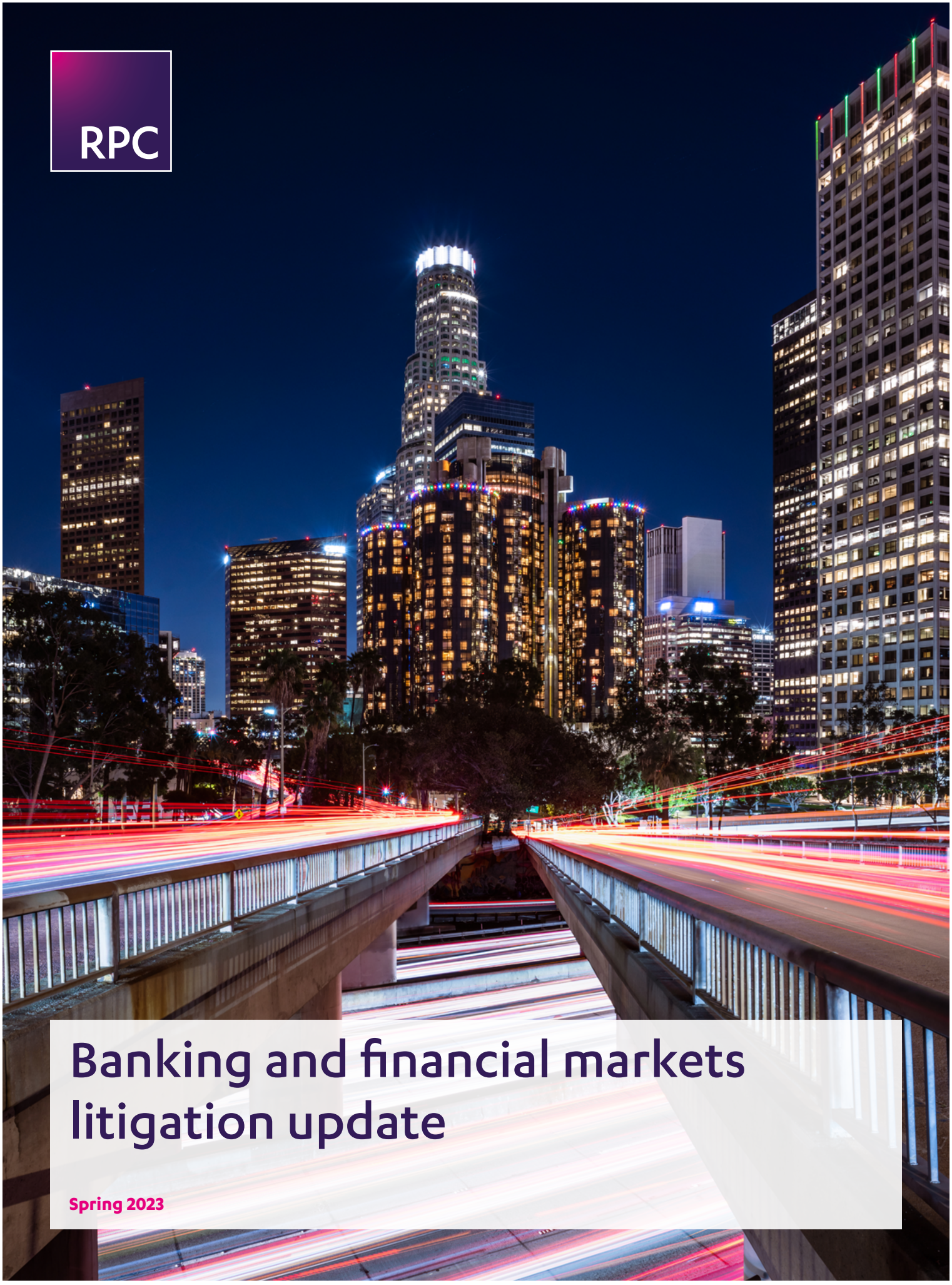


Banking and financial markets litigation update

Spring 2023

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 disputes practice in London, 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.

Overview

The highest profile topic in this area is still the scope of 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. Originally developed back in 1992[1], the first half of last year saw several judicial developments in this area, which we covered in detail in our last update. However, many questions still remain. Since last summer, the Supreme Court has considered the duty in an insolvency context in *Stanford International Bank Ltd v HSBC Bank PLC*[2]. The majority held that it did not need to examine the scope of the duty as it found that no loss had occurred, so that examining any *Quincecare* claim was unnecessary. However, in a dissenting judgment Lord Sales made interesting observations when examining the scope of the duty. While he thought that the duty must remain within "proper bounds", he did not rule out a *Quincecare* claim against a bank where the company whose funds are to be paid out is in a situation of "hopeless insolvency", even if in practice this might be a relatively rare occurrence.

Looking ahead, we will receive more guidance from the Supreme Court which in February 2023 heard the appeal in *Philipp v Barclays Bank UK Plc*[3]. This concerned a case where a customer themselves authorised a payment instruction to a fraudster in an authorised push payment fraud. We consider this in more detail below.

We also look back at the market disruption in Autumn 2022, both in the gilts and FX markets, and consider the related litigation risks in these areas. Read more below.

Italian local authorities continue to litigate in the High Court (see also our last update). We take a look at two significant decisions concerning English law governed interest rate swaps which have been handed down since the summer of 2022, one of which constituted the first ever victory for an Italian local authority in this context. It remains to be seen whether this outcome could embolden other local authority claimants. Read more here.

Elsewhere, the courts have been clarifying two interesting aspects arising out of ISDA agreements and events of default. One decided that an ISDA default notice need not be completely accurate in order for it to be valid. The other considered the meaning of continuing events of default in the context of the collapse of Lehman Brothers. The result was that payments suspended more than 14 years ago following the collapse were now due from counterparties of certain interest rate swap transactions. While these decisions do not convey any particular trend, they are very useful clarifications of these technical points. Read more here.

We also take a look at a couple of case management decisions which were particularly notable. One found that Argentina's confidentiality obligations to the International Monetary Fund did not override the duty of disclosure. In the other, the court rejected an application for a group litigation order which was sought in the context of an investor claim as it would not further the Overriding Objective. Read more here.

Funding also remains a live topic in the financial services litigation context. We take a look at a Commercial Court decision where it was held that a litigation funder was jointly and severally liable for the defendants' costs from a date prior to the litigation funding agreement, and despite the involvement of other funders (*The ECU Group plc v HSBC Bank Plc & ors*).[4] Read more below.

In the latest instalment of the long running legal battle between Deutsche Bank, Sebastian Holdings Inc and Alexander Vik, the Commercial Court found Mr Vik to have been in contempt of court for deliberately giving false evidence and withholding documents he was obliged to disclose. Read more here.

Fraud (outside of *Quincecare* duty considerations) of course also remains a live topic in the financial services realm. We consider a decision in a bribery claim concerning bonds, where the Court of Appeal provided a useful illustration of bribery principles which arose due to of a conflict of interest and lack of informed consent, rather than any proven dishonest conduct. Read more here.

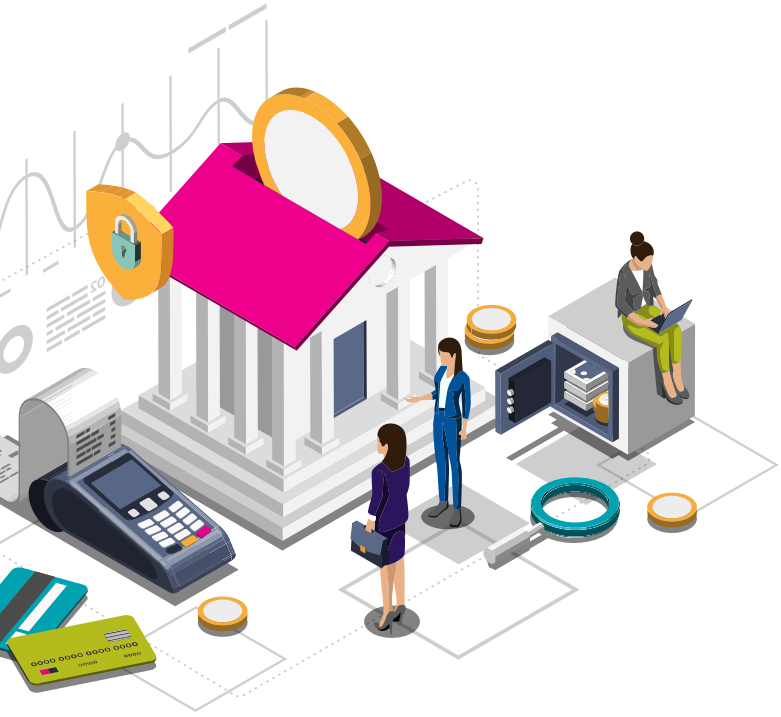
In an unusual case, the High Court considered a rare application for recusal of a judge due to apparent (not actual) judicial bias, which related to a judge's ownership of a yoga studio and related bank loan. Read more here.

1. *Barclays Bank plc v Quincecare Ltd and another* [1992] 4 All ER 363
2. *Stanford International Bank Ltd v HSBC Bank PLC* [2022] UKSC 34 (21 December 2022)
3. *Philipp v Barclays Bank UK Plc* [2022] EWCA Civ 318 (14 March 2022)
4. *The ECU Group Plc v HSBC Bank Plc & Ors* [2022] EWHC 1616 (Comm) (24 June 2022)

Quincecare duty – where to next?

We already identified the *Quincecare* duty as a hot topic in our last update. The latest development in this area is the Supreme Court's decision in *Stanford International Bank Ltd v HSBC Bank PLC*[5] and while this arose in an insolvency context, the dissenting view is of particular note as there are some obiter comments on the scope of the duty (see below).

Otherwise, we will likely have to wait until the Supreme Court hands down its decision in *Philipp v Barclays Bank UK Plc*[6] to find out where the scope of the duty is headed next. This case concerned payment instructions given by the customer themselves in a situation of authorised push payment fraud. The Court of Appeal had decided in March 2022 that, in principle, the *Quincecare* duty can arise for a bank even where it is the customer themselves giving instructions to pay money out of their account to a fraudster (we commented on the decision here). The appeal in the Supreme Court was heard in early February 2023. The court will consider in particular whether the *Quincecare* duty can apply where the payment instruction was not issued by an agent of the customer, whether the duty should be extended in relation to authorised push payment fraud and whether the duty is part of the bank's duty to exercise reasonable skill and care when executing an instruction. The court will also consider whether it can decide these issues at the summary judgment/strike out stage of the proceedings.[7]



Stanford International Bank Ltd v HSBC Bank PLC

The case concerned Stanford International Bank Ltd (SIB), which had been run as a Ponzi scheme. SIB had bank accounts with HSBC Bank PLC (HSBC), out of which payments of £116m had been made to some of its genuine customers, shortly before SIB's collapse and liquidation. The question for the court was whether these payments could be subject to a *Quincecare* claim, ie whether it could be argued that HSBC had a duty not to carry out payment instructions due to being on notice that they may have been made as part of a fraud. The court considered as the central issue whether or not SIB could establish that it had suffered loss.

The majority of the court found that there had been no loss, or loss of a chance, because the £116m paid out would have otherwise simply been distributed in the liquidation, giving the creditors (which would then have included the customers otherwise paid shortly before the liquidation) a higher dividend than they would have received otherwise. Due to this analysis, the majority did not have to consider the scope itself of the *Quincecare* duty.

However, in a dissenting opinion, Lord Sales did make some interesting obiter comments about the duty. In his view, SIB **had** suffered a loss, because, as a result of the alleged breach of the *Quincecare* duty by HSBC, there had been a diversion of funds away from the general creditors as a class. This diversion of funds to an improper destination represented a loss to the company itself.

In contrast to the majority view, Lord Sales examined the substantive scope of the *Quincecare* duty. While he thought that the duty must remain within "proper bounds", he did not rule out a *Quincecare* claim against a bank where the company whose funds are to be paid out is in a situation of "hopeless insolvency", even if in practice this might be a relatively rare occurrence.

It is worth noting that since the majority did not consider the substantive scope of the duty, this could prove to be an influential dissenting judgment, because it is not – so far as the substance of the duty is concerned – contradicted by the majority view.

For our detailed commentary on this decision, see here.

5. *Stanford International Bank Ltd v HSBC Bank PLC* [2022] UKSC 34 (21 December 2022)
6. The Supreme Court is deciding the appeal of *Philipp v Barclays Bank UK Plc* [2022] EWCA Civ 318 (14 March 2022)
7. https://www.supremecourt.uk/cases/uksc-2022-0075.html

Market disruption – a trigger for future litigation?

Autumn 2022 saw significant disruption in international financial markets, and most notably in the UK gilts market and international currency markets. Such volatility heightens litigation risk for both financial institutions and counterparties/customers, as challenging questions may be asked about the specific contractual terms governing loss making financial products and the circumstances in which those products were sold.

The announcement of the UK government's 'mini-budget' in late September 2022 saw a rapid and significant spike in UK gilt yields, which had a particularly serious impact on funds employing LDI (Liability Driven Investment) such as defined benefit pension schemes. While rising yields benefit pension schemes by reducing the present value of their liabilities, they also cause interest rate swaps and other derivatives to move significantly against them, triggering margin calls and requiring additional collateral. Given the speed at which yields rose, many funds struggled to meet margin calls and resorted to selling gilts (being their most liquid assets). This further depressed the price of gilts and triggered a 'doom loop', with forced sales pushing yields up further, triggering larger margin calls and requiring further forced sales.

The Bank of England intervened between 28 September to 14 October 2022, which restored some stability. However, the crisis exposed significant weaknesses in the LDI sector and more is needed to safeguard funds employing this strategy. Indeed, the Bank of England told MPs on 1 February 2023 that it will outline plans in March 2023 to boost the resilience of the LDI sector to market shocks. It remains to be seen whether this will be effective.

Turning to the international currency markets, we saw a dramatic strengthening of the US$ against almost every major currency. In September 2022, GBP plummeted to its lowest level against the US$ since 1972, the Euro sunk below the US$ for the first time in 20 years and major currencies in Asia fell sharply (including the Chinese Renminbi, Korean won and Japanese yen).

These steep changes meant that businesses that had turned to complex FX derivative products (such as TRFs / Tarfs or KIKOs) in an effort to hedge their position against an appreciating domestic currency were exposed to or suffered considerable losses. At the same time, more and more businesses turned to these products in order to seek to hedge their exposure. The difficulty is that these products can be hugely problematic for counterparties because the terms are generally heavily preferential towards banks, resulting in a remarkable asymmetry of risk and reward. It is, therefore, highly questionable whether such products can ever function as a hedge.

This widespread volatility in the international financial markets has generated litigation risk for both financial institutions and counterparties/customers. When funds and businesses are faced with significant losses under derivative products, this results in detailed scrutiny of the contractual terms of those products and difficult questions as to how the products were sold, whether they were suitable for their purposes and whether the banks made the buyer aware of all the significant risks. In these sorts of disputes, banks commonly turn to their contractual disclaimers for protection or claim that they are not acting in an 'advisory' capacity. While circumventing these defences is not easy, it has become apparent that many of the banks' customer-facing staff did not understand some of the complex products sold or had little regard for the suitability of such products for their customers.

For LDI funds, it is likely that the volatility in the gilt market had a material impact on the value and composition of funds' assets and resulted in several funds breaching internal investment restrictions. Fund managers may face claims by investors in respect of losses suffered as a result. We also expect to see increased scrutiny of the decisions of those responsible for investment decisions in funds which were under hedged or did not have adequate collateral buffers to meet margin calls in an orderly manner. More generally, volatility in the gilts market will have caused significant corporate transactions to be aborted, and we may see litigation as a result.

For more detail on these issues, see our commentary here and here.

Italian swaps: still keeping the English courts busy post-Cattolica

Our last update included the first decision of an English court related to the controversial *Cattolica* judgment of the Italian Supreme Court (*Deutsche Bank v Busto di Arsizio*[8]), in which it was held 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.

While that decision was the first to tackle *Cattolica*, it was certainly not the last. English law governed interest rate swaps entered into by Italian local authorities continue to keep the English courts busy, with two significant judgments handed down since the summer of 2022, one of which constituted the first ever victory for an Italian local authority in this line of cases.

In *Dexia Crediop SpA v Province of Pesaro e Urbino*[9], the Commercial Court granted Dexia Crediop SpA (Dexia) summary judgment and declaratory relief, finding that interest rate swaps entered into with Province of Pesaro e Urbino (Pesaro) were valid and that the agreement was binding under Italian constitutional law.

In the wake of *Cattolica*, Pesaro commenced proceedings in Italy to unwind or reverse swaps entered into with Dexia under an ISDA Master Agreement . Dexia then commenced English proceedings, seeking declarations that the transactions were valid and binding. Dexia applied for summary judgment in relation to certain declarations after Pesaro took almost no active part in the English proceedings. The Court found that:

- the ISDA Master Agreement clearly stated that the swaps were governed by English law and there was insufficient evidence to displace that,
- the swaps were not a form of "indebtedness" under Italian law and did not require special approval from the provincial authorities. It was not, however, prepared grant summary judgment in relation to sale of floor options and purchase of caps as neither the expert nor the court could land on a correct interpretation, and
- Pesaro's arguments in the Italian proceedings were not concerned with its capacity to enter into the transactions, so the validity of the transactions fell to be determined under English law. It was held that the transactions were valid under English law.

This indicates that the English courts remain at odds with the Italian Supreme Court's views on the contractual validity of interest rate swaps with Italian local authorities. It also serves as a reminder that the English courts will not shy away from wide-ranging declaratory relief where appropriate, even if it arises in the context of a summary judgment application.

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

Hot on the heels of Dexia, the Commercial Court tackled *Cattolica* again in *(1) Banca Intesa Sanpaolo SpA (2) Dexia Crediop SA v Comune di Venezia*[10]. This is the first time that an Italian local authority has successfully argued that an English law governed swap was void due to Italian law.

Banca Intesa Sanpaolo SpA (Banca Intesa) and Dexia issued proceedings against Comune di Venezia (Venice) in England seeking declarations that certain interest rate swaps entered into under an English law governed ISDA Master Agreement were valid and binding. Venice sought alternative declarations that the swaps were not valid and, in addition, sought restitution of the net sums it had paid to the banks over the life of the swaps.

The court held that the swaps were void for lack of capacity and Venice was therefore entitled to restitution for the amounts paid to the banks under the swaps. While the court noted that the reasoning for the decision in *Cattolica* that local authorities lacked capacity to enter into speculative derivatives was not entirely satisfactory, it accepted that the Italian Supreme Court had spoken. The court therefore concluded that, under Italian law, the swaps would be regarded as at least predominantly speculative. It also held that the swaps contravened Italian law preventing local authorities from having recourse to "indebtedness" other than for investment. However, the banks were in principle entitled to rely on a defence

8. *Deutsche Bank v Busto di Arsizio* [2021] EWHC 2706 (Comm) (12 October 2021)
9. *Dexia Crediop SpA v Province of Pesaro e Urbino* [2022] EWHC 2410 (Comm) (27 September 2022)
10. *(1) Banca Intesa Sanpaolo SpA (2) Dexia Crediop SA v Comune di Venezia* [2022] EWHC 2586 (14 October 2022)

of change of position in respect of payments made under back-to-back swaps with other financial institutions, which operated to reduce the amounts recoverable by Venice.

While the court's interpretation of *Cattolica* in this case does not mean that all such swaps will be void, it does provide further arguments for Italian local authorities to deploy when seeking to set them aside. It is therefore likely to have a significant impact on other ongoing Italian swaps cases, as well as potentially triggering fresh claims by Italian local authorities.

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

Interpreting ISDA : two takes by the High Court on events of default

Two interesting decisions have been handed down that shed light on events of default under ISDA Master Agreements.

The first considers the question whether an ISDA default notice needs to be completely accurate for it to be valid. It appears that it does not need to be perfect: the High Court handed down a decision holding that a default notice under an ISDA Master Agreement was still valid where the notice did not contain wholly accurate statements of the amount of the payment not made, the confirmation of the trade, or the currency of the payment (*Macquarie Bank Ltd v Phelan Energy Group Limited*[11]).

The court favoured an approach of substance over form, and held that the key points in relation to validity were as follows:

- the notice needs to communicate clearly, readily and unambiguously to the reasonable recipient in the context in which it is received the failure to pay or deliver in question, and
- it also needs to enable the reasonable recipient to identify what the relevant trade requires it to do in order to cure any failure to pay or deliver within the grace period.

The dispute arose in the context of an FX swap between Macquarie Bank Limited (Macquarie) and Phelan Energy Group Limited (Phelan) who entered into a US$/South African Rand FX swap, governed by an ISDA 2002 Master Agreement. The parties concluded a trade for settlement but were at odds as to which strike price should apply, so that Phelan did not pay the settlement amount. Macquarie first sent Phelan a default notice informing it that failure to make payment by the first local business day after the notice would constitute an Event of Default under s. 5(a)(i) of the ISDA Master Agreement, and later designated an early termination date giving notice pursuant to s. 6(a) of the ISDA Master Agreement, as a result of a continuing Event of Default. This was followed by a "Notice of Early Termination Amount" which requested payment of the outstanding sum.

The court decided that the default notice did not need to contain express and wholly accurate statements of the identification of the confirmation for the relevant trade; a precise and entirely accurate statement of the amount of the payment or delivery not made; or the currency of the payment. If it were otherwise, this would lead to highly improbable consequences; for example failure to include the currency or a typing error could invalidate the notice. The court held that the nature of the ISDA Master Agreement did not compel such a construction. The court also noted that whether the required information has been communicated unambiguously does not solely depend on the language used, and there could be unambiguous communication even when the communication involves a mistake.

For our detailed commentary on this decision, see here.

The second interesting ISDA judgment concerns the concept of a continuing event of default. It arose in the context of the Lehman Brothers collapse, the aftereffects of which are still playing out in the High Court many years after the event itself (as also noted in our last update).

The decision in *Grant & Ors v FR Acquisitions Corporation (Europe) Ltd & Anor (Re Lehman Brothers International (Europe))*[12] is the first occasion for a court to consider in detail the meaning of the word "continuing" for the purposes of events of default under an ISDA Master Agreement. On application by the administrators of Lehman Brothers International (Europe) (LBIE), it determined that "continuing" events of default will cease on termination of the Lehman Brothers administration. The result was that payments suspended more than 14 years ago as a result of LBIE's collapse were now due from counterparties of certain interest rate swap transactions.

The background was that the joint administrators of LBIE sought directions in relation to two swaps transactions that LBIE had entered into, under which payments were owed to LBIE (£8m by FR Acquisitions Corporation, and US$52m by JFB Firth Rixon (the respondents)).

11. *Macquarie Bank Ltd v Phelan Energy Group Ltd* [2022] EWHC 2616 (Comm) (18 October 2022)
12. *Grant & Ors v FR Acquisitions Corporation (Europe) Ltd & Anor (Re Lehman Brothers International* (Europe)) [2022] EWHC 2532 (11 October 2022)

The respondents had not made these payments. Instead, since the inception of the administration of LBIE in 2008, they had relied on a provision in the relevant 1992 and 2002 ISDA Master Agreements to suspend their payments to LBIE. Section 2(a)(iii) makes any payment obligation arising under the agreements subject to the condition that "no Event of Default or Potential Event of Default with respect to the other party has occurred and is continuing".

The administrators, who were working towards bringing LBIE's administration to an end, argued that when their appointments terminated, no event of default would be "continuing" with respect to LBIE under the ISDA Master Agreements. The respondents disagreed, arguing that due to the various events during LBIE's administration, including both the scheme of arrangement (the Scheme) proposed by the administrators and sanctioned by the court in 2018 and an order made for its recognition and enforcement in the United States of America under the US Bankruptcy Code (Chapter 15 Order), free standing events of default had arisen, in addition to the original event of default triggered by LBIE's entry into administration.

In summary, the court decided that, in relation to events of default that were undisputed, exiting the administration would cure the undisputed events of default, such that they would no longer be continuing. The proper enquiry was not as to the effect of the relevant event of default, but as to whether the event or state of affairs that triggered the event of default still subsists. As for the events of default that were disputed, the court found that the Scheme did not constitute an event of default, nor were the Chapter 15 Order or the orders made in France and Spain in 2008 and 2009 recognising the English administration order.

For our detailed commentary on this decision, see here.

Case managing financial services disputes: GLOs and confidentiality during disclosure

Two recent decisions of the High Court are particularly notable in terms of case management in a financial services context.

First, the High Court in July 2022 issued some helpful guidance in *Palladian Partners & Ors v The Republic of Argentina & Anor*[13] on the factors to be considered when balancing competing duties of confidentiality and disclosure.

The underlying claim relates to securities issued by The Republic of Argentina (Argentina), under which the right to payment was linked to its GDP growth. Palladian Partners (Palladian) alleged that the rebasing of Argentina's GDP in 2013 adversely impacted their prospects of receiving payment under the securities, which was either contractually invalid or a breach of contract. Argentina, in response, relied on its interactions with the International Monetary Fund (IMF) to explain the rebasing decision. Argentina applied under paragraphs 15 and 18.1 of PD51U (as it then was) to withhold documents provided to it by the IMF due to its confidentiality obligations to the IMF.

The court found that Argentina's obligations to the IMF did not override the duty of disclosure. In conducting the balancing exercise, the court found that the confidentiality obligations were only engaged because Argentina had not retained its own copies of the documents and, in any event, there was a limited risk to third parties or of an adverse sanction if the documents were disclosed. On the other hand, the court found the documents were highly relevant to the litigation and Palladian would be prejudiced if they were withheld.

This decision reminds parties that a duty of confidentiality is not a golden ticket permitting documents to be withheld from disclosure. The court will consider the risk of disclosure (including any sanctions) against the consequences to the litigation should disclosure be withheld.

For our detailed commentary on this decision, see here.

Second, while we generally do not see the issue of group litigation orders (GLOs) discussed much in the context of financial services litigation, this was exactly what the High Court had to consider in *Edward Moon & Ors v Link Fund Solutions*[14]. Here, Mr Justice Trower rejected a GLO which was sought in the context of an investor claim against a fund as it would not further the Overriding Objective (CPR 1). This seems to follow a general trend that GLOs remain a relatively rare phenomenon: only 111 GLOs have been made since 2000, with only one made in all of 2022.[15]

The case concerned claimant investors who claimed for damages against the authorised corporate director of the fund in question, Link Fund Solutions (Link), under s.138D of the Financial Services and Markets Act 2000 (FSMA). The allegations were that Link breached FCA Handbook rules in various respects, including by pursuing an inappropriate investment strategy and making untrue and misleading statements in the fund's prospectus. Link denied the allegations and contested the application for a GLO, arguing that other forms of case management were more appropriate in this case.

While the court first decided that the number of claimants and the issues in play met the requirements for a GLO, it also decided that the substance of the advantages of a GLO could be achieved through more standard case management, such as for example generic statements of case (outside of the GLO) regime which would allow the determination of common issues. The court also considered that that there would be limited utility in the creation of a group register, and no need for lead solicitors had been established here.

Another factor suggesting that a GLO was not appropriate was the uncertainty surrounding the other potential claimants, who might look to bring claims against an additional party in respect of slightly different issues. The court therefore declined to make the GLO as it was not required, over and above standard case management options, to further the Overriding Objective.

For our detailed commentary on this decision, see here.

13. *Palladian Partners & Ors v The Republic of Argentina & Anor* [2022] EWHC 2059 (Comm) (29 July 2022)
14. *Edward Moon & Ors v Link Fund Solutions* [2022] EWHC 3344 (Ch) (21 December 2022)
15. According to the HM Courts & Tribunals Service list of group litigation orders.

Litigation funding: can you be liable for costs that pre-date the agreement?

Litigation funding remains a significant topic in dispute resolution, and financial services litigation is no exception. The High Court decided in the long-running litigation by ECU Group PLC (ECU) against entities within the HSBC group (the HSBC parties) that Therium, a commercial litigation funder, was jointly and severally liable for costs from a date prior to the funding agreement, and this was so despite the involvement of other funders.

The case concerned a claim by ECU, an investment firm specialising in currency risk management, against the HSBC parties. ECU alleged that the HSBC parties were responsible for manipulation in 2004-2006 of the interbank spot foreign exchange rate in order to deliberately trigger 'stop-loss orders' which had been placed by ECU in connection with their management of their clients' mortgage debts under their multi-currency facilities with HSBC's UK private bank.

However, all of ECU's claims were dismissed due to limitation. The HSBC parties subsequently applied for an order that Therium pay their costs and that it be jointly and severally liable with ECU in respect of those costs. The court found that it was just to make an order against Therium in respect of these costs from before the date of the funding agreement, as Therium had assumed liability for costs incurred prior to that date in the agreement.

Moulder J also held that Therium should be jointly and severally liable with ECU. Therium had had by far the dominant financial interest in the outcome of the proceedings and effectively controlled the proceedings through the funding agreement. The HSBC parties had had no choice but to defend the claim and it would not be fair to make costs recovery deptgendent on the pursuit of numerous individuals and entities.

For our detailed commentary on this decision, see here.

The latest chapter in the legal battle between Deutsche Bank and Mr Vik

The latest instalment in the long running saga saw yet another victory for Deutsche Bank AG (Deutsche Bank), with the Commercial Court finding Alexander Vik (Mr Vik) to have been in contempt of court for deliberately giving false evidence and withholding documents (*Deutsche Bank AG v (1) Sebastian Holdings Inc (2) Mr Alexander Vik*[16]).

To recap, Deutsche Bank commenced proceedings against Sebastian Holdings Inc (Sebastian) and Mr Vik in 2009 for c. US$250m in respect of loss-making trades which it conducted through Deutsche Bank. Sebastian counterclaimed for c. US$8bn in alleged trading profits that it claimed would have accrued but for Deutsche Bank's actions. In 2013, Sebastian was ordered to pay US$250m to Deutsche Bank and the counterclaim was dismissed. Infamously, Mr Vik was found to have falsified at least elements of a dummy trading book, which he had relied on as evidence to support the counterclaim.

Sebastian failed to pay the judgment debt and Deutsche Bank made a successful application for an order under CPR 71, requiring Mr Vik to produce certain documents and attend an examination on Sebastian's means and assets (the Order). Following an unsuccessful attempt to vary or strike out the Order, Mr Vik disclosed certain documents and attended the examination pursuant to the Order (the Examination).

Around six years later, Deutsche Bank made an application to commit Mr Vik for contempt by deliberately giving false evidence in response to questions at the Examination and failing to produce all the documents required by the Order. The Commercial Court found in favour of Deutsche Bank, finding that Mr Vik's evidence during the Examination contained deliberate falsehoods and that he had deliberately withheld documentation which he was obliged to disclose. Being concerned with the truth of the evidence Mr Vik had provided on the transactions under inquiry, these findings turn very much on the facts of the case.

For our detailed commentary on this decision, see here.

16. *Deutsche Bank AG v (1) Sebastian Holdings Inc (2) Mr Alexander Vik* [2022] EWHC 1599 (Comm) (24 June 2022).

Defences to bond bribery case summarily dismissed

The Court of Appeal's decision in *Trafalgar Multi Asset Trading Company Limited (in liquidation) v James David Hadley and others*[17] provided a useful illustration of the principles of bribery in a financial services context, which arose here due to of a conflict of interest and lack of informed consent, rather than any proven dishonest conduct.

Trafalgar Multi Asset Trading Company (Trafalgar) was the trading arm of an investment fund. Its investment manager was Victory Asset Management (Victory), which was owned by James David Hadley (Mr Hadley). Mr Hadley arranged for Trafalgar to invest in certain bonds issued by CGrowth Capital Bond Limited (CGrowth) in March. The investment was facilitated by CGrowth's introductory agent, Platinum Pyramid Limited (Platinum). However, prior to the investment and unbeknownst to Trafalgar, Platinum and CGrowth had agreed that Platinum would receive 29% of all subscription monies paid by Trafalgar and only 70% of the proceeds would be paid over to the borrowing companies (the bond terms provided for 100%). Shortly after the investment, Mr Hadley received £100,00 from Platinum and agreed to sell Victory to Platinum. Mr Hadley also received a further payment of £400,000 shortly after Trafalgar invested in CGrowth's June bonds.

Trafalgar argued that the sale of Victory to Platinum created a conflict of interest for Mr Hadley and that the £500,000 payments were bribes made from the bond proceeds. Mr Hadley argued that there was no conflict, and the payments were legitimate and commercial transactions. He relied on two defences: (i) the March investment was agreed before any negotiations on the sale of Victory, and (ii) the fact of the sale and that a deposit would be payable had been disclosed to Trafalgar, which had not objected.

Trafalgar sought summary judgment on both defences and alternatively strike out. At first instance, the court allowed the defences to proceed to trial. Mr Hadley appealed.

The appeal was allowed. The Court of Appeal found that the £500,000 payments, which were (at least arguably) funded by the undisclosed commissions paid to Platinum by CGrowth, were bribes unless Trafalgar had given informed consent. The court found that, while Trafalgar had been told of a potential sale of Victory to Platinum and that a deposit might be paid, it had not been told of the commission arrangements or that its money would fund the deposit or other payments. Without this information, Trafalgar could not have given its fully informed consent as to whether to invest in the bonds. The Court of Appeal did not consider the timing defence to be realistic given that the sale of Victory was proceeding in parallel with the March investment and had tainted the June investment.

The conflict of interest and lack of informed consent resulted in Platinum being treated as having paid, and Mr Hadley as having received, £500,000 in bribes. It is notable that this conclusion did not derive from any suggestion that either Platinum or Mr Hadley acted dishonestly or knew or suspected that they were doing anything untoward. It was also unnecessary to show whether Mr Hadley had actually been induced or influenced by the payments in his dealings with Trafalgar.

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

17. *Trafalgar Multi Asset Trading Company Limited (in liquidation) v James David Hadley and others* [2022] EWCA Civ 1639 (16 December 2022)

Apparent judicial bias... and yoga studios

In what must be one of the more unusual fact patterns to be presented in recent financial services litigation, the High Court had to consider apparent judicial bias in relation to a judge's ownership of a Brixton yoga studio and related bank loan in *Ryan & Anor v HSBC UK Bank Plc & Anor*[18].

While there was no finding of *actual* bias and the only issue considered by the court was apparent bias, this is noteworthy as it is a very rare example of a successful recusal application.

However, this case underlines that such applications for recusal (based on apparent bias) should generally only be considered where there has been a clear and demonstrable departure from the judicial treatment that a party would reasonably expect, which the court found to be established here. At the same time, it is unlikely that the fact that a judge, or a company associated with a judge, has borrowed money from a bank which is party to a claim will, in and of itself, be the influential factor in deciding that there is a real possibility of apparent bias

The fact pattern of the underlying claim itself concerned a claim against HSBC UK Bank plc (HSBC) by majority shareholders and, at times, the executive directors of two property development companies. Among other things, the proceedings involved a permission application to continue a derivative claim on behalf of one of the companies against HSBC under section 261 of the Companies Act 2006. The permission application was dismissed at first instance because the judge did not find the claimants to be credible and seemed to be bringing the claim as a personal vendetta to discredit HSBC. Later, it materialised that the judge of the permission application and his wife owned the entire issued share capital of a company called Hot Yoga Brixton Limited (HYB), which had current loans with HSBC. While the judge agreed to set out information about the business association in a statement for the claimants to consider, they nevertheless made an application for recusal heard by another judge.

The court considered the fair-minded informed observer (FMIO) test and established legal principles to consider the issue of apparent bias (actual bias was **not** made out). In summary, it held that while the FMIO would probably not go as far as to consider that the judge in question would feel an obligation to be on the "right side" of HSBC, several significant incidents that had occurred during the permission application gave rise to unfair process, including allowing inadmissible evidence, rejecting evidence in witness statements as "incredible" and strongly suggesting in the judgment that the outcome was a foregone conclusion. The judgment on the permission application was therefore set aside.

For our detailed commentary on this decision, see here .

18. *Ryan & Anor v HSBC UK Bank Plc & Anor* [2023] EWHC 90 (Ch) (20 January 2023)

The RPC team

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