HERBERT SMITH FREEHILLS

BANKING LITIGATION UPDATE

In this update we highlight some of the more important cases and developments affecting UK financial institutions over the past 6 months.

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OTHER SIGNIFICANT DECISIONS

MIS-SELLING CLAIMS

1. Property Alliance Group v RBS transferred to the Financial List: top tips for parties wishing to successfully transfer proceedings

***Property Alliance Group Limited v Royal Bank of Scotland plc* [2016] EWHC 207 (Ch)**

This recent decision provides helpful early guidance as to the Court's approach to contested applications to transfer proceedings to the newly created Financial List. While each case will depend on its own facts, the following factors are likely to be key:

1. Whether the claim involves issues of general importance to the financial markets, or the need for particular expertise on the part of the judge;
2. Whether the claim is a test or lead case;
3. Whether a Financial List judge is available to conduct both the pre-trial review (**"PTR"**) and the trial; and
4. Whether the transfer will otherwise affect the trial timetable.

The party applying to transfer should also consider what assurances can be given to the Court. For example, in the instant case, the applicant addressed the final factor above by giving assurances that it did not intend to apply to adjourn or make procedural applications which might disrupt the commencement of trial.

An application to transfer proceedings to the Financial List should be made at the earliest opportunity. While the application to transfer the proceedings was successful in this case (in part because it could be done without impact on the trial timetable), the Court noted that it would have been preferable for the application to have been made earlier, and warned of the potential consequences of delay in other cases.

For more detail on this case, read our e-bulletin here, by Harry Edwards and Hannah Bain.

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2. Suresh Sivagnanam v Barclays Bank: High Court limits shareholders seeking a second bite of the cherry in IRHP mis-selling cases

***Suresh Sivagnanam v Barclays Bank plc* [2015] EWHC 3985**

The mis-selling claim, which was brought against a financial institution by a sole shareholder of a company, has failed at the summary judgment stage. The High Court relied on two grounds to find that the claim had no real prospect of success:

1. Section 138D of the Financial Services and Markets Act (**"FSMA"**) (which provides a basis for bringing a claim for breach of statutory duty) is only intended to protect customers who constitute private persons to whom a duty is owed (i.e. customers of the relevant financial institution); and
2. The well established company law principle that a shareholder cannot bring a claim for reflective loss.

The sensible approach of the Court to the interpretation of section 138D FSMA will be welcomed by financial institutions. This is particularly so against a backdrop of various attempts by claimants to widen the scope of this statutory provision by extending the definition of "private persons" to include corporate entities. See our e-bulletin on *Thornbridge Limited v Barclays Bank plc* [2015] EWHC 3430 (QB), for our most recent discussion of this trend. In that case, the defendant bank successfully argued that the corporate entity was not entitled to claim for breach of section 138D FSMA as it was clearly acting "in the course of carrying on business" and therefore did not qualify as a "private person."

For more detail on this case, read our e-bulletin here, by Damien Byrne Hill and Michael Tan.

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3. Deutsche Bank v Unitech: borrowers seeking rescission for alleged LIBOR manipulation must be prepared to pay the full loan amount outstanding before trial

Deutsche Bank AG v Unitech Ltd [2016] EWCA Civ 119

This Court of Appeal judgment will be welcomed by lenders seeking to recover against loan agreements which used LIBOR as a reference rate in the calculation of interest. Such lenders are frequently met with a defence and counterclaim in which the borrower resists or seeks to delay any repayment on grounds of alleged LIBOR manipulation. The instant judgment makes it clear that if a borrower seeks to rescind a loan agreement and any associated interest rate swaps on these grounds, it must be prepared to make an interim payment or payment into Court (in advance of trial) for the total amount borrowed under the loan. The Court also rejected a number of other defences based on LIBOR manipulation.

Lenders can often meet resistance when pursuing recovery action against borrowers because of allegations about their alleged involvement and knowledge of LIBOR manipulation. However, the reality is that such claims only have the potential to reduce liability under the loan, not escape it entirely. The clear message from the Court is that borrowers pursuing such allegations should, at an early stage of the proceedings, be prepared to pay the same sum they would be ordered to pay if their rescission defence succeeds.

For more detail on this case, read our e-bulletin here, by Rupert Lewis and Ben May.

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4. CGL Group v RBS: No Suremime-type duty of care owed directly to customer in connection with past business review

CGL Group Limited v Royal Bank of Scotland [2016] EWHC 281 (QB)

Six months after the High Court's surprising judgment in *Suremime Limited v Barclays Bank plc* [2015] EWHC 2277 (QB), this recent decision will be encouraging for financial institutions concerned about liabilities arising out of FCA past business reviews.

The Court held that the Claimant's proposed amendment to the Particulars of Claim – namely, that the Defendant bank directly owed its customers a common law duty of care in connection with the past business review mandated by the FCA (as it now is) – was not arguable.

The express exclusion of third party rights in the bank's agreement with the FCA was one of the most significant factors considered by the Court. This decision underlines the importance of taking great care when considering and negotiating the terms of any agreements with the FCA, as we noted in our August 2015 e-bulletin on the *Suremime* decision.

The Court also emphasised that to impose such a duty of care would "drive a coach and horses through a clearly defined statutory scheme". Although not expressly stated, this must be a reference to section 138D of the Financial Services and Markets Act 2000 (**"FSMA"**), which provides customers who qualify as "private persons" with a private right of action against a financial institution for certain breaches of the regulatory regime. The Court in the instant case agreed with the bank that the limited circumstances in which a customer may rely upon the obligations a bank owes to a regulator as a cause of action (i.e. under section 138D FSMA) did not arise in this case. Further, the fact that a bank owes a duty to the FCA does not mean that a similar duty is automatically owed by the bank to its customer at common law (*Green & Rowley v Royal Bank of Scotland plc* [2013] EWCA Civ 1197). In contrast to Suremime, it was held that the proposed common law duty would therefore circumvent the existence of the statutory scheme.

For more detail on this case, read our e-bulletin here, by Rupert Lewis and Benjamin Coleman.

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5. Qadir v Barclays: High Court gives helpful guidance on limitation periods in IRHP mis-selling litigation

Qadir & Hussain v Barclays Bank plc [2016] EWHC 1092 (Comm)

Following a series of decisions considering similar issues, the High Court has again granted a bank's application to strike out an interest rate hedging product (**"IRHP"**) mis-selling claim on the grounds that it was out of time under the Limitation Act 1980 (the **"Act"**).

Finding in favour of the bank, the Court held that:

1. There was no real prospect of the Claimants relying at trial on the three-year extension for negligence actions at section 14A(4)(b) of the Act, because the Claimants must have known the "essence of the claim" more than three years before they brought it: namely, that the IRHPs they acquired were lossmaking and that alternatives were available.
2. There was no real prospect of the Claimants establishing at trial that the bank made a "clear and unequivocal" representation during its review of IRHPs that it would not rely on its right to assert a limitation defence. Even if the bank's statements did amount to an unambiguous representation, the Court did not accept that the Claimants had relied on it to their detriment.

There are a number of key points to take away from this decision, which will be helpful for financial institutions dealing with IRHP mis-selling claims:

- It may be inferred from this decision that, in IRHP mis-selling cases, a claimant's cause of action accrues on the date it is sold the allegedly unsuitable product rather than at some later date when they incur actual financial loss. The primary six-year limitation period should therefore commence on the date the claimant is sold the allegedly unsuitable product.
- Time will start running for the purpose of the three-year 'safety net' extension for negligence actions when a claimant knows "the essence of the claim". In a claim about the suitability of IRHPs, this will include knowledge that the swaps are lossmaking and also knowledge that there were other alternatives available.
- There is no requirement that a claimant should know that it has a legal complaint for time to start running. If the "essence of the claim" is known, time will not be stopped from running simply because a claimant was not aware of the legal duty which completes their cause of action.
- This decision will tend to support arguments that statements made by a bank in the context of its review of IRHPs (or indeed, past sales of any type of product) do not constitute unequivocal representations that the bank will not enforce its legal right to assert a limitation defence. Indeed, cases will be "vanishingly rare" where such an estoppel could be established in the absence of a binding standstill agreement.

For more detail on this case, read our e-bulletin here, by Damien Byrne Hill and Ben Worrall.

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CONTRACTUAL CONSTRUCTION

6. Windermere VII: Financial List provides guidance of wider market significance on the rights attaching to Class X notes in a CMBS structure

Hayfin Opal Luxco 3 S.A.R.L. & Anor v Windermere VII CMBS plc & Ors [2016] EWHC 782 (Ch)

This is a recent decision (heard in the Financial List) relating to the interpretation of commercial mortgage backed securitisation (**"CMBS"**) documentation, will be of interest to finance lawyers and banking litigators alike.

The decision concerns the calculation of interest payable on certain ‘Class X’ notes. Whilst the findings relate to the specific documentation in question, they may well be of wider market significance given that such instruments are commonly used in CMBS structures and have (particularly in respect of those issued prior to the global financial crisis) been somewhat controversial. In particular, the Court confirmed that:

1. interest payable to the Class X noteholder did not increase to include any default interest payable by the borrower under one of the underlying loans;
2. interest payable to the Class X noteholder did not include interest on an underlying loan that had been capitalised;
3. unpaid interest on the Class X note itself did not accrue interest (although this element of the decision was obiter).

Indeed, the first point above on default interest has also recently been considered in *Credit Suisse Asset Management LLC v Titan Europe 2006-1 plc & Ors* [2016] EWHC 969 (Ch), in which the Chancellor of the High Court reached the same conclusion in respect of a different set of Class X notes and underlying loan documentation. Whilst the specific analysis of the contractual wording was therefore also different, the same outcome was reached on the basis of an interpretation that was most likely to carry the commercial outcome intended by the parties given the overall scheme of the notes.

This judgment also provides guidance as to the approach to interpreting contracts governing complex financial instruments more generally. The case confirms (in line with previous Court of Appeal authority), that the Court will be reluctant to depart from the plain language used in an agreement unless the provision is ambiguous.

Permission to appeal has been granted and the appeal is due to be heard in early 2017.

For more detail on this case, read our e-bulletin here, by Harry Edwards and Hannah Bain.

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7. Alexander v West Bromwich Mortgage Company Ltd: when can lenders rely on contradictory mortgage conditions?

***Alexander v West Bromwich Mortgage Company Ltd* [2016] EWCA Civ 496**

The Court of Appeal considered the right of a lender to rely on standard term mortgage conditions that contradicted the special conditions of a "tracker mortgage".

In particular, the case concerned whether the lender could rely on two provisions in its standard term mortgage conditions entitling it (1) unilaterally to vary the loan interest rate for any "valid reason" and (2) to terminate the mortgage on one month's notice absent borrower default.

The contract contained an "inconsistency clause", favouring the lender's bespoke "Offer of Loan" over its standard conditions in the event of inconsistency. The Court agreed with the borrower that both the standard conditions in question were inconsistent with the specific terms of the "tracker mortgage" sold to the borrower and hence could not be relied on by the lender.

Notably, the borrower represented a number of other borrowers with similar loans (known collectively as the "Property118 Action Group"). The case reinforces the importance of ensuring communications to borrowers (including transaction documents) accurately reflect the parties' intentions. This is particularly the case where a lender wishes to rely on a wide power or discretion conferred on it in its standard terms which might allow it to deviate from the main purpose or object of the particular contract in question.

For more detail on this case, read our e-bulletin here, by Simon Clarke, Ben May and Ben Worrall.

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8. UCTA reasonableness test may apply even where contract is only partly on standard terms

***Commercial Management (Investments) Limited v Mitchell Design and Construct Limited and another* [2016] EWHC 76 (TCC)**

The High Court has found that the requirement of reasonableness imposed by the Unfair Contract Terms Act 1977 (UCTA) can apply in circumstances where a party's written standard terms and conditions are incorporated only in part and other terms are tailor made.

The UCTA reasonableness test applies to (among other things) any attempt to exclude or restrict liability for breach of contract where one party deals "*on the other's written standard terms of business*". Parties may assume that the test is not engaged in the context of a contract made between two commercial parties where certain of the terms have been negotiated and others are in standard form.

However, this decision makes it clear that it is not necessary for the full suite of a party's standard written terms and conditions to be incorporated into a contract before UCTA will apply. This means that more exclusion clauses may be open to challenge on grounds of reasonableness than might generally have been assumed.

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9. Court of Appeal confirms exclusion clause should be construed narrowly if necessary to resolve ambiguity

***Nobahar-Cookson & Ors v The Hut Group Ltd* [2016] EWCA Civ 128**

In a recent decision on contractual interpretation relating to an exclusion clause, the Court of Appeal confirmed that, if necessary to resolve ambiguity, exclusion clauses should be narrowly construed.

The court reached this conclusion on the basis that parties are not lightly to be taken to have intended to cut down the remedies the law provides for breach of contract, unless the contract contains clear words to that effect. This principle is of similar effect to the traditional rule that exclusion clauses should be construed "contra proferentem". However, the Court of Appeal in this case rejected that underlying rationale for the principle that exclusion clauses should be construed narrowly, saying it has nothing to do with the identification of the party putting forward the clause or seeking to rely upon it.

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DISCLOSURE AND PRIVILEGE

10. Court of appeal clarifies when court will allow inspection of documents mentioned in witness statement or statement of case

***Blue Holdings (1) PTE Ltd & another v National Crime Agency* [2016] EWCA Civ 760**

In a recent decision, the Court of Appeal has clarified the approach to be taken in determining whether the court should allow inspection of a document "mentioned" in a witness statement or statement of case.

The decision confirms that there is no unqualified right to inspect such a document; inspection may be resisted for example on grounds of proportionality or legal professional privilege, though the burden is on the party resisting inspection to displace the general rule that a "mentioned" document may be inspected. Confidentiality is also a relevant factor, though it will not be determinative.

In exercising its discretion, the court will need to find a just balance between the competing interests of the party seeking to inspect and the party seeking to maintain confidentiality. In striking that balance, the court may properly have regard to the question of whether inspection is necessary for the fair disposal of the action, but there is no standalone "necessity" test which needs to be satisfied before allowing inspection.

The practical message for parties who wish to maintain confidentiality in particular documents is, so far as possible, to avoid mentioning them in witness statements or statements of case. If confidential documents are mentioned, it will be for the court to balance the competing interests, and it may be difficult to predict where that balance will be struck.

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11. The price of changing experts: disclosure of privileged report

***Stewart Coyne v (1) Alec Morgan (2) Alex Harrison (T/A Hillfield Home Improvement)* (unreported, 24 May 2016)**

In a recent decision, the Technology and Construction Court granted defendants permission to adduce expert opinion evidence from a second expert, after their first expert had ceased to act, on the condition that the defendants disclose the first expert's draft report. However, the defendants were not required to disclose their solicitors' attendance notes of meetings with the first expert, on the basis that it was not a "strong case of expert shopping".

The decision is a helpful reminder that the court's power to impose conditions when granting permission to adduce expert evidence is not limited to instances of "expert shopping" (in the sense of shopping around for a more favourable expert opinion in place of one already obtained). It suggests that once a party has engaged in a pre-action protocol process and appointed an expert in that context, it should expect to be required to waive privilege in that expert's report if it later wishes to obtain permission to adduce evidence from a different expert. That approach applies irrespective of the party's motivation for changing expert.

However, only in cases where there is strong evidence of "expert shopping" is it likely that the court will require that a party discloses other forms of document that contain the substance of the expert opinion (for example solicitors' attendance notes of meetings with the expert).

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12. Commercial Court decision suggests "torpedo" actions may not be effective where parties have agreed unilateral jurisdiction clause

***Perella Weinberg Partners UK LLP v Codere SA* [2016] EWHC 1182 (Comm)**

The recast Brussels Regulation, which applies to proceedings commenced since 10 January 2015, contains various improvements over the previous version. These include provisions aimed at defusing so-called "torpedo" actions by which a party could seek to delay proceedings in the court the parties had chosen in their jurisdiction clause by commencing proceedings in breach of the clause elsewhere in the EU.

There has however been some doubt as to whether these new "anti-torpedo" provisions would be effective where the parties had agreed a unilateral or one-way jurisdiction clause (providing for example that one party must sue in England but the other is free to issue proceedings in any available jurisdiction), rather than an exclusive jurisdiction clause binding on both parties.

In this recent Commercial Court decision, the judge has expressed the view (though it was not necessary for his decision) that the provisions should apply equally to a unilateral clause. If this view is adopted in other cases, it will mean that a party who is required to sue in a specified jurisdiction under a unilateral clause will not be able to delay proceedings in that jurisdiction by launching a "torpedo" action elsewhere in breach of the clause.

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13. Court of Appeal decision confirms stay may be granted despite forum non conveniens waiver clause but precise basis uncertain

***Standard Chartered Bank (Hong Kong) Limited and another v Independent Power Tanzania Limited and others* [2016] EWCA Civ 411**

The Court of Appeal has upheld a decision of the Commercial Court refusing a stay of English proceedings where the contracts contained a non-exclusive English jurisdiction clause combined with a forum non conveniens (FNC) waiver clause.

The Court declined to give guidance on whether the effect of a FNC waiver clause was to preclude only those arguments on forum which were unforeseen and unforeseeable at the time of contracting (as the Commercial Court held – see our blog post here) or whether it would preclude raising any arguments whether or not foreseeable (as the obiter comments of Clarke LJ suggest in *Westminster Bank v Utrecht-America Finance Company* [2001] E All ER (Comm) 7).

In practice however this may not matter greatly as the Court of Appeal accepted that a FNC waiver clause did not preclude an application for a case management stay of the kind ordered in *Reichhold Norway ASA v Goldman Sachs International* [2001] 1 WLR 173, namely where there is a "rare and compelling case". In effect, therefore, the court has retained the power to order a stay when it considers it appropriate.

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OTHER SIGNIFICANT DECISIONS

14. Court of Appeal gives guidance for bankers' references: what to include in a request for reference and the circumstances in which liability may be avoided

***Playboy Club London Ltd & Ors v Banca Nazionale Del Lavoro SPA* [2016] EWCA Civ 457**

This recent decision of the Court of Appeal is an interesting clarification of the legal principles that apply to bankers' references.

The commercial effect of the judgment is that, if a request for a bank reference:

1. deliberately chooses not to reveal the existence of an underlying customer (naming an intermediary instead); and
2. does not specify the purpose for which the reference is required;

then the underlying customer may not be able to rely upon the reference if the subject of the reference defaults.

Financial institutions drafting requests for references should therefore ensure that the above information is included in any request. Any customer who wishes to remain anonymous should be warned that there is a risk they may not be able to rely upon the reference. On the other hand, any financial institutions who are giving references may be able to rely upon this development in order to avoid liability under the reference in an appropriate case.

For more detail on this case, read our e-bulletin here, by Harry Edwards and Michael Hershan.

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15. Commercial court finds commitment letter unsigned by one party to be legally binding

***Novus Aviation Limited v Alubaf Arab International Bank BSC(c)* [2016] EWHC 1575 (Comm)**

This recent decision of the Commercial Court serves as a cautionary tale to any financial institutions that regularly use letters of commitment.

The Court found that a letter of commitment, which was expressed to be "conditional upon satisfactory review and completion of documentation", was nevertheless legally binding. Further, although it was intended that the commitment letter would become contractually binding once executed by both parties, this did not prevent it from having legal effect when executed by only one party. There was no term of the commitment letter that stipulated that the only means of acceptance was by countersignature, such that acceptance could be communicated by conduct.

For more detail on this case, read our e-bulletin here, drafted by Rupert Lewis, James Allsop and Mark Tanner.

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16. Supreme Court holds that a settlement may be set aside for fraud even if fraud was suspected

***Hayward v Zurich Insurance Company plc* [2016] UKSC 48**

The Supreme Court has held unanimously that, where a party seeks to set aside a settlement agreement on the grounds that it was induced to enter into it by its opponent's fraudulent misrepresentations, it will not necessarily be a bar to the claim that the party did not fully believe the representations.

Overturning the Court of Appeal's ruling on this point, the Supreme Court identified the appropriate question as whether the party was "influenced by" its opponent's representations in entering the agreement. There is no independent requirement that the defrauded party actually believed the representations to be true. The fact that it had doubts or suspicions may be highly relevant to the court's assessment of whether it was influenced, but it will not be determinative. In particular, in the specific context of an agreement to settle court proceedings, a party may have been influenced in the sense that it took into account the risk that the court hearing the claim would believe the representations, even if the party itself did not. Each case will however turn on its facts.

The Supreme Court's decision clarifies an uncertain area of the law regarding misrepresentation and deceit in a settlement context and will be particularly welcomed by insurers and other parties involved in proceedings where an element of fraud is suspected.

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17. Supreme Court reformulates test for when a claim will fail due to illegality

Patel (Respondent) v Mirza (Appellant) [2016] UKSC 42

The Supreme Court has established a new approach to the question of whether a defendant will be able to rely on the defence of illegality.

Under this new approach, the defence will apply if enforcing the claim would be harmful to the integrity of the legal system. In assessing whether that is the case, the court must consider:

1. whether the underlying purpose of the law which has been broken will be enhanced by denying the claim;
2. any other relevant public policy which may be affected by denying the claim; and
3. whether denying the claim would be a proportionate response to the illegality.

The Supreme Court found that, under this new approach, a claimant will not ordinarily be debarred from enforcing a claim for unjust enrichment simply because the money he seeks to recover was paid for an unlawful purpose – though there may be rare cases where enforcing such a claim might be regarded as undermining the integrity of the justice system. In this case there were no such circumstances, and so the claimant succeeded in his claim for recovery of money paid under an illegal contract (for insider dealing) which was not ultimately performed.

This new approach replaces the test adopted by the House of Lords in *Tinsley v Milligan* [1994] 1 AC 340, under which a claim would be barred if the claimant had to rely on the illegality to bring the claim. The so-called reliance test has been much-criticised on the basis that it is arbitrary, uncertain and potentially unjust, in particular because the question of whether a claim could proceed depended on a procedural issue of how the case must be pleaded rather than the merits of the parties or questions of public policy.

On numerous occasions in recent years, the courts have identified the need for the Supreme Court to address the proper approach to the defence of illegality in an appropriate case (see for example this blog post on *Jetivia SA v Bilta (UK) Limited* [2015] UKSC 23). It is therefore welcome that the Supreme Court has clarified the law in this difficult area.

That said, there is force in the view expressed by a minority of the Supreme Court that the new approach risks enabling the courts to apply the illegality principle in an inconsistent way and possibly beyond its proper limits. There is a fear, succinctly expressed by Lord Sumption, that the new approach "converts a legal principle into an exercise of judicial discretion", in the process exhibiting all the vices of "complexity, uncertainty, arbitrariness and lack of transparency". It has however been authoritatively established as the correct approach to the law.

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18. Predictive coding ordered despite party's objections

The High Court has ordered disclosure to be carried out using predictive coding despite a party's objections to the use of the technology: *Brown v BCA Trading Limited* [2016] EWHC 1464 (Ch).

This is understood to be the first reported decision in which the English courts have approved the use of predictive coding following a contested application. A decision in February this year had endorsed the use of the technology for a large disclosure exercise, but in circumstances where the parties had already agreed on its use (*Pyrrho Investments v MWB Property* [2016] EWHC 256 (Ch) – see our blog post on that decision which also explains more about predictive coding).

The present decision illustrates that the comparative costs between predictive coding and keyword searching are likely to be a significant factor in determining whether it should be ordered. It also suggests that, where there is a dispute as to whether predictive coding is appropriate, the court may take particular account of the views of the party who holds the lion's share of the documents and therefore will have the greater burden on disclosure.

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19. Courts taking tough line on disproportionate costs

***BNM v MGN Limited* [2016] EWHC B13 (Cost)**

A recent decision of the Senior Courts Costs Office shows that the post-Jackson test of proportionality can mean a significant reduction in the costs a successful party can recover, even if those costs were reasonably incurred.

The decision will be of particular interest to those defending claims commenced since 1 April 2013 (when the new test of proportionality took effect) where the claimant has the benefit of a conditional fee agreement (CFA) and/or after the event (ATE) insurance policy falling within an exception to the Jackson reforms – either because it was entered into before 1 April 2013 or because it falls within one of the exceptions to the Jackson reforms (including publication and privacy proceedings, as in the present case). The decision suggests that such arrangements will be subject to the new test of proportionality in the same way as other costs, and therefore may be more susceptible to challenge.

This is one of a number of recent decisions in which the courts have slashed the successful party's recoverable costs on grounds of proportionality. For example in *May v Wavell Group Plc* (reported on Civil Litigation Brief), a private nuisance claim which settled for £25,000, the court found the claimant's reasonable costs were just under £100,000 (of some £208,000 incurred) but awarded only £35,000 on grounds of proportionality.

Such decisions illustrate that parties who incur costs that are out of proportion to sums at stake cannot assume they will be able to recover them on success, even if they are both reasonably and necessarily incurred. That will apply even more strongly if Lord Justice Jackson's recent suggestions for a fixed recoverable costs regime for the "lower reaches of the multi-track" become a reality; he has suggested the regime should apply for cases up to £250,000 but recognised there is room for debate as to the figure. The government's policy on the issue is not yet clear.

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20. Herbert Smith Freehills LLP contributes chapters to the recently published First Edition of Getting the Deal Through – Financial Services Litigation 2016

Given the global growth of litigation in this sector following the financial crisis, it seems the appropriate time to launch a dedicated guide for practitioners in this area. While the existence of financial services litigation is truly a global phenomenon, it has become apparent through the process of compiling this edition that the law and procedures in relation to such disputes have evolved in different ways across the jurisdictions.

See here to preview this publication.

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21. Herbert Smith Freehills LLP contributes chapters to the recently published Second Edition of The Securities Litigation Review

The Securities Litigation Review is described in the Editor's Preface as a "guided introduction to the international varieties of enforcing rights related to the issuance and exchange of publicly traded securities. Unlike most of its sister international surveys, this review focuses on litigation – how rights are created and vindicated against the backdrop of courtroom proceedings. Accordingly, this volume amounts to a cross-cultural review of the disputing process."

Chapter 6 on securities litigation in England & Wales, available here, was co-written by Karen Anderson and Harry Edwards.

Luke Hastings and Andrew Eastwood, partners at Herbert Smith Freehills in Australia, have also written a chapter on the Australian jurisdiction here.

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22. Guide to Dispute Resolution in Asia Pacific – A multi-jurisdictional review

Our updated Guide to Dispute Resolution in Asia Pacific aims to provide answers to some of the basic questions a party unfamiliar with a particular jurisdiction will wish to ask when facing the prospect of having to engage in a dispute resolution process in that jurisdiction. Aspects of litigating and arbitrating across the region will, though, not only be of interest to parties once they are faced with a dispute, but also at the stage of negotiating contracts, when deciding on the choice of law and whether to include jurisdiction or arbitration clauses in favour of a particular jurisdiction.

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23. Arbitrating disputes under the ISDA Master Agreement

It is over two and a half years since the International Swaps and Derivatives Association (ISDA) published its Arbitration Guide, which provides both general guidance on arbitration, and a selection of model arbitration clauses that can be incorporated into an ISDA Master Agreement. ISDA decided to publish the Arbitration Guide following consultation with its members and other stakeholders, which confirmed the increasing interest in using arbitration as a means of resolving disputes arising from derivatives transactions documented under a Master Agreement. ISDA had previously (in 2010 and 2012) included an arbitration clause in its Islamic finance Tahawwut (Hedging) Master Agreement and its Mubadalatul Arbaah (Profit Rate Swap) Agreement, which were the first official ISDA documents to provide for arbitration. ISDA's decision to provide for arbitration in its documentation reflects a broader trend towards greater acceptance of arbitration in the financial markets - for example, the Loan Market Association (LMA) also incorporated an option for parties to agree to LCIA arbitration in some of its standard facility agreements at a similar time as the ISDA Arbitration Guide.

See our article here which considers some of the pros and cons of arbitrating (rather than litigating) derivatives disputes arising under an ISDA Master Agreement. It will then move on to consider the future of the ISDA Arbitration Guide and some areas for potential future development.

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