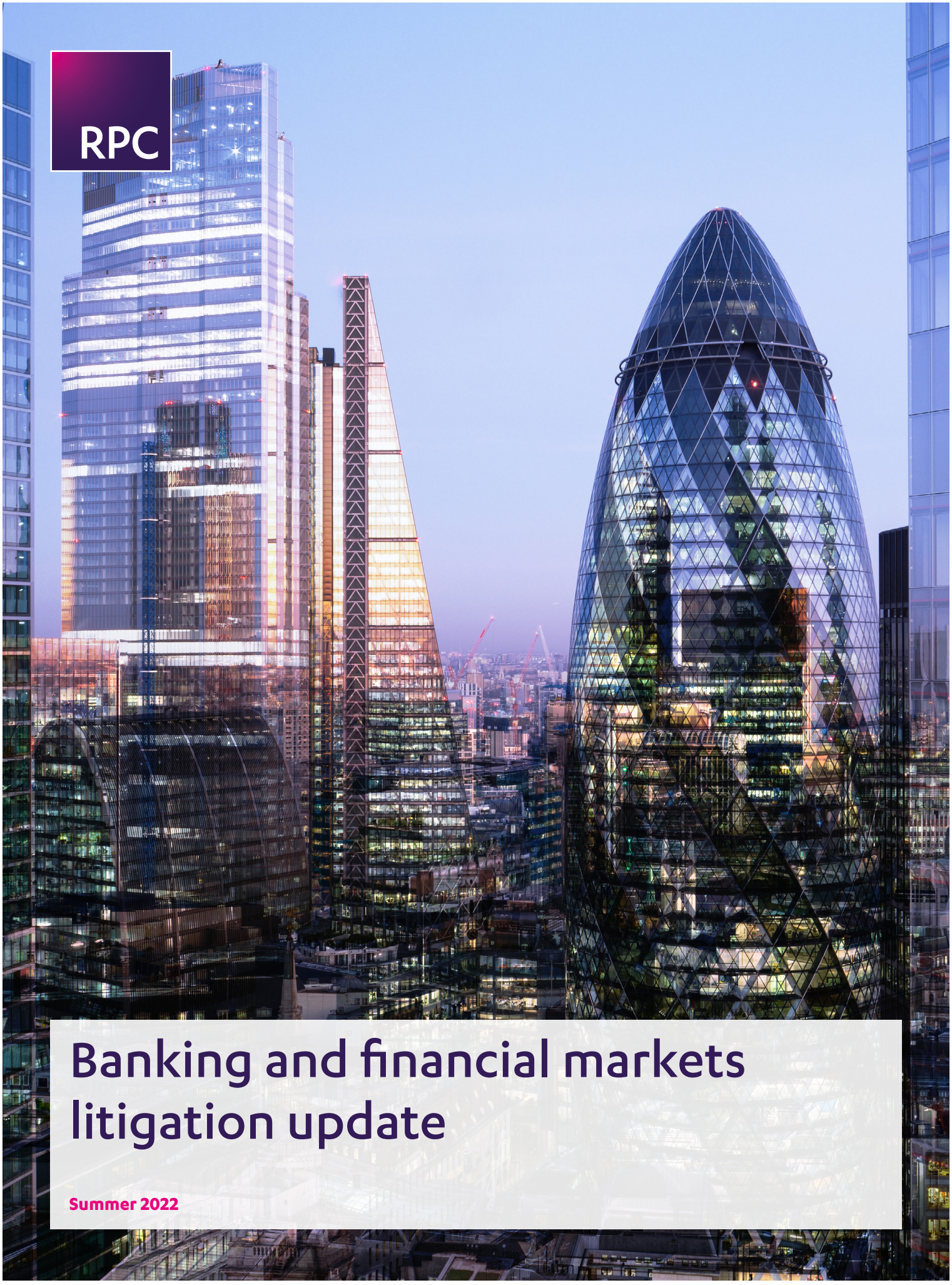

Banking and financial markets litigation update

Summer 2022

ADVISORY | DISPUTES | REGULATORY | TRANSACTIONS

Welcome to our banking and financial markets litigation update

This update is brought to you by RPC's top tier banking and financial markets practice, with specialists in all areas of financial markets litigation (and arbitration) and a wealth of expertise including frequent involvement in the most complex, high-value, and high-profile disputes in the sphere. Here, we take a look at some of the most important judgments in recent months in this area.

Overview

Quincecare duty remains a hot topic with more developments of note in recent months than we have seen in the last few years. Among them are that a bank's *Quincecare* duty does not necessarily depend on the existence of a fraudulent agent who gives instructions to the bank to pay money out of an account for a fraudulent purpose (*Philipp v Barclays Bank UK Plc*), and a finding by the Privy Council that banks do not owe a *Quincecare* duty to a beneficial owner of monies in a bank account (*Royal Bank of Scotland International Ltd v JP SPC4 and another*). The most recent decision in this area is *The Federal Republic of Nigeria v JPMorgan Chase Bank, N.A*, where the High Court rejected a *Quincecare* claim brought by Nigeria (for whom RPC acted) in the context of payments amounting to approx. USD$1bn out of an account held by Nigeria with JPMorgan to a Nigerian company closely associated with a disgraced former Nigerian oil minister. We will also hear more about *Quincecare* in an insolvency context in the forthcoming Supreme Court decision in *Stanford International Bank Ltd (in liquidation) v HSBC Bank PLC*, which was heard in January, with no judgment handed down just yet. More›

Elsewhere, authorised push payment fraud outside of a *Quincecare* context was considered in *Tecnimont Arabia Limited v National Westminster Bank PLC*, where the court rejected knowing receipt and unjust enrichment claims made by the fraud victim against the fraudster's bank who received the money, rather than against their own bank. More›

We now also know that a claim in knowing receipt will fail if, at the moment of receipt, the beneficiary's equitable proprietary interest is destroyed or overridden so that the recipient holds the property as beneficial owner, as this was clarified by the Court of Appeal in *Byers & Ors v The Saudi National Bank*. more›

In the realm of fraudulent misrepresentation, the degree of consciousness that a claimant must have of the existence of an implied representation has come under further scrutiny following the decisions in *Marme Inversiones v Natwest* and *Leeds City Council v Barclays*. The appeal of the latter decision (which held that, at least in a LIBOR context, the hurdle is set high) was settled by Barclays, avoiding a superior court decision on the point for the moment. Although not in a banking context, the point arose again in the context of an application to strike out a fraudulent misrepresentation class action against Volkswagen arising from the "Dieselgate" scandal. Waksman J provided a helpful analysis of the extent of consciousness that was required and considered the various authorities which have arisen in a LIBOR-claim context and pushed back strongly against the first instance *Leeds City Council v Barclays* decision (*Crossley and others v Volkswagen Aktiengesellschaft and others*). The claims against VW have since also been settled so the point will next be tested in another context. More›

In relation to s.90A and Schedule 10A of the Financial Services and Markets Act 2000 (relating to civil liability of issuers of publicly traded securities for publication of false, misleading or incomplete information and for dishonest delay in publication), we have now had helpful clarification of the meaning of a person discharging managerial responsibility (PDMR). It has been decided that the term "director" is broad enough to encompass not only *de jure*, but also *de facto* and at least arguably shadow directors (*Allianz Global Investors GmbH* and *Ors v G4S Ltd*). More›

In other developments, UBS was unsuccessful in a jurisdictional challenge earlier this year in a USD$495m claim against it based on allegations of negligent misstatements and advice (*Kwok Ho Wan and ors v UBS AG (London Branch)*). The Court of Appeal also looked at jurisdiction in *Skatteforvaltningen v Solo Capital Partners* where it decided that the Danish tax authority's claim to recover refunds of Danish withholding tax in the context of a dividend arbitrage scheme known as "cum-ex" did not fall within Dicey rule 3, as it concerned the restitution of monies misappropriated by fraud, rather than enforcement of tax. More›

Italian local authorities and their derivative contracts claims continue to play out in in the Commercial Court. It decided in *Deutsche Bank v Busto di Arsizio* last October that the Italian local authority did not lack capacity to enter into the mirror swap and interest rate swap it had concluded with Deutsche Bank, also analysing the *Cattolica* judgment of the Italian Supreme Court in that regard. Deutsche Bank was later partly successful in obtaining declarations from the court about the transactions in question in a consequentials judgment this year.

The Commercial Court also decided in another case involving an Italian local authority in a swaps dispute, *Bank of America Europe DAC v CITTA Metropolitana Di Milano*, that reviving proceedings automatically stayed under CPR 15.11 requires a relief from sanctions application. More›

As it has been such an active area for judgments, a full exploration of recent developments is beyond the scope of this bulletin, but the extension of limitation for fraud and concealment under s.32 of the Limitation Act 1980 has been a theme in a financial services context. In particular, the decision in *European Real Estate Debt Fund v Treon & Ors* held that the period during which "reasonable diligence" could have allowed a claimant to discover the existence of a fraud can begin to run before the claimant has suffered any loss from the fraud.

In *ECU Group PLC v HSBC Bank PLC & Ors*, Mrs Justice Moulder rejected an extension of the limitation period for the claims made against HSBC. ECU Group Plc had made allegations of front-running, trading ahead of client instructions, wrongful margins and misuse of confidential information against the bank, but was not permitted to bring the claims as they were held to be time-barred.

In yet another case involving Credit Suisse, the Libyan Investment Authority lost the argument that its claim in relation to loan notes was not time-barred, with the court finding that the LIA could with "reasonable diligence" have properly pleaded its case in fraud before the relevant limitation date (*Libyan Investment Authority v Credit Suisse International*). More›

Finally, two well-known topics in the banking world are still keeping the courts busy.

In the context of FX manipulation, in *Allianz Global Investors GmbH & Ors v Barclays Bank PLC & Ors* the Court of Appeal allowed an appeal earlier this year by claimant funds and struck out defences by the defendant banks that losses incurred by the funds had been avoided or passed on upon redemption by their investors. More›

The collapse of Lehman Brothers is still relevant for the English courts over 13 years after the event – the Court of Appeal had to decide on priorities of competing subordinated debts in *Lehman Brothers Holdings Scottish LP 3 v Lehman Brothers Holdings plc (in administration) and others*. It also considered the rule against double proof in insolvencies (which prevents the same debt being claimed twice). More›

Quincecare duty

The Quincecare duty, ie the duty of a bank to refrain from acting on a payment instruction and to make inquiries when it is on notice of a serious possibility of fraud, was originally developed in back in 1992[1], but the concept has received plenty of judicial attention recently.

The Court of Appeal held in April in *Philipp v Barclays Bank UK Plc*[2] that the *Quincecare* duty does not necessarily depend on the existence of a fraudulent agent who gives instructions to the bank to pay money out for a fraudulent purpose.

The question arose in this case in the context of so-called automated push payment (APP) fraud, where it is the account holder themselves who gives the payment instruction, rather than a fraudster, as they have been induced by the fraudster to do so. Mrs Philipp, a music teacher had been convinced that she and her husband were cooperating with the Financial Conduct Authority and National Crime Agency, whereas in fact it was a fraudster who induced them to transfer most of their life savings (around £700,000) out of her bank account. At first instance, Barclays had obtained strike out, but the Court of Appeal decided that the question whether the *Quincecare* duty was engaged and whether the bank breached it should go to trial, and should not be decided at summary stage. It held that the underlying logic of the *Quincecare* duty was to protect the customer, and the duty does not depend on whether the payment instruction is given by an agent of the customer or not (which is what happens in the case of APP fraud). The duty can apply where the customer gives the instructions, as long as the bank is "on inquiry" in the circumstances. Interestingly, unlike the decision at first instance, the Court of Appeal also expressed the view that the *Quincecare* duty was not too onerous for banks as it is a carefully calibrated duty which is conditioned by the ordinary banking practice at the relevant time and the "ordinary prudent banker" test. The court also found that the duty, which was arguable in this case, was determined by established, not new principles, and cited with approval policy reasons for the *Quincecare* duty and the role of banks in preventing fraud.

For our full commentary on this case, see our article here.

Hot on the heels of the *Philipp* decision, the Privy Council held in May in an Isle of Man case that banks do not owe a *Quincecare* duty to a beneficial owner of monies in a bank account (*Royal Bank of Scotland International Ltd v JP SPC4 and another*[3]). In this case, the bank account holder had defrauded the beneficial owner of the monies, an investment fund, by paying money out in contravention of a legitimate investment scheme. The Privy Council decided, based mainly on a consideration of English authorities, that an extension of a bank's *Quincecare* duty to protect beneficial owners of monies, which effectively sit behind the bank's immediate customer, should be rejected – only the bank's customers themselves benefitted from the *Quincecare* duty on the bank. The Privy Council also rejected that there was an implied assumption of responsibility by the bank towards the investment fund, or that there should be an incremental development of a duty of care beyond the well-established *Quincecare* duty, and also rejected any notion of accessory liability of the bank.

While this is a bank -friendly decision, it is really a logical conclusion in the absence of any precedents that supported this potentially significant extension of the *Quincecare* duty to beneficial owners. The judgment is technically not binding on English courts, but the decision is extremely likely to be followed in England and Wales.

For more detail on this decision, see our full commentary here.

The most recent decision in this area is *The Federal Republic of Nigeria v JPMorgan Chase Bank, N.A*, where the High Court rejected a *Quincecare* claim brought by Nigeria (for whom RPC acted) in the context of payments amounting to approx. USD$1bn out of an account held by Nigeria with JPMorgan to a Nigerian company closely associated with a disgraced former Nigerian oil minister.

Looking to the future, the Supreme Court is considering the *Quincecare* duty in the insolvency context in *Stanford International Bank Ltd (in liquidation) v HSBC Bank PLC*. This was heard in January 2022, with the decision being awaited. Stanford International Bank (SIB) infamously collapsed in 2009. Through its liquidators, SIB has issued claims against HSBC on the basis that the bank failed to realise that SIB was being run as a Ponzi scheme by its owner, Mr Stanford, and that HSBC provided dishonest assistance to Mr Stanford's breaches of fiduciary duty.

1. *Barclays Bank plc v Quincecare Ltd and another* [1992] 4 All ER 363
2. *Philipp v Barclays Bank UK Plc* [2022] EWCA Civ 318 (14 March 2022)
3. *Royal Bank of Scotland International Ltd v JP SPC 4 & Anor (Isle of Man)* [2022] UKPC 18 (12 May 2022)

APP fraud

The wider and ever increasing problem of APP fraud is also driving attempts to craft means of establishing liability on parties other than the hopeless target of the fraudsters themselves.

In May, the Commercial Court rejected a claim which attempted to establish liability on the bank which received the fraudulently induced payment (rather than the usual target of the claimant's own bank which processed the payment request) for unjust enrichment and knowing receipt in *Tecnimont Arabia Limited v National Westminster Bank PLC*. The claimant, Tecnimont Arabia Limited (TAL), is a company operating in Saudi Arabia. In 2018, as a result of deception on the part of a fraudster, TAL instructed its bank to pay $5m to a dollar account held at the National Westminster Bank (NatWest) in the name of a third-party, Asecna Limited which was controlled by a fraudster, who subsequently dispersed most of the funds. NatWest received and acted upon various fraud alerts before the final payments were made out of the account.

In his decision, Mr Justice Bird decided that TAL's claim for knowing receipt failed, as the transferred property was not trust property, and because NatWest had received the deposit for its customer and not for its own account and there was, therefore, no valid claim for knowing receipt. As for unjust enrichment, the court decided that the bank's unjust enrichment was not "at the claimant's expense" so that the claimant had no right to restitution of any sums. This decision shows that even cases involving employees who do not adhere to internal anti-fraud guidelines, or delays in freezing accounts after a fraud has been notified, may not necessarily give rise to redress in the courts.

For more detail on this decision, see our full commentary here.

Knowing receipt

The Court of Appeal grappled with the concept of knowing receipt in *Byers & Ors v The Saudi National Bank*[6] in January this year. It decided that a claim in knowing receipt fails if at the moment of receipt the beneficiary's equitable proprietary interest is destroyed or overridden so that the recipient holds the property as beneficial owner.

The case arose from the long-running saga of the Ahmad Hamad Algosaibi & Brothers Company (AHAB) and the Saad Group in 2009, the fallout from which has been litigated around the world ever since. The liquidators of Saad Investments Company Limited (SICL), a Saad Group company, attempted to bring a claim in knowing receipt in relation to its alleged interests in various shares transferred to a bank in Saudi Arabia shortly before the Saad Group's collapse. At first instance, Mr Justice Fancourt in the High Court decided that SICL did not have a continuing proprietary interest in the shares capable of supporting a knowing receipt claim. The Court of Appeal then confirmed this conclusion, holding that a defendant cannot be liable for knowing receipt if he took the property free of any interest of the claimant.

For more detail on this decision, see our full commentary here.

4. *The Federal Republic of Nigeria v JPMorgan Chase Bank, N.A* [2022] EWHC 1447 (Comm) (14 June 2022)
5. *Tecnimont Arabia Limited v National Westminster Bank PLC* [2022] EWHC 1172 (Comm) (17 May 2022)
6. *Byers & Ors v The Saudi National Bank* [2022] EWCA Civ 43 (27 January 2022)

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Fraudulent misrepresentation

There was an interesting development at the end of 2021 in the area of fraudulent misrepresentation: in *Crossley and others v Volkswagen Aktiengesellschaft and others*[7] the High Court refused to strike out or summarily dismiss the fraudulent misrepresentation claim brought by more than 86,000 vehicle owners against Volkswagen.

While the case arose in the context of the "Dieselgate" scandal and the class action against VW alleging that engines were fitted with a "defeat device" allowing the vehicles to cheat emissions tests, the analysis on fraudulent misrepresentation (and in particular implied representations) is very pertinent to the financial services arena in which these concepts have previously been developed and tested.

The claimants alleged that in marketing vehicles to purchasers, VW impliedly made (knowingly false) representations to all potential purchasers that its vehicles complied with emission standards and that all testing had been carried out properly and honestly. VW argued that this deceit claim should be struck out or summarily dismissed on the basis of a contention that the claimants must plead and prove that they were "consciously aware" of the implied fraudulent misrepresentations.

Mr Justice Waksman considered the "awareness" requirement for misrepresentation claims in previous authorities, including the well-known LIBOR cases of *Property Alliance Group v Royal Bank of Scotland plc*[8], *Marme Inversiones 2007 v Natwest Markets plc*[9] and *Leeds City Council v Barclays Bank plc*[10], which deal with the level of awareness required in respect of the implied representation that banks selling LIBOR-linked products were not engaged in manipulation of that benchmark. The judge refused to decide the "awareness" issue at summary stage and ordered that there was an arguable case that would need to be dealt with at trial. The judgment includes some serious criticism of the first instance analysis in *Leeds Council v Barclays* as being a wrong turn in the law. The decision is welcome recognition that it may be sufficient from a reliance perspective for a claimant to show that there was a quasi-automatic assumption drawn from the context that the defendant was making an implied representation of honesty, particularly where it can be shown that the claimant would not otherwise have entered into the transaction had they known the truth.

For more detail on this decision, see our full commentary here.

7. *Crossley and others v Volkswagen Aktiengesellschaft and others* [2021] EWHC 3444 (QB) (20 December 2021)
8. *Property Alliance Group v Royal Bank of Scotland plc* [2016] EWHC 3342 (21 December 2016)
9. *Marme Inversiones 2007 v Natwest Markets plc* [2019] EWHC 366 (Comm) (25 February 2019)
10. *Leeds City Council v Barclays Bank plc* [2021] EWHC 363 (Comm) (22 February 2021)

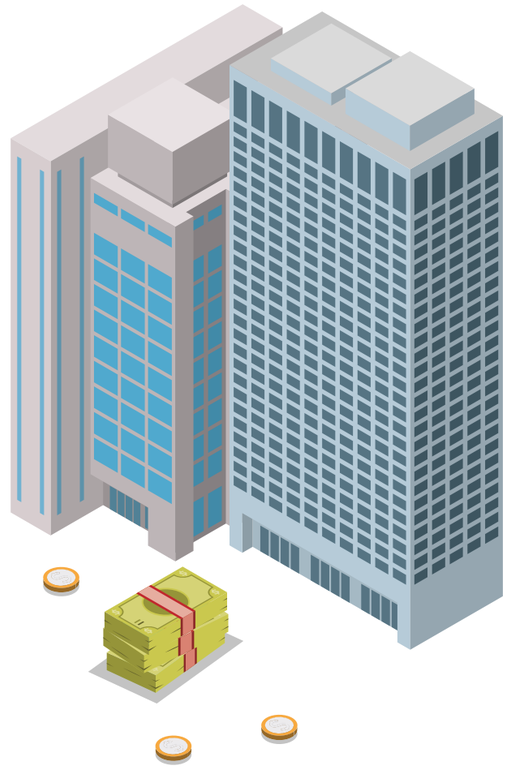
Meaning of a "person discharging managerial responsibility" under FSMA

In an interim decision, the High Court came to an interesting conclusion in *Allianz Global Investors GmbH and Ors v G4S Ltd (formerly G4S plc)*[11], holding that the term "director" is broad enough to encompass not only *de jure*, but also *de facto* and at least arguably shadow directors for the purposes of s.90A and Schedule 10A of the Financial Services and Markets Act 2000 (FSMA).

Here, institutional investors in G4S Limited (formerly G4S plc) (G4S), brought claims against G4S for breaching market disclosure rules. The background was that a wholly owned subsidiary of G4S had entered into a deferred prosecution agreement in relation to allegations of (i) wrongful billing in the context of charging the government for dealing with prisoners who were never electronically tagged or who had died and (ii) providing fraudulent financial models to the government. The claims against G4S related in this context to information being published to the market containing untrue and misleading statements, or omitting required information, and dishonest delay in publishing information.

G4S applied to strike out the claims and/or for summary judgment in respect of the claimants' allegations that certain named individuals were PDMRs of the defendant within the meaning of s.90A FSMA. Mr Justice Miles rejected G4S's application, deciding that there was a real prospect of the claimants establishing civil liability at trial for statements made by senior management, but only if the claimants could establish that the senior management on whose conduct they rely were its *de jure*, *de facto* or (arguably) shadow directors at the relevant times.

For more detail on this decision, see our full commentary here.



11. *Allianz Global Investors GmbH and Ors v G4S Ltd (formerly G4S plc)* [2022] EWHC 1081 (Ch) (10 May 2022)

Jurisdiction

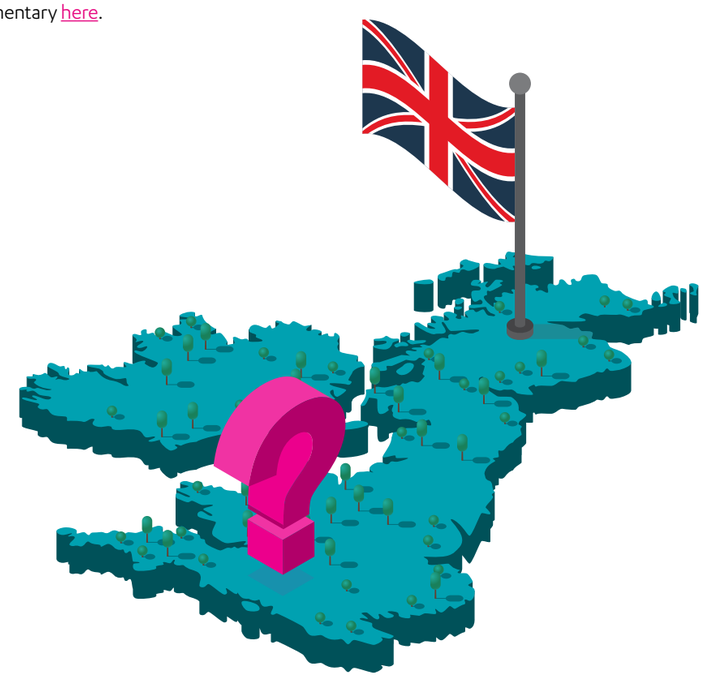
UBS in February lost a high stakes jurisdictional challenge in *Kwok Ho Wan and ors v UBS AG (London Branch)*[12], relating to a ca. USD$495m claim against it.

The claimants allege that negligent misstatements and advice was provided by the bank, which led them to make an investment that was almost completely lost when UBS exercised security over shares held by it in London as mortgagee (contrary to the statements and advice). Mrs Justice Cockerill rejected UBS's challenge to jurisdiction and held that the English court did have jurisdiction, as the claimants had a good arguable case that the damage had occurred in England and also that their claims in tort arose out of the activities of the branch established in England (where the shares in question had been liquidated in the close out).

For more detail on this decision, see our full commentary here.

Jurisdiction also played a pivotal role in the case of *Skatteforvaltningen v Solo Capital Partners*[13]. The Court of Appeal had to decide whether rule Dicey rule 3 which provides that English courts do not have jurisdiction over actions for "the enforcement, either directly or indirectly, of a penal, revenue, or other public law of a foreign State", should apply in this case. It decided that the Danish tax authority's claim (which was an appeal by the Danish tax authority (SKAT) to recover £1.44bn of refunds of Danish withholding tax in the context a dividend arbitrage scheme known as "cum-ex") did not fall within Dicey rule 3 as it concerned the restitution of monies misappropriated by fraud rather than enforcement of tax.

For more detail on this decision, see our commentary here.



12. *Kwok Ho Wan and ors v UBS AG (London Branch)* [2022] EWHC 245 (Comm) (09 February 2022)
13. *Skatteforvaltningen v Solo Capital Partners Skatteforvaltningen (Danish Customs and Tax Divisions) v Solo Capital Partners LLP (in Special Administration)* [2022] EWCA Civ 234 (25 February 2022)

Derivative contracts, Italian local authorities and Cattolica

In a case that adds to the long list of Italian swap cases that the English courts have seen, the Commercial Court in *Deutsche Bank v Busto Arsizio*[14] decided in October 2021 that an Italian local authority did not lack capacity to enter into the mirror swap and interest rate swap it had concluded with Deutsche Bank.

This was the first occasion for an English Court to analyse the *Cattolica* judgment of the Italian Supreme Court, and there had been some uncertainty whether *Cattolica* was authority for the proposition that Italian local authorities lacked capacity to enter into certain derivative contracts, or whether it had made narrower findings that a derivative contract would be invalid under Italian law if the derivative fell to be characterised as "speculative" and/or if the financial institution providing the swap did not disclose details of the mark to market valuations and probabilistic scenarios at the time the contract was entered into. However, the Commercial Court found that Cattolica was primarily concerned with the elements of a valid contract under Italian law.

For more detail on this decision, see our commentary here.

In a consequentials judgment[15] handed down in February 2022, the Commercial Court then decided on the declarations to be made further to the decision above that Busto Arsizio did have capacity to enter into the swaps. The court applied the approach to declarations summarised in *BNP Paribas SA v Trattamento Rifiuti Metropolitani SPA*[16]. Its approach on declarations was to make them on the basis that they reflected issues in dispute between the parties, on which it had explicitly or implicitly made decisions, and also with an eye to the utility of any declaration. The court granted declarations relating to seven of the 14 sought by DB, some in modified form.

For more detail on this decision, see our commentary here.

In another High Court case involving an Italian local authority, Mr Justice Foxton decided that reviving proceedings automatically stayed under CPR 15.11 required relief from sanctions in *Bank of America Europe DAC v CITTA Metropolitana Di Milano*[17]. The case concerned an ongoing dispute regarding two interest rate swaps which the Metropolitan City of Milan (Milano) had entered into with Merrill Lynch (now Bank of America) (BofA) in 2002. To ensure that the English court was the court first seised for the purposes of the Brussels Regulation Recast, BofA issued proceedings in the English court seeking negative declaratory relief. However, Milano did not file an acknowledgment of service or defence, took no steps to pursue threatened proceedings against BofA in Italy and continued to make payments under the swaps. BofA chose not to seek judgment and adopted a "wait and see" approach. Due to the parties' inaction, the English proceedings were subject to an automatic stay pursuant to CPR 15.11. In 2021, Milano commenced proceedings against BofA relating to the swaps before the Italian Court, and BofA applied to the English Court under CPR 15.11(2) seeking to lift the automatic stay to progress the English proceedings.

The court decided that relief from sanctions was required to lift an automatic stay under CPR 15.11(2), but granted relief to BofA. It further decided that Milano's application for an extension of time to file an acknowledgement of service was also an application for relief from sanctions, and allowed this application, too.

For more detail on this decision, see our commentary here.

14. *Deutsche Bank v Busto di Arsizio* [2021] EWHC 2706 (Comm) (12 October 2021)
15. *Deutsche Bank AG London v Comune di Busto Arsizio* [2022] EWHC 219 (Comm) (04 February 2022)
16. *BNP Paribas SA v Trattamento Rifiuti Metropolitani SPA* [2020] EWHC 2436 (Comm) (11 September 2020)
17. *Bank of America Europe DAC v CITTA Metropolitana Di Milano* [2022] EWHC 1544 (Comm) (20 June 2022)

Limitation

The Limitation Act 1980 and the exception for fraud and concealment under s. 32 has been a recurring theme in the financial services context.

In *European Real Estate Debt Fund v Treon & Ors*[18], the High Court decided that the question whether the claimant could have discovered the fraud with "reasonable diligence" extends to the period before the claimant suffered a loss. The background concerned an investment via loan notes in the European Care Group business by the European Real Estate Debt Fund, a property debt fund. The fund's assignee, the claimant, alleged that there had been fraudulent misrepresentation of the financial performance and future prospects of the business which were relied upon and subsequently induced the fund's investment. The court here highlighted that it is the responsibility of the claimant to gather sufficient evidence and material in order to demonstrate and convince the court that, without exceptional measures, it would not have been possible to discover the fraud. The court will then consider circumstances arising both before and after the action accrued.

For more detail on this decision, see our commentary here.

Limitation was also considered in the context of alleged FX manipulation in *ECU Group PLC v HSBC Bank PLC & Ors*[19], where Mrs Justice Moulder dismissed an extension of the limitation period for the claims against HSBC. ECU Group Plc had made allegations of front-running, trading ahead of client instructions, wrongful margins and misuse of confidential information against the bank. HSBC argued, among other things, that the claims were time-barred and that ECU consciously elected not to pursue any claims following correspondence with HSBC in 2006, even though ECU argued that it was not in a position to discover the relevant facts prior to 2013. The court held that ECU had been in a position to set out the majority of its claims in 2006 so that the claims were time-barred, but also that in any event there had not been any loss.

For more detail on this decision, see our commentary here.

In another decision on s.32 of the Limitation Act 1980, and what seems to be the concluding chapter in the history of the Libyan Investment Authority (LIA) bringing claims against banks in the English courts, the Commercial Court in *Libyan Investment Authority v Credit Suisse International*[20] granted summary judgment and dismissed LIA's claims as time barred. LIA had brought claims for breach of fiduciary duty, undue influence, rescission for illegality and unconscionable receipt in relation to loan notes issued by Credit Suisse in 2008. The court rejected LIA's argument that s.32 of the Limitation Act 1980 allowed it to bring the claims more than six years after the alleged wrongdoing. The court applied the orthodox approach that the limitation period started to run only from the point that the LIA could with "reasonable diligence" have properly pleaded its case in fraud, and affirmed that this involves a significantly higher threshold than recently applied in a judgment concerning a claim for mistake.

For more detail on this decision, see our commentary here.

18. *European Real Estate Debt Fund v Treon & Ors* [2021] EWHC 2866 (Ch) (27 October 2021)
19. *ECU Group PLC v HSBC Bank PLC & Ors* [2021] EWHC 2875 (Comm) (01 November 2021)
20. *Libyan Investment Authority v Credit Suisse International* [2021] EWHC 2684 (Comm) (3 December 2021)

Lehman insolvency

Even 13 years after Lehman Brothers' insolvency at the beginning of the banking crisis, the Court of Appeal was last November called upon to adjudicate on competing subordinated debts in the consolidated cases of *Lehman Brothers Holdings Scottish LP 3 v Lehman Brothers Holdings plc (in administration) and others*[21], one in a long line of cases seeking to unwind the issues arising from Lehman Brothers' unexpected collapse.

The background was that Lehman Brothers entities had entered into a number of subordinated loan facility agreements both intra-group and with external investors in order to satisfy regulatory capital adequacy requirements under the umbrella of the Basel II regime. The Court of Appeal was asked to determine how these differing loan instruments ranked in the distributing administration of LB Holdings Intermediate 2 Limited, given that there were insufficient assets to satisfy all subordinated creditor claims. The key takeaway from this decision is that although the construction of complex sophisticated debt instruments will be determined largely by reference to the actual words used, this does not mean that the courts will not find a way to a construction that is consistent with the apparent equity of providing restitution to external investors in preference to lenders in what appear to be more artificial intra-group transactions.

The court also adopted a purposive approach to the rule against double proof in insolvencies (which prevents the same debt being claimed twice) to consider the mischief that the rule was intended to prevent. Here, where there was no prospect of a claim being made by the guarantor, and therefore no competing claims to be policed, there was no justification for allowing the creditor to prove for the entire debt without giving credit for any part payment received.

For further detail on this decision, see our commentary here.

FX manipulation

In *Allianz Global Investors GmbH & Ors v Barclays Bank PLC & Ors*[22], the Court of Appeal considered an appeal which arose from claims by over 170 claimant funds for damages arising from alleged "illegal and anti-competitive manipulation of foreign exchange (FX) markets" by the banks, ie breach of statutory duty of article 101 of the Treaty on the Functioning of the European Union (TFEU), and section 2 of the Competition Act 1998.

The court allowed the appeal by the claimant funds and struck out defences by the defendant banks that losses incurred by the funds had been avoided or passed on upon redemption by their investors. It decided that the proper claimants at all times were the funds, both before and after any redemptions, regardless of whether these were structured as a company, trust or partnership. Redemptions by investors also did not avoid the funds' loss, as these constituted a collateral benefit and so are not treated as making good the funds' loss.

For further detail on this decision, see our commentary here.

21. *Lehman Brothers Holdings Scottish LP 3 v Lehman Brothers Holdings plc (in administration) and others* [2021] EWCA Civ 1523 (20 October 2021)
22. *Allianz Global Investors GmbH & Ors v Barclays Bank PLC & Ors,* [2022] EWCA Civ 353 (23 March 2022)

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