BANKING LITIGATION UPDATE

AUTUMN 2021

London

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

We start this overview, once again, with a spotlight on securities class actions, which continue to attract judicial attention and remain an area of increasing risk for banks which issue listed securities and/or assist others to do so. Following on from the successful settlement of *The RBS Rights Issue Litigation* and the successful defence of *The Lloyds/HBOS Litigation,* our banking litigation practice is currently acting on a further three substantial securities class actions. Claimant law firms and litigation funders remain active in this area. A particularly important feature of such disputes (and class actions generally) is the procedural mechanism used to bring proceedings on behalf of a large group of claimants, as highlighted by the recent decisions in *Merricks v Mastercard* (considering the competition regime) and *Jalla v Shell* (a representative action under CPR 19.6). Both of these procedural mechanisms work on an "opt-out" basis (i.e. the claim is brought on behalf of all claimants who fall within a defined class, unless they actively choose to opt-out). This is in contrast to the Group Litigation Order (**GLO**) procedure, which is "opt-in" and often used for multi-claimant securities litigation (GLOs were granted in both *The RBS Rights Issue Litigation* and *The Lloyds/HBOS Litigation*). However, for obvious reasons, opt-out claims are highly favoured by claimant firms and funders alike, and we anticipate that in the coming years there will be increasing debate as to the most appropriate regime to be used for disputes in the financial services sector.

As the end of 2021 draws near, so does the intended cessation of the London Interbank Offered Rate (**LIBOR**) in its current form (save for certain USD LIBOR tenors, which will continue until mid-2023). There have been some very important statutory and regulatory developments, affecting the scope of the UK's LIBOR legislative solution, designed to avoid a cliff-edge scenario for those "tough legacy" LIBOR contracts which are not actively amended to move away from the benchmark before the end of the year. While the legislation should deter arguments based on a refusal to perform contractual obligations, alleged frustration or force majeure, there remains the risk of potential litigation and market disruption as a result of speculative mis-selling type claims. The scope of the legislative fix and impact on litigation risk are

Table of Contents

Related links

Herbert Smith Freehills banking litigation blog

Herbert Smith Freehills banking litigation podcasts

Herbert Smith Freehills

Herbert Smith Freehills financial services disputes latest thinking homepage

Dispute resolution insights

considered in further detail in this update. Litigation arising from the cessation of LIBOR remains a key risk for banks for 2022.

In our last update, we commented on the limited number of commercial cases arising solely as a result of the COVID-19 pandemic, and the corresponding limited court guidance to date on the legal principles applicable to the disruption of commercial contracts. More recently, there has been a small uptick in cases, which has provided some helpful judicial scrutiny of force majeure and frustration arguments in the context of the pandemic. We have also seen some novel arguments around alleged implied terms or a total failure of consideration (or "failure of basis" as it is now called). These cases have arisen predominantly in the commercial real estate sector, but help to flesh out some of the general principles that may also apply to the financial services sector. It is clear that the bar to engage the doctrine of frustration remains high, and that the court is unlikely to find that contractual obligations have been temporarily suspended where performance was prevented for a limited period, unless specifically catered for in a force majeure clause within the relevant contract. You can read our summaries of these cases in more detail in this update. It remains to be seen whether the economic disruption caused by the pandemic will result in disputes, particularly as Government support is withdrawn and loans fall for repayment.

A particularly significant judgment to highlight from the past six months is the Supreme Court's decision in *Manchester Building Society v Grant Thornton*. The result is a new leading authority on the application of the *SAAMCO* principle, i.e. on the proper approach to determining the scope of duty and extent of liability of professional advisers in the tort of negligence. Gone is Lord Hoffman's mountaineer's knee analogy, and the need to shoe-horn disputes into the "advice" case or "information" case categories. In their place, we now have a new purposive test to determine the scope of the duty, which focuses on the purpose of the duty of care assumed by the defendant and is judged on an objective basis.

A long list of disclosure/privilege decisions have also been handed down during this period and we include selection in this update which are likely to be of most interest to financial institutions. The decisions range from whether a parent company's documents are within a subsidiary's control for disclosure purposes, to applications under the Bankers' Book Evidence Act 1879 to the (ongoing) interpretation of the Disclosure Pilot rules. On this note, it is worth highlighting that the Disclosure Pilot has now been extended to the end of 2022, so there will be plenty of opportunities for further decisions to clarify its precise scope and effect.

This update also highlights a trend in the number of disputes that have their factual roots in the 2008 global financial crisis, but are only now making their way through the court system. We have considered recent authorities where the court has grappled with complex limitation arguments, and include a link to an article we have published in the *New Law Journal*, examining the operation of the deliberate concealment extension under section 32(1)(b) of the Limitation Act 1980 (**LA 1980**) and the alternative 3-year extension mechanism for negligence actions under section 14A(4)(b).

In our last update, we noted that one of the major uncertainties following the end of the Brexit transition period was whether the UK would be able to join the 2007 Lugano Convention, governing questions of jurisdiction and recognition/enforcement of judgments between the EU and Iceland, Norway and Switzerland. Disappointingly, while Iceland, Norway and Switzerland are supportive of the UK's membership, in July of this year the EU Commission notified the Lugano Depositary that it is not in a position to consent to the UK's accession. However, that is not to say that judicial cooperation between the UK and the EU cannot be streamlined via alternative routes. The EU has indicated its intention to accede to the 2019 Hague Judgments Convention, which complements the earlier 2005 Hague Convention by allowing enforcement of judgments in much broader circumstances. Ratification of the 2019 Convention by both the EU and the UK would be a positive step in facilitating mutual enforcement of judgments in the longer term. We will continue to monitor developments in this area.

It would be remiss in this publication to fail to mention another important regulatory update, namely the Financial Conduct Authority's (**FCA**) consultation on a new "Consumer Duty", designed to add to the range of regulatory tools to address the poor customer outcomes identified by the FCA in retail markets (including the sale of financial products to SMEs). The FCA has not made any specific proposals on a private right of action for breach of the proposed Consumer Principle, but has asked for stakeholders' further views on how a private right of action could support or hinder the success of the proposals and their intended impact on firms, consumers and markets. The consultation has now closed, and we are waiting for the FCA to publish its response. We will keep you updated.

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.

Part 36 Offers/Costs

Disclosure and Privilege

Governing Law and Jurisdiction

Other Significant Developments

Brexit

1. UK post-Brexit reform: Financial Services Act 2021

On 29 April 2021, the Financial Services Act 2021 (**FSA 2021**) received royal assent. The FSA 2021 is a milestone in implementing the UK Government's wider Future Regulatory Framework initiative and represents the first major step towards HM Government's objective of maintaining the competitive position of the UK financial services industry whilst capitalising on new opportunities following the end of the Brexit transition period.

This is the first significant piece of UK primary legislation in the financial services sector following the end of the Brexit transition period; it introduces wide-ranging reforms to the current UK regulatory regime which include significant amendments to the Financial Services and Markets Act 2000 (**FSMA**) and various other 'onshored' EU financial services regulation. Many of these provisions are designed to recalibrate the UK regulatory architecture towards a more regulator-led approach and to correct various functional issues with rules introduced under former EU regimes.

For further information, please see our briefing.

^ Back to top

2. European Commission notice to Lugano Depositary states EU not in a position to consent to UK accession

The European Commission presented a "note verbale" to the Swiss Federal Council as Depositary of the Lugano Convention regarding the UK's application to accede to the Convention, submitted on 8 April 2020. This stated that:

> "The European Commission, representing the European Union, would like to notify to you that the European Union is not in a position to give its consent to invite the United Kingdom to accede to the Lugano Convention."

As we previously reported in our litigation blog post, the Commission had already confirmed its view that the EU should not consent to the UK's application to accede to the Lugano Convention, and said it would give the European Parliament and the Council an opportunity to express their views before informing the Depositary accordingly. It is not clear to what extent the current note verbale has been informed by such views.

It remains our understanding that the decision as to whether or not to consent to the UK's accession is ultimately a decision for the Council to take, by qualified majority voting. However, unless and until a proposal is put to a vote by the Council (and, of course, the Council votes in favour of giving its consent), the UK will remain unable to accede. There may therefore be something of an impasse.

For further information, please see our litigation blog post.

^ Back to top

COVID-19

3. High Court considers doctrine of frustration in COVID-19 context and confirms there is no such thing as "temporary frustration"

Bank of New York Mellon (International) Ltd v Cine-UK Ltd **[2021] EWHC 1013 (QB)**

A High Court Master considered the doctrine of frustration in the context of a claim by the landlords of commercial premises for payment of rent due since the outbreak of the COVID-19 pandemic and imposition of consequent restrictions in March 2020.

Although set in a non-financial context, this decision will be of interest to financial institutions considering the ongoing impact of the COVID-19 pandemic, particularly as it is one of the few cases to date in which the courts have considered arguments of frustration in this context.

Frustration occurs where performance of a contract has become so "radically different" to what was contemplated at the time of contracting that it would be unjust for the contract to continue. The effect of frustration is to bring the contract to an end, so that it cannot then be revived.

In this case, the Master rejected a contention by the tenants that the leases had been "temporarily frustrated" during the periods in which the premises were forced to close, finding that there is no such thing as temporary frustration as a matter of law. While this conclusion is not surprising, the decision is also of interest for the Master's comments as to why it was clear that the leases had not been frustrated altogether.

The decision demonstrates that the limits of frustration are narrow and the courts are consistent in their message that, while a lease can be frustrated, the bar has been set very high to establish frustration.

Of course, where parties wish to avoid the strictures of the doctrine of frustration, they can include a force majeure clause in their contract setting out what is to happen if unexpected events intervene – providing, for example, for obligations to be temporarily suspended if performance is prevented by specified types of occurrence.

For further information, please see our litigation blog post.

For further legal analysis and insights in relation to COVID-19, and how we expect the crisis to operate as a catalyst for change, please visit our Catalyst Hub.

^ Back to top

4. High Court considers operation of force majeure clause in context of COVID-19 pandemic

***Dwyer (UK) Franchising Ltd v Fredbar Ltd & Bartlett* [2021] EWHC 1218 (Ch)**

The High Court found that, when exercising its discretion as to whether to designate a force majeure event under a franchise agreement due to the COVID-19 pandemic, the franchisor was in breach of duty in failing to consider the franchisee's need to self-isolate.

Although set in a non-financial context, the decision will be of interest to financial institutions as one of the very few cases to date which has considered the operation of a force majeure clause in the context of the COVID-19 pandemic.

The relevant clause in this case was somewhat unusual in providing that the agreement would be suspended during any period that either of the parties was prevented or hindered from complying with their obligations "by any cause which the Franchisor designates as force majeure". The question for the court was whether the franchisor was in breach of the so-called Braganza duty, derived from the Supreme Court's decision in *Braganza v BP Shipping Ltd* [2015] UKSC 17, which meant that this unilateral power to call a force majeure event had to be exercised honestly, in good faith and genuinely.

While it is highly fact-specific and involved consideration of an atypical force majeure clause, this case nevertheless demonstrates that English courts are willing in principle to recognise that the COVID-19 pandemic, or related factors, could amount to a force majeure event. As ever with force majeure, however, each case will depend on, and require close examination of, the specific circumstances and the precise wording of the force majeure clause in question.

In August 2021, the Court of Appeal allowed the claimant's application for permission to appeal. The appeal has a hear by date of 31 October 2022.

For further information, please see our litigation blog post.

^ Back to top

5. High Court considers implied terms and "failure of basis" in context of COVID-19 pandemic

London Trocadero (2015) LP v Picturehouse Cinemas Ltd [2021] EWHC 2591 (Ch)

There have been only a limited number of commercial cases arising solely as a result of the COVID-19 pandemic and so judicial guidance on the legal principles applicable to the disruption of commercial contracts in this specific context is sparse.

However, in a recent decision, the High Court granted summary judgment to the landlord of commercial premises in a claim for arrears of rent and service charges due since the outbreak of the pandemic.

Although set in a non-financial context, the decision will be of interest to financial institutions as an example of the court's approach to applying the relevant legal principles in the context of COVID-19. In contrast to previous cases where claims to be excused from contractual performance have been based primarily on force majeure or frustration (see for example here, here and here), the tenant's arguments were based on alleged implied terms and a total failure of consideration (or "failure of basis" as it is now called).

In the present case, the court found that there was no real prospect of the tenants establishing that terms should be implied to the effect that the payment obligations under the leases were suspended during the periods that it was unlawful to operate the premises due to COVID-19 restrictions. Nor was there any real prospect of establishing that there had, in the circumstances, been a failure of basis. As such, the tenants could not avoid paying rent for the affected period.

For further information, please see our litigation blog post.

^ Back to top

Mis-selling and Misrepresentation

6. Court of Appeal decision in Adams v Options: the meaning of "advice" and potential implications for financial product mis-selling claims

Adams v Options UK Personal Pensions LLP [2021] EWCA Civ 474

In the context of an investor's claim against the provider of his self-invested personal pension (**SIPP**) under s.27 FSMA, the Court of Appeal provided guidance on the question of what constitutes "advice" on investments for the purpose of article 53 of the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 (**RAO**), which will be of broader interest to the financial services sector, beyond pensions-related disputes.

The underlying claim involved a pensions scheme operated by an unregulated intermediary (**CLP**), which persuaded the investor, Mr Adams, to cash out his existing pension fund and invest in "storepods" via a SIPP operated by Options UK Personal Pensions LLP (formerly Carey Pensions UK LLP). The Court of Appeal found that Mr Adams only agreed to transfer his pension fund into the Carey SIPP in consequence of things said and done by CLP in contravention of the general prohibition imposed by s.19 FSMA (which bars anyone except an authorised/exempt person from carrying on a regulated activity in the United Kingdom). Despite the fact that Carey had no knowledge that CLP was carrying out regulated activities, the Court of Appeal held that Mr Adams was entitled to recover his investment from Carey pursuant to s.27 FSMA.

The decision provides some interesting commentary on the meaning of "advice" in a financial services context, and the operation of the "no advice" clause in the pension contract between Carey and Mr Adams.

In April 2021, Carey applied to the Supreme Court for permission to appeal.

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

^ Back to top

7. High Court summarily dismisses alleged LIBOR fraudulent misrepresentation claim on the basis that it is time-barred

Boyse (International) Ltd v NatWest Markets plc and another **[2021] EWHC 1387 (Ch)**

The High Court granted summary judgment in favour of two banks, in connection with an alleged interest rate hedging products (**IRHP**) mis-selling claim related to LIBOR manipulation, on the basis that it was issued outside the statutory limitation period. In doing so, the High Court dismissed the claimant's appeal against the judgment of the Chief Master which struck out two IRHP mis-selling claims on the grounds of abuse of process, limitation and underdeveloped allegations of fraud (considered here).

The decision is a reassuring one for financial institutions faced with claims issued close to or after the end of the statutory limitation period. The decision provides helpful guidance on when the limitation period will begin to run under the **LA 1980** for the purpose of alleged fraudulent misrepresentation claims. In particular, the decision illustrates: (i) the difficulties that may be faced by claimants seeking to rely on the deliberate concealment extension to postpone the limitation period under s.32(1)(a) of the LA 1980; and (ii) the court's increasing willingness to deal robustly with attempts to extend the limitation period on a summary basis where, traditionally, such cases have been less amenable to strike out or summary determination (see our previous blog posts on limitation issues here).

In the present case, the High Court was satisfied that a reasonably diligent person in the position of the claimant would have been alert to the widely available material about LIBOR at the relevant time and should have been on the lookout for publications such as the Financial Service Authority's (**FSA**) (as it was then) Final Notice on LIBOR manipulation in 2013. In the High Court's view, the Final Notice would have completed the picture required for the claimant to plead a case of fraudulent misrepresentation. Given that more than six years had passed between publication of the Final Notice and the claim being issued in these proceedings, the High Court dismissed the appeal and granted summary judgment in favour of the banks, on the basis that the claim was time-barred.

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

^ Back to top

8. Court of Appeal clarifies proper approach to assessing damages for fraudulent misrepresentation

Glossop Cartons and Print Ltd and others v Contact (Print & Packaging) Ltd and others **[2021] EWCA Civ 639**

The Court of Appeal allowed an appeal by a purchaser in the context of its claim for damages for fraudulent misrepresentation against the sellers of certain business assets that it had acquired. In doing so, the Court of Appeal held that damages for fraudulent misrepresentation should, as a general rule, be assessed by ascertaining the actual value of the assets bought at the relevant date and deducting that figure from the price paid.

The Court of Appeal found that the High Court was incorrect to apply the "deduction method" to calculate the market value of the business assets as at the transaction date. The approach adopted by the High Court involved deducting from the purchase price the cost of every flaw or defect that the claimant had not itself factored into its calculation of the price. The Court of Appeal said that, in a normal case for fraudulent misrepresentation, this method is wrong in principle, unduly complex and inappropriately requires the court to consider what subjectively the claimant factored into its calculation of the purchase price. These matters are irrelevant to the calculation of direct loss for fraudulent misrepresentation, which merely requires the court to ascertain the actual value of the assets bought at the relevant date and to deduct that figure from the price paid (as per *Smith New Court Securities Ltd v Scrimgeour Vickers (Asset Management) Ltd* [1997] AC 254). In *Smith New Court Securities*, the House of Lords emphasised that the general rule for the measure of damages in deceit claims should not be "mechanistically applied". However, the Court of Appeal's decision in the present case suggests that these general principles will be the norm and that there is a threshold question as to when an alternative measure of damages may be applied.

The decision is noteworthy for financial institutions faced with claims founded in the tort of deceit, particularly in the context of mis-selling disputes and shareholder claims. In securities litigation, the judgment is relevant to claims based on alleged fraudulent misrepresentation at common law. It may also be relevant to claims brought under section 90A FSMA, although currently it remains unclear whether the appropriate measure is as for the tort of deceit or the tort of negligent misstatement (and of course there are many additional, complicating factors in measuring damages in securities litigation, not least the impact of “harmed” investors both buying and selling securities during the period in which the misrepresentation is alleged to have endured).

In the context of a shareholder claim based on a false representation, the general rule in *Smith New Court Securities* means that damages will be assessed on the date on which the securities were purchased (the transaction date). Accordingly, the amount will be calculated as the difference between the price paid for the shares and their actual/true value as at the transaction date. As a result of the Court of Appeal’s decision in *Glossop*, claimants may face additional challenges where they try to depart from the general rule, for example by seeking to recover the difference between the price paid for the shares and the amount realised on disposal of the shares, which is often one of the methods by which damages are calculated by claimants in such claims. This may be an attractive option for claimants where there has been a later fall in value of the shares due to some separate event.

The extent to which falls in the share price may be claimed by shareholders is an important battleground in securities litigation, and there is a clear (although complex) inter-relationship between the measure of damages (in cases such as *Smith New Court Securities* and *Glossop*) and the application of the principle in *South Australia Asset Management Corpn v York Montague Ltd* [1997] AC 191 (*SAAMCO*).

The *SAAMCO* principle confirms that a claimant can only recover loss that falls within the scope of the duty of care assumed by the defendant issuer, and was recently considered by the Supreme Court in *Manchester Building Society v Grant Thornton UK LLP* [2021] UKSC 20 (see our banking litigation blog post). In *Manchester Building Society*, the Supreme Court said that cases should not be shoe-horned into the categories of “information” cases or “advice” cases, and confirmed that the scope of the duty of care assumed by a professional adviser is governed by the purpose of the duty, judged on an objective basis by reference to the purpose for which the advice is being given. Whether or not a claimant can recover an unrelated stock price drop during the period between acquisition and disposal of the shares will usually depend upon whether the defendant’s responsibility extended to the decision to purchase the shares in the first place. This will present a further hurdle for claimants seeking to depart from the general rule as to the measure of damages in such cases.

For further information, please see our banking litigation blog post. Please see Update 22 below for subsequent developments in this area.

^ Back to top

Securities Litigation/Class Actions

9. CJEU considers issuer liability for prospectuses marketed to both retail and qualified investors

***Bankia SA v Unión Mutua Asistencial de Seguros* [2021] EUECJ (C 910/19)**

The Court of Justice of the European Union (**CJEU**) confirmed that qualified investors (as well as retail investors) can bring an action for damages on the basis of inaccuracies in a prospectus published to the public at large, as a matter of interpretation of Directive 2003/71/EC (the **Prospectus Directive**). The CJEU’s decision follows and confirms the opinion of the Advocate General (considered here).

The relevant provisions considered by the CJEU were Articles 3(2)(a) and 6 of the Prospectus Directive, which were implemented in UK law (before the UK left the EU) by virtue of s.90 FSMA. While the CJEU decision is unsurprising in the context of s.90 FSMA, the ruling provides helpful clarification on an important legislative framework that forms the bedrock of European securities litigation.

Although the UK is no longer a member of the EU, the CJEU decision may still be of relevance to the interpretation of s.90 FSMA claims, which 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 our litigation blog post on the practical implications of Brexit for disputes).

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

^ Back to top

10. Herbert Smith Freehills contributes chapter to The Securities Litigation Review (7th Edition)

Herbert Smith Freehills contributed the England and Wales chapter of The Securities Litigation Review. Now in its seventh edition, The Securities Litigation Review, edited by William Savitt of Wachtell, Lipton, Rosen & Katz, is a guided introduction to the class action regimes for securities claims in the key jurisdictions across the globe, providing a valuable resource for corporates and financial institutions who might face such claims.

The chapter can be downloaded here.

For further information, including access to previous editions, please see our banking litigation blog post.

^ Back to top

11. Court of Appeal provides guidance on the "reflective loss" principle and its interaction with the Contracts (Rights of Third Parties) Act 1999

***Broadcasting Investment Group Ltd & Ors v Smith & Anr* [2021] EWCA Civ 912**

The Court of Appeal held that the so-called "reflective loss" principle will not bar the claim of a shareholder, who is also a contractual promisee/beneficiary, in circumstances where the company in which the shares are owned has acquired the right to bring a claim in respect of the same contract against the same wrongdoer pursuant to s.1 of the Contracts (Rights of Third Parties) Act 1999 (the **1999 Act**).

In reaching its decision, the Court of Appeal overturned the High Court's judgment striking out the contractual promisee's claim (see our banking litigation blog post). The High Court had ruled that the company (of which the contractual promisee was a shareholder) acquired a right to enforce the contract in question pursuant to s.1 of the 1999 Act. Consequently, the promisee's claim, as a shareholder of the company, was barred by the rule in *Prudential Assurance Co Ltd v Newman Industries Ltd (No 2)* [1982] Ch 204 (often referred to as the reflective loss principle). The High Court found that s.4 of the 1999 Act, which preserves the rights of a promisee to enforce a contract, was subject to generally applicable legal principles including the rule in *Prudential*.

The Court of Appeal disagreed with the High Court's interpretation of s.4 of the 1999 Act. It held that, since the company's right to enforce the contract was conferred by the 1999 Act, it was subject to the terms and limitations imposed by that statute. Since the rule in *Prudential* was only engaged because of s.1 of the 1999 Act, it could not bar the promisee's right to enforce the contract as prescribed by s.4 of the 1999 Act. In the Court of Appeal's view, to interpret the rule in *Prudential* independently of the 1999 Act was entirely artificial, would sidestep the limitations imposed by s.4 designed to protect the rights of the promisee, and would effectively extinguish the promisee's right to enforce the contract, which was impermissible by statute.

This decision will be of interest for financial institutions following developments to the reflective loss principle, which was confirmed by the Supreme Court last year in *Sevilleja v Marex Financial Ltd* [2020] UKSC 31 (see our banking litigation blog post). The reflective loss rule plays an important part in the defence of claims brought against banks by shareholders (aside from claims brought under section 90 and 90A FSMA, which provide a statutory exemption).

Given that the outcome in the present case is to allow the concurrent claims of a shareholder and company against the same third party wrongdoer, some might argue that it has narrowed the scope of the reflective loss principle. However, the rationale supporting the decision is based on the effect of the 1999 Act and its very specific wording, and does not have wider application. Accordingly, the decision is unlikely to impact the scope of the reflective loss principle in a general sense, and is likely to be limited to the (unusual) fact pattern of cases where the company only has a claim as a result of s.1 of the 1999 Act, and the shareholder is a contractual promisee.

In addition, financial institutions are likely to welcome the helpful obiter comments from the Court of Appeal on the question of whether the reflective loss principle should bar the claim of an "indirect" shareholder, i.e. where there is a chain of shareholder ownership. On this point, the concurring judgment of Arnold LJ considered it "well arguable" that the rule in *Prudential* can apply to indirect shareholders in appropriate circumstances.

For further information, please see our banking litigation blog post. Please see Update 13 below for subsequent developments in this area.

^ **Back to top**

12. HMT reform of prospectus regime: the potential impact on securities litigation

HM Treasury (**HMT**) published an initial consultation on fundamental reforms promising the biggest shake up of the prospectus regime since 2005. The consultation follows the conclusions of the Hill Review of the UK listing regime published in March 2021 (considered here).

In our blog post, we consider HMT's consultation paper through a securities litigation lens, highlighting the potential impact on claims under s.90 FSMA for liability for prospectuses and listing particulars.

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

For an overview of all the key proposals in HMT's consultation paper, please see our Capital Markets team's briefing paper.

^ **Back to top**

13. Privy Council confirms that the so-called "reflective loss" principle applies to ex-shareholders

***Primeo Fund v Bank of Bermuda (Cayman) Ltd & Anor (Cayman Islands)* [2021] UKPC 22**

The Board of the Privy Council allowed an appeal in relation to the application of the so-called "reflective loss" principle, confirming that the rule falls to be assessed as at the point in time when a claimant suffers loss and not at the time proceedings are brought.

As a reminder, the Supreme Court in *Sevilleja v Marex Financial Ltd* [2020] UKSC 31 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).

On the facts of the present case, the claimant suffered loss arising from a breach of obligation by a wrongdoer before it became a shareholder in a company. However, by the time the claimant brought its claims, it had become a member of the relevant company, which had its own claim for the same loss against the same wrongdoer. It was common ground that if the company succeeded in its claims, it would fully restore the value of the shares in the company held by the claimant. However, the Board found that the claimant's claims were not barred by the reflective loss principle. It emphasised that the reflective loss rule is not a procedural rule, concerned only with the avoidance of double recovery, but must be applied as a substantive rule of law, focusing on the nature of the loss, which must be assessed at the time the loss is suffered.

This is a helpful clarification of the correct approach to the issue of timing. Since *Marex*, there have been conflicting decisions as to whether the rule against reflective loss will apply to a former shareholder, who is no longer a shareholder in the relevant entity at the time the claim is commenced. In particular, there has been a lot of focus in some quarters on a decision by Flaux LJ as a single judge of the Court of Appeal in relation to an application for permission to appeal in *Nectrus Ltd v UCP plc* [2021] EWCA Civ 57. In *Nectrus*, Flaux LJ held that the claim of an ex-shareholder was not barred by the reflective loss principle, finding that the rule should be assessed when the claim is made.

The decision of the Board in *Primeo Fund* has put this question beyond doubt, expressly confirming that a shareholder which suffers a loss in the form of a diminution in value of its shareholding which is not recoverable as a result of the application of the reflective loss rule, cannot later convert that loss into one which is recoverable simply by selling its shareholding. The Board said that to find otherwise would lead to very "odd results". While decisions of the Privy Council are not binding on English courts, they are regarded as having great weight and persuasive value (unless inconsistent with a decision that would otherwise be binding on the lower court). Given the questionable precedent value of Nectrus and the constitution of the Board of the Privy Council in *Primeo Fund*, it is highly likely that the decision in *Primeo Fund* will be followed by the Court of Appeal the next time this issue arises in an English case.

For further information, please see our banking litigation blog post. Please see Update 11 above for earlier developments in this area.

^ **Back to top**

14. First Collective Proceedings Order granted by the Competition Appeal Tribunal, in Merricks v MasterCard case

***Walter Hugh Merricks CBE v Mastercard Incorporated and Others* [2021] CAT 28**

On 18 August 2021 the Competition Appeal Tribunal (**CAT**) approved the first application for a collective proceedings order (**CPO**) under the UK's competition class action regime introduced in 2015. The application was initially turned down by the CAT in 2017 but was remitted to it following a series of appeals, to be reconsidered against the principles set out by the Supreme Court in its ruling of 11 December 2020 (see our briefing here).

It has taken several years for the competition class action regime to get off the ground, but there are now a further 12 CPO applications before the CAT, several of which were recently heard and are awaiting certification decisions over the coming months.

In a win for MasterCard the CAT however refused Merricks permission to amend the claim form in order to include deceased persons in the class, which would have increased the class size from approximately 42.6 million consumers to approximately 59.8 million. The CAT also refused to allow the recovery of compound interest that was included in the claim from the outset, on an aggregate basis, and would have more than doubled the estimated quantum of the principal claim (from an estimated £7.2 billion to £16 billion).

The CAT's determination of these further issues shows that, despite the more permissive approach to certification taken by the Supreme Court, the CAT will continue to carefully consider and scrutinise all issues in CPO applications in its certification process.

For further information, please see our competition blog post.

^ **Back to top**

15. Court of Appeal confirms claims seeking remediation for damage cannot proceed as representative action under CPR 19.6

***Jalla & Anr v Shell International Trading & Anr* [2021] EWCA Civ 1389**

The Court of Appeal dismissed an appeal against a High Court decision striking out the representative element of claims for failing to satisfy the "same interest" requirement under CPR 19.6.

The Court of Appeal rejected the submission that this case was "materially indistinguishable" from *Lloyd v Google LLC* [2019] EWCA Civ 1599 (considered here), in which the Court of Appeal found that an action for alleged data breaches could proceed under CPR 19.6 on behalf of some four million iPhone users. The present case was in fact quite different, the Court of Appeal held, in particular because issues of limitation, causation and damages – core issues which could not be considered "subsidiary" to the proceedings – would have to be determined on a claimant-by-claimant basis. Permitting these proceedings to continue as a representative action would not achieve any of the intended benefits of CPR 19.6.

The decision will be of interest to financial institutions as it affirms that (subject to limited exceptions) the collective action regime in England and Wales works on an "opt-in" basis, and the scope for "opt-out" actions remains limited.

Claimants seeking to bring mass tort claims, or indeed any collective litigation in which issues of limitation, causation, damages and/or potential defences may vary amongst the claimant group, will need to consider other procedural options, in particular a GLO, or combined case management utilising test cases.

For further information, please see our litigation blog post.

^ Back to top

LIBOR Discontinuation

16. LIBOR transition: critical FCA consultation on "tough legacy" definition

The FCA published an important consultation in respect of its enhanced powers under the UK's legislative solution for the transition of so-called "tough legacy" LIBOR contracts, including the all-important question as to which legacy LIBOR contracts will be within the scope of the legislative fix: Benchmarks Regulation: how we propose to use our powers over use of critical benchmarks.

The breadth of the definition of "tough legacy" will have a direct impact on the risks associated with LIBOR transition, because a narrow solution will result in a greater volume of legacy LIBOR contracts being exposed to contractual continuity issues if those contracts are not actively amended bilaterally or by consent solicitation, or amended via market protocol.

The consultation itself provides very limited insight as to the approach likely to be taken by the FCA to the use of its powers in this context. The consultation closed on 17 June 2021, after which the FCA had to consider the responses before publishing its Statement of Policy.

It now seems inevitable that much-needed clarity as to which legacy LIBOR contracts will be caught by the UK's legislative fix will not be forthcoming until Q3 2021 at the earliest. It is possible that this delay is a deliberate strategy by the regulators, to avoid giving the market the comfort of a broad and certain legislative solution and risk any slowdown in proactive transition efforts. However, given that LIBOR as we know it will cease at the end of this year (save for certain USD tenors), this continued uncertainty will no doubt be a source of significant frustration to many market participants, and is markedly different to the approach taken in other key LIBOR jurisdictions, such as the EU and New York.

For further information, please see our banking litigation blog post. Please see Update 17 below for subsequent developments in this area.

^ Back to top

17. The UK's LIBOR safe harbour legislation: a missed opportunity?

On 8 September 2021, the Critical Benchmarks (References and Administrators' Liability) Bill (**Bill**) was introduced to the UK Parliament and the first reading took place.

The Bill introduced a legal "safe harbour" within the primary legislative framework for the UK's LIBOR legislative solution, the FSA 2021. It follows a consultation paper published by HMT earlier this year: Supporting the wind-down of critical benchmarks (see our banking litigation blog post).

In our blog post, we set out our initial thoughts on the impact of the new Bill on LIBOR transition, in particular: (i) the broad parameters of the contractual continuity provision; (ii) the notable absence of protection from claims; (iii) its application to non-financial contracts; (iv) its interaction with contractual fall-backs; and (v) the likely impact on the litigation risks of LIBOR transition.

For further information, please see our banking litigation blog post. Please see Update 16 above for earlier developments in this area.

^ Back to top

Contractual Construction

18. Court of Appeal upholds decision correcting drafting error by interpretation

***MonSolar IQ Ltd v Woden Park Ltd* [2021] EWCA Civ 961**

The Court of Appeal dismissed an appeal against a High Court decision which went against the unambiguous literal meaning of the clause.

This is an application of what the court referred to as the *Chartbrook* principle, by which clear mistakes in the drafting of a document can be corrected as a matter of construction (as exemplified by *Chartbrook Ltd v Persimmon Homes Ltd* [2009] 1 AC 1011). For this principle to apply, the court said, it must be clear both that the drafting contains a mistake and how it should be corrected. If either of these requirements is not satisfied, the contract can only be corrected by a claim for rectification, which was not pleaded in this case.

This decision will be of interest to financial institutions faced with claims relating to contractual construction as it is a relatively rare example of a court finding that a contract should be interpreted against its clear literal meaning. Perhaps surprisingly, the judgment does not refer to what is now the leading Supreme Court authority on contractual interpretation, *Wood v Capita Insurance Services Limited* [2017] UKSC 24 (considered here). The suggestion in the present judgment that the court cannot depart from the clear literal meaning of the words used, unless that interpretation produces an absurd or irrational result, may be thought to sit uncomfortably with the message in *Wood v Capita* that interpretation is a unitary exercise, in which the court must strike a balance between considering the language used (textualism) and its commercial implications (contextualism) – and that it does not matter which tool is deployed first, so long as the court balances the indications given by each.

For further information, please see our litigation blog post.

^ Back to top

Duties in Financial Services

19. The FCA's proposed new "Consumer Duty" – what does it mean?

The FCA published its long-awaited consultation on "duty of care" which has morphed into a proposed package of measures intended to deliver better outcomes for consumers – together a new "Consumer Duty".

The consultation, which was open until 31 July 2021, proposed:

- a new **Consumer Principle** that provides an overarching standard of conduct; and
- a set of **Cross-cutting Rules** and four **Outcomes** that support the Consumer Principle.

The proposals apply to regulated products and services sold to "retail clients" which would include SMEs.

The proposals from the FCA will add to the range of regulatory tools to address the poor customer outcomes it has identified in retail markets. The FCA has not made any specific proposals on a private right of action. It has, however, said that it would welcome stakeholders' further views on how a private right of action could support or hinder the success of the proposals and their intended impact on firms, consumers and markets.

It is good to see that a private right of action for Principles breaches is not the focus of the Consultation Paper. In this regard, it is questionable whether a private right of action for Principles breaches would be of real benefit to consumers who already have access to the Financial Ombudsman Service (**FOS**), which is better suited to dealing with claims from a speed and cost perspective.

For further information, please see our FSR and corporate crime blog post.

^ Back to top

20. Court of Appeal determines that a fiduciary relationship is not a necessary pre-condition to relief in respect of an undisclosed commission paid to an agent

***Frances Elizabeth Wood v Commercial First Business Limited* [2021] EWCA Civ 471**

The Court of Appeal found that a fiduciary relationship is not a necessary pre-condition to relief in respect of an undisclosed commission paid to an agent. Instead, the court should determine whether the agent was obliged to provide information, advice or recommendation on an impartial or disinterested basis, saying that "it is the duty to be honest and impartial that matters". Where there is such a duty, both the payer and recipient of the undisclosed commission will be liable.

The Court of Appeal further held that the cases before it involved undisclosed commissions (which give rise to a right to rescind the contract), rather than "half-secret" commissions (where the principal was aware of the payment to its agent, but did not have sufficient information to give informed consent to that payment, with the result that rescission may, but will not necessarily, be available). In the two cases before the court a mortgage broker's terms provided that they may take a commission from lenders, but that if they did so, it would be disclosed to the borrowers. The court held that in circumstances where no commission was disclosed, the borrowers were not on notice that commission was being paid, and the commissions were therefore secret commissions.

This decision will be of interest to financial institutions as it provides a helpful clarification of the position in relation to secret commissions and indicates that the court will not be required to strain to find a fiduciary duty in order to grant relief in such cases. It further indicates that a general disclosure of potential commissions, of the kind provided to the borrowers in this case, may be insufficient to take cases out of the realm of secret commissions.

For more information, please see our civil fraud and asset tracing blog post.

^ Back to top

21. Court of Appeal considers tests for "blind-eye" knowledge and vicarious liability in the context of a dishonest assistance claim

***Natwest Markets plc & Anor v Bilta (UK) Ltd & Ors* [2021] EWCA Civ 680**

The Court of Appeal ordered the re-trial of a dishonest assistance claim by insolvent companies and their respective liquidators against a bank and its indirect subsidiary on the basis that the High Court failed to consider key evidence in reaching its findings, which were thrown into further doubt by the 19 months delay in the handing down of the lower court's judgment.

The Court of Appeal underlined that:

- When considering whether there has been dishonesty in the test for blind-eye knowledge, it was not enough that a defendant merely suspects something to be the case, or that he negligently refrains from making further inquiries.
- The tests for vicarious and dual liability are a highly fact sensitive exercise – such liability was usually imposed for policy reasons and was not concerned with fault or contractual liability.

This decision is noteworthy for financial institutions faced with claims alleging blind-eye knowledge on the part of a bank's employees and/or vicarious liability in relation to a fraud because it highlights:

- The difficulties for claimants in establishing that there has been dishonesty where a defendant merely suspects something to be the case or if the defendant negligently refrains from making further queries.
- The risks for financial institutions, particularly a parent bank and any of its subsidiaries, faced with claims of vicarious liability; any contractual arrangements in place around the group to attribute the risk of vicarious liability are unlikely to assist.

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

^ Back to top

22. Supreme Court clarifies proper approach to SAAMCO and to determining scope of duty of care owed by professional advisers

***Manchester Building Society v Grant Thornton UK LLP* [2021] UKSC 20**

In what is now the leading authority on the application of the decision in *South Australia Asset Management Corpn v York Montague Ltd* [1997] AC 191 (***SAAMCO***), the Supreme Court allowed an appeal by a mutual building society in the context of its claim for damages for economic loss against an auditor for (admitted) negligent advice regarding the accounting treatment of interest rate swaps. In doing so, the Supreme Court found unanimously that the mutual building society had suffered loss which fell within the scope of the duty of care assumed by the auditor, but that its damages should be reduced by 50% on the basis of its contributory negligence.

The appeal was heard by an expanded constitution of the Supreme Court, in order to provide general guidance regarding the proper approach to determining the scope of duty and the extent of liability of professional advisers in the tort of negligence, including the proper application of the *SAAMCO* principle. As such, the outcome and reasoning of this decision will be significant for financial institutions faced with claims for economic loss due to alleged negligent advice.

The majority (Lords Hodge, Sales, Reed and Kitchin, and Lady Black) held that the scope of the duty of care assumed by a professional adviser is governed by the purpose of the duty, judged on an objective basis by reference to the purpose for which the advice is being given. In practice, this means that, when looking at the case of negligent advice given by a professional adviser, one looks to see what risk the duty was supposed to guard against and then looks to see whether the loss suffered represented the fruition of that risk. In the view of the majority, this was the point of the mountaineer's knee example given by Lord Hoffman in *SAAMCO*.

The majority said the descriptions of "information" case and "advice" case should be dispensed with as terms of art in this area. Cases should not be shoe-horned into one or other of these categories, but rather the focus should be on identifying the purpose to be served by the duty of care assumed by the defendant. In consequence, using a counterfactual test (whereby one asks whether, if the advice or information given by the defendant had in fact been true, the action taken by the claimant would still have resulted in the same loss) should be regarded only as a tool to cross-check the result in most cases, and should not be regarded as replacing the decision which needs to be made as to the scope of duty of care. The majority rejected Lord Leggatt's emphasis on causation and the counterfactual test, and Lord Burrows' focus on public policy. However, there was unanimous agreement as to the outcome of the appeal.

In the present case, the majority found that the purpose of the advice given by the auditor was clear: to provide technical accounting advice as to whether the mutual building society could use hedge accounting in order to implement its proposed business model within the constraints of the regulatory environment. As a result of the auditor's negligent advice, the building society adopted the business model, entered into further swap transactions and was exposed to the risk of loss from having to break the swaps, when it was realised that hedge accounting could not in fact be used and the building society was exposed to regulatory capital requirements which the use of hedge accounting was supposed to avoid. That was a risk which the auditor's advice was supposed to allow the building society to assess, and which its negligence caused the building society to fail to understand. Accordingly, the losses suffered by the building society when breaking the swaps were within the scope of the duty owed by the auditor.

By focusing on the purpose to be served by the duty of care, the decision may mitigate some of the difficulties which have arisen in practice in categorising "advice" and "information" cases and in applying the correct counterfactual test on the facts of a given case. In future cases, the court is likely to place greater emphasis on understanding the purpose and commercial rationale for which a party has sought advice and identifying the potential risks from which the party was relying on an adviser to protect it. This may lead to an increased evidential burden on the parties, potentially increasing the time and costs of disclosure and witness evidence, where engagements are not documented properly and fully. Accordingly, the decision highlights the importance for financial institutions to ensure, at the outset of a transaction, that there is clear agreement as to how their advice and work will be used by clients, and the impact it could have if it transpires that their advice or work is flawed in some respect.

For more information, please see our banking litigation blog post. Please see Update 8 above for earlier developments in this area.

^ Back to top

23. Supreme Court clarifies requirements for tort of lawful act economic duress

***Pakistan International Airline Corporation v Times Travel (UK) Ltd* [2021] UKSC 40**

The Supreme Court dismissed an appeal against a Court of Appeal decision which found that a contract should not be rescinded on the basis of lawful act economic duress, in circumstances where the defendant had threatened to end any contractual relationship with the claimant (as it was entitled to do) unless the claimant waived all claims it might have against the defendant for commission due under a previous contract.

The Supreme Court was unanimous in its decision and as to the basic elements for establishing liability for the tort of lawful act economic duress, namely that: (i) the defendant's threat or pressure must have been illegitimate; (ii) it must have caused the claimant to enter the contract; and (iii) the claimant must have had no reasonable alternative to giving in to the threat or pressure.

The decision will be of interest to financial institutions as it highlights that the court will not lightly conclude that a commercial party has made an illegitimate threat in the context of negotiating a commercial contract, particularly in light of the absence in English law of any doctrine of inequality of bargaining power or any general principle of good faith in contracting. A finding that a commercial contract should be rescinded for lawful act economic duress is therefore likely to be rare.

For further information, please see our litigation blog post.

^ Back to top

Part 36 Offers/Costs

24. High Court finds existence of Part 36 offer prevents it from making costs order following split trial

***Original Beauty Technology Co Ltd v G4K Fashion Ltd* [2021] EWHC 954 (Ch)**

In a judgment following a split trial, the High Court held that it could not make a costs award until the outcome on quantum was known, because the defendant had made a Part 36 offer which did not relate solely to the issues that had been determined.

Under CPR 36.17, the court must apply certain costs consequences where a party fails to beat an opponent's Part 36 offer, unless it considers it unjust to do so. In deciding whether it would be unjust, the court must take into account all the circumstances of the case including certain factors listed in the rule, such as the terms of the offer and the information available to the parties when it was made. However, under CPR 36.16, the court must not be told the terms of any Part 36 offer until the case has been fully decided, unless the offer relates only to issues that have been decided.

In this case, the court found that the combined effect of these rules was to preclude the court determining costs, as it was impossible to make an informed costs award in compliance with CPR 36.17 when quantum was unknown and the details of the Part 36 offer could not be shared with the court.

The decision suggests that parties who succeed in a trial of preliminary issues will not be able to obtain an immediate costs order where the opponent has made a Part 36 offer, unless the offer relates only to the decided issues. The court's determination as to costs will have to wait until after questions of both liability and quantum have been decided, as only at that stage will the court be able to gauge whether or not the offer has been beaten, and to assess whether it would be unjust in all the circumstances to make the usual costs order in light of the non-exhaustive list of factors set out in the rule.

For further information, please see our litigation blog post.

^ Back to top

25. High Court refuses to apply the so-called Arkin "cap" to adverse costs order against litigation funder

***Laser Trust v CFL Finance Ltd* [2021] EWHC 1404 (Ch)**

In one of the first decisions to consider the application of the so-called *Arkin* "cap" following the Court of Appeal's decision in *Chapelgate Master Fund Opportunity Ltd v Money* [2020] EWCA Civ 246, the High Court once again made a third party costs order against a litigation funder, and refused to cap that order.

Laser Trust had previously obtained three costs awards in its favour against CFL Finance Limited (**CFL**) in litigation where CFL had been funded by Colosseum Consulting Limited (**Colosseum**). CFL failed to pay a significant proportion of the costs which it had been ordered to pay. Laser Trust therefore applied for a third party costs order against Colosseum, seeking the remainder of the funds owed.

The court made the costs award against Colosseum and did not apply a cap on the costs to be paid by it. In reaching its conclusion regarding the *Arkin* cap, the court held that the nature of Colosseum's interest in the proceedings was so great that the cap should not apply, commenting that Colosseum had a "massive" degree of control. It is not clear whether the court was referred to *Chapelgate* when considering the cap but, to the extent the decision suggests that there needs to be a high threshold of funder interest in order to dis-apply the Arkin cap, that would not be consistent with the Court of Appeal's conclusion in *Chapelgate*.

The decision in *Chapelgate* confirmed that the *Arkin* cap is not a binding rule, that the court retains a broad discretion as to the extent to which a funder should be liable for adverse costs, and that it need not limit the funder's liability to the amount of funding provided (see our litigation blog post).

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

^ **Back to top**

26. High Court finds accepted Part 36 Offer was superseded by subsequent settlement agreement

***Falcon Trident Shipping Ltd v Levant Shipping Ltd* [2021] EWHC 2204 (Comm)**

The High Court held that a settlement agreement was a binding agreement which superseded a previously accepted Part 36 Offer. The settlement agreement provided a clearer basis for the recovery of costs and was "not merely an agreement memorialising the Part 36 Offer".

In most cases, where a Part 36 offer is accepted, the offer and acceptance (together with the automatic provisions of Part 36 relating for example to the costs consequences of acceptance) will constitute the terms of settlement and there is no need for any further agreement. It is therefore very important that those drafting Part 36 offers ensure their terms are clear, so that there is no room for doubt as to the effect of any acceptance.

Similarly, as the present case shows, where the parties choose to enter into a separate settlement agreement after a Part 36 offer is accepted, they need to ensure it is clear whether that agreement is intended simply to record the terms already agreed in the offer and acceptance, or whether it supersedes those terms – and, of course, that there is no uncertainty as to the terms of the settlement agreement itself.

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

For further information, please see our litigation blog post.

^ **Back to top**

27. Court of Appeal decision suggests a Part 36 offer can leave more to be resolved than a contractual offer

***Adams v Options UK Personal Pensions LLP* [2021] EWCA Civ 1188**

The Court of Appeal held that an offer to settle which left some matters to be resolved could nonetheless be treated as a valid Part 36 offer. The court distinguished between purely contractual offers and Part 36 offers which, it pointed out, have their own self-contained code.

The Court of Appeal accepted that, while there may be circumstances where a purported Part 36 offer was so lacking in certainty that it would be rendered invalid, where an offer merely left some matters of mechanics to be further defined, and otherwise satisfied each of the conditions set out in CPR 36.5(1), it could still be a valid offer under Part 36.

While this case suggests that a court may treat a Part 36 offer that contains elements of minor uncertainty with more latitude that a purely contractual offer, it is by no means clear that the alleged defects in the offer in the present case would have been fatal even for a contractual offer. In any event, practitioners should ensure that all offers are drafted carefully, not only to minimise the risk of challenge on the basis that the offer is void for uncertainty but also, of course, to ensure that the terms of settlement are clear.

The decision is also of interest for the Court of Appeal's view that it would have been unjust to apply one of the available Part 36 costs consequences – the additional percentage of damages (which in this case would have been an extra 10%) – but it was just to applying the other enhancements under Part 36 (ie indemnity costs and enhanced interest on damages and costs). This may be seen to contrast with the Court of Appeal's approach in *Telefonica UK Ltd v The Office of Communications* [2020] EWCA Civ 1374 (considered here) which suggested that it would be unusual for the court to conclude that it is just to award a claimant some but not all of the Part 36 enhancements.

For further information, please see our litigation blog post.

^ **Back to top**

Disclosure and Privilege

28. Parent companies' documents found to be in subsidiaries' control for disclosure purposes

***Berkeley Square Holdings Ltd v Lancer Property Asset Management Ltd* [2021] EWHC 849 (Ch)**

The High Court found that documents held by the claimants' parent companies, and individuals connected with those entities, were within the claimants' "control" for the purposes of their disclosure obligations in the litigation.

This is the latest in a line of first instance decisions which have held a party will have the requisite degree of control over a third party's documents, for disclosure purposes, if there is an arrangement or understanding which means the documents are within the party's practical control, even though the party does not have a presently enforceable legal right to obtain the documents.

The present case is particularly interesting in finding that this principle applies regardless of the nature of the relationship with the third party – so in this case, it meant that a party had control over its parent companies' documents, whereas in the previous cases which have considered the issue the relationship was generally the opposite way around.

The decision emphasises that whether or not there is such an arrangement is a question of fact, and the existence of such an arrangement may be inferred from the surrounding circumstances. Where there is evidence that a third party has previously permitted access to their documents for the purposes of the proceedings, this will be a highly relevant factor – though compliance with a particular request for assistance will not, of itself, be sufficient.

As a practical matter, parties to litigation should bear in mind the risk of the court inferring the existence of a control arrangement of this sort where they have previously had access to a third party's documents for the purposes of the proceedings, but wish to argue that the documents are not in their control. While it seems a control arrangement can be terminated, a court might infer that the reason for termination was because the third party's documents (or remaining documents) are unhelpful to the party's case, as in *Pipia v BGEO Group Ltd* [2020] EWHC 402 (Comm) (considered here).

For further information, please see our litigation blog post.

^ **Back to top**

29. High Court strikes out claim for abuse of process and dismisses parallel disclosure application under Bankers' Book Evidence Act 1879

***889 Trading Limited v Clydesdale Bank Plc & Ors* [2021] EWHC 850 (Ch)**

The High Court granted an application by a bank to strike out a misrepresentation claim by a property investment SPV, which repeated a similar claim that had been struck out by the court in previous proceedings due to a failure to comply with an unless order. The court also dismissed a parallel disclosure application by the SPV under CPR Rule 31 and the Bankers' Book Evidence Act 1879 (the **BBEA**).

This decision is a reassuring one for financial institutions faced with claims which have been struck out in previous proceedings for failure to comply with a court order or with disclosure applications under the BBEA. The decision highlights the court's scope to: (a) strike out such claims on the basis that there are no reasonable grounds for bringing such claims and if they are an abuse of the court's process; and (b) dismiss disclosure applications where the documents requested do not properly fall within the definition of "Bankers books" or where an application for early extended disclosure is made in circumstances which are not exceptional.

In the present case, the court was satisfied that the claim form and particulars of claim ought to be struck out pursuant to CPR Rule 3.4(2) on the basis that the particulars of claim disclosed no reasonable grounds for bringing a claim against the bank's former/current employees. The court also found that it was a clear abuse for the claimant to commence the present proceedings and that it would be manifestly unfair to the bank to subject it to a further claim. In addition, the court highlighted that on the basis of *Meng v HSBC Bank Plc* [2021] EWHC 342 (QB) (see our banking litigation blog post) the documentation sought by the claimant as part of its disclosure application fell outside the scope of s.7 of the BBEA as it did not properly fall within the definition of "Bankers books". Also, an application for early extended disclosure will only be ordered if there are exceptional circumstances.

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

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

^ Back to top

30. Court of Appeal confirms litigation privilege available even if third party misled as to purpose of information request

***Victorygame Ltd v Ahuja Investments Ltd* [2021] EWCA Civ 993**

The Court of Appeal upheld a decision that a pre-action letter sent by the claimant to a third party, and the third party's response, were subject to litigation privilege as the claimant's true purpose in instigating the correspondence was to obtain information for the present proceedings. The dominant purpose test was therefore satisfied, and the privilege could not be overridden even if the third party was deceived as to the true purpose of the request.

The decision confirms that, as the court below had held (see our litigation blog post on the High Court's decision), in considering the dominant purpose test for litigation privilege, the relevant purpose is that of the person who instigated the communication or document in question. *Property Alliance Group v The Royal Bank of Scotland Plc* (No. 3) [2015] EWHC 3341 (Ch) (***PAG***), in which the court held that the purpose should be assessed differently where witnesses had been deceived into believing that the purpose of a meeting was other than to collect information, could be distinguished on its facts. The Court of Appeal in this case declined to express any view as to whether the approach in *PAG* was correct, saying that that question was best saved for a case in which it directly arose. That decision may therefore be ripe for reconsideration in an appropriate case.

The Court of Appeal's decision is helpful in reinforcing the absolute nature of a claim to legal professional privilege. It underlines the fact that, once established, privilege cannot be overridden by some competing public interest. As the court recognised, however, privilege can be waived and, in some circumstances, a party may be estopped from asserting privilege, though a finding of this sort would require cogent evidence. The court accepted, without deciding the point, that an estoppel might be found to arise where a party lied to its opponent to induce them to divulge information that they would not otherwise have been obliged to disclose – though it was harder to see how an estoppel could arise where information was sought from a third party.

In any event, given the uncertainties and fine distinctions in this area, as well as the risk of attracting judicial disapproval and (potentially) regulatory censure, parties should exercise caution in how they go about obtaining information for the purposes of proceedings.

For further information, please see our litigation blog post.

^ Back to top

31. Court of Appeal confirms one joint privilege holder could not prevent disclosure of privileged material to assignee of other joint client

***Travelers Insurance Company Ltd v Armstrong* [2021] EWCA Civ 978**

The Court of Appeal confirmed that, where one client to a joint retainer had assigned to a third party its claims against the jointly retained solicitors, the assignee (and its solicitors) were entitled to access the joint retainer file in order to pursue those claims, regardless of the other joint privilege holder's objections. It did not matter that, on the unusual facts of this case, that meant disclosure to the solicitors who were on the other side of long-running litigation.

The decision is of interest as a rare example of the Court of Appeal considering questions of joint privilege, which arises where two parties jointly retain the same solicitor. The decision helpfully summarises the relevant principles, including that neither party can assert privilege as against the other in respect of documents created pursuant to the joint retainer, but either can assert privilege as against any third party. The privilege can only be waived jointly and not unilaterally.

The decision also helpfully clarifies the effect of assignment on the right to assert privilege where there is a joint retainer. It confirms that, where one party has assigned its claims relating to the joint retainer, the successor in title stands in the shoes of the original party and has the same rights as the original party. In particular, the other joint privilege holder cannot prevent disclosure to the assignee. The existence of a potential conflict of interest in this case due to the identity of the assignee, and their role in the underlying dispute, did not affect this principle – though suitable safeguards to protect confidentiality would have to be put in place.

For further information, please see our litigation blog post.

^ Back to top

32. Disclosure Pilot to be extended for a further year and the procedures streamlined

On 29 July 2021, the Disclosure Working Group published an Update on the operation of the Disclosure Pilot Scheme, which has been running in the Business and Property Courts since the beginning of 2019 under Practice Direction (**PD**) 51U (the **Disclosure Pilot**).

The update notes that the Disclosure Pilot has been extended to the end of 2022, as approved by the Civil Procedure Rule Committee (**CPRC**) at a recent meeting, and outlines a number of proposed revisions to PD 51U in response to a request for feedback from court users. These have been approved in principle by the CPRC but remain subject to final approval by both the CPRC and the Justice Minister. The timing is not entirely clear from the update, but we expect the aim is to implement the revisions this autumn.

The key changes are outlined in our litigation blog post.

^ Back to top

33. Privilege not lost despite opponent having wholesale access to email accounts containing the privileged material

***ConocoPhillips Co v Chrysaor E&P Ltd* [2021] 3 WLUK 524**

The High Court held that the seller of certain companies could assert privilege against the buyer in respect of emails and documents in employees' email accounts, despite the buyer having received wholesale access to those accounts as a result of the underlying transaction.

The decision illustrates that, in some circumstances, privilege may not be lost against an opponent in litigation despite that opponent having access to the privileged material. In particular, the court may determine that access was given only for a limited purpose, and so confidentiality – and therefore privilege – has not been lost more generally.

The court in this case referred to *Berezovsky v Hine* [2011] EWCA Civ 1089 (considered here) in which the Court of Appeal held that a party was entitled to assert privilege in a draft witness statement relating to separate litigation, despite having previously copied the draft to its opponent in subsequent proceedings. The court was satisfied that the draft had been disclosed for a limited purpose, and its use for any other purpose was prohibited – despite there having been no express agreement to that effect.

While these decisions show that a party may be able to provide a third party with access to privileged material for a limited purpose, without losing the right to assert privilege even against that third party if a dispute later arises, each case will turn on its facts and this is obviously an area where it pays to be cautious. A party in this situation should consider whether it is really necessary to provide a third party with access to a database containing privileged documents, or whether the privileged documents can be carved out from the material provided. If access is given, it is best to ensure that this is accompanied by a statement (and ideally an express agreement) not only that the material is provided on confidential terms and there is no intention to waive privilege, but also restricting the use of the material for any purpose other than the specific purpose stated.

For further information, please read our litigation blog post.

^ Back to top

34. High Court finds accountants' investigation report not protected by litigation privilege and considers requirements for obtaining disclosure under the Disclosure Pilot

State of Qatar v Banque Havilland SA and others **[2021] EWHC 2172 (Comm)**

The High Court granted an application by a claimant state for orders that the defendant bank disclose an accounting firm's investigation report (and associated documents) originally withheld from disclosure on the grounds of litigation privilege, as well as to disclose certain categories of documents on a Model E or "train of enquiry" basis and make further enquiries for "known adverse documents".

The decision does not establish new principles relating to litigation privilege, but is noteworthy as it underlines the difficulties caused by the dominant purpose test in establishing a claim for litigation privilege where documents were arguably produced for a number of purposes, including to deal with enquiries from regulators, rather than solely for the purpose of anticipated litigation.

The decision, in particular, illustrates the difficulties for financial institutions seeking to withhold or redact an investigation report (and associated documents) on the basis of litigation privilege where there is little evidence at the time the report was commissioned that: (i) adversarial proceedings were, or were regarded by the bank to be, reasonably in contemplation; and (ii) the sole or dominant purpose in commissioning the report was conducting, settling or avoiding litigation. However, the decision also appears to indicate that where an investigation report is found to be protected by privilege and has been provided to a regulator on a limited waiver basis, the courts will robustly resist any claims that privilege has been waived.

The decision also highlights that, even if disclosure has initially been ordered on a Model D basis (i.e. narrow search-based disclosure of documents which support or adversely affect any party's case, similar to old-style standard disclosure) under the Disclosure Pilot, the court may later order Model E disclosure (i.e. wide search-based disclosure, to include documents which may lead to a train of inquiry to result in the identification of other documents for disclosure) if appropriate in respect of specific issues.

It also provides useful guidance as to the requirement that a party to civil proceedings has an obligation to undertake reasonable and proportionate checks to enquire for known adverse documents with the relevant custodians, even if they have left the company. In particular, the court highlighted that a check to see if a custodian is aware of any known adverse documents is not satisfied simply by asking whether he or she used a personal email account to send or receive work related emails or a personal device to store work related documents. It was therefore necessary that the bank make further inquiries of certain custodians, as they may have been aware of adverse documents stored elsewhere.

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

^ Back to top

Governing Law and Jurisdiction

35. Court of Appeal decision highlights dangers of choosing non-exclusive jurisdiction clause in favour of an EU court

***Perform Content Services Ltd v Ness Global Services Ltd* [2021] EWCA Civ 981**

The Court of Appeal held that the English court had no power under Article 33 of the recast Brussels Regulation to stay in favour of prior proceedings commenced in New Jersey, where the English court had jurisdiction under a non-exclusive jurisdiction clause. It made no difference that, absent the clause, the court would have had jurisdiction based on the defendant's domicile.

This decision will be of interest to financial institutions because of its implications for non-exclusive jurisdiction clauses in favour of EU member state courts.

For proceedings commenced since 1 January 2021, the recast Brussels Regulation will not apply in the UK. However, the Regulation will be applied by any EU member state court asked to exercise its discretion under Article 33 to stay its proceedings in favour of prior proceedings in England as a "third State" (ie a non-EU country).

If the English court's approach in this case is followed in the EU, it means an EU court would have no power to stay its proceedings in favour of (prior) English proceedings where there is a non-exclusive jurisdiction clause in favour of an EU court. This is so regardless of whether England is a more appropriate jurisdiction in which to decide the dispute, and regardless of the fact that commencing proceedings in the English court was not a breach of the jurisdiction clause.

For further information, please see our litigation blog post.

^ Back to top

36. Proposal for EU to join 2019 Hague Judgments Convention

The European Commission adopted a proposal for the EU to accede to the 2019 Hague Judgments Convention, an international treaty which is aimed at facilitating the mutual recognition and enforcement of judgments in civil and commercial matters. In order for the EU to join the Convention, the Commission's proposal will have to be adopted by the European Council, with the European Parliament's consent.

The 2019 Convention is described in more detail in this previous litigation blog post. In essence, it complements the 2005 Hague Convention on Choice of Court Agreements by allowing enforcement of judgments in much broader circumstances – in particular, in contrast to the 2005 Convention, it does not require an exclusive jurisdiction clause in favour of a contracting state, and employment and consumer contracts are within scope.

If the EU accedes to the Convention, and assuming the UK also signs up in due course, it could significantly streamline the enforcement of judgments between the UK and the EU. Currently, while the UK remains unable to accede to the Lugano Convention (considered here), enforcement in most cases relies on national rules in each country, unless there is an exclusive jurisdiction clause falling within the 2005 Convention.

The 2019 Convention will not, however, come into force for any state until (approximately) 12 months after ratification. Even then, it won't apply unless the proceedings were started (as opposed to the judgment being issued) when the Convention was in force for both the state of origin and the state of enforcement. This means that it will be some considerable time before it has any impact in practice. It is also worth noting that it is not a complete replacement for the Lugano Convention, including because recognition and enforcement can be refused on broader grounds than under Lugano, and it deals only with enforcement rather than jurisdiction. Ratification by both the EU and the UK would however be a positive step in facilitating mutual enforcement of judgments in the longer term.

^ Back to top

37. High Court finds common law "necessary or proper party" gateway for service out of the jurisdiction does not apply when the anchor defendant has voluntarily submitted to the court's jurisdiction

***ID v LU and BZ* [2021] EWHC 1851 (Comm)**

The High Court held that the "necessary or proper party" gateway contained in CPR PD 6B, paragraph 3.1(3) does not apply when the anchor defendant has voluntarily submitted to the court's jurisdiction.

In a case in which none of the parties were domiciled or resident in England, and the subject matter of the dispute was exclusively connected with the Ukraine, the High Court has confirmed that this gateway should not be applied so as to permit a party with no connection to the jurisdiction to be brought into litigation in England against their will solely by reason of the willingness of another defendant to submit to the jurisdiction for their own reasons.

Following the end of the Brexit transition period on 31 December 2020, the common law gateways for service out of the jurisdiction with the court's permission have gained added prominence, as they apply to EU domiciled as well as non-EU domiciled defendants (unless there is a jurisdiction clause in favour of the English court, in which case proceedings can be served out without the need to obtain the court's permission).

It is therefore helpful that the High Court has confirmed that a claimant seeking the court's permission under the "necessary or proper party" gateway cannot rely on an anchor defendant who has voluntarily submitted to the jurisdiction but who could not otherwise have been served in accordance with the CPR.

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

For further information, please see our litigation blog post.

^ **Back to top**

Other Significant Developments

38. Commercial Court finds witness evidence less reliable where witnesses did not refresh memories from contemporaneous documents

***Global Display Solutions Ltd v NCR Financial Solutions Group Ltd* [2021] EWHC 1119 (Comm)**

The Commercial Court rejected a party's witness evidence on a key issue, commenting that the fact the witnesses did not refresh their memories from contemporaneous documents meant their evidence was "far less likely to be reliable than it might otherwise have been".

The witness statements in the present case were signed before 6 April 2021 and so were not subject to the new requirements relating to trial witness statements in the Business and Property Courts (considered here), at PD 57AC and Appendix, including in particular the requirement to list documents a witness has referred to or been referred for the purpose of providing the evidence set out in their statement. However, it is clear that the judge did not consider the new requirements to affect his decision. He commented that the new rules contemplate that witnesses will be shown contemporaneous documents, particularly those they had seen at the time of the relevant events.

It is true that the new PD and Appendix do not preclude a witness being shown contemporaneous documents. However, the general tenor of the new provisions is to discourage over-reliance on documents in preparing witness evidence, and to distinguish between what is spontaneous recollection and what may have been influenced by reviewing documents, with the implication appearing to be that the former is somehow preferable.

The witness evidence working group's implementation report, in presenting opposing views among the group as to the proposed requirement to list documents to which the witness has been referred, noted that those in favour took the view that the court should know "the extent to which what is presented as factual witness testimony in chief" may have been influenced by going through the documents. It added that the question of what documents to show a witness should be given careful thought because "it may affect the weight to be given to what the witness will claim as recollection to have an understanding of the extent to which it was spontaneous, recollection refreshed from documents the witness saw at the time, or testimony prompted by reviewing documents the witness did not see at the time". It noted a concern among those opposed to the new requirement that a court might draw adverse inferences if the list indicated that a witness had been shown large numbers of documents.

The decision therefore illustrates the difficult judgments that will need to be made in any given case as to whether a witness should be shown contemporaneous documents, in the hope that by refreshing their memory they will be able to give more complete and ultimately more reliable evidence, or whether by doing so there is a risk that a court might consider their evidence to be primarily reconstruction rather than recollection and potentially discount it on that basis. Where a decision is taken to show a witness documents, parties should also bear in mind the new requirement at paragraph 3.7 of the Appendix to identify (where practicable) any documents used to refresh a witness's recollection on important disputed matters of fact.

In August 2021, the Court of Appeal refused an application for permission to appeal.

For further information, please see our litigation blog post.

^ **Back to top**

39. High Court strikes out time-barred claims holding that banks did not deliberately conceal facts so as to extend the limitation period

***Dixon v Santander Asset Finance plc & Anor* [2021] EWHC 1044 (Ch)**

The High Court granted applications by two banks to strike out claims brought against them after the primary limitation period for the claims had expired. This decision provides a helpful summary of the case law surrounding the operation of section 32(1)(b) LA 1980, a provision that we are increasingly seeing claimants seek to rely on in order extend the life of financial services disputes that have their factual roots in the global financial crisis of 2008.

Section 32(1)(b) LA 1980 provides that, where a fact relevant to the claimant's claim has been deliberately concealed, the limitation period will not begin to run until the claimant has discovered, or could with reasonable diligence have discovered, the concealment. In this decision the court highlighted certain challenges claimants will face when seeking to rely upon section 32(1)(b) LA 1980. In particular, the facts that are alleged to have been concealed from the claimant must be those that are essential for the claimant to prove in order to establish its prima facie case.

In reaching its decision, the court was careful to distinguish between concealed evidence on the one hand (which will not be sufficient to trigger section 32(1)(b) LA 1980) and concealed facts without which the claim is incomplete on the other (which will be).

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

^ **Back to top**

40. Redemption periods and liquidity mismatch in authorised open-ended property funds: regulatory update and litigation risks

The FCA published a feedback statement to its consultation into liquidity mismatch in authorised open-ended property funds (CP20/15) (see our banking litigation blog post).

The FCA consultation considered whether property funds should be required to have notice periods before an investment can be redeemed, suggesting a notice period of between 90 and 180 days for these funds. The recent statement sets out the feedback received by the FCA, with many respondents defending the utility of open-ended property funds as a component of an investment portfolio. The statement confirms that only a small number of respondents agreed with the proposal of notice periods as consulted on, but just over half of respondents supported the proposals in principle (subject to conditions). The FCA will not take a final decision on its policy position until Q3 2021 at the earliest, primarily due to uncertainty over the operational hurdles to overcome to support notice periods.

The latest regulatory development follows the suspension of numerous open-ended property funds last year, when lockdown measures were announced in response to the COVID-19 pandemic. Some funds have since re-opened, but a number remain gated. It is a reminder that, in times of stressed market conditions, there is likely to be an increase in investors seeking to cash in or transfer assets held in such funds, which may lead to a liquidity crisis.

This has once again cast a spotlight on the risks arising from mismatches between the redemption periods offered by investment funds and the liquidity of the underlying assets, which we considered in our article: Redemption periods and liquidity mismatch in the investment funds market: the litigation risks. This article first appeared in 2019 edition of the Journal of International Banking & Financial Law.

^ Back to top

41. Supreme Court confirms that, where cause of action accrues at midnight, the following day is included for limitation purposes

***Matthew v Sedman* [2021] UKSC 19**

The Supreme Court unanimously held that where a cause of action accrues at midnight (a “midnight deadline case”) the following day will count towards the calculation of the limitation period for commencing proceedings.

The judgment provides an important clarification for parties calculating limitation periods in cases where accrual falls at the stroke of midnight, as opposed to where it falls part way through a day. While the court noted the general rule that the day on which a cause of action accrues is excluded for limitation purposes, as the law rejects fractions of a day, it held that midnight deadline cases form an exception to that rule. In a midnight deadline case, the day following the midnight deadline is a complete, undivided day on which the claimant may start proceedings. This undivided day must be included for limitation purposes to avoid interfering with the time periods stipulated in the LA 1980, and prejudicing the defendant by providing the claimant with an additional day in which to issue its claim.

As a practical matter, the decision illustrates the dangers of waiting until a limitation period is near expiry before issuing proceedings, given the highly technical nature of the law relating to limitation and the very real prospect of things going wrong.

For further information, please see our litigation blog post.

^ Back to top

42. New regime for trial witness statements does not change law on admissibility

***Mad Atelier International BV v Manes* [2021] EWHC 1899 (Comm)**

The High Court considered the new Practice Direction (**PD**) 57AC on trial witness statements, which applies to statements signed on or after 6 April 2021, and confirmed that it does not change the law on admissibility of evidence, including the circumstances in which a witness of fact is permitted to give opinion evidence.

The judge noted that the new PD requires a trial witness statement to contain only: (i) evidence as to matters of fact that need to be proved at trial by witness evidence; and (ii) “the evidence as to such matters that the witness would be asked by the relevant party to give, and the witness would be allowed to give, in evidence in chief if they were called to give oral evidence at trial”. In the judge’s view, this makes it clear that a witness statement can include any evidence that a witness would be allowed to give if giving oral evidence in chief.

While the new PD provides that a trial witness statement should not include commentary on the documents or the evidence of other witnesses, the judge clearly did not consider the evidence in question here (as to business projections if a joint venture had not been brought to an end) to amount to such commentary. It was either itself factual evidence, or evidence of opinion given by those with knowledge of the facts and by reference to their factual evidence, and was therefore admissible.

The decision notes that the PD is “obviously valuable in addressing the wastage of costs incurred by the provision of absurdly lengthy witness statements merely reciting the contents of the documentary disclosure and commenting on it”. This was certainly one of the key aims of the PD – the other being to improve witness evidence by reducing the potential for a witness’s recollections to be influenced or overwritten by the process of taking the statement. A change to the law on admissibility of evidence was not among the aims of the PD, and this decision is helpful in confirming that it did not have this effect.

For further information, please see our litigation blog post.

^ Back to top

43. Know your limits: the increasingly high bar for claims to extend the limitation period

Herbert Smith Freehills LLP published an article in the *New Law Journal* on recent authorities clarifying the application of the LA 1980 and the high threshold for claimants to postpone the limitation period under s.32 or s.14A the LA 1980.

The litigation market is well known to be counter-cyclical – an uptick in disputes usually follows market turmoil. The 2008 global financial crisis was no exception, and disputes with their factual roots in this period are still heard by the English courts today. As an inexorable consequence, the court must grapple with complicated limitation arguments, and recent decisions fleshing out the law demonstrate the judiciary's willingness to consider time-barred claims on a summary basis, in circumstances where, traditionally, such cases have been less amenable to a strike out or summary determination.

In our article, we examine recent authorities focusing on the operation of the deliberate concealment extension under section 32(1)(b) of the LA 1980 and the alternative 3-year extension mechanism for negligence actions under section 14A(4)(b).

This article can be found here: Know your limits. This article first appeared in the 9 July 2021 edition of the *New Law Journal*.

^ **Back to top**

Banking Litigation Publications

You can subscribe to our Banking Litigation Notes blog to receive updates as soon as new material is posted.

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

Banking Litigation Contacts

Rupert Lewis, Partner
(Head of Banking Litigation)
+44 20 7466 2517
Rupert.Lewis@hsf.com

Damien Byrne Hill, Partner
+44 20 7466 2114
Damien.ByrneHill@hsf.com

Julian Copeman, Partner
+44 20 7466 2168
Julian.Copeman@hsf.com

Emma Deas, Partner
+44 20 7466 2613
Emma.Deas@hsf.com

Natasha Johnson, Partner
+44 20 7466 2981
Natasha.Johnson@hsf.com

Ben Goodman, Of Counsel
+44 20 7466 2862
Ben.Goodman@hsf.com

Nihar Lovell, Professional Support Lawyer
T: +44 20 7466 2529
Nihar.Lovell@hsf.com

Chris Bushell, Partner
+44 20 7466 2187
Chris.Bushell@hsf.com

Simon Clarke, Partner
+44 20 7466 2508
Simon.Clarke@hsf.com

John Corrie, Partner
+44 20 7466 2763
John.Corrie@hsf.com

Harry Edwards, Partner
+61 3 9288 1821
Harry.Edwards@hsf.com

Gary Milner-Moore, Consultant
+44 20 7466 2454
Gary.Milner-Moore@hsf.com

Ceri Morgan, Professional Support Consultant
+44 20 7466 2948
Ceri.Morgan@hsf.com

If you would like to receive more copies of this briefing, or would like to receive Herbert Smith Freehills briefings from other practice areas, or would like to be taken off the distribution lists for such briefings, please email subscribe@hsf.com.