IN-DEPTH

# Banking Litigation

## UNITED KINGDOM

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# Banking Litigation

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Slaughter and May

In-Depth: Banking Litigation (formerly The Banking Litigation Law Review) provides a practical overview of the litigation landscape and framework for banking disputes in major jurisdictions worldwide. Focusing on recent developments and trends, it examines a wide range of issues – including significant recent cases and legislative changes; procedural considerations; legal privilege; conflicts of law; available remedies; exclusion of liability; and much more.

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# United Kingdom

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## Summary

# Introduction

In a year of political changes and continuing geopolitical turmoil, the United Kingdom continues to represent a key jurisdiction for banking litigation, given London's leading role in global financial services and the recognised calibre of English law and English judges.

The year 2024 has seen judicial decisions on the rights and responsibilities of banks and other financial institutions, as well as shaping of the broader litigation landscape with respect to group actions and litigation funding. The impact of Russian sanctions on financial institutions and other corporates continues to give rise to litigation. The change in government has already brought legislative developments and is likely to see further changes to the regulatory landscape affecting banks and other financial institutions in the years to come.

# Year in review

## Recent cases

### The Quincecare duty and authority of a customer's agents

The *Quincecare*[1] duty, which arises from a bank's general duty to exercise reasonable skill and care in processing customer payment instructions, has been addressed in previous editions of this *Review,* and over the past year, the courts have provided further guidance on its scope. *Quincecare* established the proposition that, where a bank is on notice that a payment instruction from a customer's agent may be a fraudulent attempt to obtain the account holder's funds, but nonetheless executes that payment, the customer may seek redress from the bank for doing so.

As discussed in last year's edition, the Supreme Court considered advanced push payment (APP) fraud in *Philipp v. Barclays Bank UK Plc*[2] and emphasised the banks' 'basic duty' to make payments in accordance with the customer's instructions and should not be concerned with the 'wisdom or risks' of those instructions. The Supreme Court recognised that the steps that banks should take to guard against APP frauds was a question of policy for regulators and the governments, not the courts.

Following the decision in *Philipp*, the High Court will now consider in *CCP Graduate School Ltd v. National Westminster Bank plc*[3] whether a sending or receiving payment service provider (PSP), or both, owes a duty directly to authorised push payment (APP) fraud victims, to take reasonable steps to retrieve or recover the sums paid out as a result of the fraud. In this case, fraudsters induced CCP to make 15 payments from its NatWest bank account (the sending PSP) to a Santander account (the receiving PSP) and then quickly dissipated the funds. The High Court heard applications for reverse summary judgment and strike out, pursued by the PSPs. The claim against the sending PSP was summarily dismissed on the basis that it was brought outside the relevant limitation period. However, the judge hearing the applications did not strike out the retrieval duty claim against the

receiving PSP, allowing the case to proceed towards trial. Although Santander owed no *Quincecare* duty to CCP, the judge found that it was arguable that Santander owed a duty of retrieval to CCP on the basis that it had a measure of control over the dissipating payments and was in a special position to take steps to recover the sums.

The decision to consider this novel retrieval duty is likely to cause some apprehension for PSPs and financial institutions that would have taken a breath following the Supreme Court's decision in *Philipp*. This is particularly so in the context of the UK Payment Systems Regulator's reimbursement rules for APP fraud, which took effect in October 2024, requiring PSPs to reimburse victims of APP fraud up to a maximum of £85,000.[4] In parallel, the UK Financial Conduct Authority (FCA) intends to introduce new guidance as to whether banks can delay executing a payment for a short period of time where they suspect fraud.-[5] The FCA finds that the implementation of any such delay has a 'high' threshold and 'requires a rigorous case-by-case approach'.

Relatedly, the High Court in *Larsson v. Revolut*[6] and*Terna Energy Trading v. Revolut*-[7] refused to strike out claims against Revolut for dishonest assistance and unjust enrichment brought on the basis that Revolut, in its capacity of receiving PSP, benefitted from APP frauds committed against the claimants. While the High Court's willingness to entertain claims against receiving banks will concern PSPs, the Court in *Larsson* did strike out the claimant's argument that the fraud constituted a breach of contractual and tortious duties of care. The claimant's argument centred around his own, separate, account with Revolut, by which the claimant argued that it had a contractual duty to stop another account being opened in the customer's name, and a tortious duty to have adequate systems in place to minimise fraud. The contractual duty was dismissed because the bank did not have an obligation to prevent the claimant opening another account, and in any event the claimant did not do so. The tortious argument failed because a third-party bank would not have such a duty, and it was not reasonable to impose a duty on Revolut simply because the claimant otherwise banked with it.

Group actions

The previous edition of this *Review* highlighted the growth of group and class actions in the United Kingdom against financial institutions and this theme has continued in 2024 in respect of securities actions (discussed below) but also more broadly. For example, in September, the High Court ruled in respect of three preliminary issues in *Donna Breeze v. TSB Bank Plc*, claims brought by almost 400 homeowners whose mortgages were administered under TSB's Whistletree brand, which was set up after TSB acquired a mortgage portfolio from Northern Rock after it collapsed during the 2008 financial crisis.

The High Court found that TSB had not breached the terms of its contracts with hundreds of homeowners who claim they are 'mortgage prisoners',[8] trapped into paying rates higher than rates of other TSB customers after their mortgages were sold to Whistletree.

Litigation funding

Last year's edition of the *Review* covered the Supreme Court's decision in *R (on the application of PACCAR Inc and others) v. Competition Appeal Tribunal and others.*[9] In *PACCAR*, the Supreme Court ruled that class action litigation funding agreements must

comply with the regulatory regime for damages-based agreements (DBAs) and cannot be used in opt-out collective competition law proceedings.

Since then, the government's planned Bill to reverse the effect of PACCAR will no longer proceed, following the change to a Labour government, meaning that the uncertainty around PACCAR remains.[10] The Civil Justice Council is currently conducting a review of litigation funding, including in respect of PACCAR, with the report due in summer 2025.[11] The government has indicated that it will only review the law around litigation funding following publication of the report, meaning that legislative developments in this area should not be expected until autumn 2025 at the earliest.[12]

More broadly, the Legal Services Board (LSB) has published research into litigation funding and its potential to 'protect and promote' access to justice, the interests of consumers and the public interest.[13] The research concluded that litigation funding serves the public interest by opening the door to litigation that could not otherwise proceed to court. However, the LSB also acknowledges that the practical effect of litigation funding on access to justice is limited by the cautious attitude of funders, who select between 3 and 5 per cent of funding opportunities.

Furthermore, the UK Competition Appeal Tribunal (CAT) has also considered the impact of *PACCAR* on funding arrangements in a number of cases this year, including *Commercial and Interregional Card Claims Limited v. Mastercard*.[14] In this case, the CAT approved a funding arrangement that included a percentage-based fee structure that would only apply if it were enforceable or permitted by applicable law. This is the third time[15] that the CAT has approved the post-*PACCAR* approach of retaining a damages-based approach contingent on a change in law permitting its enforcement.

Securities litigation

Influenced by the growth of shareholder activism, mass group litigation and litigation funding opportunities in the United Kingdom, claims brought pursuant to Sections 90 and 90A of the Financial Services and Markets Act 2000 (FSMA) continue to rise. As discussed in prior editions of the *Review*, Sections 90 and 90A of FSMA provide a right of action to investors to recover losses allegedly suffered as a result of untrue or misleading statements or omissions contained in listing particulars, prospectuses or in other information published to the market.

*Various Claimants v. Standard Chartered PLC*[16] is one such claim, in which 226 shareholders in Standard Chartered allege that untrue or misleading statements and omissions in information published to the market caused losses totalling £1.45 billion, as the claimants relied on this information in acquiring, disposing or holding securities issued by Standard Chartered between 2007 and 2019. In 2024, the High Court rejected applications for strike-out and reverse summary judgment brought by Standard Chartered on the basis that the claims were pleaded on a 'purely generic basis' and the claimant should have taken steps to verify their claims. The claimants argued that the High Court should dismiss these applications on the basis that this was a developing area of law and a matter that may be affected by further investigation of the evidence. The judge dismissed a part of the application aimed at individual reliance claims on the basis that it was adequately particularised and the claimants had agreed to provide further information on their claims, although agreed to strike out an allegation that the four non-executive

directors of Maxpower (a company 47 per cent owned by Standard Chartered) were persons discharging managerial responsibilities (PDMRs) of the defendant, on the basis that this was 'unsustainable in law'. This was relevant because an issuer's liability only arises when PDMRs know, or are reckless as to the fact, that information published to the market is untrue or misleading.

At a subsequent hearing, the Court determined that the matter would be dealt with by way of a split trial, with standing, liability and common reliance issues heard at trial 1 (scheduled for October 2026) and all other reliance issues, causation, quantum and liability to be addressed at trial 2. This reflects the structure adopted in other securities cases by the courts.

Relatedly, in December 2023, the High Court handed down judgment in *Wirral Council v. Indivior PLC / Reckitt Benckiser Group PLC*,[17] rejecting Wirral Council's attempt – the first of its kind for claims under Sections 90 and 90A – to act as a representative claimant. The Court of Appeal granted permission to appeal, which will be heard on 10 December 2024. If the High Court's judgment is overturned, this would enable securities actions to be brought by a single investor on behalf of a class of affected investors, potentially increasing the risk of these types of claims being brought against financial institutions.

Russian sanctions

As the legal ramifications of Russia's war against Ukraine continue to unfold, the UK–Russian sanctions regime, as covered in last year's *Review*, has developed into high profile cases concerning financial institutions before the English courts this year.

In June 2024, in *Celestial Aviation Services Ltd v. UniCredit Bank AG (London Branch)*,[18] the Court of Appeal held that the UK sanctions regime excused a bank from making payment under various letters of credit issued in connection with the supply of aircraft to Russian Airlines. Overturning the High Court's decision, the Court of Appeal adopted a more literal interpretation of Regulation 28 of the Russia (Sanctions) (EU Exit) Regulations 2019, which restricts the provision of financial services or funds in relation to the supply of certain restricted goods – in this case, aircraft. This decision also provides a warning about the requirement for parties to use reasonable efforts to obtain licences in sanctions cases in order to rely on the well-recognised foreign illegality principle that the English courts will not enforce an obligation that is unlawful in the place of performance.[19] Such principle could apply in this case, as payment in US dollars was required; however, the Court of Appeal held that UniCredit was precluded from relying on it because it had not made reasonable efforts to obtain the relevant licence.

Notwithstanding, this year the English courts have been more proactive in assisting financial institutions to navigate the complexity posed by Russian sanctions particularly in the context of litigation brought in Russia. In *UniCredit v. RusChemAlliance (RCA)*,[20] UniCredit pursued an anti-suit injunction against RCA after RCA launched proceedings in Russia relating to a claim for payment under UniCredit's bonds. Initially, UniCredit's application failed in the High Court; however, it later succeeded in both the Court of Appeal and the UK Supreme Court. The key questions at issue were whether:

1.

the arbitration agreement was governed by English law, as was the surrounding agreement, or French law, as the agreement provided for an International Chamber of Commerce arbitration seat in Paris, and

2. the English courts were the proper place to seek the anti-suit relief. Relying on the authority of *Enka v. Chubb*,[21] which provides that the governing law of an arbitration clause will generally be the same as the governing law for the rest of the agreement, the English courts were found to have jurisdiction and were able to award this anti-suit injunction, requiring RCA to withdraw their Russian proceedings.

Relatedly, the High Court has granted anti-suit and anti-enforcement injunctions in favour of Barclays, preventing Russia's state development bank VEB from pursuing a claim commenced in breach of an arbitration clause and from enforcing any substantive order made in this claim in the Russian courts.[22] The dispute arose from Barclays' inability to pay sums due under an existing ISDA agreement with VEB subject to English law and arbitration, owing to sanctions imposed on VEB, which effectively suspend VEB's right to demand payment. Notably, the Court decided that the sanctions did not prevent VEB from obtaining substantive justice in the English courts, given the existence of general licences in respect of litigation costs to £500,000, and the opportunity to apply for a specific licence in respect of sums in excess of that figure.

The High Court also ordered a Russian company claimant to pay security for costs in *LLC EuroChem North-West-2 v. Société Générale SA & Ors*.[23] In this claim, the defendant banks accepted that they are contractually obliged to pay sums due under bonds but argued that payment would contravene certain sanctions rules, owing to EuroChem being controlled by two designated individuals. Following an application for security for costs, the Court ordered EuroChem to pay £1.85 million into court and refused to allow the security to be offered by way of a parent company guarantee because of concerns that acceptance of any such guarantee from the claimant's Swiss parent company would violate sanctions laws.

These decisions confirm the English courts' continuing willingness to exercise their jurisdictional and procedural tools in support of financial institutions and other corporates impacted by Russian (and other) sanctions, and this theme is set to continue given the ongoing conflict in Ukraine and the complexity of modern sanctions regimes.

Payment protection insurance and the Consumer Credit Act

The Courts have also taken steps to recognise the finality of settlement agreements in relation to payment protection insurance (PPI) claims.

In September, the Court of Appeal handed down judgment in the joined appeals in *Harrop v. Skipton Building Society* and *Self v. Santander Cards UK Limited*.[24] The appeals involved a challenge to settlements of Plevin-type undisclosed commission claims under Section 140A of the Consumer Credit Act 1974 arising from the sale of PPI policies. In response to the Supreme Court's decision in *Plevin v. Paragon Personal Finance*,[25] the FCA had established detailed rules guiding financial institutions on how they should respond to undisclosed commission claims arising from PPI policies and setting out on what basis redress ought to be offered. In both *Harrop* and *Self*, the claimants had accepted offers of

redress determined in accordance with the FCA's rules. The redress was offered in full and final settlement of claims in respect of undisclosed commission.

The claimants in both cases brought claims under Section 140A by which they attempted to re-open their respective settlements. Their arguments included that there was no valid consideration for the settlement agreement because the financial institutions were under an existing obligation under the FCA rules to pay redress and that the settlement agreements should be re-opened by the Court of Appeal under Section 140A because they did not fully resolve the unfairness in the credit relationship.

The Court of Appeal rejected these arguments and found the settlements binding.

### Cryptocurrency and digital assets

In September 2024, the High Court ruled against the victim of a crypto fraud attempting to trace the stolen cryptocurrency to the Biktub exchange in Thailand.[26]

The Court held that the stablecoins are 'property' under English law and so are theoretically capable of being traced, but the victim had failed to prove that any of the missing stablecoins could be followed to a Bitkub wallet. However, while the victim failed to provide the necessary evidence and thus failed as a matter of fact, the Court did confirm that the coins were capable of being identified in mixed pools, and therefore it is theoretically possible to apply English law tracing rules to identify digital currency passing through multiple wallets. Although the claimant did not plead a claim for knowing receipt against Bitkub, the Court stated that, had the claimant succeeded in his tracing arguments (and therefore retained an equitable proprietary interest) and shown that Bitkub had received the assets with the requisite knowledge, a constructive trust may be imposed.

## Recent legislative developments

### Failure to prevent fraud

As mentioned in the previous *Review*, on 2 May 2024, the Economic Crime and Corporate Transparency Act 2023 created a new offence of failure to prevent fraud, which is expected to come into force in the first half of 2025. The Act will apply to large organisations that meet two or more of the following criteria, more than:

1. £36 million in turnover;
2. £18 million in balance sheet assets; and
3. 250 employees.

An organisation, including a financial institution, will be liable for this new offence if a person associated with it – such as an employee, agent or subsidiary – commits a fraud offence; however, a defence will be available if the organisation has reasonable procedures in place to prevent fraud. Guidance on this new offence and how organisations can implement reasonable procedures is expected to be published towards the end of 2024.

Naming companies under investigation: the FCA proposal

In February 2023, the FCA opened a consultation on its proposal to name companies under investigation in an attempt to increase transparency and deter wrongdoing in the financial markets.[27] The FCA's prior approach would be to not publicise the names of companies subject to investigation unless their investigation concluded in a formal statutory decision notice or, in 'exceptional circumstances', where it was deemed necessary to maintain public confidence. The FCA's announcement was met with concern from financial institutions and other stakeholders, given the potential impact publicising such matters could have on individual firms and the wider market. Greater detail on how the proposals will operate is expected in the final quarter of 2024.

## Jurisdiction and conflicts of law

The United Kingdom has ratified the 2019 Hague Judgments Convention, the international agreement by which the courts of contracting states must recognise and enforce certain judgments of other contracting state courts.[28] The Convention comes into force in the United Kingdom next July and will apply to English judgments only where the proceedings leading to the judgment were commenced after the Convention came into force (i.e., from 1 July 2025). The Convention will make it significantly easier to enforce certain English court judgments in 28 countries – including all bar one of the EU Member States – and vice versa. The United Kingdom's participation will be a welcome development to financial institutions looking to enforce

English court judgments overseas will restore a level of reciprocal enforcement with the European Union, which has been lacking since the end of the Brexit transition period.

## Sources of litigation

Aside from the continuing concerns regarding securities litigation and sanctions discussed elsewhere in this *Review*, Banks and other financial services are increasingly at risk of regulatory enforcement action, especially in the environmental, social and governance (ESG) space, where greenwashing regulation, reporting frameworks and shareholder activism have all grown in recent times. The Labour Party manifesto also included a commitment to mandate UK-regulated financial institutions and FTSE 100 companies to 'develop and implement credible transition plans that align with the 1.5°C goal of the Paris Agreement', indicating that this will be a focus for years to come.[29]

Banks and other financial institutions are therefore increasingly at risk from regulatory enforcement action, as well as private claims brought by activist groups. One notable example of these risks is the FCA's new anti-greenwashing regime, which came into effect this year and regulates sustainability-related claims about financial products and services. Under the new regime, FCA-authorised firms will have to comply with broad requirements for the marketing of investment products and additional disclosures at both product and entity levels to ensure that sustainability-related claims are 'fair, clear and not misleading'. The Competition Markets Authority's greenwashing investigation

of fashion brands ASOS, Boohoo and ASDA's George further highlights the regulatory focus on sustainability marketing and the increasing risk of enforcement proceedings. Relatedly, development of the corporate ESG reporting frameworks such as the ISSB disclosure standards will present heightened disclosure obligations. Although efforts to align standards and applications across jurisdictions would lower compliance costs, these increasingly strict standards present a significant enforcement risk going forwards.

Furthermore, the number of ESG-related civil claims being brought before the courts has increased globally. Last year's edition of the *Review* discussed ClientEarth's unsuccessful derivative action against Shell,[30] which argued that the company's failure to rapidly decarbonise its business caused damage to the value of ClientEarth's long-term equity interest in Shell. This year, ClientEarth was refused permission by the High Court to bring a judicial review claim against the FCA in relation to its approval of Ithaca Energy plc's prospectus.[31]

A separate source for potential litigation is the transition away from the London Interbank Offered Rate (LIBOR) interest rate, with a case involving Standard Chartered heard and decided in October 2024 seen as a 'test case' for the issue.[32] Standard Chartered argued that a dividend should be paid by reference to a term secured overnight financing rate with a credit adjustment spread (rather than LIBOR) on certain preference shares. The High Court concluded that the relevant contract contained an implied term that if LIBOR was not available, the reasonable alternative reference rate should be used, and that the rate proposed by Standard Chartered was the reasonable rate.

## Outlook and conclusions

The growth of class actions and group actions, particularly in the securities litigation space, and the liquidity available in the market to fund these claims, combined with changing reporting and regulatory environment under the Labour government, means that financial services firms operating in the United Kingdom continue to face an evolving landscape of litigation risk in which claims against banks and financial institutions are likely to increase. Firms may take some comfort, however, from the sophistication of the English courts to tackle with confidence geopolitical matters in favour of protecting financial institutions from sanctioned parties and from their ability to case manage multi-party, international and complex claims sensibly.

### Endnotes

**1** The *Quincecare* duty was established in *Barclays Bank plc v. Quincecare Ltd* [1992] 4 All ER 363. ^ Back to section

**2** *Philipp v. Barclays Bank UK plc* [2023] UKSC 25. ^ Back to section

**3** *CCP Graduate School Ltd v. National Westminster Bank plc* [2024] EWHC 581 (KB). ^ Back to section

**4** https://www.psr.org.uk/news-and-updates/latest-news/news/psr-confirms-its-decision-on-app-scams-reimbursement/. ^ Back to section

**5** https://www.fca.org.uk/publication/guidance-consultation/gc24-5.pdf. ^ Back to section

**6** *Larsson v. Revolut Ltd* [2024] EWHC 1287 (Ch). ^ Back to section

**7** *Terna Energy Trading doo v. Revolut Ltd* [2024] EWHC 1419 (Comm). ^ Back to section

**8** *Donna Breeze and others v. TSB Bank Plc* [2024] EWHC 2427 (Ch). ^ Back to section

**9** *R (on the application of PACCAR Inc and others) v. Competition Appeal Tribunal* [2023] UKSC 28. ^ Back to section

**10** Litigation Funding Agreements (Enforceability) Bill HL Bill 72 (as amended in Grand Committee). ^ Back to section

**11** https://www.judiciary.uk/related-offices-and-bodies/advisory-bodies/cjc/current-work/third-party-funding/. ^ Back to section

**12** https://questions-statements.parliament.uk/written-questions/detail/2024-07-29/hl449. ^ Back to section

**13** https://legalservicesboard.org.uk/wp-content/uploads/2024/05/A-review-of-litigation-funding.pdf. ^ Back to section

**14** *Commercial and Interregional Card Claims I Limited v. Mastercard Incorporated & Others* [2024] CAT 3. ^ Back to section

**15** After *Alex Neill Class Representative Limited v. Sony* [2023] CAT 73 and *Gormsen v. Meta* [2024] CAT 11. ^ Back to section

**16** *Various Claimants v. Standard Chartered plc* [2023] EWHC 2756 (Ch). ^ Back to section

**17** *Wirral Council v. Invidor plc*; *Wirral Council v. Reckitt Benckiser Group plc* [2023] EWHC 3114 (Comm). ^ Back to section

**18** *Celestial Aviation Services v. UniCredit* [2024] EWCA Civ 628. ^ Back to section

**19** *Ralli Bros v. Compania Naviera Sota y Aznar* [1920] 2 KB 287. ^ Back to section

**20** *Unicredit v. RusChemAlliance* [2024] UKSC 30. ^ Back to section

**21** *Enka Insaat Ve Sanayi AS (Respondent) v. OOO Insurance Company Chubb (Appellant)* [2020] UKSC 38. ^ Back to section

**22** *Barclays Bank plc v. VEB.RF* [2024] EWHC 1074 (Comm). ^ Back to section

**23** *LLC EuroChem North-West-2 v. Société Générale SA & Ors* [2024] EWHC 1084 (Comm). ^ Back to section

**24** *Self v. Santander Cards UK Limited* [2024] EWCA Civ 1106. ^ Back to section

**25** *Plevin {Respondent) v. Paragon Personal Finance Limited (Appellant)* [2017] UKSC 23. ^ Back to section

**26** *Fabrizio D'Aloia v. Persons Unknown Category A, Binance Holdings Limited, Polo Digital Assets Inc, Gate Technology Corp, Aux Cayes Fintech Co Ltd, Bitkub Online Co Ltd, Persons Unknown Category B* [2024] EWHC 2342 (Ch). ^ Back to section

**27** https://www.fca.org.uk/publication/consultation/cp24-2.pdf. ^ Back to section

**28** https://www.hcch.net/en/instruments/conventions/full-text/?cid=137. ^ Back to section

**29** Labour Party Manifesto Make Britain a clean energy superpower – The Labour Party; https://labour.org.uk/wp-content/uploads/2024/03/Make-Britain-a-Clean-Energy-Superpower.pdf. ^ Back to section

**30** *ClientEarth v. Shell plc* [2023] EWHC 1897 (Ch). ^ Back to section

**31** *R (on the application of ClientEarth) v. Financial Conduct Authority* [2023] EWHC 3301 (Admin). ^ Back to section

**32** *Standard Chartered plc v. Guaranty Nominees Limited and others* [2024] EWHC 2605 (Comm). ^ Back to section

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