HERBERT SMITH FREEHILLS

BANKING LITIGATION UPDATE

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Welcome to the Spring 2021 edition of our biannual Banking Litigation Update, in which we highlight a number of the most important cases and developments affecting UK financial institutions over the past six months.

The first notable theme during this period concerns the number of judgments related to securities class actions. While there have been some high profile and high value claims of this type in recent years, the past six months have witnessed an uptick in interim judgments being handed down by the court. These decisions have helped to provide clarity on key procedural issues, particularly in the context of claims brought under s.90A of the Financial Services and Markets Act 2000 (**FSMA**). For example, trial structure tends to be a key case management battleground, and in the *Allianz v RSA* s.90A FSMA claim the court has provided important confirmation that reliance issues should be heard at the first trial, rather than held over to the second. We have also been tracking the ever-evolving regulatory landscape for climate-related disclosures by issuers, and we have included in this update our recent blog posts considering what, if any, litigation risks may arise as a result of these developments.

Judgments considering the *Quincecare* duty keep coming out at pace. These decisions are helping to put flesh on the bones of the duty, as the court continues to grapple with its parameters. Although there has still only been one case to date in which the court held that the duty was owed and breached (*Singularis*), there has been an unhelpful trend in recent case law to expand the scope of the duty, therefore increasing the risk profile of such claims for banks. However, the court has recently confirmed limitations to the potential beneficiaries of the duty, finding that it does not extend to protecting individuals (*Philipp v Barclays*) or creditors of the bank's customer (*Stanford v HSBC*). For those who are interested in an easily digestible overview of the duty and recent case law, please check out the *Quincecare* special edition of our banking litigation podcast here.

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Dispute resolution insights

In the world of LIBOR, the Financial Conduct Authority (**FCA**) has finally made its much anticipated announcement that all LIBOR settings will either cease to be provided or will no longer be representative after 31 December 2021 (or after 30 June 2023 in the case of certain US dollar settings). With this deadline fast approaching, there has been a flurry of regulatory and legislative activity around the globe to deal with so-called “tough legacy” LIBOR contracts where the parties are unable or unwilling to amend existing LIBOR-referencing contracts before the benchmark ceases. The legislation passed or proposed in each of the key LIBOR jurisdictions (the UK, US and EU) to tackle “tough legacy” LIBOR contracts is unlikely to eliminate the risk of future claims, and there are potential jurisdictional issues which may arise from the interaction between the different solutions. Please have a look at the LIBOR section of this update for further details.

It seems that each biannual update reports a further development in the law of contractual estoppel, and this edition is no exception. This legal principle is particularly important to banks defending mis-selling claims. However, since the Court of Appeal’s 2019 judgment in *First Tower* (a landlord and tenant case), there have been concerns that clauses stating that a bank is providing general dealing services on an execution-only basis and not providing advice on the merits of a particular transaction (a so-called no-advice clause), could be subject to the requirement of reasonableness in the Unfair Contract Terms Act 1977 (**UCTA**). In good news for the financial services sector, the court has finally had the opportunity to consider how the doctrine of contractual estoppel should be applied to no-advice clauses, and has confirmed that UCTA does not apply when relied upon in the context of a breach of advisory duty claim.

There have been no major developments in legal professional privilege over the past six months, although there have been a couple of noteworthy disclosure decisions that financial institutions should be aware of. In particular, the court has considered the scope of extraterritorial application of the SFO’s document compulsion powers under section 2(3) of the Criminal Justice Act 1987 (**CJA**) (*KBR v SFO*) and the application of the Bankers’ Book Evidence Act 1879 for disclosure of bank documents for use in foreign or domestic legal proceedings (*Meng v HSBC*).

Since our last update, the Brexit transition period has ended, and with minutes to spare the UK and EU finalised a Trade and Cooperation Agreement to govern their trading and security relationship. However, there remain a number of question marks when it comes to commercial dispute resolution in cases involving the UK and the EU, which was not covered as part of the agreement. In particular, there is continuing uncertainty over the question of whether the UK will be able to join the 2007 Lugano Convention. Accession to the Convention requires the unanimous consent of the current contracting states and, while Iceland, Norway and Switzerland are supportive of the UK’s membership, the EU has not yet reached a decision, with press reports suggesting that the European Commission is opposed to the UK’s application, although ultimately the decision will be for the Council of the European Union. Unless and until the UK’s application is approved, the position remains as set out in our blog post on the practical implications of Brexit for disputes, which is included below.

This update would not be complete without a comment on the impact of the COVID-19 pandemic. While the pandemic is first and foremost a humanitarian crisis, some commentators have predicted that the economic impact will result in a large number of commercial disputes. However, it remains the case that we have seen only a small number of new claims issued which arise solely as a result of the COVID-19 pandemic, and still have little judicial guidance on whether the pandemic, or events relating to it, should enable counterparties to delay, avoid performance and/or terminate agreements (e.g. under force majeure clauses, the doctrine of frustration, material adverse change clauses etc.). One recent High Court decision found that alleged frustration of a contract due to the pandemic was not sufficiently arguable to grant an injunction restraining a demand under a bank-confirmed standby letter of credit (*Salam Air*). While decisions applying the doctrine will depend on their precise facts, it is helpful to see recent authority confirming the established principles, in particular when considering the specific context of the COVID-19 pandemic.

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

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BREXIT

1. Brexit: key practical implications for disputes and dispute resolution clauses

Despite the UK and EU having finalised a Trade and Cooperation Agreement (**TCA**) to govern their trading and security relationship following the end of the Brexit transition period, there remain a number of uncertainties when it comes to commercial dispute resolution in cases involving the UK and the EU.

The main source of uncertainty arises from the fact that the EU has not yet indicated whether it will consent to the UK's accession to the 2007 Lugano Convention. It was hoped that a post-Brexit trade deal would pave the way for a further agreement on the UK's accession to that Convention, but we are still waiting for a decision.

The position should become clear by the end of April 2021, since the UK submitted its application for permission to accede on 8 April 2020 and the Convention provides that contracting parties "shall endeavour to give their consent" within a year – though that is not a hard deadline (see Update 2 below for a more recent update on this timeframe). If consent is given, the Convention will come into force as between the UK and the EU on the first day of the third month following the UK's deposit of its instrument of accession, and will apply to proceedings commenced after it comes into force.

In the meantime, two things are clear: (i) the recast Brussels Regulation no longer applies to jurisdiction and enforcement of judgments as between the UK and the EU, unless proceedings were commenced in a UK or EU court before the end of 2020; and (ii) the UK re-joined the 2005 Hague Convention on Choice of Court Agreements in its own right from 1 January 2021 (having previously been party to it by virtue of EU membership) so that the 2005 Convention now applies as between the UK and the EU in matters falling within its scope (as explained below).

For further information, please see our litigation blog post.

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2. UK's bid to join Lugano Convention: no decision yet

There is continuing uncertainty over the question of whether the UK will be able to join the 2007 Lugano Convention, which governs questions of jurisdiction and the recognition and enforcement of judgments between the EU and Iceland, Norway and Switzerland. Together with the recast Brussels Regulation, which governs such questions as between EU Member States, the Lugano Convention ceased to apply to the UK at the end of the Brexit transition period on 31 December 2020.

Accession to the Lugano Convention requires the unanimous consent of the current contracting states and, while Iceland, Norway and Switzerland are supportive of the UK's membership, the EU has not yet reached a decision. The UK submitted its application last April (see this blog post) and it had been hoped that the position would be clear by now, since the Convention provides that contracting parties "shall endeavour to give their consent" within a year. But that is not a hard deadline, and it now seems clear that a decision will not be reached for some weeks or months.

While recent press reports have suggested that the European Commission is opposed to the UK's application, we understand that it has not reached a definite position. The Commission is due to issue a formal communication to EU Member States in the coming weeks setting out its stance.

Ultimately the decision will be for the Council of the European Union, by qualified majority voting. This means that approval requires a 55% majority in favour, ie 15 out of the 27 Member States, representing at least 65% of the EU population.

Unless and until the UK's application is approved, the position remains as set out in our previous blog post here and in Update 1.

For further information, please see our litigation blog post.

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COVID-19

3. Commercial Court considers impact of force majeure clause on repayment obligation in sale of goods contract

Totsa Total Oil Trading SA v New Stream Trading AG [2020] EWHC 855 (Comm)

The Commercial Court considered the impact of a force majeure clause on a repayment obligation in a contract for the sale of goods.

While the force majeure event in this case was unrelated to COVID-19, the decision will be of interest to financial institutions considering the ongoing impact of the pandemic. Although, under English law, force majeure is entirely a creature of contract, it is helpful to see further examples of the court's interpretation of such clauses. Whether force majeure can be relied on, and the effect of such reliance, will depend on the proper construction of the contract and the particular circumstances of the case.

In this case, the court granted summary judgment on a buyer's claim for repayment of an advance payment, in circumstances where (on facts assumed for the purposes of the summary judgment application) the seller had been prevented from delivering product due to a force majeure event, and the buyer had given notice terminating the contract. The court found that, on the proper construction of the contract, the repayment obligation kicked in if product was not delivered in accordance with the contract (and any agreed extension) for any reason whatsoever, including force majeure. However, where the failure to deliver was due to force majeure and that triggered an extension to the delivery timeframe, it could not be said that product had not been delivered "in accordance with the contract and any agreed extension" until the contract was actually terminated in accordance with its terms.

This decision illustrates that a valid claim to force majeure will not necessarily relieve a party of all of its obligations under the contract, such as obligations to repay advance payments for deliveries that are prevented due to force majeure. Parties negotiating force majeure provisions will wish to consider the extent to which any relevant obligations are to be affected by force majeure, and ensure the drafting is clear.

For further information, please see our litigation blog post.

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4. Supreme Court hands down judgment in FCA's Covid-19 Business Interruption Test Case

The Financial Conduct Authority v Arch and Others [2021] UKSC 1

The Supreme Court handed down judgment in the Covid-19 Business Interruption insurance test case. Herbert Smith Freehills acted for the FCA who advanced the claim for policyholders.

The Supreme Court unanimously dismissed Insurers' appeals and allowed all four of the FCA's appeals (in two cases on a qualified basis), bringing positive news to policyholders across the country that have suffered business interruption losses as a result of the Covid-19 pandemic.

At first instance the FCA had been successful on many of the issues, and now the Supreme Court has substantially allowed the FCA's appeal on the issues it chose to appeal. The practical effect is that all of the insuring clauses which were in issue on the appeal will provide cover for the business interruption caused by Covid-19.

For further information, please see our insurance blog post.

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5. High Court finds alleged frustration of contract due to COVID-19 pandemic is not sufficiently arguable to grant injunction restraining demand under letter of credit

***Salam Air SAOC v Latam Airlines Group SA* [2020] EWHC 2414 (Comm)**

The High Court dismissed an application for an injunction to prevent an airline group from making demands under bank-confirmed standby letters of credit (**SBLCs**), securing aircraft leases granted to the claimant (a budget passenger airline), on the basis that it was not sufficiently arguable that the leases were frustrated due to the effects of the COVID-19 pandemic.

The court's decision confirms the established position on the law of frustration, which requires a multi-factorial approach as per *Edwinton Commercial Corporation v Tsavliris Russ (Worldwide Salvage and Towage) Ltd (The Sea Angel)* [2007] 1 CLC 876. The decision highlights the importance that the nature of the contract and its terms may play when applying the multi-factorial approach. Here, the claimant had agreed to provide the SBLCs as an alternative to paying a cash deposit for the aircraft, and the SBLCs were commercially and legally intended to be equivalent to cash. The terms of the leases also expressly placed on the claimant the full risk of any disruption whatsoever to their airline business; they had been drafted to make it clear that the claimant's obligation to pay continued in almost any conceivable circumstances. Taking these factors into account, the court found that the claimant's frustration case was "far too weak" to justify the step of interfering with the operation of the SBLCs.

It is a noteworthy decision for financial institutions because of the obvious increased risk of frustration arguments relating to the ongoing COVID-19 pandemic. There have been relatively few decisions on frustration in recent years, most notably: *Canary Wharf (BP4) T1 Ltd & Ors v European Medicines Agency* [2019] EWHC 335 (Ch) (see our litigation blog post). While decisions applying the doctrine will depend on their precise facts, it is helpful to see recent authority confirming the established principles, in particular when considering the specific context of the COVID-19 pandemic.

In addition, the decision will be a reassuring one for financial institutions as credit-providers under letters of credit and other similar instruments, providing certainty and clarity as to the high bar for any interference with their operation. In particular, it confirms that the enhanced merits standard for obtaining interim relief against the credit-provider applies equally to any injunction applications seeking to restrain the beneficiary from making a demand, i.e. that in either scenario, the claimant must establish that the case is "seriously arguable".

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

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Mis-selling and Misrepresentation

6. High Court considers First Tower judgment in the context of no-advice clauses and confirms UCTA does not apply

***Fine Care Homes Limited v National Westminster Bank plc & Anor* [2020] EWHC 3233 (Ch)**

The High Court dismissed an interest rate hedging product (**IRHP**) mis-selling claim, in a judgment which will be welcomed by financial institutions for its general approach to claims alleging that a bank negligently advised its customer as to the suitability of a particular financial product (whether an IRHP or otherwise). While there are some aspects of the decision which hinge on the unsophisticated nature of this particular claimant, the touchstone of when it can be said that a bank owes a common law duty to advise, the content of that duty and what a claimant must prove to demonstrate that the advisory duty (if owed) has been breached, will be of relevance to similar claims faced by banks in relation to other products or services.

The aspect of the judgment likely to be of greatest and widest importance to the financial services sector, is the court's analysis of how the doctrine of contractual estoppel should be applied in these types of mis-selling cases.

The question in this case was whether the bank was entitled to rely on its contractual terms as giving rise to a contractual estoppel, so that no duty of care to advise the customer as to the suitability of the IRHP arose.

In good news for banks, the court determined that clauses stating that the bank was providing general dealing services on an execution-only basis and was not providing advice on the merits of a particular transaction (precisely the sort of clauses which are typically relied upon to trigger a contractual estoppel), were not subject to the requirement of reasonableness in UCTA when relied upon in the context of a breach of advisory duty claim.

This may appear an unsurprising outcome, given the Court of Appeal's decision *Springwell Navigation Corpn v JP Morgan Chase Bank* [2010] EWCA Civ 1221. However, certain *obiter* comments by Leggatt LJ in *First Tower Trustees v CDS* [2019] 1 WLR 637 could be read as conflicting with *Springwell* in relation to the effect of so-called no-advice clauses and the application of UCTA in relation to them.

In the present case, the court emphasised the clear distinction made in *First Tower* between, on the one hand, a clause that defines the party's primary rights and obligations (such as a no-advice clause), and on the other, a clause stating that there has been no reliance on a representation (a "non-reliance" clause). It said that the Court of Appeal's decision in *First Tower* was limited to the effect of non-reliance clauses given the nature of the clause at issue in that case. *First Tower* confirmed that where the effect of a non-reliance clause is to exclude liability for misrepresentation which would otherwise exist in the absence of the clause, section 3 of the Misrepresentation Act 1967 will be engaged and the clause will be subject to the UCTA reasonableness test. In contrast, the clauses at issue here were not non-reliance clauses, but rather clauses that set out the nature of the obligations of the bank, and therefore were not subject to section 2 of UCTA.

Contractual estoppel has regularly been relied upon by banks defending mis-selling claims to frame the obligations which they owe to customers, particularly in circumstances where claimants have sought to argue that, notwithstanding the clear terms of the contracts upon which the transactions were entered into, the banks took on advisory duties in the sale of financial products which turned out to perform poorly. The decision in *Fine Care Homes* will therefore be welcomed by financial institutions, particularly against the backdrop of the *First Tower* decision. While in many circumstances, no-advice clauses would be likely to meet the requirements of reasonableness under UCTA in any event (as was the outcome in the present case), removing a hurdle that must be cleared in order to rely on such clauses is clearly preferable from the bank's perspective, adding certainty to the relationship.

In February 2021, the claimant applied to the Court of Appeal for permission to appeal.

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

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7. Supreme Court rejects illegality defence to claim where claimant had engaged in an illegal act (mortgage fraud)

***Stoffel & Co v Grondona* [2020] UKSC 42**

The Supreme Court held that a claimant who had engaged in mortgage fraud was not barred from bringing a negligence claim in relation to the property transaction associated with the fraud.

While the claim in this case was against the claimant's solicitors, it is a noteworthy decision for financial institutions considering how to resist claims where there is some element of illegality involved on the claimant's part (such as mis-selling claims where the claimant has provided deliberately false information).

The decision illustrates the application of the (relatively) new test for the illegality defence, as established in *Patel v Mirza* [2016] UKSC 42 (considered here). This replaced the test adopted by the House of Lords in *Tinsley v Milligan* [1994] 1 AC 340, which turned on the formalistic question of whether the claimant had to rely on the illegality to bring the claim. The current test is described by the Supreme Court in the present case as "a more flexible approach which openly addresses the underlying policy considerations involved and reaches a balanced judgment in each case, and which also permits account to be taken of the proportionality of the outcome".

The decision suggests, however, that while the test is no longer one of reliance, this question may still have a bearing on whether the fraud is central to the claim, which may in turn be relevant in considering whether it is proportionate to deny the claimant relief. It also suggests that, in the ordinary course, a claimant is unlikely

to succeed in a claim to recover the profits of the fraud – not because the claimant would have to rely on the fraud in order to establish the claim, but because this is likely to be the outcome when the court balances the competing policy considerations. As the court commented in this case: "Clearly, it would be objectionable for the court to lend its processes to recovery of an award calculated by reference to the profits which would have been obtained had the illegal scheme succeeded."

For further information, please see our litigation blog post.

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8. Financial product mis-selling claims against banks: the increasing willingness of the English courts to strike out allegations of fraud in "appropriate" cases

Herbert Smith Freehills LLP published an article in *Butterworths Journal of International Banking and Financial Law* on the increasing willingness of the English courts to deal with opportunistic claims against banks (and other third parties) involving allegations of fraud without the need for a full trial, in "appropriate" cases.

Traditionally, in a financial product mis-selling context, claims against financial institutions involving allegations of fraud, LIBOR manipulation and unlawful means conspiracy have not been amenable to strike out or summary determination. However, the recent decisions in *Boyse (International) Limited v Natwest Markets plc & The Royal Bank of Scotland Plc* [2020] EWHC 1264 (Ch) and *Elite Properties and Ors v BDO LLP* [2020] EWHC 1937 (Comm) represent useful additions to the body of English court judgments arising out of financial product mis-selling allegations, which are likely to be of broader interest to financial institutions. In both cases, allegations of fraud were made against the defendant entity, and in both cases, the court struck out the claim/granted reverse summary judgment, finding that these were cases in which it was "appropriate" to deal with the claims without the need for a full trial. The decisions, taken together, could be viewed as an encouragement by the courts for financial institutions to seek to dispose of mis-selling claims at an early stage of the litigation proceedings.

In our article, we examine the lessons learned from *Boyse* and *Elite* as to when it will be "appropriate" to strike out/summarily determine mis-selling fraud claims, and the impact of these decisions upon the litigation tactics of defendant financial institutions facing such claims.

This article can be found here: Financial product mis-selling claims against banks: the increasing willingness of the English courts to strike out allegations of fraud in "appropriate" cases. This article first appeared in the January 2021 edition of JIBFL.

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9. High Court finds that a claimant's "awareness" of a representation is an essential prerequisite to a claim for misrepresentation

***Leeds City Council and others v Barclays Bank plc and another* [2021] EWHC 363 (Comm)**

In an important decision for financial institutions, the High Court confirmed that a claimant's awareness of a representation is an essential prerequisite to a claim for misrepresentation, by striking out implied fraudulent misrepresentation claims in relation to LIBOR against a defendant bank. The claimants had failed to plead that the alleged representations were actively present in their mind when entering into the products in question and therefore the claim stood no realistic prospect of success.

The decision is particularly helpful in several respects:

- **Requirement for awareness.** The court's detailed consideration of the "awareness" requirement in the context of misrepresentation claims provides important, binding clarity on the topic. This prerequisite means that a representee must have had some appreciation that a representation in the sense alleged was being made, and is a necessary part of the reliance or inducement analysis in misrepresentation claims. Without it, a claim must fail.
- **Satisfying the awareness requirement.** What is required to satisfy the awareness requirement will depend upon the precise circumstances. The answer may be one which requires conscious thought,

or for the representation to have be "actively present" in the representee's mind, or some less stringent element of awareness (depending on the facts).

- **Assumptions based on conduct.** The court rejected the notion that mere assumption based on the representor's conduct is sufficient. In the simplest representation by conduct cases, the element of awareness may be very similar to an assumption (e.g. where a bidder at auction represents their willingness and ability to pay a certain sum by raising a paddle). However, this principle should not be inferred in more complex cases where the conduct does not "speak for itself" in the same way so as to permit the quasi-automatic understanding which may look like assumption.

Considering the awareness requirement in the context of the present case, the court commented that the present claim was not being considered in a vacuum and referred to two previous cases based on similar LIBOR-related representations: *Property Alliance Group Ltd v The Royal Bank of Scotland plc* [2016] EWHC 3342 (Ch) and Marme Inversiones 2007 v Natwest Markets [2019] EWHC 366 (Comm) (see our blog posts here and here). These decisions pointed towards an established position that, in misrepresentation cases of this type, there is a relatively stringent awareness requirement. In the present case, this required each claimant to prove that the alleged representations were "*actively present*" in their mind. As the claimants failed to plead awareness in the sense required, the claims were struck out.

At first blush, it may appear obvious that a party saying that it has relied upon a representation must also be able to say that it was aware of the representation being made. However, the healthy debate in this case and others demonstrates that the requirement for awareness has caused controversy. *Leeds v Barclays* provides welcome clarity and certainty on the issue. The approach taken by the court in finding that the alleged representations were not understood in the sense alleged and therefore not relied upon demonstrates a welcome degree of scepticism, particularly given how intricate and complex the alleged representations at issue in the claims have been. It is also noteworthy that to date, no claim relating to LIBOR representations has been successful at full trial.

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

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10. High Court strikes out claims relating to alleged mis-selling of IRHPs on res judicata and abuse of process grounds

***Elite Property Holdings Limited & Anor v Barclays Bank plc* [2021] EWHC 772 (Comm)**

The High Court's decision is the latest instalment in a series of claims brought by the same claimant property investment companies against the defendant bank (and others) in relation to alleged mis-sold interest rate hedging products (**IRHPs**), which were included in the then-FSA (now FCA) past business review undertaken by the bank. The High Court granted the bank's application to strike out the claim alleging breaches of agreements: (i) in relation to the bank's assessment of consequential loss suffered by the claimants in respect of their IRHPs and (ii) that the bank would not take enforcement action against the claimants.

The decision is a reassuring one for financial institutions faced with duplicative claims involving the same cause of action, or matters determined in previous proceedings. The decision highlights the High Court's scope to strike out such claims on the grounds of cause of action estoppel, issue estoppel or abuse of process. It also suggests that claimants may face difficulties in bringing further claims on issues not raised or determined in previous proceedings if, in the court's view, such issues could or should have been raised then.

In the present case, the High Court was satisfied that the claim involved the same cause of action as was determined against the claimants in the original action or, in the alternative, it raised the same issues previously resolved against the claimants (see our banking litigation blog posts, on the previous decisions by the High Court and the Court of Appeal in related actions brought by the same claimants). Accordingly, the High Court held that the claim was barred by the principle of *res judicata*. The High Court also observed that: (i) even if it was wrong about the claim being barred by cause of action or issue estoppel, the new claim would fall squarely within the principle in *Henderson v Henderson* (1843) 3 Hare 100 and/or be an abuse of the court's process; and (ii) the claimants' allegations had no real prospect of success and, if it had been necessary to do so, the court would have granted the bank's application for summary judgment.

Securities Litigation/Class Actions

11. Climate-related disclosures for issuers: next steps from UK financial regulators outlined

There have been some significant regulatory announcements in relation to climate-related disclosures. These announcements are a result of the increasing focus on climate change and sustainability risks across governments, regulators and industry and a continued move towards corporate compliance with the Task Force on Climate-related Financial Disclosures' (**TCFD**) recommendations.

While not launching new developments or heralding the unexpected, these announcements are noteworthy for issuers as they mark a change in tone from the UK regulators regarding climate-related disclosures. Previously, the FCA and Prudential Regulation Authority took a cooperative and directional view, in recognising that issuers' capabilities were continuingly developing in some areas which might limit their ability to model and report scenarios in the manner recommended by the TCFD. With the latest announcements, it seems increasingly likely that there will now be a shift away from voluntary climate-related disclosures towards mandatory TCFD aligned disclosures across the UK economy.

Key announcements include:

- HM Treasury publishing the Interim Report of the UK's Joint Government-Regulator TCFD Taskforce (the **Taskforce**) on the implementation of the TCFD recommendations and a roadmap towards mandatory climate-related disclosures;
- the Governor of the Bank of England's speech reaffirming what the BoE is doing to ensure that the UK financial system plays its part in tackling climate change;
- the FCA's speech on rising to the climate challenge; and
- the Financial Reporting Council's publication of its Thematic Review on climate-related risk.

For a summary of the points from these announcements, please see our banking litigation blog post. Please see Update 14 and Update 18 below for subsequent developments in this area.

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12. Supreme Court ruling in Merricks: some important clarifications but a number of unresolved issues

***Mastercard Incorporated & Ors v Merricks* [2020] UKSC 51**

On 11 December 2020 the Supreme Court handed down a very significant judgment relating to the certification of a £14bn opt-out competition collective action brought by Walter Merricks against Mastercard, in respect of losses alleged to have resulted from the use of anti-competitive multilateral interchange fees.

Although set in a competition context, the decision will be of interest to financial institutions following developments in class actions generally.

The Supreme Court largely confirmed the less restrictive approach to certification set out by the Court of Appeal when it overturned the CAT's original refusal to grant the Collective Proceedings Order (**CPO**) sought by Mr. Merricks (see our previous briefing). As a result, the CAT will now need to reconsider Mr. Merricks' application for certification of the claim against the principles set out by the Supreme Court. Thus, the Supreme Court's ruling does not amount to any determination of the CPO application nor of the merits of the claim. Instead it provides clear principles against which the CPO application is to be reconsidered by the CAT.

For further information, please see our competition blog post.

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13. High Court strikes out "paradigm" claim for reflective loss in the context of allegedly negligent advice on an IPO

***Naibu Global International Company plc & Anor v Daniel Stewart & Company plc & Anor* [2020] EWHC 2719 (Ch)**

The High Court struck out a claim which engaged the so-called "reflective loss" principle, in proceedings brought by a parent company and its subsidiary against advisers that prepared the parent company for its IPO on the Alternative Investment Market.

To put the decision in context, a significant number of judgments involving consideration of the reflective loss principle were adjourned pending the Supreme Court's judgment in *Sevilleja v Marex Financial Ltd* [2020] UKSC 31, with the parties making submissions on the implications of the *Marex* judgment after it was handed down (in July 2020). This is precisely what happened in the present case, which represents a recent application by the court of the newly defined rule.

As a reminder, the Supreme Court in *Marex* confirmed (by a 4-3 majority) that the reflective loss principle is a bright line legal rule, which prevents only shareholders from bringing a claim based on any fall in the value of their shares or distributions, which is the consequence of loss sustained by the company, where the company has a cause of action against the same wrongdoer (see our banking litigation blog post).

In *Naibu*, the court held that the relevant claim was a "paradigm" example of a claim for reflective loss, where the loss and damage pleaded by the parent turned almost entirely upon the loss suffered by the subsidiary, since the alleged loss consisted of a fall in the value of the shares in the subsidiary (to nil). The most interesting aspect of the judgment, is the court's rejection of the suggestion that it should look at the losses of the parent and subsidiary as they evolved over time, and that the parent should be entitled to recover any loss suffered at a particular stage if it was different in nature or quantum to the loss to the subsidiary. The court found that it would be wholly artificial to carve up the losses by time in an attempt to circumvent the application of the reflective loss rule.

While *Marex* emphasised the narrow scope of the reflective loss rule, *Naibu* demonstrates that the court is prepared to take a robust approach and strike out claims falling within its parameters. This result is likely to be welcomed by financial institutions, as the reflective loss rule is an important defence to shareholder claims, as illustrated by the context of the present case.

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

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14. Climate-related disclosures for issuers: FCA publishes final rules

The FCA published a Policy Statement (PS20/17) and final rules and guidance in relation to climate-related financial disclosures for UK premium listed companies.

Companies will be required to include a statement in their annual financial report which sets out whether their disclosures are consistent with the Task Force on Climate-related Financial Disclosures (TCFD) June 2017 recommendations, and to explain if they have not done so. The rule applies for accounting periods beginning on or after 1 January 2021.

As well as some additional guidance, the FCA has made only one material change to the rules consulted upon in March 2020 (CP20/03) with the final LR 9.8.6(8)(b)(ii)(C) R requiring non-compliant companies to set out details of how and when they plan to be able to make TCFD-aligned disclosures in the future.

With regard to monitoring compliance with the new listing rule, the FCA confirmed in its Policy Statement that it will provide further information on its supervisory approach to the new rule in a Primary Market Bulletin later in 2021.

In light of this latest regulatory development, issuers may also want to consider what, if any, litigation risks may arise in connection with climate-related disclosures (and indeed other sustainability-related disclosures which are made in response to these regulatory developments). There may be an increased risk of litigation under s90 FSMA, s90A FSMA, or in common law or equity. This was considered in greater detail in our recent Journal of International Banking & Financial Law article (published in October 2020) in which we also

examined the existing climate-related disclosure requirements, the impact of the FCA's proposals on issuers and how issuers can mitigate against such litigation risks. Our article can be found here: Climate-related disclosures: the new frontier?

For a more detailed analysis of the FCA's Policy Statement, please see our corporate blog post. Please see Update 11 above and Update 18 below for further developments in this area.

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15. Court of Appeal clarifies that cross-undertakings should rarely be required as a condition of security for costs

Mr Nigel Rowe & Ors v Ingenious Media Holdings & Ors **[2021] EWCA Civ 29**

In a marked shift from previous first instance decisions, the Court of Appeal provided guidance on the circumstances in which a defendant seeking security for costs may be required to provide a cross-undertaking in damages.

The court held that cross-undertakings should only be required as a condition of security for costs in "rare and exceptional cases" and, where the claimants are funded by a commercial litigation funder, "even rarer and more exceptional cases". A number of first instance decisions which had indicated an emerging practice of cross-undertakings being generally required (including a decision in the *RBS Rights Issue Litigation,* considered here) should no longer be followed.

The court commented that it is critical to the business of litigation funders that they are adequately capitalised such that they can meet any potential liabilities arising from the litigation they choose to fund. It follows that there should rarely be any need for security from a "properly run" litigation funder, and disallowing cross-undertakings where security is required from a litigation funder "can be expected to incentivise improvements in the way in which the commercial litigation funding market operates".

The court also suggested that, if there were to be a new practice in this area, it would be best developed by primary or delegated legislation, particularly in light of the likely effects on the litigation funding market and the potential engagement of considerations of access to justice.

For a more detailed analysis of the decision, see our litigation blog post.

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16. High Court considers principles relating to cut-off dates and the costs of advertising in group litigation

Weaver v British Airways Plc **[2021] EWHC 217 (QB)**

In a procedural judgment in the British Airways Data Event Group Litigation, the High Court granted a modest extension to the cut-off date for claimants to join the litigation, and has confirmed that the costs of substantial media advertising to attract claimants will not be recoverable if the claims succeed.

The decision emphasises the importance of cut-off dates in providing defendants with some degree of certainty as to the extent of their potential exposure in the litigation – even if they cannot provide ultimate certainty because there may be additional claims down the line (subject to questions of limitation) either in the same action or in separate proceedings. As the decision highlights, any litigant's decisions as to resource allocation, and (crucially) settlement, will be fundamentally dependant on the size and extent of the claimant group and the extent of its potential exposure. The court had to balance that benefit against other relevant factors, most significantly access to justice which would be promoted by a later cut-off date.

The decision also acts as a reminder that the costs of getting business are not recoverable in litigation. That includes the costs of advertising for potential clients to join group litigation, to the extent that goes beyond the costs of taking reasonable steps to publicise the group litigation order as may be required under the terms of the order itself.

For further information, please see our litigation blog post. For further discussion of these issues see *Class Actions in England and Wales*, written by lawyers from this firm and published in 2018 by Sweet & Maxwell, which the judge said he had been referred to in considering these issues.

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17. High Court strikes out s.90A FSMA claims for failure to comply with pre-service joinder rules following expiration of arguable limitation period

***Various Claimants v G4S plc* [2021] EWHC 524 (Ch)**

The High Court struck out certain of the claims brought against G4S under section 90A Financial Services and Markets Act 2000, in a judgment which emphasises the risks inherent in issuing complex group litigation shortly before the expiry of an arguable limitation period. The decision brings into sharp relief the need for claimants to balance the tension between the crucial practice of book-building and awaiting regulatory investigations on the one hand and limitation periods on the other. Ultimately, in this case, the court had little sympathy for claimants who had failed to get their "ducks in a pen, let alone in a row" prior to the expiry of the limitation period.

The successful application will have a significant impact on the proceedings, with approximately 90% of the quantum of the claims being struck out.

The claims were primarily struck out on the basis that new claimants cannot be added to an existing claim form using CPR 17.1, which allows a party to amend its statement of case before it has been served. The court also held that, in order for new claimants to be properly added to an existing claim form, a separate document recording their written consent must be filed with the court pursuant to CPR 19.4(4). The filing of an amended claim form, signed by the claimants' solicitor, does not constitute such consent.

The court further considered whether to grant the claimants permission to amend the claimants' names where certain claimants were incorrectly identified on the claim form. The judgment provides a helpful reiteration of the legal principles which apply when the court is considering whether to exercise its discretion to amend party names following the expiry of a limitation period.

Herbert Smith Freehills acts for the defendant, G4S, in this matter.

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

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18. Climate-related disclosures for issuers: further steps towards mandatory requirements?

In November 2020, the UK Joint Government Regulator TCFD Taskforce published its "roadmap towards mandatory climate-related disclosures", which set out a vision for the next five years. As an initial step towards fulfilling that vision, in January 2021, the new Listing Rule 9.8.6(8) (**LR**) came into force. The LR requires premium-listed issuers, in their periodic reporting, to publish disclosures in line with the TCFD recommendations on a 'comply or explain' basis. However, the FCA has recognised that some issuers may need more time to deal with modelling, analytical, metric or data-based challenges.

This flexibility in the new LR's compliance basis reflects the challenges and evolving experiences with working on data and metrics in the context of climate risk. Key stakeholders should now be redoubling their efforts to meet the challenges and with the promise of further TCFD guidance on data and metrics later this year and the recent launch of a Department for Business, Energy and Industrial Strategy (**BEIS**) consultation seeking views on proposals to mandate climate-related financial disclosures in line with the TCFD recommendations from 6 April 2022, the step to a mandatory climate-related disclosure regime may be closer than initially envisaged.

In light of the ever-evolving regulatory landscape, it is important issuers continue to monitor the impact of any changes to their disclosure requirements and to consider what, if any, litigation risks may arise (particularly, under s90 FSMA, s90A FSMA, or in common law or equity) in connection with their climate-related disclosures.

Please see our banking litigation blog post for consideration of what the key developments on data and metrics, as well as the key proposals from the BEIS consultation, mean for issuers in terms of regulatory reporting requirements. Please see Update 11 and Update 14 above for earlier developments in this area.

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19. EU Advocate General considers interpretation of Prospectus Directive in relation to an issuer's liability for a prospectus marketed to both retail and qualified investors

Bankia SA v UMAS **(Case C-910/19) EU:C:2021:119 (11 February 2021), (Advocate General Richard de la Tour)**

The Advocate General (**AG**) of the Court of Justice of the European Union (**CJEU**) handed down an unsurprising opinion on the interpretation of Directive 2003/71/EC (the **Prospectus Directive**), considering the liability of issuers to qualified investors in respect of inaccuracies in a prospectus.

The referral was made by the Spanish Supreme Court on the interpretation of Article 3(2)(a) and Article 6 of the Prospective Directive, which (before its repeal – as discussed further below) provided the framework for a "single passport" for prospectuses throughout the EU. As an EU Directive, it required further implementation measures by EU Member States to be effective. In the UK, the relevant provisions considered by the AG are found at s.90 FSMA.

The context for the referral was the relatively commonplace scenario in a securities issuance, where an issuer publishes a prospectus to the public at large, and as a consequence it is received by qualified investors as well as retail investors (e.g. where there is a combined offer). The question for the AG was whether the issuer could be liable (under Article 6 of the Prospectus Directive) to qualified investors (as well as retail investors) for any inaccuracies in the prospectus in circumstances where, if the offer had been directed *solely* at qualified investors, the issuer would have been exempt from publishing the prospectus under Article 3(2)(a) of the Prospectus Directive. If the qualified investor is entitled to bring a claim in these circumstances, the AG was asked if the qualified investor's awareness of the true situation of the issuer could be taken into consideration.

In response to these questions, the AG's opinion (which is non-binding but influential on the CJEU) concluded as follows:

1. Article 6 of the Prospectus Directive, in light of Article 3(2)(a), must be interpreted as meaning that where an offer of shares to the public for subscription is directed at both retail and qualified investors, and a prospectus is issued, an action for damages arising from the prospectus may be brought by qualified investors; although it is not necessary to publish such a document where the offer concerns exclusively such investors.
2. Article 6(2) of the Prospectus Directive must be interpreted as not precluding, in the event of an action in damages being brought by a qualified investor on grounds of an inaccurate prospectus, that investor's awareness of the true situation of the issuer being taken into consideration besides the inaccurate or incomplete terms of the prospectus, since such awareness may also be taken into account in similar actions for damages and taking it into account does not in practice have the effect of making it impossible or excessively difficult to bring that action, which is a matter for the referring court to determine.

From a UK perspective (and as prefaced above), this is an unsurprising outcome in the context of s.90 FSMA. In particular, because the second point (awareness of the true position of the issuer) is expressly included in the Schedule 10 defences to a s.90 claim.

Securities lawyers will immediately question the impact of the AG's opinion in the light of the Prospectus Regulation (EU) 2017/1129 and Brexit. Although the Prospectus Regulation repealed and replaced the Prospectus Directive (see our banking litigation blog post), the substance of the Articles considered by the AG have been carried forward into the equivalent Prospectus Regulation provisions.

As to Brexit, although the UK is no longer a member of the EU (following the end of the Brexit transition period on 31 December 2020), the AG's opinion may still be of relevance to the interpretation of s.90 FSMA claims. S.90 FSMA represents "retained EU law" post-Brexit because it is derived from an EU Directive. In interpreting retained EU law, CJEU decisions post-dating the end of the transition period are not binding on UK courts, although the courts may have regard to them so far as relevant (see Update 1 on the practical implications of Brexit for disputes). As noted above, AG opinions are not binding in any event, but this will be the status of the CJEU decision when finally handed down.

The AG's opinion is considered in more detail in our banking litigation blog post.

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20. High Court determines that reliance issues in context of a s.90A FSMA claim should be heard at first trial

***Allianz Global Investors GmbH & 76 Ors v RSA Insurance Group plc* [2021] EWHC 570 (Ch)**

At a case management conference where a split trial was proposed by the parties in relation to a section 90A FSMA claim, the High Court held that reliance issues should be heard at the first trial rather than held over to the second trial.

Trial structure tends to be a key case management battleground in securities class actions. For strategic and practical reasons, claimants often seek to postpone issues involving reliance, causation and quantum (i.e. issues which concern the conduct of the claimants) to the second trial and render issues surrounding the issuer's alleged liability the sole focus of the first trial (see our banking litigation blog post on The Tesco Litigation: lessons learned from split trial orders in the context of securities class actions for further details).

The judgment therefore provides noteworthy and helpful guidance to issuers faced with securities claims in advocating for a trial structure with a fairer allocation of the burden of preparing for trial. The court referred to various factors which influenced its decision that reliance issues should be heard at the first trial. In summary, the court was of the view that an early determination on reliance may increase the chance of a settlement, and that since questions concerning reliance are primarily factual, these should be determined as early as possible during the trial process, particularly where the claimants had issued proceedings deep into the limitation period.

There are two particular points of note from the judgment:

i. the court acknowledged the claimants' argument that the inclusion of reliance issues could lead to a longer first trial; however, the court found that this was not a telling factor in a claim of this size and significance, and that the claimants who had brought the claim "*must be ready to take part in it fully*" especially as litigation funding had been arranged; and

ii. the allocation of the litigation burden between the parties was one of the factors which had a bearing on the court's decision. The court noted that the claimants who brought the claim *"should be prepared to undertake substantial work in ensuring the expeditious progress of the proceedings to resolution*".

The additional implication of these points is that further securities class actions may be more costly or practically burdensome for claimants to pursue, as they may need to invest more time and costs in anticipation of being required to participate more fully throughout the proceedings from the outset.

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

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21. Intermediated securities in a securities class action context

Herbert Smith Freehills LLP published an article in *Butterworths Journal of International Banking and Financial Law* on intermediated securities in a securities class action context.

The majority of investors in the UK hold their interests through an intermediated chain of securities. The relationships between the investors in the chain are governed by the contracts they have entered into, and the system is largely operated on a "no look through" basis, meaning investors only have rights against their own counterparties. The Law Commission has considered whether to reform the law in this area, in order to give greater rights to ultimate investors. Any amendments to the current law may impact upon securities class actions. If the law is reformed to provide additional protections to ultimate investors, this could result in greater litigation risk for issuers, as well as an increased practical and administrative burden. However, there may also be some benefits to issuers from reform in this area; if ultimate investors are easier to identify, this can provide clarity to the issuer in relation to who might bring a claim against it, and enable the issuer to quantify any claims which it is facing more readily.

In our article we examine: what intermediated securities are, the legal consequences of holding intermediated securities, the Law Commission's proposed reform of the existing law on intermediated securities, the potential solutions proposed by the Law Commission to reform the current law relating to intermediated securities, and the impact of the proposed reforms upon listed issuers.

The article can be found here: Intermediated securities in a securities class action context. This article first appeared in the April 2021 edition of JIBFL.

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LIBOR DISCONTINUATION

22. Leaving LIBOR – the ISDA Protocol and Supplement

With LIBOR due to disappear by end-2021, work has been underway to facilitate the transition from LIBOR and other IBORs to alternative risk free rates (**RFRs**). The derivatives market has been at the forefront of the transition and is some distance further ahead than other financial markets. In particular, ISDA published the 2020 IBOR Fallbacks Protocol and IBOR Fallbacks Supplement, which introduce hardwired fallbacks from IBORs to relevant RFRs for new products and legacy products.

Publication of these documents is a key milestone in the transition journey from IBORs to RFRs, and amounts to the starting gun being fired on what is expected to be a mass market wide repapering and amendment exercise as the market says goodbye to the old world of IBORs and welcomes the new world of RFRs. We expect clients will wish to enter into the IBOR Fallbacks Protocol to amend existing transactions, and to include the IBOR Fallbacks Supplement in new trades. In agreeing to do so, hardwired fallbacks from LIBOR to RFRs will be included in the transactions, which will clearly have a significant impact on those transactions and beyond. Clients are therefore well advised to give careful thought to the issues raised by these documents.

Our briefing (which can be found here) provides a detailed analysis of the two publications, including the issues they raise and how adherence to these documents will affect clients' existing and future transactions.

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23. LIBOR transition measures in the new Financial Services Bill: the legal framework, market impact and risks

On 21 October 2020, the UK government introduced the Financial Services Bill (**FS Bill**) to Parliament, which has been described by HM Treasury (**HMT**) as a new Bill "designed to ensure the UK's world-leading financial services sector continues to thrive and grasp new opportunities on the global stage".

The focus of our blog post is on the LIBOR transition measures included in the FS Bill, which are consistent with the Chancellor's announcement of the legislative fix mechanism on 23 June 2020, as considered in our previous blog post.

Please see the banking litigation blog post, which explains the legal framework of the measures included in the FS Bill, and explores the potential market impact and legal risks.

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24. Final EU legislative fix for legacy LIBOR: impact on transition risk for UK entities

On 2 February 2021, the European Council paved the way for the EU's legislative solution for the transition of legacy LIBOR contracts to become law, by adopting amendments to the Benchmark Regulation (EU) 2016/1011 (**BMR**), which is now in force and applies from 13 February 2021.

The final version of the EU's legislative fix contains some welcome improvements on the European Commission's initial proposal, most notably in the reduced scope for potential conflict with the LIBOR legislative solutions proposed by other jurisdictions (see our blog post considering the original EU proposal here).

In the context of comparing global legislative proposals for LIBOR cessation, the expected extension to end-June 2023 of the continued publication of certain USD LIBOR tenors is relevant (following the ICE Benchmark Administration Consultation on Potential Cessation published in December 2020). The consultation confirms that ICE intends to cease publication of all other LIBOR settings (including all tenors of GBP LIBOR and EUR LIBOR), as planned, at the end of 2021. It is worth noting that the legislation enacted

now will (unless amended) still apply to legacy USD LIBOR contracts caught within the relevant framework at that later date. It remains important, therefore, to understand how all of the different legislative solutions fit together, complement one another or potentially overlap.

In our banking litigation blog post, we summarise the EU's new framework for the legislation, highlight the key changes that have been made since publication of the initial proposal and discuss the likely impact on LIBOR transition risk.

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25. LIBOR transition: What is a "safe harbour" and why does the UK's legislative toolkit need one?

In the context of the UK's legislative solution for the transition of so-called "tough legacy" LIBOR contracts, contained within the FS Bill, HMT published a consultation paper: Supporting the wind-down of critical benchmarks.

The consultation considers the case for incorporating a legal "safe harbour" in the legislation, to reduce the potential risk of contractual uncertainty and disputes in respect of legacy LIBOR contracts that are automatically transitioned by the statute. In essence, the proposed safe harbour may include one or both of the following features in order to reduce such risks: (1) express wording as to the continuity of contracts that are automatically transitioned by the FS Bill; and/or (2) protection from claims relying on the effect of automatic transition under the FS Bill (e.g. a change in interest rate payable under the contract) as a cause of action, liability or grounds for litigation between parties to contracts. The consultation was published in response to approaches made to HMT by a number of stakeholders, articulating the need for such a provision.

The significance of the legal safe harbour will depend ultimately on the all-important question as to which legacy LIBOR contracts will be able to take advantage of the legislative fix, on which the market does not yet have clarity, nor is it likely to in the near future. The breadth of the definition of "tough legacy" LIBOR contracts will be considered as part of the FCA's forthcoming consultation on its enhanced powers under the FS Bill (specifically its powers under Article 23C), which has not yet been published. If "tough legacy" is defined broadly, it could contradict the regulator's policy for parties to proactively transition. If the definition is too narrow, it will limit the impact of the legislative fix on the problematic cliff-edge scenario when publication of LIBOR ceases. Equally, greater clarity on the definition of "tough legacy" at an earlier stage may impact negatively on proactive transition efforts; but if the regulators wait too long, then the legislative solution may cause more disruption than it is trying to fix.

The dynamic between the scope of the safe harbour vs the scope of the definition of "tough legacy" is important and illustrates the difficult balance the regulators are trying to achieve. The wider the definition of "tough legacy", the greater the volume of legacy LIBOR contracts caught by the legislative fix, increasing the potential risk of contractual uncertainty and disputes in respect of legacy LIBOR contracts that are automatically transitioned by the statute, and emphasising the need for a robust safe harbour in the legislation.

"Safe harbour" is not a term of art and the precise effect of a safe harbour in the context of the FS Bill will be defined following the receipt of responses from stakeholders to the consultation, which closes on 15 March 2021. However, the wording of the consultation itself provides some insight as to the operation and parameters of the safe harbour that HMT is considering, as discussed in our banking litigation blog post. We also give an overview of how the UK proposal compares with other jurisdictions and the likely impact of the safe harbour provision on the risks of LIBOR transition.

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26. LIBOR Discontinuation: FCA non-representativeness announcement

The FCA made its much anticipated announcement that all LIBOR settings will either cease to be provided by any administrator or will no longer be representative:

- immediately after 31 December 2021, in the case of all sterling, euro, Swiss franc and Japanese yen settings, and the 1-week and 2-month US dollar settings; and
- immediately after 30 June 2023, in the case of the remaining US dollar settings.

The FCA has said that, based on undertakings received from the panel banks, it does not expect that any LIBOR settings will become unrepresentative before the relevant dates set out above. Representative LIBOR rates will not, however, be available beyond the dates set out above.

The FCA expressly state that they "make this statement in awareness that it will engage certain contractual triggers for the calculation and future application of fallbacks that are activated by pre-cessation or cessation announcements made by the FCA (howsoever described) in contracts…" as they had said that they would.

Publication of most of the LIBOR settings will cease immediately after the dates above, though the FCA will consult on requiring the IBA to continue to publish certain tenors of Sterling, Yen and potentially USD on a synthetic basis, using changed methodology, under its new proposed powers in the Financial Services Bill 2020 which we have previously analysed in Update 23. The FCA also published their statements of policy in relation to these proposed new powers.

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

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27. Navigating "the final and critical phase" of LIBOR – Senior Managers take heed

At the end of 2020, we identified the following key issues to have in mind as we entered the LIBOR "endgame":

- **Readiness**, meeting the milestones set by relevant industry groups
- **Right time**, the need to communicate with customers in a timely way
- **Right information**, communicating in a way that's clear, fair and not misleading
- **Right rate**, using a fair replacement rate
- **Remaining contracts**, managing "tough legacy"
- **Record keeping**, the importance, not least for senior managers, of having a record of decisions and their rationale

The PRA and FCA have reinforced all these points in a Dear CEO letter published on 26 March 2021.

The issues raised in this Dear CEO letter are not unexpected. But that does not mean they are straightforward to manage. LIBOR transition remains a key challenge for financial institutions and a key area of regulatory scrutiny, and risk, throughout 2021.

While this guidance has been promulgated in a Dear CEO letter, it is impossible to miss that accountability for orderly transition is being placed on relevant Senior Managers, and the letter refers to a separate letter being sent to the senior managers at firms with the largest and most complex LIBOR exposures. The regulators have made it clear that failure to take appropriate steps in the remaining time will have consequences, highlighting that "As a key regulatory priority, we expect that this transition forms part of the performance criteria for determining their variable remuneration."

For a more detailed analysis of the latest Dear CEO letter, please see our FSR blog post.

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28. New York legislative solution for LIBOR passed: Impact on transition of legacy LIBOR contracts

The New York (**NY**) State Legislature has passed a statutory solution to tackle so-called "tough legacy" LIBOR contracts, to reduce the risks associated with the transition away from USD LIBOR: Senate Bill 297B/Assembly Bill 164B. This is very welcome news given the widespread use of NY law in financial contracts.

The final form of the NY legislation is based on the draft proposal by the Alternative Reference Rates Committee, see our previous blog posts: LIBOR transition: What does the US regulator's proposed legislative fix mean for UK financial markets? and LIBOR Transition: Is ARRC's Proposed Legislative Fix Constitutional? Similar Federal level legislation seems to be a possibility as well.

In our banking litigation blog post, we continue to highlight the global progress of the legislative fixes in each of the key LIBOR jurisdictions (the UK, US and EU), consider the effect and scope of the NY legislation, look its safe harbour provisions in more detail and highlight the potential jurisdictional issues which may arise from the interaction between the different solutions.

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Contractual Construction

29. US Sanctions and the right of borrowers to withhold repayment: Commercial Court signals return to orthodoxy

***Banco San Juan Internacional Inc v Petroleos De Venezuela SA* [2020] EWHC 2937 (Comm)**

The Commercial Court granted summary judgment in favour of a bank seeking to recover payments under Credit Agreements entered into with the Venezuelan state-owned oil and gas company, Petroleos De Venezuela SA (**PDVSA**), finding that the defaulting borrower had no real prospect of successfully defending the claims on the basis of certain US Sanctions imposed on Venezuela which post-dated the execution of the Credit Agreements.

The court rejected all of the arguments put forward by PDVSA as to why it was prevented from making repayments as a result of the imposition of US sanctions (PDVSA is now a US Specially Designated National (**SDN**)). In particular, the court made the following findings, which will be of broader interest to global lenders with exposure to borrowers facing sanctions risk:

1. No “normal course” to suspend payment obligations where there is a risk of US Sanctions

   In interpreting the sanctions clause in the Credit Agreements, the court rejected the suggestion that the Court of Appeal’s decision in *Lamesa Investments Limited v Cynergy Bank Limited* [2020] EWCA Civ 821 demonstrated that it is perfectly normal and sensible in commercial agreements to suspend payment obligations where payment would otherwise be in breach of US sanctions (see our banking litigation blog post). It found that this authority (and others) were simply decisions on their (very different) facts. On the facts of the present case, the court concluded that the relevant clause provided no basis for a suspension of the repayment obligations (and in any case it was not clear that it would in fact be a breach of sanctions for PDVSA to make payment).

   This represents a move back to orthodoxy in cases of this kind, emphasising the importance of the contractual construction of the particular wording of the clause in each case. *Lamesa v Cynergy* was a surprising decision in part because the party with the payment obligation in that case was (if payment was made) only at risk pursuant to US secondary sanctions. Here, US primary sanctions were in play to some extent, given that the payment was to be made in US dollars and to a US account. Nonetheless, the court found that PDVSA’s payment obligation was not suspended. As such, it appears that the outcome in *Lamesa v Cynergy* does not have broader application – instead, as the court itself observed in *Lamesa*, each case will turn on the interpretation of the particular contract in question.

   2. Impossibility vs impracticability of repayment

   On an *obiter* basis, the court expressed the view that it was merely impracticable and not illegal for PDVSA to make payments in USD to a US bank account, because: (i) it was not illegal for PDVSA (a non-US entity based outside the US) to initiate payment; and (ii) it was possible for the parties to vary the Credit Agreements and make payment in euros to a bank outside the US. Accordingly, the court doubted that PDVSA could rely on the “very narrow gateway” in *Ralli Bros v Compania Naviera Sota y Aznar* [1920] 2 KB 287 (providing that English law governed contracts are unenforceable where performance is prohibited in the place of performance).

   3. Burden of proving that US Sanctions prevent contractual performance

   Even if the US Sanctions *prima facie* rendered the performance of PDVSA’s payment obligations necessarily illegal at the place of performance, the court found that PDVSA had an obligation under the Credit Agreements to apply for a licence from the US Office of Foreign Assets Control (OFAC) in order to make the payments, which it had failed to discharge. As an important point of general application, the court stated that (absent any contractual provision to the contrary or a statutory

reversal), the legal burden to obtain the necessary licence to effect the repayments was on PDVSA (as the debtor and the party bound to perform).

In February 2021, the Court of Appeal refused the defendant's application for permission to appeal.

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

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30. High Court considers entitlement of investment firm to terminate Bitcoin trading account due to alleged money laundering concerns

***Ang v Reliantco Investments Ltd* [2020] EWHC 3242 (Comm)**

The High Court found in favour of a claimant investor in a dispute arising from the termination of her Bitcoin trading account with an online trading platform and concurrent cancellation of open trades (as a result of an alleged money laundering risk). Although the claim relates to an account used to trade Bitcoin futures, the decision will be of broader interest to financial institutions, given the potential application to other types of trading accounts and accounts more generally.

The judgment is noteworthy for the court's analysis of the defendant's contractual termination rights in relation to the account and open trades. While the Customer Agreement provided the defendant with the right to terminate the account, the court found that the defendant remained under an obligation to return money deposited in the account (which was held under a *Quistclose* trust). As to the related open trades, the court found that the defendant only had a contractual right to close out the trades rather than to cancel them (or alternatively, the court said that the same result would be required under the Consumer Rights Act 2015 (the **Act**), as the investor was a "consumer" for the purposes of the Act).

The decision illustrates the risks for financial institutions seeking to terminate relationships with their customers, particularly in circumstances where there are money laundering or other regulatory compliance concerns. Often accounts may need to be closed without notice (as per *N v The Royal Bank of Scotland plc* [2019] EWHC 1770; see our banking litigation blog post). Claims against banks by customers in this type of scenario can be significant, and not limited to claims for money deposited in the account, extending to gains on outstanding trades and the loss of future investment returns but for the termination of the account. In the present case, the court found that the claimant was entitled to recover the loss on her investment returns, as it was deemed to be within the reasonable contemplation of the parties when they contracted that, if the defendant failed to repay the claimant sums which she had invested, she might lose the opportunity of investing in similar products.

In order to manage the litigation risks, it may be prudent for financial institutions to review the relevant contractual documentation associated with trading accounts to ensure that it: (i) allows for termination of the account in the relevant circumstances at the absolute discretion of the bank; and (ii) confers an appropriate contractual right to deal with any deposits and open trades. This is particularly the case where the customer is a consumer for the purposes of s.62 of the Act, as there will be a risk that any term in the contract consequently deemed unfair will not be binding on the customer.

In February 2021, the Court of Appeal refused the defendant's application for permission to appeal.

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

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31. Court of Appeal rejects all claims relating to transfer of property portfolio to lender's restructuring unit following borrower default

***Morley (t/a Morley Estates) v The Royal Bank of Scotland plc* [2021] EWCA Civ 338**

The Court of Appeal upheld the High Court's decision to reject all claims arising from the transfer of a defaulting borrower's property portfolio to his lending bank's restructuring unit during the global financial crisis. Dismissing the appeal in full, the Court of Appeal refused to imply any contractual terms into the mortgage, and did not accept claims that the bank owed a general duty to act in good faith in relation to the negotiation of the restructuring, or that the bank's actions amounted to intimidation or economic duress.

This decision is a reassuring one for financial institutions where borrower default has led to a restructuring and the bank is faced with attempts to rescind, especially where there has been significant market turmoil

(such as the global financial crisis or the current COVID-19 pandemic). It highlights the difficulties for claimants bringing claims of this nature in circumstances where the bank's exercise of its powers under a facility agreement are in line with its commercial interests and the negotiation of the relevant restructuring is between commercial parties with the benefit of legal advice.

The key points decided by the Court of Appeal that are likely to be of broader interest are as follows:

- **Duty to provide services with reasonable skill and care.** The Court of Appeal rejected the implication of a contractual term into the original loan agreement under section 13 of the Supply of Goods and Services Act 1982 (the **Act**). It did not accept that the bank was under any implied contractual duty to exercise reasonable skill and care in negotiating the restructuring with the claimant after his default on the original loan; by then the parties' relationship was governed by the express terms of the loan and the equitable principles applicable to that relationship. Even if owed, the Court of Appeal commented that this duty was not breached on the facts.
- **Duty to act in good faith**. The Court of Appeal did not accept that the bank was subject to an implied contractual duty under the loan to act in good faith in its negotiations with the claimant. All the bank's actions in any case, in the court's view, were rationally connected to its commercial interests.
- **Intimidation and economic duress**. The Court of Appeal underlined that the bank had not committed the tort of intimidation and that the restructuring agreement between the bank and claimant was therefore not voidable for economic duress. In its view, the restructuring agreement concluded was the result of a robust negotiation between commercial parties, each of which had legal advice and was well able to look after itself in that negotiation. Also, it was notable that the restructuring agreement concluded was one that the claimant had wanted and had originally proposed.

For further consideration of the decision, please see our banking litigation blog post.

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Duties in Financial Services

32. High Court strikes out group claims in light of parallel claims overseas: good news for parent company liability claims?

***Municipio de Mariana v BHP Group plc* [2020] EWHC 2930 (TCC)**

The High Court struck out the claims of over 200,000 claimants against two companies in a group of companies (domiciled in England and Australia respectively) arising out of an incident in Brazil. The court struck out the claims as an abuse of process in light of concurrent proceedings and compensation schemes in Brazil.

Whilst set in a non-financial context, this decision is relevant and comforting to UK-domiciled financial institutions who might be considered to be at risk of claims being brought which allege a duty of care in relation to the actions of their foreign subsidiaries or branches. The Supreme Court in *Vedanta Resources PLC & Anor v Lungowe & Ors* [2019] UKSC 20 considered whether the implementation of group-wide policies was arguably sufficient to found a duty of care owed by a parent company to third parties. The Supreme Court noted that group-wide policies do not of themselves give rise to such a duty of care to third parties, but they may do so if the parent company: (a) does not merely proclaim them, but takes active steps, by training, supervision and enforcement, to see that they are implemented by the relevant subsidiaries; and (b) in the published materials, holds itself out as exercising that degree of supervision and control of its subsidiaries, even if it does not do so.

The High Court's decision therefore provides some comfort to UK financial institutions exposed to such parent liability claims. The decision confirms that the English courts will, in appropriate cases, be prepared to take a robust approach in striking out such parent liability claims filed in the English courts against a UK-domiciled parent company on the grounds that such claims are a clear abuse of process especially: (a) where there is no compelling evidence of difficulties in bringing the claim in the relevant foreign jurisdiction; and (b) there is a concurrent claim in the relevant foreign jurisdiction which relates to the same issues and involves many of the claimants who are seeking the same compensation for the same alleged damages. However, see Update 37 below, where the Supreme Court found that the English court does have

jurisdiction to hear parent liability claims, having found that it was reasonably arguable that the UK domiciled parent company owed a duty of care to the claimants.

The High Court refused the claimants' application for permission to appeal to the Court of Appeal.

For a more detailed discussion of the High Court's decision, please see our litigation blog post.

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33. High Court finds no breach of duty by bank in exercise of enforcement rights under finance agreements

***Aegean Baltic Bank SA v Renzlor Shipping Ltd & Ors* [2020] EWHC 2851 (Comm)**

The High Court granted a claim brought by a bank against two companies (and the managing director of one of them) to recover outstanding sums due under a USD 9 million loan agreement and related security agreements (the **Finance Agreements**).

In doing so, the court confirmed that the bank owed an equitable duty in exercising its enforcement rights under the Finance Agreements. However, that duty was capable of amendment and constriction by contractual agreement and, on the facts, there had been no breach by the bank of its equitable duty.

In light particularly of the complex impact of the current COVID-19 pandemic on borrowers including the likely increase in default and therefore enforcement, this decision will be of significance to financial institutions considering the exercise of contractual rights. The decision provides a helpful reminder of the extent to which: (a) a duty can be imposed on a bank in respect of the exercise of its enforcement rights under various finance agreements; and (b) certain actions linked to the exercise of enforcement rights will not be considered to be in breach of such a duty. Please also see our previous blog post on a related decision considering whether a bank would have a duty of care akin to that which a mortgagee would have when exercising a power of sale over its security.

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

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34. High Court dismisses unconscionable bargain and lawful act economic duress defences raised in context of lender's claim

***Adare Finance DAC v Yellowstone Capital Management SA & Anor* [2020] EWHC 2760 (Comm)**

The High Court granted a lender's application for summary judgment in relation to its USD $10.5 million claim against a borrower and guarantor for outstanding sums due under finance agreements.

The decision will be welcomed by financial institutions considering their enforcement rights under finance agreements given the court's robust findings that the defences raised (unconscionable bargain and lawful act duress) were not applicable in the context of detailed financing arrangements. This is especially the case where these are the product of commercial negotiation where both parties are sophisticated, experienced and professionally advised.

The decision is also consistent with the trend in the court's approach to dealing with novel arguments raised by claimants that seek to allege that financial institutions should not be able to rely on such agreements, or need to take action or refrain from exercising their contractual rights under financing documents because of some overarching legal theory (see, for instance, our banking litigation blog post on the case of *Standish v RBS* [2018] EWHC 1829 (Ch) where the court struck out a claimant's claim that an overarching implied duty of good faith meant that a lender should have refrained from exercising its strict contractual rights).

In such cases, the courts have demonstrated a reluctance to invoke overarching legal theories to set such agreements aside, or fetter the exercise of rights under those agreements. Instead, the courts' approach demonstrates a willingness to respect the terms of such agreements which have been the product of commercial negotiations between the parties involved.

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

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35. High Court provides further insights on the risks of Quincecare claims against banks

***Roberts v The Royal Bank of Scotland plc* [2020] EWHC 3141 (Comm)**

The High Court handed down another interesting decision on the so-called *Quincecare* duty.

Quincecare duty claims typically arise where a bank received a payment mandate from an authorised signatory of its customer, and executed the order, in circumstances where (allegedly) there were red flags to suggest that the order was an attempt to misappropriate the funds of the customer. The recent uptick in *Quincecare* duty claims against financial institutions is striking, perhaps a culmination of years of increased regulation which has raised the expectation of firms to identify potentially fraudulent activity. Accordingly, insights from the court on the risks associated with processing client payments will be welcomed by the sector. You can find our blog posts on previous *Quincecare* decisions here. See also Update 36, Update 40 and Update 41 below for judgments considering the scope of the duty.

Roberts involved a classic breach of *Quincecare* duty (and breach of mandate) claim, in respect of which the court granted the defendant bank's application for reverse summary judgment on the basis that the claims were time-barred under the Limitation Act 1980. It highlights the court's approach to a limitation defence to resist claims alleging breach of *Quincecare* duty and breach of mandate claims. The decision confirms that the court will (in appropriate cases) take a robust approach in dismissing such claims which on the facts are clearly time-barred; this will especially be the case where the necessary facts required to plead a *prima facie* case of breach were within the claimant's knowledge at an earlier date than contended.

However, in doing so the court concluded that a *prima facie* case for breach of the *Quincecare* duty could be pleaded by the claimants from inference, i.e. simply being inferred from the fact of payment. While this was helpful in the context of the bank's limitation defence, it is potentially less helpful to the extent that it suggests a low threshold applies to the pleading requirements in *Quincecare* cases.

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

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36. High Court confirms current scope of Quincecare duty is limited to protecting corporate customers and does not extend to individuals

***Philipp v Barclays Bank UK plc* [2021] EWHC 10 (Comm)**

The High Court granted reverse summary judgment in favour of a defendant bank on the basis that the so-called *Quincecare* duty of care did not operate in the context of an authorised push payment (**APP**) fraud, where a third party fraudster tricked the bank's customer willingly to instruct the bank to transfer large sums out of her account, which were then misappropriated.

The judgment is the latest in a line of judgments concerning the parameters of the *Quincecare* duty, which arises where a bank has received a payment mandate from an authorised signatory of its customer, and executed the order, in circumstances where (allegedly) there were red flags to suggest that the order was an attempt to misappropriate the funds of the customer. This recent decision is important and helpful for financial institutions, because it confirms that existing authorities limit the *Quincecare* duty to protect corporate customers or unincorporated associations such as partnerships (i.e. where the instruction to the bank has been given by a trusted agent of the customer). The decision confirms that the *Quincecare* duty does not currently extend to individual customers. On the facts of the present case, the court was not persuaded to extend the *Quincecare* duty to protect an individual customer in the context of an APP fraud, saying to do so would be contrary to the principles underpinning the duty.

There has been an unfortunate proliferation of APP frauds over recent years which has seen a staggering increase in the accompanying sums that individuals are therefore out of pocket. While this decision closes one avenue by which banks were said to be liable for compensating victims, it will only be of relevance when the circumstances of the fraud cause it to fall outside of the voluntary Contingent Reimbursement Model Code, which seeks to compensate victims of APP frauds and is funded by banks for this purpose.

In March 2021, the claimant's application for permission to appeal to the Court of Appeal was granted by the High Court. The appeal is due to be heard by 14 February 2022.

For further information, please see our banking litigation blog post. See Update 35, Update 40 and Update 41 for further consideration of the duty.

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37. Supreme Court allows appeal in jurisdictional challenge relating to parent company duty of care

***Okpabi and others v Royal Dutch Shell plc and Shell Petroleum Development Company of Nigeria Ltd* [2021] UKSC 3**

On 12 February 2021, the Supreme Court handed down its judgment in a high profile jurisdictional challenge relating to group claims brought against Royal Dutch Shell plc and its Nigerian subsidiary in connection with alleged pollution in the Niger Delta.

While set in a non-financial context, this decision will be of great interest – and potential concern – to all UK-domiciled financial institutions who might be considered to be at risk of claims being brought which allege a duty of care in relation to the actions of their foreign subsidiaries or branches.

The Supreme Court unanimously allowed the claimants' appeal, finding that the English court does have jurisdiction over the claims. It held that (1) the Court of Appeal materially erred in law by conducting a mini-trial in relation to the arguability of the claim at the jurisdiction stage, and (2) it was reasonably arguable that the UK domiciled Shell parent company owed a duty of care to the claimants.

The decision provides further consideration of the circumstances in which a parent company may owe a duty of care to those affected by the acts or omissions of its foreign subsidiary, an issue that the Supreme Court considered in its recent judgment in *Vedanta Resources PLC and another (Appellants) v Lungowe and others (Respondents)* [2019] UKSC 20 (which was heavily relied upon by the Supreme Court in this case).

The latest Supreme Court judgment on this question will not provide comfort to UK financial institutions exposed to such parent liability claims. In particular, the decision is likely to constrain defendants (as part of a jurisdictional challenge) from seeking to challenge the factual basis on which claims are advanced. As a result, many defendants will be concerned that they are more vulnerable to weak and speculative claims being allowed to proceed in the English courts. See also Update 32 above for a judgment considering a jurisdictional challenge relating to parent company liability.

For a more detailed analysis of the decision, see our litigation blog post.

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38. High Court considers distinction between liability for dishonest assistance and knowing receipt in failed claim against bank

***Byers & Ors v Samba Financial Group* [2021] EWHC 60 (Ch)**

The High Court dismissed a claim brought by the liquidators of an investment company against a bank for knowing receipt, in circumstances where the investment company's shares were transferred by a trustee (in breach of trust) to the bank, and used by the bank to discharge part of a debt owed by the trustee to the bank.

One of the key issues before the court was whether the claimants' claim in knowing receipt must fail, where the beneficiary's interest in the shares was extinguished by the transfer (as per local Saudi Arabian law, which was applicable to the property). Such a question does not arise in relation to English property under the general law of England and Wales, but may arise (as in this case) where under the foreign law applicable to the property, the transferee's title may trump the interest of the beneficial owner and knowledge of that interest is irrelevant.

In summary, the court found that a claim in knowing receipt where dishonest assistance is not alleged, will fail if, at the moment of receipt, the beneficiary's equitable proprietary interest is destroyed or overridden so that the recipient holds the property as beneficial owner of it. In the absence of a formal allegation of dishonesty against the bank, and given the claimants' failure to prove that the investment company's beneficial interest continued under local law despite receipt of the shares by the bank, the claim failed.

The judgment is noteworthy for its analysis of the distinction between liability for dishonest assistance and knowing receipt, both of which are common types of claim made against financial institutions. Historically, there has been some blurring of the line between the two causes of action, further complicated by references to "dishonest receipt" in certain judgments. The decision provides the following helpful clarification:

1. Dishonest assistance is truly fault-based. It arises from the dishonesty of the defendant in assisting a trustee to commit a breach of trust (or assisting a fiduciary to commit a breach of fiduciary duty). From the perspective of financial institutions, it is important to note that such liability, if established, may result in vicarious liability for the employer of the individual defendant. For example, in *Bilta (UK) Ltd (in Liquidation) v Natwest Markets plc & Anor* [2020] EWHC 546 (Ch), the parent bank and its indirect subsidiary were found vicariously liable for the dishonest assistance of carbon credit traders employed by the subsidiary).
2. Knowing receipt unconnected with dishonesty is different, at least at the moment of receipt. The recipient is not liable in such a claim for wrongly agreeing to receive the property. The knowing recipient's liability depends on their knowledge that the property they receive is trust property and is to be dealt in that way. The principal duty of a knowing recipient is to deal with the property once received as if they are a trustee of it and to restore it to the trust; it would be unconscionable for them to do otherwise.

The High Court granted the claimants permission to appeal to the Court of Appeal on the knowing receipt issue. The Court of Appeal hearing is currently listed for 13 December 2021.

For a more detailed analysis of the decision, see our banking litigation blog post.

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39. Interesting New York court decision provides warning for financial institutions in relation to possible retention by recipients of mistaken payments

In Re Citibank August 11, 2020 Wire Transfers

On 16 February 2021, Judge Jesse Furman of the United States District Court for the Southern District of New York ruled, in a 105-page decision, that recipients of erroneous transfers made by Citibank N.A. of its own money to creditors of Revlon, Inc. were entitled to retain the sums totaling more than $500 million.

While the court applied a well-established exception under New York law, known as the "discharge-for-value defense", to the general rule that failure to return money wired by mistake constitutes unjust enrichment or conversion, this decision – notable not least for the large amounts in dispute (Citibank mistakenly transferred almost $900 million in all, but some of the recipients voluntarily returned the money upon realizing the error) – underscores the competing policy considerations of the defense and raises questions of its own.

This outcome contrasts with the legal position on mistaken payments in the UK, under which there is no equivalent discharge-for-value defence. The overall statutory regime governing this situation is the Payment Services Regulations 2017. In the UK, the recipient must instead rely on general restitutionary defences in particular the change of position defence. This sets a far higher bar for recipients to meet; they will be required to prove that their circumstances changed detrimentally as a result of the receipt of the enrichment and that they are not disqualified from relying on the defence.

For a more detailed analysis of the decision, see our banking litigation blog post.

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40. Hong Kong court refuses to expand scope of Quincecare duty

***Luk Wing Yan v CMB Wing Lung Bank Ltd* [2021] HKCFI 279**

The Hong Kong Court of First Instance dismissed a claim for breach of the so-called *Quincecare* duty of care on the basis that the duty could only arise in circumstances where misappropriation of a customer's funds occurred by an authorised or trusted agent of the customer, rather than where the customer itself instructed payment as a result of being tricked or defrauded by a third party.

As discussed in our previous blog posts (see also Update 35, Update 36 and Update 41), the *Quincecare* duty of care is a key risk area for financial institutions handling client payments, given the proliferation of claims relying on the duty and an expansion in the scope of the duty in recent judgments. As a reminder, the duty arises where a bank has received a payment mandate from an authorised signatory of

its customer, and executed the order, in circumstances where (allegedly) there were red flags to suggest that the order was an attempt to misappropriate the funds of the customer.

The decision of the Hong Kong court highlights the global nature of the *Quincecare* duty risk and illustrates the strict parameters of who the duty can be owed to. In summary, the Hong Kong court reached the same conclusion as the English High Court in *Philipp v Barclays Bank UK plc* [2021] EWHC 10 (Comm) (considered in Update 36) and refused to broaden the scope of the duty to protect an individual customer who had instructed the bank to make the relevant payment directly, confirming that existing authorities limit the *Quincecare* duty to protect corporate customers or unincorporated associations such as partnerships.

For further information, please see our Asia Disputes blog post.

41. Court of Appeal confirms that the Quincecare duty does not extend to protect creditors

***Stanford International Bank Ltd v HSBC Bank plc* [2021] EWCA Civ 535**

The Court of Appeal struck out *Quincecare* duty and dishonest assistance claims brought by the liquidators of a Ponzi scheme against a correspondent bank that operated various accounts for the company. In doing so, the Court of Appeal confirmed that the scope of the *Quincecare* duty, which may arise in the context of a financial institution processing client payments, is limited to protecting customers of the financial institution, and does not extend to protect the customer's creditors.

In relation to the *Quincecare* duty claim, the Court of Appeal found that the company had no claim in damages because it suffered no loss. The way the Ponzi scheme operated, payments made by the bank to genuine investors reduced the company's assets, but equally discharged the company's liabilities to those investors by the same amount. The net asset position therefore remained the same in the period between: (a) when the liquidators said the bank should have recognised the "red flags" and stopped processing its customer's payments, thereby exposing the fraud; and (b) the date upon which the accounts were eventually frozen by the bank.

In reaching this conclusion, the Court of Appeal overturned the decision of the High Court, which had refused to strike out the claim (see our banking litigation blog post). The High Court relied on the company's state of insolvency as a key factor, finding that if the bank had performed its *Quincecare* duty, then more cash would have been available to pay other creditors once the company's insolvency process began (at a later date). However, in the Court of Appeal's view, the problem with this argument was that it proceeded on the basis that the bank owed a direct duty to the company's creditors, which it did not. It said the High Court erred in its reasoning by confusing the company's position before and after the inception of an insolvency process. Before an insolvency process commences (and the statutory insolvency regime is invoked), the fact that a company has slightly lower liabilities is a corresponding benefit to its net asset position, even if the company is in a heavily insolvent position. Having more cash available upon the eventual inception of its insolvency for the liquidators to pursue claims and for distribution to creditors, is a benefit to creditors, but not to the company while it is still trading.

The Court of Appeal upheld the High Court's decision to strike out the dishonest assistance claim, emphasising that dishonesty and blind-eye knowledge allegations against corporations (large or small) must still be evidenced by the dishonesty of one or more natural persons. Blind-eye knowledge cannot be constituted by a decision not to enquire into an untargeted or speculative suspicion rather than a targeted and specific one; and the liquidators could not hide behind the fact that the defendant bank was a large corporation.

This decision is a reassuring one for financial institutions faced with *Quincecare* and dishonest assistance claims from liquidators in relation to the processing of payment mandates in connection with customer accounts. The decision limits the scope of the *Quincecare* duty that is owed by a bank in such circumstances to its customer; it will not extend to the customer's creditors. It also suggests that claimants may face difficulties in pursuing similar *Quincecare* claims against banks that have been inadvertently involved in processing the payments of a Ponzi scheme.

For further information, please see our banking litigation blog post. See also Update 35, Update 36 and Update 40 above) for earlier consideration of the duty.

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Part 36 Offers/Costs

42. Court of Appeal gives guidance on proper approach to enhanced awards where claimant beats its own Part 36 offer to settle

***Telefonica UK Ltd v The Office of Communications* [2020] EWCA Civ 1374**

The Court of Appeal held that a claimant who beat its own Part 36 offers was entitled to the full range of enhanced awards under CPR 36.17, rather than the less generous partial award ordered by the High Court.

CPR 36.17(4) provides that, where a claimant has obtained a judgment which is at least as advantageous as the proposals contained in its Part 36 offer, the court must (unless it considers it is unjust to do so) order that the claimant is entitled to: enhanced interest on both damages and costs at up to 10% above base rate; an award of indemnity costs; and an additional amount of up to £75,000 calculated as a percentage of the judgment sum. The court must take into account all the circumstances of the case when deciding whether it would be unjust to make such an order, including "whether the offer was a genuine attempt to settle the proceedings".

In the present case, the High Court judge had awarded indemnity costs and the additional £75,000. However he considered that it would be disproportionate, and therefore unjust, to order enhanced interest on damages and costs, in particular because of the small differential between the claimant's offers and the amount claimed (and awarded), and the fact that the extra interest on damages would be very large (£3.2 million).

The Court of Appeal was critical of this approach, finding in particular that the margin by which a claimant beats his own offer is irrelevant in the exercise of the court's discretion, and that the judge had failed to take into account that he did not have to award enhanced interest at the maximum 10% above base rate but could award a lesser percentage.

This decision confirms that, in cases where a claimant has beaten its own Part 36 offer, it will be unusual for the court to conclude that it is just to award the claimant some but not all of the enhancements under that rule, though enhanced interest may be awarded at less than the full 10% above base rate.

For further information, please see our litigation blog post and Update 43 below.

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43. High Court held it could determine costs where Part 36 offer accepted one day after expiry of relevant period, even though the offer contained a term as to costs

***Pallett v MGN Ltd* [2021] EWHC 76 (Ch)**

The High Court held that advice from accountants on a proposed new tax structure was not prepared for the dominant purpose of litigation, and was therefore not protected by litigation privilege, even if litigation over the relevant tax affairs was in reasonable contemplation at the time the advice was given.

The decision emphasises that, for litigation privilege to apply, a communication or document must have been prepared for the dominant purpose of obtaining advice or evidence in relation to litigation that is reasonably in contemplation. As the judge explained, even if it is contemplated that a particular tax structure will be subject to challenge, and eventual litigation, advice as to how to implement the new structure is not primarily advice as to the conduct of the potential litigation.

While not surprising, the decision illustrates the point that advice about a potential course of action may not be covered by litigation privilege, even if that course of action is expected to lead to litigation. Where the advice in question is legal advice given by lawyers, legal advice privilege (rather than litigation privilege) is likely to apply. However, legal advice privilege does not apply to advice from other professionals, as confirmed by the Supreme Court in *R (Prudential plc) v Special Commissioner of Income Tax* [2013] UKSC 1 (considered here).

For further information, please see our litigation blog post. For further consideration of Part 36 offers, please see Update 42 above.

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Disclosure and Privilege

44. Court of Appeal finds one defendant cannot claim litigation privilege over text messages, despite accepting other defendants can do so

***TBD (Owen Holland) Ltd v Simons and others* [2020] EWCA Civ 1182**

The Court of Appeal found that a defendant was not entitled to claim litigation privilege in certain text messages as no litigation was in reasonable contemplation against him at the time they were created – despite the court accepting that other defendants to the litigation (including a company of which he was a director) had a good claim to privilege in the messages. Nor could he claim common interest privilege, as he did not have his own interest in the subject matter of the messages at the relevant time.

This decision illustrates the established principle that litigation privilege can only arise in favour of a person who is a party to the litigation in question. It is unusual, however, in that the implication appears to be that the text messages will be privileged and therefore cannot be relied on as against certain defendants to the action, but will not be privileged and therefore can be relied on as against another defendant to the same action. It is not clear how that will work in practice.

The judgment may also be seen as difficult to reconcile with the principle “once privileged, always privileged” – unless waived by the privilege holder – which was vividly illustrated by the Court of Appeal’s decision last year in *Addlesee v Dentons Europe LLP* [2019] EWCA Civ 1600 (considered here). In that case, the court confirmed that the documents of a dissolved company remained privileged, regardless of whether there was anyone who could assert the company’s privilege.

It may be that the cases can be distinguished on the basis that in *TBD* the claimant was not applying for disclosure of the text messages; they were already in its possession, having been obtained pursuant to (and indeed in breach of) a search and imaging order. (That aspect of the judgment will be the subject of a separate post on our Civil Fraud and Asset Tracing Notes blog. *Note: now available here.) The case may therefore be seen as akin to an application to restrain use of privileged documents, where the question of whether the applicant has standing to assert the privilege may come into play. However, it remains to be seen how these authorities may be applied in future cases.

For further information, please see our litigation blog post.

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45. High Court concludes no waiver of privilege resulted from negative assertions relating to legal advice

***PJSC Tatneft v Bogolyubov* [2020] EWHC 3225 (Comm)**

The High Court held that a party who stated in documentation before the court that a particular issue had not been discussed with its lawyers, in order to deny an assertion made by its opponent, had not thereby waived privilege as there had been no voluntary disclosure.

It is well established that, in certain circumstances, a party who voluntarily discloses some of its privileged material in statements of case, witness statements or other documentation used in court proceedings may be required to disclose other privileged material relating to the same issue. This is known as collateral waiver or the “cherry picking rule”. The test, as set out in *PCP Capital Partners LLP v Barclays Bank Plc* [2020] EWHC 1393 (Comm) (considered here), is whether there is sufficient reference to the privileged material and whether it has been relied on to support the relevant party’s case.

The present decision is of particular interest for the court’s discussion of whether negative assertions, to the effect that a particular matter had not been discussed with a party’s lawyers, could result in a waiver of privilege over the communications that had taken place. The court drew a distinction between a situation where a party has chosen to put forward a positive case in reliance on legal advice (which may include a negative proposition) and where the party has merely denied an assertion made by the other party. The decision suggests that no waiver of privilege will occur when a party is merely responding to an opponent’s assertion as to the contents of a privileged communication.

While the court’s willingness to uphold privilege in such circumstances may be seen as welcome, it would be dangerous to take too much comfort. Even if the same approach is followed in other cases, there may be a

rather fine line in practice between a negative proposition which puts forward a positive case and one which merely responds to an opponent's assertion.

The case of *Guest Supplies Intl Ltd v South Place Hotel Ltd* [2020] EWHC 3307 (QB), decided 9 days after *PJSC Tatneft v Bogolyubov*, provides an illustration. In that case Murray J had little hesitation in finding that a claimant had waived privilege as a result of a negative assertion regarding his communications with his lawyers. The relevant assertion was made in the claimant's evidence in response to an application for specific disclosure of the original or digital version of an important agreement, the authenticity of which was disputed. The claimant gave evidence explaining why the original no longer existed, and that he had "never said" to his solicitor that the version disclosed was the actual final version of the agreement. Murray J held that, as a result, the claimant had waived privilege in any communications with his solicitor relating to the creation, provenance and/or authenticity of the document.

For further information, please see our litigation blog post.

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46. High Court confirms jurisdiction to order disclosure under Disclosure Pilot Scheme not confined to issues identifiable from statements of case

***The Commissioners for Her Majesty's Revenue and Customs v IGE USA Investments Ltd* [2020] EWHC 1716**

The High Court confirmed that it has jurisdiction to order disclosure of specific documents under the Disclosure Pilot Scheme, even where the disclosure relates to issues which are not identifiable on the face of the statements of case and no List of Issues for Disclosure has been agreed by the parties.

The court noted that the Disclosure Pilot Scheme (at Practice Direction (**PD**) 51U) does not contain a direct equivalent to the general power to order "specific disclosure" in cases falling outside the pilot. Instead there are two new powers: paragraph 17, which applies where there has been a failure to comply with an existing order for extended disclosure, and paragraph 18, which allows the court to vary such an order, including by ordering further disclosure of documents "relating to a particular Issue for Disclosure".

However, the court did not accept that "Issues for Disclosure" are limited to issues that can be identified on the face of the statements of case at the date that the List of Issues for Disclosure is finalised. The concept comprises the key issues that will need to be determined by reference to contemporaneous documents for there to be a fair resolution of the proceedings, which is broader than just the issues to be determined at trial, or those raised in the statements of case. Nor is the existence of a List of Issues for Disclosure a pre-requisite to making an order: the List of Issues for Disclosure is merely a tool for identifying the Issues for Disclosure.

On the facts of this case, that meant that the court could grant an application for disclosure of documents that were relevant only to allegations of fraud which the claimant was seeking to introduce by an amendment to its particulars of claim.

For further information, please see our litigation blog post.

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47. High Court dismisses disclosure application by a group of unidentified investors on the grounds that it amounted to a "fishing expedition"

***Zeus Investors v HSBC Bank plc* [2020] EWHC 3273 (Comm)**

The High Court dismissed an application by a group of unidentified investors for *Norwich Pharmacal* relief (or, alternatively, pre-action disclosure under CPR 31.16) in relation to a potential GBP £50 million damages claim against the defendant bank for an alleged breach of contract/negligence in connection with the sale of various tax mitigation schemes.

This decision is a reassuring one for financial institutions faced with broad applications for disclosure before proceedings have been commenced by prospective claimants; especially from those who may not be parties to the contractual arrangement which is the subject of the dispute and who are not identified precisely in the applications. Such applications may be used tactically by claimants seeking to put pressure on defendant banks with requests that are time-consuming to deal with and/or seek disclosure of potentially confidential documents. The decision highlights the narrow scope of the court's *Norwich Pharmacal* jurisdiction, with

claimants being required to: (a) evidence the vital need for the documentation requested in order to be able to plead their case; (b) engage appropriately with the requisite pre-action protocols; and (c) identify upfront and precisely who the applicants are.

In the present case, the court was satisfied that the information sought by the claimants was not necessary in order to plead their claim, given the material already available to them. This did not suggest to the court that a missing piece of the jigsaw was required to be able to formulate their case. In addition, the court found that the claimants' application was unfocused and over wide, providing all the hallmarks of a fishing expedition. In particular, the court drew attention to the electronic search terms proposed by the claimants, which would likely have generated a large number of responsive materials and required a manual review prior to disclosure. These search terms did not appear to the court to be formulated by reference to a potential claim, with the claimants instead seeking every document of the slightest relevance for a purported claim which would be particularised at a later date. It was therefore not in the interests of justice to order the disclosure sought.

The court also found that, had the claimants sought to pursue their application for pre-action disclosure under CPR 31.16, this application would similarly have been refused. Due to the wide nature of the disclosure sought by the claimants which went further than standard disclosure, the test under CPR 31.16(3)(c) was not met. The pre-action disclosure application was ultimately not pursued by the claimants, as they recognised that if they could not meet the conditions for *Norwich Pharmacal* relief, it would not be possible to meet the requirements of CPR 31.16.

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

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48. Court of Appeal orders defendants to request their employees and ex-employees to produce personal devices for inspection to identify documents in defendants' control

***Phones 4U Limited v EE Limited* [2021] EWCA Civ 116**

The Court of Appeal upheld a decision that, where personal devices belonging to the defendants' employees and ex-employees potentially contained relevant documents within the defendants' "control" for the purposes of disclosure, the court had jurisdiction to order the defendants to request the employees and ex-employees to deliver up those devices for inspection by the defendants' IT consultants.

The decision illustrates the breadth of the court's powers aimed at ensuring that relevant documents within the parties' control are before the court so as to enable it fairly to decide the issues in dispute. The court cannot order a party to disclose documents that are not within the party's control, but it can make orders directing how disclosure is to be given, including what searches are to be undertaken to locate documents within the party's control. That can include requiring a party to make requests of third parties – though the third party cannot be compelled to disclose documents (unless the court exercises its powers to order non-party disclosure).

The court recognised the need to safeguard the privacy rights of the non-parties, but noted that they were not being compelled to deliver up the devices, and the searches were to be carried out by independent IT consultants subject to comprehensive undertakings as to the use of the documents. It was also significant that the case involved allegations of collusive behaviour, and in such cases the individuals involved may sometimes deliberately avoid using their work email or work devices so as to conceal their dealings.

While this decision was reached in a competition case, which fell outside the Disclosure Pilot and was therefore governed by CPR 31, similarly broad powers are likely to apply under the pilot rules at CPR PD 51U.

The Court of Appeal accepted that it would have been open to the claimant to seek disclosure via the alternatives of an application for specific disclosure against the defendants (who would then be required to take steps to obtain the documents from the third parties if they did not provide them voluntarily) or an application for third party disclosure, but commented that it was not necessary for the claimant to navigate that "obstacle course" if there was a simpler way. Those routes would however still be available to the claimant if the non-parties refused to hand over their personal devices voluntarily.

The court said it was not necessary to decide whether the devices themselves fell within the defendants' control, since the work-related documents on them were within the defendants' control. However, in the

recent decision in *Pipia v BGEO Group Ltd* [2021] EWHC 86 (Comm), the High Court ordered the defendant to disclose WhatsApp and text messages on a mobile phone belonging to an ex-employee on the grounds that the phone fell within the defendant's control. In that case, the employment contract expressly authorised the defendant to access "any program or data held on any computer" used by the employee in performing his duties, regardless of whether the program or data was itself related to his duties of employment. The court found that the clause survived termination of employment and the mobile phone was a "computer" for these purposes.

For further information, please see our litigation blog post.

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49. Supreme Court judgment in KBR v SFO appeal: detailed briefing published

***R (on the application of KBR, Inc) v Director of the Serious Fraud Office* [2021] UKSC 2**

The Supreme Court handed down judgment in a keenly anticipated case concerning the scope of extraterritorial application of the SFO's document compulsion powers under section 2(3) of the CJA.

The Supreme Court unanimously allowed the appeal, confirming that the SFO did not possess the power to compel a foreign company to produce documents held outside the UK.

Our FSR and Corporate Crime team published a briefing with further analysis of the decision and its practical implications for multinational corporations.

The briefing refers to the Supreme Court's interesting observations on the potential read across value for other regulatory bodies. There was some anticipation that the *KBR* judgments might, depending on the outcome of the Supreme Court case, be used by other law enforcement or regulatory authorities (including the FCA) in arguing that their own powers should be considered to have extraterritorial scope. This potentially included any agencies who may be involved in cross-border investigations and who have statutory document compulsion powers which are not expressly limited in their territorial scope.

The Supreme Court warned, however, against "reading across" between the document production powers vested in different UK agencies, noting that each operates under its own legislative history and context. The court distinguished the tax case of *Jimenez, R. (On the Application of) v The First Tier Tribunal (Tax Chamber)* [2019] EWCA Civ 51, which had followed the High Court decision in *KBR v SFO*, on the basis that (among other things) the powers pursuant to the Finance Act 2008 were expressly limited for the purpose of checking the taxpayer's tax position. The powers were necessarily and only exercisable in relation to someone who is or may be liable for tax in the United Kingdom and who, to that extent, had an identifiable relationship with the United Kingdom. This, it indicated, was different to the broad ambit of section 2(3) CJA 1987 which, on the High Court's analysis, had required limitation through the creation of the "sufficient connection" test. A further distinguishing factor was that non-compliance in *Jimenez* did not amount to a criminal offence, as under section 2(3).

Notwithstanding these comments, the parallel between the SFO's document compulsion powers and those of the FCA under the Financial Services and Markets Act 2000 is noteworthy (and arguably more aligned than the tax example). The Supreme Court's ruling may therefore provide a helpful indication that the FCA's similar statutory powers do not extend to compel foreign group companies to produce overseas held documents, within the context of an FCA investigation into a group company based in the UK.

For further information, please read our FSR and corporate crime briefing on this decision.

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50. High Court considers scope of jurisdiction and meaning of records under Bankers' Book Evidence Act 1879

***Meng v HSBC Bank Plc & Ors* [2021] EWHC 342 (QB)**

The High Court dismissed an application (under the Bankers' Book Evidence Act 1879) by the CFO of a telecommunications company for access to bank documents for use in Canadian extradition proceedings (initiated by US prosecutors who were seeking to join the CFO as a co-defendant to criminal proceedings in the US because she was alleged to have misled the respondent banks into processing transactions linked to Iran which were in contravention of US sanctions law).

This decision is a reassuring one for financial institutions faced with applications under the Bankers' Book Evidence Act 1879 (the **Act**) for disclosure of bank documents for use in foreign or domestic legal proceedings. Such applications may be made by parties to legal proceedings in addition to disclosure applications under the CPR and other avenues for obtaining disclosure, which may increase the administrative burden and cost of business for a financial institution. Despite the longevity of the Act, there is relatively little reported authority interpreting the Act. This decision highlights the narrow scope of the court's jurisdiction, and helpfully limits the type of documents which may be obtained, under the Act. Additionally, the decision underlines the fact that even if certain conditions in the Act are met for ordering disclosure, the court still ultimately retains the discretion as to whether to order disclosure.

In summary, the court found that it had no jurisdiction under the Act to make the disclosure order sought by the applicant. The Act was limited to UK legal proceedings and did not extend to making orders for the purposes of foreign legal proceedings. The court also said that if even it had found in favour of the applicant on the jurisdiction issue, it would have still refused the application on the basis that the documents/records sought by the applicant did not fall within the scope of the Act (which was limited to transactional records and did not include non-transactional records, such as attendance notes or correspondence between a bank and its customer). The court also noted that even if the applicant had been successful on both the jurisdiction and the records issues, the court would not have not exercised its discretionary power to grant the application. A number of factors which the court took into account in declining to exercise its discretion included the express US prohibition order on the use of the documents in the Canadian extradition proceedings, the likelihood of the applicant having a fair trial before the Canadian courts and the failure of the applicant to link the documents requested sufficiently clearly to specific regulatory duties to maintain records.

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

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Governing Law and Jurisdiction

51. Latest guidance from the Court of Appeal on asymmetric jurisdiction clauses

***Etihad Airways PJSC v Lucas Flother* [2020] EWCA Civ 1707**

The Court of Appeal held that an asymmetric or unilateral jurisdiction clause is an exclusive jurisdiction clause for the purposes of the recast Brussels Regulation. The English court was therefore entitled to continue with its proceedings where it was the chosen court but proceedings had been commenced earlier in Germany.

Asymmetric jurisdiction clauses are common in the financial sector, and typically require one party to bring proceedings in one jurisdiction only, while the other (usually the financial institution) may choose to bring proceedings in other jurisdictions. The effect of this decision is (for proceedings commenced in England & Wales before 1 January 2021 at least – see further below) that an asymmetric jurisdiction clause will have the benefit Article 31(2) of the recast Regulation, a provision designed to defuse the so-called Italian Torpedo (whereby a counterparty could delay a resolution in the chosen court by racing to commence proceedings first in some other EU state, and the chosen court would then have to stay any proceedings under the "first seised" rule). Accordingly, the Court of Appeal's decision will be welcomed by banks for providing certainty in respect of how asymmetric jurisdiction clauses will be treated under the recast Regulation.

However, the recast Regulation ceased to apply in the UK when the Brexit transition period came to an end on 31 December 2020. This means that the Court of Appeal's decision will only be of direct relevance in respect of proceedings commenced in England & Wales before 1 January 2021. This is the case even if the UK accedes to the Lugano Convention 2007, as there are no similar provisions within Lugano giving priority to an exclusive jurisdiction clause where the proceedings in the chosen court are second in time. In this context, it is worth noting that judicial cooperation in civil and commercial matters was outside the mandate of the negotiations leading to the TCA agreed between the UK and the EU, which therefore contains no relevant provisions (for our initial commentary on the TCA, see our Beyond Brexit blog post).

Of more interest and ongoing relevance are the Court of Appeal's comments concerning whether an asymmetric clause is an exclusive jurisdiction clause for the purposes of the 2005 Hague Convention on Choice of Court Agreements, as this Convention will apply post-Brexit to proceedings between the UK and

the EU (assuming no Lugano). The Court of Appeal's view, was that there were strong indications that the intention was to exclude asymmetric clauses from Hague.

While this aspect of the decision is less helpful from the perspective of financial institutions, it is important to note that Court of Appeal did not reach a final decision on the point and there have been two previous Commercial Court decisions observing that there are good arguments for asymmetric clauses being within the Hague Convention (see our posts here and here).

It is also worth noting that whatever view the English court takes concerning such clauses, the most important question from a UK perspective will be what stance an EU court takes on this question, i.e. whether it will stay proceedings and enforce judgments under the Hague Convention where there is an asymmetric clause which restricts one of the parties to bringing proceedings in England. While under Article 23 of Hague, courts must have regard to the Convention's international nature and the need to promote uniformity in its application, English judgments will not be binding on foreign courts.

For a more detailed analysis of the decision, see our litigation blog post.

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50. High Court confirms no abuse of process or exceptional grounds for partially striking out/staying parallel English proceedings brought by a Bank in relation to a swap claim

Banca Intesa Sanpaolo SPA and Dexia Credip SPA v Commune Di Venezia **[2020] EWHC 3150 (Comm)**

The High Court dismissed an Italian municipal authority's application to strike out certain parts of the claimant banks' particulars of claims and/or for a stay (in relation to a declaratory relief claim in connection with two interest rate swap transactions).

This decision is a noteworthy and reassuring one for financial institutions which may be considering whether to pursue English proceedings, especially where there are existing parallel foreign proceedings in relation to a particular subject matter, or which may be at risk of an application for a stay if parallel foreign proceedings are filed after English proceedings have commenced. The decision highlights the grounds on which the court will decline to strike out part of a claim (insofar as they refer to foreign proceedings or finance documentation which is not directly related to the transaction at the centre of the dispute) or stay proceedings where there are related proceedings in another jurisdiction.

The court found that the definition of a new claim (which would be liable to be struck out) is a new cause of action which changes the essential features of the factual basis of the claim. Interestingly, the court found that references to documentation not directly related to the interest rate swaps at the centre of the dispute in the English proceedings (and which were central to the dispute in Italian proceedings) did not constitute a new claim for the purpose of the English proceedings. Further, the court did not consider that the existence of the Italian proceedings changed the essential features of the factual basis of the English claim. The fact that the relief sought in the English claim form and particulars of claim was the same was significant.

The court also found that exceptionally strong grounds are needed for a stay on case management grounds where the English courts have been granted exclusive jurisdiction. The court confirmed that the risk of parallel proceedings and inconsistent judgments is not sufficient to warrant a stay.

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

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Other Significant Developments

52. Court of Appeal finds no binding settlement reached, emphasising importance of "subject to contract" label

Joanne Properties Ltd v Moneything Capital Ltd **[2020] EWCA Civ 1541**

The Court of Appeal overturned a deputy judge's decision that a binding settlement agreement had been reached in inter-solicitor correspondence despite the use of the "subject to contract" label.

The decision illustrates that, once parties have started to negotiate "subject to contract", the court will not conclude that they have dispensed with that proviso unless they have agreed to do so expressly or that is

the necessary implication of their words or conduct. It also suggests that, while a Part 36 offer must be one that is capable of acceptance (and so not "subject to contract"), the making of a Part 36 offer will not ordinarily be taken to "recalibrate" the status of without prejudice negotiations that are taking place in parallel.

For more information on the requirements for a binding contract, and the effect of negotiating "subject to contract", see the first edition of our contract disputes practical guides series When do you have a binding contract? It may be more (or less) often than you think (or click here to access the whole series).

For further information, please see our litigation blog post.

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53. Supreme Court changes law on when time starts to run for limitation purposes in a claim to recover money paid under a mistake of law

***Test Claimants in the Franked Investment Income Group Litigation & Ors v Commissioners for Her Majesty's Revenue and Customs* [2020] UKSC 47**

In a decision in the long-running Franked Investment Income (**FII**) Group Litigation, the Supreme Court held that, for a claim to recover money paid under a mistake of law, the statutory limitation period begins to run when a claimant could with reasonable diligence have discovered the mistake, in the sense of recognising that it had a "worthwhile claim".

The court departed from the House of Lords decision in *Deutsche Morgan Grenfell Group plc v Inland Revenue Commissioners* [2006] UKHL 49, which had established that (in cases where a payment was made in accordance with the law as it was then understood to be) time did not begin to run until a judicial decision had established that the law was otherwise and, accordingly, the claimant had a well-founded cause of action. The court's decision brings the law on limitation for claims based on a mistake of law in line with the position for cases of fraud or deliberate concealment, where time starts to run when the claimant knows enough to pursue a claim in fraud or to allege deliberate concealment – not when the fraud or concealment is established by judicial decision.

The Supreme Court was also asked to reconsider the earlier decision of *Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 AC 349, in which the House of Lords concluded that the statutory provision postponing commencement of the limitation period for claims based on a mistake included mistakes of law as well as mistakes of fact. The court affirmed that earlier decision, finding that the purpose of the provision was to relieve a claimant from the need to comply with a time limit at a time when it could not reasonably be expected to do so, and that purpose would be frustrated by excluding mistakes of law from the scope of that provision.

The decision provides a rare example of the Supreme Court overturning one of its own earlier decisions, or an earlier decision of the House of Lords, and in effect has re-written the law of limitation on the discoverability of a mistake of law. By focusing the enquiry on when the claimant recognised (or could with reasonable diligence have recognised) that it had a worthwhile claim, the court's decision is likely to require evidence to be brought on developments in legal understanding within the relevant category of claimants and their advisers, which may include the need for expert evidence. The court recognised that this approach involves a more nuanced inquiry than a test based on when an authoritative appellate judgment determined the point in issue, but said there was no reason to think this would be unworkable in practice, or too uncertain in its operation to be acceptable.

For further information, please see our litigation blog post.

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54. Court of Appeal decision clarifies when new claims can be introduced after limitation has expired

***Libyan Investment Authority v King* [2020] EWCA Civ 1690**

The Court of Appeal held that parties seeking to introduce a new claim after the expiry of the relevant limitation period cannot rely on previously struck out pleadings in order to demonstrate that the new claim arose out of substantially the same facts.

CPR 17.4(2) empowers the court to permit new claims to be introduced if they arise out of the same (or substantially the same) facts as a claim for which a remedy has already been claimed in the proceedings. However, the court held that CPR 17.4(2) must be read as subject to s.35 of the Limitation Act 1980, which requires a comparison with the facts that "are already in issue" (a phrase not used in CPR 17.4(2)). Facts set out in previously struck out particulars of claim could not be said to be "in issue".

The upshot is that, if a party wishes to amend its claim to introduce a new cause of action after the limitation period has expired, the court will not allow the amendment unless the new cause of action arises out of (substantially) the same facts as are in issue *at the time of the amendment.*

The court commented that there would be nothing wrong – nor indeed unusual – in a claimant who had pleaded claim A amending to plead claim B based on substantially the same facts and then dropping claim A. But, as this decision shows, a party cannot first drop claim A (or allow it to be struck out), and only then seek to use claim A to justify adding a new claim based on the same facts. A party that is considering abandoning part of its claim, or facing an application to strike out, may wish to bear this in mind.

For further information, please see our litigation blog post.

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55. Witness evidence reforms: final versions now published and will apply from 6 April

The 127th update to the CPR Practice Directions has been published and includes (at Schedule 3) the final version of the new Practice Direction (**PD**) 57AC and Appendix that will govern preparation of trial witness statements in the Business and Property Courts. As anticipated, these will come into force on 6 April and will apply to all trial witness statements signed on or after that date (subject to very limited exceptions set out in the PD).

The final versions of the PD and Appendix contain a number of changes from the drafts that had previously been published. The most significant of these are outlined in our litigation blog post.

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56. High Court considers where cryptocurrencies are located and compels disclosure of information by cryptocurrency exchanges outside the UK

Ion Science Ltd v Persons Unknown (unreported, 21 December 2020)

On 22 December 2020, the High Court ruled on an ex parte interim application involving allegations of fraud in relation to a cryptocurrency initial coin offering (**ICO**). An ICO, similar to an initial public offering or IPO, is a fund-raising exercise but which seeks to raise finance through the creation of a cryptocurrency or cryptographic token.

The decision is the latest in a series of interim rulings from the English courts which suggest that cryptoassets can be treated as property within the common law definition of the term. The decision is also notable for considering the lex situs of cryptoassets – a point on which there appears to be no decided case. In the absence of prior case law, the judgment relies on academic commentary to conclude (to the standard of a serious issue to be tried) that the lex situs of a cryptoasset is the place where the person or company who owned the coin or token is domiciled.

Finally, the judgment is notable for finding that a free-standing Bankers Trust order could be made against cryptocurrency exchanges out of the jurisdiction, to compel the disclosure of information relating to the cryptoassets.

For further information, please see our litigation blog post.

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57. Court of Appeal clarifies requirements for establishing deliberate concealment to postpone limitation period

Canada Square Operations Ltd v Potter [2021] EWCA Civ 339

The Court of Appeal found that a defendant creditor could not rely on a limitation defence to a borrower's claim that its non-disclosure of a very high rate of commission rendered the relationship "unfair" within the

meaning of s.140A of the Consumer Credit Act 1974, as the borrower could establish deliberate concealment to postpone limitation under s.32 of the Limitation Act 1980.

Section 32(1)(b) of the Act provides that, where any fact relevant to a claimant's right of action has been deliberately concealed by the defendant, limitation does not begin to run until the claimant has discovered the concealment (or could with reasonable diligence have discovered it). Section 32(2) provides that, for these purposes, deliberate commission of a breach of duty in circumstances where it is unlikely to be discovered for some time amounts to deliberate concealment of the facts involved in that breach of duty.

The Court of Appeal's decision is of interest in confirming that s.32 does not require "active concealment". It may apply to cases of non-disclosure and, in such cases, there is no need for the court to consider whether there was a pre-existing contractual, tortious or fiduciary duty to disclose. Precisely when the court will find there was a sufficient duty is not altogether clear, however. The decision suggests that the obligation may arise from "a combination of utility and morality", which is not the most straightforward of benchmarks. The upshot is that claimants may be able to postpone the limitation period due to (deliberate) non-disclosure, even where the non-disclosure is not actionable in itself.

The decision also clarifies what is meant by "deliberate", for both deliberate concealment under s.32(1)(b) and deliberate commission of a breach of duty under s.32(2). It shows there is no need for the claimant to establish actual knowledge or wilful blindness on the part of the defendant. Recklessness is sufficient, in the sense that: (a) the defendant realised there was a risk (that they ought to disclose the information, or that their conduct amounted to a breach of duty); and (b) it was objectively unreasonable to take that risk. Again, this may make it easier for claimants to postpone time running, as there is no need to show a defendant was aware of its wrongdoing so long as it took an unreasonable risk that what it was doing was wrong.

For further information, please see our litigation blog post.

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58. Consumer class actions – global perspectives

The latest edition of our Future of Consumer series looks at key areas of class action risk that businesses in the Consumer sector are facing across key jurisdictions of the UK, the US, and Australia, including:

1. Product liability and consumer law;
2. Supply-chain issues (with a focus on business human rights and environmental, social, and governance);
3. Data and privacy;
4. Employment class actions; and
5. Securities class actions.

It also examines key mitigating steps that businesses can take to protect themselves against the risks of exposure to such class actions and costly and reputation-damaging campaigns.

Click here to read the full briefing.

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