

STEWARTS

Analysing trends

Data from commercial fraud
claims in England and Wales

August 2023



Introduction

Stewarts and Solomonic have worked together to produce and analyse data regarding commercial fraud claims in the civil courts of England and Wales.ⁱ

The results are revealing. In this report, we examine the most striking trends arising from that data. Notably:

- 1 **Volume**
The number of claims issued and judgments given involving issues of fraud has generally increased in recent years, although there was a reduction in claims issued in 2022 and there has been a plateau in judgments since 2019.
- 2 **Preferred courts**
The Commercial Court is the clear court of choice for issuing fraud claims, ahead of the Business List, the general King's Bench Division and the Circuit Commercial Court.
- 3 **International reach**
A sample study of claim forms illustrates the international nature of claimants, although the proportion of UK-based claimants increased in 2021 and 2022.
- 4 **Success rates**
Where fraud claims have reached the judgment stage since 2014, they have had a c.50% success rate, which is higher than other tort claims and significantly higher than negligence claims.
- 5 **Sectors**
Banking and finance claims predominate – but there were spikes in real estate and technology, media & telecoms disputes in 2022.
- 6 **Cryptoassets**
Cryptocurrency claims have increased significantly since 2019, and there is a notable overlap with fraud.



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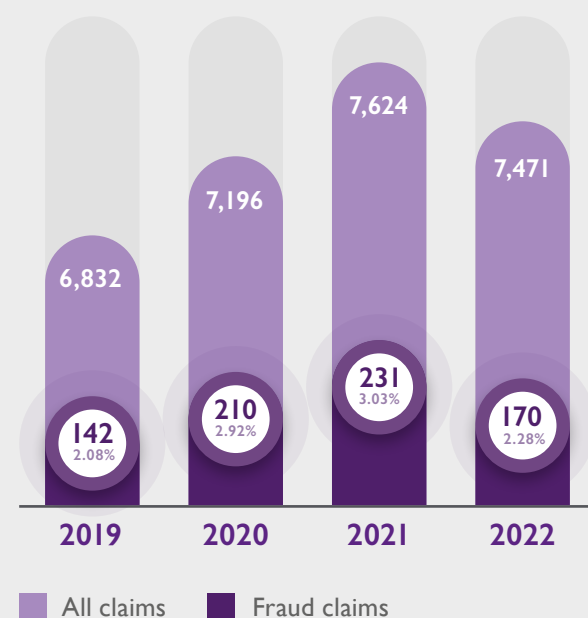
The data shows that fraud is a constant feature of commercial litigation in the English courts... That is in and of itself significant: it is reflective of the experience the English courts have of dealing with these types of issues, the remedies available under English law and procedures and, more fundamentally, the inevitable darker hinterland of commercial dealing in the UK in the context of the economic pressures of the last decade.

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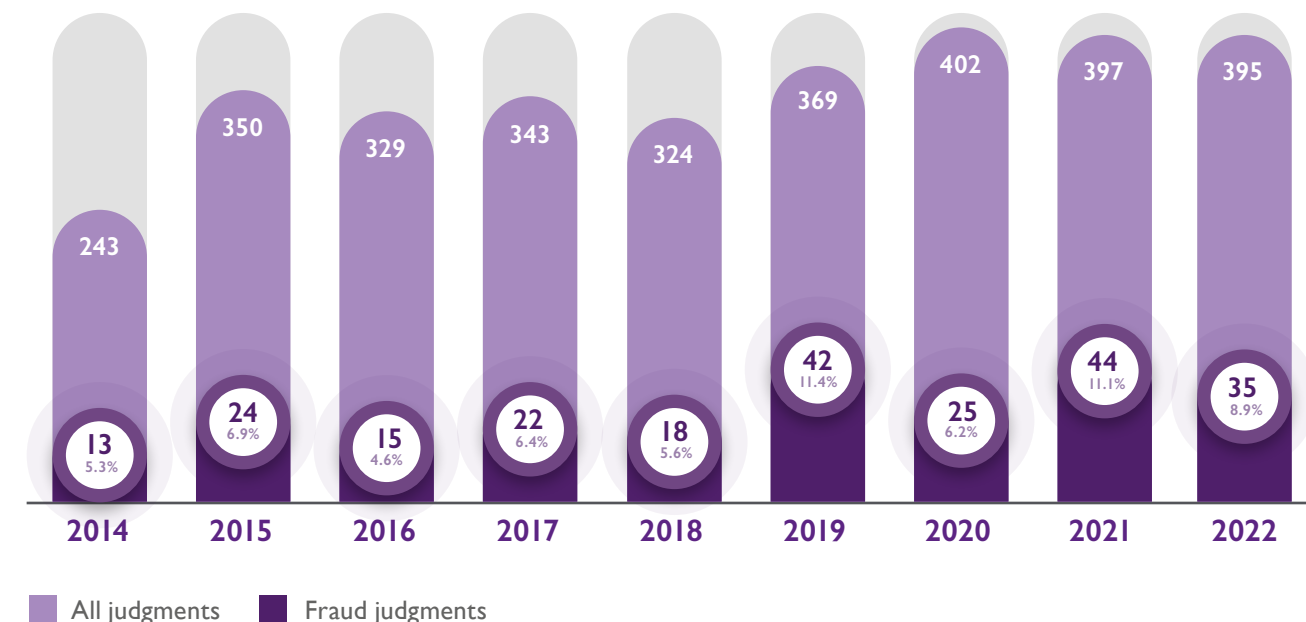
Volume

The number of claims issued and judgments given involving issues of fraud has generally increased in recent years, although there was a reduction in claims issued in 2022 and there has been a plateau in judgments since 2019.

Number of fraud claims issued in England and Wales



Number of fraud judgments given in England and Wales



The data shows that fraud is a constant feature of commercial litigation in the English courts. Cases involving those issues hover at c.2-3% of claims issued since 2019 and c.5-11% of judgments given since 2014. That is in and of itself significant: it is reflective of the experience the English courts have of dealing with these types of issues, the remedies available under English law and procedures and, more fundamentally, the inevitable darker hinterland of commercial dealing in the UK in the context of the economic pressures of the last decade.

The data also indicates an upward trend in the number of fraud claims since 2014, both as standalone figures and proportionally in the context of other types of claims. This would most obviously be indicative of an increase in fraudulent behaviour. However, other factors could be at play, such as a heightened awareness of and willingness to plead fraud causes of action.

There was a notable (c.26%) reduction in fraud claims in 2022, over and above the wider reduction in all claims issued and judgments given in that period. It is too early to tell if that is a wider trend or the extent to which issues such as Brexit are having an impact, not least given that the figures show a relatively high degree of year-on-year fluctuation. Indeed, we would expect the current economic climate to produce more claims in this area, potentially in combination with claims arising from the distribution of funds to support businesses through COVID-19. What is clear is that commercial fraud will remain a significant part of the work of the English courts.

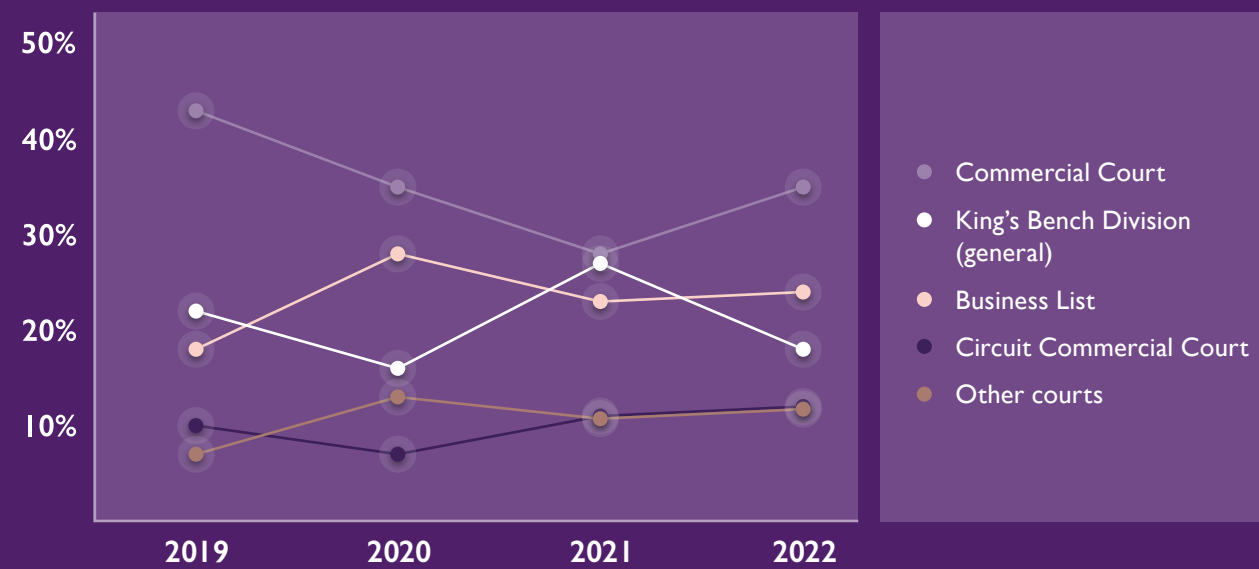


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Preferred courts

The Commercial Court is the clear court of choice for issuing fraud claims, ahead of the Business List, the general King's Bench Division and the Circuit Commercial Court.

Courts in which fraud claims are issued



The Commercial Court has been the clear court of choice for issuing fraud claims since 2019, followed by the Business List (by far the most significant Chancery Division representative), the general Kings Bench Division and the Circuit Commercial Court.

The Commercial Court's overall dominance indicates the value of the fraud claims being issued, ie that they are higher value and likely more complex. However, it also reflects the fact that it is particularly well suited to these types of claims, including due to its experience in considering these types of issues, its familiarity with granting injunctive relief such as worldwide freezing orders or search orders and the internationality of its users (which we touch on elsewhere in this report).

The Commercial Court's own dataⁱⁱ states that 5% of all claims issued in that court in 2021-22 were commercial fraud claims and 4% were pre-action injunctions. It also states that 4.48% of claims issued in the London Circuit Commercial Court were commercial fraud claims. This emphasises the familiarity of those courts with these types of claims.

The data indicates the potential start of a slight downward trend in the Commercial Court's share since 2019. This (along with the slight increase in claims in the general King's Bench Division, Circuit Commercial Court and other courts) potentially indicates an increase in lower value or less complex disputes. However, for all the reasons given above, we see that the Commercial Court is likely to remain the court of choice for general fraud disputes for the foreseeable future.

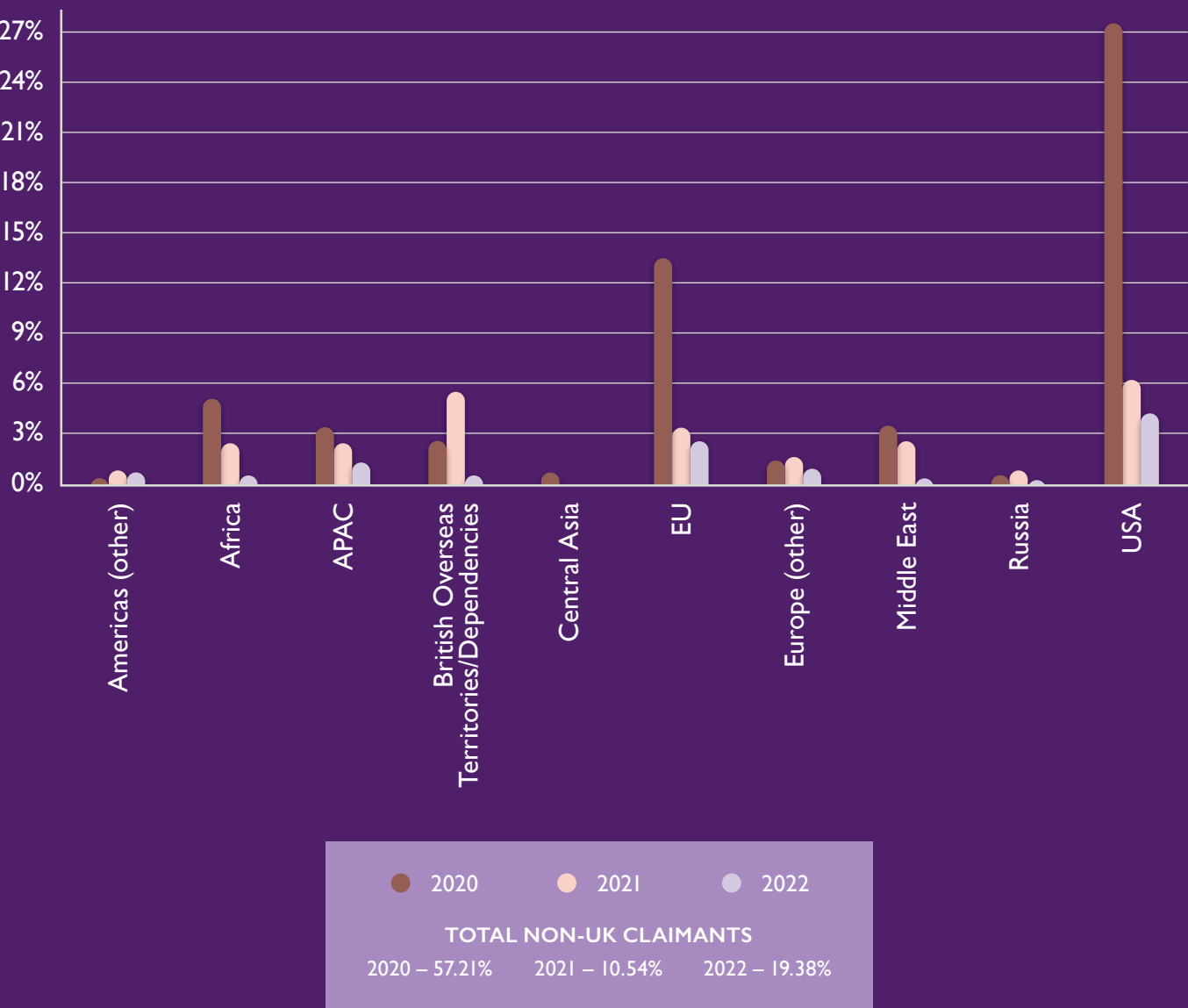


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International reach

A sample study of claim forms illustrates the international nature of claimants, although the proportion of UK-based claimants increased in 2021 and 2022.

International profile of claimants in fraud claims in the English courts (2020-22)ⁱⁱⁱ



Based on a review of a representative sample of claim forms issued between 2020 and 2022, England and Wales is clearly a popular forum for international litigants to commence fraud claims. A number of factors determine the choice of jurisdiction to commence a claim, for example, the governing law of a relevant contract, the location of assets, the domicile of the defendant, the location of relevant wrongdoing, the remedies offered by the English courts (including the availability of worldwide freezing and search orders), as well as other benefits of the English legal system. The English courts continue to attract claimants in fraud claims from all parts of the world for these reasons.

The proportion of UK-based claimants was higher in 2021 and 2022. It is too early to determine if that is part of a broader trend and if issues such as Brexit have had an effect, although the drop in EU claimants is striking. There are also some elements of caution to be applied to the data, including the high number of instances where the claimant’s nationality is unknown and the potentially skewing effects of group actions, which can introduce a large number of UK-based claimants. All that said, the international appeal of the English courts remains clear. Notably, the Commercial Court’s own data indicates that the proportion of what it classes as international cases remained high in 2022 (69%), notwithstanding a slight drop from 2021 (74%).^{iv}



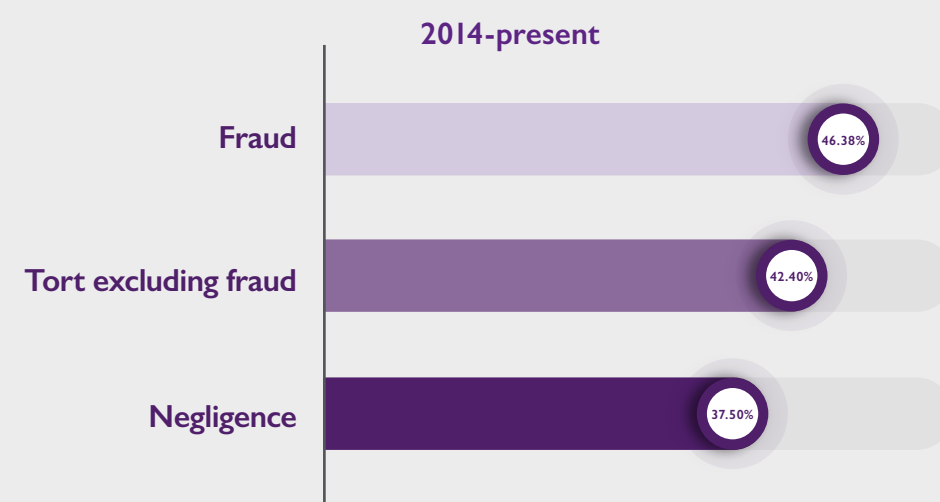
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Success rates

Where fraud claims have reached the judgment stage since 2014, they have had a c.50% success rate, which is higher than other tort claims and significantly higher than negligence claims.

Success/partial success rate of fraud claims in the English courts

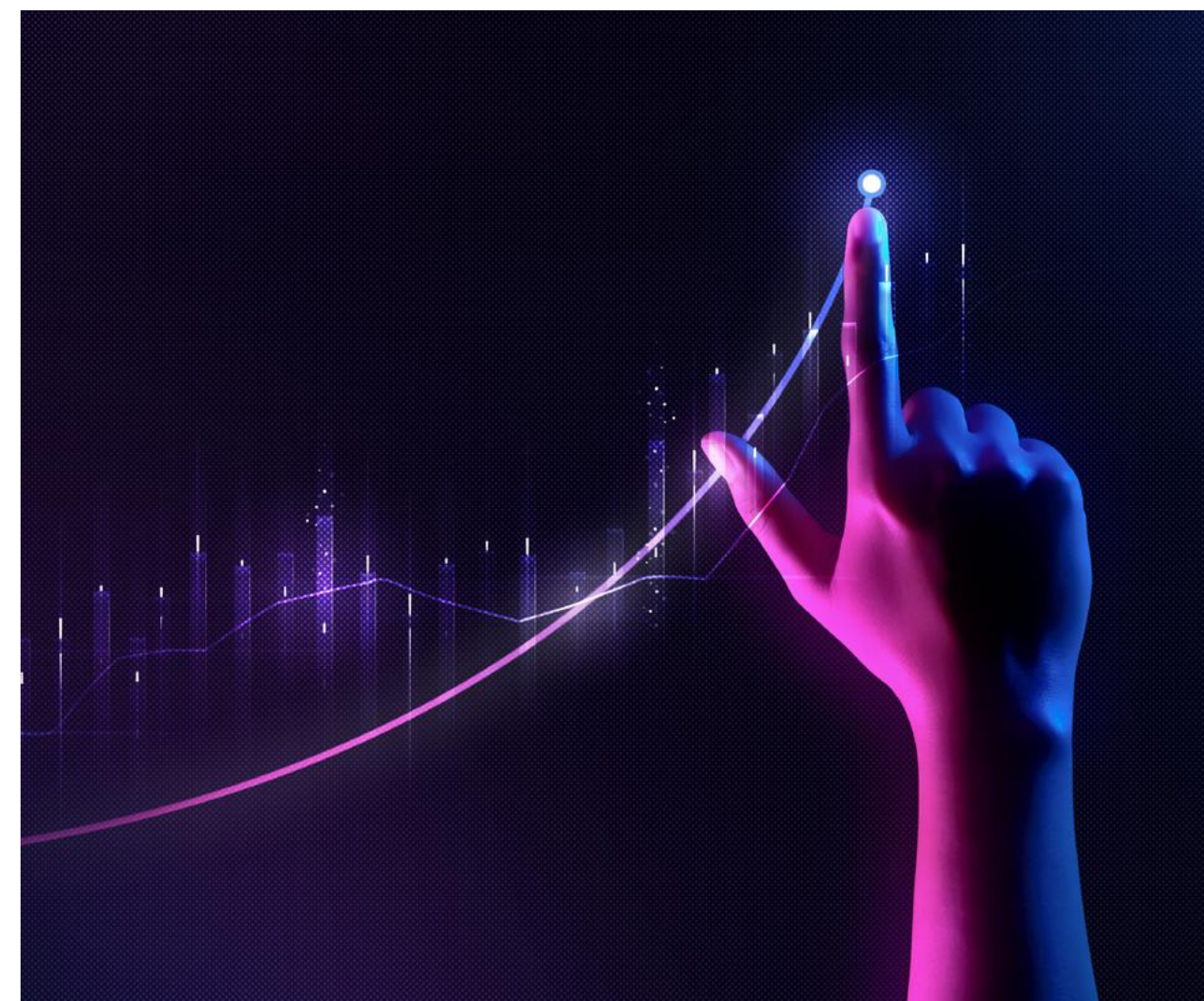


The data indicates that, since 2014, where fraud claims have reached the judgment stage, they have a roughly equal success and failure rate. In and of itself, this outcome is not surprising. On the one hand, fraud or dishonesty can only be pleaded where there is credible material to support the allegations made and the particulars need to be carefully and distinctly set out, which means that fraud claims need to be carefully prepared. On the other, those exacting requirements mean the courts will subject those claims to particular scrutiny. Overall, these two factors weigh finely in the balance. Some of those principles were recently examined and restated by Mr Justice Bryan in *National Bank Trust v Ilya Yurov & Ors* [2020] EWHC 100 (Comm).

However, more interestingly, fraud claims are slightly more likely to succeed than other tort claims and significantly more likely to succeed than negligence claims (which have a 62.5% failure rate). This may again be indicative of how those cases are pleaded or which of those cases settle and which reach trial. The high bar for proving allegations of fraud means that cases are not likely to proceed to judgment unless the prospects of success are good. At any rate, it should give potential claimants confidence that the English courts are willing and able to assess fraud issues and make findings of fraud, where appropriate.



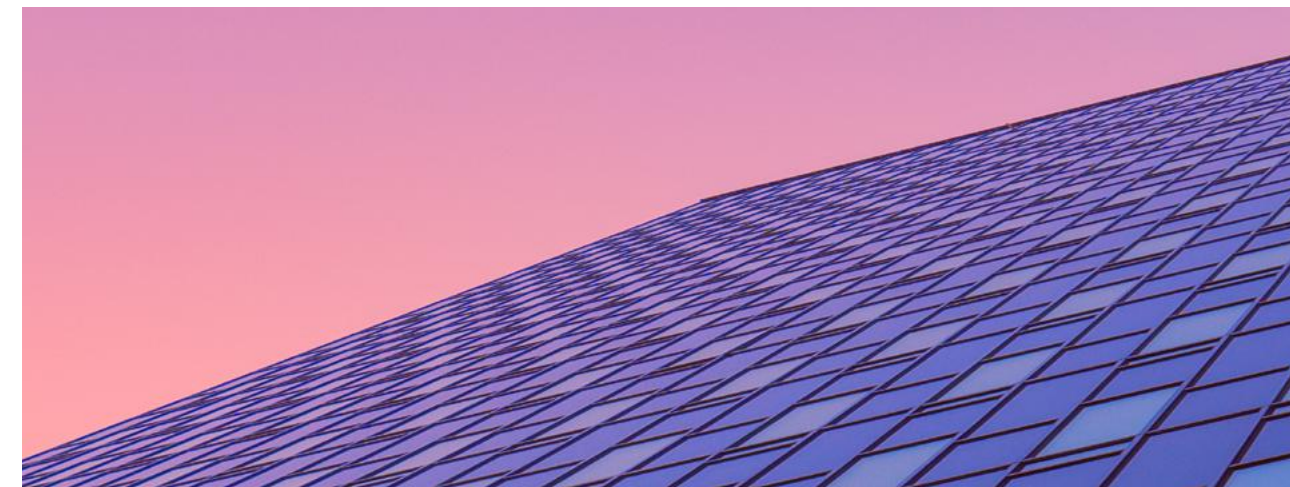
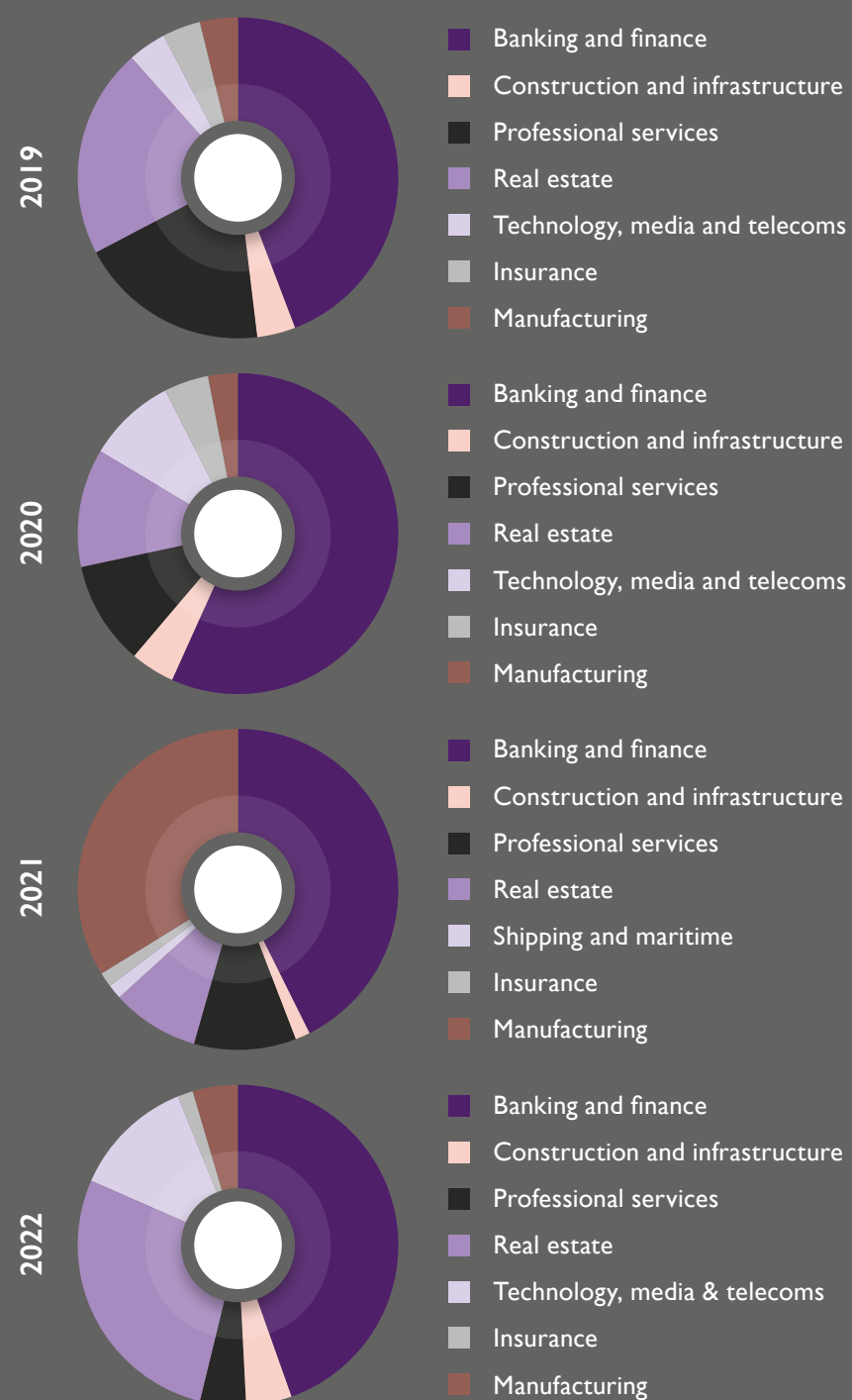
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Sectors

Banking and finance claims predominate – but there were spikes in real estate and technology, media & telecoms disputes in 2022.

Key factual subject matter that fraud claims relate to^v



Banking and finance disputes have dominated since 2019 and continued to do so in 2022. This is not surprising given that financial institutions and transactions are so often at the heart of these disputes, whether that be a bank pursuing a creditor, a fall-out over a specific transaction, where a sovereign wealth fund or other financial institution has been defrauded, where a claimant is seeking to recover funds from a financial institution, or where a claimant is seeking to trace, freeze or identify assets held by a bank. Indeed, even fraud claims centred on other sectors will inevitably interplay with the financial system in some respect.

This dominance reflects the findings of a recent study by the Association of Certified Fraud Examiners (“ACFE”), which found that the banking and financial services industry was affected by the greatest number of cases of occupational fraud.^{vi} And it is not just in the numbers. Some of the key fraud disputes over the last decade have centred on banking and finance, ranging from the landmark *JSC BTA Bank v Ablyazov* litigation to significant cases currently going through courts, including *The Republic of Mozambique v Credit Suisse International and others* and *PJSC Commercial Bank PrivatBank v Igor Valeryevich Kolomoisky and others*.

What is more striking is the steady presence of sectors such as real estate. Not only was there a spike in that sector in 2022, but there has been a constant stream of disputes since 2019. A review of a sample of claim forms does not reveal any particular unifying issues that have driven this spike, although a number related to disputes arising from investments and joint ventures.

Notably in 2022, there was also a spike in disputes in the technology, media and telecoms sectors. Although the ACFE’s study indicates that instances of occupational fraud are steady in those industries,^{vii} a review of a sample of claim forms does not reveal any particular drivers from the past year.

Historically, high-value disputes in the telecoms sector have arisen from, for example, joint ventures in emerging markets between international investors and local partners, as exemplified most recently in the successful claim by Iraqi Telecom against its local partner in the Kurdistan region of Iraq for bribery and corruption, resulting in an arbitral award of US\$1.65bn.^{viii} Although such claims are often subject to arbitration, there are a number of ways they can interplay with the English courts (and those of offshore jurisdictions), including for the purposes of asset preservation and other actions in support of the arbitration.

In technology, the most high-profile recent dispute was the landmark claim relating to the purchase of Autonomy by Hewlett-Packard in 2011, which involved a 93-day trial and in May 2022 resulted in a 1,700-page judgment (not including quantum issues).^{ix} That case exemplified the capacity of the English courts to handle significant fraud disputes in that sector and beyond.

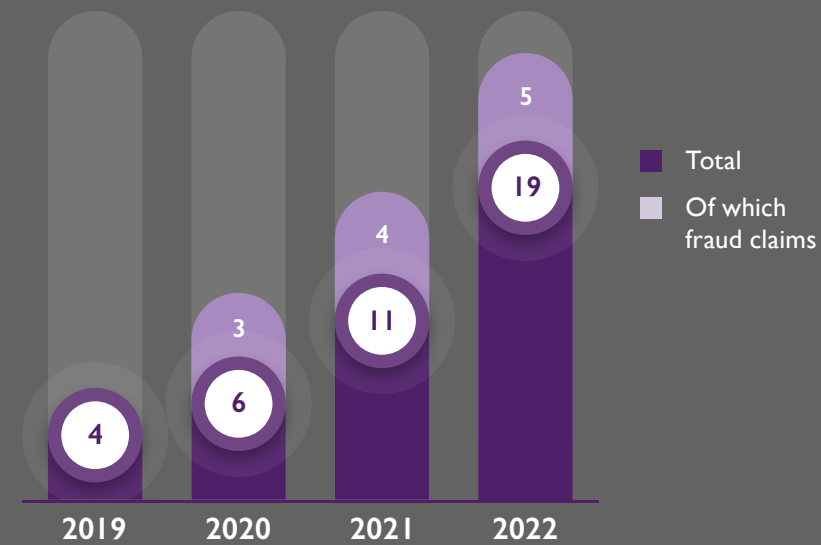


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Cryptoassets

Cryptoasset claims have increased significantly since 2019, and there is a notable overlap with fraud.

Number of cryptocurrency claims issued since 2019



The upward trend in cryptoasset disputes since 2019 coincides with the emergence of cryptoassets into the mainstream and its ascent to a legally recognised asset class, along with massive growth and turmoil in the crypto-industry generally. It also coincides with the COVID pandemic and the widely-reported increase in online fraud generally during that period. What is perhaps surprising given the prevalence and value of crypto-related fraud – and in contrast to the number of high-profile and high-value recoveries that have been made both in the UK and internationally – is that there are very few fraud cases making it to court. This may reflect anecdotal experience that the vast majority of such frauds concern amounts which it is uneconomic to pursue in High Court litigation.

English courts have been at the forefront of efforts to develop the law rapidly to enable victims of crime to bring actions for the recovery of cryptoassets. The English courts were amongst the first to recognise that cryptoassets can be legal property (*Robertson v Person Unknown*, 16 July 2019 (unreported) followed by *AA v Persons Unknown* [2019] EWHC 3556 (Comm)) and have taken a highly flexible and innovative approach to issues such as jurisdiction and governing law to ensure that claims can be heard before the English courts. The result has been that the English courts have now granted several proprietary injunctions over cryptoassets, including worldwide freezing orders relating to cryptoasset frauds and a number of third-party disclosure orders against crypto exchanges located overseas. Court procedure has been amended specifically to make it easier to serve defendants in these types of cases outside the jurisdiction, and service has recently been permitted via NFT (see *D'Aloia v Persons Unknown* [2022] EWHC 1723 (Ch)). These developments are no accident but reflect a recognition within the judiciary, from the top down, of the importance of this developing area. It is fair to say that, when it comes to cryptoassets, the English judiciary “get it”. The English High Court is without a shadow of a doubt one of the best venues – I would say the best – in the world for claimants to bring crypto-related fraud claims.



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Key trends to watch

Economic headwinds

Most obviously, the current economic climate and any future downturn increases the potential for fraud claims. As Warren Buffett's often-repeated aphorism goes: "only when the tide goes out do you discover who's been swimming naked". Those claims could arise from corporate insolvencies, which have increased sharply in the UK since the pandemic,^x or from the mini-banking crisis in early 2023 that has (to date) included the collapse of Silicon Valley Bank, First Republic Bank and Credit Suisse. There is also always the potential for alleged wrongdoing that emerges in these periods to result in securities claims by investors, as has already been the case with Credit Suisse.^{xi}

International disclosure orders

There are several ongoing developments that will affect the shape of fraud litigation in the UK.

As we have previously commented,^{xii} a new jurisdictional gateway came into force in England and Wales in late 2022 that allows the English courts to grant permission for applicants to serve disclosure orders on third parties based outside England and Wales. Prior to this, applicants would need to persuade the court that the application fell within one of the existing service gateways, for example that the respondent was a "necessary and proper party".

The new gateway applies where the applicant seeks disclosure of information regarding either (i) the true identity of a defendant; and/or (ii) what has become of the applicant's property. The application must be made for the purpose of proceedings that are or are intended to be commenced before the English court.

This is good news for victims of fraud. Although there will remain challenges (such as enforcing the order granted in other jurisdictions), it should mean that where a victim of fraud needs to obtain information about the identity of a fraudster or the location of misappropriated assets, it is likely to be simpler to obtain permission to serve an order for disclosure on (for example) a foreign bank or cryptocurrency exchange that holds that information.

Enforcement of judgments

The UK Ministry of Justice is currently considering responses to a consultation on whether the UK should sign up to and ratify the Hague Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters ("**Hague 2019**"). The government's paper summarising its responses is expected to be published shortly.^{xiii}

Hague 2019 establishes common rules to facilitate the recognition and enforcement of foreign judgments between contracting states. Since the end of the Brexit transition period on 31 December 2020, there has been no comprehensive framework in place between the UK and the EU covering the recognition and enforcement of civil and commercial judgments and jurisdiction. The main convention that currently applies is the 2005 Hague Convention on Choice of Court Agreements ("**Hague 2005**"), which provides a framework of rules relating to exclusive jurisdiction agreements and the subsequent recognition and enforcement of judgments based on those agreements.

As things stand, therefore, Hague 2005 is limited and, where it does not apply, parties wishing to enforce an English judgment in the EU must rely on common law rules or any separate bilateral treaties with the relevant member state. This, in turn, means they will have to commence new proceedings, with the increased time, cost and uncertainty that brings.

The UK applied to re-join the Lugano Convention on Jurisdiction and the Recognition and Enforcement of Judgments in April 2020. This provides a comprehensive framework regarding jurisdiction and the enforcement of judgments between the EU, Switzerland, Norway and Iceland (offering similar advantages to the pre-Brexit position). However, the EU has not yet consented to that application. The government's intention, therefore, is for the UK to sign and ratify Hague 2019. This would provide a set of common rules for the recognition and enforcement of judgments between the UK and EU (which has already acceded to it) and other jurisdictions.

If the UK were to join Hague 2019, it would not be a perfect solution. For example, certain types of disputes are excluded, including insolvency disputes and interim measures. It also does not address jurisdiction, meaning a risk of parallel proceedings would remain (although work has started on a separate convention to address this). However, the framework it provides would nevertheless improve the EU enforcement position post-Brexit.

Supreme Court decisions

Quincecare – Philipp v Barclays Bank UK PLC [2023] UKSC 25

The UK Supreme Court recently handed down a decision in relation to the *Quincecare* duty. The *Quincecare* duty takes its name from *Barclays Bank plc v Quincecare Ltd* [1992] 4 All ER 363. It has traditionally been understood as the duty of a bank to refrain from processing a payment instruction if it is “put on inquiry” that the instructions are the result of fraud and an attempt to misappropriate funds. Although *Quincecare* claims are not fraud claims as such, they are an important tool in the armoury of victims in offering an alternative route to recovering misappropriated funds.

As we have previously commented,^{xiv} the Supreme Court was asked to consider whether these claims only cover situations where the payment instructions are given by an agent (the High Court’s original decision) or where they were given by the customer directly (the Court of Appeal’s decision). In relation to that narrow point, the Supreme Court has now held that *Quincecare* does not cover such situations, thereby limiting the duty in that respect. However, in its landmark judgment, it also made a number of other significant findings, including clarifying that that the duty constitutes part of the general duty of a bank to act with reasonable care and skill when processing customer payments and that this duty only arises where the validity or content of the customer’s instruction is unclear or leaves the bank with a choice about how to carry out the instruction. More positively for claimants, it also serves to endorse at the highest court level the principles concerning a bank’s duty to enquire and refrain from processing payments believed to be attempts at defrauding the customer and confirms that *Quincecare* claims are not limited to corporate customers.

Limitation – Canada Square Operations Ltd (Appellant) v Potter (Respondent) (UKSC 2021/0139)^{xv}

The Supreme Court is also due to issue guidance regarding the meaning and effect of section 32(1) (b) and (2) Limitation Act 1980, which (in short) postpone the commencement of a limitation period where a fact relevant to the claimant’s claim has been “deliberately concealed” by the defendant. Among other things, the Supreme Court is due to decide both what “deliberate” means in this context (ie whether recklessness is sufficient or actual knowledge is required) and the meaning of “conceal” (ie whether the defendant needs to have breached a legal duty to disclose). The Court of Appeal held (in short) that recklessness absent actual knowledge is sufficient and that concealing was not limited to a legal duty to disclose. As it stands, therefore, this exception to the normal limitation rules is interpreted broadly, which in turn is helpful for victims of fraud. We will see if the Supreme Court agrees.

Cryptoassets

We expect the number of cryptoasset claims to continue to increase, with English law continuing to be at the forefront of legal developments in this area. The industry continues to grow and, in recognition of that, legislative moves are now well under way in the UK to bring a broad range of cryptoassets under the same regulatory framework as applies to other financial instruments. The hope is that, in doing so, consumers will be better protected and fraud reduced, though it may also lead to an increase in regulatory litigation against cryptoasset service providers. In a more mainstream and regulated commercial environment, one might also expect see a continued increase in the variety of disputes concerning cryptoassets, moving beyond fraud to, for example, professional negligence and financial market disputes.

The UK’s fraud reporting agency, Action Fraud, recently found that there has been a 40% rise in crypto fraud in the UK over the last year, surpassing £300m for the first time.^{xvi} The willingness of the English courts to develop the law to accommodate victims of crypto-related fraud has certainly helped remove uncertainties and lower the barriers to obtaining effective remedies against fraudsters. Whether, as a result, there will be an increase in claimants reflecting the increase in fraud has yet to be seen.

Stewarts is the UK’s largest litigation-only law firm with more than 400 staff, including 80 partners. We act for governments, sovereign wealth funds, corporates and individual clients in high-value and complex disputes, including fraud and asset tracing claims and some of the world’s largest fraud disputes and investigations.

We act for clients in both pursuing and defending fraud claims. Our lawyers co-ordinate claims in multiple jurisdictions, when necessary working alongside specialist law firms around the world.

Solomonic is an award-winning and intuitive litigation analytics platform. Its product drives actionable intelligence that transforms the way litigation decisions are made and empowers professionals to operate at the cutting edge of their sector. Solomonic has partnered with Stewarts on the data insights provided in this report.

Endnotes

i. The findings in this report are taken from data relating to all courts in the King’s Bench and Chancery Divisions (excluding the Administrative Court and the Planning Court). It is mostly based on two categories of data held and processed by Solomonic:

1. Judgments issued from 2014 onwards. This is a complete data set

2. Claim forms issued since 2019, but only where all defendants have acknowledged service and/or there has been a public hearing and/or there has been a judgment. This accounts for c.45% of all claim forms. It is assumed that (a) the remaining c.55% settle or are discontinued early, and (b) the c.45% is representative of the wider population.

References to “fraud” includes claims tagged by Solomonic with the legal subject matters “fraud” and “conspiracy”.

The data regarding the origins of claimants was produced by Stewarts via a manual review of the claim forms available to Solomonic from the relevant years, based on the address given (where available).

ii. See the Commercial Court Report 2021-2022 (the “Commercial Court Report”) at pages 21 and 32 (https://www.judiciary.uk/wp-content/uploads/2023/04/14.244_JO_Commercial_Court_Report_WEB.pdf). Note that 90 of the 723 claims issued in the Commercial Court were not counted as they were categorised as “other” in their subject matter (see page 21).

iii. It is worth noting that the high percentage of UK claimants in 2021 was affected by a small number of group actions, which introduced a large number domestic claimants.

iv. The Commercial Court Report (see page 18 to 19) defines international cases as all cases that are not domestic, which it in turn defines as cases where (a) the subject matter of the dispute between the parties is related to property or events situated within the United Kingdom, and (b) the parties are based in the United Kingdom relative to the dispute (in other words, that the part of the business relevant to the dispute is carried on in the UK, regardless of whether the business is incorporated, resident or registered overseas).

v. Solomonic monitors for a standard selection of factual subject matters, so not all claims have a factual subject matter associated with them. Claims may also be associated with more than one factual subject matter.

vi. The ACFE Report to the Nations 2022 (the “ACFE Report”), page 32 (<https://legacy.acfe.com/report-to-the-nations/2022/>).

vii. The ACFE Report, page 32.

viii. <https://globalarbitrationreview.com/article/agility-wins-bribery-claim-against-iraqi-mobile-operator>.

ix. ACL Netherlands BV (as successor to Autonomy Corporation Limited) & others v Michael Richard Lynch and another [2022] EWHC 1178 (Ch).

x. <https://www.stewartslaw.com/news/early-developments-in-2023-for-insolvency-and-asset-recovery/>.

xi. <https://www.reuters.com/legal/credit-suisse-is-sued-by-us-shareholders-over-finances-controls-2023-03-16/>.

xii. <https://www.stewartslaw.com/news/new-service-gateway-disclosure-orders/>.

xiii. The government’s consultation can be accessed here: <https://www.gov.uk/government/consultations/hague-convention-of-2-july-2019-on-the-recognition-and-enforcement-of-foreign-judgments-in-civil-or-commercial-matters-hague-2019/consultation-on-the-hague-convention-of-2-july-2019-on-the-recognition-and-enforcement-of-foreign-judgments-in-civil-or-commercial-matters-hague-2019#the-consultation-1>.

xiv. <https://www.stewartslaw.com/news/the-road-to-the-supreme-court-for-philipp-v-barclays/>.

xv. <https://www.supremecourt.uk/cases/uksc-2021-0139.html>.

xvi. <https://www.ft.com/content/88602223-004b-4e27-b9eb-c45ef850f9f>.

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