BANKING BRIEFING

Banking and financial services litigation: key themes from 2023 and trends for 2024

Some of the litigation trends for 2024 in the financial services sector can be illustrated by reviewing key decisions from the English courts in 2023 (*see box "Cases to watch in 2024"*).

Global political environment

Throughout 2023, the English courts have grappled with claims arising out of the increased imposition of sanctions following Russia's invasion of Ukraine and other claims arising from the wider global political environment (*see feature article "Divesting Russian interests: issues for companies", www.practicallaw.com/w-039-7042*). The courts have sought to take a pragmatic approach to commercial arrangements in the current environment.

In *Fortenova Grupa DD v LLC Shushary Holding and others*, the High Court granted an order for a commercial party to pay into court loan note redemption funds owed to a sanctioned entity (*[2023] EWHC 1165 (Ch)*). Fortenova would have breached the UK sanctions regime if it had paid the defendant, but the decision means that payment from court can be made if sanctions are lifted.

In *Mints and others v PJSC National Bank Trust and another*, which related to a dispute over an alleged conspiracy to enter into uncommercial transactions with companies connected to the Mints, the Court of Appeal refused the Mints' request for a stay of proceedings (*[2023] EWCA Civ 1132*). The court agreed with the High Court that the imposition of sanctions did not curtail the banks' right of access to the courts, including to have a claim adjudicated on and, if successful, to obtain favourable judgment.

In a dispute concerning events before the Ukraine invasion, the Supreme Court unanimously held that Ukraine should be permitted to pursue a defence of duress in a claim for the repayment of Eurobonds issued to Russia (*Law Debenture Trust Corporation plc v Ukraine [2023] UKSC 11; see News brief "Contracting with foreign states: capacity and authority", www.practicallaw.com/w-039-2440*). Ukraine's defences of lack of capacity, authority and countermeasures, however, were struck out.

Banking duties

The Supreme Court reconsidered the *Quincecare* duty and provided welcome clarification of its scope in *Philipp v Barclays Bank UK plc* (*[2023] UKSC 25; see feature article "The Quincecare duty: understanding the risks", www.practicallaw.com/w-040-6851*). In holding that the duty had not arisen in a claim involving an authorised push payment fraud where the retail customer had unequivocally authorised and instructed the bank to make payment, the court clarified that the duty is merely an application of a bank's duty to act with reasonable care and skill when processing payments, and is not a distinct, standalone duty.

In a case with wider application to misrepresentation claims generally, the High Court confirmed that a claimant's conscious awareness or understanding of an implied representation is an essential element of a misrepresentation claim (*Loreley Financing (Jersey) No 30 v Credit Suisse Securities (Europe) [2023] EWHC 2759 (Comm)*). Loreley asserted that, in marketing a collateralised debt obligation transaction to it, Credit Suisse had made representations, either deliberately or negligently, that were false, in the absence of which it would not have entered the transaction. The court considered, however, that Loreley was not aware of the misrepresentation and did not rely on it.

Dishonest assistance

Claims for dishonest assistance continue to arise in the financial services context, although there remains a reasonably high bar for success.

In *Henderson & Jones Ltd v Ross and others*, the High Court rejected a claim that Barclays Bank and others had dishonestly assisted a company to put assets out of creditors' reach in a corporate restructuring (*[2023] EWHC 1276 (Ch)*). The court found that there had been no breach by the company's directors of their duties to the company and therefore accessory liability in dishonest assistance did not arise. However, the court stated that it would not have found Barclays liable in dishonest assistance in any case on the basis that its employee had not turned a blind eye, was highly experienced, had taken a significant interest in the customer and took specific legal advice where appropriate.

In a judgment concerning the co-availability of the remedies of equitable compensation and an account of profits to the claimants, the Court of Appeal held that only one remedy was available (*Hotel Portfolio II UK Ltd and another v Ruhan and others [2023] EWCA Civ 1120; www.practicallaw.com/w-041-5078*). In this case, equity was satisfied by the award of an account of profits which related to the entirety of the director's conduct. It would not have been just to order the dishonest assistant to pay equitable compensation as well.

The Supreme Court held that a claim in knowing receipt requires the claimant to have a continuing equitable interest in the property transferred to the defendant in breach of trust, in addition to knowledge on the part of the defendant, so as to render its receipt unconscionable (*Byers and others v Saudi National Bank [2023] UKSC 51; see News brief "Knowing receipt: Supreme Court untangles the issues", this issue*). In this case, Saudi Arabian law applied to the claimant's interest in the disputed shares. However, this law does not recognise the division of legal and equitable interests in property so the claimant did not have a continuing equitable interest once the shares had been legally transferred. The court therefore held that the recipient of the shares could not be liable for any loss.

Complex financial transactions

Familiar themes emerge from cases in 2023. In a further dispute over the validity and enforceability of certain swaps entered into between Italian and English parties, the High Court held that the dispute was not governed by the terms of an earlier settlement agreement related to the same swaps, which did not contain a jurisdiction clause and was governed by Italian law (*Dexia Crediop SpA v Provincia di Brescia [2023] EWHC 959 (Comm)*). Rather, the English jurisdiction clause in the underlying derivatives master agreement was applicable to the dispute. The court placed heavy reliance on the earlier decision in *Deutsche Bank v Brescia,* in which

 © 2023 Thomson Reuters (Professional) UK Limited. This article first appeared in the January/February 2024 issue of PLC Magazine.

Cases to watch in 2024

It will be interesting to follow the upcoming trials in:

- *The Eclipse Investors v HSBC Private Bank (UK) Limited*, scheduled to commence in January 2024, in which investors are seeking to recover losses arising from a film investment scheme following adverse tax treatment.
- *Stichting Hef Wonen v Barclays Bank PLC*, scheduled for May 2024, which is the last in a long line of claims brought by Vestia against several banks alleging that derivative transactions were ultra vires or void.
- *Various claimants v Serco Group plc*, scheduled for June 2024 which, if it proceeds, will be the first group shareholder claim under section 90A of, and Schedule 10A to, the Financial Services and Markets Act 2000 to go to trial.

Notable appeals include that of the decision in *Macquarie Bank Ltd v Phelan Energy Group Ltd* relating to the validity of a notice of default served under a derivaties master agreement (*[2022] EWHC 2616*).

Regulatory practitioners should also watch out for decisions in the appeals of:

- *Bluecrest Capital Management (UK) LLP v The Financial Conduct Authority* regarding the scope of the Financial Conduct Authority's (FCA) own-initiative powers (*[2023] UKUT 00140 (TCC); www.practicallaw.com/w-040-1791*).
- *FCA v Papadimitrakopoulos* concerning the FCA's use of material obtained as a result of a request for mutual legal assistance for purposes other than that stated in the request (*[2022] EWHC 2792 (Ch); see Briefing "Banking and financial services litigation: 2022 in review and 2023 in prospect", www.practicallaw.com/w-038-3446*).
- *R (Options UK Personal Pensions LLP) v Financial Ombudsman Service* in which permission to appeal a judicial review decision is sought in relation to a Financial Ombudsman Service decision involving the scope of self-invested personal pension operators' due diligence duties (*[2022] EWHC 3325 (Admin)*).

the court considered that the jurisdiction clause in a derivatives master agreement was widely drawn and took precedence over the settlement agreement (*[2022] EWHC 2859*).

More recently, the Court of Appeal determined that the Venice local authority had capacity to enter into a swap transaction (*Banca Intesa Sanpaolo Spa and another v Comune Di Venezia [2023] EWCA Civ 1482*). Rolling over the negative mark-to-market value in the context of restructuring a swap to align it with an underlying bond did not constitute speculation or recourse to indebtedness under Italian law, so the swap was valid.

ESG issues

Financial institutions continue to be at high risk of facing litigation relating to environmental, social and governance matters and, in particular, climate risk claims (*see feature articles "ESG claims against directors: contending with the changing climate", www.practicallaw.com/w-040-9447 and "ESG litigation risks: building momentum", www.practicallaw.com/w-035-5489*).

In 2023, there were attempts to bring climate risk claims against firms by way of derivative claims; however, the English courts have so far given short shrift to these attempts. In *ClientEarth v Shell plc*, ClientEarth, a minority shareholder in Shell, alleged that Shell's directors had breached their duties under the Companies Act 2006 (2006 Act) by mismanaging risks related to climate change and sought a court order requiring Shell to adopt a new strategy to manage these risks (*[2023] EWHC 1897 (Ch); www.practicallaw.com/w-040-4924*). In dismissing the application to bring a derivative claim against Shell, the High Court held that ClientEarth had not established that Shell's directors were managing the relevant business risks in a manner that was not open to a board of directors acting reasonably. The High Court and Court of Appeal both refused permission to appeal.

In *McGaughey and another v Universities Superannuation Scheme Ltd*, the Court of Appeal upheld a refusal of permission to continue derivative claims against directors of a pension scheme's corporate trustee for alleged breaches of fiduciary duties or statutory duties or both (*[2023] EWCA Civ 873*). The claimants asserted, among other claims, that continued investment in fossil fuels without any or any adequate plan for divestment amounted to a breach of various directors' duties under the 2006 Act. In dismissing the appeal, the Court of Appeal noted, among other things, that the derivative action regime was not designed to monitor directors' general decisions and should only be used exceptionally, with the suffering of loss being part of what justifies such use.

Competition claims

In *Walter Hugh Merricks CBE v Mastercard Incorporated and others*, the Competition Appeal Tribunal (CAT) reserved its decision following a hearing in July 2023 on the factual question of whether there was a relevant causal link between the multilateral interchange fees that applied to EEA cross-border transactions using Mastercard credit cards and those that applied to domestic transactions in the UK (*[2023] CAT 15*). A further hearing started on 15 January 2024 to determine whether the claim, insofar as it relates to transactions predating 20 June 1997, is time-barred. In addition, hundreds

© 2023 Thomson Reuters (Professional) UK Limited. This article first appeared in the January/February 2024 issue of PLC Magazine.

of merchants have brought umbrella proceedings against Mastercard and Visa and these are presently the subject of case management by the CAT to determine the level of pass-on between different levels of the supply chain.

In *Michael O'Higgins FX Class Representative Ltd v Barclays Bank plc and others* and *Evans v Barclays Bank plc and others*, the Court of Appeal overturned the CAT's decision that claims relating to the European Commission's May 2019 foreign exchange settlement decisions could not proceed on an opt-out basis (*[2023] EWCA Civ 876; see Briefing "Collective proceedings regime: CAT at the gate", www.practicallaw.com/w-040-7963*). Mr Evans will act as class representative in the opt-out proceedings.

Although not in a financial services context, in a significant ruling for litigation funders that has wider implications, the Supreme Court in *Paccar Inc v Road Haulage Association Ltd* held that litigation funding agreements whereby the funder receives a share of the damages are damages-based agreements (DBAs) and are therefore unenforceable unless compliant with legislation on DBAs (*[2023] UKSC 28; see News brief "The Supreme Court's decision in PACCAR: litigation funding stopped in its trucks?", www.practicallaw.com/w-040-4985*). The use of DBAs by class representatives bringing opt-out collective proceedings under section 47B of the Competition Act 1998 (1998 Act) is prohibited; however, Parliament is expected to amend the 1998 Act in the Digital Markets, Competition and Consumers Bill in order to permit the use of DBAs in opt-out collective proceedings (*see feature articles "New consumer protection regime: a dramatic increase in compliance risk", this issue and "Digital markets regulation: comparing the new EU and UK regimes", www.practicallaw.com/w-040-0659*).

Limitation

The Supreme Court allowed two claims to proceed, rejecting limitation defences, which could have broader implications for retail financial product claims.

In *Canada Square Operations Ltd v Potter*, the Supreme Court dismissed Canada Square's appeal against the decision that a claim for sums paid under a payment protection insurance (PPI) policy sold in 2006 was not time-barred (*[2023] UKSC 41*). Canada Square's failure to disclose that it had charged a substantial commission on the policy had amounted to deliberate concealment under section 32(1)(b) of the Limitation Act 1980 (1980 Act). In clarifying the meaning of "deliberate concealment", the court held that a fact would have been concealed if the defendant kept it secret, either by taking active steps to hide it or by failing to disclose it. As to the meaning of "deliberately", the court held that the defendant's concealment of a relevant fact would be deliberate if the defendant intended to conceal it.

In *Smith and another v Royal Bank of Scotland*, the Supreme Court considered the limitation period applicable to unfair relationship claims under sections 140A to C of the Consumer Credit Act 1974 (*[2023] UKSC 34*). The relevant claims were brought more than six years after the claimants' PPI policies ended but less than six years after the claimants' credit card agreements had ended. In holding that the claims were brought before the relevant time limit expired, the court held that time ran from the end of the parties' relationship rather than the conclusion of the disputed PPI policies.

Separately, in *Shokrollah-Babaee v EFG Private Bank Ltd* the High Court confirmed that section 14A of the 1980 Act does not apply to claims under section 138D of the Financial Services and Markets Act 2000 for breach of statutory duty in the financial services context because these claims are not an action for damages for negligence (*[2023] EWHC 3270 (Ch)*).

Judicial scrutiny of regulatory decisions

The All-Party Parliamentary Group on Fair Business Banking has obtained permission to proceed with a judicial review of a Financial Conduct Authority (FCA) decision to take no further action in response to a specific criticism relating to its supervisory intervention to interest rate hedging products (*R (All-Party Parliamentary Group on Fair Business Banking) v Financial Conduct Authority [2023] EWHC 1616 (Admin)*).

In contrast, the High Court dismissed judicial review proceedings brought against the London Metal Exchange (LME) in respect of its decisions to cancel trades in three-month nickel futures on 8 March 2022 (*R (Elliott Associates, Elliott International and Jane Street Global Trading) v The London Metal Exchange and LME Clear [2023] EWHC 2969 (Admin)*). The judgment considered the lawfulness of decisions by UK-recognised investment exchanges and their central counterparties in times of increased volatility, and held that there is no single clear definition of an orderly market. The LME had been entitled to conclude that the market had become disorderly and to take urgent action that it considered appropriate in response.

In the course of a challenge to an FCA enforcement decision, the Upper Tribunal criticised the FCA's conduct during its investigation and made a rare costs order against it (*Seiler, Whitestone & Raitzin v FCA [2023] UKUT 00133 (TCC); www.practicallaw.com/w-040-1803*).

Emma Probyn is a partner, and Sophie Horton is a senior associate, at Freshfields Bruckhaus Deringer LLP.

 © 2023 Thomson Reuters (Professional) UK Limited. This article first appeared in the January/February 2024 issue of PLC Magazine.