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FINANCIAL SERVICES LITIGATION

United Kingdom

LEXOLOGY

Financial Services Litigation

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Generated on: August 12, 2024

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NATURE OF CLAIMS

Common causes of action

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

Common law claims for misrepresentation or breach of professional duty are often brought against banks and other financial services providers. Claimants often allege that financial institutions should have provided advice, failed to provide correct advice, or provided incorrect information. Claims may also be brought for alleged fraudulent activity, including dishonest assistance or conspiracy. Retail claimants may also seek to rectify contracts, on the basis that financial institutions are in an unfair relationship with them pursuant to the Consumer Credit Act 1974. Additionally, private persons (as defined by law) may bring claims for breach of rules set by the Financial Conduct Authority, most commonly the Conduct of Business rules.

Claims for breach of contract are commonly brought by large corporate or institutional counterparties, in relation to more complex financial products.

Investors, including retail investors, may bring claims for misrepresentation in relation to securities under common law or under the Financial Services and Markets Act 2000 (FSMA 2000).

Law stated - 17 June 2024

Non-contractual duties

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?

Financial institutions may be subject to tortious duties of care to act with reasonable care and skill when giving advice. A duty will arise if the person asking for advice was reasonably trusting the financial institution to exercise a degree of care, and the financial institution knew, or ought to have known, this (***Hedley Byrne & Co Ltd v Heller & Partners Ltd*** [1964] AC 465). The courts have indicated that the existence and scope of such a duty of care will likely be determined by its purpose (***Manchester Building Society v Grant Thornton UK LLP*** [2021] UKSC 20).

The courts have been reluctant to find that a duty of care arises, although it is not impossible. For example, in ***Crestsign Ltd v National Westminster Bank Plc*** [2014] EWHC 3043 (Ch), the court found that such strong advice on interest rate swaps had been given by the defendant bank that the bank owed a duty to use reasonable skill and care to ensure that the advice given was suitable.

Banks may owe a duty of care where they are party to a contract which gives them discretion as to how to carry out the contract (***Philipp v Barclays Bank UK Plc*** [2023] UKSC 25). For example, when the bank has reasonable grounds to believe that instructions provided by customers are subject to an attempt to misappropriate funds, they may breach that duty (known as a ***Quincecare*** duty) by following the instructions regardless.

Parties may be able to limit their liability for breach of duty through contractual clauses. In *Fine Care Homes Ltd v National Westminster Bank Plc & Anor* [2020] EWHC 3233 (Ch), the court found that clauses stating that a bank is providing general dealing services, rather than advice, are enforceable, and not subject to the statutory requirement for reasonableness under the Unfair Contract Terms Act 1977.

Parties may also be held liable for misrepresentations where they make false statements of fact or law without reasonable grounds for believing the statement is true, another party relies on that misrepresentation and enters into a contract as a result of it, and then suffers loss as a result of that contract. Liability for misrepresentation may be limited by contractual clauses; however, such clauses are subject to a test of reasonableness, and will not be binding if unreasonable.

Section 138D of FSMA 2000 allows customers to bring a claim against a financial institution for breach of its statutory duties. This rule is limited to individual customers, rather than companies, subject to a limited number of exceptions.

Law stated - 17 June 2024

Statutory liability regime

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

Liability for untrue or misleading statements in prospectuses is governed by section 90 of FSMA 2000. If an investor purchases securities, and suffers loss as a result of a misleading statement or omitted required information in the relevant prospectus, the issuer of the prospectus will be liable to compensate that investor. The investor does not need to show that they relied on the particular misstatement in order to claim compensation.

Liability in respect of misleading statements in published information other than prospectuses is governed by section 90A of FSMA 2000. If an investor deals in securities in reliance on misleading information published by the issuer, suffers loss as a result, and a person discharging managerial responsibilities (PDMR) at the issuer knew that or was reckless as to whether the information was misleading, the issuer may need to pay compensation. Section 90A excludes most civil liabilities for the same information, although claims for breach of contract, misrepresentation, negligent misstatement, statutory compensation claims and penalties, and under section 90 of FSMA 2000, are still permitted.

The first trial judgment on section 90A of FSMA 2000 was handed down in 2022 (*ACL Netherlands BV v Lynch* [2022] EWHC 1178 (Ch)). In this case, the court held that actual knowledge of each alleged misstatement by the PDMR was required, but that a defendant could not rely on the fact that a claimant could have discovered the truth as a defence to a FSMA 2000 claim.

Law stated - 17 June 2024

Duty of good faith
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 implied duty of good faith in contracts under English law. However, one may arise in 'relational' contracts, in which parties are committed to collaborating on a long-term basis (*Candey Ltd v Basem Bosheh* [2022] EWCA Civ 1103).

Since 31 July 2023, financial services firms have been required to act in good faith towards retail customers, as one of the cross-cutting rules underpinning Principle 12 of the FCA Handbook, that firms must act to deliver good outcomes for retail clients. Firms are also required to avoid causing foreseeable harm, and enable and support customers to pursue their financial objectives. The FCA has the ability to issue penalties for breaches of the Principles; however, the impact (if any) of Principle 12 on contractual interpretation has yet to be seen.

Additionally, where a party has the ability to exercise its discretion under a contract, it must do so with honesty and in good faith and without capriciousness (*Braganza v BP Shipping Ltd* [2015] UKSC 17). In a financial services context, this has been held to apply to an obligation for losses to be 'reasonably determined in good faith' in a case relating to an International Swaps and Derivatives Association (ISDA) Master Agreement (*Lehman Brothers Finance AG (In Liquidation) v Klaus Tschira Stiftung GmbH* [2019] EWHC 379 (Ch)).

Law stated - 17 June 2024

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

Fiduciary duties arise where an entity acts for another in circumstances which give rise to a relationship of trust and confidence, such as where a trustee acts for a beneficiary, or an agent acts for a principal. These obligations can be conferred, restricted or shaped by contractual terms, provided that such terms do not undermine the fundamental nature of the relationship.

There is no general presumption that a financial institution owes a fiduciary duty to its customers. It has been consistently held that a bank does not owe a fiduciary duty to its customers in respect of ordinary banking services (see, eg, *Philipp v Barclays Bank UK Plc* [2023] UKSC 25). However, where a financial institution acts in a fiduciary manner, it will take on fiduciary duties – for example, banks may owe fiduciary duties to customers when giving financial advice in the customer's interests.

Law stated - 17 June 2024

Master agreements

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

Standard form master agreements, such as the ISDA Master Agreement and Loan Market Agreement (LMA), are treated as any other contract under English law, and are subject to the usual rules on contractual interpretation. The English courts have noted that the ISDA Master Agreement is intended to apply in as many situations as possible, with as much straightforward application as possible, and therefore may be particularly reluctant to find interpretations which rely on the specific position as between parties and stray from the ordinary meaning of the words in the contract (***Grant & Ors v FR Acquisitions Corporation (Europe) Ltd & Anor*** [2022] EWHC 2532 (Ch)).

The courts may take a relatively pro-active approach to determining disputes on ISDA agreements; for example, English courts also have the power to rectify an error in a calculation made under an ISDA Master Agreement, even if the party's purported contractual calculation was infected by material error and was therefore invalid (***BNP Paribas Trust Corp UK Ltd v Uro Property Holdings SA*** [2022] EWHC 3251 (Comm)).

The English courts are familiar with such standard form master agreements and are used to interpreting them. The Court of Appeal has ruled that ISDA Master Agreements are sufficiently international in nature to displace mandatory local law provisions, meaning that English law will generally be deemed to be the governing law of disputes pertaining to swaps or derivatives governed by an ISDA agreement (***Dexia Crediop SpA v Comune di Prato*** [2017] EWCA Civ 428).

Law stated - 17 June 2024

Limiting liability

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

Financial institutions can limit their liability through contractual wording or through issuing a disclaimer stating that they do not accept responsibility for advice or information they have provided. Under common law, contractual exclusions for liability must be properly incorporated into the contract, cover the negligence in question, and have been made free from misrepresentations. They must also be clear and unambiguous, and any ambiguous terms are interpreted in favour of a party which does not seek to rely on them.

Unfair terms in contracts are not binding. The Unfair Contract Terms Act 1977, which applies to non-consumer contracts used in the ordinary course of business, provides that exclusion or limitation clauses will not be enforceable where they are not fair and reasonable in the circumstances known to the parties at the time of contracting.

The Consumer Rights Act 2015 applies to consumer contracts, and provides that a contractual term will be unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations under the contract to the detriment of the consumer.

Law stated - 17 June 2024

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

Freedom of contract is generally unrestrained under English law. However, penalty clauses are unenforceable; these are – broadly speaking – clauses which impose a detriment on a party which is out of all proportion to any legitimate interest of the other party in the enforcement of a primary obligation under the contract (***Cavendish Square Holding BV v Talal El Makdessi*** [2015] UKSC 67). Clauses which seek to simply punish the other party will be held to be penalty clauses.

Law stated - 17 June 2024

Litigation remedies
What remedies are available in financial services litigation?

Claimants may seek damages for breaches of contract or torts committed. The measure of damages in contract law seeks to put the claimant in the position it would have been had the contract been correctly performed. In tort, damages seek to put the claimant in the position they would have been in if the tort had not occurred. In addition, equitable remedies, such as injunctions, tracing, estoppel and contract rectification and rescission are available. Generally, such remedies will only be awarded where damages would be inadequate.

Law stated - 17 June 2024

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

The limitation period for contractual claims and most torts is six years. A longer limitation period of 12 years applies to claims under a deed.

In respect of negligence claims which do not involve personal injury, the limitation period is the later of either six years from the date on which the cause of action accrued, or three years from the date on which the claimant knew or ought to have known the material facts, the identity of the defendant and that the cause of action could have arisen. In financial services cases, such as mis-selling, it has been held that claimants may be able to rely on this, arguing the knowledge of the unsuitability of a product sold may arise at a significantly later stage than the sale of the product (***Kays Hotels Ltd v Barclays Bank Plc*** [2014] EWHC 1927 (Comm)).

Law stated - 17 June 2024

PROCEDURE

Specialist courts

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?

Generally, financial disputes are subject to the usual rules on court allocation. However, the Financial List (a specialised division of the Business and Property courts of the High Court of Justice) has jurisdiction to deal with cases which need expert judicial knowledge of financial markets, which raise important issues for the sector, and/or which (generally) are for more than £50 million. Judges are nominated to the Financial List from the Commercial or Chancery Lists based on their experience.

Law stated - 17 June 2024

Procedural rules

Do any specific procedural rules apply to financial services litigation?

Financial services litigation is subject to the usual Civil Procedure Rules (CPR), subject to limited amendments set out in CPR Part 63A or Practice Direction 63AA regarding the jurisdiction of the Financial List and the process for commencing or transferring a claim there. The Financial List Guide also contains a summary of specific rules for the Financial List, and states that the Admiralty and Commercial Court Guide or Chancery Guide will apply for matters not covered in the Financial List Guide.

Law stated - 17 June 2024

Arbitration

May parties agree to submit financial services disputes to arbitration?

Parties are free to elect to submit financial services disputes to arbitration.

Financial services entities have historically been slow to adopt arbitration, preferring the English or New York courts. However, in recent years, there has been a significant increase in the number of banking and finance disputes resolved in arbitration, often with a London seat. In this context, the London Court of International Arbitration (LCIA) has reported that banking and finance disputes have been in the top three sectors in LCIA arbitrations, making up 29 per cent of LCIA cases in 2018, 32 per cent in 2019, 20 per cent in 2020, 26 per cent in 2021 and 15 per cent in 2022.

Law stated - 17 June 2024

Out-of-court settlements

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

While there is no general rule that claims must be subject to alternative dispute resolution (ADR), the Court of Appeal has recently held that the courts are able to order parties to engage in mediation or another form of ADR, and may stay proceedings to facilitate ADR between the parties (***Churchill v Merthyr Tydfil County Borough Council*** [2023] EWCA Civ 1416).

From 22 May 2024 to 21 May 2026, claims for money where the value of the claim is less than £10,000 will be subject to mandatory mediation. The rules governing these mediations have been published in Practice Direction 51ZE of the CPR. The government has indicated an intention to ultimately consider expanding mandatory mediation to higher value commercial claims.

More generally, parties are required to consider whether ADR might enable them to settle their dispute under the pre-action protocol of the CPR. Parties may be subject to cost consequences if they fail to reasonably engage in ADR.

Additionally, the Financial Ombudsman Service (FOS) has compulsory jurisdiction over complaints regarding regulated financial activities within the UK. If disputes between financial institutions and consumers are not able to be resolved internally, the financial institution must notify the consumer of their right to refer the dispute to the FOS. This does not prevent the parties from commencing court proceedings.

Law stated - 17 June 2024

Pre-action considerations

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

Financial services claims are subject to the general Practice Direction on pre-action conduct under the CPR.

Law stated - 17 June 2024

Unilateral jurisdiction clauses

Does your jurisdiction recognise unilateral jurisdiction clauses?

Unilateral or asymmetric jurisdiction clauses are recognised in English law, and courts will give effect to them (***Mauritius Commercial Bank Ltd v Hestia Holdings Ltd & Anor*** [2013] EWHC 1328 (Comm)). Following Brexit, the common law test for determining jurisdiction will apply; it seems likely that unilateral jurisdiction clauses will be upheld by English courts applying this test.

After Brexit, the UK left the Brussels I Regulation, and judgments have been enforceable under the Hague Convention 2005. The Court of Appeal has noted, without reaching a binding decision, that a unilateral jurisdiction clause is unlikely to be capable of engaging the provisions of the Hague Convention 2005 (***Etihad Airways PJSC v Prof Dr Lucas Flöther*** [2020] EWCA Civ 1707). There is, however, uncertainty as to how EU courts will treat unilateral jurisdiction clauses in favour of the UK.

On 12 January 2024, the UK entered the Hague Convention 2019. The Convention aims to provide a uniform approach to recognising and enforcing judgments between contracting states (which include the EU, Ukraine and Uruguay), and encompasses unilateral jurisdiction clauses. The Hague Convention 2019 is expected to enter into force in the UK by mid-2025, and should provide greater certainty on the enforcement of unilateral jurisdiction clauses in favour of the UK in other jurisdictions.

Law stated - 17 June 2024

DISCLOSURE

Disclosure obligations

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?

Financial services disputes are subject to the general disclosure provisions set out in Part 31 and Practice Directions 31A and 31B of the Civil Procedure Rules (CPR). For disputes in the Business and Property courts, parties must also comply with Practice Direction 57AD. In accordance with these provisions, financial services institutions are required to disclose all documents that are in their control on which they intend to rely, and which may adversely affect their own case.

The disclosure obligations set out in the CPR are ongoing – if previously unknown documents are discovered during the proceedings, they must also be disclosed.

If a party considers that their opponent has not complied with their disclosure duty, they may apply to the court for an order for specific disclosure in respect of certain categories of documents. If a party fails to comply with an order for disclosure, the court may strike out its statement of case, grant an unless order against the party, or find the party to be in contempt of court. Further, if a party does not provide relevant documents or evidence, the court may draw adverse inferences.

There are currently no banking secrecy regimes or blocking statutes applicable to financial services disputes in England and Wales. Documents protected by legal advice or litigation privilege are exempt from disclosure. The CPR also allow a party to apply to the court for an order permitting it to withhold disclosure of a document(s) on the basis that disclosure would damage the public interest.

Law stated - 17 June 2024

Protecting confidentiality

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

Financial institutions are required to disclose confidential client documents in court proceedings in England and Wales if the documents fall within the agreed scope of disclosure. If confidential documents are disclosed or referred to in pleadings, a party can seek a court order restricting access to the material.

If the dispute is subject to the jurisdiction of the Business and Property courts, Practice Direction 57AD (PD 57AD) provides specific guidance in relation to documents which may be deemed to be confidential. Paragraph 15 of PD 57AD gives the court the power to order disclosure of confidential documents to a limited class of persons and subject to any necessary conditions. This is sometimes referred to as a confidentiality ring or club. Confidentiality rings are a common feature in other categories of disputes, such as competition and IP disputes. They can be used in financial services litigation, provided the court deems it appropriate to do so.

When considering the class of persons who are permitted to form part of the confidentiality ring, the court has held that designating documents as 'attorney eyes only' will only occur in exceptional circumstances (***Oneplus Technology (Shenzhen) Co Ltd & Ors v Mitsubishi Electric Corporation & Anor*** [2020] EWCA Civ 1562).

A party may redact part or parts of a document if it considers them to be irrelevant to the issues in dispute and confidential. A party applying redactions must explain the basis on which the redaction has been applied to the document.

Law stated - 17 June 2024

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

Section 45 of Chapter 3 of the Data Protection Act 2018 (DPA 2018) provides private individuals with the right to make a data subject access request (DSAR). Making a DSAR allows a private party to request all information an entity holds about them. DPA 2018 provides for some exemptions to the right to request information including where withholding the information would protect public security or protect the rights and freedoms of others.

The court may find that numerous and repetitive requests for information amount to an abuse of process (***Lees v Lloyds Bank Plc*** [2020] EWHC 2249 (Ch)). In such cases, the court can exercise its discretion to not grant an order requiring a party to make further disclosures in response to the DSAR. An entity facing manifestly unfounded or excessive requests may, under section 53 of DPA 2018, charge a reasonable fee for dealing with the request or refuse to act on the request.

The court has discretion to compel a financial institution to comply with a DSAR should the private party make an application to the court in accordance with section 167 of DPA 2018 (***Dawson-Damer v Taylor Wessing LLP*** [2017] EWCA Civ 74, which was concerned with the equivalent provision in the Data Protection Act 1998).

Law stated - 17 June 2024

Data protection

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?

Disclosure can often be time consuming and costly. Courts therefore require that disclosure be provided electronically, which allows data to be managed more efficiently and deals with any accessibility issues (ie, formatting, programme specific documents, etc).

As part of the disclosure process, parties to disputes are required to agree search parameters to be applied to documents in their possession. These may include details of custodians, locations of documents, date ranges and/or keyword searches to be applied as part of the review exercise.

Technology assisted review (TAR) is increasingly used to assist with particularly large disclosure exercises. The court has supported the use of TAR, and has noted the accuracy and efficiency of TAR over manual review. In ***Pyrrho Investments Ltd & Anor v MWB Property Ltd & Ors*** [2016] EWHC 256 (Ch), the use of TAR over manual disclosure was ordered, due to the greater consistency in disclosure which TAR may provide; in ***Brown v BCA Trading Ltd*** [2016] EWHC 1464 (Ch), the court noted the potential cost savings associated with using TAR as opposed to ordinary key word search and manual review.

Law stated - 17 June 2024

INTERACTION WITH REGULATORY REGIME

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

Regulatory authorities have a number of statutory powers available to them under the provisions of the Financial Services and Markets Act 2000 (FSMA 2000). Under FSMA 2000, the Financial Conduct Authority (FCA) may apply to the court for an injunction restraining a person from contravening a requirement imposed by FSMA 2000, or requiring a person to pay restitution to those who have suffered loss as a result of contravention of regulatory requirements. In addition, the FCA may impose financial penalties on authorised persons who have contravened a requirement imposed by or under FSMA 2000, and may also prosecute certain criminal offences.

FSMA 2000 also grants the Prudential Regulation Authority and the Bank of England powers to impose sanctions.

Given the wide-ranging powers regulatory authorities have to impose sanctions themselves without the need for court proceedings, regulators are likely to conduct proceedings and impose fines on financial institutions themselves. In cases where the remedy is only available by way of a judgment or court order, or in particularly high-profile cases where the breaches are particularly serious, regulators may opt for civil or criminal proceedings against the financial institutions, which may additionally act as a deterrent to other entities engaged in similar conduct, and indicate that regulatory authorities are willing to take strong and decisive action to ensure compliance. Further, court proceedings can set precedent and provide clarification on the regulatory regime.

Law stated - 17 June 2024

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

Communications between financial institutions and regulators can be subject to certain disclosure restrictions. Section 348 of FSMA 2000 imposes a duty of confidentiality in respect of sensitive information provided to or obtained by regulators. Regulators are prohibited from disclosing information obtained in the exercise of their functions, save for in the limited circumstances set out in section 349 of FSMA 2000.

In general, communications between regulators and financial institutions are not subject to privilege. In *Property Alliance Group Ltd v Royal Bank of Scotland Plc* [2015] EWHC 1557 (Ch), the court held that without prejudice privilege did not apply to communications between the parties because the communications were not part of a formal dispute resolution process and did not involve a genuine attempt to settle a dispute between the parties.

Law stated - 17 June 2024

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

Section 138D of FSMA 2000 confers a statutory right for private parties to bring a claim for damages against a financial institution if they have suffered loss as a result of a breach of a regulatory rule. A claimant seeking to bring an action under this provision must show a factual and causal link between the breach of the relevant rule committed by the financial institution and the loss suffered by the claimant.

Redress under section 138D of FSMA 2000 is only available to a ‘private person’, which includes any individual (unless they suffered loss carrying out a regulated activity) and any company or other entity (unless it suffered the relevant loss in the course of carrying on business of any kind – in practice, this means that most companies are precluded from relying on section 138D).

Law stated - 17 June 2024

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

A financial institution may need to disclose complaints made against it if they are relevant to the facts and issues in dispute in the proceedings brought by a private party, and are therefore caught by the disclosure provisions under the Civil Procedure Rules.

A party could also apply to the court for specific disclosure of such complaints. In determining whether to order specific disclosure, the court will have regard to whether the complaints are relevant to the facts of the case. In *Property Alliance Group Ltd v Royal Bank of Scotland Plc* [2015] EWHC 1557 (Ch), the court ordered the bank to disclose complaints from other customers relating to LIBOR manipulation and mis-selling, because these served as evidence of the bank's conduct in relation to LIBOR and were therefore relevant to the claim. In contrast, the court in *Claverton Holdings Ltd v Barclays Bank Plc* [2015] EWHC 3603 (Comm) refused to make an order for specific disclosure of such documents on the basis that the existence of prior complaints was not necessarily probative of the conduct alleged in that case and granting the order would result in the bank carrying out an unduly expensive search which would be disproportionate and unreasonable.

Law stated - 17 June 2024

Enforcement

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?

Private parties do not generally have direct enforceable rights to the terms of a business review or redress exercise agreed between a financial institution and a regulator. This question has been considered by the Court of Appeal in *CGL Group Ltd v Royal Bank of Scotland Plc* [2017] EWCA Civ 1073, in which the appellants argued that the banks owed them a duty of care when carrying out a review of the sale of interest rate hedging products. The Court of Appeal refused to find that a duty of care in this case was owed, holding that a decision in favour of the appellants would 'undermine a regulatory scheme which has carefully identified which class of customers are to have remedies for which kind of breach'.

Law stated - 17 June 2024

Changes to the landscape

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

Changes to the regulatory landscape following the financial crisis have impacted financial services regulation. The powers granted to the Financial Conduct Authority and the Prudential Regulation Authority have led to an increase in regulatory actions being brought against financial institutions, particularly in relation to mis-selling financial products and manipulating LIBOR. Some of the leading financial institutions have been fined heavily for their role in manipulating LIBOR. Similarly, banks have faced regulatory sanctions for mis-selling interest rate swaps and payment protection insurance. The increased regulatory action has inevitably led to an increase in litigation in this area.

Law stated - 17 June 2024

Complaints procedure

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 complaints service established to deal with customer complaints against financial institutions without the need for proceedings. The FOS is available to individuals and small and medium-sized enterprises in respect of complaints regarding a wide range of financial products and services including, banking, insurance, investments, pensions, loans, mortgages and debt management.

Financial services firms are required to have an established complaints procedure of which their customers should be made aware. Once a complaint has been received, firms have up to eight weeks to investigate the complaint and notify the customer of the outcome. Firms should ensure that they keep the customer updated throughout this process. Once the final response letter has been issued, the customer is entitled to refer the matter to the FOS should they not be satisfied with the outcome.

As of 1 April 2024, the maximum compensation the FOS can award against a financial institution is £430,000 for complaints referred to FOS on or after 1 April 2024 about acts or omissions by firms on or after 1 April 2019. Any complaints about acts or omissions by firms before 1 April 2019 have a maximum compensation limit of £150,000.

The decision of the FOS, if accepted by the complainant, becomes binding on both parties and court action cannot be taken against the financial institution in respect of the same complaint. If the complainant does not accept the FOS' decision, then they are free to seek remedy from the courts in the usual manner.

Law stated - 17 June 2024

Recovery of assets

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 Financial Services Compensation Scheme (FSCS), established by FSMA 2000, provides private individuals with a statutory mechanism to recover lost assets from insolvent financial services firms. The FSCS covers a wide range of financial services, including banking, debt management insurance, investments, mortgages, and pensions.

Generally, recovery is limited to £85,000 per eligible person, per authorised firm. There are other thresholds in place for specific products and situations: for example, temporarily high balances in bank accounts are subject to a recovery limit of £1,000,000 for up to six months; and with insurance products, private individuals are able to recover between 90–100 per cent of the value of the claim.

To be eligible for compensation under the FSCS, the financial services firm must be authorised by the Prudential Regulation Authority and/or regulated by the Financial Conduct Authority. Private individuals should have regard to the eligibility criteria provided by the FSCS, as this must also be complied with in order to bring a claim under the scheme.

Law stated - 17 June 2024

UPDATE AND TRENDS

Challenges and trends

What are the principal challenges currently facing the financial services litigation landscape in the past year? 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?

Financial services litigation has continued to loom large in the overall UK litigation landscape, not only in terms of frequency of claims, but also in relation to the degree of complexity and the sums at stake.

While the courts have tended to articulate a restrictive approach to the development of legal duties on financial institutions (such as the so-called *Quincecare* duty), new regulatory requirements, such as sustainability disclosure obligations and the consumer duty, are likely to put increased pressure on financial institutions to ensure that they are complying with regulatory requirements and not misleading their customers. Similarly, the uptake of new technological developments by financial institutions, such as AI, may well expose them to increased regulatory and litigation risks.

More established financial services litigation mechanisms, such as securities and fraud claims, are likely to continue as the legal frameworks develop. Class actions are also likely to continue to develop, with financial institutions both as defendants and as claimants.

Law stated - 17 June 2024