RPC

Banking and financial markets litigation update

Summer 2024

Welcome to our banking and financial markets litigation update

This update is brought to you by RPC's top tier banking and financial markets disputes practice in London, with specialists in all areas of financial markets litigation (and arbitration) and a wealth of expertise including frequent involvement in the most complex, high-value, and high-profile disputes in the sphere.

The year or so since our last Banking and Financial Markets Litigation Update has been a relatively stable period in the financial markets, perhaps more so than many expected given the backdrop of the significant interest rate reset. There are evident signs of stress particularly in commercial property (as members of our team noted in the Estates Gazette earlier this year) but so far restructuring has tended to provide solutions in the UK markets. Further afield, Chinese property is seeing more dramatic stresses and defaults, and unfortunately there is significant distress in particularly African sovereign debt. None of these thematic developments have really worked their way into litigation in the English courts as yet, with financial markets cases having a disparate business-as-usual quality.

However, one noticeable theme that emerges from reviewing our commentary from the last year is the sheer proportion of financial markets disputes which now involve claims of fraud. Indeed, both of our Lawyer Top 20 cases which resulted in judgments last year were fraud claims in a banking setting (*Suppipat v Narongdej*[1], and *Loreley Financing (Jersey) No 30 Ltd v Credit Suisse*[2]).

1. [2023] EWHC 1988 (Comm)
2. *Loreley Financing (Jersey) No 30 Ltd v Credit Suisse Securities (Europe) Ltd* [2023] EWHC 2759 (Comm) (3 November 2023)

The smorgasbord of fraud

Last summer, the much-anticipated decision in *Philipp v Barclays Bank UK PLC*[3] overturned the judgment of the Court of Appeal in relation to the role of the Quincecare duty in respect of Authorised Push Payment (APP) fraud.

The Supreme Court held that the Quincecare duty does not extend to instructions given by a customer itself in the context of APP fraud. This was a return to the orthodox position that the duty arises only where the payment instruction is given by a dishonest agent of the customer. APP fraud regardless continues to be a significant problem in the UK (and is likely to become even more so with the rise of AI) – read our take here of what can be done by victims of this type of fraud.

Byers v Saudi National Bank arose out of the 14-year legal fallout from the corporate collapse in 2009 of AHAB and the Saad Group as a result of significant fraud. The Supreme Court judgment in that case culminated in an unsuccessful attempt by the liquidators of a Saad Group entity to bring a claim in knowing receipt against SNB in relation to shares transferred to it shortly before the Saad Group's collapse. The Supreme Court held that a claim for knowing receipt cannot be made if a claimant's equitable interest in the property in question has been extinguished by the time of the defendant's knowing receipt of the property.[4]

In a "lukewarm" pursuit cross-border fraud case, the High Court set aside Bankers Trust disclosure orders made against two Australian banks. The decision suggests that English courts should only grant disclosure orders against overseas banks in exceptional circumstances (*Scenna v Persons unknown using the identity 'Nancy Chen'*).[5]

The Supreme Court also held that one of the largest fraud cases currently in the Commercial Court (the SKAT claim by the Danish tax authority seeking to recover sums lost through cum/ex dividend tax rebate fraud) could proceed to trial after finding that the claim was admissible in the English courts. At first instance, the defendants had succeeded in their argument that SKAT (the Danish tax authority) was seeking to indirectly enforce Danish revenue or public law through the English courts, which was impermissible. The Supreme Court held that this claim was not pursuing enforcement of foreign tax or exercising foreign sovereign powers. Instead it found that the Danish tax authority was seeking redress as a private law victim of fraud (*Skatteforvaltningen (Danish Customs and Tax Administration) v Solo Capital Partners LLP (In Special Administration)*).[6] The lengthy trial is now proceeding in the High Court and is not scheduled to finish until April 2025.

Elsewhere, the Supreme Court gave permission for the claim relating to the "Tuna Bonds" scandal in Mozambique to be heard in the English court. It rejected an attempt by defendants (successful at Court of Appeal level) to force key elements of the claim to be subjected to arbitration *(Republic of Mozambique (acting through its Attorney General) (Appellant) v Privinvest Shipbuilding SAL (Holding) and others (Respondents))*.[7] The Tuna Bonds saga has been rumbling on for about a decade and centres around bank loans given to state-owned Mozambican companies and related government guarantees and allegations of bribery and corruption. The claims have been settled by certain bank defendants (Credit Suisse and subsequently VTB) but the dispute continued to a 13 week trial, on which judgment is still anticipated.

The Privy Council's decision in *Finzi v Jamaican Redevelopment Foundation Inc and others* concerned an attempt to reopen a dispute concerning the settlement of loans which had been bought by the Jamaican government's Financial Sector Adjustment Company (FINSAC) in order to seek to restore stability during a time of financial turbulence. The claim had previously been adjudicated but the appellant sought to relitigate it on the basis that the prior judgment had been procured by fraud. The Board of the Privy Council dismissed his claim as an abuse of process.[8]

3. [2023] UKSC 25
4. *Byers & Ors v Saudi National Bank (Rev1)* [2023] UKSC 51 (20 December 2023) see here
5. *Scenna v Persons unknown using the identity 'Nancy Chen'* [2023] EWHC 799 (Ch) (5 April 2023) see here
6. *Skatteforvaltningen (Danish Customs and Tax Administration) v Solo Capital Partners LLP (In Special Administration)* [2023] UKSC 40 see here
7. *Republic of Mozambique (acting through its Attorney General) (Appellant) v Privinvest Shipbuilding SAL (Holding) and others (Respondents)* [2023] UKSC 32 see here
8. *Finzi v Jamaican Redevelopment Foundation Inc and others* [2023] UKPC 29 (27 July 2023) see here

The smorgasbord of fraud continued

In the context of carbon trading VAT fraud, the Court of Appeal held that "a party to" a fraud was not limited to those who perform a management or controlling role in a company, but could also include a third party, even if that party did not have a controlling or managerial function within the company.[9] Liquidators could therefore make claims pursuant to section 213 of the Insolvency Act (IA) 1986 for a contribution by a broker who had recklessly enabled the insolvent company's fraudulent trading towards a company's assets (*Tradition Financial Services Ltd v Bilta (UK) Ltd & Ors*). This judgment is being appealed so this may not be the last word on this issue of principle.

In an unusual appeal case, the Court of Appeal reversed a finding of dishonesty where there had been no discernible victim of the relevant conduct. The claim was for the recovery of $1.1m, held at first instance to have been dishonestly diverted by an investment manager from a fund to which it ought to have been paid.

The court found that the investment manager appellants had made no attempt to conceal their conduct. The fund had a maximum return to its shareholders which if exceeded resulted in the excess profits forming part of the management fee. Accordingly, the diversion of the monies before they were paid to the fund caused no harm to any other party and the high bar for a finding of dishonesty had not been reached (*Floreat Investment Management v Churchill and others*).[10]

The Court of Appeal also handed down an important judgment on dishonest assistance in *Hotel Portfolio II UK Ltd & Anor v Ruhan & Anor*).[11] This held that if a fiduciary commits two closely connected breaches of duty, one of which gives rise to a profit and one of which causes a loss, a claim for equitable compensation against the fiduciary or a dishonest assister cannot be determined solely by reference to the loss and that instead it must involve an exercise in setting-off the profit against the loss. (This is another case to watch as there is an appeal outstanding.)

9. *Tradition Financial Services Ltd v Bilta (UK) Ltd & Ors* [2023] EWCA Civ 112 (10 February 2023) see here
10. *Floreat Investment Management v Churchill and others* [2023] EWCA Civ 440 (25 April 2023) see here
11. *Hotel Portfolio II UK Ltd & Anor v Ruhan & Anor* [2023] EWCA Civ 1120 (4 October 2023) see here

The miscellany

A return for Argentinian sovereign bonds, Ukraine, Russia and sanctions, jurisdiction over margin call disputes, and the evergreen Italian local authorities.

Almost a decade after our own success in obtaining judgment releasing interest payments to holders of restructured Eurodollar debt which had been held up by orders of the NY courts,[12] Argentinian bonds issued as part of the 2005 and 2010 restructurings were back before the English courts.

The High Court found in favour of four hedge funds who sued over the construction and application of the GDP linkage provisions for GDP-linked bonds originally issued to investors as part of the restructurings as a fillip which would reduce haircuts in the event of better than predicted economic performance. This resulted in the Republic of Argentina being ordered to pay €1.33bn to the bondholders plus interest.[13] The Court of Appeal has since upheld the first instance judgment in its own judgment issued in late June.[14]

Sovereign bonds also kept the Supreme Court occupied in the case between Ukraine and Russia over non-payment of Eurobonds that Ukraine had issued and sold to Russia in the period prior to the Maidan uprising. The Supreme Court decided that a defence of duress advanced by Ukraine could not be decided at summary stage and instead should be determined after a trial (*The Law Debenture Trust Corporation plc v Ukraine*).[15]

The impact of the Russian war against Ukraine has also sent a shockwave through the financial markets via the impact of the sanctions which have been imposed by western nations. Although much of the resulting legal impact has an advisory quality, we have seen a considerable uptick in litigation and related inquiries around those issues. The observant will have seen that we have been actively involved in sanctions work at both first instance and Court of Appeal level ourselves, and we have recently issued further sanctions related cases, still at an early stage. We expect the volume of litigation around sanctions to increase, but it is already having a visible impact on the workload of the English courts.

An example is the decision in *LLC EuroChem North-West-2 v Societe Generale & Ors*[16] concerning refusals by Société Générale and ING to make payments aggregating to over €200m under on-demand bonds connected to the construction of an ammonia plant in Russia. The banks argued that the principals of EuroChem were subject to both EU and UK sanctions. The High Court decided (among other things) that it was not open to it to order interim payment under CPR 25, as the court was not satisfied that EuroChem would obtain judgment if the claim went to trial. More recently, Mrs Justice Cockerill has held that the Italian construction company involved, Tecnimont, submitted to the jurisdiction for the purposes of Part 20 claims made against it by the banks, by making submissions in the main claim as an interested third party.

Another example of spill-over from Russia's war on Ukraine was highlighted in the case of *Renaissance Securities (Cyprus) Ltd v Chlodwig Enterprises Ltd*.[17] As part of increasing international tension, article 248 of the Russian Commercial Procedure Code was used to introduce measures seeking to give the Russian courts control over disputes with foreign investors. In support of English arbitration provisions, the High Court in response granted anti-suit and anti-anti-suit injunctions against defendants who had commenced proceedings in Russia.

12. *Knighthead Master Fund LP & Others v The Bank of New York Mellon & Others* [2015] EWHC 270 (Ch) (13 February 2015)
13. *Palladian Partners LP v Republic of Argentina* [2023] EWHC 711 (5 April 2023) see here
14. [2024] EWCA Civ 641 (12 June 2024)
15. *The Law Debenture Trust Corporation plc v Ukraine* [2023] UKSC 11 (15 March 2023) see here
16. *LLC EuroChem North-West-2 v Societe Generale & Ors* [2023] EWHC 2720 (3 November 2023) see here
17. *Renaissance Securities (Cyprus) Ltd v Chlodwig Enterprises Ltd* [2023] EWHC 2816 (Comm) (3 November 2023)

The miscellany continued

In an important case for the London banking litigation market, the Court of Appeal upheld Mrs Justice Cockerill's decision to dismiss UBS's challenge to the jurisdiction of the English courts over claims worth $495m stemming from margin calls made in London but relating to financing UBS provided for the acquisition of shares on the Hong Kong Stock Exchange.[18] Although the decision was made under Lugano Convention rules which have now fallen away, the decision sends a clear signal that the English courts will protect their jurisdiction over alleged torts with a sufficient nexus to London, in this case where the shares were in custody here, and the margin calls were issued by the London branch of the bank.

Elsewhere, we reported on the evergreen Sebastian Holdings case between Deutsche Bank and Sebastian Holdings and its principal, Alexander Vik. Following its success in the trial judgment in 2013 , Deutsche has been vigorously pursuing enforcement but against stubborn opposition: we wrote on the Court of Appeal's refusal[19] to overturn findings of contempt against Mr Vik, a High Court decision on the date on which interest becomes due on costs for limitation purposes and the High Court's decision to refuse permission for Mr Vik, a convicted contemnor, to give remote evidence.[20] The Court of Appeal has now pronounced on the same interest on costs point, holding that time runs on interest on costs from the point when the costs are quantified in the final costs certificate.[21]

Finally, in a significant judgment, the Court of Appeal overturned the findings of the High Court in *Banca Intesa Sanpaolo and Dexia Credit Local SA v Comune di Venezia*.[22] At first instance, it had been decided that English law governed interest rate swaps entered into by the Municipality of Venice were void for lack of capacity. This came as a direct consequence of the 2020 decision of the Italian Supreme Court in *Banca Nazionale del Lavoro SpA v Comune di Cattolica*. However, the Court of Appeal found that Venice did have capacity to enter into the swaps as a matter of English law. As a result, these cases continue to be brought before the English courts, with Dexia for example having very recently issued proceedings against the Province of Crotone.

It would not be possible in the current culture of hope and hype to close without mentioning the "AI" buzzword. That's reflected in the financial markets, with predictions AI might revolutionise investment selection and investment advisory processes. We have reflected on how such changes might impact financial mis-selling cases – read more here. We can certainly see that the future may well hold rich potential for AI misselling disputes!

18. *Kwok and ors v UBS AG (London Branch)* [2023] EWCA Civ 222 (1 March 2023) see here
19. *Deutsche Bank AG v Sebastian Holdings Inc* [2023] EWCA Civ 191 (24 February 2023) see here
20. *Deutsche Bank AG v (1) Sebastian Holdings Inc (2) Mr Alexander Vik* [2023] EWHC 2234 (Comm) see here
21. *Deutsche Bank AG v Sebastian Holdings Inc and another* [2024] EWCA Civ 245 (14 March 2024)
22. *Banca Intesa Sanpaolo and Dexia Credit Local SA v Comune di Venezia* [2023] EWCA Civ 1482 see here

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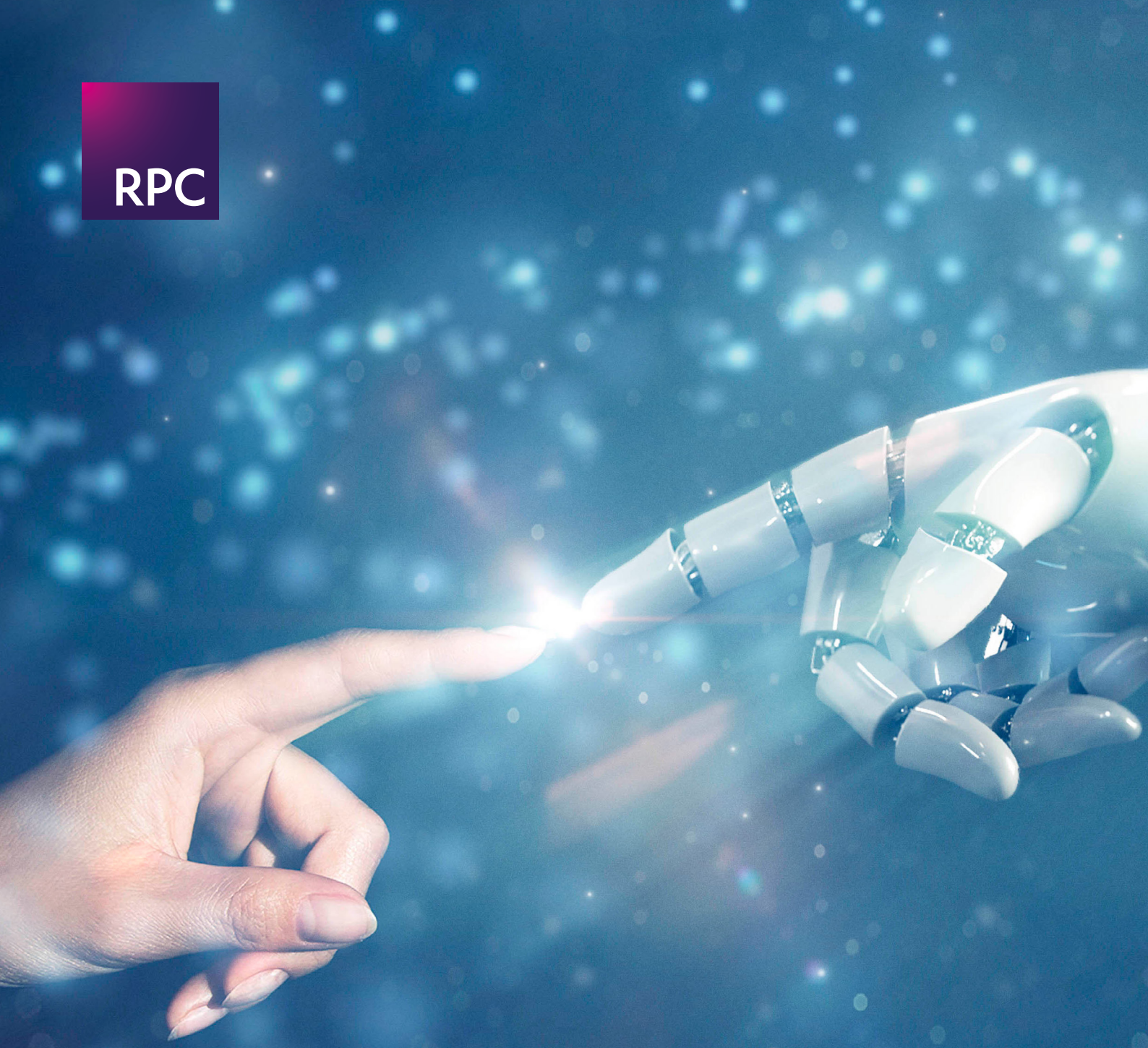

AI and emerging technology disputes symposium

8 October 2024

Register here

Symposium 1230-1800
Networking drinks 1800-2100

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