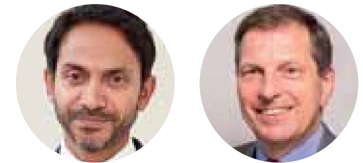
Was 2022 a good year for the banks?



Yash Kulkarni KC and Chris Wright

Yes

Although most, if not all, years are good for the banks, 2022 was very good. We focus on three areas: the *Quincecare* duty; limiting the remedies of victims of push payment fraud; and limiting the access of stale claims against banks. All illustrate how 2022 is a year that banks will remember fondly.

Quincecare duty

The *Quincecare* duty was a judicial favourite in 2022 – there were more important developments over those 12 months than have been seen for some years. To recap, the *Quincecare* duty – named after the 1992 case of *Barclays Bank plc v Quincecare Ltd* – refers to the duty of a bank to refrain from acting on a payment instruction and to make enquiries when it is on notice of a serious possibility of fraud.

In *Royal Bank of Scotland International Ltd v JP SPC 4 and another (Isle of Man)* [2022] UKPC 18, the Privy Council held, in a judgment handed down in May 2022, that banks do not owe a *Quincecare* duty to a beneficial owner of monies in an account. In that case, the account holder had defrauded an investment fund (the beneficial owner of the monies) by paying money out in breach of a legitimate investment scheme. The Privy Council held that a bank's *Quincecare* duty to protect its customer did not extend to the beneficial owner, who stood behind its customer: only the bank's customers themselves should benefit from the *Quincecare* duty.

The Privy Council also rejected the suggestion that there was any implied assumption of responsibility by the bank towards the beneficial owner, or that its duty of care should extend beyond the limits of the *Quincecare* duty, rejecting any notion of accessory liability of the bank. A positive decision for the banks, which, while not strictly binding on English courts, is likely to be followed.

In *Federal Republic of Nigeria v JPMorgan Chase Bank* [2022] EWHC 1447 (Comm), the High Court rejected a *Quincecare* claim brought by Nigeria in the context of payments amounting to around $1bn to a Nigerian company closely associated with a disgraced former minister out of an account held by Nigeria with JPMorgan. The High Court reiterated that a banker's primary duty was to comply promptly with authorised payment instructions from its customer and that the *Quincecare* duty applied by way of derogation from that duty. It was for Nigeria to prove that the payments were part of a contemporaneous fraud on it, and that the bank was on notice of the possibility of that fraud. The court underscored that breach of the *Quincecare* duty required gross negligence. This meant there was an obvious risk that Nigeria was being defrauded and that the bank's conduct evidenced serious disregard for that risk. Here there was a risk of fraud in relation to the payments in question but that risk was held not to be obvious and the bank's conduct did not show the serious disregard required. The court thus reminded potential defrauded claimants of the high bar that needs to be crossed before they can consider their own banks as targets.

Finally, in a judgment handed down on 21 December 2022, the Supreme Court in *Stanford International Bank Ltd (in liquidation) v HSBC Bank plc* [2023] 2 WLR 79 analysed the question of the loss suffered by an insolvent company where a bank pays out money, in alleged breach of its *Quincecare* duty. The claimant had been used as the vehicle for a substantial Ponzi scheme fraud and went into insolvent liquidation. Its liquidators brought a claim in respect of £116m, which had been paid to 'early customers' of the Ponzi scheme, who recovered in full before the scheme collapsed, leaving 'late customers' at risk of losing all their money. The claimant argued that the bank had breached its *Quincecare* duty in executing the order for payment to the early customers when it had reasonable grounds to believe this was an attempt to misappropriate funds.

On the question of loss, the claimant argued it had suffered the loss of a chance: when the payments were made it was hopelessly insolvent; had the early payments not been made, there would have been more left in the pot to distribute to creditors as a whole and the creditors would, generally, have received more than they now would. The Supreme Court disagreed, and held that the same extent of indebtedness would have been discharged vis-à-vis its creditors. While the extra £116m might have meant all creditors would receive, say, 12p in the pound rather than the 5p in the pound the late customers would receive, at the end of day, the same amount of indebtedness would be repaid.

APP fraud

In May 2022, the Commercial Court in *Tecnimont Arabia Ltd v National Westminster Bank plc* [2022] EWHC 1172 (Comm) dismissed claims for knowing receipt and unjust enrichment by an authorised push payment (APP) fraud victim against the bank. The claimant, induced by a fraudster, instructed its bank to pay $5m to a NatWest account in the name of a company controlled by the fraudster, who subsequently abstracted most of the funds. The claimant then brought knowing receipt and unjust enrichment claims against NatWest, that is, against the third-party bank.

The court held that the claimant's claim for knowing receipt failed as the funds were not trust property: the fact the transfer was procured by fraud did not make them trust property. Furthermore, NatWest had received the monies for its customer and

not for itself. As for unjust enrichment, there had been no direct transfer between the claimant and the bank such that any unjust enrichment by NatWest was not at the claimant's expense so that the claimant had no right to restitution.

Limitation

Three decisions in 2021 on limitation merit a mention though they are just outside our timeframe. They suggested a move by the courts to try to prevent stale claims against banks getting very far and by treating 'reasonable diligence' within section 32 of the Limitation Act 1980 as far more achievable than many claimants would wish.

In *European Real Estate Debt Fund v Treon* [2021] EWHC 2866 (Ch), a fraud claim concerning information provided before a fund's investment, it was held that a reasonable investor exercising reasonable diligence could have discovered sufficient facts to enable them to plead a statement of claim within the limitation period, even if this was before the claimant had suffered any loss from the fraud.

Similarly, in *ECU Group plc v HSBC Bank plc* [2021] EWHC 2875 (Comm), it was held that the claimant could have been in a position, had it exercised reasonable diligence, to plead most of its claims of front-running, trading ahead of client instructions, breach of confidence and unlawful means conspiracy against HSBC when they arose in 2006.

Finally, in *Libyan Investment Authority v Credit Suisse International* [2021] EWHC 2684 (Comm). The court held that the LIA could with 'reasonable diligence' have properly pleaded its case in fraud before the limitation date.

In all three cases, the claimants were not entitled to postpone the start of limitation under section 32 of the Limitation Act 1980.

In conclusion, 2022 was a good year for the banks.

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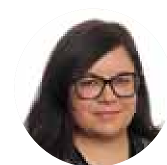

Robert-Jan Temmink KC, Tracey Wright

No

In answering this question we are going to give the lawyers' answer: it depends. Our equivocal answer arises from the choice of metric by which we answer the question and which banks we choose to look at. We accept that higher interest rates usually lead to more profit for banks; we accept that some of the legal cases of 2022 seem to have favoured the banks above customers; but overall 2022 has been a bad year for banks.

Geopolitical shocks

What has dominated the news over the past year? A hesitant recovery from a pandemic (and a stagnant anticipation of a relapse), a war in Europe that shows no sign of settlement but presents shocking daily news stories and a degree of instability across Europe we hoped never to see again, and an increasing awareness that Brexit has led to labour shortages and innumerable unnecessary (and avoidable) costs.

With war came more sanctions. Perhaps that should not have been a heavy burden for the banks given the already weighty international regulation to stop money laundering, financing of terrorism and tax evasion. But have they succeeded and, if they have, at what cost? Criticism of banks' abilities to meet the standards necessary to comply with international regulations is not new: reports and attempts to demonstrate their failings where sham companies are set up and accounts opened are a necessary test of the system, but adding another significant compliance challenge on top has stretched them. These are matters driven by the banks' internal structure, reporting lines and the costs of managing and recruiting to posts that monitor and implement regulation and report on investigations.

The working regime for bankers now is a tightly woven web of legislation and regulation to understand, implement and update, almost daily. The (sole?) legacy of the Truss month may be a removal of the cap on bankers' pay, but even so the stress of working in a highly regulated environment with restrictions on free movement of workers, and the need to obtain ever-higher profit means that banking is a less attractive career than it has been in the past. This has repercussions for banks' ability to attract and retain talent, and talent is needed to adapt and thrive in an increasingly complex and volatile macroeconomic environment.

Litigation and reputational risks

Regulation is one thing, but doing the right thing is quite another. Banks need to engage with changing societal expectations concerning sustainable finance, as the sector appears to recognise – UK banks have joined coalitions like the Glasgow Financial Alliance for Net Zero. However, 2022 was a year where banks repeatedly disregarded those commitments. They continued to make loans and invest in projects which contribute to carbon emissions. Some banks (HSBC being one public example) have been found by advertising standards agencies to have misled the public about their green credentials. Not only has this resulted in new litigation against banks globally, but it has further eroded public trust in the sector.

Macroeconomic factors

The macroeconomic situation may look superficially favourable for banks – broadly, higher interest rates lead to higher profits – but that glimmer of light needs to be balanced against dark days ahead for banks and borrowers. Over the past two years, UK banks have issued companies with a large number of emergency loans under the UK government's Covid 'bounce back' scheme, which have been flagged as fraudulent by the Department for Business, Energy & Industrial Strategy(BEIS). BEIS estimates that of the £47bn lent by all banks through the scheme, up to £1bn could be lost to fraud.

In the meantime, borrowers will be faced with variable rate mortgages which they may no longer be able to afford. Not only has the cost of mortgages increased in the last part of 2022, but the value of real property