THE Banking Litigation Law Review

Fourth Edition

Editor
Deborah Finkler

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THE BANKING LITIGATION LAW REVIEW

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PREFACE

This year's edition of *The Banking Litigation Law Review* demonstrates that litigation involving banks shows little sign of slowing and continues to evolve.

Disputes that have arisen in the past year cover a broad spectrum, from claims by consumers against banks (relating to losses incurred either to the bank or to third parties) to claims by banks for the recovery of loans and the enforcement of guarantees. Cross-border issues frequently arise, with banking litigation continuing to be a key area of focus for international commercial litigation.

One of the major challenges of 2020 has, of course, been covid-19, and this year has demonstrated the resilience and flexibility of court systems around the world, including in the UK, in adapting their procedures in order to minimise disruption to the administration of justice. At the time of writing, the 'new normal' in many jurisdictions now provides for virtual hearings (including remote witness evidence) and electronic trial bundles as a default. This enforced experiment seems likely to have a lasting impact on court procedures around the world. While it is likely that trials involving witness evidence will revert to being largely in person, the need to do so for many procedural applications is less obvious. In any event, it is to be hoped that some of the positive aspects of operating remotely – for example the reduction in the amount of paper used – are here to stay.

A continuing trend is the increase in the use of class or multi-party actions and representative claims. Although often perceived as a predominantly US phenomenon, the past year has seen growth in the use of class actions within non-US jurisdictions, particularly in the UK, Canada and Australia. Whether this rise is the precursor to a worldwide adoption will depend on a number of factors, including any new mechanisms for group actions that are adopted in countries where they did not previously exist and the way courts in different jurisdictions react to such new actions. In the UK, for example, judgment is keenly awaited in a Supreme Court case that is expected to play a key role in clarifying the operation of a new collective proceedings regime and, depending on its outcome, either energise or curtail the growth of competition class actions in the UK. Related to the rise of group actions, one potential area of reform is third party litigation funding (a frequent driver of such actions). Recent regulatory reforms in Australia means that litigation funders are now required to hold a licence and must comply with the same conduct obligations to which banks and other credit providers are subject, including the requirement to provide their licensed 'financial services' efficiently, honestly and fairly. It will be interesting to see whether other jurisdictions follow suit.

The preface to last year's edition highlighted the concern that claimants will seek to use data protection legislation, including the General Data Protection Regulation (GDPR) in the European Union, as a tool in litigation, and noted that this concern is only likely to grow. The rise of UK class action cases for damages resulting from data breaches in the past year reinforces the importance of banks managing such risks, both in a regulatory and in a litigation context. Set against the background of increasingly litigious and well-funded claimants, and considering the extensive volume of personal data that banks hold, the need for adequate systems and controls to protect the data of consumers and employees is ever more vital.

At the time of writing, the Brexit transition period is drawing to an end, and nobody is any closer to being able to say what the political or economic impact of Brexit will be. The prospect of the transition period ending with no deal is a real possibility, and it remains to be seen whether the UK can agree a deal with the European Union in the time available. The UK government has declared its intention to sign up to either or both of the 2007 Lugano Convention and 2005 Hague Convention on Choice of Court Agreements, but unless and until that happens there remains a degree of uncertainty over jurisdiction and the enforcement of judgments.

Overall, 2020 has no doubt been a tumultuous year for many. As the year approaches its end, there are some reasons for optimism: global stock markets surged following the results of the US 2020 presidential elections and news of significant strides being made in the development of a covid-19 vaccine. Nevertheless, a substantial amount of political and economic uncertainty remains. Moving forward, the prospect of an unknown future legal landscape in the UK, and to an extent in the remainder of the EU, following Brexit and the continuing effect of covid-19 on the world economy (which may well persist long after the virus itself has been contained) can be expected to generate disputes in the banking sector for a long time to come.

Deborah Finkler
Slaughter and May
London
November 2020

Chapter 12

UNITED KINGDOM

Deborah Finkler and Liu Hui[1]

I OVERVIEW

Against the backdrop of exiting the European Union and covid-19, the UK has continued to maintain its status as a key jurisdiction for litigation involving banks and other financial institutions. The UK left the European Union on 31 January 2020 and is now in a transition period that ends at 11pm on 31 December 2020. Despite the uncertainty of Brexit and covid-19, there is no reason to think that banking litigation in the UK will decrease.

II SIGNIFICANT RECENT CASES

In this section, cases from the past year that may be of particular interest to banking litigation practitioners are highlighted.

i Implied contractual duties of good faith and rationality

While there is no general English law doctrine of good faith, there are circumstances in which the English courts will imply duties of good faith and rationality into a contract. There has been much litigation on this issue in recent years, and a number of decisions in the past year have demonstrated the relative unwillingness of the courts to expand the scope of such duties, particularly in contracts negotiated between sophisticated commercial parties.

An implied duty of good faith may arise in a specific class of 'relational contracts', which are contracts that require a high degree of co-operation, communication and confidence between the parties.[2] In *Morley v. RBS*,[3] the court firmly rejected an argument that a loan agreement between RBS and the claimant borrower constituted a 'relational contract' and that a duty of good faith ought to be implied into the entire loan agreement. Instead, the court found the contract to be 'an ordinary loan facility agreement'. The court did accept that a duty of good faith attached to RBS's exercise of its contractual discretions under the loan agreement,[4] but found that RBS's decision to call in the loan was a contractual right and not a discretion. Where RBS exercised its contractual discretion to obtain a revaluation of the charged assets and to charge a default interest rate, it had discharged its duty of good faith because its decisions were rationally connected to its legitimate commercial interests.

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1 Deborah Finkler is a partner and Liu Hui is an associate at Slaughter and May. The authors would like to thank Ben Lewy, barrister from One Essex Court on secondment at Slaughter and May, associate Melissa McFarlane and trainee Emma Reynolds for their input on the chapter.
2 *Yam Seng Pte Ltd v. International Trade Corporation Ltd* [2013] 1 Lloyds Rep 526.
3 [2020] EWHC 88 (Ch).
4 *Property Alliance Group Ltd v. Royal Bank of Scotland plc* [2018] EWCA Civ 355.

As discussed in the Third Edition of this Review, the 2015 Supreme Court decision in *Braganza v. BP Shipping Limited*[5] held that, in certain circumstances, a term may be implied that requires a party exercising a contractual discretion to act in good faith and not arbitrarily or capriciously (what is referred to as a *Braganza* duty). The application of the *Braganza* duty was clarified in *TAQA Bratani & Ors v. RockRose*,[6] in which the claimant's notice to terminate four Joint Operating Agreements (the JOAs) was challenged by the defendants on the basis that a *Braganza* duty should be implied into the JOAs. This was rejected by the court, which held that the termination provisions clearly conferred onto the claimants an unqualified right to terminate, and that there was no contractual discretion in relation to which a *Braganza* duty could be said to arise. The relevant provision created an absolute right and did not require the claimants to undertake any 'evaluatory' or adjudicatory exercise before they were entitled to take the decision. According to the court, 'the Braganza doctrine has no application to unqualified termination provisions within expertly drawn complex commercial agreements between sophisticated commercial parties.' In fact, extending the doctrine to an absolute termination right would be an unwarranted interference in the freedom of the parties to contract on the terms they choose.

In addition, the court stated that although it was at least arguable that the JOAs were 'relational contracts', that does not lead to a conclusion that it is necessary to imply a good faith obligation. Instead, the implication of such duties require the satisfaction of a number of requirements, including that the implication of the term must be necessary to give business efficacy to the contract or to give effect to what was so obvious that it went without saying.

TAQA was applied in *Cathay Pacific v. Lufthansa*,[7] which concerned a contract that permitted Cathay 'at its option' to remove aircraft engines from the service programme being provided by Lufthansa. The Court rejected Lufthansa's argument that Cathay's exercise of this contractual option was subject to a *Braganza* duty, finding that the option was closely analogous to the termination right considered in *TAQA*, as it was unqualified. The Court also noted that a power to terminate or withdraw an object from a contract of service was by definition a power inserted for the benefit of the terminator or withdrawing party, and ought usually to take effect in accordance with its express terms. In addition, the court found that although the contract was long-term (for 10 years) and exclusive, it was not a 'relational contract' because other core indicia of a 'relational contract' (e.g., that the spirit and objectives of the venture may not be capable of being expressed exhaustively in a written contract)[8] were not present.

ii Reflective loss

The doctrine of reflective loss operates in certain circumstances to prevent a person who has suffered loss as a result of their interest in a company from claiming directly against the third party who has caused that loss to the company. The reasoning is that the claimant's loss is merely reflective of the loss suffered by the company, and it is the company that is the

5 [2015] UKSC 17.

6 [2020] EWHC 58 (Comm).

7 [2020] EWHC 1789 (Ch).

8 Other core indicia of 'relational contracts' are that they are typically longer-term relationships with significant investment (i.e., substantial financial commitments) and require a high degree of communication, co-operation and predictable performance based on mutual trust, confidence and loyalty – *Bates v. Post Office Ltd* [2019] EWHC 606 (QB).

proper claimant. Although this doctrine was initially confined to claims by shareholders,[9] in recent years it had been broadened to also capture claims by creditors.[10] Following the Supreme Court's decision in *Sevilleja v. Marex*,[11] however, those authorities that broadened the doctrine have been overturned and the scope of the doctrine of reflective loss significantly narrowed.

Marex involved a tort claim by Marex, an unsecured creditor, against Mr Sevilleja, who was the owner of two companies. Mr Sevilleja had arranged for assets to be transferred out of the companies so that Marex could not enforce its judgment debt. When Marex brought a claim in tort against Mr Sevilleja, Mr Sevilleja argued that Marex's claim was barred by the doctrine of reflective loss because Marex's losses were reflective of the companies' loss. In a landmark judgment, which overturned a number of Court of Appeal cases, the Supreme Court unanimously allowed Marex's claim by finding that the reflective loss principle did not in fact apply to creditors. The Supreme Court's reasoning was that the relationship between a creditor and a company is not analogous to that of a shareholder because the amount a company is indebted to a creditor is not dependent on the value of the company, even in cases where the company has substantially the same cause of action.

The outcome of *Marex* means that the doctrine of reflective loss is once again confined only to shareholders, where loss suffered by a company has caused a diminution in the value of their shares or a reduction in distributions, in respect of which the company also has a cause of action. Creditors now have a clearer route of recovery against a wrongdoer who has deprived a borrower company of its assets.

iii Corporate liability in data breach cases

Group action claims against corporates involving data breaches continue to make their way through the English courts, with no sign of abating. In the past year, there have been a number of decisions that have clarified the court's approach to corporate liability in connection with data breaches.

In *Lloyd v. Google*,[12] the Court of Appeal held that damages are 'in principle' capable of being awarded, even in the absence of any pecuniary loss or distress, for privacy breaches that lead to a loss of control over data. Lloyd is an opt-out class action against Google on behalf of four million iPhone users. The claimants allege that Google tracked their iPhone activity without their consent from April 2011 to February 2012 and used the information for targeted advertising for Google's 'commercial purposes'. Even though the opt-out nature of the claim makes it impossible for the claimants to demonstrate that each of them has suffered loss or distress as a result of the data breaches, the Court of Appeal granted the claimants approval to proceed with their claim. At the time of writing, this decision is subject to an appeal, which is expected to be heard by the Supreme Court in early 2021.

WM Morrison Supermarkets Plc v. Various Claimants[13] looked at one aspect of how corporates can be found liable in common law for data breaches. *WM Morrison* was a group action by Morrisons' employees for compensation resulting from the leak of the personal data of almost 100,000 staff by a rogue IT employee. The Supreme Court held that vicarious

9 *Prudential Assurance Co Ltd v. Newman Industries Ltd* [1982] Ch 204.

10 *Gardner v. Parker* [2004] EWCA Civ 781.

11 [2020] UKSC 31.

12 [2019] EWCA Civ 1599.

13 [2020] UKSC 12.

liability did not attach to Morrisons because the rogue employee was acting for personal reasons following disciplinary action by the supermarket, had used a personal laptop, and had distributed the data online outside of working hours. While *WM Morrison* may be a welcomed decision in paring back the applicability of vicarious liability in data breaches, the Supreme Court stopped short of finding that vicarious liability can never attach to a corporate via an employee, and each future case will turn on its facts.

Further group actions have arisen from high profile data breaches in the past year, which will be cases to watch going forward. On 4 October 2019, British Airways customers were granted court permission to bring a claim in relation to a cyberattack, in which half a million individuals' personal information was exposed to an unknown third party. In June 2020, EasyJet was served with a group action claim by up to 10,000 customers across more than 50 countries, for a data breach on 19 May 2020 where the personal data of nine million customers had been exposed. In addition, Marriott, Oracle, Salesforce and Google subsidiary YouTube are facing potential group actions for data-related breaches.

iv First Financial Markets Test Case Scheme

The year 2020 saw the first test case brought under the Financial Markets Test Case Scheme pilot. The pilot was introduced on 1 October 2015 to allow parties to litigate market issues of general importance, even where there is no cause of action between parties, on the basis that 'immediately relevant authoritative English law guidance is needed'.

On 9 June 2020, the UK's Financial Conduct Authority (FCA) brought the first ever case under the scheme, after a number of insurers refused business interruption claims for losses suffered as a result of covid-19. The test case sought clarity on the meaning and effect of covid-19 on non-damage business interruption insurance policy wording. The court's decision, which was published in a record 47 days,[14] found that disease clauses, which broadly cover business interruption caused by a notifiable disease, will in many cases be construed widely, thereby allowing businesses a greater chance of recovering their covid-19 losses. On 3 November 2020, the Supreme Court granted the FCA, six defendant insurers and the intervening party Hiscox Action Group permission to appeal to the Supreme Court; the hearing begins on 16 November 2020. It has been reported that a claimant law firm is preparing a group action claim against a further 12 insurers for their refusal to pay out on claims for business damage caused by covid-19.

The FCA's success in using the scheme to obtain a judgment in a short timespan may encourage others to bring further test cases under the scheme.

v Lender liability

Barness v. Ingenious[15] demonstrates the court's reluctance to find lender liability in claims by disgruntled investors who have lost money in tax deferral schemes. This case was brought by claimant investors against defendant banks who had acted as lender in tax deferral schemes that transpired not to provide the tax benefits they were supposed to provide. The claimants' claims in contract and negligence against the lenders were all struck out at a preliminary stage. Although necessarily fact specific, this case is a helpful illustration of the principle that, unless there are clear words and conduct suggesting the contrary, a lender has no obligation,

14 [2020] EWHC 2448 (Comm).

15 [2019] EWHC 3299 (Ch).

whether in contract or as a matter of tortious duty, to give advice about the prudence, or otherwise, of the transaction a loan is intended to fund. A lender does not assume an advisory role simply because it agrees to lend to a borrower. The claimants' claim in vicarious liability (for breaches of duty by the investors' independent financial advisers) also failed because there was no evidence that the advice was being provided to the investors 'on behalf of the banks' or as 'representing the banks'. The decision in *Barness* is subject to appeal, which is due to be heard early in 2021.

The Third Edition of this Review considered the well-established principle that a bank will be liable in negligence if it makes a payment in circumstances where it has reasonable grounds for believing that the request is an attempt to misappropriate the funds of its customer – referred to as the *Quincecare* duty.[16] As discussed more fully in the First and Second Editions of this Review, although the duty was established in 1992, the 2017 case of *Singularis Holdings v. Daiwa Capital Markets Europe*[17] was the first time that a bank had been found liable for the breach of this duty. The bank's appeal was dismissed by the Supreme Court in 2019. The bank did not appeal the finding that it had breached the *Quincecare* duty,[18] but instead focused on the issue of attribution, arguing that the corporate customer's claim was barred for illegality because the fraud of its sole shareholder and controller should be attributed to the corporate. The Supreme Court rejected this argument and held that a distinction was to be made between the corporate customer and the fraudster that controlled it, even where the customer was a 'one man company'.

The decision in *Singularis* was followed in *Hamblin and another v. World First Ltd*,[19] in which the court considered the application of the *Quincecare* duty to a payment services provider (PSP) acting for a corporate customer that had no directors and was controlled by fraudsters (who had gained control of the customer via identity theft). The court refused to strike out the claim, relying on the distinction that had been drawn in *Singularis* to find that a *Quinecare* claim was realistically arguable. This result is perhaps not surprising given the similarity between the facts of *Hamblin and Singularis*, albeit *Hamblin* is arguably a more extreme example. Banks will need to ensure that they have sufficient controls to take account of the fact that a request from their own customer is not an absolute defence to a *Quincecare* claim: liability will attach if a bank is found to have reasonable grounds to suspect that a request is an attempt to misappropriate funds.

vi Sanctions

There have been significant additions to the UK sanctions regime over recent months. On 6 July 2020, the UK introduced its first autonomous sanctions regime via the Global Human Rights Sanctions Regulations 2020, which gives the UK power to effect the freezing of funds and assets of certain designated persons identified by the UK government. New sanctions have also been introduced on the wider world stage, an example being US measures against China over its actions towards Hong Kong. Against this political backdrop, the applicability

16 Derived from *Barclays Bank plc v. Quincecare Ltd* [1992] 4 All ER 363 (Comm).
17 [2017] EWHC 257 (Ch).
18 Such appeal having failed in the Court of Appeal, as further discussed in the Second Edition to this Review.
19 [2020] EWHC 2383 (Comm).

of sanctions to banking practices is likely to be an area of increasing interest. Two cases from the past year that may be of interest are *Lamesa Investments Limited v. Cynergy Bank Limited*[20] and *R (Certain Underwriters at Lloyds of London) v. HM Treasury*.[21]

Lamesa concerned the interpretation of a facility agreement that provided that Cynergy was not required to make any payment where 'such sums were not paid in order to comply with any mandatory provision of law.' The court found that this clause, which was a standard clause in any loan agreement, entitled Cynergy to refuse to pay interest payments under the facility agreement due to concerns that it would be subject to US secondary sanctions.

HM Treasury provides an interesting insight into the court's interpretation of the purpose and scope of sanctions. In this case, the claimants wanted to enforce a judgment debt against funds that had been frozen as a result of EU law sanctions against Syria and were therefore seeking information to allow the claimants to trace the funds. HM Treasury declined to provide information on the location of the frozen funds on the basis that the relevant article in the EU Council Regulation[22] setting out the sanction provided that information held by HM Treasury should only be used for the purposes of facilitating compliance with the Regulation. According to HM Treasury, disclosing the information to the claimants would not satisfy this test because the expectation was that the claimants would use the information to apply to the UK government for release of the frozen funds. The court rejected this argument, noting that one of the purposes of the Regulation was the satisfaction of a judgment debt, and that the claimants stood to lose money if funds needed to satisfy the judgment debt were frozen. Although specific to its facts, this case is helpful in demonstrating the court's view that the purpose of a sanction is not purely punitive, but also includes measures that take into account the interests of innocent civilians (including judgment creditors). The outcome of the case provides a potential tool for judgment creditors of a sanctioned entity to seek disclosure of information, with the aim of releasing such funds to satisfy a judgment debt.

vii Market volatility

The past year has seen a great deal of market volatility caused by the covid-19 pandemic, including negative oil prices earlier in 2020.

Although it is not specific to covid-19, *CFH Clearing Limited v. Merrill Lynch International*[23] considers the impact of market volatility on ISDA documentation. CFH had suffered losses under an ISDA agreement for FX transactions after the Swiss National Bank unexpectedly removed the 'floor' that had previously been imposed on the relevant exchange rate, which led to market volatility. After the event, CFH was able to agree with some other trading counterparties to limit its losses by reference to a market recognised 'official low'. Merrill Lynch, however, did not agree to the rate adjustment and CFH commenced proceedings, arguing that the reference to 'market practice' in the ISDA documentation meant that its trades with Merrill Lynch should be re-priced at the official low. The Court of Appeal rejected CFH's claim, finding that the clear wording of the ISDA documentation did not allow for CFH's interpretation.

20 [2020] EWCA Civ 821.

21 [2020] EWHC 2189 (Admin).

22 Council Regulation (EU) No 36/2012.

23 [2020] EWCA Civ 1064.

III RECENT DEVELOPMENTS

Perhaps unsurprisingly, the key legislative developments in the past year relate to covid-19. The Coronavirus Act 2020 was passed in March 2020 in order to enable the government to respond to the emergency situation and manage the implications of covid-19.

The UK government also launched a wide range of business support measures, including the Coronavirus Large Business Interruption Loans Scheme (CLBILS), which is intended to help eligible medium- and large-sized businesses access loans and other kinds of finance. First launched in April 2020, the window for applications to the CLBILS will close on 30 November 2020. There is also an equivalent scheme for small businesses.

In the area of restructuring and insolvency, the Corporate Insolvency and Governance Act (CIGA) came into force in June 2020. One of the key purposes of CIGA was to introduce significant permanent reforms to the UK restructuring and insolvency regime, which had been in the pipeline for some time but were fast-tracked as part of the government's response to covid-19. These comprise:

a a restructuring plan procedure;

b a moratorium procedure; and

c measures to provide that termination clauses in supply contracts, triggered by the insolvency of a counterparty, will cease to have effect in certain circumstances.

CIGA also contains a number of temporary measures designed to mitigate the immediate economic and practical challenges of covid-19, including restrictions on the presentation of winding up petitions and the making of winding up orders. These temporary measures will be in place until 31 December 2020 but may well be extended.

The Bank of England also issued a series of statements regarding the suspension of dividends and share buy backs by large UK banks, and stated that it expected regulated firms not to increase dividends and other distributions, intended to act as a precautionary step to help banks support the economy. It is no surprise that banks halted dividend payments in response. A number of central banks around the world (including the European Central Bank) have also issued similar restrictions. It is too early to tell, but as and when the time comes, it will be interesting to see if such restrictions are lifted at the same time around the world.

IV CHANGES TO COURT PROCEDURE

As a result of covid-19, the English courts have this year embraced virtual and remote hearings. Remote hearings are the new norm and have worked very well in practice.[24] As at the time of writing, most, if not all courts, have now reopened for physical hearings where necessary. Temporary courts have also been set up to alleviate the pressure on courts and tribunals resulting from covid-19.

In parallel to these changes, the courts continue to consider reforms to court procedure. As discussed in the Third Edition of this Review, the Disclosure Working Group and Witness Evidence Working Group (both of which consist of judges, barristers, solicitors and lay clients) have been set up to innovate court procedure relating to disclosure and witness evidence.

24 Survey results published in the Civil Justice Council report dated 5 June 2020, based on 486 remote hearings, stated that 71.5 per cent of survey respondents described positive experiences of online hearings.

The Disclosure Working Group has implemented a disclosure pilot scheme in the Business and Property Courts[25] (including the Commercial Court) in response to concerns over the spiralling cost, scale and complexity of disclosure in High Court litigation. The key feature of the disclosure pilot scheme is the introduction of different disclosure models, which provide for varying models of disclosure, most of which are less onerous than the traditional 'standard disclosure' (requiring all documents relevant to the issues in dispute to be disclosed, and can result in very voluminous disclosure). Parties are encouraged to specify less invasive models for as many issues as possible. By moving away from the presumption of 'standard disclosure', the hope is for smaller disclosure exercises in practice. The two-year pilot was originally due to finish at the end of 2020, but has since been extended by a further year until 31 December 2021. Feedback from court users is being used to prepare amendments to the pilot.

The Witness Evidence Working Group is considering reforms to court procedure on witness evidence. In a final report published on 6 December 2019, the Group concluded that often witness statements discuss matters of which the witness had no contemporaneous knowledge, contain inappropriate assertions or arguments for factual witness evidence and are far from the witness's own words. It also noted that current practice encourages the front-loading of costs, which can prevent, rather than promote, settlement, and called for stricter enforcement of existing page limits for witness statements and sanctions for parties' non-compliance. The group has proposed new rules that, if adopted, would take witness statements back to basics. It may also be that this results in a return to some form of live evidence in chief, which, ironically, was originally dispensed with because it was believed that witness statements would be more cost effective in getting across the parties' evidence in chief.

i Privilege and professional secrecy

Legal advice privilege attaches to communications between a solicitor and client sent with the purpose of giving or obtaining legal advice. Recent case law considers the scenarios in which privilege may be lost.

In *PCP Capital Partners LLP v. Barclays Bank plc*,[26] the court held that references to legal advice within Barclays' opening statement in court and witness statements amounted to a waiver of legal professional privilege. The court found that Barclays' reference to 'taking comfort from' their legal advisors' advice constituted a waiver because it was more than a mere reference to the fact that legal advice was given, but instead amounted to a reference to the legal view on the validity of the agreements in question. As a result, Barclays was ordered to produce the entire legal file relating to the relevant agreements. PCP highlights that any reference to legal advice within witness evidence (however small or whether in respect of the effect of it or its content) should be approached with caution, particularly when such advice is relied upon in support of a party's case.

In *Raiffeisen Bank v. Asia Coal Ventures*,[27] Asia Coal's solicitors, acting on the basis of client instructions, gave a written confirmation of the transfer of funds to a third party (the bank) as part of a commercial transaction. Raiffeisen later brought a claim against Asia Coal

25 Broadly speaking, the Business and Property Courts decide on specialist business and civil international disputes cases.

26 [2020] EWHC 1393 (Comm).

27 [2020] EWCA Civ 11.

in relation to the transaction and sought disclosure of the documents relating to the solicitors' instructions. Disclosure was not granted by the court, which held that the confirmation of transfer given by the solicitors to the bank did not automatically lead to a loss of privilege over the client instruction documents. The solicitors were undertaking an independent obligation to the bank to confirm the transfer of funds, and any instructions between the solicitors and Asia Coal Ventures remained privileged in respect of the wider detail of the communications between a solicitor and client.

Sports Direct v. Financial Reporting Council[28] concerned the sharing of privileged documents between Sports Direct and its auditor, on a confidential limited waiver basis. The Financial Reporting Council (FRC), a body that regulates auditors in the UK, sought these documents from Sports Direct as part of its investigation of the auditor. The court found that the FRC was unable to compel the production of a company's privileged documents from the company or auditor because its statutory power as regulator, to compel information from a company, did not allow it to compel the production of privileged documents.

ii Jurisdiction and conflicts of law

Asymmetric jurisdiction clauses are commonly included in UK loan agreements for the benefit of lenders. Often, the borrower consents to submit to the jurisdiction of the English court, with the lender retaining the right to sue in any court with jurisdiction in the matter.

In *Etihad Airways PJSC v. Prof. Dr. Lucas Flöther*,[29] the court considered whether an asymmetric clause within a facility agreement, in favour of Etihad Airways as lender, benefited from the protection given to exclusive jurisdiction clauses by the Brussels Recast Regulation (the Regulation).[30] Although Air Berlin had already commenced proceedings in Germany, Etihad nevertheless issued proceedings in the English court in reliance on the jurisdiction clause. The court found the asymmetric jurisdiction clause to be an exclusive jurisdiction clause for the purposes of Article 31(2) of the Regulation, meaning that proceedings could be continued in the English courts even though proceedings in Germany were first in time.

It should be noted that the Regulation will cease to apply after the Brexit transition period, from 1 January 2020. It is, however, likely that the UK will accede to the 2007 Lugano Convention (Lugano) or 2005 Hague Convention on Choice of Court Agreements (Hague), or both, or implement Hague into domestic law. Lugano deals with jurisdiction and recognition of judgments and Hague more specifically with exclusive jurisdiction agreements and reciprocal enforcement of judgments.

iii Sources of litigation

Group litigation continues to be a key source of litigation in the UK, particularly due to the increase of litigation funders in the market.

Group actions are often brought by way of the 'opt-in' Group Litigation Orders (GLO) procedure, which was first introduced in the 2000s but did not take off until recent years. The *WM Morrison* case discussed above was brought using the GLO procedure. This procedure was also used in the first shareholder group action judgment in England and Wales, *Sharp v. Blank*.[31] This case, funded by a commercial funder, arose from Lloyds' acquisition of Halifax

28 [2020] EWCA Civ 177.
29 [2019] EWHC 3107 (Comm).
30 EU 1215/2015.
31 [2019] EWHC 3096 (Ch).

Bank and the associated recapitalisation at the peak of the financial crisis. The claimants, 5800 former Lloyds' shareholders who voted in favour of the acquisition, brought proceedings against Lloyds and five of its former directors. The claim was ultimately dismissed as the failure to provide sufficient information in the offering circular was not causative of loss and the directors' recommendation to vote in favour of the acquisition was not enough to have swayed the majority to alter their vote. The court found that the commercial funder's liability for the defendants' costs would be joint and several with the claimants (instead of being capped at the level of funding it provided), a reminder that funders are not immune from large costs orders.

Various group actions are also brought by way of representatives on behalf of a defined class – 'opt-out' claims that bind all members of the defined class unless they have actively opted out. The recent introduction of an opt-out regime for competition-related claims in 2015 is a substantial source of litigation. The largest potential claim so far is *Merricks v. Mastercard Inc*,[32] a consumer class action against Mastercard following on from the findings by the EU Commission that Multilateral Interchange Fee (MIFs) charged by Mastercard and Visa were in breach of competition law. As stated in the Third Edition of this Review, the purported class in this claim covers all UK-resident individuals over the age of 16, who purchased goods or services from UK businesses that accepted Mastercard between 1992 and 2008 (estimated to be 46.2 million individuals), and the applicant is seeking damages of approximately £14 billion including interest. Last year, the Court of Appeal found that the Competition Appeal Tribunal had erred in refusing the application for the claim to be brought, and remitted the case back for rehearing. The Supreme Court heard the case in a virtual hearing on 13 and 14 May 2020, and judgment is pending at the time of writing. Practitioners are awaiting the outcome of this case with interest. It is expected to play a key role not only in clarifying the operation of the new collective proceedings regime, but also in energising or curtailing the growth of competition class actions in the UK.

A further source of opt-out competition-related group litigation is the European Commission's investigation into manipulation of the foreign exchange (FX) market, which culminated in an infringement finding against five banks in May 2019. At the time of writing, there are currently two pending applications in the Competition Appeal Tribunal for proceedings to be issued. These cases are being case-managed together, with the collective proceedings order hearing currently listed for March 2021 (query if this will be pushed back pending the Supreme Court decision in *Merricks*). The claim is estimated to be worth more than £1 billion.

Looking ahead, litigation may well be generated by the increasing use of group actions and engagement by litigation funders. The discontinuation of LIBOR as the benchmark rate for interest rate transactions may also lead to litigation as parties are left with agreements that make reference to a benchmark that no longer exists.

V OUTLOOK AND CONCLUSIONS

There are uncertain times ahead, the main unknowns being the impact of Brexit once the transition period on 31 December 2020 ends and the amount of market disruption (to say the least) that will be caused by the covid-19 pandemic. As businesses continue to struggle financially (the UK having entered into recession as at 12 August 2020), the risk of defaulting

32 [2019] EWCA Civ 674.

under commercial loans grows, bringing into play complex legal issues relating to events of default, cross-defaults, repayment accelerations, waivers and early termination, with any resultant instability within the global credit markets likely to spawn further litigation.

We can, however, be reasonably confident that there will be ample capital to fund such litigation. It is thought that there is £2 billion of litigation funding in the London market alone, and we may expect this to rise with the increasing prevalence of opt-out class action claims in England and Wales, which can be very lucrative for funders. This is yet another reason all eyes are on the outcome of the Supreme Court ruling in *Merricks*.

It is also clear from the judiciary's swift and efficient response to the challenges of covid-19 that the UK remains well equipped to deal with any increase in the volume of litigation. In the midst of these uncertainties, we can take comfort in the fact that the fundamental strengths of the English legal system remain, including legal certainty, well-established procedure, the flexibility of the common law to adapt rapidly, and a highly skilled judiciary.

Appendix 1

ABOUT THE AUTHORS

DEBORAH FINKLER

Slaughter and May

Deborah Finkler is a partner in our dispute resolution group and was formerly head of both dispute resolution and our global investigations group. Her practice covers the broad spectrum of commercial litigation and both domestic and cross-border investigations. She acts on substantial and complex commercial disputes for a wide range of clients, including a number of international banks and financial institutions. Deborah is highly regarded for her banking litigation and regulatory investigations practice. She is also regularly involved in complex corporate recovery and insolvency work.

Deborah is ranked as a Leading Individual for Banking Litigation and for Financial Services (Contentious Regulatory) in *Chambers UK*, 2020. She is also recognised as a 'Hall of Fame' individual for both Banking Litigation and for Commercial Litigation in *The Legal 500*, 2020, where she is also recommended for Financial Services (Contentious).

Deborah is described in the legal directories as a 'formidable' practitioner who is also 'extremely smart and high quality'; 'respected by fellow practitioners as a tough negotiator and a forceful advocate for her clients' and 'an absolute class act'.

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Liu Hui is an associate in our dispute resolution and investigations group. She has a broad contentious practice and has advised international banks and financial institutions on a range of actual and potential disputes relating to, among other things, economic torts and contractual interpretation, including the interpretation of ISDA documentation. She also has an insolvency practice, having advised on both contentious and non-contentious schemes of arrangement.

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