BANKING LITIGATION UPDATE

AUTUMN 2025

London

Welcome to the Autumn 2025 edition of our biannual Banking Litigation Update, in which we highlight the most important cases and developments affecting UK financial institutions over the past six months.

We begin this edition with the Supreme Court's significant decision in *Hopcraft* (see update 10), considering motor finance commission claims, which has potential ramifications for other industries with a business model involving the payment of commissions to third parties. In a nutshell, the Supreme Court held that the lenders were not liable at common law for payment of a bribe by paying commissions to motor dealer brokers (or as accessories for breach of fiduciary duty by the motor dealer brokers), because the brokers did not owe a fiduciary duty to their customers. The decision represents a welcome return to the orthodox position as to how fiduciary duties arise and the common law tort of bribery, effectively overturning the most difficult to reconcile elements of the Court of Appeal's decision. However, the Supreme Court did allow the appeal in respect of Mr Johnson's claim under s.140A of the Consumer Credit Act 1974 (**CCA**), finding that the relationship between Mr Johnson and the lender was unfair and ordering the lender to pay the commission amount to Mr Johnson with interest. This decision is expected to shape the landscape for future claims and regulatory action in this area, with the Financial Conduct Authority (**FCA**) planning to consult on a redress scheme for motor finance customers imminently. If you are looking for an easy way to get on top of this decision and its implications, check out the *Hopcraft* special edition of our banking litigation podcast.

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This update includes a number of decisions with significant implications for financial institutions navigating the complexities of international sanctions. In particular, the High Court's decision in *EuroChem v SocGen* (see update 17) demonstrated the English court's willingness apply the common law principle in *Ralli Bros* in the context of sanctions against Russia. This rule prevents enforcement of an English law contract if performance is illegal in the place of performance. The court also refused enforcement of contracts on public policy grounds. The judgment is an interesting example of the tension between compliance with sanctions over contractual obligations. In this case, the banks were vindicated in their decision not to pay for fear of breaching EU sanctions. The decision is subject to an appeal, likely to be heard during the course of 2026. Another sanctions appeal to watch out for is in the long-running *Celestial v UniCredit* litigation, which will be heard by the Supreme Court in December this year. Much like the *EuroChem* case, the question before the Supreme Court is whether the bank was prohibited from making payment under various letters of credit as a result of sanctions. Hopefully we will be in a position to report back on these appeals in the next edition of this update.

There have been a number of important decisions in securities class actions over the past six months. In the group action brought against Standard Chartered under s.90/90A of the Financial Services and Markets Act 2000 (**FSMA**) (see update 32), the High Court considered whether "passive" investors, who do not actively manage their portfolios, can meet the reliance requirement for s.90A FSMA claims based on alleged omissions or misstatements and the requirements for a claim of dishonest delay. The High Court declined to follow the approach taken in *Allianz v Barclays* last year, and allowed the passive investor claims to continue. The *Barclays* litigation has since settled, but the Court of Appeal will have the opportunity to decide which approach is correct in January 2026, when it hears the appeal in *Mercy v Standard Chartered*. In an important procedural development in this area, the Privy Council abrogated the so-called "shareholder rule" in *Jardine v Oasis* (see update 34), confirming that companies can assert privilege against their shareholders. This will be highly significant in the context of shareholder litigation, including securities class actions, as it will mean that shareholders generally have no entitlement to production of the company's privileged material.

Another key focus is authorised push payment (**APP**) fraud and the continued attempts by claimants to bring these claims through the civil courts, notwithstanding the effective bar imposed by the Supreme Court's decision in *Philipp v Barclays*. Recent cases have explored various innovative causes of action against payment service providers (**PSP**), highlighting the evolving litigation risks in this area. For instance, in *Hamblin v Moorwand* (see update 1) the High Court found in favour of two APP fraud victims in circumstances where a *Quincecare* duty claim was brought by the victims by way of a "derivative" action in place of the PSP's corporate customer, which was used as the vehicle to perpetrate the fraud against them. And the High Court's decision in *Barclay-Ross v Starling* (see update 13) recognised the so-called "retrieval duty", suggesting that APP fraud victims may have a basis upon which to bring claims against their own banks, provided the alleged breach of duty is rooted in the sending bank's failure to take adequate steps after being alerted to a fraud, rather than the duty owed by the bank when processing the payment instruction itself. These developments underscore the need for appellate guidance and the potential for further claims in this area.

It is interesting to see a surge in cases considering apparent/ostensible authority. Several recent decisions illustrate the enforceability of financial contracts executed by agents, with analysis of the principles governing apparent authority. The cases confirm the importance of clear documentation, but highlight how a principal's conduct can lead a third party to reasonably believe an agent has apparent authority. The purported title of the agent's role is also a factor that the court has found to be relevant in a number of apparent authority cases.

Procedural highlights during this period include the Hague 2019 Judgments Convention (**Hague 2019**) coming into force in the UK (see update 52), which provides a uniform framework for the recognition and enforcement of judgments between contracting states. This development facilitates the enforcement of English judgments in other Hague 2019 contracting states and vice versa, broadening the scope of enforceable judgments. Finally, we highlight the Solicitors Regulation Authority's (**SRA**) review of the high-volume consumer claims sector (see update 63). This review aims to address concerns about how the market operates and the potential for consumer harm, with a focus on areas such as motor finance commission claims and other financial services. The SRA's discussion paper sets out key challenges and potential regulatory changes, emphasising the need for improvements in the high-volume claims market. The deadline for responses is 14 November 2025.

You can read about these developments and more in our full Biannual Banking Litigation Update. We hope you find our update useful and, as ever, please feel free to contact one of us or your usual HSF Kramer contact if there are any topics which you would like to discuss further.

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Duties in financial services

1. High Court rules in favour of APP fraud victims in "derivative" action against PSP for breach of so-called Quincecare duty

***Hamblin & Anor v Moorwand Ltd & Anor* [2025] EWHC 817 (Ch)**

On appeal, the High Court found in favour of two individual victims of an APP fraud against a PSP, in circumstances where the claim was brought by way of a "derivative" action in place of the PSP's corporate customer, which was used as the vehicle to perpetrate the fraud against them.

Following the Supreme Court's decision in *Philipp v Barclays Bank UK plc* [2023] UKSC 25 (see our blog post), victims of APP fraud are effectively barred from bringing a claim against their own bank for breach of the so-called *Quincecare* duty. *Philipp* clarified that this is a limited duty to act with reasonable skill and care when processing customer payments, which applies only to “interpreting, ascertaining, and acting in accordance with the instructions” of the customer. Accordingly, the duty cannot arise in an APP fraud context, because by definition the mandate is validly made by the victim of the fraud.

The decision in *Philipp* resulted in many and varied attempts to bring novel APP fraud claims against both sending and receiving banks, and the present claim represents an innovative example of such a claim. Here, a fraudster set up an "electronic wallet" with the defendant PSP, which was held in the name of a corporate entity. As part of an APP fraud, two individuals were induced to make a payment into the electronic wallet, and the funds were subsequently paid away pursuant to instructions given on behalf of the company by the fraudster. The claimants (the victims of the APP fraud) were granted permission by the judge at first instance to bring a "derivative" action against the PSP on behalf of the PSP's corporate customer. The claim alleged breach of (among other things) the PSP's so-called *Quincecare* duty owed to the company. The claim was dismissed at first instance and the claimants appealed. On appeal (which did not include any appeal of the judge's decision to grant permission to bring the derivative claim), the High Court found that the PSP failed to make necessary inquiries, thus breaching its *Quincecare* duty in paying away the sums in question. Consequently, the PSP was ordered to restore the funds to the company's account.

The case is particularly interesting in exploring the possibility (and risk) of derivative actions in a *Quincecare* context, as well as the circumstances which could put a PSP on inquiry so as to trigger the duty. Importantly, the judge's decision to grant the claimants permission to bring the derivative action on behalf of the company was not appealed by the PSP. Somewhat unhelpfully, this means the legal basis upon which permission was granted to creditors of the company was not considered by the appellate court. However, the same claimants previously sought to bring a derivative action against a different PSP arising from the same underlying fraud. In that case, the claimants argued that there was an alleged trust where the company used to perpetrate the fraud was the trustee, and the APP fraud victims had standing to bring representative proceedings as beneficiaries of the trust. In a judgment handed down in 2020 (prior to the Supreme Court's decision in *Philipp*), the High Court refused to strike out the claim, but it appears the claim did not proceed to trial (see our blog post).

There was also a secondary claim under Regulation 61 of the Payment Services Regulation 2009 (the **2009 Regulations**), which provides that where an executed payment transaction was not authorised, the PSP must immediately: i) refund the amount of the unauthorised payment transaction to the payer; and ii) restore the debited payment account to the state it would have been in had the unauthorised payment transaction not taken place. The court found that the 2009 Regulations focused solely on the mechanical execution of payment instructions, which the PSP had adhered to, rather than an evaluative exercise to determine the precise nature of the transaction in question.

In May 2025, the PSP applied to the Court of Appeal for permission to appeal.

For further information, please see our Banking Litigation blog post.

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2. Supreme Court confirms fiduciary must account even for profits that would have been made without the breach of duty

***Rukhadze v Recovery Partners GP Ltd & Anor* [2025] UKSC 10**

The Supreme Court confirmed that a fiduciary is liable to account for all profits made out of their position as such. They cannot circumvent liability by arguing that "but for" the breach they would have made the profits in any event – for example because, if asked, the principal would have consented.

In its decision, the Supreme Court unanimously declined to change the law governing a fiduciary's liability to account for profits. However, three of the seven justices disagreed with the reasoning.

The decision confirms the strictness with which the equitable principles that attach to a fiduciary relationship are to be applied. The "no profit" rule requires a fiduciary who makes a profit out of their position (such as by exploiting a business opportunity they became aware of by virtue of being a fiduciary) to account for that profit unless the principal provides informed consent to the fiduciary keeping it. It is closely linked to the "no conflict rule", which prohibits fiduciaries from placing themselves in a position where their interest and duty may conflict. The essential purpose of both rules is to deter individuals who have undertaken an obligation of undivided loyalty to someone else from being tempted to fall short of that obligation for their own gain.

For further information, please see our Civil Fraud and Asset Tracing blog post.

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3. County Court considers limitation period for unfair relationship claim in secret commission case

***Howard & Anor v GE Money Mortgages Ltd & Anor* [2025] EWCC 18**

The County Court partially allowed an appeal against the decision of a District Judge to dismiss unfair relationship claims under s.140A CCA by two borrowers against a lender/its assignee, in respect of allegedly secret commissions paid by the lender to a third-party credit broker.

This follows a line of decisions concerning "secret" and "half secret" commissions payable to third party intermediaries (see our previous blog posts here). It underscores the distinction between limitation periods for breach of fiduciary duty and unfair relationship claims brought under s.140A CCA. The decision is a timely reminder for financial institutions of the risk of longer limitation periods for unfair relationship claims.

This decision highlights that even if the limitation period in respect of a breach of fiduciary duty claim has expired, there is a risk that the limitation period for an unfair relationship claim has not, particularly where the credit relationship is ongoing, has been assigned or has recently ended. That said, the decision gives some comfort that this risk may be mitigated by the exclusionary rule in *Barnes v Black Horse Ltd* [2011] EWHC 1416 (QB), which disallows the making of a separate unfair relationship claim by a debtor where that claim could have been brought in the context of earlier proceedings by a lender to enforce a loan.

In May 2025, the borrowers applied to the Court of Appeal for permission to appeal. However, in October 2025 the application was withdrawn.

For further information, please see our Banking Litigation blog post.

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4. An overview of potential disputes caused by market dislocation

History tells us that periods of market dislocation, such as that which has arose from the introduction of tariffs by the US administration, frequently lead to an increase in disputes. This is because such periods tend to go hand in hand with increased market volatility, and thus a rise in companies facing financial distress and difficulties associated with the pricing of assets. These factors may in turn contribute to a more contentious environment as stakeholders on both sides attempt to navigate the uncertainties and protect their interests during turbulent times.

For a summary of the key types of disputes we tend to see in such periods, and our suggestions on how to guard against the risks of such issues arising, please see our Banking Litigation blog post.

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5. High Court considers how sale proceeds should be accounted for as between first-ranking secured creditor and second-ranking judgment creditor

***Brooke Homes (Bicester) Ltd v Portfolio Property Partners Ltd & Ors* [2025] EWHC 1305 (Ch)**

The High Court granted relief in favour of a judgment creditor who had brought two applications against the first-ranking secured creditor for (i) an equitable account, and (ii) the application of the equitable doctrine of marshalling (under which it would have access to the first-ranking creditor's broader package of security).

This decision is a useful reminder for lenders with higher-ranking security that they may be liable to account to other secured creditors interested in the equity of redemption, including for any personal advantage obtained by the lenders beyond that due under their charge.

In determining the scope of the account, the court will assess not only a lender's monetary gains from the charged property, but also the non-monetary ones, though it will exclude mere "collateral advantages". It will also consider whether the lender has committed a "wilful default" by not, for example, obtaining the best price reasonably obtainable on sale of the property. If wilful default is established, the court can order an account for the difference between the actual price and the price that should have been obtained, as assessed on the evidence available to it, including in relation to the negotiations that occurred between the parties to the sale.

The decision will offer additional reassurance to creditors with lower-ranking security as the court recognised that the lower-ranking creditor's position in this case could also be protected by the equitable doctrine of marshalling. Marshalling applies where there are two creditors of the same debtor, each owed a different debt. Where one creditor (A) can enforce its claim against more securities than the other creditor (B), the doctrine gives B the right to have the securities "marshalled", so that both A and B are paid so far as possible (see *Szepietowski v The National Crime Agency (Rev 1)* [2013] UKSC 65).

The case also offers insight into how the court will determine the lender's expenses that can be deducted from the proceeds of sale.

For further information, please see our Banking Litigation blog post.

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6. Privy Council clarifies that a mortgagee seeking to realise its security does not need to improve asset in order to obtain best price reasonably obtainable

***Garet O Finlayson & Anor (Appellants) v Caterpillar Financial Services Corporation (Respondent) (The Bahamas)* [2025] UKPC 24**

The Board of the Privy Council ruled that two guarantors under a loan agreement remain liable for the loan's outstanding balance, despite their allegations that the asset used to secure the lending was sold at an undervalue.

This decision is relevant to financial institutions seeking to realise security under a loan as mortgagee. It provides a useful analysis of the scope of the duty of care applicable to lenders in such scenarios, which requires them to sell an asset provided by way of security for the best price reasonably obtainable. In the present case, the Board determined that the duty does not oblige a lender to improve an asset before sale in order to obtain the best possible price (even where improvements may result in that best possible price being far higher). Instead, a lender is required only to take such steps as are reasonable in the circumstances.

The Board also considered the question of which party bears the burden of proof in determining whether a mortgagee has breached this duty. Whilst the guarantors in the present case sought to assert that a mortgagee is generally responsible for proving that it has complied with this duty, the Board determined that the burden properly rests with a mortgagor to show that it has not. Where the burden has been reversed in previous cases, this has been for fact-specific reasons (eg where a sale has been effected to a related party) – which should not be applied too broadly.

For further information, please see our Banking Litigation blog post.

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7. Section 172 "good faith" duty: Court of Appeal clarifies honesty requirement, which must be assessed objectively

***Saxon Woods Investments Ltd v Francesco Costa* [2025] EWCA Civ 708**

The Court of Appeal considered s.172 of the Companies Act 2006, which requires a director to act in the way they consider, "in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole".

The decision emphasises that, as a core fiduciary duty, this requirement cannot be met where a director has acted dishonestly, and that the test for honesty is not purely subjective, based on whether the director personally believed they were acting in the company's best interests. Rather, honesty is also to be assessed objectively: the court must consider whether the director's conduct was objectively honest, by the standards of ordinary decent people.

The Court of Appeal's judgment also gives helpful guidance on the relevance of a shareholders' agreement in assessing the meaning of "the success of the company" for the purposes of s.172. Where a shareholders' agreement identifies the shareholders' objectives, it may be taken to indicate what is meant by the company achieving success for the benefit of its members. This suggests that directors taking decisions which run contrary to a provision of a shareholders' agreement may breach s.172.

Separately, the decision confirms that a finding of unfair prejudice under s.994 of the Companies Act is not dependent on the petitioner suffering financial loss, and that the court has wide discretion in granting relief.

In August 2025, the defendant applied to the Supreme Court for permission to appeal.

For further information, please see our Litigation blog post.

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8. High Court dismisses US$ 21m claim for mistaken payments made to a commodities trader in fraudulent trade finance scheme

***Rasmala Trade Finance Fund v Trafigura PTE Ltd* [2025] EWHC 1569 (Ch)**

The High Court rejected a restitution claim by a trade finance fund, which sought to recover approximately US$ 21 million paid to a commodities trader on the mistaken belief that the payments were financing genuine contracts.

The court found that the payments were made by the trade finance fund under a mistaken belief due to fraudulent contracts presented by a third party, and that the commodities trader was accordingly unjustly enriched. However, the trader successfully established a change of position defence through its continued trading with the third party (which would not have continued but for the payments received), making restitution inequitable.

The decision demonstrates how a good faith change of position defence can shield recipients of mistaken payments from liability in unjust enrichments claims. It underscores the importance of verifying the legitimacy of contracts and payments in trade finance transactions, potentially leading to more stringent due diligence processes in the industry.

In August 2025, the trade finance fund applied to the Court of Appeal for permission to appeal.

For further information, please see our Banking Litigation blog post.

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9. Supreme Court clarifies remedies available against dishonest assistant for breach of a constructive trust

***Stevens v Hotel Portfolio II UK Ltd* [2025] UKSC 28**

The Supreme Court restored an order requiring a third party who dishonestly assisted a company director in making and then dissipating an unauthorised profit to pay equitable compensation equal to the amount of that unauthorised profit.

The Supreme Court confirmed that, in cases involving multiple breaches of duty, such as the making of unauthorised profits and the subsequent dissipation of those profits, the two breaches must be viewed as separate and distinct. The result is that a dishonest assistant can be liable, jointly with the defaulting fiduciary, for losses caused by the dissipation. The Supreme Court held that this does not contradict the established principle that a dishonest assistant can only be liable to account for profits they have themselves made (and not those made by the defaulting fiduciary). It is irrelevant that the compensation awarded against the dishonest assistant may be equal to the profit gained by the defaulting fiduciary.

The Supreme Court rejected the argument, which the Court of Appeal had accepted, that a gain to the beneficiary represented by the unauthorised profits could be set off against the loss caused by their dissipation in order to reduce, or extinguish, a dishonest assistant's liability where the two breaches were inextricably connected as elements of a single scheme. The decision leaves open the potential for equitable set-off, but not merely because the breaches are closely connected. Instead, the court may allow a set-off when there would otherwise be a "clearly inequitable result".

For more information, see this post on our Civil Fraud and Asset Tracing Notes blog.

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10. Supreme Court decision in Hopcraft motor finance commission appeal – key implications for financial services firms

***Hopcraft & Anor v Close Brothers Ltd* [2025] UKSC 33**

The Supreme Court allowed the lenders' appeal in part in its much-anticipated judgment relating to lender liability for the payment of third-party broker commissions in the motor finance context.

The three conjoined appeals considered the sale of motor finance to financially unsophisticated consumers. Each of the customers had bought a second-hand car from dealerships which also brokered the finance the buyers required. As a result of doing so, the dealer brokers received a commission payment from the relevant lender (either not disclosed or only partially disclosed to the customer).

In a unanimous judgment, the Supreme Court (Lords Reed, Hodge, Lloyd-Jones, Briggs and Hamblen) held that the lenders were not liable: (a) at common law for payment of a bribe; nor (b) as accessories for breach of fiduciary duty by the dealer brokers. This is because the dealer brokers had not assumed, and did not owe, any fiduciary duty to the customer. However, the Supreme Court did allow the appeal in respect of Mr Johnson's claim under s.140A CCA, choosing to decide the issue of unfairness for itself rather than remitting the case to a District Judge, and finding that the relationship between Mr Johnson and the lender was unfair on the basis of its assessment of the underlying facts of the lending. The Supreme Court ordered the lender to pay the amount of the commission to Mr Johnson with commercially appropriate interest from the date of the agreement.

The decision represents a welcome return to the orthodox position in relation to how fiduciary duties arise and the law of common law bribery, effectively overturning the most difficult to reconcile elements of the Court of Appeal's decision in this case (see our blog post). As a result, motor finance commission claims against lenders are likely to be limited to statutory claims under s.140A CCA. The Supreme Court also gave careful, if non-exhaustive, guidance on the factors to be taken into account for the purpose of s.140A claims (which requires a court to have regard to all matters it considers relevant when deciding whether a consumer credit relationship is unfair to the debtor).

That said, the requirement for a multi-factorial analysis under s.140A CCA will, inevitably, create some uncertainty when trying to determine the merits of such cases. Mr Johnson's case may, despite turning on its facts, be seen in practice as a benchmark both for this analysis and for the appropriate remedy under s.140B CCA. This focus on the underlying facts may also create procedural difficulties for claimants wishing to proceed by way of a class action, particularly for any attempt to bring a representative action under CPR 19.8, which requires claimants to have the "same interest in the claim" (seen in the context of secret commission for IP renewals in *Commission Recovery Ltd v Marks & Clerk LLP* [2024] EWCA Civ 9 – see our blog post).

With the Supreme Court's rejection of the common law and equitable claims, focus has now shifted to whether the FCA will provide an alternative route for consumers seeking redress. The FCA has welcomed the Supreme Court's clarification of the law and confirmed that it will consult in the Autumn of 2025 on a redress scheme as part of the regulator's review into motor finance commission arrangements: FCA to consult on a compensation scheme for motor finance customers. The FCA will propose that discretionary commission arrangements will be covered by the redress scheme and will also consult on whether non-discretionary arrangements should be included in light of the Supreme Court's decision in relation to Johnson.

In stating its view that a redress scheme should cover agreements dating back to 2007, the FCA notes that it wants a scheme to be comprehensive and avoid the need for consumers to use other routes to secure compensation and to prevent large numbers of ongoing disputes in the courts. The FCA has also discouraged the use of claims management companies as being unnecessary.

The FCA has reiterated that it will keep in mind seven principles, set out in a previous announcement in June 2025, which will guide the design of any redress scheme, with a balance of priorities between consumers and firms' interests. The scheme will be subject to a consultation period, with final steps confirmed afterwards and, if approved, is expected to be operational in 2026.

The FCA's statement focuses on the finding of unfairness under the CCA, and states that its consultation will cover how firms should assess whether the relationship between the lender and borrower was unfair for the purposes of the scheme and if so, what compensation should be paid. However, it also notes that firms were not complying with the FCA's rules. It is possible therefore that the scope of a redress scheme may potentially be broader than s.140A CCA claims.

What is clear, is that the outcome of these appeals will significantly impact the landscape for civil claims in respect of motor finance commissions (existing and future). The judgment may also have ramifications for other industries with a business model involving the payment of commissions to third parties. In terms of tax implications, in principle payments which compensate (or settle claims) for losses suffered by customers in the course of dealing with a lender may be deductible in computing the lender's taxable profits. Our tax colleagues have considered these issues and have extensive experience of dealing with such issues with HMRC.

For further information, please see our Banking Litigation blog post and our *Hopcraft* special edition podcast.

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11. High Court permits documents obtained via Norwich Pharmacal Order to be used against disclosing bank in related APP fraud claim

***Babco Chemicals Inc v HSBC UK Bank plc* [2025] EWHC 1749 (Comm)**

The High Court permitted a potential claimant to use documents received from a financial services firm under a *Norwich Pharmacal* Order to found a claim arising out of an APP fraud against that same firm as the receiving bank.

Following the Supreme Court's decision in *Philipp v Barclays Bank UK plc* [2023] UKSC 25 (see our blog post), victims of APP fraud are effectively barred from bringing a claim against their own bank for breach of the so-called *Quincecare* duty. *Philipp* clarified that this is a limited duty to act with reasonable skill and care when processing customer payments, which applies only to "interpreting, ascertaining, and acting in accordance with the instructions" of the customer. Accordingly, the duty cannot arise in an APP fraud context, because by definition the mandate is validly made by the victim of the fraud.

The decision in *Philipp* has resulted in many and varied attempts to bring innovative APP fraud claims against both sending and receiving banks. The present case highlights an additional area of risk for receiving banks in an APP fraud scenario, where potential claimants do not have the necessary information available to them to fully plead their claim. While the *Norwich Pharmacal* jurisdiction has safeguards to prevent fishing expeditions for what is in essence pre-action disclosure via the back door, this case evidences that those safeguards are not cast iron.

In terms of potential alternative avenues for claims arising from APP fraud, the Supreme Court in *Philipp* identified an arguable "duty of retrieval", requiring banks to take adequate steps after being alerted to a fraud to recover payments made, albeit the existence of such a duty being owed by receiving banks has been recently rejected in *CCP v Santander* [2025] EWHC 667 (KB) (see our blog post). However, the risk of APP claims for receiving banks remains through other heads of claim. For example, the decision in *Terna Energy v Revolut* [2024] EWHC 1419 (Comm) (see our blog post) is a recent example of an APP fraud claim relying upon unjust enrichment as the primary cause of action. The High Court in *Terna* refused to strike out/give reverse summary judgment on the claim.

This decision is therefore of interest in the context of APP fraud claims against receiving banks, and wider payment processing risks for banks and other PSPs.

For further information, please see our Banking Litigation blog post.

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12. High Court grants bank stakeholder relief under CPR Part 86 in US$ 11 million deposit dispute involving competing claims

***SP Hinduja Banque Privee SA v Bank of Baroda* [2025] 7 WLUK 377**

The High Court granted stakeholder relief under CPR Part 86 to a London branch of an Indian bank, finding that two rival parties had competing claims to a US$ 11 million deposit.

This decision follows a series of stakeholder applications under CPR Part 86 (see our previous blog posts here). As a reminder, CPR Part 86 allows a person facing competing claims over money, goods or chattels (a "stakeholder") to apply to the court for directions on how to deal with the disputed property, provided they claim no personal interest in it and are willing to transfer it into court or as directed.

The decision will be of interest to financial institutions navigating competing claims to funds or assets. It illustrates the threshold for stakeholder relief under CPR Part 86. It reaffirms that, as per *Skatteforvaltningen (The Danish Customs And Tax Administration) v Shah & Ors* [2020] EWHC 1658 (Comm), the threshold is not high: the applicant must show that there are "competing claims" (including proprietary claims) in the sense that compliance with one claim would expose them to the risk of liability to another. However, if one party's claim is so weak as to be entirely frivolous or insubstantial, the court may exercise its discretion not to grant relief. The stakeholder procedure is intended to address genuine situations of doubt, not to provide a platform for plainly unmeritorious claims.

One of the most interesting aspects of the decision is the way in which the court dealt with the question of jurisdiction. In this case, the competing claims faced by the bank were from its customer and a third party. The contract between the bank and its customer was subject to English law and jurisdiction. However, the separate contractual relationship between the customer and the third party (to which the bank was not a party) was arguably subject to an exclusive Swiss jurisdiction agreement. In the court's view, that did not affect its ability to grant relief, as it was not resolving the dispute between the bank's customer and the third party, but rather giving directions as to two separate claims by each of the customer and the third party against the bank. It considered that there was no need to refer to the Swiss courts the incidental issues of Swiss law and contract that might have to be resolved. The issue for the English court was narrow, namely whether – as against the bank – the customer or the third party was entitled to give instructions in relation to the funds.

For further information, please see our Banking Litigation blog post.

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13. High Court finds "retrieval duty" arguable against sending bank in an APP fraud context

***Dawn Barclay-Ross v Starling Bank Ltd* [2025] EWHC 2158 (KB)**

The High Court ordered partial strike-out of a claim brought by the alleged victim of an APP fraud against the sending bank.

This decision will be of broader interest to retail banks with a customer base susceptible to APP fraud. It illustrates the application of the Supreme Court's decision in *Philipp v Barclays Bank UK plc* [2023] UKSC 25 (see our blog post), which is taken as authority for the proposition that it is at least arguable to the strike-out standard that banks owe a duty to seek a customer's instructions to recover monies paid once notified that the relevant payments have been induced by fraud. This (arguable) "retrieval duty" arises from the contractual obligation owed by a sending bank to its customer to exercise reasonable skill and care (per *Santander UK plc v CCP Graduate School Ltd* [2025] EWHC 667 (KB) – see our blog post).

This decision demonstrates that even post-*Philipp*, APP fraud victims have a basis upon which to bring claims against their own banks, provided the alleged breach of duty is rooted in the sending bank's failure to take adequate steps after being alerted to a fraud, rather than the duty owed by the bank when processing the payment instruction itself. As confirmed by *Philipp*, a bank's general duty to act with reasonable skill and care when processing customer payments will only arise where there are questions about the validity of the payment made. As such, the duty cannot arise in an APP fraud context, because by definition the mandate is validly made by the victim of the fraud.

Interestingly, the court confirmed that any claim based on the so-called "retrieval duty" could only be a claim for the loss of a chance of recovering the money that has been paid out. This is significant, because it departs from the characterisation of claims founded on breach of the duty of reasonable skill and care when processing payments. The Supreme Court in *Philipp* confirmed that breach of the latter duty gives rise to a debt claim, which has practical consequences for any litigation (in terms of limitation, causation and contributory negligence). In contrast, it seems that any "retrieval duty" claims will be for damages for breach of a duty of care or contract. The practical implications flowing from the characterisation of such claims was considered by the Hong Kong Court of Final Appeal in *PT Asuransi Tugu Pratama Indonesia TBK (formerly known as PT Tugu Pratama Indonesia) v Citibank N.A.* [2023] HKCFA 3 (see our blog post).

In the present case, the court adopted a relatively permissive approach to allowing a vulnerable claimant (without representation) to make substantial amendments to their claims and refused to strike them out entirely. Simultaneously, the decision illustrates the limits of the court's permissiveness. The court will not seek to improve inarguable points: breaches of non-binding FCA Handbook provisions are not actionable; a payment to a foreign recipient is not caught by the contingent reimbursement model code (**CRM Code**) simply through the involvement of a UK-domiciled intermediary; and claims against banks for distress, inconvenience and emotional damages remain bad in law. Although the court said it lacked sufficient evidence to decide the point, it also queried whether alleged breaches of the voluntary CRM code are actionable.

The claimant has now discontinued the claim.

For further information, please see our Banking Litigation blog post.

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14. Fiduciary relationships reshaped

HSF Kramer LLP have published an article in the *New Law Journal* on the Supreme Court's landmark decision in *Hopcraft & Anor v Close Brothers Ltd* [2025] UKSC 33.

The three conjoined appeals considered the sale of motor finance to financially unsophisticated consumers buying second hand cars. In a unanimous judgment, the Supreme Court allowed the lenders' appeal in part. The judgment restores orthodoxy in the law of fiduciary duties and common law bribery, while simultaneously providing a basis and benchmark for future motor finance commission claims under s.140A CCA.

The article first appeared in the September 2025 edition of the New Law Journal.

You can access the article here.

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Impact of sanctions on financial services agreements

15. High Court declines to vary interim payment order despite sanctions concerns

***Celestial Aviation Trading Ireland Ltd & Ors v Volga-Dnepr Logistics B.V.* [2025] EWHC 1156 (Comm)**

The High Court rejected an application by a company, whose ultimate beneficial owner was a designated person under UK and US sanctions, to vary an interim payment order to delay payment until it obtained the necessary licences from UK and US sanctions enforcement agencies.

Although set in a non-financial context, the decision will be of interest to financial firms navigating payment issues relating to sanctioned entities. It illustrates the extent to which concerns about sanctions breaches will influence the court's decision whether to vary an interim payment order. It is a reminder that the court's discretion under CPR 25.20(6)(b) to vary such orders will only be exercised for principled reasons such as, for example: (i) a material change of circumstances since the original order; or (ii) where the original decision was based on a material misstatement of fact (innocent or otherwise).

The decision reinforces that the courts will not easily allow sanctioned parties to use sanctions as a shield against compliance with court orders. It highlights the difficulty that sanctioned parties face in seeking a variation of a court order requiring payment if the court was already aware of their designation as a sanctioned person and the potential impact of sanctions on their ability to comply. Reiterating sanctions challenges, without new evidence or developments, is unlikely to persuade the court to exercise its discretion to vary the order. Additionally, the court will not favour delays by sanctioned parties in addressing their compliance obligations, such as obtaining the necessary licences from sanctions agencies like the UK Office of Financial Sanctions Implementation (**OFSI**) or the US Office of Foreign Assets Control. The issue of obtaining the necessary licences should properly have been raised in relation to the initial application for the interim payment order, and not in a new application to vary the order.

For further information, please see our Banking Litigation blog post.

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16. High Court refuses to set aside statutory demand issued by "designated person" for the purpose of UK Russian sanctions

***Chanana v Khan* [2025] EWHC 1472**

The High Court dismissed an application to set aside a statutory demand brought by a tenant who believed it was unlawful to pay rent to their landlord, who was a designated person under the Russia (Sanctions) (EU Exit) Regulations 2019, finding that the tenant's rent payments fell within the exception under regulation 58(5).

While regulations 12 and 13 prohibit the making available of funds to a designated person or for the benefit of a designated person, the court found that the rent payment fell within the exemption to this general prohibition, because the tenant's obligation arose before the landlord's designation, as it was created by the lease.

The decision will be of broader interest to financial services firms navigating payment issues relating to sanctioned entities. It clarifies that, under regulation 58(5), an obligation under a contract entered into before designation remains a pre-designation obligation, even if the payment dates fall after the person becomes designated. As a result, payments made in discharge of such obligations are not prohibited and do not require a licence from the OFSI, provided the funds are credited to a frozen account held or controlled by the designated person at a UK credit or financial institution.

The decision also highlights the scope of the "reasonable belief" defence under s.44 of the Sanctions and Money Laundering Act 2018 (**SAMLA**). Following *obiter* comments in *Celestial Aviation Services Ltd v Unicredit Bank GmbH, London Branch* [2024] EWCA Civ 628 (see our blog post), the court confirmed that s.44 SAMLA provides protection for acts or omissions done in the reasonable belief that they are in compliance with sanctions regulations, which ensures that a person is not pressurised into doing something that risks breaching sanctions by a fear of being exposed to civil proceedings – it does not protect against pre-existing liabilities. In the court's judgment, while s.44 SAMLA could provide protection against insolvency proceedings based on a failure to pay a debt, it did not automatically extend to the statutory demand process (which do not amount to civil proceedings). Nonetheless, to mitigate the risk of adverse consequences from a reasonable (but mistaken) belief about the effect of sanctions, the court exercised its discretion to allow the debtor an additional 21 days to make the required payment to a frozen account in the name of the landlord before a bankruptcy petition could be presented (thereby providing protection in accordance with s.44 SAMLA).

For further information, please see our Banking Litigation blog post.

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17. English High Court decides in favour of banks in EuroChem bond claim, confirming payment under on-demand bonds prohibited due to Russian sanctions

***LLC EuroChem North-West-2 & Anor v Société Générale S.A. & Ors* [2025] EWHC 1938 (Comm)**

The High Court found in favour of the banks in a dispute with the EuroChem Group, a Russian fertiliser company, concluding that the banks are prohibited from making payment under on-demand bonds due to asset-freezing provisions under EU Regulation 269/2014 (**Regulation 269**).

The court found that Mr Melnichenko, who is a "designated person" listed in Annex I to Regulation 269, is the true owner of the relevant EuroChem group entities. On that basis, it found that the bonds in question were frozen under Article 2(1) of Regulation 269, as the French and Italian national competent authorities (**NCAs**) had determined. Accordingly, the banks were prohibited from making payment under the bonds. In reaching this conclusion, the court held that indirect ownership is sufficient to trigger the asset-freezing provisions under Article 2 of Regulation 269. Furthermore, the court determined that a beneficiary under a discretionary trust is considered the owner of the trust's assets for the purposes of Regulation 269. In addition, the court considered the application of EU Regulation 833/2014, which restricts claims brought by or on behalf of Russian entities where the claim is connected to contracts and their performance has been affected by the measures imposed under that regulation.

The decision will be of particular interest to financial institutions as it demonstrates the English court's willingness to apply the common law principle in *Ralli Bros v Compania Naviera Sotay Aznar* [1920] 2 KB 287 (which prevents enforcement of a contract if its performance is illegal in the place of performance), and to refuse enforcement of contracts on public policy grounds in the context of sanctions against Russia. The judgment provides a detailed analysis of the concept of "place of performance" under the *Ralli Brothers* rule, specifically in relation to on-demand bonds which do not specify a place of performance explicitly, following the approach adopted in *Britten Norman Ltd v State Ownership Fund of Romania* [2000] Lloyd's Rep and *Marconi Communications International Ltd v PT Pan Indonesia Bank Ltd TBK* [2005] EWCA Civ 422.

The judgment reinforces the position that decisions made by NCAs are binding on operators within their jurisdictions, and that compliance with sanctions takes precedence over contractual obligations, even where autonomous financial instruments such as demand bonds are concerned. The decision also provides a detailed analysis of the EU sanctions regulations and the concepts of "ownership and control", particularly in the context of complex corporate structures involving trusts and transfers of ownership.

For further information, please see our Banking Litigation blog post.

In October 2025, the High Court granted the claimants' application for permission to appeal to the Court of Appeal.

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Contractual construction

18. High Court finds third party can enforce lender's rights under loan agreement pursuant to Contracts (Rights of Third Parties) Act 1999

***HNW Lending Ltd v Lawrence* [2025] EWHC 908 (Ch)**

The High Court found that a loan agreement could be enforced by a third party acting as security agent for a lender, despite the contract not conferring a benefit on the security agent, which was not itself a party to the agreement. In particular, the court considered the impact of the Contract (Rights of Third Parties) Act 1999 (the **1999 Act**) in conferring on a third party equivalent enforcement rights to those of the lender.

In the context of a claim against a borrower for failure to make repayment under a loan agreement, the court considered (among other things) a strike out application by the borrower on the basis that the claimant lacked standing to file the claim. The borrower asserted that the claimant, which was described as the lender's security agent and was not itself a party to the loan agreement, had no enforceable rights under it. However, in the court's view, one of the clauses of the loan agreement appeared to have been drafted with the 1999 Act in mind and with the intention of conferring on the security agent equivalent enforcement rights to those of the lender, enabling the security agent to enforce obligations owed to and benefitting the lender.

The court considered the scope of the 1999 Act. In the court's judgment, s.1(1)(a) of the 1999 Act is not limited to the enforcement by a third party of a term purporting to benefit the third party, since this type of term is specifically addressed in s.1(1)(b). The court noted that its conclusion on this point differed from the example given in Chitty on Contracts (35th Edition) of a situation where a third party may enforce a term of the contract pursuant to this section. It also differed to a previous County Court decision involving the same lender and a clause in identical terms. However, the court concluded that it is sufficient, for the purpose of s.1(1)(a) of the 1999 Act, that a contract expressly provides that the third party may enforce the relevant contractual rights.

From a drafting and risk management perspective, the decision highlights that a third party may be entitled to enforce a contractual term under the 1999 Act, even where that term does not purport to benefit the third party, if the contract expressly provides that the third party is entitled to enforce the contractual right in question. If the parties wish to exclude enforcement by a third party and put the position beyond doubt, they should include express wording to this effect.

In April 2025, the High Court gave the borrower permission to appeal to the Court of Appeal. The Court of Appeal hearing is due to take place by 26 May 2026.

For further information, please see our Banking Litigation blog post.

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19. Agreements to agree: Court of Appeal finds supply contract enforceable despite leaving price to be fixed

***KSY Juice Blends UK Ltd v Citrosuco GMBH* [2025] EWCA Civ 760**

The Court of Appeal upheld a contract for the sale of goods which stipulated that the price for a portion of the contract volume was an "open price to be fixed". The court overturned the High Court's decision that the term constituted a mere unenforceable agreement to agree. Instead, a term could be implied that, in the absence of agreement, the parties intended for the price to be set by reference to a reasonable or market price.

The Court of Appeal confirmed that, while agreements to agree are not valid contracts, each case must be decided on its own facts and on the construction of the relevant terms. In particular, in commercial dealings between parties who are familiar with the relevant trade and have acted in the belief that there is a binding contract, courts will be willing to imply terms, where possible, to enable the contract to be carried out.

This decision highlights the English courts' commitment to upholding long-term commercial agreements, particularly in fluctuating markets where pricing terms may be left flexible on purpose. The court firmly rejected the first instance judge's view that the court may strive less hard to uphold an agreement where the result would be to undermine the intended bargain only in part, rather than in its entirety.

However, the decision also reaffirms the importance of drafting clear mechanisms to determine pricing and the resolution of related disputes. Where parties intend pricing to be settled at a later date and through negotiation, arbitration or expert determination clauses or reference to objective pricing indices may mitigate uncertainty and litigation risk.

In July 2025, the defendant applied to the Supreme Court for permission to appeal.

For further information, please see our Litigation blog post.

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20. High Court finds breach of express obligations of good faith but no loss

***Matière SAS v ABM Precast Solutions Ltd* [2025] EWHC 1434 (TCC)**

The High Court found that a party had breached an express duty of good faith in a collaboration agreement to bid for a large tunnelling sub-contract on the HS2 project, but that the breach was not the cause of the innocent party's loss as the bid would have been rejected anyway.

The decision is a useful reminder of how courts will interpret and enforce express obligations of good faith in commercial contracts. In particular, the decision illustrates that conduct which is dishonest, commercially unacceptable, or which undermines the contract's purpose may be held to breach a good faith clause.

The case also illustrates that, to be awarded substantial damages, the innocent party must prove that the breach actually caused it to suffer loss – such as, in this case, the loss of a real and substantial chance to win the sub-contract which was the subject of the collaboration agreement. Although the court accepted that the claimant originally had a real and substantial chance of being awarded the sub-contract, and that chance diminished over time, it held that the breach was not the cause of that loss.

For further information, please see our Litigation blog post.

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21. High Court refuses bond issuer's interim mandatory injunction application seeking to compel release of funds by settlement agent

***Eraaya Lifespaces Ltd v Elara Capital plc & Ors* [2025] EWHC 1506 (Comm)**

The High Court dismissed an interim mandatory injunction application made by a bond issuer, seeking to compel an investment bank to instruct the settlement agent to release funds received from the bond issuance. The dispute centred on whether the investment bank, which acted as the claimant issuer's financial advisor on the issuance, was contractually required to instruct the settlement agent to release the funds to the claimant.

Applying the principles for granting interim mandatory injunctive relief (which are the same as for prohibitory injunctions per *National Commercial Bank Jamaica Ltd v Olint Corp Ltd (Jamaica)* [2009] UKPC 16), the court acknowledged that there was a "serious issue to be tried" in this case. However, a court is "far more reluctant" to grant a mandatory injunction, and in the court's view the claimant's case was confused and far from strong. The court held that the combined factors on balance of convenience tipped decisively away from the grant of an injunction.

A key issue considered by the court was the proprietary interest in the funds held by the settlement agent. In the present case, there was evidence that a clause was incorporated in the bond documentation to specifically require the investment bank's confirmation in order for the settlement agent to release funds to the issuer, as an alternative to a formal escrow process. In these circumstances, the court found that it was arguable that the settlement agent held the funds on trust for the bondholders on either an express trust or a *Quistclose* trust.

For further information, please see our Banking Litigation blog post.

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22. High Court finds private equity fund bound by its agent acting with apparent/ostensible authority

***Sanlam General Insurance Ghana Ltd v Sustainable Growth Fund II SCSP SICAV-SIF* [2025] EWHC 559 (Comm)**

The High Court found in favour of a guarantor in its claim against a private equity fund for sums due under a promissory note or a corporate counter-guarantee, finding that the fund's agent had apparent/ostensible authority to bind it.

This decision will be of interest to financial institutions as it illustrates the enforceability of financial contracts executed by agents who may not have actual authority. It reaffirms the principle in *Armagas Ltd v Mundogas (The Ocean Frost)* [1985] UKHL 11 that an agent will be deemed to be acting with ostensible authority (which can be binding) if there is a representation by the agent's principal to a third party that the agent has the relevant authority to conduct the principal's business.

Interestingly, the court noted that the guarantor might have struggled to make good its case on ostensible authority, if the court had looked exclusively at the terms of the agreement relied upon. However, in the court's view, it was legitimate to look at the whole of the correspondence that followed the signature of the counter-guarantee, as well as the lack of any assertion by the fund that its agent did not have the relevant authority to sign on its behalf (up until the defence was filed). The court observed that it was "very difficult" for the fund to argue that its agent lacked ostensible authority, particularly since the agent had signed not only the key contractual documents at the heart of this dispute, but also all related correspondence and the defence documents on behalf of the fund during the proceedings.

The decision highlights that when an agent's authority to sign a contract is questioned, the court may take post-contractual communications into consideration. This appears to be because such conduct can serve as an indication that there was no genuine issue about the agent's authority. While this approach may seem counterintuitive, a similar principle applies to contract formation generally, where conduct which post-dates the conclusion of the contract can be taken into account (see our blog post). The present decision therefore reinforces the importance of consistent and proactive post-contract conduct by the principal.

For further information, please see our Banking Litigation blog post.

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23. Court of Appeal finds PSP liable for deceitful representations made by agent acting with apparent/ostensible authority

***Giwa v JNFX Ltd & Ors* [2025] EWCA Civ 961**

The Court of Appeal partially upheld a High Court decision to grant summary judgment in favour of a foreign exchange (**FX**) broker in its claim against a PSP for failing to honour a series of FX contracts, finding the PSP liable for deceitful representations made by its agent, who was acting with the PSP's apparent/ostensible authority.

The decision follows a line of cases addressing the scope and effect of apparent/ostensible authority (see our previous blog posts here). It will be of interest to financial institutions as it illustrates the enforceability of financial contracts executed by agents who may lack actual authority, but who appear to third parties to have the power to bind their principal. It reaffirms the principle in *Freeman & Lockyer v Buckhurst Park Properties (Mangal) Ltd* [1964] 2 QB 480 that ostensible authority - which can bind a principal to contracts entered by an agent - requires a representation by the principal, not merely by the agent. The most common form of such a representation is by conduct, such as permitting the agent to act in the conduct of the principal's business with third parties.

The decision highlights how a principal's conduct through allowing an agent to negotiate, communicate and conclude transactions over a period, can lead a third party to reasonably believe that the agent has ostensible authority. On the facts of the present case, the relevant conduct included the principal's directors failing to object to or clarify the agent's authority when copied to email correspondence relating to the transactions (in particular, where the agent was using the principal's email address and signed himself off as "Head of Global Markets"). The purported title of the agent's role is a factor that the court has found to be relevant in other recent ostensible authority cases (for example, in *Vegesentials Ltd & Anor v Shanghai Commercial & Savings Bank Ltd* [2024] EWHC 7 (Ch) – see our blog post). Importantly, the decision underlines that disclaimers in email footers purporting to limit an agent's authority are unlikely to be effective, where a third party seeks and obtains explicit confirmation from the principal.

While this case is unusual on the facts (given the overwhelming evidence of the agent's dishonesty, the fact that the principal was copied to the relevant emails, plus the directors of the principal providing separate affirmation of the business relationship), the principles applied are more broadly applicable in a financial services context, particularly around the limitation of authority.

For further information, please see our Banking Litigation blog post.

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24. Court of Appeal finds binding contract concluded by exchange of emails despite referring to preparation of formal agreement

***DAZN Ltd v Coupang Corp.* [2025] EWCA Civ 1083**

The Court of Appeal held that an agreement concluded by emails against a backdrop of communications over WhatsApp was binding even where the parties had not agreed every term of the contract.

The judgment is a further illustration of the English courts' pragmatic approach to contract formation in commercial negotiations. The court's focus is on whether the parties have agreed all terms they themselves regard as essential, and whether their words and conduct objectively demonstrate an intention to be bound. The whole course of negotiations must be considered, and a binding contract can be formed even if the parties anticipate a formal document to follow. The absence of “subject to contract” wording may be a factor though it is not decisive.

This case is also a timely reminder that informal communications, such as emails and WhatsApp messages, can crystallise a binding agreement - even if a number of elements of the contract are yet to be agreed. Where parties do not wish to be bound immediately, it is prudent to state expressly that the negotiations are subject to contract.

For further information, please see our Litigation blog post.

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25. High Court finds investment bank entitled to success fee under mandate executed by company's agent acting with apparent authority

***Xtellus Capital Partners Inc v DL Invest Group PM SA* [2025] EWHC 1989 (Comm)**

The High Court found in favour of an investment bank in its claim against a company for the payment of a success fee due under a mandate, finding that the company's agent had apparent/ostensible authority to bind it.

This is the latest decision in a line of cases addressing the scope and effect of apparent/ostensible authority (see our previous blog posts here) and considering the recoverability of success fees (see our previous blog posts).

The decision will be of interest to financial institutions as it provides a good case study of the requirements to establish apparent authority. It reaffirms the principle from *Freeman & Lockyer v Buckhurst Park Properties (Mangal) Ltd* [1964] 2 QB 480 that apparent authority arises where a principal represents, through words or conduct, that an agent has authority to act on its behalf, and the counterparty relies on that representation. On the facts of the present case, the court placed particular weight on communications from the Polish company's Head of Legal, which implicitly accepted that the contract would be executed by the agent in question. Specifically, the Head of Legal made changes to the contract prepared by the investment bank, which provided for the contract to be executed by the agent, but did not mention or change the intended signatory on behalf of the company. The court found that this was a plain representation on behalf of the company that the agent had authority to bind it. While this could raise concerns for legal teams, the Head of Legal had actual authority to bind the company under Polish law, even when acting alone. This is in line with *Freeman*, which confirms that a representation made as to an agent's authority to act, must be made by a person who has "actual" authority to manage the business of the company – which included the Head of Legal on the facts of this case.

The decision also reflects the guidance in *Law Debenture Trust Corp. v Ukraine* [2023] UKSC 11 (see our blog post), which clarified that a party is generally entitled to assume that the person they are dealing with has the authority they appear to have – unless the circumstances are such that a reasonable person in their position would have investigated that authority, and they failed to do so. In particular, the court emphasised that there is no general duty of inquiry "where one deals with a company via a person that one believes acts as an officer of the company". Here, the court found there was nothing at all to put the investment bank on notice of the need to question the agent's authority, and so the company was bound by the terms of the contract.

The decision is also of interest for its treatment of success fee arrangements. It highlights that allegations regarding the sufficiency of the investment bank's work were irrelevant to the court's construction of the contract. The mandate did not require a minimum threshold of work or output for the success fee to be payable; the only requirement was that the contractual conditions for payment were satisfied. This reinforces the importance of precise drafting in engagement letters and mandates.

In August 2025, the company applied to the Court of Appeal for permission to appeal.

For further information, please see our Banking Litigation blog post.

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26. High Court holds that exercise of rights under charge document is not subject to Braganza duty

***Glint Pay Ltd & Ors v Baker & Anor* [2025] EWHC 2166 (Ch)**

The High Court struck out a company's claim against its former administrators, finding there was no arguable case that the appointment of the administrators by a chargee was invalid, despite being for the purpose of an attempted takeover of the company by the chargee. In reaching this conclusion, the court found that a chargee's ability to exercise its rights under a charge document is not subject to a *Braganza*-style implied term.

Where a *Braganza* duty applies, a decision maker must exercise its discretion in a manner that is reasonable and not irrational, arbitrary or capricious, in accordance with the Supreme Court's decision in *Braganza v BP Shipping Ltd* [2015] UKSC 17. In the present case, the court held that a chargee is entitled to act in its own interests absolutely, without being subject to any requirement for rationality. Even though the court agreed that it was likely the chargee had engineered the event of default under the facility agreement which formed the basis for the administrators' appointment in order to acquire the claimant companies, it determined that this was a valid use of the chargee's powers under the charge documents.

The court also considered points of contractual interpretation, reaffirming the use of commercial common sense as an aid to contractual construction per *Wood v Capita Insurance Services Ltd* [2015] EWCA Civ 839 (see our blog post). In the present case, the court was not prepared to endorse an overly literal reading of the contract where the result would be contrary to commercial sense, particularly because there was a clear explanation as to why the wording in question was used. The wording originated from earlier financing arrangements which were expanded to cover a broader set of the company's assets, but the wording in the clause was not amended to reflect this. The court emphasised that understanding the genesis and evolution of the contractual language was crucial, as a strictly literal approach would have produced a result at odds with the parties' commercial objectives and the practical realities of the transaction.

For further information, please see our Banking Litigation blog post.

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27. High Court sets aside default judgments entered against guarantors under a facility agreement on the basis that service of the claim was not valid

***Regera SARL v Cohen & Ors* [2025] EWHC 2107 (Comm)**

The High Court allowed an application to set aside default judgments obtained by a lender against guarantors in respect of unpaid sums under a facility agreement.

The application centred on the enforceability of a clause in the facility agreement which allowed the lender to appoint a process agent to receive legal documents on behalf of the guarantors. The clause in question provided for the borrower and guarantors to appoint a service of process agent, but contained a mechanism giving the lender a unilateral right to replace a process agent who could no longer act (if the borrower failed to appoint an alternative).

In the present case, the lender obtained judgment in default of the guarantors filing an acknowledgment of service. The guarantors applied to set aside the default judgment under CPR 13.2, on the basis that the time for filing an acknowledgment of service had not expired, because the proceedings had not been validly served. The lenders argued that CPR 6.11 provides for service of the claim form via a contractually agreed method, which was provided for by the facility agreement, namely by service on the replacement process agent. However, the court found that the lender failed to discharge the burden of proof on the balance of probabilities that the facility agreement which contained this clause was binding on the guarantors.

Importantly, the court found that the clause which governed the appointment of a replacement agent was unfair in any event and therefore not binding on the guarantors under the Consumer Rights Act 2015. The court expressed a number of concerns, including that: (i) the clause regulated the service of process on the borrower and the guarantors but not the lender; (ii) the power of appointing a replacement was limited to the borrower and, failing any appointment by the borrower, the lender (with no involvement of the guarantors); (iii) proceedings could be served on a replacement agent on behalf of the guarantors without them being made aware of such an appointment; and (iv) the lender was not exposed to the same risks as regards the service of process as the guarantors which indicated that there was an imbalance in the parties' legal rights and obligations.

The court recognised that clauses appointing agents for service are commonly enforced and have not been treated as unfair in the context of contracts between commercial parties (for example, in *Banco San Juan Internacional Inc v Petroleos de Venezuela SA* [2020] EWHC 2145 (Comm) – see our blog post). It appears that the court's concern in the present case arose from the use of the clause in a consumer contract. While commercial contracts should remain unaffected by this ruling, this distinction should prompt banks to reassess the terms of process agent appointment clauses in consumer contracts, which are commonly used when dealing with international borrowers and guarantors.

For further information, please see our Banking Litigation blog post.

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Mis-selling and misrepresentation

28. High Court dismisses judicial review of FCA decision relating to IRHP voluntary redress scheme

***R (on the application of the All-Party Parliamentary Group On Fair Banking) v The Financial Conduct Authority* [2025] EWHC 525 (Admin)**

The High Court found that the FCA's decision not to do anything further, following an independent review of its regulatory action, was rational and reasonable.

By way of refresher, in 2012, in response to allegations relating to potential mis-selling of Interest Rate Hedging Products (**IRHPs**), the then Financial Services Authority (**FSA**) agreed a voluntary redress scheme (**the Scheme**) with various banks. The Scheme included the Sophistication Test which differentiated between certain types of customers to exclude those who were deemed "sophisticated" in terms of their knowledge and experience of financial products, their financial resources and their ability to source independent professional advice (the **Excluded Customers**). Subsequently the FCA (as successor to the FSA) committed to a review of its supervisory intervention on IRHPs (**the Review**). The Review concluded that while the voluntary agreement was appropriate for non-sophisticated customers, the FCA should not have confined the Scheme to a subset of customers via the Sophistication Test. The Review recommended that there should be consistent treatment in relation to regulatory intervention, unless there is an objective justification founded on strong evidence and tested through consultation.

The FCA disagreed with these findings and concluded that it was not appropriate or proportionate to take further action (the **Decision**). The claimant challenged the Decision by way of judicial review, arguing that: (i) it was irrational to reject the findings of the Review concerning the Sophistication Test and to decide to do nothing further; and (ii) there was procedural unfairness in failing to consult stakeholders prior to announcing the Decision.

The court found that it was open to a public body, such as the FCA, to reject a recommendation where it held a reasonably based disagreement. There is no presumption that a public body should follow a recommendation in these circumstances, absent a good, very good or cogent reason. Nor does it matter if the court prefers the view of the Reviewer or disagrees with the view of the public body, unless there is irrationality or common law unreasonableness about the decision of the public authority. Ultimately, the court found that it was rational of the FCA to disagree with the recommendations of the Review that differential treatment of Excluded Customers had to be justified by reference to "strong evidence" and should be regarded as exceptional. In respect of the second ground of challenge, the court quickly concluded it was not conspicuously unfair or irrational or unreasonable at common law for the FCA not to seek more information before reaching the Decision, emphasising repeatedly that the FCA was already aware of the criticisms and dissatisfaction.

For further information, please see our Public Law blog post.

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29. Hedging: where is the dividing line?

Herbert Smith Freehills Kramer LLP published an article in *Butterworths Journal of International Banking and Financial Law* on the legal distinction between internal and external hedging.

Hedging is a risk management practice commonly adopted by financial institutions and corporations to manage their exposure to risks like movements in interest rates, currency fluctuations, or commodity price fluctuations.

To hedge its risk exposure, a party can choose to use internal or external hedging arrangements. The distinction between "external" and "internal" hedging is simple, and relates to the relationship between the counterparties to the hedge.

The English courts also recognise that there is a distinction between internal and external hedging, which has consequences for the calculation of losses in breach of contract claims. This was discussed recently in *Rhine Shipping DMCC v Vitol SA* [2023] EWHC 1265 (Comm) and [2024] EWCA Civ 580, which concerned a dispute over the effect of internal hedging on the assessment of causation and loss for a breach of contract.

In this article, we consider the implications of this legal distinction and practical steps to mitigate any associated litigation risks.

The article can be found here: Hedging: where is the dividing line? This article first appeared in the April 2025 edition of JIBFL.

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30. Greenwashing at a glance - regulatory sanctions and claims in financial services across Europe

Discover the latest insights on regulatory sanctions and claims related to greenwashing in the financial services sector across Europe with our comprehensive briefing "Greenwashing at a Glance".

Delving into the evolving landscape of greenwashing regulations, enforcement actions, and litigation risks, this briefing provides a detailed overview of the regulatory priorities and enforcement powers in key European jurisdictions, including France, Germany, Italy, Belgium, Spain and the United Kingdom. It also highlights the increasing focus on consumer protection and the potential for investor claims and collective actions.

Equip yourself with the knowledge to mitigate greenwashing risks and ensure compliance with the latest standards by requesting a copy of the briefing.

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31. High Court refuses to strike out lender's claim against law firm for tort of unlawful interference in respect of irresponsible lending claims they advanced on behalf of the lender's customers

***Vanquis Bank Ltd v TMS Legal Ltd* [2025] EWHC 1599 (KB)**

The High Court dismissed applications by a defendant law firm for strike out/summary judgment against a lender's claim alleging the tort of causing loss by unlawful means.

By way of refresher, the tort of causing loss by unlawful means involves four essential elements: i) unlawful acts independently actionable by a third party; ii) interference with the actions of the third party; iii) intention to cause loss; and iv) actual loss.

In the present case, the law firm had submitted tens of thousands of irresponsible lending complaints to the lender and the Financial Ombudsman Service (**FOS**), allegedly without proper investigation and in breach of the law firm's obligations to its clients. The overwhelming majority of those complaints were ultimately rejected or withdrawn. However, the law firm's actions disrupted the lender's relationship with its customers and led to significant damage, including costs incurred in investigating complaints that should never have been brought, lost profit from customers whose accounts had been suspended and associated FOS fees. The lender brought proceedings against the law firm for the tort of causing loss by unlawful means. The law firm applied to strike out the lender’s claim and/or obtain summary judgment on the basis that one or more of the four essential elements of the tort of causing loss by unlawful means is not met and thus that the claim is legally untenable.

The court refused the applications, holding that the lender's claim was based on the application of well-established principles to a novel fact pattern. It found that each essential element of the tort of causing loss by unlawful means was met on the basis of the facts as alleged.

The court's decision will be of interest to financial institutions as highlights the potential exposure of law firms operating high-volume complaint models to claims from third parties affected by their conduct. It confirms that the tort of causing loss by unlawful means is a flexible remedy capable of addressing novel forms of economic harm. While the court recognised that a claim of this sort had not been pursued previously, the court noted that this might be because it could only succeed on egregious facts and that, if the allegations were correct, it "would be an example of egregious conduct" by the law firm.

In July 2025, the law firm applied to the Court of Appeal for permission to appeal.

For further information, please see our Litigation blog post.

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Securities litigation and class actions

32. High Court declines to restrict "passive" investors from bringing claims under s.90A/Schedule 10A FSMA

***Persons Identified in Schedule 1 v Standard Chartered plc* [2025] EWHC 698 (Ch)**

The High Court declined to follow the approach taken in *Allianz Funds Multi-Strategy Trust v Barclays plc* [2024] EWHC 2710 (Ch), allowing claims by "passive" investors, who do not actively manage their portfolios, to continue.

S.90A and Schedule 10A FSMA impose civil liability on issuers of securities for untrue or misleading statements or omissions in all documents (except prospectuses or listing particulars, where the issuer has potential liability under s.90 FSMA) published to the market via a regulatory information service where a person discharging managerial responsibility at the issuer knew that, or was reckless as to whether, the statement was untrue or misleading, or knew the omission to be a dishonest concealment of a material fact, or where there has been a dishonest delay in publishing relevant information. It is a requirement for a successful claim under s.90A/Schedule 10A that a shareholder must have acquired, continued to hold or disposed of securities in reasonable reliance on the published information to which the claim relates.

In July 2025, the Court of Appeal allowed the defendant's application for permission to appeal. The Court of Appeal hearing is due to take place on 20/21 January 2026.

For more information, please see our Banking Litigation blog post.

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33. FCA publishes new UK prospectus rules: potential impact on securities litigation

The reforms represent the biggest change to the UK public offer regime since 2005. FCA Policy Statement 25/9 contains the new rules, which set out the detailed requirements of the new UK prospectus regime – and follows the establishment of the framework for the UK's new Public Offers and Admissions to Trading regime last year. The rules involve significant changes, particularly around when a prospectus is needed on a secondary capital raising, as well as making it easier for companies to make forward-looking statements – and are broadly in line with CP24/12, the FCA's consultation in July 2024 on the new regime. The new rules aim to reduce the costs of listing on UK markets, make capital raising easier on UK listed markets and remove barriers to retail participation. They dovetail with the introduction of the new UK Listing Rules in July 2024.

Our corporate colleagues have considered the impact of the new rules for UK capital markets in this blog post: Prospectus regime – FCA confirms 75% threshold for new UK prospectus regime.

We previously considered the potential impact of the new rules on claims brought by shareholders in the following article: UK prospectus regime reform: potential impact on securities litigation (as above, the changes now introduced are broadly the same as the FCA's proposals last year, which were considered in our article). The article first appeared in the December 2024 edition of JIBFL.

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34. Privy Council abrogates so-called "Shareholder Rule" under English law: companies can assert privilege against their shareholders

***Jardine Strategic Ltd v Oasis Investments II Master Fund Ltd* [2025] UKPC 34**

The Privy Council held unanimously that the so-called Shareholder Rule – ie that a company cannot assert privilege against its shareholders save in relation to documents created for litigation against that shareholder – forms no part of either Bermudian or English law.

In essence, the Privy Council held that the modern "joint interest" justification for the rule, based on the supposed joint interest between a company and its shareholders relating to the affairs of the company, cannot replace the original justification for the rule, which was based on the now-discredited notion that shareholders have a proprietary interest in the company's assets.

The decision notes that shareholders will often have diverging interests even among themselves, and that a company has various other groups of stakeholders whose interests must be taken into account, such as funders and employees. It concludes that the continued recognition of the Shareholder Principle would discourage directors from taking legal advice required in order to make decisions for the benefit of the company, due to the risk of it having to be disclosed to shareholders at a later date.

The Privy Council therefore decided to abrogate the Shareholder Rule, and used its power (recognised in *Willers v Joyce* (No 2) [2016] UKSC 44, considered here) to make a direction that its decision should be regarded as binding on the English courts, as well as deciding the appeal in Bermuda.

The decision means that companies can assert privilege against their shareholders, as the High Court had held in its decision last November in *Aabar Holdings v Glencore* [2024] EWHC 3046 (Comm) (see our blog post here). It will be highly significant in the context of shareholder litigation, including securities class actions, as it will mean that shareholders generally have no entitlement to production of the company's privileged material.

While rejecting the "joint interest" justification for the Shareholder Rule, the Privy Council made clear that nothing in its judgment should be taken as laying down the law about joint interest privilege generally (which may still apply to various relationships including principal and agent, trustee and beneficiary, joint venturers and various insurance-based relationships) or the difference between joint interest and common interest privilege.

For more information, please see our Litigation blog post.

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35. Financial List finds claim for declaratory relief brought by ultimate beneficial owners of loan notes against issuer is arguable

***Caxton International Ltd v & Ors v Essity Aktiebolag (Publ) & Anor* [2025] EWHC 1477 (Ch)**

The Financial List allowed the claim of certain ultimate beneficial owners (**UBOs**) of loan notes to continue against the issuer of the notes, where the UBOs are seeking a declaration that an event of default has occurred under the notes. The decision arose in the context of a failed application by the issuer to set aside service of the claim form out of the jurisdiction, on the basis that the claim had no reasonable prospect of success.

The court examined whether the claimants, as UBOs, had sufficient standing to seek declaratory relief. Despite the issuer's argument that UBOs had no direct contractual rights under the notes, the court found it was arguable that the claimants had a sufficient interest in the determination of their rights, given their economic stake. The issuer also relied on the "no look-through" principle, which typically prevents UBOs from asserting rights under intermediated securities. However, the court distinguished this case from *Secure Capital SA v Credit Suisse AG* [2017] EWCA Civ 1486 (see our blog post), noting that the claimants were not seeking to enforce contractual rights but rather to resolve a genuine dispute affecting their interests.

It is notable that the court was willing to consider granting declaratory relief to non-contractual parties in this case. These developments highlight the court's nuanced approach to balancing the formal legal structures governing intermediated securities with the practical realities of the claimants' economic interests. This decision will be of interest to financial institutions, asset managers and clearing and settlement participants as it provides some guidance as to the ability of ultimate beneficial holders of intermediated securities to obtain declaratory relief in respect of those securities.

In July 2025, the issuer applied to the Court of Appeal for permission to appeal.

For more information, please see our Banking Litigation blog post.

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36. HSF Kramer contributes chapter to The Securities Litigation Review (11th Edition)

HSF Kramer have contributed the England and Wales chapter of *The Securities Litigation Review*. Now in its eleventh edition, The *Securities Litigation Review* is a guided introduction to the class action regimes for securities claims in the key jurisdictions across the globe, providing a valuable resource for corporates and financial institutions who might face such claims.

The chapter is reproduced with permission from Law Business Research Ltd. This chapter was first published in May 2025.

You can access the chapter here.

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37. Class Actions radar: Scanning global trends and risks

Class actions continue to grow in volume, complexity and strategic importance across global markets. Their rise is a 21st-century phenomenon shaped by megatrends such as globalisation, digital transformation, economic development, rapid consumerisation, and heightened expectations of corporate responsibility. These forces are reshaping legal systems and driving demand for more accessible and coordinated litigation pathways.

Drawing on our deep experience advising clients across sectors and jurisdictions, and with our newly enhanced US practice, this overview of the legal landscape in key jurisdictions is designed to support legal teams and business leaders navigate the challenges. The report covers key developments in Australia, France, Germany, Italy, South Africa, Spain, Thailand, the UK, and the US.

To explore our full report, please see here.

To view our UK Chapters on: (a) General Class actions, please see here; or (b) Competition class actions, please see here.

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Costs and funding

38. Civil Justice Council's final report on litigation funding recommends "light touch" statutory regulation

The Civil Justice Council (**CJC**) published its final report in its review of litigation funding. This comprehensively addresses the issues identified in its interim report published in October 2024 (see our blog post here).

The review was set up in April 2024 in the light of the Supreme Court's decision in *Paccar* in July 2023, which established that litigation funding agreements (**LFAs**) based on a share of damages are Damages-Based Agreements (or **DBAs**) and are therefore unenforceable unless they comply with the restrictive regulatory regime for such agreements under the 2013 DBA Regulations (see our blog post here).

The key recommendations from the CJC's report are as follows:

- **Reversal of *Paccar*.** Legislation should be introduced as soon as possible to reverse the effect of *Paccar*, with retrospective effect, so that LFAs will be enforceable regardless of whether they provide for the funder to receive a percentage share of damages and whether they comply with the DBA Regulations.

- **Regulatory framework for litigation funding.** A new system of "light-touch" statutory regulation should be implemented for litigation funding through Regulations issued by the Lord Chancellor. This should not apply to the funding of arbitration proceedings. Regulation by the FCA is not recommended at this stage, but that should be revisited after five years.

- **Regulatory requirements for all cases.** There should be a base-line set of requirements for all litigation funding, including for example capital adequacy requirements, restrictions on funders controlling litigation, and disclosure of the fact and source (but not the terms) of funding.

- **Additional requirements for funding class actions and consumer claims.** Additional requirements should apply to funding for consumers and class actions, including, for example, a requirement for independent legal advice and court approval of funding agreements. Interestingly, the funder and legal representative would have to certify that they did not approach the funded party directly or indirectly in respect of the claim – ie that pursuit of the claim was initiated by the funded party and not the funder or legal representative.

- **Funder's return not capped.** There should be no cap on the amount litigation funders can receive as a return from the litigation.

- **Recoverability of litigation funding costs.** Litigation funding costs should be recoverable in litigation in exceptional circumstances.

- **Contingency fee agreements.** The current legislation relating to contingency fee agreements provided by lawyers, ie Conditional Fee Agreements and DBAs, should be replaced by a single, simplified legislative contingency fee regime.

For further information, please see our Litigation blog post.

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39. High Court finds there is no discretion to order security for costs in favour of an interested party

***The New Lottery Company Ltd v The Gambling Commission* [2025] EWHC 1522 (TCC)**

The High Court held that it does not have jurisdiction to order security for costs in favour of an interested party, either under CPR 25 or under its general case management powers. Further, when assessing whether there is reason to believe that a claimant company will be unable to pay the defendant's costs if ordered to do so (one of the gateway conditions for the grant of security for costs, known as the "impecunious company condition"), it may be appropriate to take into account the wider corporate group's financial position.

The decision confirms that the court's general case management powers set out in CPR 3.1 – in particular the power to “take any other step or make any other order for the purpose of managing the case and furthering the overriding objective" – cannot be used to circumvent an express procedure set out in the rules, such as the established regime for security for costs in CPR 25. Where the rules are silent on a particular issue, the court can use its powers under CPR 3.1 to fill the lacuna. However, as the court concluded, the lack of provision for interested parties to obtain an order for security for costs under CPR 25 was deliberate and does not represent a lacuna in the rules.

While the making of an order for security for costs is ultimately a matter for the court's discretion, the court must first be satisfied that, as a matter of fact, one of the preconditions for the grant of such an order is met. This decision suggests that, when assessing whether the "impecunious company condition" applies, the court is not necessarily confined to a narrow analysis of the assets directly owned by the claimant company. The court may take into account the wider financial position of the corporate group, where that is relevant in assessing the assets the claimant will be able to marshal if required to pay adverse costs – such as, for example, where the claimant exercises control over group assets.

For further information, please see our Litigation blog post.

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40. Court of Appeal confirms litigation funding agreements are not DBAs if based on a multiple of funding rather than a percentage of damages

***Sony Interactive Entertainment Europe Ltd v Alex Neill Class Representative Ltd* [2025] EWCA Civ 841**

The Court of Appeal upheld various decisions of the Competition Appeal Tribunal (**CAT**) which found that LFAs that were revised to take account of the Supreme Court's decision in *Paccar* (considered in our blog post here) were not DBAs and therefore were not unenforceable on that basis.

The decision confirms that LFAs in which the funder's fee is calculated as a multiple of the funding provided, rather than a percentage of damages, will not fall within the definition of a DBA – even if the fee is subject to an express or implied cap by reference to the amount of the proceeds of the litigation, or some subset of those proceeds.

The decision means that LFAs based on a multiple of outlay do not fall foul of *Paccar* and can continue to be used by claimants, including in opt-out collective proceedings in the CAT (where DBAs are prohibited). The decision will, however, be rendered academic if the government brings in legislation to reverse the effect of *Paccar*, as recommended in the CJC's final report in its review of litigation funding (see update 38 above).

For further information, please see our Litigation blog post.

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Disclosure and privilege

41. Without prejudice privilege rejected for survey reports commissioned unilaterally to assist with prospective negotiations

***BNP Paribas Depositary Services Ltd v Briggs & Forrester Engineering Services Ltd* [2024] EWHC 2575 (TCC)**

The High Court held that survey reports commissioned by a party to a dispute for use in potential future without prejudice (**WP**) negotiations were not covered by the WP rule, because they were commissioned unilaterally outside of the negotiation process.

The WP rule prevents evidence of the content of settlement negotiations from being admitted in evidence in legal proceedings. The question considered by this decision was the extent to which the rule can protect communications with third parties, as opposed to the parties to the negotiations.

The publication of the decision (which was handed down confidentially in October 2024, but only made public on 26 March 2025) follows another decision on the application of the WP rule to documents produced by third parties, *Mornington 2000 (t/a Sterilab Services) v SoS for Health and Social Care* [2025] EWHC 540 (TCC), discussed in our post here.

In the present case, the deputy judge interpreted the previous authorities as demonstrating that the WP rule will apply to reports or other communications with third parties where those documents effectively form part of the negotiations between the parties. That will be the case where the third party report was commissioned, even if by only one of the parties, pursuant to an agreement or understanding between them and as an element of their joint efforts to settle their dispute.

In the deputy judge's view, such a result was based on the public policy underlying the WP rule and did not depend on the court finding that the parties also specifically agreed, whether expressly or impliedly, that the third party communications would be covered by the rule. This is in direct contrast with *Mornington*, where the judge found that parties can agree to extend the protection of the WP rule to cover, for example, a third party report obtained for the purposes of the negotiations, but unless there was such an agreement the rule would only protect what was said during the negotiations themselves.

These cases demonstrate the current uncertainty on the law in this area, and highlight the risks in commissioning reports from third parties in order to assist with WP negotiations, unless there is a clear agreement to extend the WP protection or the report will be covered by litigation privilege.

As in *Mornington*, the present decision does not consider whether the third party reports might have been protected by litigation privilege, on the basis that they were obtained for the dominant purpose of obtaining information or evidence for the conduct (including the settlement) of legal proceedings that were in reasonable contemplation. It is not clear whether this point was argued.

For further information, please see our Litigation blog post.

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42. High Court grants permission to rely on inadvertently disclosed privileged documents where the mistake was not obvious

***The New Lottery Company Ltd v The Gambling Commission* [2025] EWHC 1058 (TCC)**

The High Court granted the claimants permission to rely on certain privileged documents that the defendant said had been disclosed in error, where it found that the error would not have been obvious to a reasonable solicitor carrying out a proper disclosure review. Permission was refused for other documents, where the mistake would have been obvious.

The decision confirms that, as a starting point, a reviewing party is entitled to assume that documents disclosed (even privileged documents) were deliberately disclosed. However, where a privileged document has been produced inadvertently, the opponent will be able to rely on it only with the court's permission. There are no rigid rules, but the court is more likely to refuse permission if there was an obvious mistake - which depends on whether it would have been obvious to a reasonable solicitor (ie an objective test). The subjective views of those reviewing the documents will be a relevant, and potentially important, factor in the court's assessment, but the weight given will depend on the status and experience of those conducting any particular level of review.

This case highlights some practical takeaways for parties engaged in complex and extensive disclosure exercises – apart from the obvious need to review documents carefully for privilege, including checking for consistency in applying redactions across multiple versions of a document:

- Where a party's disclosure contains documents sent to, received by, commented on or authored by in-house counsel, particularly where the in-house counsel team is extensive, it may be prudent to provide the receiving party with a list identifying the relevant individuals.
- Where it is clear that multiple versions of a document have been disclosed, and a version contains privileged advice which may have been disclosed unintentionally, it would be reasonable for the receiving party to check at least one other version to see if the disclosure appears to be deliberate.
- Where the nature of an issue for disclosure might lead to a reasonable assumption that the disclosing party may wish to produce privileged documents, it should make clear whether or not it intends to do so.

The decision is also of interest in highlighting a potential tension between the test of obvious mistake and the wording of Practice Direction (**PD**) 57AD, which applies in most cases in the Business and Property Courts. Paragraph 19.2 of the PD provides that a party who "is told, or has reason to suspect", that a document has been disclosed inadvertently must promptly notify the disclosing party and follow their directions as to the return or destruction of the document, subject to any court order to the contrary. The court in the present case noted that the PD did not apply, because there is an exception for procurement cases. It expressed the view, however, that the PD cannot mean the court will no longer give weight to a solicitor's consideration of whether there has been a mistake.

For further information, please see our Litigation blog post.

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43. High Court finds iniquity exception to privilege applied, but not on a blanket basis

***Foundation Stimm v King & Spalding International LLP & Anor* [2025] EWHC 1067 (Ch)**

The High Court held that the iniquity exception to privilege applied in respect of certain aspects of a transaction, so that no privilege attached to various categories of documents over which the defendants had asserted privilege. It did not, however, follow that none of the defendants' documents relating to the transaction were privileged.

The iniquity exception provides that legal professional privilege will not apply to documents or communications that are made as part of, or in furtherance of, a fraud, crime or other iniquity. Successful applications for disclosure of documents over which privilege has been asserted on the basis of the iniquity exception are relatively rare. However, the exception will apply if there is sufficient evidence that there has been an iniquity, and that it involves an abuse of the lawyer/client relationship – such as where lawyers are used to provide authenticity and regularity to the iniquitous behaviour.

However, even where multiple iniquities have been established in relation to a transaction, it does not follow that *none* of the documents connected with the transaction are privileged. This decision highlights that documents must still be reviewed to determine whether they involved an abuse of the lawyer/client relationship. That may not be the case, for example, if the client was seeking advice in relation to the lawfulness or otherwise of the proposed iniquitous conduct (as opposed to seeking advice that would assist the client in committing the iniquity). Similarly, privilege would apply to any communications about matters which were not tainted by the iniquity.

For more information, see this post on our Civil Fraud and Asset Tracing Notes blog.

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44. High Court declines to set aside order giving effect to letter of request despite failure to give full and frank disclosure

***Topalsson Gmbh v Rolls-Royce Motorcars Ltd & Anor* [2025] EWHC 1584 (KB)**

The High Court rejected an application to set aside an order giving effect to a letter of request issued by a US court in support of copyright proceedings in the US. Although there had been non-disclosure of material relevant to the without notice application, that did not justify setting aside the order, but it did justify making the order conditional on paying costs into court. However, the High Court narrowed the scope of the letter of request.

The decision underlines the need for letters of request to the English court to obtain evidence in support of foreign proceedings to be drafted carefully, with a close focus on the issues the foreign court will need to determine and the particular documents sought. The English court will generally rely on the requesting court's assessment of what is relevant, but it may consider relevance for itself where appropriate, such as where that is not considered by the foreign court in issuing the request. While the court may be able to narrow down a request, rather than refusing it entirely, it is better to ensure the request is sufficiently focused from the outset.

The decision also shows the importance of complying with the duty of full and frank disclosure on an application seeking to give effect to a letter of request – or any other "without notice" application. Although the court did not consider the failures in this case to be sufficiently serious to justify setting aside the order, any material non-disclosure will carry significant risks.

For further information, please see our Litigation blog post.

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45. Court of Appeal overturns decision refusing order for Extended Disclosure to aid construction of insurance policy

***AmTrust Specialty Ltd v Endurance Worldwide Insurance Ltd* [2025] EWCA Civ 755**

The Court of Appeal held that a first instance judge erred in refusing Extended Disclosure of a particular category of documents potentially relevant to the construction of a professional indemnity policy.

Allowing the appeal, the Court of Appeal ordered the disclosure of correspondence between an insurer and two insured firms of solicitors prior to the inception of their professional indemnity policies. The decision provides guidance as to the court's approach to determining whether it would be reasonable and proportionate to order Extended Disclosure, having regard to the overriding objective. Crucially, the Court of Appeal confirmed that there is no threshold test of relevance before Extended Disclosure can be ordered. Consequently, the Court of Appeal held that the first instance judge had improperly decided on an issue that rightly fell to be determined by the trial judge (ie that the placement correspondence was not relevant to construction of the policy). The judge was also criticised for failing to consider the factors listed in PD 57AD in considering whether Extended Disclosure was necessary.

In considering the specific Extended Disclosure sought in this case, the Court of Appeal rejected the argument that the pre-contractual correspondence between the insurer and its insureds could not be relevant to the construction of a policy, noting that the fact that the relevant policy clauses might be in standard form and modelled on minimum terms was not determinative of the proper construction of those clauses. The trial judge will need to consider the construction of the particular policies and whether, in the circumstances of this case, the terms cover the claim.

For more information see this post on our Insurance Notes blog.

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Governing law and jurisdiction

46. High Court decision underlines that the English court may refuse to enforce a foreign judgment even if the relevant foreign rules on jurisdiction and service were complied with

***Siddik Mohammad v Mohammad Hilal Salim Bin Tarraf* [2025] EWHC 776 (KB)**

The High Court set aside an order registering a Canadian court judgment for enforcement under the Foreign Judgments (Reciprocal Enforcement) Act 1933 (the **1933 Act**) on the basis that: the necessary jurisdictional criteria were not met; the defendant did not have notice of the Canadian proceedings; and the claimant breached his duty of full and frank disclosure when applying to register the judgment.

There is little value in a judgment that cannot be enforced. This case highlights the importance of thoroughly researching the process that is likely to apply to the enforcement of a foreign judgment at an early stage and ensuring that any requirements are met. For example, enforcement may be refused on jurisdictional grounds even if (as in this case) the foreign court was entitled to exercise jurisdiction under its own conflict of laws rules – and indeed even if (though it was not the case here) the English court would have been entitled to exercise jurisdiction in similar circumstances. Enforcement may also be refused if the defendant did not receive actual notice of the proceedings, even if there was valid service under the foreign court's rules.

The requirements for enforcing Canadian judgments are contained in the 1933 Act, which is one of a number of routes for enforcing foreign judgments in England. The rules attaching to each route differ and their application can be complex.

A further route to enforcement is available in respect of proceedings commenced on or after 1 July 2025 under the Hague 2019. Where Hague 2019 applies, an English court judgment will be enforceable (subject to limited exceptions and the application of various jurisdictional filters) in all other contracting states and vice versa. The contracting states currently comprise all EU Member States (except Denmark), Ukraine and Uruguay. The list is expected to grow over time.

For more information on Hague 2019, see our previous blog post, and for a high level overview of the different regimes for the enforcement of foreign judgments, see our decision tree: Will an English court judgment be enforceable abroad?

For further information on the High Court's decision, please see our Litigation blog post.

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47. High Court declines to extend time for defendant to challenge court's jurisdiction, despite claim form having been served out of time

***The Occupiers of Samuel Garside House v Bellway Homes Ltd* [2025] EWHC 772 (KB)**

A High Court Master held that service of a claim form out of time but via an appropriate method will be effective, with the result that the time limits for acknowledging service and challenging the court's jurisdiction will begin to run.

This is the first judgment that has considered the consequences of a claim form being served out of time by a valid method, and a defendant's subsequent failure to file an acknowledgment of service and apply to challenge the court's jurisdiction within the time limits set out in the rules. Given the court's acceptance that the case raised "an important and novel point of law", it is unlikely to be the last.

As a Master's decision it will not bind other courts, but the decision suggests that where a claim form is served using an appropriate service method, but out of time, the claim is not in a permanent state of "limbo" such that it cannot proceed. It remains in existence unless and until the court makes an order refusing to exercise jurisdiction, which requires the defendant to take positive steps to challenge jurisdiction under CPR 11.

The key practical takeaway for defendants faced with late service of a claim form is that they should not assume that service has been ineffective. Instead, they should file an acknowledgment of service and apply to challenge jurisdiction within the relevant time periods in order to prevent the claim from proceeding.

In April 2025, the Court of Appeal allowed the defendant's application for permission to appeal. The Court of Appeal hearing is due to take place on 08/09 October 2025.

For further information, please see our Litigation blog post.

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48. Court of Appeal decision shows possibility of parallel proceedings inherent in asymmetric jurisdiction clauses

***Hipgnosis SFH 1 Ltd v Barry Manilow* [2025] EWCA Civ 486**

The Court of Appeal found that an asymmetric English jurisdiction clause did not give the party with the benefit of the clause a right to revoke their submission to the English court's jurisdiction.

Although set in a non-financial context, the decision will be of interest to financial institutions for the court's discussion of asymmetric clauses, also known as "unilateral" or "one-way" clauses, used frequently in certain types of finance transactions. These clauses generally require the borrower to litigate in one jurisdiction but give the finance parties the option to litigate in any jurisdiction willing to hear the dispute. They can be useful tools for finance parties as they are flexible and keep the finance parties' options open depending on the location of the obligors' assets and the ease of enforcing a judgment in a given jurisdiction. As a result, they appear in many of the Loan Market Association (**LMA**) recommended forms of facility agreements.

In the present case, the clause at issue required the claimant to litigate all claims in England but gave the defendant counterparty the option of litigating certain pricing claims in the US. When proceedings were brought by the claimant in England, including in relation to pricing, the defendant invoked its option, brought proceedings in the US and disputed the English High Court's jurisdiction to hear the pricing claims. The High Court stayed the pricing claims, construing the jurisdiction clause as creating a type of "floating" jurisdiction which was somehow lost by the English court in respect of those claims when the defendant's option to bring proceedings in the US was exercised, at which point jurisdiction crystallised in favour of the US. The claimant appealed.

In support of its analysis of how the jurisdiction clause in the agreement was intended to work, the claimant referred by way of analogy to the regular use in finance transactions of asymmetric jurisdiction clauses, citing the LMA's recommended form of asymmetric jurisdiction clause. Such clauses often provide for the exclusive jurisdiction of the English courts but give the lender (or other finance party) the option to sue the borrower in other jurisdictions. The defendant, however, argued that there were various differences between the jurisdiction clause at issue and the LMA wording, which it submitted were individually and cumulatively substantial.

The Court of Appeal, lifting the stay, firmly rejected the concept that England might have had jurisdiction when proceedings were issued but then lost it because of the exercise of the option. The Court of Appeal accepted that there were differences between the LMA wording and the asymmetric clause in this case, but found this did not detract from the correct interpretation of the clause at issue, being that it expressly contemplated that there might be parallel proceedings in England and the US. Further, although the court noted that the LMA wording expressly recognised the possibility of concurrent proceedings, and the clause at issue did not, the question for the court was whether the clause contemplated parallel or concurrent proceedings in respect of purchase price claims. On its proper construction, it did.

As a practice point, the approach taken towards the contractual interpretation of asymmetric jurisdiction clauses sounds a cautionary note. This case acknowledges that the possibility of parallel proceedings is inherent in an asymmetric jurisdiction clause (even where this is not express, as it is in the LMA wording). If the party with the benefit of an asymmetric English jurisdiction clause wants to be able to require any English proceedings issued by a counterparty to be discontinued if it exercises its option to commence proceedings elsewhere, this will need to be clearly stated in the clause.

For more information, please see our Litigation blog post.

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49. High Court grants banks' request to revoke final anti-suit injunctions in their favour but refuses to revoke declarations on jurisdiction

***Bayerische Landesbank & Ors v RusChemAlliance LLC* [2025] EWHC 924 (Comm)**

The High Court revoked anti-suit injunctions (**ASIs**) made in favour of the claimant banks, but kept in place declarations regarding the court's jurisdiction.

The decision will be of interest to financial institutions as it highlights that the English court continues to take a pragmatic approach to jurisdiction battles between commercial parties.

In the present case, the ASIs had prohibited the defendant from bringing or continuing proceedings in Russia in breach of agreements in favour of Paris-seated arbitration. Rather than complying, the defendant obtained its own ASIs from the Russian court, which required the banks to take all measures within their control to cancel the English ASIs or face a significant penalty. The banks therefore applied to revoke the relevant English court orders.

The court followed recent guidance from the Court of Appeal in *Unicredit Bank v RusChemAlliance* [2025] EWCA Civ 99, reported in our blog post here, which gave rise to similar issues against a similar background. On this basis, it revoked the final injunctive relief. However, it refused to revoke declarations on the court's jurisdiction, which recorded the position as determined by the court under English law and could therefore not be revoked "any more than a bell can be unrung".

The court took a different approach to declarations regarding breach of the arbitration agreement, which the court said were forward-looking and concerned the parties rather than the courts. These could be revoked because circumstances had changed materially since they were made.

In June 2025, the Court of Appeal refused the claimants' application for permission to appeal.

For more information, please see our Litigation Notes blog post.

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50. Asymmetric jurisdiction clauses: when will they be effective?

Herbert Smith Freehills Kramer LLP published an article in *Butterworths Journal of International Banking and Financial Law* on asymmetric jurisdiction clauses and when they will be effective.

Asymmetric jurisdiction clauses (also known as unilateral or one-way clauses) allow one party greater choice than the other as to the courts in which proceedings can be brought if a dispute arises under the agreement. Such clauses are often used in finance agreements, where they typically require an obligor to bring claims in a named jurisdiction, but permit the finance parties to sue in any competent court. This gives the finance parties flexibility to choose an appropriate jurisdiction once a dispute arises depending on where the counterparty may have assets at that time.

In this article, we consider the impact of the decision of the Court of Justice of the European Union (**CJEU**) in *Società Italiana Lastre SpA (SIL) v Agora SARL* (C-537/23, 27 February 2025). The CJEU confirmed that asymmetric jurisdiction clauses may be valid under Art 25 of the recast Brussels Regulation despite giving one party a greater choice as to where to bring proceedings. However, the decision suggests that validity will be called into doubt unless the choice of courts is limited to EU member states and contracting states to the Lugano Convention (ie Iceland, Norway and Switzerland). This may cause difficulties for parties choosing asymmetric English jurisdiction clauses where there is an EU nexus.

The article can be found here: Asymmetric jurisdiction clauses: when will they be effective? This article first appeared in the May 2025 edition of JIBFL.

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51. High Court finds lender's claim not barred due to sovereign immunity

African Export-Import Bank v National Government of the Republic of South Sudan & Anor **[2025] EWHC 1079 (Comm)**

The High Court found in favour of a lender in its claim against a sovereign state and a central bank for unpaid sums due under multiple facility agreements and guarantees, finding that it was not barred on sovereign immunity grounds.

The decision will be of interest to financial institutions as it illustrates the enforceability of loan agreements and guarantees against sovereign states and central banks, particularly when they fail to engage in proceedings. It is a reminder that, under the State Immunity Act 1978 (**SIA 1978**), foreign states generally enjoy immunity from the jurisdiction of the English courts (as can a state's central bank or monetary authority, even if a separate entity). However, exceptions exist, particularly for commercial transactions or when the state or central bank has expressly submitted to the jurisdiction of the English courts.

The decision highlights the importance of including express jurisdiction and waiver of immunity clauses in financial contracts with sovereign states and their central banks. While the nature of a transaction may inherently be commercial and fall under the "commercial transaction" exception in the SIA 1978, these clauses provide extra protection. They ensure transactions also meet the "submission to jurisdiction" exception in the SIA 1978, minimising the risk of claims being barred on sovereign immunity grounds and reducing the likelihood of a successful sovereign immunity defence.

For further information, please see our Banking Litigation blog post.

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52. Hague 2019 Judgments Convention comes into force in UK

Hague 2019 provides a uniform framework for the recognition and enforcement of judgments between the UK and the other contracting states, which currently includes all EU member states (except Denmark), Uruguay and Ukraine. The coming into force of Hague 2019 facilitates the enforcement of English judgments in other Hague 2019 contracting states and vice versa.

English judgments are currently enforceable under the Hague 2005 Convention on Choice of Court Agreements (**Hague 2005**), which includes all EU member states (as well as Mexico, Singapore, Montenegro, Ukraine, Moldova, Albania, Switzerland, North Macedonia and Bahrain), but only where there is an exclusive English jurisdiction clause. Otherwise, the question of enforceability depends on whether there is a reciprocal arrangement for the enforcement of judgments between the UK and the relevant state, such as via a relevant bilateral treaty, or (failing that) the relevant state's national rules on the enforcement of foreign judgments.

Hague 2019 allows for a much broader range of judgments to be enforced. In particular, it provides for the enforcement of a judgment given by a court designated in an agreement on jurisdiction where the dispute falls within a non-exclusive or asymmetric jurisdiction clause as well as in a wide range of scenarios where there is no applicable jurisdiction clause. It is also wider in scope than Hague 2005, applying for example to employment and consumer contracts.

Hague 2019 is expected, in time, to gain increased acceptance internationally and to attract further state parties – including, initially, Albania, Andorra and Montenegro which will all become contracting states in 2026.

For a more detailed analysis of Hague 2019, including when it will apply, what judgments are eligible for enforcement and when enforcement can be refused, see our blog post here.

Our quick reference guide will also help determine whether and how an English court judgment may be enforced in another country.

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53. Court of Appeal confirms court has no jurisdiction despite English jurisdiction clauses as defendants were not parties to relevant contracts as undisclosed principals

***Berge Bulk Shipping PTE Ltd v Taumata Plantations Ltd & Ors* [2025] EWCA Civ 876**

The Court of Appeal upheld the High Court's decision that the English court lacked jurisdiction over claims brought under letters of indemnity (**LOIs**) containing English jurisdiction clauses. This was on the basis that the defendants were not parties to the LOIs and could not be treated as undisclosed principals under them.

The decision provides important clarification of the limits of the undisclosed principal doctrine. The Court of Appeal emphasised that the doctrine is already anomalous and should not be extended beyond its established bounds. It also reaffirmed that the liability of an undisclosed principal can only arise where the agent has actual authority to conclude a contract on behalf of the principal – apparent authority is not sufficient.

The decision also confirms that the test to be satisfied in order for jurisdiction to be established pursuant to CPR 6.33(2B)(b), which applies where claims fall within a contractual jurisdiction clause in favour of the English courts, is that of a good arguable case that the party is contractually bound. Parties should ensure that agency and authorisation arrangements are clearly documented and adhered to, and should not rely on implied agency or economic interest alone to establish liability or jurisdiction. International commercial agreements should be carefully structured to avoid unexpected jurisdictional challenges and liabilities.

For further information, please see our Litigation blog post.

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54. High Court finds English court has exclusive jurisdiction in ISDA swaps case

***Dexia S.A. v Comune di Torino* [2025] EWHC 1903 (Comm)**

The High Court granted summary judgment in favour of a French bank seeking declarations that: (i) the English courts had exclusive jurisdiction under the jurisdiction clause contained in the 1992 ISDA Master Agreement (which applied to the transactions in dispute); and (ii) proceedings commenced in Italy by an Italian municipal authority were therefore commenced in breach of that clause.

This decision, one of a number of judgments in recent years relating to swaps entered into by Italian public authorities, will be of particular interest to financial institutions trading in derivatives based on standard form ISDA documentation. The English court has once again taken a robust approach to interpreting a jurisdiction clause, confirming its appreciation of the importance of market certainty and predictability in the interpretation of standard form ISDA documentation.

For further information, please see our Banking Litigation blog post.

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55. High Court interprets rules allowing service out of the jurisdiction without the court's permission based on a contractual jurisdiction clause

***White Rock Corporation Ltd v Middle Volga Shipping Company* [2025] EWHC 2089 (Comm)**

The High Court upheld a jurisdiction challenge by a Russian defendant, finding that there was no good arguable case that it was a party to the charterparty which contained an English jurisdiction clause and on which the claimant had relied in serving the claim form out of the jurisdiction without the court's permission.

The rules relating to service out of the jurisdiction have undergone significant changes in recent years, particularly following on from Brexit and the UK's departure from the EU regime governing questions of jurisdiction and the enforcement of judgments. Pre-Brexit, a claim form could be served out of the jurisdiction without the court's permission where the court had jurisdiction under that regime, which included where there was an English jurisdiction clause.

After the UK left the EU, a new rule was introduced to reinstate the ability to serve out without permission where the claim falls within an English jurisdiction clause (whether or not it is an exclusive jurisdiction clause for the purposes of Hague 2005, for which there was an existing provision). A separate gateway allowing service out with the court's permission where the claim is "in respect of" a contract containing an English jurisdiction clause was removed, as it was thought to be redundant, but the rule allowing service out without permission was subsequently amended to include an apparently similar provision.

Following these changes, there has been some uncertainty as to the breadth of the new provisions. The current decision is one of a number which suggests that they are not as broad as they may appear on their face, but instead are limited to cases where the defendant is party to a contract containing an English jurisdiction clause, or is seeking to enforce rights under such a contract without adhering to the jurisdiction clause.

For further information, please see our Litigation blog post.

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56. High Court finds claim brought by director under Contracts (Third Party Rights) Act 1999 to enforce an SPA warranty could be served out of the jurisdiction without the court's permission

***Campeau v Gottex Real Asset Fund 1 (OE) Waste SARL* [2025] EWHC 2322 (Comm)**

The High Court held that it has jurisdiction to hear a claim by a third party to a contract, in this case a director of a company sold under a sale and purchase agreement (**SPA**) who was seeking to enforce a warranty by the seller not to bring any claim against him relating to the transaction. The director was expressly entitled by the terms of the SPA to enforce the warranty under the 1999 Act.

The court found that there was a good arguable case that the director's claim was covered by the exclusive English jurisdiction clause in the agreement, which meant that it could be served on the seller out of the jurisdiction without the court's permission under the relevant procedural rules. For those rules to allow a claim to be served out of the jurisdiction without permission based on a contractual jurisdiction clause, the defendant must be a party to the contract. However, there was no requirement that the claimant should also be a party. It was sufficient in this case that the defendant was a party and, as the court held, the jurisdiction clause in the SPA should be interpreted as broad enough to cover claims by and against non-parties.

In case it was wrong on the scope of the jurisdiction clause as a matter of contractual interpretation, the court also considered whether the effect of the 1999 Act was to require third party claims to be brought in accordance with the clause. This is a somewhat controversial question, with conflicting first instance authority. The court in this case concluded that third party claims will be subject to a contractual jurisdiction clause if that clause would apply to a dispute between the parties regarding the term the third party is seeking to enforce. In the present case, therefore, the effect of the 1999 Act would also have been that the jurisdiction clause applied and, on this basis too, the claim could be served out of the jurisdiction without the court's permission.

For further information, please see our Litigation blog post.

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Procedural developments

57. High Court finds parties not bound by expert determination which contained manifest errors

***WH Holding Ltd v E20 Stadium LLP* [2025] EWHC 140 (Comm)**

The High Court granted a claim for declaratory relief that parties were not bound by an expert determination which contained manifest errors, where the relevant clause in the underlying contract contained a carve-out for manifest error or fraud on the part of the expert.

While noting that what constitutes a manifest error will depend on the circumstances of a specific case, the judge applied guidance from a number of authorities to conclude that the appropriate test was whether the error was "so obvious and obviously capable of affecting the determination as to admit of no difference of opinion". He warned against evaluating errors by reference to pejorative language such as whether the expert has committed a "blunder" or "howler", which involve subjective judgment and may cast unfair aspersions on the expert's approach.

The judge also provided helpful comments as to what a court can consider when evaluating whether an expert's decision contained manifest errors. While, again, each case will turn on its facts, in circumstances where the parties had agreed that a reasoned decision may only be overturned on grounds of manifest error or fraud, the judge considered that it was appropriate for the examination to be fairly thorough, including a review of the submissions made to the expert and the documents mentioned in them.

In April 2025, the Court of Appeal allowed the defendant's application for permission to appeal. The Court of Appeal hearing is due to take place on 18/19 November 2025.

For further information, please see our [Litigation blog post](#).

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58. Court lambasts citation of fake authorities in proceedings and orders wasted costs

***R (on the application of Ayinde) v London Borough of Haringey* [2025] EWHC 1040 (Admin)**

The High Court heavily criticised a party's solicitors and barrister for citing fake authorities in their client's pleadings.

The defendant in a judicial review case applied for a wasted costs order on the basis that the claimant's solicitors and barrister had cited a number of fake cases in their client's statement of facts and grounds for judicial review.

The defendant submitted that the fake citations arose from the use of artificial intelligence (**AI**). In the absence of relevant evidence, the judge declined to make a specific finding on this point. However, he firmly rejected the barrister's own explanation of how the fake cases had come to be cited and her submission that these were no more than "minor citation errors". He also criticised the solicitors for their unprofessional approach and failure to account for what had happened. He concluded that the conduct of the barrister and solicitors had been improper, unreasonable and negligent, ordered the judgment to be sent to the regulators and suggested that the barrister and solicitors also self-report. He also ordered wasted costs.

The President of the King's Bench Division summoned the legal representatives involved to attend court to consider what further steps, including the initiation of proceedings for contempt, might be appropriate.

This case is only one of a number of recent examples of fake cases being cited in court proceedings. This issue is likely to become more prevalent as the use of AI increases.

For more information, see [this post on our Insurance Notes blog](#).

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59. Court of Appeal decision shows importance of applying promptly to set aside a default judgment

***Leadingway Consultants Ltd v Saab* [2025] EWCA Civ 582**

The Court of Appeal held that default judgment should not have been set aside where a defendant delayed 16 months before applying to set aside. It, however, upheld a decision granting relief from sanctions against another defendant who was one day late complying with an unless order, where the mistake was caused in part by the order failing to specify the precise date for compliance.

The decision underlines that a defendant seeking to set aside a default judgment must make a prompt application to do so. The court firmly rejected the suggestion that a lack of promptness will be readily outweighed by the fact that there are ongoing proceedings against another defendant. It recognised, however, that if there will in any event be a trial of the very same issues as are engaged by the claim in which the default judgment was made, that is a factor that the court may take into account.

The decision also emphasises that breach of an unless order is serious, and that an innocent mistake does not automatically mean relief from sanctions will be granted. However, in this case the court was sympathetic to a defendant whose minor delay in compliance with an unless order was the result of his solicitors confusing the date of the court seal for the date of the order. The court noted that this error was unlikely to have occurred if the parties had complied with a court practice direction which indicates that parties should, wherever possible, specify the date (rather than a time period) for compliance with an unless order in the order itself.

This decision illustrates the importance of specifying a precise date for compliance with an unless order, and (where a date is not specified) taking care in calculating the relevant time period for compliance. In particular, where an order specifies a number of days from the date of the order, that does not necessarily mean the date shown on the court seal. It also shows the dangers of waiting until the last minute to comply with an unless order.

In July 2025, the defendant applied to the Supreme Court for permission to appeal.

For further information, please see our Litigation blog post.

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60. High Court discharges lender's freezing injunction due to failure to meet duties of full and frank disclosure and fair presentation

***Apollo XI Ltd v Nexedge Markets Ltd* [2025] EWHC 1488 (KB)**

The High Court discharged a freezing injunction obtained by a lender against a borrower, finding that the lender had breached its duties of full and frank disclosure and fair presentation.

The decision will be of interest to financial firms and their legal advisers as it illustrates the importance of the duty of full and frank disclosure when seeking *ex parte* injunctive relief. It highlights the potential consequences of misrepresenting evidence and failing to provide necessary context. The decision reinforces the principles set out in *Tugushev v Orlov* [2019] EWHC 2031 (Comm) and *Fundo Soberano De Angola & Ors v dos Santos & Ors* [2018] EWHC 2199 (Comm), which require that material facts be fairly presented at without notice hearings for injunction applications, to ensure that the court can have full confidence in the thoroughness and objectivity of those presenting the case.

The court may view any withholding of critical information that could influence its decision as a tactic to gain an unfair advantage. Consequently, where a party does not present a material fact or obfuscates its presentation at an injunction hearing where the respondent is not represented, in line with its duty of full and frank disclosure and fair presentation, there is a risk that the court will later discharge the injunction. This is so even if the relief would still have been granted had the relevant matters been brought to the court's attention at the without notice hearing.

For further information, please see our Banking Litigation blog post.

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Other significant developments

61. Supreme Court confirms the types of defendant who can be liable for fraudulent trading

***Bilta (UK) Ltd (in liquidation) & Ors v Tradition Financial Services Ltd* [2025] UKSC 18**

The Supreme Court confirmed that liability for fraudulent trading under s.213 of the Insolvency Act 1986 is not limited solely to persons responsible for company management and control. Any persons knowingly involved in the company's fraudulent business activities can be liable.

The judgment follows other recent decisions of the English courts confirming an expansive reading of the statutory protections available in an insolvency context. It means that third parties who know that a company's business is being run in a manner intended to defraud creditors and then participate in, facilitate or assist with fraudulent transactions may be liable under the Insolvency Act 1986.

The Supreme Court separately considered whether limitation should be postponed under s.32 of the Limitation Act 1980 on the basis that, in the period for which a company had been dissolved, it could not with reasonable diligence have discovered a fraud. The Supreme Court's decision shows that this will not necessarily follow. Under s.1032(1) of the Companies Act 2006, companies restored to the register are deemed to have continued in existence as if they had not been dissolved or struck off. They are not, however, deemed to have had no directors or other officers for as long as they remained struck off, so as to render discovery of the relevant circumstances impossible.

Claimants seeking to postpone limitation in such circumstances will therefore be required to adduce evidence as to what would have happened if the company had not been dissolved, to establish that they could not have discovered the fraud any earlier. The decision serves as a cautionary tale to other would-be litigants as the claimants in this case had not adduced any such evidence.

While only mentioned in passing, the decision also suggests that, in theory, it may be open to claimants who are restored companies to seek a direction on limitation under s.1032(3) in respect of claims those companies wish to make against others. That section gives the court power to make directions aimed at placing the company and all other persons in the same position as if the company had not been dissolved. Such a direction was not sought in this case.

For further information, please see our Litigation blog post.

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62. UK Supreme Court quashes LIBOR and EURIBOR convictions: implications for financial crime enforcement

Tom Hayes and Carlo Palombo were two among several traders convicted for conspiring between 2006 and 2010 to influence key benchmark interest rates used in financial markets: in Mr Hayes' case, the London Inter-bank Offered Rate (**LIBOR**); and in Mr Palombo's case, the Euro Inter-bank Offered Rate (**EURIBOR**). The Serious Fraud Office prosecuted Hayes and Palombo under the common law offence of conspiracy to defraud, arguing that they had agreed to procure rate submissions that were false or misleading and intended to favour their trading positions (and so prejudice the economic interests of swap counterparties).

Hayes was convicted in 2015 and sentenced to 14 years' imprisonment (later reduced to 11) and Palombo was convicted in 2019 and sentenced to four years' imprisonment. Both convictions were upheld in two separate appeals. However, in 2023, the Criminal Cases Review Commission referred both cases back to the Court of Appeal in light of the US Second Circuit's decision in *United States v Connolly and Black*. In that case, the US court rejected the "one true rate" theory of LIBOR submissions, holding that if a rate was within the range the bank could have legitimately submitted, it was not false or fraudulent—even if influenced by trading advantage. The UK Court of Appeal dismissed the renewed appeals but certified a question of law of general public importance as to the proper construction of the LIBOR and EURIBOR definitions, paving the way to the Supreme Court. In a unanimous judgment delivered by Lord Leggatt, the Supreme Court allowed both appeals and quashed the convictions.

The Supreme Court's decision shows the challenge in bringing criminal prosecutions in cases involving subjective financial assessments under the common law. It noted that, especially for a broad offence like conspiracy to defraud, the content of the alleged agreement and the dishonest means must be specified with "reasonable certainty and clarity" so that both the defendant and the jury understand what must be proved. The judgment also highlights an evidential challenge for criminal prosecutions involving subjective financial assessments, which may make it harder to successfully bring similar prosecutions in future. Finally, the Supreme Court's obiter comments further raise questions around future prosecutions of the common law conspiracy to defraud offence. The judgment describes the continued existence of conspiracy to defraud as a common law offence, following developments under the Criminal Law Act 1977 and the Fraud Act 2006, as "controversial" and it will be interesting to see whether the judgment will impact the way in which fraud charges are indicted and prosecuted going forward.

You can read about this decision in more detail in the blog post prepared by our Corporate Crime and Investigations colleagues.

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63. Solicitors Regulation Authority reviews high-volume consumer claims sector

The SRA has published a discussion paper: How can the high-volume consumer claims market work better for consumers?

The SRA uses the term high-volume claims to refer to situations where large numbers of consumers file claims against the same organisation or in relation to the same issue. It notes that such claims activity is currently concentrated in areas including housing disrepair, data breaches, flight delays, diesel car emissions, motor finance commission, and other financial services. The discussion and opportunity to give feedback is therefore very relevant to financial services firms, particularly those operating in the retail sector.

As the title of the discussion paper suggests, the review is prompted by concerns as to how the high-volume claims market operates and the potential for consumers to be harmed. In particular, it notes that some of the issues cut across multiple sectors and regulatory regimes, including claims management, finance and insurance, and that it is working closely with a range of organisations and government departments who share its concerns (referring in particular to the warning to law firms and claims management companies around poor practice in motor finance commission claims, which was published jointly by the SRA and FCA).

The paper sets out five "key challenges" where the SRA believes the current regulatory regime could be strengthened, including: "Delivering wider improvements across the system for consumers in high-volume claims processes". In respect of this challenge, the paper notes that, as well as law firms, consumers seek help from claims management companies who are regulated by the FCA (and other unregulated providers). The paper notes that this has led to a fragmented landscape, emphasising the importance of different organisations working together and giving the example of the close work between the SRA and FCA in motor finance commission claims. Interestingly, there is a suggestion that there may be changes to how the SRA regulates the market where it benefits the public.

The discussion paper states the SRA's view that maintaining the status quo is "not an option", given the scale and range of issues it is seeing in this area. It says it is exploring a wide range of options, including changes to its rules and regulations which would be subject to formal consultation in 2026. **Stakeholders are invited to make submissions by 14 November 2025.**

For more details, please see our Litigation blog post.

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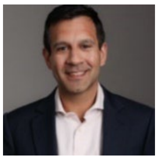

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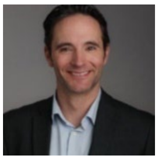

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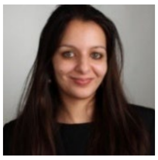

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