Disputes Outlook 2025

Financial services

For what comes next

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Disputes are inevitable. Spotting future risks can help you prepare for a more effective resolution. Once you are aware, you can prepare - our team is here for what comes next.

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APP fraud

Authorised Push Payment (APP) fraud remains extremely high on the agenda for all organisations that process payments. The courts have delivered significant and surprising decisions in this space in 2024 - particularly concerning the application of a potential 'retrieval duty' to both sending and receiving payment service providers (PSPs), and the merits of the causes of action often advanced against receiving PSPs.

Recent legislation has extended the time available to PSPs to investigate suspected fraud before processing payments. The role 'Big Tech' and social media platforms play in preventing fraud is still the subject of debate, and the National Payments Vision advocates for a cross sectoral approach to tackling fraud. The Payment Systems Regulator's (PSR's) controversial mandatory reimbursement scheme recently came into force in respect of payments made by CHAPS and Faster Payments.

→ While in-scope PSPs grapple with the early operational stages of mandatory reimbursement, all organisations which process payments should also monitor developments in case law, as well as opportunities to feed into the further development of cross-sector policy.

Cryptocurrency

As cryptoassets become increasingly widely used and valuable (even more so following the recent US election), more disputes about them are coming before the courts. In two notable decisions in 2024, the courts considered the correct approach to the assessment of damages (in a claim involving a loan of Ethereum tokens), and several novel legal points arising in an attempt to recover Tether funds - allegedly lost to fraud - from a cryptocurrency exchange through tracing, constructive trust or unjust enrichment. The Property (Digital Assets etc) Bill was introduced in September 2024 and, if passed, will - in addition to the common law position - provide greater certainty as to the legal status (as personal property) of digital assets such as cryptocurrency. This would further contribute to the rise in the prevalence of cryptocurrency in disputes, with owners better equipped to act in the event of fraud/theft, and applicants looking to bring digital assets within the scope of freezing injunctions.

On the regulatory side, 2024 saw the Financial Conduct Authority (FCA) making its first criminal prosecution for unlawfully running crypto ATMs and taking enforcement action against a cryptoasset trading platform. Both the FCA and the Prudential Regulatory Authority (PRA) are currently seeking feedback from market participants on (respectively) plans to improve the transparency of the UK's crypto markets, and both current and expected future cryptoasset exposures.

→ As the UK's regulatory regime around cryptoassets continues to evolve, any firms doing business in this space should ensure they remain up to date with developments in the FCA's approach and provide feedback to the FCA and PRA where applicable.

Settlement/release

The courts dealt with several cases in 2024 where claimants have sought to re-litigate matters despite earlier compromises. Three notable cases against defendant FS firms (two of which were dealt with together) were heard by the Court of Appeal, which in both instances rejected the respective claimants' challenges to the earlier compromise agreements. The judgments give important guidance on the interaction between settlements, the FCA's dispute resolution complaints sourcebook (DISP) rules, and the unfairness provisions of the Consumer Credit Act 1974, as well as on the terms of settlement of alleged 'fraud' claims.

→ All organisations should ensure they/their advisers take great care in agreeing settlement terms since, in the current litigation climate, opponents may be more likely to try to re-open disputes.

New type of security in Scotland

The Moveable Transactions (Scotland) Act 2023 creates a new form of security (the statutory pledge) in Scots Law which will simplify the process for taking security over moveable assets (for example plant and machinery or intellectual property). A new Register of Statutory Pledges will be introduced. It will also be possible to complete assignation (the Scottish equivalent of assignment) by entering the assignation into a Register of Assignations rather than intimating it.

The Act is expected to come into force on 1 April 2025. The Act also sets out details of enforcement provisions for statutory pledges. These include that, following a Pledge Enforcement Notice being served, in some cases a court action must be raised to obtain a court order to enforce the pledge.

→ Lenders should be aware of this new type of security in Scotland and the relevant enforcement provisions.

Group litigation

Group or class actions in the financial services arena have been a growing theme for some time and are likely to continue to be particularly contentious in the year ahead.

In retail banking, claimant firms continue to seek to pursue large numbers of claims in relation to PPI, mortgage interest rates and motor commission payments (amongst other things) through group actions. While the claimants often seek Group Litigation Orders as part of their overall strategy, this has been met with mixed results in the Courts. Likely as a result (at least in part) of the Courts' hesitance to grant GLOs even where the threshold test is met, claimants are increasingly simply issuing 'omnibus' Claim Forms and, where there is more than one omnibus claim, seeking to have them case managed together. The appropriateness of the use of such Claim Forms was recently considered by the Court of Appeal, however further key appeals on the issue in the context of motor finance claims are due to be heard in February 2025.

Securities class actions under s.90A/Schedule 10A of FSMA 2000 (in relation to alleged misleading statements, dishonest omissions and/or dishonest delay with respect to published information) remain an area to watch in 2025. While a number of such claims brought in recent years have settled, case law is developing around summary disposal. A recent High Court decision struck out large swathes of a s.90A claim by investment funds and while a significant minority of the claims remained, the proceedings have since settled. Separately, a Court of Appeal judgment is awaited in what is understood to be the first attempt to bring similar securities claims via a representative action under CPR r.19.8, which was struck out at first instance. Further developments in this area could materially affect the level of risk such claims potentially pose to UK listed companies (including banks and FS firms).

The conclusions of the Civil Justice Council's review of litigation funding, expected in summer 2025, and any resulting proposals for legislation and regulation, will doubtless have a significant impact on the group litigation/class actions landscape as a whole – including the increasingly common 'satellite' litigation around disclosure of funding arrangements and security for costs.

- Financial services firms should keep a watching brief on developments in the key cases in this area; as the varying strategies of claimant firms (and those funding them) continue to evolve, so too does the Courts' approach to managing the proceedings.
- Firms with experience of dealing with funded claims may also wish to consider responding to the Civil Justice Council's consultation on litigation funding; the deadline for doing so is 31 January 2025.

Financial crime

We anticipate disputes around the PSR's mandatory reimbursement scheme in respect of APP fraud as its provisions are interpreted, particularly those relating to the consumer standard of caution exception, the treatment of multiple payments, and disputes regarding the contribution amount between PSPs.

APP fraud victims may also complain to the Financial Ombudsman Service (FOS) given the possibility of an award higher than the scheme limit of £85,000 and we anticipate regulatory action in this space, with the FCA indicating that the Consumer Duty could be used to take enforcement action against regulated firms who do not have robust anti-fraud measures in place.

As they start to respond to claims received under the mandatory reimbursement scheme, in-scope PSPs will no doubt consider very carefully all the guidance issued by the PSR as well as the wider regulatory, disputes and market perspectives.

- Organisations should monitor the regulators' actions, as well as case law and FOS decisions for additional guidance upon the nuances of the APP mandatory reimbursement scheme.
- There may be opportunities for lobbying around cross sector information sharing, and the responsibility allocated to big tech and social media platforms in tackling financial crime.

Commission disclosures

The legal and regulatory position in relation to commission arrangements between brokers and lenders continues to evolve. Increased disputes activity is anticipated particularly within the motor finance market (and potentially other markets where commission is or was paid to intermediaries without adequate disclosure), following a Court of Appeal decision which went beyond what the industry had previously considered to be the regulatory requirements. Permission to appeal this decision has been granted and the Supreme Court is due to hear the expedited appeal in April 2025. There has also been a recent judicial review judgment which dismissed a challenge to a FOS decision to uphold a consumer complaint relating to motor commission. The FCA intends to set out the next steps in its existing review of historic discretionary commission arrangements in May 2025. In the meantime, the FCA has extended the time firms have to respond to complaints about motor finance commission until December 2025.

- FS firms should identify the business areas potentially affected by the recent Court of Appeal judgment and consider steps to mitigate litigation/regulatory risk pending the outcome of the appeal to the Supreme Court.
- Organisations of all industries should also identify any parts of their business which have involved the payment of commission to brokers and consider to what extent these arrangements were disclosed to their customers.

Financial greenwashing

The FCA's anti-greenwashing rule came into force on 31 May 2024. We anticipate that FS firms will encounter challenges from the regulator, customers and/or environmental/social campaign groups on alleged 'greenwashing' as we head into 2025. Elsewhere, ClientEarth's recent complaint to the French financial regulator in relation to certain 'sustainable' investment funds is likely to be regarded as something of a test case in (at least) the EU and UK markets and is one for FS firms to watch. Meanwhile, following the lead of the EU in 2020, HM Treasury has recently published a consultation on a potential Green Taxonomy in the UK intended (amongst other things) to help prevent greenwashing by providing a common framework to define sustainable economic activities.

- There are various practical steps firms can take to mitigate risk in this respect (to the extent they have not already done so). Read **our article here** for more information.
- Organisations should continue to monitor developments in respect of the potential Green Taxonomy and consider responding to the consultation.

FCA and FOS Powers

In 2024, we saw several high-profile judicial review challenges to decisions of the FOS, along with a significant decision in relation to the extent of the FCA's power to impose redress requirements. A further judicial review of an FCA decision in relation to interest rate hedging product redress was heard in December 2024 and the decision is awaited. Relatedly, and while there is no right of action for breach of it per se, the FCA has used the Consumer Duty to address a broad range of areas where it considers there is potential for consumer harm, and we see this continuing in 2025.

The Chancellor has announced plans to reform the FOS and encourage co-operation between the FCA and FOS, particularly on historic market practice and mass redress events and a joint Call for Input has been launched seeking views on this by 30 January 2025. If successful, these reforms could help to bring about greater consistency in outcomes, and greater certainty and confidence in the financial market as a result. In the short term, however, we anticipate an increase in challenges by firms emboldened by the Government's position that financial regulation "has gone too far."

- Regulated firms should watch developments in this space closely and consider engaging in the policy making process, for example by responding to the FCA and FOS's joint Call for Input on modernising the redress system.

Data Disputes

Disputes around data breaches are a key challenge for the FS sector in 2025. FS firms hold significant amounts of sensitive personal data, and a data breach has the potential to affect a large group of customers; a breach could give rise to various causes of action against the firm including negligence and breach of regulatory requirements.

The level of damages sought and high number of potential claimants in data breach cases make them attractive to claims management companies seeking to issue group litigation. In addition to these types of consumer claim, data breaches carry significant regulatory risk, with potential enforcement action across multiple regulators (including the ICO and FCA) and may require widescale programmes of redress.

Regulatory action includes challenges to the adequacy of technical and organisational measures in place and firms' operational resilience, systems and controls and accountability of individuals under SMCR. These factors make data breaches a significant risk for FS firms in reputational damage, cost, and time to resolve. The causes of data breaches vary from unintentional human error to targeted cyber-attacks and the FS sector continues to be a target for cyber criminals, Foreign Intelligence Services, and activists.

- Firms should adopt a cyber first culture, minimising the risks of data breaches occurring through by keeping security policies, tools, and technologies up to date and training staff on how to avoid data breaches and how to spot the signs of a potential cyber-attack.
- Firms should also prepare a playbook response plan so that action can be taken promptly should a data breach occur. This will need to include addressing the immediate threat, as well as notifying the regulator, communicating with those affected and proactively considering whether redress is needed as well as seeking advice upon these elements to reduce the impact of the data breach.
- See our Commercial Disputes guide for more information about group litigation and data breaches.

Future changes to arrestment process and introduction of a mental health moratorium in Scotland

The Bankruptcy and Diligence (Scotland) Act 2024 received Royal Assent on 15 July 2024 and provides a framework for a mental health moratorium (similar to the Breathing Space scheme that operates in E&W), makes technical changes to the Bankruptcy (Scotland) Act 2016 and updates debt recovery mechanisms. Under the Act, it is proposed that banks who have arrestments served on them will now have a duty to make a disclosure to the creditor even if no funds have been arrested (this would be a change from the current position where there is no requirement on the bank to issue a "nil return"). It is also proposed that it will be possible to serve arrestments electronically. Both would be significant changes and are likely to place an increased burden on banks.

The Scottish Government has not yet confirmed when these measures will be introduced albeit have commented that they want to work with financial institutions and are committed to discussing further prior to their coming into force. Furthermore, the draft Debt Recovery Mental Health Moratorium (Scotland) Regulations 2024 have been published and a public consultation was announced on 9 December 2024.

→ Creditors should be aware of the proposed changes that are coming up and the obligations on them where there is a mental health moratorium in place. They will also need to prepare their internal processes.

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