

**UK COMMERCIAL DISPUTES
2023 YEAR IN REVIEW**



As 2023 draws to a close, we reflect on the key developments in commercial litigation in the year that was. With many significant decisions in the English courts this year, in this newsletter we offer our reflections on the key developments which shaped the 2023 legal landscape, and we look forward to what's ahead in 2024. We also take a moment to reflect on the high points of another active year for Hausfeld's Commercial Disputes group.

HOW DID 2023 CHANGE THE LEGAL LANDSCAPE?

Duties owed by banks to customers

The law around the Quincecare duty and the scope of banks' duties to query instructions to carry out transactions has continued to develop. We saw several high-profile decisions in 2023, including two important Supreme Court decisions which have clarified the extent of the Quincecare duty.

Insolvency

The Supreme Court handed down its judgment in *Stanford International Bank Limited (in Liquidation) v HSBC Bank plc* [2022] UKSC 34. This case dealt with the operation of the Quincecare duty in insolvency situations. The majority of the Supreme Court decided that even if the bank in question had breached its Quincecare duty, the claimant had not suffered a loss, as payments made by the bank merely discharged debts it owed to certain customers in an equivalent amount. This was a very fact-specific decision and the Supreme Court left open the possibility that future Quincecare claims could be brought in an insolvency context where payments reduce assets available for distribution. [For further details.](#)

Third party fraud

In July 2023 the Supreme Court gave its unanimous judgment in the case of *Philipp v Barclays Bank UK Plc* [2023] UKSC 25, which dealt with a situation where the relevant transaction was authorised by a customer acting under the influence of a third-party fraudster. The Supreme Court determined that the scope of the Quincecare duty does not extend to cases where a customer is defrauded by a third party, as opposed to the typical Quincecare scenario of a customer being defrauded by one of its agents. The

Supreme Court's judgment reinforces that the relationship between a bank and a customer is a contractual one. Therefore, the bank's obligation to carry out payment instructions in accordance with its mandate from the customer does not lend itself much flexibility, rather the contract requires the bank to follow payment instructions promptly, without second-guessing the customer's motivation. [For further details.](#)

The other side of Quincecare

Staying with banks' duties to customers, in March 2023 Hausfeld prepared a summary of what account holders can do when protective measures by financial institutions cause harm. Very few would disagree that it is important for borrowers, especially SMEs and individuals, to be afforded fair and appropriate protection against fraud, which is increasingly sophisticated and difficult to detect. However, claims may be available against financial institutions that fail to discharge their duties lawfully, even under the guise of 'protecting' account holders from harm or complying with regulations. [For further details.](#)

Concealment by defendants

Cases continue to be brought by claimants who have discovered their entitlement to claim only after considerable time has passed. The Supreme Court has recently provided welcome clarification on the meaning of "deliberate concealment" and "deliberate commission of breach of duty" under s32 of the Limitation Act 1980, in *Canada Square Operations Ltd v Potter* [2023] UKSC 41. In unanimously dismissing Canada Square's appeal, the Supreme Court concluded that the words "deliberately" and "concealed" must be given their ordinary meaning, requiring only an intended concealment, whether by positive steps or by a withholding of information. As Canada Square had deliberately concealed the facts required to bring the claim and as the claimant did not find out about those facts until shortly before the claim was commenced, it was brought in time. This important decision is likely to have far-reaching impact on cases involving deliberate concealment and the clarification of the meaning of "concealed" is reassuring for potential claimants.

Cryptoassets

Cryptocurrencies continue to emerge as the subject of numerous disputes in English Courts and 2023 was no exception.

The recent High Court decision in *Jones v Persons Unknown* [2022] EWHC 2543 (Comm) highlights the English court's ability to deal with crypto fraud in novel ways, including the imposition of a constructive trust between an individual and a cryptocurrency exchange platform, and permitting service by way of an NFT air drop. This is a particularly helpful authority for victims of crypto fraud where, in many cases, they do not know the identity or location of the fraudsters. [For further details.](#)

In addition, the Court of Appeal's decision in *Tulip Trading Limited v Wladimir van der Lan and Ors* marked an important development in the cryptocurrency space. The High Court had earlier decided that developers of cryptocurrency networks cannot owe fiduciary duties to the owner of cryptocurrency used within that network. The claimant's subsequent appeal was then allowed. Whilst the question of whether the duty arose on the facts of the present case has not yet been determined, by allowing the case to proceed, the English courts have demonstrated that they continue to be prepared to consider the claimants' position in this space. Moving forward to 2024, when the hearing is expected to take place, it will be interesting to observe how the court decides to deal with these issues. [For further details.](#)

In *Chechetkin v Payward LTD & Ors* [2022] EWHC 3057 (CH), the High Court was tasked with considering an arbitration clause in the context of a consumer crypto contract. It was held that the court had jurisdiction to consider a consumer's claim for repayment of sums lost trading cryptocurrencies, rejecting the defendant's arguments that an arbitration clause should prevent the claim from proceeding. The judgment is important to UK consumers, with the English Courts clearly taking a robust pro-consumer approach in confirming that consumer claims of this kind can be heard in the domestic courts. [For further details.](#)

Arbitration

In a further look at the interaction between arbitration and consumer legislation, the English Commercial Court provided clarification on the circumstances in which consumer law can be engaged to prevent enforcement of an arbitration award on public policy grounds pursuant to s103(3) of the Arbitration Act 1996. The Court in *Eternity Sky Investments Ltd v Zhang* [2023] EWHC 1964 (Comm) refused a consumer's application to set aside an order enforcing a New York Convention arbitration award, where it was alleged that the Consumer Rights Act 2015 applied. This decision is an important further clarification of the circumstances in which the English courts will block enforcement of awards in the context of consumer contracts. [For further details.](#)

In a landmark arbitration judgment in November 2023, the English courts overturned a USD 11 billion arbitration award against the government of Nigeria, on the grounds of serious irregularity. The decision has been hailed as a victory against corruption. The Commercial Court's judgment sought to provoke debate within the arbitration community regarding the arbitration process and whether it needs further attention, in particular where the value of the claim is so large and where a state is involved. [For further details.](#)

Mediation

This year has once again seen a number of important pro-mediation developments, with the judiciary and the Government both emphasising the value of mediation with them being increasingly willing to consider compelling parties to come to the table.

Court's power to order mediation

The Court of Appeal has recently handed down its decision in the much-anticipated case of *Churchill v Merthyr Tydfil County Borough Council* [2023] EWCA Civ 1416, where it was confirmed that the court has the power to compel parties to engage in Alternative Dispute Resolution. Whilst this claim deals with a failure to exhaust the Council's internal complaints procedure (as a form of ADR), the decision is relevant to all ADR procedures, including mediation. The Court of Appeal decided that parties can be ordered to undertake ADR, or proceedings can be stayed to allow for ADR, in circumstances where it is proportionate to do so and where this does not hinder the claimant's right to a fair trial. The Court of Appeal recognised that a wide range of factors would be relevant in determining whether such an order will be appropriate in any particular future case.

Compulsory mediation for small claims

In 2023 it was also confirmed that mediation will be made compulsory for small claims worth up to £10,000. This reform will see mediation become a standard step in the vast majority of claims allocated to the Small Claims track, with sanctions including costs consequences or strike out of a party's claim or defence for non-attendance of a scheduled telephone mediation. This is an important development, as mandatory ADR of this kind is new in the English civil courts and while only small claims are currently impacted the Government has indicated the scheme is likely to be extended to larger claims in the future.

The Singapore Convention

Another key mediation development this year was the UK's May 2023 signature of the United Nations Convention on International Settlement Agreements Resulting from Mediation, known as the Singapore Convention. Ratification will now take place once all necessary implementing legislation has been passed to facilitate the Convention's smooth operation in the UK. Once in force, the UK courts will directly enforce settlement agreements resulting from mediations held anywhere in the world, without the enforcing party needing to commence proceedings for breach of contract in respect of the paying party's failure to comply with the settlement agreement. The Convention will likely be a useful tool for claimants where a party is attempting to walk away from a settlement agreement resulting from a mediation in circumstances where enforcement would otherwise be difficult given the location of assets. That said, while signature of the Convention is a welcome sign of Government support for mediation, it is relatively uncommon for settlements reached through mediation to need enforcement action. [For further details.](#)

Litigation funding

The Supreme Court's PACCAR decision was handed down in July and our reflections around this significant decision can be accessed in our 2023 Year in Review Collective Redress [Newsletter](#) on page 6.

Procedural developments

In one of the most important procedural developments of 2023, the Pre-Action Protocols Working Group of the Civil Justice Council published the first part of its final report on the Pre-Action Protocols in August 2023. The final report examines the role of the Pre-Action Protocols in the civil justice system, the potential benefits of digitalising pre-action processes, and the place and content of the Practice Direction on Pre-action Conduct. [For further details.](#)

HAUSFELD COMMERCIAL DISPUTES TEAM: 2023 HIGHLIGHTS

Growth and recognition

Hausfeld's Commercial Disputes team has continued to grow from strength to strength over 2023. In January 2023, [Duran Ross](#) was promoted to Partner. Duran is recognised for his expertise in both complex multinational litigation and arbitration, representing individuals and companies in a variety of disputes, including insolvency matters. [Jonathan Amior](#) and [Chrysanthi Bampali](#) were promoted to Senior Associate and the team welcomed two new associates: [Alex Cooper](#) and [Chantal Ottow](#).

The Commercial Disputes team received recognition with a variety of awards and accolades, consolidating its directory rankings. The [Legal 500](#) acknowledged the team's litigators as being "very focused, efficient, and on the ball", "focused on goal achievement while always maintaining the highest degrees of sensitivity, empathy and humanity to its legal solutions and client management", while the international arbitration team was commended for being a "driven, focused, accomplished and experienced team in this sector". [Chambers UK](#) recognised the team as being a go-to firm for banking, environment and commercial litigation.

Case highlights

The Commercial Disputes team continued to represent our clients in complex and high-value litigation and commercial arbitrations across multiple sectors in 2023, bringing to bear our depth of expertise and experience in financial services disputes, M&A and post-completion disputes, boardroom and shareholder disputes, insurance, intellectual property, restructuring and insolvency, civil fraud and more. Highlights include:

- Representing a claimant bringing a high-profile LIBOR manipulation claim against a large retail bank with a value of over £1 billion and involving some of the most prestigious assets in London.
- Acting for a subsidiary of a large private equity house in an LCIA arbitration against a law firm arising from the firm's historic negligence when advising the subsidiary on a corporate restructuring. The arbitration went to a final hearing for 10 days in October 2023 before a Tribunal led by a former President of the UK's Supreme Court.
- Acting for an individual who sold his business in pursuing three separate negligence claims against his four advisers on the transaction. Issues include alleged double counting of cash in the funds flow, the provision of negligent tax advice relating to transaction bonuses, and the failure to upload a key due diligence document to the data room.
- Acting for a joint venture in relation to a failed investment in the UK's largest static mobile homes park operator. The joint venture has engaged Hausfeld to seek to recover the debt, which is currently approximately £57m, through both insolvency processes as well as pursuing civil fraud and contractual claims.
- Advising on aviation insurance claims for aircraft stranded in Eastern Ukraine as a result of the Russian invasion.
- Acting for the All-Party Parliamentary Group on Fair Business Banking, a cross-party group of MPs and Peers, in a judicial review against the FCA, requiring the FCA to give bank customers access to IRHP compensation of c. £1 billion.
- Successfully winning an ICC arbitration for an airline in a dispute with a logistics company by proving liability under a collateral oral contract, a duty of care and for inducing breach of contract.
- Representing Spanish and Panamanian companies in a substantial claim alleging that a global travel company misappropriated a highly valuable and commercially sensitive airfare booking software system.

Personal perspectives

We continue to strive for diversity, inclusivity and collegiality within Hausfeld, working continually to learn and improve in order to produce the best results for not just our clients but also the communities we represent. We once again explored these themes with a variety of events and publications in 2023, with highlights including:

- In July 2023, we celebrated UK South Asian Heritage Month for the first time, with a panel event at the firm fielding speakers from both Europe and the US to mark the important contribution of the South Asian community throughout history.
- October 2023 saw us team up with Black History Walks to showcase African and Caribbean influence and contribution throughout London, in honour of UK Black History Month. These Hausfeld walks took place in the City and in the National Gallery, taking a look at key moments in Black History.
- In December 2023, we marked International Day of Persons with Disabilities with an inspiring presentation on workplace inclusion from Yasmin Sheikh of Diverse Matters, former Vice-Chair of the Disabled Solicitors Network at the Law Society as well as multi-award-winning presenter and TEDx speaker. Yasmin shared her insights on how we can all become disability confident, overcoming social barriers to inclusion.

WHAT'S ON THE HORIZON FOR 2024?

With a variety of high-profile cases and legislative changes coming down the track, 2024 promises to be another interesting year for commercial disputes.

Supreme Court decisions

In the banking arena, an important Supreme Court decision is due this year on the interpretation of guarantees in an appeal of the case of *Shanghai Shipyard Co Ltd v Reignwood International Investment (Group) Company Ltd* [2021] EWCA Civ 1147. The case concerns whether the guarantee in question was a demand guarantee, so that payment was due on demand, regardless of whether there was contractual liability according to the terms of the underlying contract. This case will have consequences for the interpretation of other guarantees and whether payment can be demanded under the guarantee before the contractual dispute resolution has been exhausted.

In July, the Supreme Court heard the appeal of the Court of Appeal's decision in *Byers & Ors v Saudi National Bank* [2022] EWCA Civ 43. In the earlier decision, the Court of Appeal decided in favour of the Defendants in a claim against it for knowing receipt, confirming that a claimant needs to have a beneficial interest in property at the time the property is received to sustain a personal claim to it. The proceedings were issued by Saad Investments Company Ltd (and its joint liquidators) alleging knowing receipt of trust property against Saudi National Bank, contending that a transfer of shares had been made in breach of trust and that the transferee had known of its interest in the disputed securities. The Supreme Court heard the appeal on this very issue, where the appellants contended that they were not required to demonstrate a continuing proprietary interest in the disputed securities to succeed in their claim. The Supreme Court's decision in this case will be welcome guidance on the limits of knowing receipt, in particular whether there must also be a continuing proprietary interest for the claim to succeed. The Supreme Court judgment is awaited. [For further details.](#)

Securities litigation

In 2024 we expect to see the continued growth of collective shareholder actions under FSMA s90/90A. There are a number of high-profile cases currently proceeding through the courts which are likely to provide important guidance on claims of this kind. As these claims commonly involve circumstances where facts have been concealed from potential claimants, it is expected that this year's Supreme Court decision in *Canada Square* (covered earlier in this newsletter) will be helpful to many claimants bringing this type of claim. We await further FSMA s90/90A claims in 2024, which may well also see clarification of the parameters of these claims.

Brexit legislation

In a welcome development, on 23 November 2023 the UK Government announced that the UK will join the Hague Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters (Hague 2019). The Government also confirmed that it will seek to do so as soon as practicable. It is accordingly expected that after signing Hague 2019 the required legislation will be passed in the UK and ratification will follow swiftly, probably within 2024. Hague 2019 will enter into force for the UK twelve months after it is ratified here, so it is hoped that entry into force will happen in the first half of 2025. This will offer a strong multilateral framework of uniform rules for the recognition and enforcement of a wide range of judgments between the UK and other Hague 2019 contracting parties, including the EU and Ukraine. This is particularly important as (post-Brexit) there is currently no fully comprehensive private international framework between the UK and the EU covering civil and commercial matters. For example, Hague 2019 will permit enforcement of judgments under non-exclusive jurisdiction clauses, which are not currently enforceable under the 2005 Hague Convention on Choice of Court Agreements.

ESG litigation

2023 has been another busy year for Environmental & Social Governance cases, a trend which is set to continue into 2024. Our environmental team report on the latest from COP28, the most significant climate actions in the last year, and their impact, and what businesses need to know. For further details, please read our 2023 [Climate Impact Year in Review](#).

This 2023 Year in Review was authored by John McElroy, Rebecca Warder and Chantal Ottow.



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Beyond their impeccable ethics and apex legal knowledge, they are reliably creative and fearless when it comes to legal strategy and tactics. They are collaborative when appropriate and always transparent.

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