RPC

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Introduction

Welcome to the latest edition of our financial litigation roundup. In this edition, we consider recent judgments and ongoing cases from the banking and financial world in the UK and Hong Kong, as well as other legal developments across those jurisdictions.

RPC continues to build on its status as one of the few premier tier banking and finance litigation specialists which is able to assist market counterparties of all descriptions in disputes against the largest banking institutions due to our predominantly conflict free position. The practice goes from strength to strength and has earned the recognition of Chambers and Legal 500 as being in the highest bracket of conflict free firms operating in the financial markets disputes sector, together with many well-deserved individual rankings and reviews for our partners. In May 2018, Simon Hart took up the role of Head of Banking and Financial Markets Disputes, with Tom Hibbert continuing in his role as Global Head of Commercial Disputes and a senior partner in our financial disputes team.

We thoroughly recommend following our Twitter feed at @conflictfreeRPC for up-to-the-minute topical updates, news and views on financial markets issues and financial markets disputes.

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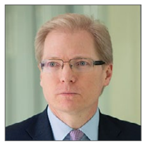

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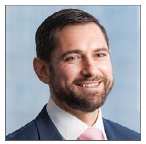

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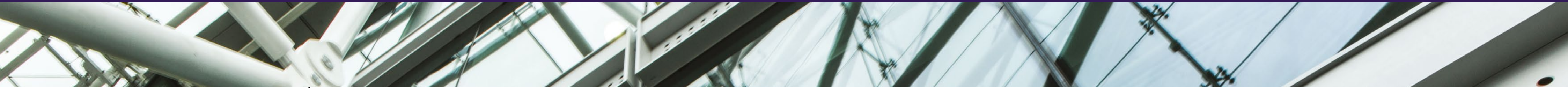

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Developments of note

- RPC are founder members of the inaugural London International Disputes Week, to be held on 7 – 10 May 2019. The event will bring together members of the legal community from all over the world, including practitioners, clients, judges and arbitrators, to celebrate London's heritage as an international disputes centre and to debate its future. The technical sessions will explore current issues surrounding different types of disputes and the various methods of resolving them. Members of RPC's Banking and Financial Markets Disputes team are involved in three of those sessions. **Jonathan Cary** is speaking on *Third party funding/collective actions and the impact on financial services litigation* in the Financial Services Disputes session. **Parham Kouchikali** is a panel member debating *Disclosure in England & Wales* in the session on *Issues in Commercial Litigation* (for which **Davina Given** is on the organising committee) and **Jonathan Wood** is moderating the panel on *Cross-border insurance disputes*. More details on the London International Disputes Week can be found at https://lidw.co.uk/.

- The International Comparative Law Guides have released for the first time a dedicated Financial Services Disputes guide, which is a very useful cross-border resource. We contributed the England & Wales chapter, but there are a range of views from other heavyweight financial markets litigation firms from 21 other jurisdictions, and without any bias we can say it is well worth a read! (click here to view)

- We continue to act for the **Federal Republic of Nigeria** which is suing **JP Morgan** in the Commercial Court to seek to recover over US$1billion paid out by the bank from the account of a Nigerian state entity at the instigation of associates of the previous Nigerian government. The allegation is that the payments in issue diverted the proceeds of a sale of an oilfield by the Nigerian state to Shell and ENI away from the state and into the hands of private individuals. The core allegation against the bank is that it breached a bank's 'Quincecare' duty not to give effect to payment instructions in circumstances where it is or should be evident to a reasonable banker that the instructions were being given to it to effect a fraud on an accountholder. JP Morgan recently failed in its application to strike out the claim (the case is reported below), and the case now proceeds.

- The Competition and Markets Authority (**CMA**) announced in November 2018 that it had launched an investigation into cartel behaviour in **London's bond markets**. This was followed in January 2019 by the EU competition authorities announcing that a Statement of Objections had been sent to 8 banks setting out allegations of cartel behaviour in the EUR-denominated SSA (Sovereign, Supranational and Agency) bond markets. The alleged price rigging appears to be another instance of "chat room" collusion between traders at the various banks who are under the regulatory spotlight.

- The undercurrent of phasing out the **LIBOR** and **EURIBOR** benchmark rates is running ever faster in the run up to completion of their phase-out at the end of 2021. It would surprise us very much if the markets manage the transition to new benchmark rates without any hitches. Replacement benchmarks are active and being promoted heavily, but the historic inventory of products contractually linked to IBOR benchmarks is obviously huge. It is unrealistic to expect anything approaching 100% contractually consensual conversion of that inventory over to the new benchmarks, leaving huge uncertainty as to what will happen when the rate setting ceases. After a relatively slow start, the markets are now very alive to this issue. We would expect global industry wide conventions and solutions begin to emerge as a means of providing a default transition procedure, but the risk of disputes is very evident.

- In October 2018 three British former currencies traders from JP Morgan Chase, Citigroup and Barclays Bank plc were acquitted for price-fixing five years after the **foreign-exchange scandal** first broke. This is one of a number of recent cases where British currency traders have ended up being tried in criminal proceedings in the US courts. In this case, despite the fact that the UK's Serious Fraud Office had already investigated their behaviour first and had found that there was no basis for prosecution in the UK. These men have been the only people to have faced a jury over the 2013 foreign exchange rigging scandal that has seen USD10bn of fines levelled against six banks and their former employers.

- On a related note, there have been reports that the EU Commission are close to concluding their foreign-exchange manipulation investigation and that the announcement of fines for a number of the investment banks may come as early as June.

- Bank Mellat's huge claim against HM Treasury for damages under the Human Rights Act allegedly flowing from the HMT's *Financial Restrictions Iran Order 2009* (a sanctions order which was held by the Supreme Court in 2013 to have been made unlawfully by HMT) continues to wend itself through the courts. The case is fixed for trial in June 2019, but is clearly in procedural difficulties. The Court of Appeal in mid-March handed down an appeal judgment on disclosure issues. At the end of its judgment, it took the very unusual step of expressing concerns about the case management of the matter, urging an urgent CMC, and advocating for the appointment of a designated judge to oversee the US$1.7billion claim. With issues as to the terms on which the bank's disclosure on the customer business it says it lost only now being resolved, it seems very unlikely that the trial could proceed in June 2019.

- In procedural news from the perspective of the London Business and Property courts:

  - The **new disclosure pilot scheme** came into force on 1 January 2019. This scheme quite dramatically alters the rules relating to disclosure, with front-loading of disclosure and a much more judicially interventionist and multi-modal approach to the scope of disclosure obligations. Our experience to

date is that the pressure is on parties to seek to resolve these issues by consent and that the courts may be content to endorse that approach notwithstanding their powers to intervene more actively. The shorter trials scheme (introduced to ensure claims are completed within a year of issue) has been permanently adopted after its three-year trial. The scheme is restricted to cases with limited disclosure or witness evidence, but there is no limit on the size of cases, with some worth several million pounds reportedly resolved through the process. It provides a useful half-way house between the bare-bones CPR Part 8 procedure for resolving legal issues where there is no real dispute on the facts, and full-blown CPR Part 7 proceedings.

- Mr Justice Popplewell is leading a Working Group which is reviewing the approach taken to **factual witness evidence**. Various reforms have been mooted, perhaps the most radical of which include dispensing with witness statements altogether in favour of a return to oral evidence in chief.

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Deutsche Bank AG v Comune di Savona[1]

In this judgment, the Court of Appeal held that an English jurisdiction clause contained in an ISDA Master Agreement governed all disputes stemming from interest rate swap (**IRS**) transactions. In particular, it found that an Italian jurisdiction clause in an advisory umbrella agreement governing the parties' wider relationship was displaced and overridden where the complaints about breach of the advisory duties in that umbrella agreement concerned the entry into IRS governed by the English law and jurisdiction ISDA Master Agreement.

Deutsche Bank (**DBAG**) had entered into several agreements with the Italian local authority, Comune di Savona (**Savona**). These included an umbrella relationship agreement (called "the Convention") in which DBAG agreed to provide general advisory services to Savona. Subsequently, the parties entered into an English law ISDA Master Agreement, and two very substantial IRS transactions governed by its terms. The Convention contained an exclusive jurisdiction clause in favour of the Court of Milan. The Master Agreement as standard for the 1992 English law version contained a non-exclusive English jurisdiction clause[2], as well as the standard entire agreement and 'no reliance' clauses.

In 2016, Italian judicial criticism of Savona's entry into the IRS led to expectations of legal action to challenge the validity of the transactions in the Milan courts. This prompted DBAG to issue proceedings in London seeking declarations that the IRS transactions were valid and enforceable. Savona challenged jurisdiction, based on the contractual election in the Convention agreement. At first instance, Savona was successful before deputy judge HHJ Waksman QC as he then was, now Mr Justice Waksman. HHJ Waksman QC had found that the exclusive Italian jurisdiction clause in the Convention governed the dispute, which he considered to concern the advice to enter into the IRS provided under the Convention agreement, rather than the operation of the IRS contracts under the ISDA documented transactions.

The Court of Appeal disagreed. It placed emphasis on the fact that the entry into the ISDA transactions post-dated and supervened the Convention agreement. In doing so, the parties had agreed that the ISDA entire agreement clause applied to the IRS transactions the validity of which was being disputed. Moreover, in entering into the ISDA transaction, Savona had represented that it had not relied on any advice from DBAG.

The case serves to underline how actively the English courts will seek to defend their default remit under the ISDA standard documentation terms.

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Barclays Bank plc v Price[3]

The judgment in this case held that a demand made under a bank guarantee was effective even when the amount demanded exceeded the amount which could actually be due under the guarantee due to it being higher than the amount permitted by an express liability cap.

The claim was against a director of a law firm which went into liquidation owing money to Barclays. The director had provided a guarantee which resulted in him being obliged to pay Barclays £55,000. Barclays sent a notice in October 2015 demanding £55,500 (the agreement also made reference to that higher figure although it was not the applicable amount). The main issue was whether the inflated demand for £500 more than was due was an effective demand for the actual amount due.

The judge held that errors in a notice of demand do not necessarily render the notice ineffective, provided they are "*sufficiently clear and unambiguous to leave a reasonable recipient in no reasonable doubt as to how and when they are intended to operate*". On that basis, the judge concluded that the demand was valid, despite being for the wrong amount.

This purposive approach is pragmatic, but subject to the usual black letter law concern of certainty – at less than 0.1% of the sum actually due, the error was small in this case. As there is no bright line, the degree of departure from the amount lawfully due which is permissible is left open to be determined on a case by case basis.

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1. [2018] EWCA Civ 1740.
2. In 2018, ISDA introduced alternative model clauses including an exclusive version, but these have to be specifically adopted to displace the standard Master Agreement term. For more see https://www.isda.org/book/2018-isda-choice-of-court-and-governing-law-guide/
3. [2018] EWHC 2719 (Comm).

Nederlandse Industrie Van Eiprodukten v Rembrandt Enterprises[4]

This was a case concerning supply of foodstuffs rather than our usual fodder of financial markets cases, but we cover it here because it is an important judgment on the nature of the test as to whether a claimant has been induced by a fraudulent misrepresentation into entering into a contract.

The issue arose because the judge found that a fraudulent misrepresentation had been made to the defendant (which was seeking to rescind the contract for misrepresentation by way of defence to a claim for contractual damages). The misrepresentation was, in essence, that a price increase over a prior contract price was necessary to cover the claimant's additional costs under a new regulatory inspection regime. In fact that was not the case, and there was a profit element to the price increase. The difficulty arose because the defendant could not show that it entered into the contract just because that representation was made. There were several reasons for the defendant entering into the contract other than price – and there was some evidence that the claimant might have agreed to the higher prices even if the fact there was an additional profit element to them had been disclosed.

In a case of negligent misrepresentation, it is well established that the test of inducement is whether in the absence of the misrepresentation the claimant would have entered into the contract anyway. In fraudulent misrepresentation, the authorities were mixed, with some suggesting that a weaker test applied and some more recent authority suggesting that was not the case. The weaker test of inducement in question is that inducement is to be found where the person misled can establish they *might have* acted differently. The judge held that the weaker test was operative in cases of fraudulent misrepresentation.

The judge then went on to consider how this test interacted with the principle that there is a strong presumption of inducement in cases of fraudulent misrepresentation. He found that the result of applying this strong presumption was that the claimant would have to prove that the defendant *would have* agreed to the contract if the misrepresentation had not been made – as that could not be proven by the defendant, the claimant succeeded in establishing that it *might have* acted differently, and so inducement was proven, and the contract fell to be rescinded for fraudulent misrepresentation.

The first instance judgment on this point was more recently upheld on appeal by the Court of Appeal

The case is helpful in underlining that in cases of deceit, fraudulent actors will not readily be permitted to hide behind denials that their deceitful statements had any causative effect.

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Carlos Sevilleja Garcia v Marex Financial Limited[5]

This Court of Appeal case clarified the 'reflective loss' principle, which prevents shareholders from bringing personal claims for losses suffered by the company in which they own shares.

In particular, the case raised issues as to (i) whether the bar on claiming reflective losses extends to unsecured creditors (who were not also shareholders) as well as to shareholders, and (ii) the exception to the rule which applies where the wrongdoing of the defendant has prevented the company from bringing a claim (the "Giles v Rhind rule").

The claimant owned two companies through which he conducted FX trading. The defendant is an FX broker. The claimant's companies made losses on trading and defaulted on their obligations to Marex, which in an earlier set of proceedings in 2013 was awarded US$5m in damages. During enforcement measures, it became apparent the companies had assets of less than US$5,000.

Marex alleges that the reason for this was that CSJ had dishonestly asset-stripped his companies of more than US$9.5m, which it alleges CSJ did after seeing the 2013 judgment against the companies when it was handed down in draft. Marex then issued the instant proceedings against CSJ in person alleging he had intentionally caused loss to Marex by unlawful means.

CSJ challenged jurisdiction on the basis that there was no serious case to answer, because, he argued, Marex as a judgment creditor of his companies was barred from pursuing CSJ by the reflective loss principle. Any asset stripping of the sort alleged by Marex would have given rise to a claim by the companies against CSJ. Accordingly, he argued, Marex itself as a creditor of his companies could not bring proceedings against him in person. At first instance, the judge dismissed this argument, and CSJ appealed.

The Court of Appeal reversed the first instance decision on this point, finding that the rule against reflective loss was well established and justified. Moreover, it held, drawing a distinction between a creditor who happened to be a shareholder and a creditor who happened not to be a shareholder would be artificial and would introduce arbitrary outcomes.

The Court of Appeal then considered whether notwithstanding that default position, Marex could bring a claim against CSJ under the 'Giles v Rhind rule'. This exception to the reflective loss rule applies where the alleged wrongdoer's actions have prevented the company from pursuing an action against the wrongdoer, such that only the shareholder (or here, by extension, creditor) can bring an action. The company's inability to pursue the claim must be a legal barrier - it cannot be, for example, a lack of funds which could be cured by providing a loan. Accordingly, the Court of Appeal decided that the exception did not apply. The

4. Inc [2018] EWHC 1857 (Comm) and [2019] EWCA Civ 596

5. [2018] EWCA Civ 1468

companies simply lacked the funds to pursue CSJ for his breach of duty against them, but that could be cured by Marex directing and funding a liquidator of the companies to pursue the claim, or by Marex taking an assignment of the companies' claims.

The case serves as a useful reminder of the reflective loss principle (and the Giles v Rind exception), but the extension of the principle from shareholders of a company to creditors of a company is a significant development. This is now an important constraint on economic tort remedies which would previously have been seen as available in the hands of creditors, if not shareholders.

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Playboy Club London Ltd v Banca Nazionale Del Lavoro SpA[6]

This Court of Appeal decision is an important judgment on the interplay between restraints on abuse of process and the constraints on pleading fraud in the English courts.

The background is that a Lebanese resident, Mr B, wished to gamble at the Playboy Club, which required a bank reference before extending him credit. In the interests of discretion, the Club's practice was to seek a reference from the gambler's bank through an associated company called Burlington Street Services Ltd. Banca Nazionale Del Lavoro (BNDL) provided a reference, saying there was an account open and the gambler was creditworthy for up to £1.6m. In fact, he had not completed opening an account and when he did it had a nil balance. Mr B paid £800k by cheque at the Club for gambling chips, lost half, cashed the remainder, and skipped back to the Lebanon, leaving the cheques to bounce behind him.

The Playboy Club sued BNDL first for negligence. It won at first instance, but eventually lost in the Supreme Court. That was on the basis that BNDL had not assumed any responsibility to the Playboy Club, but only to the Burlington Street company (which the bank had no idea was connected to the Playboy Club).

During the appeal process, the Playboy Club issued fresh proceedings in deceit, based on evidence which had come to light at trial. The bank tried to strike these out, arguing that it was an abuse of process because the claim in deceit should have been brought in the original proceedings. At first instance, the Playboy Club lost and the claim was struck out. However, it was restored by the Court of Appeal, which found that any claim in deceit made at the time of the negligence proceedings would have been very weak and highly speculative because of a lack of evidence. The new evidence which had emerged at trial had transformed the deceit claim into something with substance. Accordingly, it was not an abuse of process not to advance the claim when it was merely speculative – the claimant was entitled to be cautious before accusing the defendant of dishonesty, and indeed that was mirrored in the duty of counsel not to plead fraud without cogent evidence.

There was therefore no abuse of process in bringing the claim in separate later proceedings when it became apparent that there was a good arguable case. The outcome is very positive for claimants who are (rightly in our view) not permitted in the English courts to make accusations of deceit lightly, but who later come across cogent evidence which reveals that the picture is worse than originally imagined.

Subsequently, the bank sought to appeal to the Supreme Court, but permission was refused. Most recently, in a novel decision by the High Court, Playboy Club has been given permission to amend their Particulars of Claim in the new deceit claim in order to include as a head of the loss claimed in damages the costs of their previous unsuccessful negligence action.

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K. Medsted Associates Limited v Cannacord Genuity Wealth (International) Limited[7]

This was another decision of the Court of Appeal, of some potential importance when considering commission arrangements which are not fully transparent to the client of an agent.

The point came up in the context of a dispute between a broker (Cannacord, then Collins Stewart) and an introducer over arrangements to introduce clients who wished to trade in CFDs (contracts for difference). Medstedt, the introducer and Collins Stewart entered into an agreement by which Medstedt would be paid commission on a share of the revenues from introductions effected by Medstedt. As part of those arrangements, Collins Stewart agreed not to circumvent the agreement by dealing directly with those clients without paying the commission.

As it turned out, Collins Stewart did exactly that, and was sued by Medstedt for the commissions which should have been paid. At first instance, Collins Stewart succeeded in defending the claim on the basis that the commission arrangements between it and Medstedt had not been disclosed to the end clients. As Medstedt was a fiduciary agent for the clients it introduced, it was bound not to take secret commissions. Accordingly, the judge declined to award Medstedt anything more than nominal damages on public policy grounds.

The Court of Appeal rejected this conclusion. At first instance there had been a finding of fact that the end clients knew that Medsted was being paid something by Collins Stewart (presumably because they were not paying Medstedt anything directly themselves), but that they did not know any details. This knowledge, the Court of Appeal held, was sufficient to mean that the commission was not a secret commission. The clients were aware of the overall commission charged by Collins Stewart, and there was no duty to disclose to them how that was split between Medsted and Collins Stewart. The Court of Appeal ordered damages to be assessed.

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6. [2018] EWCA Civ 2025

7. [2019] EWCA Civ 83

J. Carr v Formation Group Plc[8]

This decision arose in another case concerning non-disclosed commission payments. Formation Group is an investment advisory company. Through a now-insolvent subsidiary, it entered into an arrangement with a football agent (Proactive Sports Management) under which the subsidiary shared with Proactive commission which it was paid on investments which it had recommended to Proactive clients. The clients were not made aware of these commission sharing arrangements. A group of ex-professional footballers (including Robbie Savage, Andy Cole, Shaka Hislop and Zat Knight) are suing in relation to the commission arrangements, alleging that a group of defendants around the insolvent subsidiary were liable for various breaches of fiduciary and tortious duties, including dishonest assistance, deceit and unlawful means conspiracy.

The point in issue arose in the course of a case management conference at which 3 of the defendants applied for permission to adduce expert evidence of market practice in relation to commission sharing agreements. The defendants argued that such evidence would assist the court in determining whether they had acted dishonestly, as alleged by the claimants.

The court found that it would be inappropriate to give permission for such market practice expert evidence going simply to the issue of whether the defendant's conduct was dishonest (for instance for the purposes of determining whether there was dishonest assistance). Such evidence could only help to determine whether the participants are aware that they are being dishonest, which is a subjective question which has never been part of the civil test for dishonesty (and since the Supreme Court's decision in *Ivey –v- Genting* is not part of the criminal test either). As the defendant's own appreciation of their honesty or otherwise is irrelevant, so are the standards adopted in the milieu of the market in which that person operates. The objective test for the court to apply was simply whether the conduct fell short of the standards expected of honest and reasonable people.

However, permission was granted to adduce this sort of market practice evidence directed at issues where the subjective awareness of the defendants might be relevant. Those issues included causes of action which required intentionality and knowledge of dishonesty. As an example, the conspiracy to injure by unlawful means claims at least arguably required evidence of intentional dishonesty in the sense of knowing that means in issue are unlawful, and the market practices surrounding the defendant could affect his perception of the honesty of his own conduct. The court also found that the evidence might be relevant in determining whether for limitation purposes there had been deliberate commission of a breach of duty in circumstances where it is unlikely to be discovered for some time. Under section 32(1)(a) of the Limitation Act, such a breach of duty is deemed to be deliberate concealment, extending the limitation period until it comes to light. However, the deliberateness of the breach of duty which is required again introduces a subjective element to the required level of dishonesty.

8. [2018] EWHC 3116

Accordingly, the defendants were given permission to adduce market practice evidence, but not on whether in practice the relevant market participants believed that secret commission sharing arrangements were honest or dishonest. That is an assessment the court will make itself, based on the factual evidence and the relevant legal principles.

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Barnardo's v Buckinghamshire and others[9]

This Supreme Court appeal concerned the interpretation of a clause in the pension scheme trust deed for the charity, Barnado's. The scheme documentation provided for pensions to be indexed to the "Retail Prices Index" (RPI) measure of inflation. The UK Office for National Statistics no longer designates RPI as an official "national statistic" due to known flaws in its statistical methodology. The main ONS inflation index is the CPI (and CPIX, ex-housing costs) and the less prominent RPIJ which is a version of RPI with corrected methodology. However, ONS continues to calculate and publish unofficial RPI statistics for the purposes of continuing the long established time series for comparative purposes.

The issue was whether the trustees of the pension scheme were permitted in these circumstances to adopt CPI as the "replacement for" RPI, given it was no longer an official national statistic, and the ONS's main inflation index was now CPI.

In short, the Supreme Court agreed with the decision of the Court of Appeal before it, in interpreting the clause literally such that it did not give the power to the trustees to adopt a different index in circumstances where RPI has not been completely discontinued. It therefore dismissed the appeal (and as the statistical error in RPI tends to increase the measure of inflation, this was a win for the pensioners).

Stepping back from the particular context, this is an interesting precedent (at the very highest level) on controls over rights to unilaterally substitute new financial benchmarks and indices in place of ones which have become moribund or defunct. This reflects the current swing towards literalist, less purposive, approaches to contractual construction. In the context of the current trailing out of the IBOR benchmarks as institutions cease to contribute submissions (especially in the less widely traded currencies and durations), this should serve as a warning sign to parties to agree a multilateral replacement rather than one party seeking to impose a replacement through contractual provisions (for instance, calculation agent discretionary powers) unless those are very clearly defined to capture the situation exactly.

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9. [2018] UKSC 55

The Federal Republic of Nigeria v JP Morgan Chase Bank, N.A.[10]

JP Morgan faces a claim from the Federal Republic of Nigeria (represented by RPC) for over USD875m over an allegedly fraudulent scheme under a previous Nigerian administration to transfer the rights to a Nigerian oilfield to Shell and ENI. At the core of the claim against JP Morgan is an allegation of breach of a "Quincecare duty": a bank's duty not to make payment from an account in circumstances when the bank was "on inquiry" i.e. when it had reasonable grounds for believing that the payment out was part of an attempt to defraud the accountholder.

JP Morgan sought to strike out the claim on the basis that "even if it knew" that a payment instruction was given to it for the purposes of defrauding the Nigerian state, it had no duty to take any steps to protect the customer, on the basis that the Quincecare duty had been contractually excluded under JP Morgan's contract with Nigeria. The bank argued that in the circumstances it was entitled to make a $1 billion payment out of the account "like an ATM machine or a robot".

The court declined to strike out the claim in no uncertain terms. The Judge subsequently declined JP Morgan permission to appeal and ordered the bank to make an interim payment to Nigeria of £350,000 on account of costs incurred defeating the strike out application. The case proceeds.

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The ECU Group PLC v HSBC Bank PLC[11]

We previously reported on currency manager ECU Group's successful application for pre-action disclosure against HSBC in relation to FX front-running allegations.

In a new decision arising from that, the High Court considered applications for prospective and retrospective permission to make collateral use of the documents which HSBC had disclosed to the ECU Group in accordance with the earlier pre-action disclosure order.

The retrospective permission issues arose because having received the documents in accordance with the CPR 31.22(1) restriction that they could only be used for the purpose of the proceedings in which they were disclosed, ECU Group used them for other purposes, in particular: (i) communicating with UK and US regulatory authorities; (ii) in communications with lawyers in the United States; and (iii) in providing to a journalist a copy of a witness statement made in support of an application seeking further disclosure under the original pre-action disclosure order.

The court waved through the retrospective permission to use the documentation in communications with regulators. The judge noted that HSBC conceded it would have consented to this had advance permission been requested (we observe it would have been rather awkward for HSBC to try to resist this). This is a tactical point worthy of note.

In relation to the communications with US lawyers, the court noted that there were subtleties involved. Although ECU Group had used the documents to seek advice on what remedies might be available in the US, an assessment of that was a sensible part of assessing what claims to bring or not to bring in the UK proceedings, so using the documents in the course of consulting US lawyers for that purpose would not necessarily have been a collateral use of the disclosure. However, the court found the actual purpose went further than that (and was naturally concerned by the fact ECU Group also sought prospective permission to use them in US proceedings). The court laid down a sharp line by granting permission for the retrospective use, but requiring ECU Group to terminate the retainers of its US lawyers, require them to return the disclosure documents and swear evidence as to what was done with them whilst in their possession, and direct them not to allow their advice to be provided to anyone including any replacement US lawyers.

In relation to the provision of the witness statement to FX Week, the court noted that the journalist had requested a copy from ECU Group's solicitors (having apparently been tipped off by ECU Group that it might be considered interesting). The initial response had directed the journalist to apply to court, but a subsequent approach to the lawyer at the instigation of the CIO of ECU Group resulted in the journalist obtaining a copy. The judge held this was "a very serious breach, neither sensibly explicable nor remotely excusable" and refused retrospective permission.

The applications for prospective permission were mostly resolved by consent by the time of the hearing, but the judge noted that he would have granted permission to use the documents to join an additional HSBC group company to the proceedings, as not being a collateral usage. The ECU Group had backed off the application to use the documents in US proceedings at the hearing, but the judge refused permission in any case (whilst permitting a fresh application to be made if there was a material change in circumstance).

Indemnity costs were ordered against ECU Group.

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10. [2019] EWHC 347 (Comm)
11. [2018] EWHC 3045 (Comm)

Marme Inversiones v Natwest Markets and others[12]

In the latest IBOR-related interest rate swap claim decision, Mr Justice Pickens rejected a claim by Marme Inversiones, and upheld counterclaims by Natwest Markets (ex RBS) and banks in a lending syndicate led by RBS. The claims were yet another set of proceedings arising from the Santander HQ sale and leaseback which took place right on the cusp of the financial crisis. Marme's claims were based on the implied representation of honest dealing cause of action which was approved in principle by the Court of Appeal in the PAG (Property Action Group) case. In essence, the contention was that as RBS had proposed EURIBOR for a loan and interest rate swap (**IRS**) package, it had impliedly represented that RBS had not been, was not, and would not be involved in dishonest conduct in relation to EURIBOR.

The judgment looks in detail at some of the loose ends touched on in the Court of Appeal's PAG judgment. The core of the case rested on the conviction of an RBS employee (Mr M) for fraud in relation to EURIBOR manipulation. The facts were, however, very difficult for Marme. Most of Mr M's misconduct was carried in previous employment at Barclays, predating the Marme IRS transaction. At the time of the transaction, RBS was not a panel bank for EURIBOR submissions, and the sparse evidence of any ongoing attempts by Mr M to influence rate setting came in the form of attempts to persuade his trader co-conspirators at Barclays and Deutsche Bank to persuade their rate setters to submit false rates. To the extent that Marme was able to point to RBS misconduct, the allegations would not in fact have affected the floating rates payable by Marme under the swap. Even more fundamentally, the judge found that the use of EURIBOR as the benchmark had been instigated by Marme and not RBS, but also that in any case no real thought had been given to the adoption of what was simply a standard commercial benchmark rate. In the light of this set of facts, the judge found that it was it was unrealistic to suppose that the representations pleaded by Marme had in fact been made by RBS, or operated on the mind of the decision-maker at Marme in terms of reliance on the alleged representations.

Our view is that much of the (technically *obiter dicta*) reasoning in the judgment was driven by the diffuse and vague nature of the representations that Marme was forced to plead because of its inability to establish that anything that RBS (or Mr M) did in terms of misconduct around EURIBOR was capable of causing it loss under the IRS. It seems to us that was ultimately the underlying factor which was fatal to its attempt to rescind the IRS contract, and is reflective of the difficulties in general with proving that any concrete loss was visited on any individual IRS counterparty by any individual IBOR rate submitting bank engaged in attempted rate manipulation misconduct.

An important limb of the judgment considered the attribution of knowledge of dishonesty within and to RBS as a corporation. As a matter of fact, it was found that the RBS team dealing with Marme on its transaction had no knowledge of any of the EURIBOR misconduct which the claimant alleged RBS, primarily through Mr M, had engaged in. However, there was no evidence that Mr M had any knowledge of the IRS transaction with Marme. The issue then was whether Mr M's knowledge of his own dishonesty in relation to EURIBOR could be isolated with him, such that RBS's actions through the salespeople on the deal with Marme were not tainted with his knowledge of the dishonesty. If that was the case, then any implied representations made by RBS through those salespeople that there was no relevant EURIBOR misconduct could have been made honestly, without any knowledge that they were false. The judge rejected this argument, finding that it was sufficient that Mr M (as a human agent of RBS) knew of the misconduct and also knew that RBS in a general sense transacted in IRS benchmarked to EURIBOR. He held that any corporate knowledge of the dishonesty that RBS had through Mr M could have been sufficient to establish that any implied representations made by (personally unwitting) salespeople were known to RBS to be false (had it been the case that any false representations had been made, which he found was not the case).

Subject to any appeal (which would not look promising) the Marme case seems to us to draw a fairly definite line **in the context of claims about IRS and IBOR manipulation** on the development of the 'PAG' implied representations. It is our view that there are much more promising fact patterns outside of the IBOR manipulation context from which to take forward the cause of action approved in principle by the Court of Appeal in PAG.

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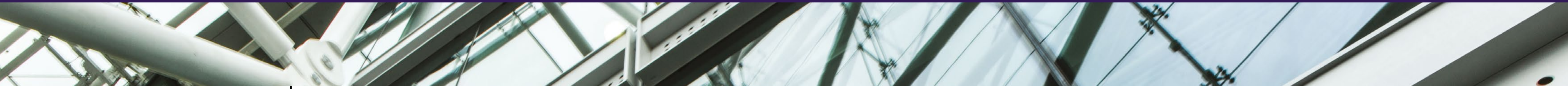
12. [2019] EWHC (Comm) 366



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Court grants access to court pleadings to shareholders of a party – *Elliot International LP v Bank of East Asia Ltd (No. 2)*[13]

In *Elliott International LP v Bank of East Asia Ltd (No. 2)*, the plaintiffs (all shareholders in the first defendant, the Bank of East Asia (the Bank)) applied for an order for disclosure of the case's pleadings to the rest of the Bank's shareholders. The plaintiffs argued that disclosure was desirable to give the Bank's shareholders a complete picture of the parties' competing cases.

The application was opposed by all of the respondents except the Bank, which was neutral. The respondents argued that the plaintiffs were pursuing the application not to provide the Bank's shareholders with a clearer understanding of the dispute, but to advance the plaintiffs' wider public campaign to pressure the Bank to begin an auction of its shares.

The court granted the plaintiffs' application on the basis that although the respondents' arguments were not fanciful, they were still conjecture.

The court departed from the general rule (in Hong Kong) that third parties should not have access to pleadings beyond those that form part of an originating process (for example, part of a writ). The principle of open justice means that most hearings are heard in public, and members of the public could also apply to access court documents if sufficiently interested in a case and good grounds exist. As the Bank was a public company, and the dispute would be of interest to many of its shareholders, granting publication of the entire pleadings to its shareholders would have the benefit of allowing them a greater understanding of the dispute with limited negative effect.

This decision is particularly encouraging for large investors such as asset managers and hedge funds. If followed in other cases, it would allow interested parties to understand the particulars of disputes involving public companies in which they are invested.

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Bank did not owe its customer a duty to provide investment advice (but watch this space) – *Shine Grace Investment Ltd v Citibank NA*[14]

In *Shine Grace Investment Ltd v Citibank NA & Anor* the Court of First Instance dismissed a mis-selling claim against Citibank arising out of pre-crisis financial products.

The plaintiff (Shine Grace) had entered into a number of equity accumulator contracts (the Contracts) with Citibank in 2007, under which It suffered heavy financial losses totalling HK$478 million. The plaintiff launched a claim against the bank in 2008, alleging that the bank had mis-sold the Contracts and seeking the return of the money it lost, plus damages.

One of the key questions the court had to consider was whether the bank had breached its duty of care to the plaintiff. The general rule is that the existence of a bank-customer relationship alone will not impose a common law duty on the bank to advise the customer in respect of their investments. This has formed the subject of several mis-selling cases since the global financial crisis.

A bank can assume responsibility for providing advice to an investor, but even if a bank gives advice it does not necessarily mean that it will be responsible for that advice. The court will consider the terms and conditions of the parties' agreement and the factual circumstances to determine (i) if a duty has arisen and (ii) the scope of such a duty.

In a decision which will be welcomed by financial institutions (but not so much by their customers), the court held that under the proper construction of the Contracts, the bank had effectively disclaimed its duty to advise the plaintiff. The consequence was that the duty of care, which the plaintiff claimed to exist, in fact did not.

In reaching its conclusion, the court was also persuaded by the character of the individual investor who entered into the Contracts with the bank. The court held that as she was a sophisticated investor in her own right, it was unlikely she would have taken the bank's advice even if it *had* recommended the Contracts as an investment option.

This judgment reinforces the current judicial trend, both in Hong Kong and England, to allow financial institutions generally to rely on contractual disclaimers to demonstrate that they have not assumed responsibility for their customers' investment decisions. The same bank was successful in another investor dispute (*Protpakorn v Citibank NA* [2018] HKCA 450).

However, any comfort the banks can take from these cases relates only to agreements which predate 9 June 2017. Since then, the Security and Future Commission's (SFC) Code of Conduct has mandated that a 'suitability clause' be included in bank-customer (client) agreements. This regulatory interference with banks' freedom to contractually exclude liability for mis-selling should give investors greater protection and reduces the previously wide-ranging effect of such exclusion clauses.

For more detail on this subject, please see our article first published by *International Law Office* – https://www.internationallawoffice.com/Newsletters/Litigation/Hong-Kong/RPC/Mis-selling-claim-dismissed

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13. [2018] 4 HKLRD 427

14. [2018] HKCFI 1737

Court refuses to recognise authority of foreign bankruptcy trustee (in proceedings involving creditor bank) – *China Fishery Group Ltd*[15]

Although Hong Kong still lacks a statutory regime for cross-border insolvency (unlike Singapore or the USA), its courts will typically assist foreign insolvency office-holders, to the extent permitted under Hong Kong law, if they apply for recognition under common law principles.

The case of *China Fishery Group Ltd* [2019] HCFI 174, however, demonstrates that foreign insolvency office-holders should not expect to be recognised in Hong Kong as of right. It also demonstrates that public policy considerations can be a key factor in the court's approach to such applications.

The application related to an ongoing dispute between HSBC and companies relating to the China Fishery Group (the CFG companies), against whom the bank had applied for a winding-up petition. Although joint provisional liquidators were appointed over both companies, they were dismissed on 5 January 2016. The bank and the CFG companies subsequently signed a deed of undertaking under which the bank agreed to withdraw all global proceedings against the CFG companies, in exchange for the CFG companies' agreement to comply with certain obligations, including repaying its debts to the bank (the Deed).

Rather than fulfil their obligations under the Deed, the CFG companies filed for Chapter 11 bankruptcy in the USA, even though none of the group companies had any connection with the USA. This procedure has the automatic effect of staying all proceedings. The bank was therefore unable to take action for the CFG companies' alleged breach of the Deed.

A Chapter 11 trustee was then appointed over the CFG companies. The trustee applied for disclosure of the original Hong Kong decision (removing the joint provisional liquidators over the CFG companies), hoping to use it as evidence in proceedings the Trustee had commenced against the bank in New York. That application was tantamount to an application to the Hong Kong court for recognition of their authority to act in Hong Kong.

The Hong Kong court refused the application and ordered the trustee to pay the bank's legal costs. One of the two considerations for the court, when deciding whether to recognise a foreign office holder, is whether the company has a relevant connection to the foreign jurisdiction in which the office holder has been appointed. The court held that there was no relevant connection between the CFG companies and the USA.

The application was therefore dismissed.

15. [2019] HKCFI 174

Even if the trustee had established a relevant connection (jurisdiction), the application may have been rejected on public policy grounds because of the CFG companies' unconscionable behaviour. It appears that the CFG companies would have been wound up had they not signed the Deed, which included undertakings to the court. The judge doubted that the owners of the CFG companies intended to honour those undertakings. The court was of the view that the Chapter 11 bankruptcy was, in effect, an attempt to frustrate the bank from enforcing the Deed.

This case follows *Re CW Advanced Technologies Limited* [2018] HKCFI 1705, and illustrates the need for Hong Kong to modernise its cross-border insolvency regime, similar to other leading jurisdictions, to give parties greater legal certainty about whether a foreign insolvency office-holder will be recognised in Hong Kong. In the absence of a statutory cross-border corporate rescue and insolvency procedure, creditors need to apply complex common law principles concerning judicial recognition of foreign insolvency proceedings and the giving of assistance to foreign office holders.

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Hong Kong regulator wins landmark civil lawsuit concerning insider dealing in foreign listed securities (and more of the same expected) – *SFC v Lee & Ors*[16]

The Securities and Futures Commission (SFC) has for some time been using section 213 of the Securities and Futures Ordinance (Cap 571, the Ordinance) to secure (among other things) compensation on behalf of counterparty investors to impugned transactions.

The landmark Court of Final Appeal judgment in *SFC v Lee & Ors*, has confirmed that the SFC's remit under section 213 extends to contraventions of section 300 of the Ordinance, including transactions carried out through means of fraud or deception that involve shares listed locally *or overseas*.

The three appellants were alleged to have been party to a scheme to buy shares in a company listed on the Taiwan Stock Exchange after obtaining inside information from a 'tipper'. Had the conduct occurred in connection with locally listed shares, it would likely have constituted insider dealing.

The SFC commenced civil proceedings under section 213 of the Ordinance seeking determinations that one or more of the defendants had contravened section 300. Section 213 allows the SFC to seek orders that (among other things) defendants give up the profit made on the transactions. Importantly, section 213 proceedings are civil in nature requiring proof on the balance of probabilities, compared to the criminal standard of beyond reasonable doubt. The defendants were not charged criminally under section 300.

16. [2018] HKCFA 45

The Court of Final Appeal confirmed the lower courts' decision that the three defendants' conduct amounted to a contravention of section 300, and dismissed the appeal unanimously.

The outcome of this case was widely anticipated but is an outright win for the SFC. In a series of cases in 2018, the Hong Kong courts have adopted a purposive, and wide, interpretation of local securities legislation to tackle market mischiefs of insider dealing and transactions using fraudulent or deceptive conduct.

In *SFC v Lee & Ors*, the Court of Final Appeal has confirmed that section 300 has wide application. It catches any person who plays a part in a transaction involving securities where the misuse of inside information occurs in Hong Kong. This is irrespective of whether the transaction takes place on the Hong Kong Stock Exchange or an overseas stock exchange, or whether that person actually placed the trade him/ herself. This does not mean the section has extra-territorial effect – it does not. There must be some connection between a defendant's conduct and Hong Kong.

Armed with section 291 of the Ordinance (for insider dealing in Hong Kong-listed securities) and section 300, the SFC's section 213 armoury is extensive. Where conduct occurs in Hong Kong, the SFC can pursue these market transgressions itself through the civil courts to obtain injunctions, disgorgement orders and other relief. It does not need to wait for a successful prosecution through the criminal courts.

For more detail on this subject, please see our article first published by *International Law Office* – https://www.internationallawoffice.com/Newsletters/Litigation/Hong-Kong/RPC/Lead-regulator-wins-landmark-civil-lawsuit

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Hong Kong regulator issues record fines to four banks for IPO Sponsor failures

On 14 March 2019, the Securities and Futures Commission (SFC) issued fines to four global banks for failures in their IPO sponsor duties.

Together the four banks were fined HK$787 million (US$100 million): UBS (UBS AG and UBS Securities Hong Kong Limited collectively) HK$375 million, Morgan Stanley Asia Limited HK$224 million, Merrill Lynch Far East Limited HK$128 million, and Standard Chartered Securities (Hong Kong) Limited HK$59.7 million. The SFC also suspended UBS' licence to act as a sponsor for Hong Kong listings for one year, and the licence of one of its sponsor principles for two years.

The sanctions relate to the banks' work as IPO sponsors for certain Mainland Chinese companies that listed on the Hong Kong Stock Exchange between 2009 and 2014, whose shares were subsequently suspended from trading.

Together they constitute the largest fine ever imposed by the SFC in one go. The UBS fine is also the second largest individual fine by the SFC (after HSBC Private Bank (Suisse) SA's HK$400 million fine in November 2018).

The sanctions show that the SFC will hold IPO sponsors, as market 'gatekeepers', to a high standard. It is also suspected that they are intended to be a 'shot across the bow' of Mainland Chinese banks in their IPO sponsor activity for Hong Kong listings.

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Third party funding of arbitrations (now operative in Hong Kong)

In December 2018, the Hong Kong Government published its Code of Practice for Third party Funding of Arbitration in Hong Kong in the "Government Gazette". This follows the Arbitration and Mediation Legislation (Third Party Funding) (Amendment) Ordinance, which was enacted in June 2017.

Following the publication of the *Code of Practice*:

- the common law offences and torts of maintenance and champerty are disapplied in respect of third party funding of arbitration; and
- the Code of Practice implements safeguards and formal measures for funding arrangements and agreements.

As a result, from 1 February 2019, arbitrations seated in Hong Kong can now be funded by qualifying third party funders.

Third party funding is becoming of considerable interest to financial institutions and counterparties in Hong Kong and in Asia generally; particularly, given the increase in the use of arbitration for disputes arising out of complex financial products.

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Hong Kong and Mainland Chinese Courts to provide mutual assistance in interim measures in support of arbitral proceedings

On 2 April 2019, the Hong Kong Government and the Supreme People's Court of the PRC signed an *Arrangement Concerning Mutual Assistance in Court-ordered Interim Measures in Aid of Arbitral Proceedings by the Courts of the Mainland and of the Hong Kong Special Administrative Region* (Arrangement).

When in force, the Arrangement will allow parties to arbitral proceedings seated in Hong Kong and administered by a designated arbitral institution (on a list to be agreed by both sides to the Arrangement), to apply to Mainland Chinese courts for interim measures in support of the arbitration. The measures available will be those that parties to the relevant Mainland Chinese court can seek, including for example orders to preserve assets and take evidence from individuals in Mainland China. The Arrangement is also reciprocal, allowing interim relief from the Hong Kong court to be ordered in support of Mainland Chinese arbitral proceedings.

These developments enhance Hong Kong's position as the premier dispute resolution hub in Asia, especially for disputes with a Mainland Chinese element.

The Hong Kong International Arbitration Centre is the preferred international arbitral institution in Asia (with 521 cases filed in 2018) and the third most preferred in the world. This reflects not just its international status but also its benefits in Mainland China-related arbitrations.

The ability to obtain litigation funding for Hong Kong seated arbitrations will enable claimants to bring cases they might not be able to otherwise, alternatively to account for the costs of such claims efficiently on their balance sheets. The availability of interim relief from the Mainland Chinese courts is a significant development that will give Hong Kong-seated administered arbitrations a clear advantage where there is a Chinese element.

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Anti-Money Laundering update 2018 (a year of big change)

The Anti-Money Laundering and Counter-Terrorist Financing Ordinance came into force in 2012 and (among other things) mandated statutory record-keeping and customer due diligence requirements for financial institutions (in the main, the banks). After a quiet period, there followed a number of convictions (and fines) for certain regulated entities. The general sentiment is that the Ordinance, and these convictions, shook up the market. The lead market regulator "the Securities and Futures Commission" has also been particularly active in sanctioning financial institutions for money laundering violations.

As a consequence, most financial institutions have changed how they conduct due diligence for new clients. Indeed, opening a bank account in Hong Kong is no mean feat and some regulators have had to remind banks not to be so stringent as to hurt the general business environment.

In March 2018, the Ordinance was extended to include certain designated non-financial businesses and professions, including lawyers and accountants. The government considered this was necessary to enhance Hong Kong's compliance with international standards for combating money laundering.

At the same time, the Companies (Amendment) Ordinance 2018 came into force. This required companies incorporated in Hong Kong (except those listed on the Hong Kong Stock Exchange) to ascertain and identify persons with significant control over the company and to maintain a significant controllers register accessible to law enforcement agencies. Prosecutions and fines followed in late 2018.

All this was set against the background of the Financial Action Task Force's (the inter-governmental body) mutual evaluation of Hong Kong in November 2018. Its report is due in the summer of 2019.

As is customary in this section of the briefing, we conclude with a summary of the number of suspicious transaction reports (STRs) made to the Hong Kong Joint Financial Intelligence Unit Hong Kong (effectively, the police) for 2018, according to the JFIU's website. The number of STRs received in 2018 was 73,889 (down from 92,115 for 2017), approximately 92 per cent of which were made by banks and financial institutions. The drop in figures seems to indicate that banks and regulated entities (encouraged by law enforcement agencies) are becoming better at making more informed reports and reducing the amount of "defensive reporting".

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