers to compel the production of documents by overseas companies.

In another reassuring decision for banks in particular, in *Meng v. HSBC*,[25] it was held that the court's discretion to permit inspection of bank records under the Bankers' Books Evidence Act 1879 in legal proceedings did not extend to disclosure in foreign proceedings, and that foreign requests for information must come from foreign courts rather than individual parties. It was also clarified that 'bankers' books', for the purposes of the legislation, referred specifically to transaction records, and not to broader categories of documents, such as records kept by the bank for regulatory purposes.

Less reassuringly for parent companies with subsidiaries engaged in litigation, *Berkeley Square Holdings v. Lancer*[26] confirms that documents held by a party's parent company, or individuals associated with that company, can be within the party's 'control' for the purposes of their obligation to disclose documents. The court held that the requisite 'control' is not determined by the existence of a legal right to obtain the documents, but rather the existence of an arrangement or understanding around the sharing documents, which is general in its nature and might be inferred from prior conduct. This decision highlights the importance of giving careful thought to processes around the sharing of documents on an intra-group basis, particularly when litigation is in prospect.

Banks concerned about the increasing burden of requests for personal data under the Data Protection Act 1998, including by claims management companies seeking to bring groups of claims against financial institutions, will take some comfort from the decision in

24 [2021] UKSC 2.
25 [2021] EWHC 342 (QB).
26 [2021] EWHC 849 (Ch).

© 2021 Law Business Research Ltd

Lees v. Lloyds Bank.[27] In this case, a claimant alleged that the bank had failed to comply with his requests for copies of his personal data. As well as rejecting the claim on the basis that the bank had, in fact, complied with the requests, the court took the opportunity to criticise the claimant's approach, finding that he had made 'numerous and repetitive' requests, which was abusive, and that the requests were driven by a 'collateral purpose' of obtaining assistance with litigation. The court did also note, however, that a collateral purpose of seeking material to assist in litigation would not be an absolute exemption to complying with a data subject access request, but would be a relevant factor in the exercise of the court's discretion to order a data controller to comply with such a request.

VI JURISDICTION AND CONFLICTS OF LAWS

Unsurprisingly, Brexit has resulted in some changes to the United Kingdom's position vis-à-vis EU Member States in terms of the rules that determine which country's courts have jurisdiction over cross-border disputes and which country's laws apply to such disputes. These, and other areas where conflicts of laws can arise, are the subject of EU rules which no longer apply to the United Kingdom. It is now clear which rules the United Kingdom will apply: in some areas, the changes are minor; in others, they are more significant, which could entail greater complexity in certain cross-border cases with a European element. Despite these challenges, however, English governing law and jurisdiction clauses are likely to retain their attraction for banks and financial institutions, given the enduring popularity of English law, the quality of judges and the legal infrastructure, as well as the English courts' experience of dealing with complex financial disputes.

Regarding choice of law, the position remains substantially unchanged. The EU regulations governing the law applicable to contractual and non-contractual obligations[28] have been incorporated, with minor amendments, into English law and will continue to be applied by the English courts, while English governing law clauses will be given reciprocal effect in EU Member States.

By contrast, the position regarding jurisdiction is now, in some cases, quite different. The relevant European rules[29] ceased to apply to proceedings started in the English courts on or after 1 January 2021. The rules that the English court will now apply depend on the circumstances of the case. The area in which the change is least marked is where the parties have agreed to give the English courts exclusive jurisdiction over disputes that may arise between them. These kinds of clauses will, in many cases, be within the scope of the Hague Convention on Choice of Court Agreements, an international agreement to which the United Kingdom acceded at the end of the transition period and to which the European Union was already party. The Hague Convention operates similarly to the formerly applicable European rules: where an exclusive jurisdiction clause nominates the courts of a contracting state, the courts of other contracting states will uphold that clause by accepting jurisdiction if nominated and declining it if not. In addition, contracting state courts are required to enforce each other's judgments in cases founded on qualifying exclusive jurisdiction clauses.

27 [2020] EWHC 2249 (Ch).

28 Regulation (EC) No. 593/2008 (Rome I) and Regulation (EC) No. 864/2007 (Rome II).

29 Regulation (EU) No. 1215/2012 (the Recast Brussels I Regulation) and its predecessor instruments as well as the 2007 Lugano Convention, which extends the broad scheme of the EU rules to Norway, Iceland and Switzerland.

© 2021 Law Business Research Ltd

Importantly, however, the Hague Convention does not apply to other types of jurisdiction clause commonly used by corporates, such as one-way or asymmetric jurisdiction clauses. Commonly used in financing documents, these require one party, typically the borrower, to bring any claims in a specified country while the other party, usually the lender, is free to litigate in any court that will hear the claim. In these circumstances, English courts will resolve questions of jurisdiction using rules set out in the common law. These rules are not new: they have always been applied in cases without a European nexus. However, they are very different from the European rules; while they allow a degree of flexibility not available to EU Member State courts, this can sometimes come at the cost of more time spent litigating preliminary jurisdictional points. As regards the enforcement of an English judgment in the European Union (and vice versa), litigants will need to rely on local laws. Judgments will still be enforceable, but it is likely to take longer. As a result, commercial parties may choose to adopt exclusive jurisdiction clauses, where appropriate, to ensure the applicability of the Hague Convention to their disputes.

VII SOURCES OF LITIGATION

As already discussed in detail above, the Supreme Court's decision in *Merricks* is a significant milestone for all UK corporates, including banks and financial institutions, as it will undoubtedly embolden would-be claimants and third-party funders, potentially triggering an increase in successful applications for certification. This is in addition to the continued use by claimants of other types of group action, such as opt-in Group Litigation Orders, which were covered in more detail in the previous edition of this Review.

Another key development over the past year has been the continued growth of the third-party funding market, which has led to an uptick in funded litigation against financial institutions and other corporates. A key area of focus for funders has been on cartel claims in the competition sphere, and there is likely to be a long tail of follow-on claims from decisions of the European Commission, which remain within the relevant time limits for limitation purposes, despite the United Kingdom's recent exit from the European Union. In terms of group claims, a number of landmark decisions addressed in this edition of the Review are broadly favourable to claimants, particularly *Merricks*, *Vedanta* and *Okpabi*, which will produce opportunities for funders to support the development of evermore ambitious and high-value claims in the months and years to come.

© 2021 Law Business Research Ltd

Appendix 1

ABOUT THE AUTHORS

DEBORAH FINKLER

Slaughter and May

Deborah Finkler is a partner in Slaughter and May's disputes and investigations group and was formerly head of both dispute resolution and the firm's global investigations group. Her practice covers the broad spectrum of commercial litigation and both domestic and cross-border investigations. She acts on substantial and complex commercial disputes for a wide range of clients, including a number of international banks and financial institutions. Deborah is highly regarded for her banking litigation and regulatory investigations practice. She is also regularly involved in complex corporate recovery and insolvency work.

Deborah is ranked as a leading individual for Banking Litigation and for Financial Services (Contentious Regulatory) in *Chambers UK*, 2021. She is also recognised as a 'Hall of Fame' individual for both Banking Litigation and for Commercial Litigation in *The Legal 500*, 2022, where she is also listed as a 'Leading Individual' for Financial Services (Contentious).

Deborah is described in the legal directories as 'the best there is' and a 'formidable' practitioner with 'massive experience over a very wide range of cases'. She is 'respected by fellow practitioners as a tough negotiator and a forceful advocate for her clients', 'an absolute class act'.

CHRIS WILKINS

Slaughter and May

Chris Wilkins is an associate in Slaughter and May's disputes and investigations group. Chris has a wide-ranging arbitration, litigation and investigations practice, which includes acting on large-scale and complex disputes for international banks and financial institutions. Recent financial services experience includes advising an investment company in respect of an LCIA arbitration and acting for various financial institutions in relation to international regulatory investigations. Chris also has experience advising clients across a wide range of other sectors, including pharmaceuticals, natural resources, telecommunications, mobile advertising and consumer goods.

© 2021 Law Business Research Ltd

SLAUGHTER AND MAY

47th Floor, Jardine House
One Connaught Place, Central
Hong Kong
Tel: +852 2521 0551
Fax: +852 2845 2125
wynne.mok@slaughterandmay.com
kathleen.poon@slaughterandmay.com

One Bunhill Row
London
EC1Y 8YY
United Kingdom
Tel: +44 20 7600 1200
Fax: +44 20 7090 5000
deborah.finkler@slaughterandmay.com
chris.wilkins@slaughterandmay.com

www.slaughterandmay.com

© 2021 Law Business Research Ltd

an **LBR** business

ISBN 978-1-83862-761-4

© 2021 Law Business Research Ltd