Financial Services Litigation 2020

Contributing editors
Elaina Bailes and Aleks Valkov

LEXOLOGY
Getting The Deal Through

Publisher
Tom Barnes
tom.barnes@lbresearch.com

Subscriptions
Claire Bagnall
claire.bagnall@lbresearch.com

Senior business development manager
Adam Sargent
adam.sargent@gettingthedealthrough.com

Published by
Law Business Research Ltd
Meridian House, 34-35 Farringdon Street
London, EC4A 4HL, UK

First published 2016
Fifth edition
ISBN 978-1-83862-338-8

Printed and distributed by
Encompass Print Solutions
Tel: 0844 2480 112

Financial Services Litigation

2020

Contributing editors
Elaina Bailes and Aleks Valkov
Stewarts

Lexology Getting The Deal Through is delighted to publish the fifth edition of *Financial Services Litigation*, which is available in print and online at www.lexology.com/gtdt.

Lexology Getting The Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique Lexology Getting The Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured.

Lexology Getting The Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at www.lexology.com/gtdt.

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Lexology Getting The Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editors, Elaina Bailes and Aleks Valkov of Stewarts, for their continued assistance with this volume.

LEXOLOGY
Getting The Deal Through

London
July 2020

Contents

United Kingdom

Aleks Valkov, Elaina Bailes and Tom Otter

Stewarts

NATURE OF CLAIMS

Common causes of action

1 What are the most common causes of action brought against banks and other financial services providers by their customers?

Common claims include those for mis-selling and breach of duty. Retail (rather than institutional) customers often bring misrepresentation claims (negligent or fraudulent) in mis-selling cases. Claims also arise from suspected criminal activity (eg, freezing of an individual's account or banks' employees or agents' involvement in bribery or other criminal schemes). Claims in fraud and conspiracy are not uncommon.

Institutional customers more commonly bring claims related to breach or interpretation of contracts (such as structured products or debt instruments) or claims based on statutory provisions giving rise to liability for securities actions.

Retail clients and consumers benefit from greater regulatory and legal protection when dealing with financial services firms compared to businesses (and sophisticated individuals).

The Financial Conduct Authority (FCA) regulates the conduct and behaviour of financial firms. Regulated financial services providers must comply with the applicable rules contained in the FCA's Conduct of Business Sourcebook (COBS) and relevant provisions of the Financial Services and Markets Act 2000 (the FSMA 2000). Breaches of COBS and the FSMA 2000 may give rise to civil claims. The Prudential Regulation Authority is the prudential regulator of about 1,500 financial firms, supervising them to ensure their products and services are safe and sound.

Non-contractual duties

2 In claims for the mis-selling of financial products, what types of non-contractual duties have been recognised by the court? In particular, is there scope to plead that duties owed by financial institutions to the relevant regulator in your jurisdiction are also owed directly by a financial institution to its customers?

Claimants often have tortious claims alongside contractual causes of action against financial institutions.

Counterparties frequently allege negligence concerning financial institutions' advice. To succeed, a claimant must show that:

- he or she received advice; and
- the advice was given in circumstances that gave rise to a duty of care.

A duty of care will exist where one of the following criteria is met:

- the financial institution assumed responsibility concerning its advice to the client (see *Henderson v Merrett* [1995] 2 AC 145). In *Springwell Navigation Corp v JP Morgan Chase Bank* [2010] EWCA Civ 1221, the Court of Appeal held that the Court would consider all the circumstances and possibly apply a lower duty of care in cases of professional institutions and investors;
- the threefold test in *Caparo Industries Plc v Dickman* [1990] 2 AC 60 is satisfied that:
- the loss was foreseeable;
- there was sufficient proximity between the parties; and
- it is just, fair and reasonable to impose the duty; and
- the duty is incremental to an already existing and established category of duties.

A financial institution might be liable for misrepresentation under the Misrepresentation Act 1967. The claimant would need to show that:

- a pre-contractual representation was made;
- the representation was false (and the representor had no reasonable grounds for believing that it was true);
- the party entered into a contract relying on the representation; and
- the party suffered a loss as a result of entering the contract.

The English court also recognises implied representations (see *Geest v Fyffes* [1999] 1 All ER 672 (Comm) and *Property Alliance Group Ltd v Royal Bank of Scotland plc* [2018] EWCA Civ 355).

Liability may arise in tort for fraudulent misrepresentation if the claimant can prove that the defendant made the false representation knowingly or without belief in its truth, or recklessly.

Hedley Byrne v Heller [1964] AC 465 established that a financial institution has a duty not to negligently misstate information. The cause of action relies on an assumption of responsibility by the financial institution concerning the provision of the information.

Under section 138D(2) of the FSMA 2000, a statutory duty of care is established that allows a private person who has suffered a loss to bring a claim against a regulated financial institution for a breach of FCA rules.

Statutory liability regime

3 In claims for untrue or misleading statements or omissions in prospectuses, listing particulars and periodic financial disclosures, is there a statutory liability regime?

The two main statutory provisions are found in sections 90 and 90A of the FSMA 2000.

Section 90 of the FSMA 2000 provides a statutory cause of action for misleading statements and omissions in prospectuses or listing particulars. Claimants are not required to prove reliance (or even show that they read the misleading information).

Section 90A of the FSMA 2000 covers a wider range of publications, requires reliance to be shown and that a person discharging managerial responsibility within the issuer knew (or was reckless to the fact that) the statement was untrue or misleading or that omission constituted dishonest concealment of a material fact.

The relevant parts of the statute are still untested in a full trial. The *Tesco* litigation (*Omers Administration Corporation & Ors v Tesco plc*), which is listed for trial later in 2020, should provide further clarity on the application of section 90A of the FSMA 2000.

Claims under section 90 of the FSMA 2000 are most likely in times of corporate distress when the need to raise funds rapidly results in limited time for prospectus preparation. Facts giving rise to section 90A of the FSMA 2000 actions often arise from companies misstating profits or under-reporting debt.

Duty of good faith

4 Is there an implied duty of good faith in contracts concluded between financial institutions and their customers? What is the effect of this duty on financial services litigation?

There is no general duty of good faith in English law. However, there are exceptions where the court accepts that a party has a duty to act fairly, equitably and reasonably. Examples include the following.

- Certain types of contracts attract a duty of good faith as a result of legislation or the implied nature of the relationship between the parties (eg, insurance, mortgage contracts or contracts involving fiduciary duties (eg, see *Downsview Ltd v First City Corp Ltd* [1993] AC 295, 312)). Furthermore, in *Bates v Post Office Ltd* (No. 3 Common Issues) [2019] EWHC 606 (QB), the court concluded that a special category of cases existed called 'relational contracts', which includes an implied term requiring good faith.
- Parties may expressly include a 'duty of good faith' term in a contract. Enforceability will depend on the circumstances and the wording of the contract.

Where a party has discretionary powers to act within a contract, the English court has established that the party must exercise those powers in good faith and not arbitrarily or capriciously (see *Braganza v BP Shipping Ltd* [2015] UKSC 17).

Fiduciary duties

5 In what circumstances will a financial institution owe fiduciary duties to its customers? What is the effect of such duties on financial services litigation?

Under English law, the relationship between a financial institution and a customer is not a fiduciary one (*Governor and Company of the Bank of Scotland v A Ltd* [2001] EWCA Civ 52). However, special circumstances may arise under the nature of a specific relationship (eg, of a financial adviser or a custodian of securities) or where the financial institution has acted in a way that constitutes such a relationship (see *Fahad Al Tamimi v Mohamad Khodari* [2009] EWCA Civ 1109).

Master agreements

6 How are standard form master agreements for particular financial transactions treated?

Standard form master agreements are treated under English law in the same way as any other contract, and the usual rules of contractual interpretation apply.

The English courts are well versed in dealing with the International Swaps and Derivatives Association (ISDA) Master Agreements and regularly hear cases concerned with interpreting their provisions. Recently, the court considered the date and method of calculation to be used when ascertaining the loss suffered by a party when equity derivative transactions under an ISDA Master Agreement terminated on the collapse of Lehman Brothers (*Lehman Brothers Finance AG (In Liquidation) v Klaus Tschira Stiftung GmbH* [2019] EWHC 379 (Ch)).

The court will usually give effect to the parties' contractual choice on jurisdiction and governing law. Where there are competing jurisdiction clauses in related contracts, according to *BNP Paribas SA v Trattamento Rifiuti Metropolitani SPA* [2019] EWCA Civ 768, the starting point is that:

> *competing jurisdiction clauses are to be interpreted on the basis that each deals exclusively with its subject matter and they are not overlapping, provided the language and surrounding circumstances so allow.*

If, on the evidence a dispute may fall under both clauses, then the result may be that either clause could apply (see *Deutsche Bank AG v Comune di Savona* [2018] EWCA Civ 1740).

Limiting liability

7 Can a financial institution limit or exclude its liability? What statutory protections exist to protect the interests of consumers and private parties?

The enforceability of exclusion or limitation clauses is limited by common law and statute. English law favours freedom to contract but balances this with protecting counterparties (particularly consumers) against having no remedy for non-performance. Typical limitation clauses include those applying a cap on damages for breach, exclusions on certain remedies and restrictions on specific categories of loss. Parties can never exclude liability for their fraud.

The main statutory controls are the Unfair Contract Terms Act 1977 (the UCTA 1977) and the Consumer Rights Act 2015 (the CRA 2015). The UCTA 1977 applies to all commercial relationships and controls the exclusion or restriction of liability for breach of contractual obligations and the common law duty of care. Section 11(1) of the UCTA 1977 applies a reasonableness test, requiring exclusion or limitation clauses to be fair and reasonable in the circumstances known to the parties when contracting.

The CRA 2015 applies a fairness test to all terms in consumer contracts. A term will be regarded as unfair if it causes a significant imbalance to the parties' positions to the consumer's detriment.

Common law rules also apply general principles of reasonableness to contractual terms, although the assessment is fact-specific. To be operative, exclusion clauses must be incorporated into the contract, cover the liability in question and not be too broad in scope. Reasonableness will likely be found where a contract is fully negotiated between parties of equal bargaining power (*Raiffeisen Zentralbank Osterreich AG v Royal Bank of Scotland plc* [2010] EWHC 1392).

Freedom to contact

8 What other restrictions apply to the freedom of financial institutions to contract?

Under English law, penalty clauses are unenforceable (see *Makdessi v Cavendish Square Holdings BV* [2015] UKSC 67). Any contractual term that seeks to impose a detriment to the contract breaker that is out of proportion to any legitimate interest of the innocent party in the enforcement of the obligation will not be allowed to stand by the court.

Regulated financial institutions must also comply with the FCA Handbook Business Standards, which impose duties and restrictions on how financial institutions deal with clients before entering into contracts (and the necessary information to be provided), the contracts that can be entered into and the types of clients who can enter into a contract.

Financial institutions are usually allowed to enforce non-reliance clauses (ie, that the parties have not relied on any representations other than those already in the contract). But where the clause will prevent the other party from asserting a fact that is necessary to establish liability for a pre-contractual misrepresentation, the clause will be subject to the statutory regime in section 3 of the Misrepresentation Act 1967 (see *First Tower Trustees Ltd v CDS (Superstores International) Ltd* [2018] EWCA Civ 1396).

Litigation remedies

9 | What remedies are available in financial services litigation?

Damages are the remedy most commonly sought for breach of contract or in tort claims. Rescission is available in contractual matters in circumstances where:

- the contract has not been affirmed;
- all parties can be put back in their pre-contract positions;
- a third party has not acquired rights; and
- there has not been a significant delay.

Equitable remedies (including injunctive relief) are available. These remedies are at the court's discretion.

Injunctions prevent a party from doing something or force it to do something and are available where damages would not be an adequate remedy. There is a duty of full and frank disclosure on the applicant for an injunction made without notice to the other party. Among other matters, a party seeking an injunction must satisfy the court that it is just and convenient to order the injunction and provide a cross-undertaking in damages in favour of the other party to compensate that party for the losses it suffered in the event the injunction is later overturned.

Limitation defences

10 | Have any particular issues arisen in financial services cases in your jurisdiction in relation to limitation defences?

The Limitation Act 1980 prescribes limitation periods. Claims for breach of contract must be issued within six years from the date of the breach (12 years for a deed). The tort limitation period is the later of six years from suffering the damage, or three years from the date when the claimant knows or ought to have known the facts sufficient to bring a claim. Time will run as soon as the claimant knows enough to make it reasonable to investigate a potential claim further (see *Nobu Su v Clarkson Platou Futures Ltd* [2018] EWCA Civ 1115). The limitation period for fraud starts running from the date the claimant discovers or could reasonably have discovered the fraud.

Claims against banks sometimes arise after the standard limitation period has expired, particularly those arising after lengthy regulatory investigations where claimants wait until the outcome of that investigation to commence proceedings. However, those claims have had limited success, with the courts often finding them time-barred on the basis that the claimant had the relevant knowledge to bring a claim before the conclusion (or commencement) of the regulatory investigation.

PROCEDURE

Specialist courts

11 | Do you have a specialist court or other arrangements for the hearing of financial services disputes in your jurisdiction? Are there specialist judges for financial cases?

The Financial List is a special initiative established to ensure that judges with knowledge and experience in financial markets are allocated to hear cases involving such issues. It is not a separate court – proceedings are issued in the Commercial and Chancery divisions in the normal way. Cases are then placed in the List and allocated to a specialist judge if the case meets one of the following criteria:

- the claim is worth more than £50 million and relates to banking or financial transactions;
- it requires particular expertise in the financial markets; and
- it raises issues of general importance to the financial markets.

The list is available to claims commenced on or after 1 October 2015. The selected judges are all Commercial and Chancery judges who are nominated to the List based on their expertise.

Procedural rules

12 | Do any specific procedural rules apply to financial services litigation?

Normal procedural rules apply to the Financial List. Also, it has its own procedural rules contained in the Civil Procedure Rules (CPR) Part 63A, Practice Direction 63A and the Guide to the Financial List.

Arbitration

13 | May parties agree to submit financial services disputes to arbitration?

Arbitration is permitted but has been perceived as less popular for disputes in financial services compared to other sectors. However, its use is not insignificant and is growing. For example, the London Court of International Arbitration Annual Casework Report 2019 states that banking and finance made up the largest proportion of its caseload (32 per cent, up from 29 per cent in 2018). Advantages include confidentiality and the ability to select seats and procedural rules that offer more flexibility than the default jurisdiction. Another advantage for cross-border disputes and parties in emerging jurisdictions is that enforcement of arbitration awards is streamlined and regulated by the New York Convention 1958.

Factors relevant to the preference for litigation include the English courts having wider powers to provide swift interim and summary relief, the relevant expertise of judges in the Financial List and the High Court and the need for publicly available precedent in regulated and fast-moving markets.

Out-of-court settlements

14 | Must parties initially seek to settle out of court or refer financial services disputes for alternative dispute resolution?

The English court has emphasised that to compel parties to use alternative dispute resolution (ADR) would be a constraint on the right of access to the court, violating article 6 of the European Convention on Human Rights (see *Halsey v Milton Keynes General NHS Trust* [2004] EWCA (Civ) 576).

However, that case emphasised that courts should generally encourage parties to explore ADR if it is appropriate in the circumstances. Where a party has unreasonably refused ADR, the court can order parties to take steps to engage in ADR.

Failure to explore ADR may also lead to cost sanctions. The CPR Pre-Action Protocol encourages parties to use ADR before issuing proceedings. CPR Rule 44.3(5) allows the court to vary the rule that the unsuccessful party pays the successful party's costs to take account of the parties' reasonableness in behaviour throughout the dispute, including their willingness to explore ADR.

When unable to resolve a dispute with consumers, financial institutions are required to inform the consumer of their right to refer the dispute to the sector's ADR scheme, the Financial Ombudsman Service (FOS).

Pre-action considerations

15 | Are there any pre-action considerations specific to financial services litigation that the parties should take into account in your jurisdiction?

There are no pre-action considerations specific to financial services litigation, although if a consumer is bringing a claim to FOS, then there is a set procedure.

Unilateral jurisdiction clauses

16 | Does your jurisdiction recognise unilateral jurisdiction clauses?

Unilateral or asymmetrical jurisdiction clauses (ie, a clause that requires one party to bring proceedings in one specified jurisdiction only, while the other may choose to bring concurrent proceedings in an unlimited number of jurisdictions) are allowed under English law (see *Mauritius Commercial Bank Ltd v Hestia Holdings Ltd* [2013] EWHC 1328 (Comm)).

It is expected that after the end of the Brexit transition period, the common law rules on jurisdiction will apply under which the inherent imbalance that those clauses create is not usually a problem (although exceptions exist).

DISCLOSURE

Disclosure obligations

17 | What are the general disclosure obligations for litigants in your jurisdiction? Are banking secrecy, blocking statute or similar regimes applied in your jurisdiction? How does this affect financial services litigation?

The disclosure regime in England and Wales has undergone recent changes under the Disclosure Pilot Scheme. The Scheme is designed to promote a narrower, issue-based disclosure to make the process less onerous and less costly for the parties.

It departs from using standard disclosure under the Civil Procedure Rules (CPR) (ie, disclosure of documents relied upon by the parties that adversely affect a party's case, support another party's case or are otherwise required to be disclosed) as the default disclosure obligation in civil proceedings. Different levels of search obligations are applied to the matters at issue between the parties. Within these categories, parties must still disclose documents that support or damage their case.

The Scheme requires parties to locate and potentially review the documents relevant to their case earlier in proceedings, which increases costs but also promotes earlier settlement. The obligation for disclosure is an ongoing one, but a party who discloses documents late risks not being able to rely on them at trial.

There is no secrecy code or equivalent banking secrecy statute in England. Recently, the court has held that a bank must still disclose documents even if the disclosure may contravene foreign regulations (see *Byers & Ors v Samba Financial Group* [2020] EWHC 853).

Protecting confidentiality

18 | Must financial institutions disclose confidential client documents during court proceedings? What procedural devices can be used to protect such documents?

Confidentiality in itself is not a bar to disclosure. Confidential documents must be disclosed if relevant. Documents (or information in documents) that are confidential and irrelevant can be withheld or redacted. Privileged information in documents can be redacted.

It is common for parties to agree (and the court to order) confidentiality clubs protecting the confidentiality of certain documents, for example, where foreign law confidentiality obligations apply or where documents contain business-sensitive information. These agreements often restrict the circulation of disclosed documents to the lawyers and experts involved in the case. However, the documents may still be made public in open court during hearings. It is only in exceptional circumstances that a court will order proceedings to take place in private given the primacy of open justice.

Documents disclosed in legal proceedings must only be used for those proceedings (CPR Rule 31.22) unless they have been made public or the court has given permission for them to be used for another purpose.

Disclosure of personal data

19 | May private parties request disclosure of personal data held by financial services institutions?

Article 15 of the General Data Protection Regulation (EU) No. 2016/679 (implemented by the Data Protection Act2018) provides that a party may request copies of its data. A recipient must respond to a request within one month (which can be extended) of the request. The request can be refused, but it can be a useful tool for litigation.

There are various exemptions to the requirement to disclose information, for example, legal privilege and where disclosure would involve information that could identify another individual (whose consent may be required). Parties sometimes provide composite documents rather than individual documents containing the personal data, and often the results are heavily redacted to ensure that only personal data is included.

Dawson-Damer v Taylor Wessing [2017] EWCA Civ 74 provides that a data subject is entitled to exercise their rights under data protection law, even if there is a collateral purpose. *Dr B v The GMC* [2018] EWCA Civ 1497 confirmed that the motivation behind a request is not relevant to the data subject's rights to the data.

Data protection

20 | What data governance issues are of particular importance to financial disputes in your jurisdiction? What case management techniques have evolved to deal with data issues?

Financial services firms generate large volumes of data. Firms must give careful consideration to their data protection, and regulatory and any contractual obligations while ensuring that they comply with their disclosure obligations.

The Disclosure Pilot Scheme provides that the parties must now engage relatively early to consider the scope of the disclosure exercise and must utilise technology to make the process more efficient.

Extensive use is made of e-disclosure online review platforms to process this data. Simply, keyword search terms are applied to narrow the data and deduplication is carried out. Parties can also use email threading – an automated process that ensures that only one chain of emails is reviewed rather than each email in the chain. It is increasingly common for parties to use more advanced technology-assisted review tools, including predictive coding. This involves an algorithm extrapolating which documents are relevant or responsive based on a sample of documents reviewed by a human.

INTERACTION WITH REGULATORY REGIME

Authority powers

21 | What powers do regulatory authorities have to bring court proceedings in your jurisdiction? In particular, what remedies may they seek?

Under the Financial Services and Markets Act 2000 (the FSMA 2000), the Financial Conduct Authority (FCA) has wide disciplinary, criminal and civil powers to take action against regulated and non-regulated firms and individuals failing to meet standards. This includes the power to bring court proceedings.

The FCA commonly exercises its powers through enforcement procedure. The FCA Annual Report 2018–2019 indicates that its Regulatory Decisions Committee made 770 decisions on cases during the year, but only nine involved civil cases and six involved criminal cases.

The FCA may use court proceedings where specific civil remedies or criminal penalties are necessary to prevent wrongdoing or further harm. These could include court orders for compulsory winding up of companies, injunctive relief to prevent dissipation of assets and injunctive relief to prevent the expected contravention of a regulatory requirement.

Disclosure restrictions on communications

22 Are communications between financial institutions and regulators and other regulatory materials subject to any disclosure restrictions or claims of privilege?

As a public body, under data protection laws, the FCA must treat information as confidential and only disclose it if there is a public interest in doing so. Further, section 348 of the FSMA 2000 provides that confidential information received by the FCA, the Prudential Regulation Authority (PRA) or the Bank of England to discharge its functions cannot be disclosed. The exceptions to this are where the provider of the information consents and where there is a statutory gateway permitting disclosure to third parties in certain circumstances (section 349 of the FSMA 2000 and the Financial Services and Markets Act 2000 (Disclosure of Confidential Information) Regulations 2001).

There is no privilege protecting documents by a firm or individual created in connection with responding to a regulatory investigation (unlike documents created for litigation that may be covered by litigation privilege). The result is that those documents may be disclosable in legal proceedings with third parties if no other privilege attaches, which was confirmed in *RBS Rights Issue Litigation* [2016] EWHC 3161.

Private claims

23 May private parties bring court proceedings against financial institutions directly for breaches of regulations?

Claims may be brought under section 138D of the FSMA 2000 by private persons who suffer loss as a result of statutory rule breaches. This allows claims where the claimant suffered a loss, but there is no evidence to support a common law cause of action.

However, the definition of private persons under the Financial Services and Markets Act 2000 (Rights of Action) Regulations 2001 is narrow and excludes:

- individuals where a loss was sustained carrying out regulated activities; and
- non-individuals where a loss was incurred in the course of carrying out business.

Thus, courts have rejected claims by individual directors and shareholders of companies suffering a loss on the basis that:

- they did not fall within the category of persons with a right to action; and
- this would contravene the principle that a shareholder cannot recover damages merely reflective of loss to the company (see *Sivagnanam v Barclays Bank Plc* [2015] EWHC 3985 (Comm)).

The Court of Appeal expressed doubts in *MTR Bailey Trading Ltd v Barclays* [2015] EWCA Civ 667 over the regulations' exclusion of businesses suffering loss outside their normal business activities (as is often the case for financial transactions), but the issue was not finally adjudicated.

The right of action under section 348 of the FSMA 2000 only applies where the statutory rules are actionable. The default position is that PRA rules are not actionable, and under section 138D(3) of the FSMA 2000, the FCA has removed the right to action of some rules and guidance.

24 In a claim by a private party against a financial institution, must the institution disclose complaints made against it by other private parties?

Normal Civil Procedure Rules provisions will apply to those claims, and documents must be disclosed where they meet the test under the disclosure obligations applicable to those proceedings.

The court has the discretion to permit similar fact evidence if:

- relevant; and
- admissible, using its discretion to consider whether there are good grounds to decline to admit it (see *JP Morgan Chase Bank and others v Springwell Navigation Corporation* [2005] EWCA Civ 1602).

Documents relating to complaints by other private parties are unlikely to be disclosable unless they are directly relevant to the facts of the case. In *Claverton Holdings Ltd v Barclays Bank plc* [2015] EWHC 3603 (Comm), the court refused to order disclosure of documents relating to similar complaints against the bank for mis-selling on the basis that the documents did not meet the two tests of relevance and admissibility.

Enforcement

25 Where a financial institution has agreed with a regulator to conduct a business review or redress exercise, may private parties directly enforce the terms of that review or exercise?

Recent cases confirm that private parties cannot directly enforce the terms of regulatory reviews because institutions regulated by the FCA do not owe a duty of care to customers in carrying out a review (see *CGL Group Ltd v RBS plc and Ors* [2017] EWCA Civ 1073). This case was followed in:

- *Elite Property Holdings Ltd v Barclays Bank plc* [2018] EWCA Civ 1688, which held that the bank did not owe contractual duties to a customer when making an offer of redress following a review conducted by agreement with the FCA; and
- *Nordham Holdings Group Ltd v Lloyds Bank Plc* [2019] EWHC 3744 (Ch), which held that where a settlement agreement is entered under an FCA review scheme, the customer does not have an automatic entitlement to claim consequential losses, and the fact that a settlement agreement had been concluded did not prevent the bank from contesting that the product had been mis-sold.

Changes to the landscape

26 Have changes to the regulatory landscape following the financial crisis impacted financial services litigation?

The regulatory regime has tightened since the 2008 global financial crisis. In response, most financial institutions have expanded their compliance functions and improved processes, but that has not meant an end to claims. Instead, regulatory investigations and enforcement actions often give rise to information in the public domain that then provides a foundation for civil claims. Documents published concerning regulator reviews have been used in recent years by claimants to support their case in section 90 of the FSMA 2000 prospectus claims and mis-selling claims.

The increase in third-party litigation funding means that individuals (and institutions) enjoy a more level playing field. Alongside after-the-event insurance that protects against adverse costs, the availability of funding means that it is now more attractive for claimants to seek redress from financial institutions, and this has led to an increase in group actions.

Complaints procedure

27 Is there an independent complaints procedure that customers can use to complain about financial services firms without bringing court claims?

The Financial Ombudsman Service (FOS) is an independent and free service that adjudicates in disputes between consumers, certain small businesses and charities and financial services providers. Its investigations are generally not confidential.

The maximum that FOS can award is limited by statute and increases each financial year (currently £355,000 for complaints about actions on or after 1 April 2019). Therefore, it is not an appropriate forum for resolving higher value disputes, although a FOS finding may assist in reaching a satisfactory settlement.

A claimant does not need to use the FOS process before bringing a court action. FOS decides cases on what is fair and reasonable. It does not apply the same legal tests or level of scrutiny as a court.

A FOS award is not binding unless it is accepted by the claimant. In the event that a claimant is not satisfied with the FOS award (and has not accepted the award), it is still able to bring a court action. The documents provided to FOS and the FOS award are likely to be disclosable in those proceedings.

Recovery of assets

28 Is there an extrajudicial process for private individuals to recover lost assets from insolvent financial services firms? What is the limit of compensation that can be awarded without bringing court claims?

The United Kingdom operates the Financial Services Compensation Scheme, which provides compensation to customers of authorised financial services firms, offering numerous compensation limits for different financial services firms.

UPDATE AND TRENDS

Challenges and trends

29 What are the principal challenges currently facing the financial services litigation landscape in 2020? What trends are apparent in the nature and extent of financial services litigation? Are there any other noteworthy features that are specific to financial services litigation in your jurisdiction?

The covid-19 pandemic will affect financial services, both as a result of business interruption and the economic downturn and in terms of the impact of emergency legislation on financial contracts. Litigation dealing with issues such as breach of covenants in financial documents, payment defaults and the operation of force majeure and material adverse change clauses seems inevitable.

Shareholders are expected to become more willing to participate in group actions following in the footsteps of the *RBS rights issue* and the *Tesco* litigations.

Litigation involving crypto-assets is expected to grow. In 2019, the English courts saw a raft of cases tackling issues such as contractual terms, whether crypto-assets are property and appropriate remedies (including confirming that freezing injunctions can be sought over crypto-assets). Currently, most crypto-investments are not specified investments under the Financial Services and Markets Act 2000, and so customers do not benefit from statutory or regulatory protection.

STEWARTS

Aleks Valkov
avalkov@stewartslaw.com

Elaina Bailes
ebailes@stewartslaw.com

Tom Otter
totter@stewartslaw.com

5 New Street Square
London, EC4A 3BF
United Kingdom
Tel: +44 020 7822 8000
www.stewartslaw.com

From 2021, the Financial Conduct Authority will no longer require banks to sustain the London Inter-bank Offered Rate (LIBOR) benchmark or provide LIBOR quotations. This is likely to give rise to issues about the interpretation of legacy contracts referencing LIBOR and lead to disputes.

Financial institutions continue to be wary of international sanctions compliance, and claims could arise out of the divergence of the US and EU sanctions regimes (eg, under Regulation (EC) No. 2271/96 (the Blocking Regulation).

Finally, Brexit means the English courts will face the challenge of keeping their reputation as a jurisdiction of choice for litigating financial contracts despite the jurisdiction no longer being part of the European Union.

Coronavirus

30 What emergency legislation, relief programmes and other initiatives specific to your practice area has your state implemented to address the pandemic? Have any existing government programmes, laws or regulations been amended to address these concerns? What best practices are advisable for clients?

The UK government has created the Coronavirus Business Interruption Loan Scheme, which allows businesses to access government-guaranteed finance from certain lenders. Taking out those loans may have an impact on businesses' existing arrangements with lenders and trigger breach of financial covenants. Businesses should pay attention to the exact terms to avoid disputes.

Significant changes to the insolvency regime due to become law in June 2020 through the Corporate Insolvency and Governance Bill 2019–21 will affect relationships between financial institutions and customers in financial difficulty. This includes restrictions on creditors seeking the winding up of companies in covid-19-related distress and may lead to disputes with lenders.

Despite social distancing in the United Kingdom, the courts (including the Financial List) have continued to operate by way of virtual hearing and trials. For example, shortly after the lockdown began, the court heard the case of *National Bank of Kazakhstan and another v The Bank of New York Mellon and Ors* [2020] EWHC 916 (Comm). The current expectation is that the court will continue with its work offering either fully, virtual or hybrid hearings to its users.

Other titles available in this series

Acquisition Finance
Advertising & Marketing
Agribusiness
Air Transport
Anti-Corruption Regulation
Anti-Money Laundering
Appeals
Arbitration
Art Law
Asset Recovery
Automotive
Aviation Finance & Leasing
Aviation Liability
Banking Regulation
Business & Human Rights
Cartel Regulation
Class Actions
Cloud Computing
Commercial Contracts
Competition Compliance
Complex Commercial Litigation
Construction
Copyright
Corporate Governance
Corporate Immigration
Corporate Reorganisations
Cybersecurity
Data Protection & Privacy
Debt Capital Markets
Defence & Security Procurement
Dispute Resolution
Distribution & Agency
Domains & Domain Names
Dominance
Drone Regulation
e-Commerce
Electricity Regulation
Energy Disputes
Enforcement of Foreign Judgments
Environment & Climate Regulation
Equity Derivatives
Executive Compensation & Employee Benefits
Financial Services Compliance
Financial Services Litigation
Fintech
Foreign Investment Review
Franchise
Fund Management
Gaming
Gas Regulation
Government Investigations
Government Relations
Healthcare Enforcement & Litigation
Healthcare M&A
High-Yield Debt
Initial Public Offerings
Insurance & Reinsurance
Insurance Litigation
Intellectual Property & Antitrust
Investment Treaty Arbitration
Islamic Finance & Markets
Joint Ventures
Labour & Employment
Legal Privilege & Professional Secrecy
Licensing
Life Sciences
Litigation Funding
Loans & Secured Financing
Luxury & Fashion
M&A Litigation
Mediation
Merger Control
Mining
Oil Regulation
Partnerships
Patents
Pensions & Retirement Plans
Pharma & Medical Device Regulation
Pharmaceutical Antitrust
Ports & Terminals
Private Antitrust Litigation
Private Banking & Wealth Management
Private Client
Private Equity
Private M&A
Product Liability
Product Recall
Project Finance
Public M&A
Public Procurement
Public-Private Partnerships
Rail Transport
Real Estate
Real Estate M&A
Renewable Energy
Restructuring & Insolvency
Right of Publicity
Risk & Compliance Management
Securities Finance
Securities Litigation
Shareholder Activism & Engagement
Ship Finance
Shipbuilding
Shipping
Sovereign Immunity
Sports Law
State Aid
Structured Finance & Securitisation
Tax Controversy
Tax on Inbound Investment
Technology M&A
Telecoms & Media
Trade & Customs
Trademarks
Transfer Pricing
Vertical Agreements

Also available digitally

lexology.com/gtdt

an LBR business

ISBN 978-1-83862-338-8