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Financial Markets Disputes View: November 2024

11 November 2024

This monthly update will highlight recent litigation and contentious regulatory issues which we think should be on your radar.

The courts are back with a vengeance following the long summer. For this edition of Disputes View we have selected 8 important judgments to cover for you and we suspect that more than one of these will have repercussions for some time to come. We take a look at a novel final notice from the FCA on sanctions systems and controls failings and one on more familiar ground - treating customers fairly. We also provide an update on the latest developments concerning the FCA's proposals to change the way in which they publicise enforcement actions and we bring you some points of interest from our disputes colleagues in France and Holland. As always, please do contact us with any thoughts.

What's coming up?

Join us for our annual Contract Masterclass webinar series, crafted to provide you with timely insights into contractual matters under English law. These concise 30-minute sessions, scheduled on Tuesday and Thursday mornings from 5 November to 5 December, are designed to equip you with practical guidance and will be available on demand thereafter. The first two sessions are already available on demand: Formation and Good faith. These sessions cover the latest legal developments in drafting, interpretation, and potential dispute areas. Don't miss this opportunity to enhance your contract law expertise in a rapidly evolving landscape. Register today to stay ahead of the curve.

Global legal and business outlook: future + vision - In a world marked by constant change and uncertainty, financial services face unprecedented challenges and opportunities. Over the course of three days from 19 to 21 November, our virtual event will delve into the pressing macro-economic issues, sector-specific topics, and the transformative impact of Artificial Intelligence on the legal landscape. We look forward to welcoming you. View the agenda and Register.

Join us for a webinar on 13 November 2024 as our experts review and discuss the newly released guidance on the new "failure to prevent fraud" offence introduced by the Economic Crime and Corporate Transparency Act 2023 (ECCTA). We'll delve into the implications of the new offence, which introduces corporate criminal liability for fraud offences committed by associates, significantly increasing the risk of criminal prosecution for large organisations that do not have reasonable anti-fraud procedures in place. Our team has been closely reviewing the guidance and can help you understand the details and navigate its requirements. Don't miss this opportunity to stay informed and gain actionable insights for navigating the ECCTA requirements effectively. Register now to stay informed and gain actionable insights for navigating the ECCTA requirements effectively.

CP24/2: the FCA's proposals for publicising enforcement investigations - update

The FCA's proposals to make public the fact and detail of their enforcement investigations (now infamously the 'Name and Shame' proposals) were originally contained in CP24/2 published back in February. The FCA provided an update on the proposals in the form of a speech given by Therese Chambers at the AFME Annual European Compliance and Legal Conference in September.

We noted a slight softening of the FCA's approach to the proposals and a confirmation that it will now consider the potential impact of an announcement on an individual firm and the market. We also highlighted what we considered to be some likely key focus areas for the engagement process which the FCA is undertaking with stakeholders. These include the development of a more defined public interest test.

As part of this work the FCA intends to provide more detail on how that could work in practice and will publish case studies "*examining how the criteria might apply and what announcements could look like*" as well as *"more information on the numbers of cases that might be affected*".

The FCA published its revised Regulatory Initiatives Grid on 15 October and we now have confirmation of the proposed timetable.

- Q4 2024 – the FCA intends to publish "further information" which will include the case studies, as it continues with its engagement process.
- Q1 2025 – the FCA aims to reach a final decision.

In his speech to the Mansion House City Dinner on 17 October Nikhil Rathi commented on the proposals and provided some more detail. He accepted that the proposals had fallen short of the FCA's own predictability test but that the regulator had heard the strength of opposition. He suggested that the case studies would be published in November and sought to provide reassurance that "relatively few" cases would be affected by the proposed new approach. He concluded "Where we decide to name a firm in the public interest, it wouldn't by default be when an investigation starts. Unlike in many jurisdictions, our enforcement investigations typically follow at least a year of supervisory engagement. We would give firms of all sizes longer to make representations about impact. And we know we have to be particularly mindful of impact on small firms. We'll continue to listen to feedback and our Board will decide early next year."

We will be watching for developments so expect further updates. Please do reach out to Emma Sutcliffe, Caroline Hunter-Yeats or Thomas Makin if it would be helpful to discuss.

Market abuse

Our contentious asset management team is releasing a series of podcasts covering contentious trends in the asset management and investments funds sector.

In this podcast, Mark Uttley discusses two publications by the FCA earlier this year relating to market abuse (Market Watch 77 and Market Watch 79). Market Watch 77 focused on the trading activities of organised crime groups and, in particular, the various methods that they might use to obtain inside

information (including the recruitment of junior members of staff). Market Watch 79 provided insight into common issues that the FCA had seen with surveillance alerts, including as regards faulty calibration of these alerts. The FCA recommended a number of steps to avoid failures, including around data governance, model testing and model implementation and amendment.

Please contact Mark Uttley for further information.

A challenging outcome for passive s90A investors

The recent judgment in Allianz Funds Multi-Strategy Trust & Ors v Barclays Plc [2024] EWHC 2710 (Ch) concerns one of the key evidential hurdles for shareholders - the 'reliance test' - when bringing claims against UK-listed companies for misleading public information under section 90A / Schedule 10A of Financial Services and Markets Act 2000.

The Court determined that shareholders who have not directly reviewed the company's Published Information (Annual and Interim Reports, RNS releases) will not be able to meet that test. This effectively rules out passive investors from the statutory remedy. All passive investor whose cases in this claim rested exclusively on s90A/Schedule 10A, representing 60% (£332m) of the total value of the claim and 241 funds, have therefore had their cases disposed of summarily.

The decision is likely to be appealed. If upheld, it will likely have an adverse effect on the attractiveness and ease of bringing s90A FSMA cases for shareholders and third-party litigation funders alike. For a more detailed analysis of the case please read our article or listen to our podcast here.

To discuss the implications of the case in more detail please contact Adam Brown, Chloe Morris or Mark Uttley.

Sanctions systems and controls

The majority of crime-related FCA enforcement cases to date have been concerned with breaches of the money laundering regulations or the equivalent SYSC rules on establishing policies and procedures to identify and address money laundering risk. Some enforcement notices have also addressed fraud risk (particularly where firms have been used to execute fraudulent trading schemes) and sanctions (where representation of sanctioned customers has led to breaches of the money laundering regulations).

On 2 October 2024, the FCA fined Starling Bank nearly £29m for failings in its sanctions systems and controls, described by the FCA as “shockingly lax”, and for breaching a voluntary requirement not to open accounts for high-risk customers.

The failings in sanctions controls described in the Final Notice were systemic, and it may be tempting for established institutions to assume that they do not have much to learn from this decision. However, it is an important development for the fact that it represents the first instance of the FCA making stand alone and detailed findings about the adequacy of a firm’s financial sanctions controls.

This is – in our view – indicative of a trend towards the FCA taking more cases concerned predominantly with the operation of sanctions controls. Although the FCA has a more established track record and a clearer and more prescriptive regulatory framework to enforce against in an AML context, it has the

powers it needs to address weak sanctions controls by reference to Principles 2 (the requirement for a firm to "conduct its business with due skill, care and diligence"), and 3 (the requirement for a firm to "take reasonable care to organise and control its affairs responsibly and effectively, with adequate risk management systems"), and SYSC 6.1.1R (the requirement for a firm to "establish and maintain effective systems and controls for countering the risk that it might be used to further financial crime"). The FCA also has ready access to information about sanctions breaches in the regulated sector as a result of firms' mandatory reports to OFSI, of which it requires notice.

A focus on sanctions systems and controls is consistent with the FCA's recent policy statements and follows on from its review of sanctions compliance at over 90 firms in 2023, from which it identified multiple areas where sanctions risk management could be improved. Those areas of weakness align closely with the areas which the FCA has targeted in previous money laundering enforcement decisions, and so represents familiar territory for the Authority.

Firms at particular risk of enforcement in the coming year include those who may have less developed financial crime controls such as challenger banks or who are operating in higher risk sectors such as crypto firms. However, more established institutions are also at risk, particularly where sanctions controls failings and weaknesses in AML systems and controls go hand in hand.

Please speak to Alexandra Webster if you would like to discuss further.

FCA final notices and prosecutions

One other final notice and a conviction caught our eye.

TSB Bank

The FCA imposed a financial penalty of £10,910,500 on TSB Bank Plc ("TSB") for its handling of retail customers who were experiencing financial difficulties between June 2014 and March 2020. The FCA found that TSB had breached Principles 3 (Management and Control) and 6 (Treating Customers Fairly). The FCA's enforcement action followed a skilled person review (under s.166 FSMA) ordered by the FCA in July 2020.

Breaches of Principle 3 were based on shortcomings in TSB's: policies and processes; training and incentivisation; systems; and testing and assurance, which in each case created a risk of unfair outcomes for customers.

Breaches of Principle 6 were based on the following examples of unfair treatment of customers by TSB:

- failure to adequately assess customer circumstances (including whether they were vulnerable);
- failure to use forbearance in appropriate circumstances for customers;
- inappropriate application of interest, fees and charges; and
- poor and inappropriate testing and communication created a lack of clarity for customers.

The FCA identified as an aggravating factor TSB's failure to remediate issues identified with its collections and recoveries business through internal reviews conducted in 2016, 2019 and 2020. The FCA identified as mitigating factors: (1) TSB's payments to customer of £69m (to customers in arrears

during the relevant period) and £29m (to customers in arrears outside the relevant period) as part of its customer remediation programme; (2) “considerable steps” taken to remedy failings in its systems and controls; and (3) TSB’s full cooperation with the FCA in particular TSB’s acceptance of the findings of the skilled person and agreement for the FCA to rely on those findings. The net impact of the aggravating and mitigating factors was a reduction of 40% at step 2 of the FCA’s penalty calculation.

Key takeaways:

- As is so often the case, governance was key here. The FCA expects the core pillars of a firm’s governance framework (e.g. policies, procedures, training and systems) to function effectively and mitigate the risk of harm to retail customers.
- The relevant period for the FCA’s investigation pre-dated introduction of the Consumer Duty, which has raised the standard further for treatment of retail customers (particularly those that are vulnerable or in financial distress).
- The FCA only accepts cooperation as a mitigating factor in exceptional circumstances. Here, TSB’s agreement that the FCA could rely on the skilled person’s findings had the effect of expediting the investigation and therefore qualified as a mitigating factor.
- The FCA may be prepared to look at actions taken by a firm outside of the relevant period as a mitigating factor for the purposes of a financial penalty (where they are relevant to the subject matter of the enforcement action).

Olumide Osunkoya

The FCA has announced the first UK conviction for offences relating to the operation of crypto ATMs. Mr. Olumide Osunkoya pleaded guilty to five offences under the Money Laundering Regulations 2017 at Westminster Magistrates' Court on 30 September 2024.

Crypto ATMs are machines that allow you to buy or convert money into crypto-assets. Mr Osunkoya was the director of a company which ran multiple crypto ATMs without FCA registration (he had been refused registration in 2021), using false documents and a false alias to evade FCA rules. Mr Osunkoya is due to be sentenced.

The FCA has been the anti-money laundering supervisor of UK cryptoasset businesses since 10 January 2020. Crypto ATMs are required to be registered with the FCA and there are currently no legal crypto ATM operators in the UK.

This conviction follows concerted efforts by the FCA to crackdown on unregistered crypto ATMs; in 2023 it inspected a number of sites alongside regional police where unauthorised ATMs were suspected to be operating. The FCA considers that these ATMs are used for money laundering and other criminal activity. Indeed in Mr Osunkoya’s case the Court heard evidence that those likely committing money laundering or tax evasion were using his machines.

If you would like more information, please contact Thomas Makin.

Collective proceedings

Developments in collective proceedings are continuing at pace. As at 4 November 2024, 39 different sets of collective proceedings had been issued in the Competition Appeal Tribunal (CAT), with no sign of slowing. Recent months have seen further developments in certification, with the CAT issuing judgments in *AdTech v Google*, the *Commercial and Interregional Card Claims v Mastercard* cases and *Gormsen v Meta* and the first proposed class representative being cross-examined in *Christine Riefa Class Representative Limited v Apple & Amazon*. The first judgment in these types of proceedings - *Justin Le Patourel v BT* - is awaited following the trial earlier this year.

To help keep on top of these developments, our tracker monitors the collective proceedings issued in the CAT and outlines the current stage of each set of proceedings, as well as providing a summary of each claim and links to the key documents. We regularly update the tracker to ensure the latest developments are captured to maintain oversight of trends, developments and opportunities. You can access the tracker here.

If you have any questions, or would like to discuss the Competition Appeal Tribunal's collective proceedings regime in more detail, please contact Eleanore Di Claudio.

Material Adverse Change clauses

The English Commercial Court has recently handed down an important decision, which is likely to become the leading authority on how to interpret Material Adverse Change ("MAC") clauses in mergers and acquisition agreements and loan and other agreements. In this case which involved a mining company, the Court has considered the factors that should be taken into account when invoking a MAC clause generally, as well as specific factors to be taken into account in the Energy, Natural Resources and Infrastructure sector.

Our in depth article provides practical guidance for the drafting and invoking of MAC clauses.

If you would like to discuss the case further or have any questions regarding MAC/MAE clauses, please contact Robert Turner or Victor Croci for further discussion.

BM Brazil 1 Fundo De Investimento EM Participacoes Multistrategia and other companies v Sibanye Bm Brazil (PTY) Ltd and another company [2024] EWHC 2566 (Comm).

Court of Appeal sides with consumers on Motor Finance Commission Disclosures

The Court of Appeal has handed down a landmark judgment on motor finance commission disclosures, which has potentially significant implications for motor finance providers and the wider lending industry. The judgment concerns three appeals - *Johnson, Wrench*, and *Hopcraft* – and addresses the duties of motor dealers acting as credit brokers in arranging hire-purchase agreements for car buyers, and whether lenders are liable in cases of undisclosed or "partially disclosed" commissions.

The Court of Appeal held that, in all three cases, the dealers owed the claimants the "disinterested" duty (i.e. the duty to provide information, advice, or recommendations on an impartial or disinterested basis) and that the dealer/customer relationship was a fiduciary one. The Court of Appeal held that *Hopcraft* and *Wrench* were both cases involving secret commission – in *Hopcraft* there was no disclosure of

commission and in Wrench there was insufficient disclosure to negate secrecy. As to *Johnson*, which involved partial disclosure, the Court of Appeal held that the lender was liable as an accessory for procuring the broker's breach of fiduciary duty.

The result is that the level of disclosure required of lenders in relation to commission is now significantly greater than that specified by the relevant legislation, regulations and FCA rules/guidance. The judgment will therefore have significant consequences for lenders who enter into commission arrangements with credit brokers.

We take a closer look at the implications of the decision here. If you would like to discuss further, please contact please contact Amy Cook or Neelam Hundal.

Data processing under the GDPR: legitimate interest

The European Court of Justice issued a preliminary ruling last month following questions posed by the District Court of Amsterdam in a dispute between the Royal Dutch Lawn Tennis Association and the Dutch Data Protection Authority. The key issue was whether purely commercial interests can qualify as a legitimate interest for the processing of personal data under the GDPR

The most important element of the ruling is the clear confirmation by the ECJ that:

- an interest need not be enshrined in EU or local law in order to qualify as a legitimate interest for the processing of personal data as meant in Article 6(1)(f) of the GDPR, and
- purely commercial interests, such as selling personal data for direct marketing purposes, can in principle also constitute such a legitimate interest and constitute a valid legal basis for data processing activities.

The judgment provides welcome clarification on what many considered to be a rather obvious point but one which appeared to have been lost on the Dutch DPA. Our article provides more in depth analysis of the judgment but if you would like to discuss any issues arising out of the case, please contact Jaap Tempelman.

Our DORA podcast series has been designed to help you navigate the requirements of the Digital Operational Resilience Act.

Recent French ruling on the extent of legal privilege protection: a limited approach

In a recent case, the Criminal Division of the French Supreme Court addressed the scope of lawyer-client privilege during antitrust inspections and raids authorized by judicial orders. The Court emphasized the distinction between the protections afforded under lawyer-client privilege and the regulations governing criminal searches. French law, specifically articles 56-1 and 56-1-1 of the French Code of Criminal Procedure, safeguards lawyers' professional secrecy in both litigation and advisory roles. These provisions ensure protective measures during searches of lawyers' offices and grant the right to challenge the seizure of confidential documents elsewhere, allowing such documents to be sealed.

In the present case, the applicant invoked these protections, arguing against the seizure of documents under lawyer-client privilege during a criminal search. The Court, aligning with established case law, confirmed that while lawyer-client communications are protected across all matters, they are exempt from seizure only when pertaining to the client's defence rights. The debate extended to whether the protections for searches in lawyers' offices, as outlined in the Code of Criminal Procedure (art. 56-1, para. 11), should also apply to home searches, including those under article L. 450-4 of the Commercial Code, beyond criminal investigations. The Court, adhering to the specific wording of the legal texts, rejected this argument, maintaining the distinction between criminal searches and other types of home inspections.

This decision underscores a disparity in the treatment of criminal searches versus other inspections, such as those related to competition or stock market regulations. Only in criminal searches could a company object to the seizure of lawyer-client communications and request sealing. For non-criminal searches, companies must seek judicial intervention post-search to contest the procedure and recover privileged documents, a process that does not prevent investigators from initially reviewing the documents. For instance, the court did require the company subject to the French competition authority's dawn raid to identify which seized documents related to defence work before the authority's case could continue. The court also said that the judge in charge of the case would not be able to conduct a review of the privileged materials to exclude them from the case files unless the company labels the documents first.

This decision should be considered in the light of the European Union court ruling of 26 September 2024 (case C-432/23), in which it opted to protect the secrecy of legal advice regardless of the area of the law in a dispute between a Luxembourg law firm and investigators from the Spanish tax authority. It is therefore to be hoped that forthcoming appeals against seizures of lawyer-client correspondence, will finally provide an opportunity for the Criminal Chamber to adopt a more respectful approach to the rights of litigants.

If you would like to discuss further, please contact Etienne Kowalski or Sam Koochek.

Judicial review

There have been a couple of interesting judicial review judgments over the last few weeks.

First up, the Court of Appeal's decision in *Elliott Associates L.P and anor v The London Metal Exchange and anor* [2024] EWCA Civ 1168.

By way of recap, the Divisional Court refused an application brought by commodities traders for judicial review of the decision by the London Metal Exchange to suspend and cancel nickel trades worth around $12 billion during a period of disorderly trading in the metal. Contrary to the arguments put forward by the traders the court held that the LME had acted lawfully. Their claims for damages for alleged breach of their right to "*peaceful enjoyment of their possessions*" under the Human Rights Act 1998 were also rejected.

The judgment was appealed and the Court of Appeal has now rejected the appeal holding that the LME's decision had not been procedurally unfair, ultra vires, irrational or disproportionate. In fact, in the circumstances, the LME had been left with effectively "*no alternative*" to the decision it made.

It is interesting to note that there were a couple of issues on which the Court of Appeal disagreed with the first instance decision. The Divisional Court had apparently attached considerable weight to the contractual context in the case – indeed at one point they refer to it as "*highly significant*". Lord Justice Males commented "*if this is to be read as suggesting that the 'contractual context' justified a less rigorous approach to review of the LME's determination that the market had become disorderly than would result from the application of ordinary public law principles, I would respectfully disagree.*" The second point of disagreement centred on the question of whether Elliott had "*possessions*" for the purpose of its Human Rights Act claim. The Divisional Court had said no. The Court of Appeal said yes – they had a legitimate expectation of obtaining cleared contracts, and this had economic value. However, that did not assist as there had been no interference with rights which were always qualified and, even if there was, any interference was clearly justified.

In the second case, *Re McAleenon [2024] UKSC 31*, the Supreme Court was asked to consider the question of suitable alternative remedies.

Judicial review is frequently described as a "remedy of last resort" and an application can fail where it can be shown that there had been a suitable alternative. In this case, the applicant sought judicial review of environmental regulators' decisions not to take action against the operator of a waste site. The Court of Appeal had concluded that the applicant had suitable alternative remedies in the form of a private prosecution or a nuisance claim against the site operator, or a complaint to the public services ombudsman. The Supreme Court disagreed finding that the question of whether a claimant has a suitable alternative remedy available to them falls to be addressed by reference to the type of claim the claimant has chosen to bring and what relief they have sought against the particular defendant. Here the applicant's overall objective had been to stop noxious emissions from the site but she had various legal proceedings open to her to achieve that. She had chosen to try to force the regulators to do their job as she saw it and to bring to bear their greater powers and resources. It was not for the court to say that she should have chosen a different claim against a different party.

The judgment contains some helpful analysis of the suitable alternative remedy issue which frequently appears as a potential hurdle when considering possible judicial review proceedings against regulators and other public authorities.

For further information, please contact Thomas Makin.

The FCA's redress powers

In December 2021, the FCA announced that it planned to impose a penalty on BlueCrest Capital Management (UK) LLP for conflicts of interest failings and to impose a requirement on the firm to pay redress to clients pursuant to s.55L FSMA. BlueCrest referred its case to the Upper Tribunal which in July 2023 ruled that the FCA did not have the power to impose a redress requirement using its powers under s.55L FSMA.

The Court of Appeal has now handed down its decision in *The Financial Conduct Authority v BlueCrest Capital Management* [2024] EWCA Civ 1125. The decision is a significant one.

The court concluded that the FCA has a power under s.55L FSMA (read together with s.55N(5) FSMA) to impose a single firm redress requirement in relation to past conduct.

In effect, this means that the FCA has a very wide discretion to impose a requirement to pay redress on a firm if it "appears to the FCA" that to do so: (i) "is desirable … in order to advance one or more of the FCA's operational objectives", and (ii) "is a rational decision which the FCA considers to advance the objective of securing an appropriate degree of consumer protection."

The only practical constraints on the FCA's power to impose redress are: (i) the right to refer the FCA's decision to the Upper Tribunal which will hear the matter afresh; and (ii) the FCA's public law obligations. The court confirmed that the FCA can in principle deploy this power in circumstances where the conditions of loss, causation, breach of duty and actionability as set out in s.404 FSMA are not met, though it considered that it would "*rarely be the case that the FCA would be able to justify the imposition of a redress requirement as rational*" where none of the conditions is met.

The judgment is subject to appeal, but it is important in the context of the FCA's notable shift towards early intervention and ensuring redress is paid to consumers as its primary regulatory tool.

The FCA's most recent statistics show that since financial year 2019/20, the number of FCA interventions cases has doubled, meaning that the FCA is taking action earlier and more decisively where it identifies harm. Following changes to the FCA's internal procedures in November 2021, the FCA can make supervisory interventions quickly (much more quickly than for Enforcement action) and firms should take care to ensure that their systems and controls, firm and product governance and consumer engagement meet regulatory expectations.

The FCA's current approach therefore marks a significant shift in regulatory risk for firms away from FCA Enforcement and into what was previously the supervisory arena and is particularly relevant to firms interfacing directly with consumers. Our experience is that identifying issues early and managing them proactively is essential and we assist many firms to manage their regulatory risk ahead of time.

Please do get in touch with Thomas Makin to discuss further.