BANKING BRIEFING

Dispute resolution in financial services: scanning the horizon for key trends

Regulatory practitioners should consider carefully the key decisions from the English courts in 2024 in order to gauge the litigation trends that are likely to have implications for the banking and financial services sector in 2025 and beyond (*see box "Cases to watch in 2025"*).

Jurisdiction

The current geopolitical environment continues to generate anti-suit injunction and jurisdiction disputes. The leading case in 2024 was the Supreme Court's decision in *UniCredit Bank GmbH v RusChemAlliance LLC*, in which, in breach of the applicable arbitration clause, RusChemAlliance LLC (RCA) issued proceedings in Russia seeking to enforce payment obligations arising under English-law governed bonds that provided for International Chamber of Commerce arbitration in Paris (*[2024] UKSC 30; www.practicallaw.com/w-044-8122*). In response, UniCredit sought an anti-suit injunction from the English court. The court upheld the Court of Appeal's decision and held that:

- Although the chosen seat of the arbitration was Paris, the arbitration agreements were not governed by French law. Rather, the choice of English law to govern the bonds extended to the arbitration agreements, which formed part of the bonds.
- England and Wales was the proper place to bring the claim. The French courts were not an available forum; they would have no jurisdiction over RCA and, even if they did, had no power to grant an anti-suit injunction. Separately, although an arbitrator could make an order directing a party to refrain from bringing, or to discontinue, court proceedings brought in breach of an arbitration agreement, these orders lacked coercive force (*see News brief "Anti-suit injunctions in arbitration: a long-running saga", www.practicallaw.com/w-042-4291*).

Other notable cases include *Renaissance Securities (Cyprus) Ltd v ILLC Chlodwig Enterprises and others*, *Barclays Bank plc v VEB.RF* and *Barclays Bank plc v PJSC Sovcombank and another* in which the High Court upheld arbitration and jurisdiction clauses in financial agreements providing for arbitration at the London Court of International Arbitration and the English courts, respectively, in circumstances where the defendants had commenced proceedings in Russia in breach of those clauses (*[2024] EWHC 2843 (Comm); [2024] EWHC 225 (Comm); [2024] EWHC 1338 (Comm), www.practicallaw.com/w-043-9435*). These decisions provide helpful analyses of the circumstances in which the High Court will grant anti-suit injunctions, anti-anti-suit injunctions, previously rare anti-enforcement injunctions and declaratory relief.

In *Zephyrus Capital Aviation Partners 1D Ltd and others v Fidelis Underwriting Ltd and others*, the High Court notably declined to stay proceedings brought in England in breach of an exclusive jurisdiction clause in favour of the Russian courts because the claimant would be unlikely to receive a fair trial in Russia (*[2024] EWHC 734 (Comm); www.practicallaw.com/w-043-4019*). *Zephyrus* is an important reminder that, while the English court will usually uphold exclusive jurisdiction clauses by staying proceedings issued in breach of those clauses, it is not bound to do so if a party can show strong reasons for it not to grant a stay, although this is extremely rare.

Cases to watch in 2025

In 2025, some of the key decisions to watch out for include:

- The trial in *LLC EuroChem North-West 2 v Société Générale SA and others*, which is on the topic of contractual obligations and sanctions and is due to commence in June 2025.
- The trial in *Credit Suisse Virtuoso SICAV-SIF and another v SoftBank and others*, which relates to the collapse of Greensill Capital and is also due to commence in June 2025.
- The contested settlement hearing in the long-running *Merricks v Mastercard* collective proceedings, which is due to take place before the Competition Appeal Tribunal early in 2025 (*see Briefing "Banking and financial services litigation: key themes from 2023 and trends for 2024", www.practicallaw.com/w-042-1373*).
- The Supreme Court decision in the joined cases of *Johnson v Firstrand Bank Ltd (London Branch) (t/a Motonovo Finance), Wrench v FirstRand Bank Ltd* and *Hopcraft v Close Brothers Ltd*, which is scheduled to be heard between 1 and 3 April 2025 (*[2024] EWCA Civ 1282*) (*see "Commission payments" in the main text*).
- The appeal in *Evans v Barclays Bank plc and others*, a foreign exchange class action, where the Supreme Court will consider the test for certifying collective proceedings as opt-out or opt-in and the admissibility of European Commission decisions against non-addressees (*[2023] EWCA Civ 876; see Briefing "Collective proceedings regime: CAT at the gate", www.practicallaw.com/w-040-7963*).
- A ruling in *R (All-Party Parliamentary Group on Fair Business Banking) v Financial Conduct Authority*, the judicial review claim brought against the Financial Conduct Authority (FCA) by the All-Party Parliamentary Group (APPG) on Fair Banking (formerly the APPG on Fair Business Banking) regarding the FCA's decision not to seek to use its powers to require any further redress to be paid to interest-rate hedging product customers (*AC-2022-LON-001500*). The judicial review was heard on 10 and 11 December 2024 and a ruling is likely to be handed down early in 2025.

In *Macquarie Bank Ltd v Banque Cantonale Vaudoise*, Macquarie issued proceedings in England seeking to enforce the terms of two English-law governed letters of credit issued by Banque Cantonale Vaudoise (BCV), a Swiss bank (*[2024] EWHC 114 (Comm)*). BCV challenged the jurisdiction of the English court on the basis of forum non conveniens, arguing that the Swiss courts were a more suitable forum for the trial of the action. Rejecting BCV's application, the High Court held that England was the most appropriate forum because:

- The letters of credit were governed by English law, meaning that they benefitted from important procedural implications that were intended to prevent a payee's substantive rights being circumvented by procedural means, as they already had been in Switzerland.
- Although proceedings had already been commenced in Switzerland, those proceedings were likely to be stymied for an extended period owing to a Swiss criminal investigation.
- The court was not troubled by the existence of those parallel proceedings because BCV was willing to undertake to use best endeavours to discontinue those proceedings.

Sanctions compliance

In a decision that will be reassuring for firms seeking to rely on the defence in section 44 of the Sanctions and Anti-Money Laundering Act 2018 for acts or omissions taken in the reasonable belief that they were in compliance with UK sanctions, the Court of Appeal in *Celestial Aviation Services Ltd v UniCredit Bank GmbH, London Branch* indicated in obiter remarks that the standard of reasonable belief must not be set too high, particularly where firms must make complex decisions in a fast-moving, high-risk legislative landscape (*[2024] EWCA Civ 628*). Had UniCredit needed to rely on the defence, the Court of Appeal did not consider that it would have been required to show the workings of its formation of reasonable belief.

Contractual interpretation

2024 saw only the second case to be brought under the Financial Markets Test Case Scheme (*Standard Chartered Plc v Guaranty Nominees Ltd and others [2024] EWHC 2605; www.practicallaw.com/w-045-0967*). The case concerned long-term financial instruments in which interest was set by reference to the now-defunct three-month US dollar LIBOR. While Guaranty Nominees tried to persuade the High Court that the relevant shares should be redeemed, the court took a pragmatic view and elected to imply a term that the dividends should be calculated using the reasonable alternative rate.

In a judgment illustrating the need for clear drafting of contractual interest provisions in financial agreements, the Court of Appeal in *Houssein and others v London Credit Ltd and another* clarified that the correct test for determining whether a clause is an unenforceable penalty comprises, firstly, a threshold question of whether the contractual stipulation is, in substance, a secondary obligation triggered by a breach of contract, and then secondly, two main stages; that is:

- Whether the clause seeks to protect a legitimate interest.
- If it does, whether the clause is extravagant, exorbitant, or unconscionable (*[2024] EWCA Civ 721; www.practicallaw.com/w-044-2495*).

On the facts, however, the court declined to apply the test, holding that it would not be appropriate to substitute its own decision for that of the High Court, and instead it remitted the case back to the High Court.

In *RTI Ltd v MUR Shipping BV*, which concerned the interpretation of a force majeure clause, the Supreme Court held that the requirement in the clause for the party affected to exercise reasonable endeavours did not require the party wishing to rely on the clause to accept an offer of non-contractual performance, which in this case was payment in euros as opposed to US dollars (*[2024] UKSC 18; see News brief "Force majeure and reasonable endeavours: Supreme Court provides certainty", www.practicallaw.com/w-043-4209*). Absent express wording, a reasonable endeavours proviso does not require the acceptance of an offer of non-contractual performance. Clear words are needed to forego valuable contractual rights.

APP fraud

In the aftermath of the Supreme Court's decision in *Philipp v Barclays Bank UK plc*, victims of authorised push payment fraud have looked to alternative remedies to obtain compensation from banks where the fraudster cannot be found. In particular, they have sought to bring claims against receiving banks or payment services providers rather than against the victim's own bank (*[2023] UKSC 25; see feature article "The Quincecare duty: understanding the risks", www.practicallaw.com/w-040-6851*).

In *Terna Energy Trading DOO v Revolut Ltd*, in considering a reverse summary judgment application on a claim in unjust enrichment, the High Court departed from the analysis in *Tecnimont Arabia Ltd v National Westminster Bank plc* in finding that, even though the payment had been made through various steps, the defendant receiving bank was still enriched at the expense of the claimant (*[2024] EWHC 1419 (Comm); [2022] EWHC 1172 (Comm)*). This represents a more pragmatic and less technical approach to this aspect of an unjust enrichment claim and removes one way that receiving banks might have sought to defend these sorts of claims.

CCP Graduate School v National Westminster Bank plc, which was another reverse summary judgment application, left open the question of whether, following *Philipp*, receiving banks have a common law duty to retrieve misappropriated funds (*[2024] EWHC 581 (KB); www.practicallaw.com/w-043-1198*). In *Larsson v Revolut Ltd*, an attempt to expand the contractual or tortious duties of a receiving bank was unsuccessful (*[2024] EWHC 1287 (Ch)*). However, the High Court did not give summary judgment against a claim in dishonest assistance, holding, contrary to *Tecnimont Arabia*, that it is arguable that the funds paid into the account with the receiving

bank are trust property because the transfer was procured by fraud.

Digital assets

While the Property (Digital Assets etc) Bill continues to progress through Parliament, in *D'Aloia v Persons Unknown Category A and others*, the High Court confirmed, for the first time at a full trial, the conclusions that had already been reached at interim hearing level; that is, that digital assets (in this case, the stablecoin USD Tether) constitute property under English law (*[2024] EWHC 2342 (Ch)*).

Derivatives

Deutsche Bank AG London and Dexia SA v Provincia di Brescia is the latest in a series of cases where an Italian local authority has sought to challenge the validity of English-law governed derivatives that are subject to the exclusive jurisdiction of the English courts by relying on Italian law arguments that go to the authority's capacity or authority to enter into the derivatives (*[2024] EWHC 2967 (Ch)*). In *Deutsche Bank*, the parties had settled a previous dispute relating to the derivatives in question, which had been reflected in an Italian-law governed settlement agreement. The settlement agreement did not contain a jurisdiction clause. In upholding the validity of both the transactions and the settlement agreement, the High Court noted the wide terms of the derivatives master agreement jurisdiction clause, considering that it was sufficiently broad to capture any dispute, not only as to the validity of the transactions, but also as to the effect of the Italian law-governed settlement agreements.

Securities litigation

In *Allianz Funds Multi-Strategy Trust and others v Barclays Plc*, claimants issued claims under section 90A of the Financial Services and Markets Act 2000, arguing that they had relied on misstatements or omissions in published information issued by Barclays, which had caused them a loss (*[2024] EWHC 2710 (Ch)*). Barclays applied to strike out the claims of those claimants whose reliance was described as "price reliance"; that is, where they could not show individual reliance but instead had relied on the share price, which is also known as the "fraud on the market" theory.

The High Court granted Barclays' strike-out application, in a decision that is consistent with the High Court's remarks in *Autonomy and others v Lynch and another* that claimants must have actually read the information (*[2022] EWHC 1178; see News brief "HP's section 90A claim: guidance on liability and ESG class actions", www.practicallaw.com/w-036-0481*). The effect of the strike out was to reduce the quantum of the claim by 60%. The proceedings have since settled meaning that, for now, this is the final word on the issue.

Commission payments

The Court of Appeal considered the underlying common law principles on discretionary commission in the joined cases of *Johnson v Firstrand Bank Ltd (London Branch) (t/a Motonovo Finance), Wrench v FirstRand Bank Ltd* and *Hopcroft v Close Brothers Ltd* (*[2024] EWCA Civ 1282; see News brief "Broker duties, lender liability and secret commission: broking bad", www.practicallaw.com/w-045-0984*). The claimants were individual customers who had bought cars from car dealerships. In each case, the Court of Appeal found that the car dealers had acted as credit brokers for these customers. The dealers had received a discretionary commission from the lenders for arranging the finance under a commission structure that allowed them to set the interest rate, and correspondingly the commission rate, under the financing agreements. In upholding the appeals, the court found that:

- The dealers owed a disinterested duty to the customers, as well as a fiduciary duty.
- There had been a breach of both duties because of the existence of the commission arrangements with the lenders and the lack of informed consent to these arrangements by the customers.
- The lenders were liable under common law principles where a secret commission was paid. Where the commission was partially disclosed, the lender was found to be liable as an accessory to the dealer's breach of fiduciary duty.

The court provided key guidance regarding:

- The disclosure of commission arrangements, which must be adequately signposted and oblique references to which would be insufficient to negate secrecy.

Judicial review and scrutiny of regulatory decisions

In a decision that highlights the obstacles that claimants will face when challenging decisions of specialist decision makers through judicial review, the Court of Appeal in *R (on the application of Elliott Associates LP and another v London Metal Exchange and another* dismissed an appeal of the High Court's judgment in favour of the London Metal Exchange (LME) in relation to the LME's decision to cancel trades in three-month nickel futures in response to the nickel crisis in March 2022 (*[2024] EWCA Civ 1168*). The court found that the cancellation was lawful, and that the LME's decision making had been driven by unprecedented and urgent circumstances that left it with effectively no choice but to cancel the trades, a power it was legally required to have in the event of such exceptional circumstances. Assessed in this context, the court found that the decisions had been rational and lawful.

In a decision showing the Court of Appeal's reluctance to imply restrictions on wide express regulatory powers granted to the Financial Conduct Authority (FCA) by statute, the Court of Appeal in *FCA v Bluecrest Capital Management (UK) LLP* confirmed that the FCA is entitled, under section 55L of the Financial Services and Markets Act 2000 (FSMA) to impose a redress requirement on a regulated firm even where the pre-conditions for a statutory market-wide redress scheme under section 404F of FSMA are not met, provided that the decision is rational and advances the FCA's objective of securing an appropriate degree of consumer protection (*[2024] EWCA Civ 1125; see News brief "Single-firm schemes of customer redress: Court of Appeal clarifies FCA powers", www.practicallaw.com/w-044-8134*). The court in *Bluecrest* also notably confirmed that the FCA is entitled, in certain circumstances, to advance wider or amended allegations in the Upper Tribunal than those that appeared in any earlier decision notice.

- The accessory liability of a lender for assisting in a breach of fiduciary duty. To establish liability, the lender must be shown to know of the fiduciary relationship between the customer and the broker. It must also be shown that the lender either knew of the breach of that duty or turned a blind eye to it.

- Unfair relationships under section 140A of the Consumer Credit Act 1974 (CCA). Relationships will not necessarily be unfair purely because a broker receives a commission from the lender of which the borrower is not aware; the court must consider all the facts and weigh their importance.

The Supreme Court granted permission to appeal.

In another motor finance decision, the High Court in *R (on the application of Clydesdale Financial Services Ltd) v Financial Ombudsman Service* declined to uphold the judicial review of a Financial Ombudsman Service (FOS) decision relating to commission arrangements between a car dealer and a lending bank, which had affected the interest rate payable by the customer (*[2024] EWHC 3237 (Admin)*). The FOS decision concerned the commission arrangements and what had been disclosed to the customer about them. The FOS had ultimately determined that the arrangement had, in breach of regulatory standards, not been adequately disclosed and that this had given rise to an unfair relationship under the CCA. The High Court supported the FOS's reasoning in relation to all grounds.

Bringing challenges

Practitioners who may be considering judicial review or other challenges to regulatory decisions need to be aware of the obstacles that may need to be faced (*see box "Judicial review and scrutiny of regulatory decisions"*).

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