Banking Disputes Report 2024

Data-driven analysis and trends

DATA
DRIVEN
DISPUTES

Foreword

With over 1,000 new claims, the Banking and Finance sector topped the rankings for the number of High Court claims filed in any sector in 2023. The sector also remains top for Q1 2024.

In this data-driven review, we look back at activity over recent years to identify key trends, focusing on where, and how, banking disputes are being determined in 2024 and what might lie ahead.

Our report explains some emerging trends, including a substantial increase in the volume of complaints around motor finance commission payments, claims being filed very quickly after significant market events take place as claimant law firms seek to establish themselves as the lead claimant firm on a matter, and the inevitability of future ESG related action involving financial institutions whether via regulators, activist litigators, or litigation seeking commercial return.

We also take a deeper dive looking at the following banking litigation hot topics for 2024:

Debanking – the claims data for 2023 shows a number of claims having been filed in the High Court following a customer banking relationship having been terminated, but a 2024 judgment has put a marker down regarding some of the challenges faced by such claims.

Class actions – class action risk is on the rise generally and banks continue to feature in pending claims across all available UK class action regimes. This trend is very likely to continue throughout 2024 and beyond.

Motor finance commission claims – motor finance commission claims are increasing, and 2024 will be an important year in determining whether these claims are viable and shaping where and how such claims are to be determined.

ESG litigation – we remain at the early stages of ESG litigation action against banks and other financial institutions in the UK. As we move through 2024 and into 2025 it is likely we will see some form of regulatory action taken by the FCA under the soon to be introduced anti-greenwashing rule and litigation either via activists or claimants seeking commercial returns.

The future of the Quincecare duty – important case law in 2023 narrowed the boundaries of claims based on a breach of the Quincecare duty. However, we are likely to see a continuation of these claims in 2024 and beyond and therefore we look at the available judicial guidance as to what might amount to red flags putting a bank on inquiry of potential fraud and how claims might be reframed on the basis of an alleged "retrieval duty".

Redress schemes – following the public and political spotlight placed on redress schemes in 2023 and into 2024 as a result of the Post Office/Horizon scandal, we look at the APPG's 2023 report into redress schemes and what a good scheme looks like from a consumer's perspective.

We hope that you find this report interesting and informative, and we look forward to discussing its content with you.

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Sixty second summary

Banking and Finance sector has the most new claims

The Banking and Finance sector was the sector with the highest volume of new High Court claims filed in 2023 (1,070 claims) according to Solomonic data. Also, 2023 was the highest volume of new claims for the Banking and Finance sector since Solomonic started monitoring data in 2014 (that year there were just over 1,000 new claims filed). The sector is also top in Q1 2024.

Drivers of high claim volumes in 2023

All businesses and consumers use Banking and Finance services
The financial services sector is a significant one in the UK – all consumers and businesses rely on it giving many touchpoints for disputes. This will explain, in large part, why the Banking and Finance sector is regularly amongst the top sectors for volumes of new claims. The sector is usually vying with Construction or Professional Services for top spot.

A wide range of claims in 2023
As regards some of the types of claims filed in the High Court in 2023: the data shows claims brought by litigants in person against retail banks; various claims for Norwich Pharmacal or Bankers Trust disclosure orders (caused by an increase in customers being victims of fraud); numerous claims under loans and guarantees (caused by the economic downturn); claims that relate to situations where banks have frozen a customer's account and/or purported to end the banking relationship; and various examples of "follow on" claims being brought against banks based on regulatory findings.

High Court maintains high claim volumes despite alternatives

A high volume of Banking and Finance sector claims are brought in the High Court notwithstanding (i) that many complaints separately get dealt with via the Financial Ombudsman Service and (ii) a high volume of claims also go through the County Courts (e.g. PPI claims and motor finance commission claims).

Swift action by claimant law firms

Notwithstanding the traditional long tail of litigation following significant market events, we are also now seeing claims being filed very quickly after events take place as claimant law firms seek to establish themselves as the lead claimant firm on a matter. For example, the Swiss regulator intervened to write down the value of Credit Suisse AT1 bonds in March 2023 ahead of UBS acquiring Credit Suisse and claims were filed by two claimant law firms just one month later in April 2023 in Switzerland as a prelude to action in other jurisdictions.

Historic collapses continue to create claims

It is notable that there are still claims being filed in 2023 regarding the collapse of Lehman Brothers in 2008 demonstrating the long tail of significant market events.

Financial Ombudsman Service complaints landscape

2023 saw a significant increase in the volume of complaints to FOS regarding motor finance commission payments. For 2024, the FOS is expecting a growing number of complaints regarding fraud as scams becomes more sophisticated, a rise in complaints regarding irresponsible lending, a rise in complaints regarding account closures, and at least the same volume of complaints regarding motor finance (although this projection was made by the FOS before the recent FCA intervention that has paused new motor finance complaints going to FOS).

British Banking Resolution Service awaits demand

The British Banking Resolution Service (BBRS) remains in place for 2024 as a forum for resolving disputes for SME clients of seven major banks (with an award limit of £600,000). However, there has not been the uptake of this service that was anticipated when it was formed in 2021 and so it remains to be seen as to how long the BBRS will continue in its current form. If the BBRS is disbanded, the calls for some kind of replacement tribunal for SMEs will likely become louder.

A call for a new banking dispute resolution tribunal

There have been various recent calls for a new banking dispute resolution tribunal to be formed. For example, the Federation of Small Businesses (FSB) requested this in 2023 as a result of the FCA declining to expand the jurisdiction of the FOS, as did the All-Party Parliamentary Group for Fair Business Banking in their 2023 report titled "Building a Framework for Compensation and Redress".

Arbitration shows a consistently high volume

Data from the London Court of International Arbitration (LCIA) shows that new claims in the Banking and Finance sector were down year on year in 2022 (being the latest data available). However, LCIA data for the previous six years shows that new arbitrations in the Banking and Finance sector are averaging approximately 25% of the LCIA's annual caseload year on year which demonstrates a consistently high volume.

The High Court

The English High Court is a popular forum for determining banking disputes. Many international banking contracts are both English law governed and provide for English court jurisdiction.

There is a wide body of English case law on bank-related disputes setting important precedents to assist parties to know where they stand when disputes arise. English law has long recognised the importance of certainty for commercial parties. Under the umbrella of the Business and Property Courts, there are number of specialist courts including the Financial List which is designed to determine high value Banking and Finance cases.

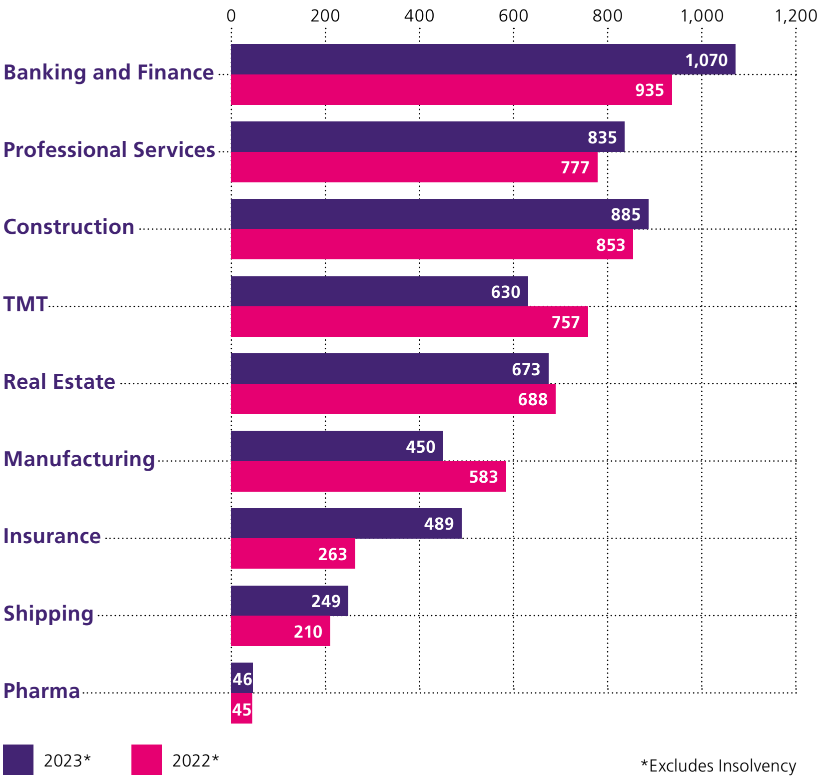
We therefore start this report by considering activity before the English High Court.

The High Court

Sector analysis

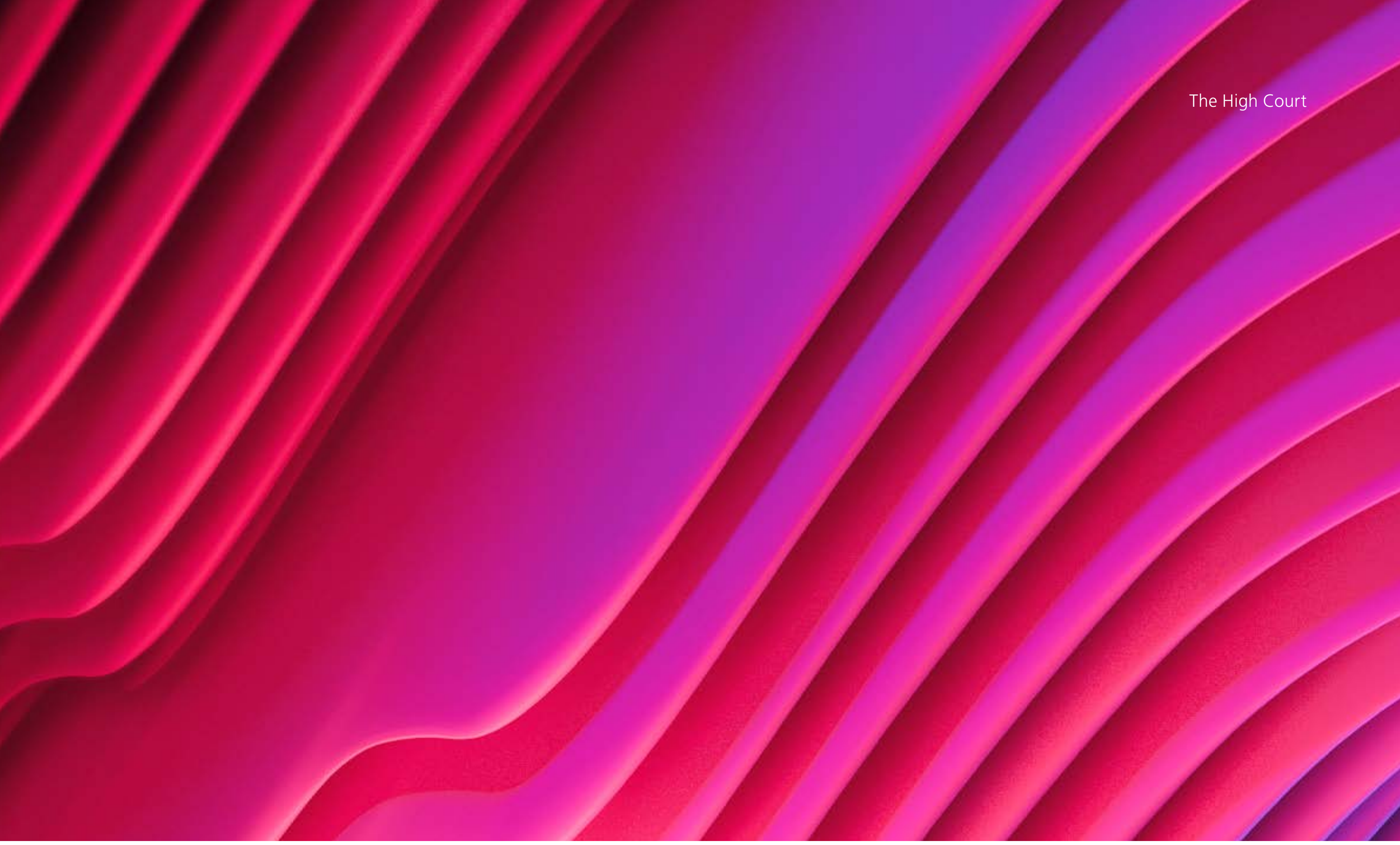
The Solomonic data for the Banking and Finance sector covers all claims filed that involve a party within the financial services sector (excluding insolvency claims). The data will therefore cover claims involving banks and also other financial institutions and firms operating in the financial services sector.

Claims by Sector: 2022-2023



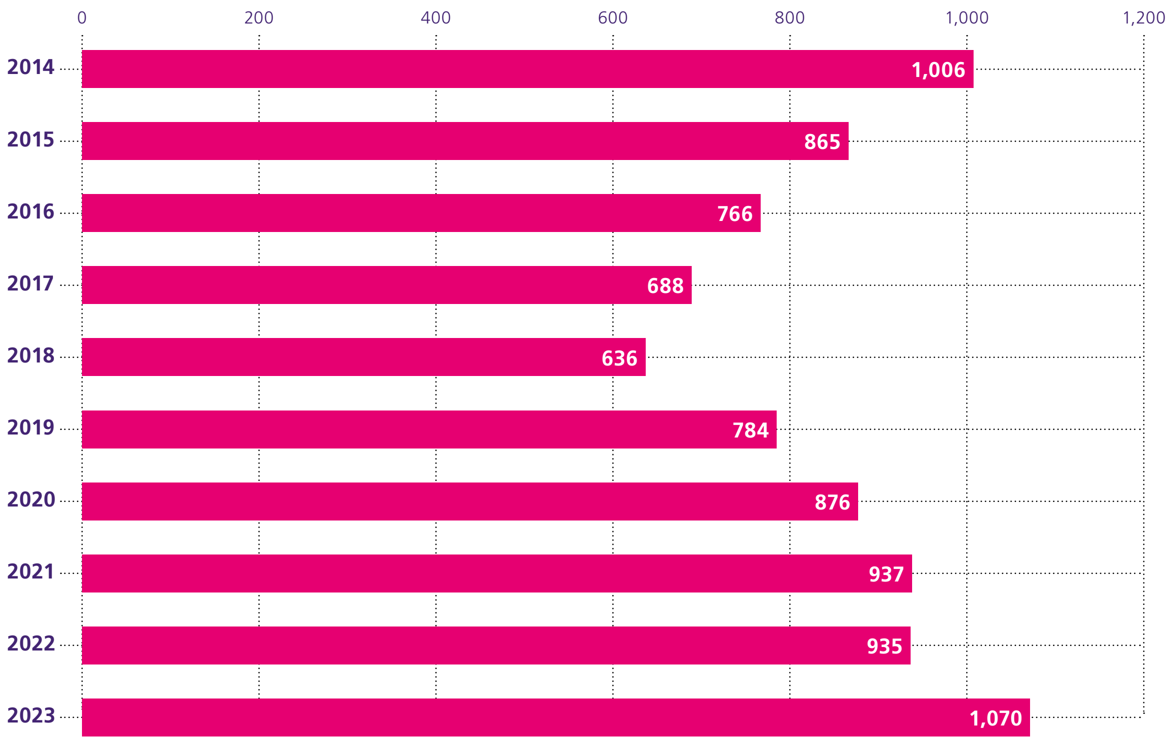
County Courts

A detailed analysis of banking litigation in the County Courts is beyond the scope of this report. Although there is limited data available on sector specific actions, the County Courts provide an important forum for certain banking related disputes. It is where the majority of possession proceedings take place and where high volume / lower value disputes are determined such as the ongoing significant PPI claim case load and the increasing volume of motor finance secret commission claims.



The data shows that for calendar years 2022 and 2023 the Banking and Finance sector had the highest claim volumes each year. This is in contrast to calendar years 2021 and 2020 when the Professional Services sector had the highest claim volumes each year (with the Banking and Finance sector being in second place each year).

Claims involving parties in the Banking and Finance sector



The graph above shows claim volumes for the Banking and Finance sector between 2014 – 2023. As can be seen, claim volumes have been on a steady rise from 2019 onwards with 2023 claim volumes (1,070) surpassing the previous annual high in 2014 (1,006).

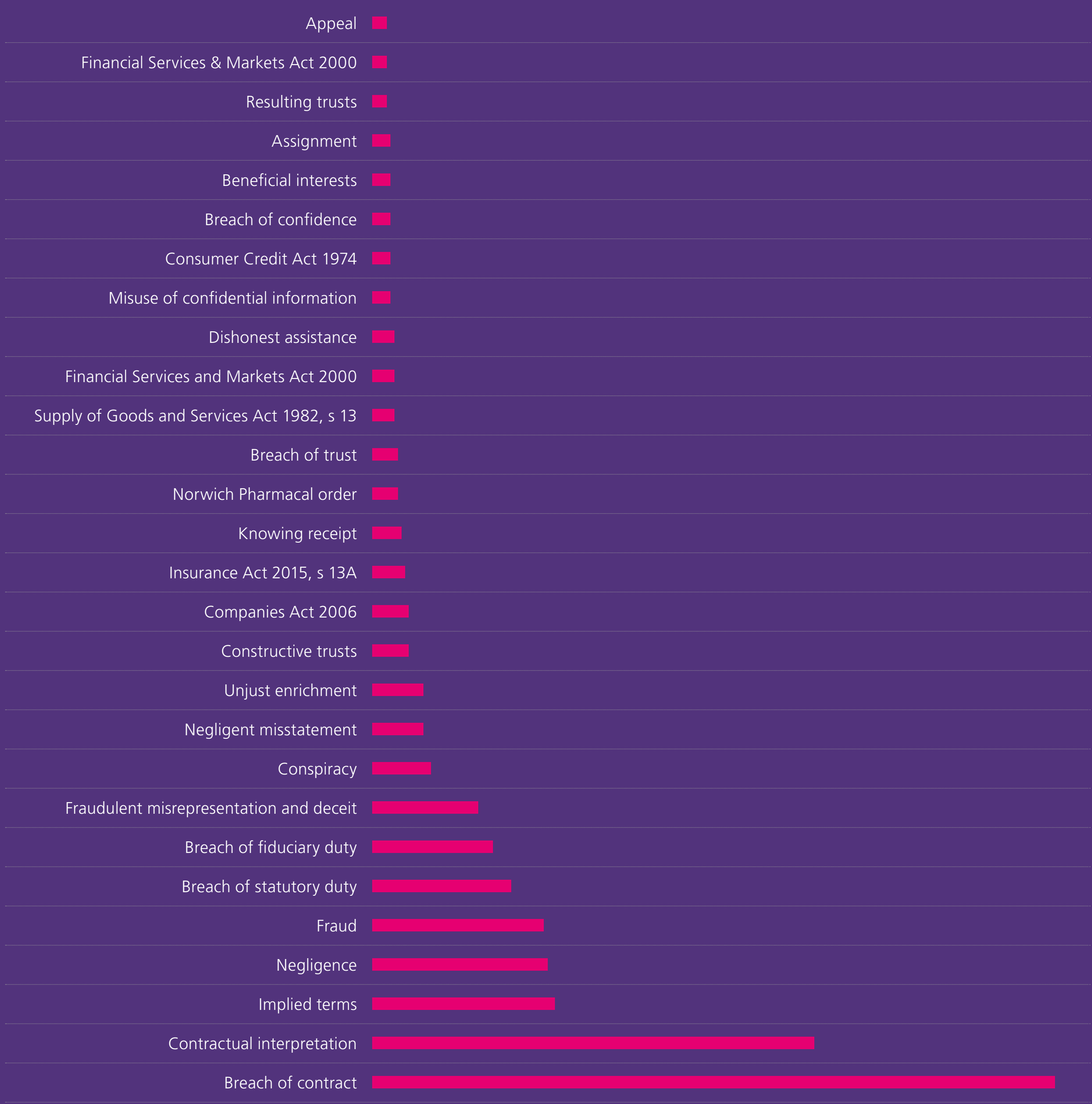
Annual data for 2023

Heads of claim

The Solomonic data for 2023 shows that a wide variety of claims are asserted in High Court proceedings involving the Banking and Finance sector. However, the vast majority of claims are contractual (breach of contract, contractual interpretation, implied terms).

Allegations of fraud are often asserted in a banking context to try and circumvent contractual limitations and exclusions and fraud-based heads of claim also feature in the 2023 data.

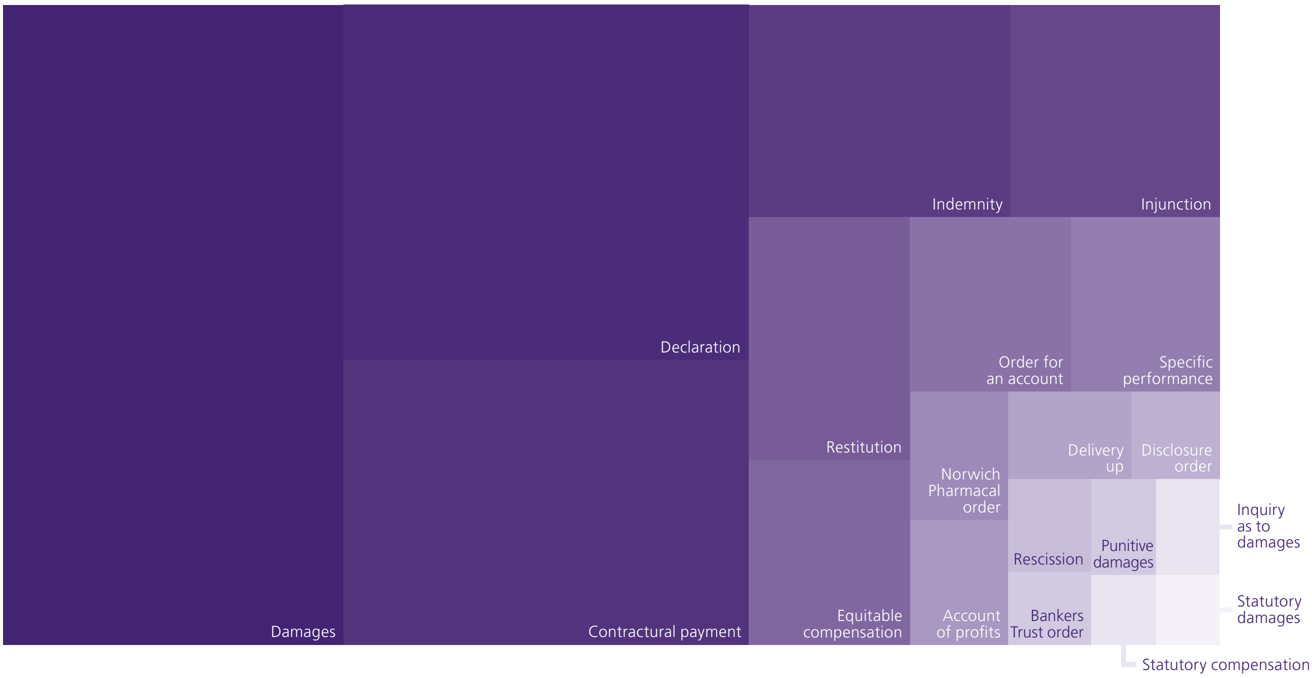
Banking and Finance sector: legal claim type 2023



Claim types

When comparing heads of claim in the Banking and Finance sector in 2023 against heads of claim across all sectors, the data shows that the Banking and Finance sector has a higher share of contractual and tort claims on a pro rata basis than across all sectors as a whole.

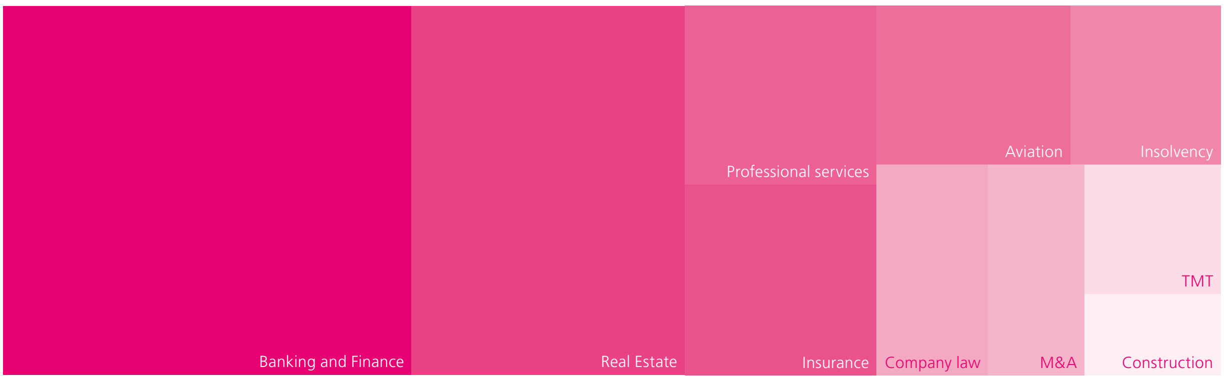
Remedy sought



The majority of claims in the Banking and Finance sector filed in 2023 were seeking compensatory damages.

Declarations were the next most common remedy sought and various claims were filed seeking Bankers Trust and Norwich Pharmacal orders.

Factual subject matter

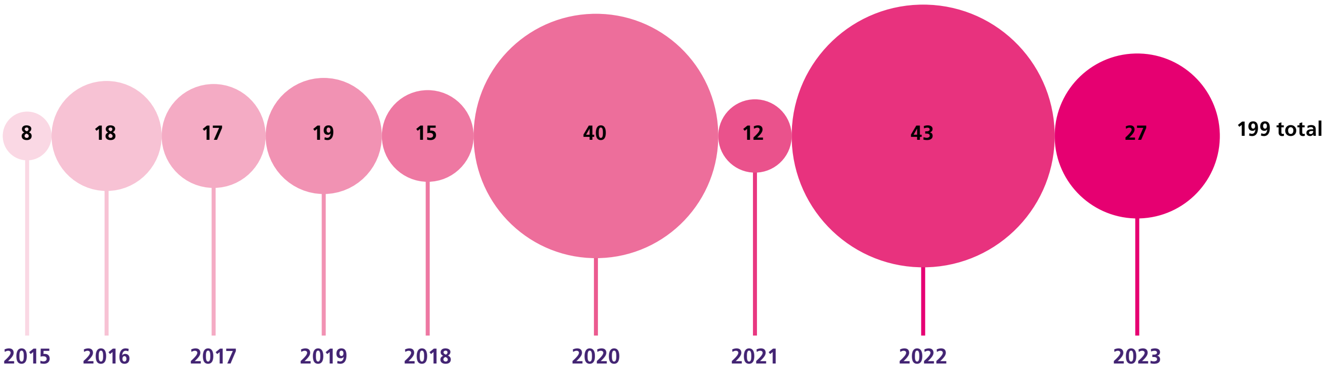


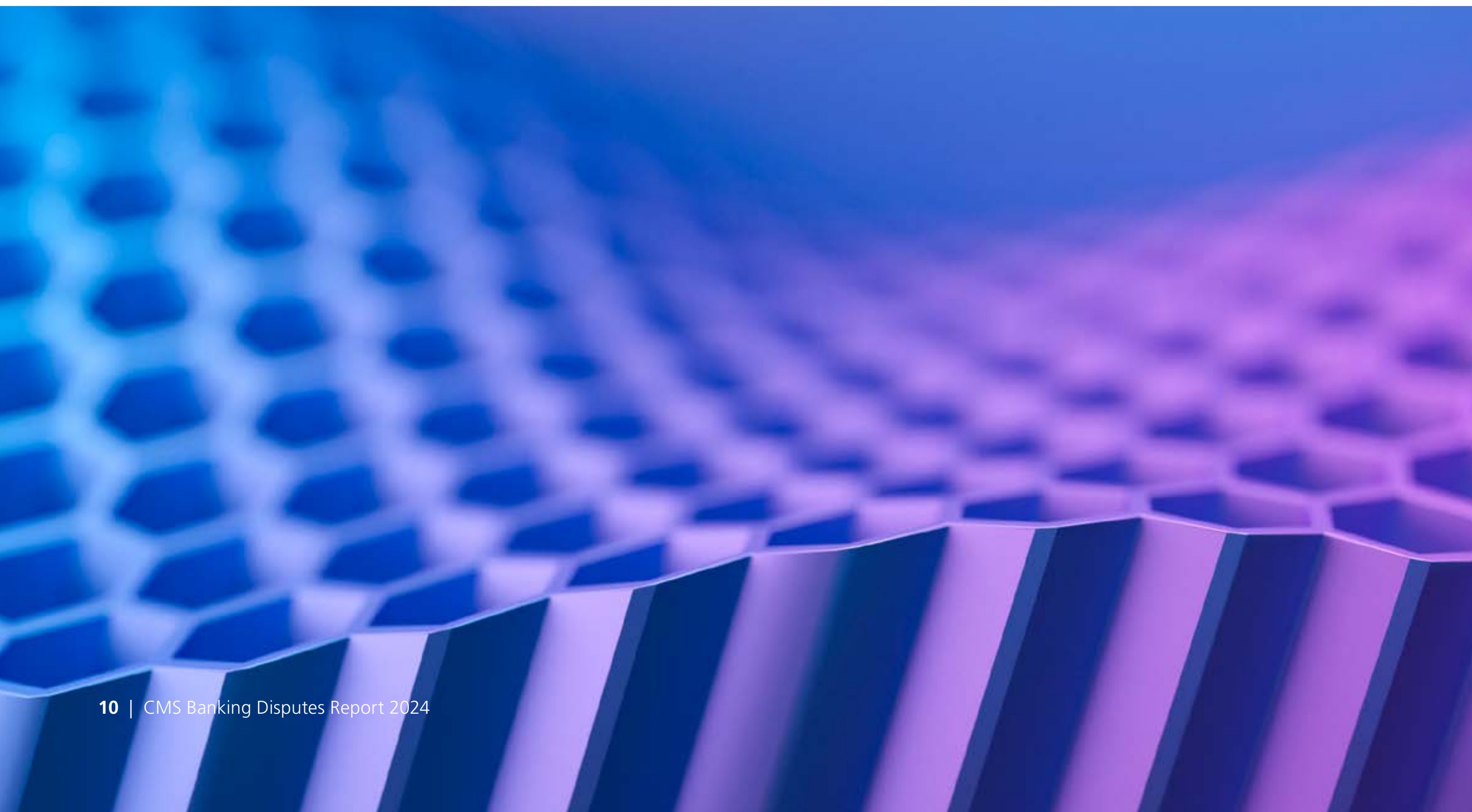
Outside of the Banking and Finance sector, claims arise in many other factual contexts demonstrating the wide reach of the Banking and Finance sector.

The Financial List

The Financial List has been operational since 1 October 2015. It uses specialist judges from both the Chancery Division and the Commercial Court and is intended for (i) finance sector claims of £50m or more; or (ii) cases that require particular expertise in the financial markets; or (iii) cases that raise issues of general importance to the financial markets. The List provides for an innovative test case procedure, the aim of which is to facilitate the expeditious resolution of issues that affect the wider financial market where there is no clear English legal precedent.

Number of cases filed each year in the Financial List:





Types of claims involving banks in 2023

To give a flavour for the types of claims being filed in 2023 that involve banks, we have undertaken a review of the claim forms issued in the last calendar year which show the following:

- There are a high number of claims brought by litigants in person against retail banks.
- Various claims relate to Norwich Pharmacal / Bankers Trust disclosure orders.
- There are numerous claims under guarantees, including personal guarantees, where the principal obligor has defaulted.
- Multiple claims relate to situations where banks have frozen a customer's account and/or purported to end the banking relationship where different forms of relief are sought. For example, there are examples of injunctions being sought to compel banks to complete a compliance review and give access to funds held; injunctions being sought to restrain a bank from terminating a customer's contract; claims for restitution for failure to release funds to customers; claims for damages for closing an account without notice; claims for breach of mandate for failing to pay out funds on instruction.
- There are examples of claims being made following the receipt of documents received from a bank pursuant to a Norwich Pharmacal order for the claimant to be released from its standard undertaking not to sue the bank. In one case, the claimant alleges that the documents disclosed by the bank demonstrated a breach of duty and failure to adhere to its own terms and conditions, KYC policy, and AML policy which meant that the funds transferred by the bank (that would otherwise have been the subject of a tracing action) were not able to be traced.
- There are various examples of "follow on" claims being brought against banks based on regulatory findings.
- There are claims that allege fraudulent misrepresentation against banks. In one case a participant in a syndicated loan arrangement alleges fraudulent misrepresentation against an investment bank as the original lender and arranger of the syndicated loan.
- There are various examples of claimants (often litigants in person) seeking to claim that mortgages are void giving an entitlement to be repaid sums paid to the bank during the life of the mortgage. The modus operandi for such claims appears to be the submission of a DSAR regarding all documents held relating to a mortgage followed by the allegation that the mortgage has been unlawfully sold to a third party without proper notice as required by the Consumer Credit Act 1974 thereby rendering the mortgage void.
- As an example of the "long tail" of certain major market events, there were still claims arising from the collapse of Lehman Brothers being filed in 2023. However, we are also seeing claims being filed very quickly after events take place as claimant law firms seek to establish themselves as the lead claimant firm on a matter (for example, the Swiss regulator intervened to write down value of Credit Suisse AT1 bonds in March 2023 ahead of UBS acquiring Credit Suisse and claims were filed by two claimant law firms in April 2023 in Switzerland as a prelude to action in other jurisdictions).

2024: Data for the period 1 January 2024 to 31 March 2024

The claims data for Q1 2024 also shows the Banking and Finance sector retaining top place with over 200 new High Court claims filed. The sector is just ahead of Construction and Professional Services for new claims activity this year.

Financial Ombudsman Service (FOS)

What is the FOS?

The FOS is a free service available to determine complaints made by individual consumers, microenterprises, and certain small businesses about financial services businesses.

The FOS was created in 2001 by the Financial Services and Markets Act as an alternative to the court system. The FOS aims to resolve all disputes in a fair and impartial way, taking into consideration the individual circumstances of each case. In particular, the FOS decides cases by reference to what is, in their opinion, fair and reasonable in all the circumstances of the case taking into account the law; regulatory rules, guidance and standards; codes of practice; and (where appropriate) what is considered to have been good industry practice at the relevant time. Therefore, the approach taken by the FOS to considering complaints is much broader and more flexible than how a claim would be determined before a court.

The process is intended to be simple allowing eligible parties to participate without legal representation. The customer is required to contact the business in the first instance and if not satisfied with the response received to the complaint they can refer the complaint to the FOS. The complaint will be considered by a case investigator who will make an initial determination. If not satisfied with that decision, the customer can ask that an Ombudsman review the case file and make its own determination. At the end of that process, the customer can decide whether to accept the decision of the FOS or reject it (in which case the complaint could be pursued elsewhere such as via court proceedings).

FOS Latest Annual Report

The FOS Annual Report and Accounts for the year ended 31 March 2023 was published on 4 December 2023.

The FOS year at a glance for 2022/2023 notes the following in relation to "banking" complaints:

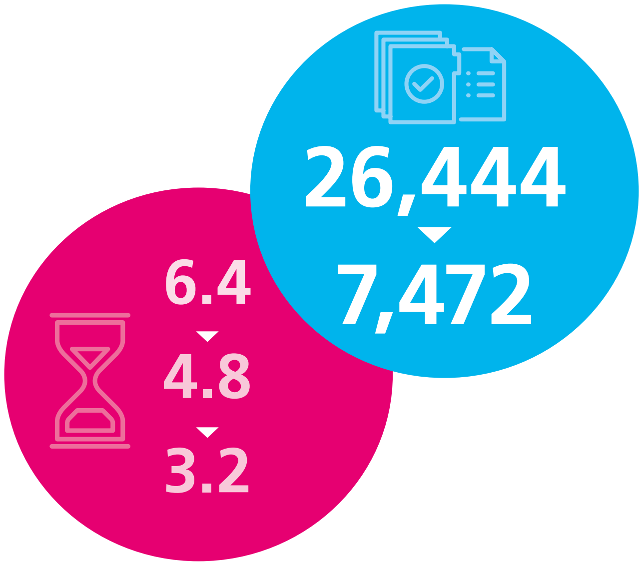
61,995
new cases

76,637
resolved cases

36%
of complaints upheld

The number of open cases across all types of complaint older than 18 months is down from 26,444 at the start of the financial year to 7,472 at the end of the financial year.

Median waiting time (between case starting and reaching a resolution) is down from 6.4 months in 2021/22 to 4.8 months in 2022/23, to 3.2 months in the first half of 2023/24.



In relation to types of complaints:

- Uphold rates on APP fraud cases have reduced over the last year from around 75% to 50%. The FOS considers that this suggests the industry has learnt from complaint outcomes and guidance issued by relevant bodies.
- Over 2022/23, the FOS received 21,673 new fraud and scam complaints, up from 18,764 in 2021/22. The FOS upheld 45% of these compared to 64% in the previous year.
- The FOS received 2,708 complaints from consumers and businesses unhappy that their current, savings, or e-money accounts had been closed. This was a 7% increase on the previous year.
- Complaints about CMCs and their handling of claims continued to fall in 2022/23. Of the 361 new complaints that the FOS received, most were from consumers who were unhappy about how CMCs pursued their fees (47% of complaints about CMCs were upheld).

The top five most complained about products in 2022/23 were:

Q2 complaints data (July to September 2023) confirmed that vehicle-related complaints now make up 25% of all cases. The volume of complaints from people financing their vehicles has reached a five-year high.

These increasing complaint levels have arisen in two separate areas: (i) consumer credit (largely driven by motor finance commission complaints) and (ii) insurance.

Future trends

The trends that the FOS is monitoring and expects to see in 2024/25 include:

- A continued rise in disputed transaction cases given the increasing volume and sophistication of fraud and scams
- A rise in irresponsible and unaffordable lending complaints as cost of living pressures continue
- A rise in account closure complaints
- At least the same levels of complaint regarding motor finance commission to volumes that the FOS is currently receiving
- A slight increase in complaints about mortgages, predominately led by interest rate rises as fixed term deals come to an end

The FOS and the Consumer Duty

There is currently no private right of action in relation to the new Consumer Duty (introduced in 2023). However, complainants are expected to rely on the Consumer Duty when making complaints to the FOS (indeed the FOS has confirmed that it has already started to receive complaints regarding the application of the Duty).

The FOS has noted that the Consumer Duty intends to drive up standards for businesses, which the FOS believes, over time, might reduce the number of complaints being made to them. However, some stakeholders have raised concerns that complaints may rise in the short term while firms adjust. It also remains to be seen how the FOS will interpret and apply the Consumer Duty given its wide jurisdiction. While it is being monitored by the FCA through its engagement with FOS through the wider implications framework, whether this will be effective and lead to a consistent approach will need to be kept under careful review by firms.

The jurisdiction of the FOS

In October 2023, the FCA published "*Feedback Statement FS23/5: Findings of review of rules extending SME access to the Financial Ombudsman Service.*"

Since 1 April 2019 small businesses as well as micro-enterprises have been able to refer complaints to the ombudsman service with a "small business" defined as one that:

a. is not a micro-enterprise

b. has an annual turnover of less than £6.5m (or its equivalent in any other currency); and

  i. employs fewer than 50 people; or

  ii. has a balance sheet total of less than £5m (or its equivalent in any other currency).

The FCA undertook a review to consider whether the current thresholds for SMEs to be able to refer complaints to the FOS remained appropriate.

The FCA concluded that the current thresholds strike the appropriate balance between providing access to the ombudsman service to SMEs that do not have the resources to resolve financial services disputes through the legal system and broadening this access too far. In particular, the FCA noted that 99% of private businesses in the UK have access to the ombudsman service. Enabling businesses with significant resources or bargaining power, who are likely to be better placed to negotiate contracts and resolve disputes themselves, to access the ombudsman service would place additional burden and costs on the ombudsman service, and result in a disproportionate increase in regulatory costs.

The above conclusions have been criticised by SMEs who fall outside the criteria for referring complaints to the FOS. The Federation of Small Businesses (FSB) has noted that even businesses towards the larger end of the SME scale may still encounter a considerable imbalance of power when going up against banks. The FSB considers that the British Banking Resolution Service (discussed below) has not been successful to the scale needed leaving a "justice gap" for SMEs that fall outside the current FOS criteria. The FSB has called for the government to legislate to create a banking tribunal service, to be funded by a levy on the banking sector, with the expertise and the capacity to take on larger and more complex cases.

New award limits

On 13 March 2024, the FCA confirmed that, from 1 April 2024, the FOS award limits will go up to:

- £430,000 for complaints referred to us on or after 1 April 2024 about acts or omissions by firms on or after 1 April 2019
- £195,000 for complaints referred to us on or after 1 April 2024 about acts or omissions by firms before 1 April 2019

British Banking Resolution Service (BBRS)

In March 2018, UK Finance launched a review into the banking complaints landscape for the UK's SME market. In response, the Walker Review was published in October 2018.

The Walker Review recommended the establishment of a voluntary ombudsman scheme for larger SMEs (who were ineligible for the FOS) and a voluntary scheme to consider historic SME banking disputes.

In response, the BBRS was launched on 15 February 2021 to provide a new form of alternative dispute resolution for eligible SMEs and participating banks to resolve complaints.

The BBRS ran a historical scheme that covered acts or omissions that took place between 1 December 2001 to 31 March 2019. This scheme was for eligible SMEs with a turnover of less than £6.5m and a balance sheet of less than £5m who were not eligible for the ombudsman service at the time of complaint. The historical scheme closed on 14 February 2023.

The BBRS runs a contemporary scheme which remains open. The contemporary scheme deals with complaints about incidents that took place on or after 1 April 2019 and covers SMEs with a turnover of less than £10m and balance sheet of less than £7.5m that are not eligible for the ombudsman service. It is open for SME customers of Barclays Bank, Danske Bank, HSBC UK, Lloyds Banking Group, NatWest Group, Santander, and Virgin Money. Customers have six months from the date of their final response letter to register their case with the BBRS. Businesses can be awarded up to £600,000 in compensation.

The BBRS was originally funded by the participating banks to run until the end of 2023. However, in November 2023, the BBRS announced that the participating banks had agreed to fund it during 2024.

The BBRS was originally forecast to receive approximately 6,000 cases over three years. However, take up has been significantly lower and it remains to be seen for how much longer the BBRS will continue.

In January 2024, the BBRS made the following points to the UK Treasury Select Committee regarding the future of SME / bank dispute resolution based on the BBRS's three years of experience to date:

For banks:

— Banks should ensure clarity of communication by using language that is easy to understand

— Around personal guarantees, banks need to ensure SMEs have a full understanding of obligations and practical clarity on release

— Banks should improve fraud prevention and enable easy reporting by customers

— Banks should improve transparency of fees and product features

For government:

— Any case for an SME / bank dispute resolution service should be built only on data – avoiding optimism bias

— For the same reason, vested interests able to influence decision making at the set-up stage should be avoided

— For any dispute resolution service to be credible it must be perceived to be independent

— It is for lawmakers and policy makers to determine the future of dispute resolution services for SME banking complaints in the UK

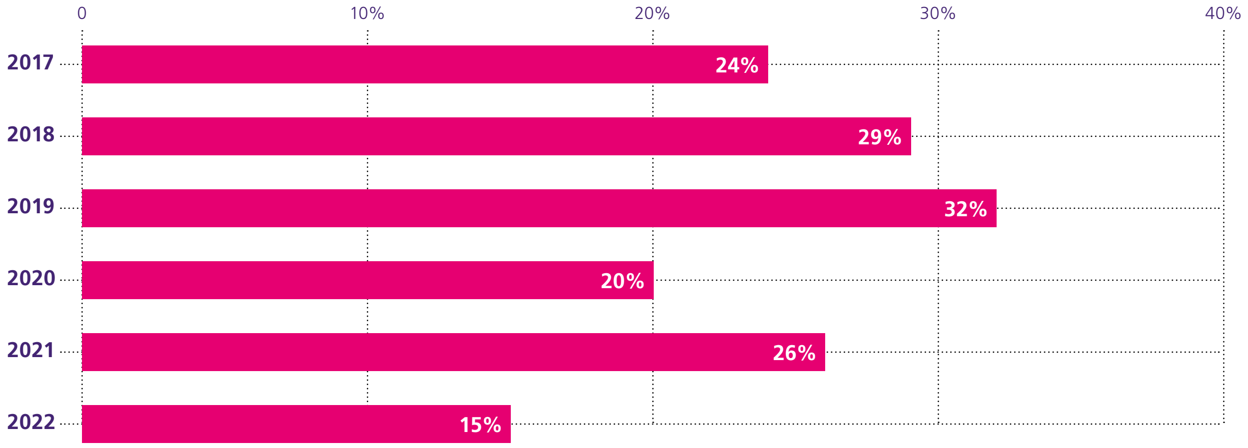
If the BBRS is wound down, the calls for a new banking tribunal service of some description (to allow cost effective determination of disputes for larger SMEs outside of the court system) are likely to be reinvigorated. As noted in the FOS section above, the Federation of Small Businesses is already calling for such changes and this is also a feature of the recommendations arising from the APPG in the context of their report on redress schemes (see below).

Arbitration

Traditionally, the Banking and Finance sector has favoured court proceedings rather than arbitration as a means of resolving disputes. Our last [Banking Disputes Report] looked at some of the historical reasons for this and the steps that arbitral tribunals have taken to promote the use of arbitration by financial institutions.

The latest available data confirms that arbitration is an accepted method of dispute resolution in appropriate contractual situations across the Banking and Finance sector. In most cases this will be where the contractual parties are based in different jurisdictions. The 2022 annual data from the London Court of International Arbitration (LCIA) (being the latest data available at the time of publication) confirms a drop in the number of arbitrations in Banking and Finance sector disputes from the prior year, (down from 26% of all LCIA arbitrations to 15%). However, "Banking and Finance" was the second placed industry sector behind "Transport and Commodities" (37%).

LCIA annual percentage of Banking and Finance arbitrations



As can be seen from the above data, Banking and Finance sector arbitrations are averaging just under 25% of the LCIA's annual caseload across a six-year period which demonstrates a consistently high volume.

In summary, the data shows that the LCIA are receiving a consistent level of new arbitrations each year from Banking and Finance disputes. While a jurisdiction clause nominating the courts in England or New York will remain the most common choice for international contracting parties in the Banking and Finance sector, it seems that there is a growing acceptance that arbitration may be an appropriate dispute forum for certain situations depending on the type of contract / counterparty.

Arbitration generally remains a popular forum for dispute resolution as our data driven analysis here shows.

Debanking

In 2023, the Collins English Dictionary introduced a new word: "*Debanking (noun), the act of depriving a person of banking facilities*".

Bank terms and conditions usually allow the bank to terminate a relationship either immediately (on certain grounds) or by giving reasonable notice.

Debanking is not a new issue:

— In 2016, the FCA looked at banks' approach to "de-risking" as a result of money laundering concerns. The FCA called for a 'commonsense' approach and effective risk-based strategies.

— In 2017, the FCA issued guidance on dealing with PEPs and money laundering which focused on a risk-based approach.

— In 2019, the High Court decided that a major retail bank was entitled to terminate its relationship with its customer without notice on the basis that it had carried out a thorough risk assessment based on AML concerns.

The topic of debanking was thrust onto the front pages following the Nigel Farage scandal in the summer of 2023. As a result of this scandal:

1. The FCA undertook a review into whether banks were closing accounts based on political views. The FCA concluded (in September 2023) that across the 34 banks that were asked to submit data to the FCA, there was no evidence that bank accounts were being closed due to political views.
2. HM Treasury announced (in October 2023) that it would be introducing new rules to require banks to explain and delay any decision to close an account. Under the new rules, banks will need to:
   a. Provide a clear and tailored explanation to a customer where their account has been terminated, except when doing so would be unlawful. Draft regulations recently published for consultation require a "sufficiently detailed and specific" explanation of the reason for termination.
   b. Provide at least 90 days' notice when closing an account, unless for a serious and uncorrected breach, such as non-payment, or other serious occurrence. Shorter termination periods will be allowed in certain circumstances, such as where a provider is required to terminate the contrac to comply with financial crime obligations.

APPG report on debanking

In February 2024 the All-Party Parliamentary Group (APPG) on Fair Business Banking commissioned a report into debanking to understand how this affected different types of customers.

The report questions the role of banks in society: should banking facilities be considered a fundamental right, akin to a utility rather than a discretionary service?

The APPG report identified three main factors that have typically gone into bank decision making when deciding whether to close accounts: (1) cost, (2) reputation, and (3) financial crime:

1. **Cost:** The APPG report identifies a concern that groups of customers are being cut out from the banking system on cost grounds with limited regard for individual circumstances (for example, individual customers from perceived high-risk jurisdictions, businesses that deal only in cash such as oncourse bookmakers, and cryptocurrency businesses). The report notes that "*The simple fact is that the regulatory and legal obligations on banks mean it is more expensive to bank a bookie than a baker*". The report points to data showing that compliance costs in the UK financial services industry hit £34.2bn in 2022 (up by nearly a fifth in just two years) with customer due diligence (CDD) being by far the largest cost for banks (making up 67% of their annual compliance spend).

A quarter of these costs are "ongoing CDD" costs year on year. The APPG report suggests that rather than simply debanking customers on cost grounds, banks should consider alternatives such as increasing bank charges or offering a more basic banking facility.

2. **Reputation**: The APPG report recognises that banks have been required by the FCA to have regard to the impact of fraud on their reputation. However, the APPG raise concerns that reputation has in some cases leapfrogged the real risk of financial crime as the issue of paramount importance to banks. The APPG recommend that banks are viewed more as a utility provider and that the regulator should act as a buffer against public opinion in standing up for banks providing services to customers who may otherwise be unpopular (in the same way that nobody would expect a water or electricity company to withdraw their services from someone with an unpopular reputation).

3. **Financial crime:** The APPG report points to the ever increasing cases year on year regarding bank account closures for "financial crime" and anecdotal complaints that banks use this as a default reason for terminating customer relationships. The report recognises that a reason behind the increased number of cases is that banks are getting better at identifying potential crime (using automation and AI). However, the report also points to the significant disparity between the number of Suspicious Activity Reports submitted by banks (running to the hundreds of thousands each year) and the prosecutions or other enforcement action taken by authorities which suggests that bank accounts are being terminated on financial crime grounds without corresponding action being taken by law enforcement authorities.

Courts' approach to debanking

Whilst the focus from regulators, government, and the APPG has been on the rights of customers, the English courts continue to apply conventional principles in considering claims that arise from the termination of a customer relationship.

In January 2024, the High Court handed down judgment in *Ildar Uzbekov v Revolut Ltd* [2024] EWHC 98 (KB) (Admin), regarding a claim brought following the termination of a customer relationship based on media reports suggesting that Mr Uzbekov was involved in money laundering. The claim was unusual as the claim was filed in 2023 relating to events in 2020, Mr Uzbekov therefore had no ongoing relationship with Revolut and no reasonable prospect of one at the time of filing the claim. Mr Uzbekov accepted that he had suffered no quantifiable loss but said that he had suffered distress and embarrassment (as a result of a payment being returned to a third party car dealer) and he wished to obtain an authoritative determination that Revolut had no good reason to suspect him of money laundering. Mr Uzbekov sought nominal damages together with declarations including that Revolut had no good reason to close his account.

The Court struck out Mr Uzbekov's claims as there was no real prospect that he would be granted the declarations being sought. Even if nominal damages and a declaration in the form sought were ultimately granted, the cost to the defendant and the impact on the court's resources (and indirectly on other litigants and potential litigants) would be disproportionate to the marginal objective benefit the relief would confer on Mr Uzbekov. In reaching this decision, the Court noted that Mr Uzbekov could vindicate his reputation via defamation proceedings against those publishing the articles on which Revolut had relied; Mr Uzbekov could have complained to the FOS instead of using the Courts; and if there was currently a public interest in debanking (as Mr Uzbekov had argued as a reason to be allowed to continue the claim to trial), the regulators were better placed to consider such systemic issues.

As noted in the section above regarding High Court claims, there have been various claims filed in 2023 that relate to debanking. The High Court in the Uzbekov case put a marker down that these claims need to be carefully considered to determine if the High Court is the appropriate venue for them to proceed. It will therefore be interesting to see what happens to the 2023 filed claims and whether similar claims are filed in the High Court during 2024.

However, with debanking remaining a hot topic in 2024, banks will need to take care that they comply with the (soon to be updated) applicable rules when closing an account to avoid facing potential claims (whether via the FOS or courts) by customers on one or more of the following grounds:

- The bank has breached its contract with the customer by closing the account.
- The bank has acted in breach of mandate by failing to pay money from the account in accordance with the customer's instructions.
- The customer has suffered additional consequential losses as a result of that non-payment.
- The customer has been discriminated against when making the decision to terminate the relationship.

Class Actions

Class action risk is on the rise in the UK. Banks have historically featured as defendants in some of the leading UK collective redress proceedings and continue to feature in new claims issued across the different available procedures.

By way of example:

Group Litigation Orders

The shareholder class action brought by investors against the Royal Bank of Scotland who had acquired shares in RBS' rights issue in 2008 represented an important step in the development of UK securities litigation. The RBS Rights Issue Litigation concerned claims brought under s90 of the Financial Services and Markets Act 2000 (FSMA) pursuant to a Group Litigation Order. Although the case did not go to trial, it has paved the way for other group actions under s90 / s90A FSMA which are now regularly brought in the High Court.

The first judgment in a shareholder class action in England & Wales was handed down by the High Court in 2019 in another bank case *Sharp v Blank* [2019] EWHC 3078 (Ch) (the Lloyds/HBOS litigation). This was a claim brought outside of FSMA (alleging negligence and lack of adequate disclosures by directors). The investor claim was dismissed in full providing important guidance on shareholder claims brought under the common law outside of the FSMA regime.

In relation to more recent group actions, there is currently a pending application for a GLO against various banks in relation to PPI claims.

Representative actions

Rather than always appearing as defendants to group claims, some banks have been taking advantage of the available court procedures for determining their own multi-party claims. The High Court allowed representative proceedings to be used to determine issues common to Barclays' claims to restore charges over approximately 5,000 customers' properties. HHJ Pelling gave judgment on these common issues, which could be decided on Barclays' evidence alone, enabling Barclays to pursue claims against the customers to determine individual issues (*Barclays Bank UK PLC v Shaun Richard Terry and another* [2023] EWHC 2726 (Ch)).

Competition Appeal Tribunal

The CAT is a popular venue for claimants as offering a recognised "opt-out" class action regime. It is a notable feature of the current class action landscape in the UK that group claims will be framed as competition based claims where possible to come within the CAT opt-out regime.

Banks feature in pending class actions before the CAT where various "follow on" claims are being pursued in relation to findings by the European Commission in 2019 that a number of banks operated two separate cartels in the foreign exchange market. These proceedings have given rise to important interim decisions regarding the rules around whether the claims should proceed on an "opt-out" or "opt-in" basis.

A further claim was commenced in the CAT in 2023 against various lenders in the context of motor finance commissions. This claim is a good example of claimant law firms looking to bring claims in the CAT wherever possible to leverage the availability of the "opt-out" regime. Motor finance commission claims are typically brought on the basis of an alleged "unfair relationship" (under the Consumer Credit Act 1974) or common law secret commission claims. However, in order to come within the jurisdiction of the CAT, the cause of action in this class action was reframed to allege anti-competitive agreements between motor finance lenders and car dealers.

Our 2023 European Class Actions Report identifies "financial products / securities claims" as the highest volume type of class action across Europe in 2022 (31% of claims).

As can be seen from the above, class action risk is on the rise generally and banks have featured and continue to feature (primarily as defendants) across all available UK class action regimes. This trend is very likely to continue throughout 2024 and beyond.

Motor Finance Commission Claims

2024 is shaping up to be an important year for motor finance commission claims against certain banks and other motor finance lenders. There has been a flurry of activity in this area following FOS decisions and FCA intervention in January 2024. We therefore look at the current position and what is likely to come for the rest of this year and into 2025.

Claims regarding undisclosed motor finance commission payments are not new. Claims have been pursued via complaints to the FOS and County Court actions for a number of years now.

The claims are asserted against motor finance lenders (and sometimes car dealers, acting as credit brokers) regarding commissions paid under “discretionary commission arrangements” (“DCAs”) in motor finance agreements entered into before 28 January 2021 (being the date on which the FCA banned DCAs following a market review of the motor finance sector).

In many cases, the DCA model meant that when arranging financing for a vehicle the car dealer could select an interest rate on a sliding scale (within set limits) and would receive different commission by reference to the interest rate that the customer agreed to (usually the higher the rate of interest, the higher the commission).

The customer’s claim is commonly put on the basis of a combination of:

— A claim that the failure to disclose the fact or amount of commission and/or the nature of the commission model renders the agreement unfair under s.140A of the Consumer Credit Act 1974.

— The commission arrangement amounts to a “secret commission” giving rise to a claim under the principles arising in the Court of Appeal’s decision in *Wood v Commercial First Business Ltd & ors and Business Mortgage Finance 4 plc v Pengelly* [2021] EWCA Civ 471.

— Claim for breach of statutory duty (s.138D of the Financial Services and Market Act 2000) based on alleged failure to comply with the FCA’s Principles for Business or rules in the Consumer Credit sourcebook (CONC).

Customers typically seek a variety of remedies ranging from the return of the commission, to the difference between the interest rate they paid and the lowest interest rate which the motor finance firm would have been prepared to offer them based on the DCA commission model or rescission of the agreement.

Dispute resolution

Financial Ombudsman Service:
A high volume of complaints regarding motor finance commission payments have been referred to the FOS. The FOS has taken some time to decide on its overall approach to dealing with these complaints. However, on 11 January 2024, the FOS published two Final Decisions upholding complaints against lenders who used a DCA model and awarding compensation to the customers. Compensation was calculated as the difference between the interest rate that the customer paid under the credit agreement and the lowest interest rate in the DCA model plus interest at 8%. The FOS published a third Final Decision on 11 January 2024 involving a fixed rate commission model where the complaint was not upheld. In April 2024, one lender applied to the High Court seeking permission to bring a judicial review claim against the FOS in relation to its Final Decision.

In parallel with the FOS publishing the Final Decisions above, the FCA announced that it would be intervening to pause the FOS complaints process whilst the FCA instructed a skilled person report under s.166 of FSMA 2000 to review historic finance commission arrangements and sales across several firms (see below).

County Courts:
In parallel with the increasing volume of complaints to the FOS, there has also been an increasing volume of claims filed in County Courts across the UK. The outcomes in the County Court claims that have progressed to judgment have been mixed and it is certainly the case that lenders have had some success in defending claims.

County Court proceedings are unaffected by the January 2024 FCA intervention and court claim volumes may well increase as claimant firms look to direct claims away from the FOS during the FCA imposed pause. However, some County Court claims are also now being stayed as a result of pending appeals in higher courts.

Group actions:
There are various ongoing attempts to pursue group actions either via court proceedings or in the Competition Appeal Tribunal (CAT). To come within the competition law jurisdiction of the CAT, the basis of the claim has been repositioned away from the typical causes of action set out above to allege that agreements which included DCAs between motor finance lenders and credit brokers were anti-competitive agreements in breach of the Competition Act 1998.

FCA intervention

The FCA first investigated the motor finance sector between 2017-2018 and published a report entitled "Our work on motor finance – final findings" in March 2019. The FCA report looked at the various commission structures which were commonly in place between motor finance lenders and credit brokers. In consequence of the 2019 report, the use of DCAs was banned with effect from 28 January 2021 and brokers were required to disclose not only the "existence" but also the "nature" of any other form of commission received. However, the FCA did not see fit at that stage to implement any form of redress for customers.

On the same day as the FOS publishing its Final Decisions above (11 January 2024), the FCA announced that it was instructing a skilled person report under s.166 of FSMA 2000 to review historic motor finance commission arrangements and sales across several firms. To allow time for this work to take place, the FCA has paused the usual eight-week deadline for firms to provide a final response to existing or future complaints until 25 September 2024 (the FCA has also extended the deadline for consumers to refer complaints to the FOS after receipt of a final response from a firm).

Whilst the above steps pause the complaints process for complaints which have not so far been referred to FOS until at least September 2024, the FOS will continue to investigate and issue decisions on those complaints which have already been referred to it.

The FCA recognised in its announcement that it may need to extend its pause depending on the outcome of the s.166 review. The FCA has said that if it finds there has been widespread failure to comply with regulatory requirements which has caused consumers financial loss, they have various options available to them which might include:

— establishing a consumer redress scheme; or

— leaving complaints in the hands of the FOS (and the courts) and allowing the application of the root cause analysis rules under the FCA complaints handling rules which may require firms to undertake proactive redress exercises; or

— bringing a test case to resolve any contested legal issues of general importance.

The FCA's work and the possible routes to resolution of any regulatory breaches will take time.

At this stage, it is clear that 2024 will be an important year in determining how many motor finance commission claims are likely to be viable and shaping where such claims are to be determined (i.e. via redress schemes, the FOS, the County Courts, and/or group actions).

ESG Litigation

ESG litigation is a growing risk area for banks and other financial institutions. Whilst there has been limited action taken to date in the UK against banks (whether via regulatory enforcement action or litigation) there is an inevitability as to what is likely to come in the UK as a result of ongoing legal developments in this area and by drawing parallels with risks that have already materialised in other jurisdictions.

The risks can best be considered by reference to (i) regulatory risk, (ii) activist litigation, and (iii) litigation seeking commercial returns.

A. Regulatory risk
To date, the Financial Conduct Authority (FCA) has not taken enforcement action in this area. However, the FCA has recently introduced a new "anti-greenwashing" rule (in force from 31 May 2024) and the FCA has also emphasised the overlap between ESG-related marketing of investment products to retail customers and the new Consumer Duty ("consumer understanding" element).

By way of example of regulatory enforcement action that could be on its way to the UK, the US Securities & Exchange Commission (SEC) fined a bank USD 19m in September 2023 after finding that the bank had told the market that they followed certain ESG policies when they either did not follow the policies or could not evidence them having been followed. In another recent example, the US SEC fined a bank USD 1.5m in 2022 for misstatements and omissions regarding their ESG credentials.

If regulatory action is taken against UK banks then litigation will likely follow with claimants seeking damages by "piggy-backing" on regulatory findings.

Outside of the financial regulators, the Competition and Markets Authority (CMA) published its Green Claims Code in 2021 regarding the advertising of any product directed at a UK consumer. The CMA is due to receive increased enforcement powers under the forthcoming Digital Markets, Competition and Consumers Act (giving the CMA powers to fine up to 10% of global turnover).

The UK Advertising Standards Agency (ASA) will take action if it suspects greenwashing. By way of example, two advertisements from a bank were challenged by the ASA on the basis that, although the adverts contained factually accurate statements from the bank as to the green initiatives they were supporting, the ASA found them to be misleading adverts in the round as they did not also refer to the financing that the bank provided to companies generating greenhouse gases.

B. Litigation Risk
1. Activists
Activists are increasingly targeting corporates by bringing novel legal claims in relation to ESG-related matters to bring public attention to their complaints and to attempt to drive changes in corporate behaviour.

Recent examples of activist claims in the UK include:

- *ClientEarth v Shell* [2023] EWHC 1897 (Ch) where ClientEarth alleged the Shell board were in breach of directors' duties in failing to adopt and implement an energy transition strategy that aligned with the Paris Agreement.
- ClientEarth's attempt to judicially review a decision of the FCA in 2023 to approve the prospectus of a UK oil and gas company.

Both of the above legal claims by ClientEarth were ultimately unsuccessful. However, a primary purpose behind activists bringing legal claims is to raise the profile of the issues in the complaint and to ensure boards are aware that corporate actions may be subject to public challenge. We can therefore anticipate that these types of legal claims will continue – and may be pursued against banks – with activists paying close attention to corporate ESG-related disclosures and ESG strategies.

As an example of what could be heading to the UK, various activist claims have been brought against banks across Europe as climate activism starts to focus on banks that provide financing to the fossil fuel industry or otherwise adversely impact climate change. Legal action has been threatened or commenced by NGO's against banks in the Netherlands, Belgium, and France over the last few years on these grounds.

2. Commercial claims

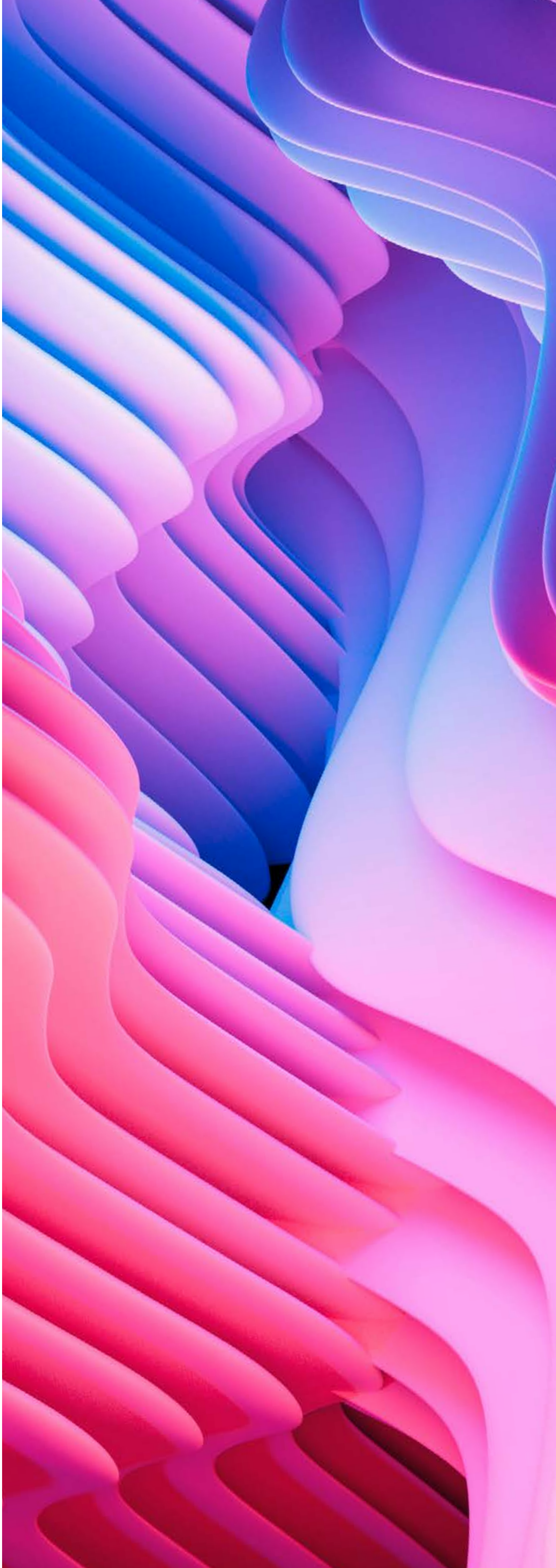
Separate to activist actions above, there is a growing risk of ESG-related litigation from claimants who are seeking commercial returns from the litigation.

By way of example of the types of litigation risk that banks may face:

a. There is an increasing focus on consumer-led litigation and a growing group action risk with sophisticated claimant law firms and litigation funders actively identifying opportunities to pursue claims. There is a risk of consumer claims where "green" investments or other financial products have been sold on a misleading basis. Consumers will have a private right of action under section 138D of FSMA for alleged breaches of the FCA's new anti-greenwashing rules (in force from 31 May 2024).

b. The UK is also seeing a rise in "securities litigation" where shareholders are bringing claims against companies as a result of alleged losses suffered in respect of their shareholding. These claims are brought under the statutory liability regimes provided for by the UK Financial Services and Markets Act 2000 and common law claims in fraud or negligent misstatement. Claims are usually brought by way of group action and there is an increasing risk of such claims arising from ESG related disclosures to the market if such disclosures prove to be inaccurate and affect the share price.

In summary, we remain at the early stages of ESG litigation action against banks in the UK. As we move through 2024 and into 2025 it is likely we will see some form of action taken by activists against banks and other financial institutions, regulatory action taken by the FCA under the soon to be introduced anti-greenwashing rule, with commercial claims certain to follow in some capacity.



The Future of the Quincecare Duty

2023 was an important year for clarifying the proper boundaries of claims alleging breach of a bank's so-called "Quincecare duty". In 2024, given the increase in fraud, we are likely to see Quincecare duty claims continue where these are still viable with claimants also re-positioning claims to allege breach of a "retrieval duty".

In *Philipp v Barclays Bank UK plc* [2023] UKSC 25, the Supreme Court decided that an individual customer that makes a payment pursuant to an authorised push payment (APP) fraud cannot bring a claim against their bank for breach of the Quincecare duty. This was on the basis that, although the customer was misled by fraudsters to make the payment, the payment instruction to the bank was still validly authorised and the bank was required to act on that instruction.

The Supreme Court confirmed that, properly understood, the so-called Quincecare duty is underpinned by agency law and the purpose of the duty is not to protect customers from fraud but rather to establish whether a payment instruction is authorised or not.

Claims for breach of the Quincecare duty are therefore restricted to claims where the payment instruction comes from an agent of the customer of the bank (e.g. an instruction from an employee or officer of a company or an agent acting on behalf of an individual).

These types of claims, brought on the narrower basis above, are likely to continue to be pursued in 2024 and beyond.

When will a bank be "on notice" as to whether a payment instruction is authorised or not? Below we consider the judicial commentary from decisions in England & Wales, Hong Kong, Singapore, and Dubai to provide some practical guidance on this question.

Confirmed red flags

The only decided case in England & Wales to find a breach of the Quincecare duty remains the decision in *Singularis*[1].

Singularis was an unusual case. Not least, the defendant bank (Daiwa) was not a typical bank administering hundreds of bank accounts with thousands of payment instructions every week. Given the nature of Daiwa's banking operations, the court found that it was not impractical to expect Daiwa to look carefully at the instructions that were given for payments out of the Singularis account.

The key "red flag" findings of the English High Court were as follows:

— Any reasonable banker would have realised that there were many obvious, even glaring, signs that the individual instructing the payment was perpetrating a fraud on the company. He was clearly using the funds for his own purposes and not for the purpose of benefiting Singularis. In making the disputed payments without proper or any inquiry, Daiwa were negligent and were liable to repay the money to Singularis.

— The Daiwa witnesses accepted that it was highly unusual, if not unique in their experience, for money in a customer account not to be paid back into another account in that customer's name.

— The senior management of Daiwa were well aware that Singularis was in a very precarious financial state.

— Daiwa was aware that Singularis may have other substantial creditors with an interest in the money held in their account.

— Whilst the Quincecare duty does not require a bank to become paranoid about the honesty of those it does business with in normal circumstances, the Quincecare duty does require a bank to do something more than accept at face value whatever strange documents and implausible explanations are proffered by the officers of a company facing serious financial difficulties.

1 See *Singularis Holdings Ltd (In Liquidation) v Daiwa Capital Markets Europe Ltd* [2017] EWHC 257 (Ch) (High Court), as upheld by the Supreme Court *Singularis Holdings Ltd (In Liquidation) v Daiwa Capital Markets Europe Ltd* [2019] UKSC 50.

- The production of a "Hospital Expenses Agreement" which had never been mentioned before but which was conveniently produced to justify a very substantial payment out of Singularis' funds was suspicious.
- The disputed payments were signed off by the Daiwa staff that were processing payments without any consultation or discussion with anyone else within Daiwa. There was a failure at every level. What emerged from the evidence was a wealth of emails being sent by senior executives to colleagues in London and Tokyo stressing how great care and caution must be exercised in handling any requests for payment from the Singularis account. Everyone recognised that the account needed to be closely monitored but no one in fact exercised care or caution or monitored the account themselves and no one checked that anyone else was actually doing any exercising or monitoring either.
- The above failings had been predicted by a Thematic Review conducted by the bank a year earlier that had warned "*if accountability for fraud is not clearly defined there may be confusion with regards to whose responsibility it would be to ensure there are sufficient anti-fraud controls in place*".

Therefore, as can be seen from the above, there were many "red flags" in the Singularis case that should have put the bank on notice that the agent instructing payment on behalf of the company was attempting to defraud the company.

Other judicial commentary on red flags

England & Wales

Barclays Bank plc v Quincecare Ltd [1992] 4 All ER 363

In *Quincecare*, the court explained that the assessment as to whether the bank was properly "on notice" of the potential fraud would always depend on the particular facts of each case. By way of example, the judge highlighted the possibility that "the amount involved" and "the need for a prompt transfer" may be relevant flags. However, the judge was reluctant to lay down any specific thresholds as every banking relationship is different, and what might be an unusual transaction for one customer could be very common for another.

Steyn J held that:

"*The law should not impose too burdensome an obligation on bankers, which hampers the effective transacting of banking business unnecessarily. On the other hand, the law should guard against the facilitation of fraud, and exact a reasonable standard of care in order to combat fraud and to protect bank customers and innocent third parties. To hold that a bank is only liable when it has displayed a lack of probity would be much too restrictive an approach. On the other hand, to impose liability whenever speculation might suggest dishonesty would impose wholly impractical standards on bankers. In my judgment the sensible compromise, which strikes a fair balance between competing considerations, is simply to say that a banker must refrain from executing an order if and for as long as the banker is 'put on inquiry' in the sense that he has reasonable grounds (although not necessarily proof) for believing that the order is an attempt to misappropriate the funds of the company*".

Lipkin Gorman (A Firm) v Karpnale Ltd [1989] 1 WLR 1340

In *Lipkin Gorman*, the Court of Appeal recognised the volume of payments handled by banks and deliberately set a high threshold for the triggering of the duty. The court confirmed that it would only be in "rare circumstances" that a banker would be expected to refer all cheques to a manager before they were paid. Also, that cheques should be paid immediately unless "*the circumstances are such that a reasonable cashier would hesitate to pay a cheque at once and refer it to his or her superior, and when any reasonable superior would hesitate to authorise payment without inquiry.*"

Tecnimont Arabia Ltd v National Westminster Bank plc [2022] EWHC 1172 (Comm)

The judge in *Tecnimont* decided that there was "*nothing out of the ordinary about a payment to a foreign account*" on the facts of the case.

The judge also held that the bank had "*adequate and properly designed systems*" in order to try and prevent frauds being perpetrated on and by its customers.

***Federal Republic of Nigeria v JP Morgan Chase Bank NA* [2022] EWHC 1447 (Comm)**

In *FRN* the court confirmed that the red flags must be specific and identifiable as a risk to the particular payment instruction / transaction in question, rather than just general red flags or concerns: "*it is not enough to ask about fraud in broad terms, because that does not engage the particular fraud which needs to be proved... it is a question of maintaining a distinction between the fraud which is critical and the many frauds which are not*".

Therefore, even though the transaction in *FRN* had "unattractive features" and there was "an association with past corruption", that was not enough to trigger the Quincecare duty.

Dubai

In *Aegis Resources DMCC v Union Bank of India* [2020] DIFC CFI 004, the Dubai International Financial Centre ruled on a situation where a fraudster had access to the customer's email account through a phishing scam. The judge decided that because the destination of the payment (Mexico) was not one of the destinations listed in the current account opening form, that was a red flag which contributed to the bank being put on notice and ultimately being found in breach of the Quincecare duty. The judge was not persuaded by the explanation by the bank's witness that "*there could always be a first time for any company to have a transaction in a different geography*".

Further, in that particular bank-customer relationship, it was the standard procedure for payment instructions to be sent by email and then also followed up by fax and/or telephone call. The judge decided that even if the bank was entitled to act on emails alone under the terms of the facility agreement, the absence of a fax or telephone call was out of the ordinary (which was a ground for suspicion).

Hong Kong

In the Hong Kong case of *Pt Asuransi Tugu Pratama Indonesia TBK v Citibank N.A.* [2022] HKCA 510, the Court of Appeal considered that a pattern of payments (most of which exceeded $1m) was not enough on its own to put the bank on inquiry. However, the court decided that the pattern of payments would put a bank on inquiry when considered in conjunction with two other factors relevant in this case, namely: (1) the lack of business connection between the payments and the customer; and (2) the instruction being signed by the agent due to benefit from the transaction. Therefore, on the facts of this case, the Hong Kong court held that all three factors considered together would have alerted the reasonable and prudent banker about a serious possibility of fraud.

Singapore

In *Hsu Ann Mei Amy v Oversea-Chinese Banking Corp Ltd* [2011] SGCA 3, the Singapore Court of Appeal considered a bank's duty to exercise its customer's mandate in circumstances where the bank was concerned that the instructions were being made as a result of coercion by the customer's agent. In this case, an elderly customer entered a branch of the defendant bank accompanied by her adopted daughter, and instructed the bank to open a joint account in the names of the customer and her daughter and transfer all monies in the customer's account to that new joint account. After visiting the customer at her home and having concerns about her mental capacity, the defendant bank refused to comply with the instructions given concerns that they did not reflect the customer's real intentions.

The Singapore Court of Appeal held that the bank had acted reasonably in refusing the instructions because it had been put on notice. Relevant factors included:

- The customer appeared 'dazed' and didn't speak to the bank. Instead, her adopted daughter spoke on her behalf.
- The adopted daughter was a stranger to the bank, as the customer had previously always dealt with the bank herself.
- The customer later denied wanting to open a joint account and said she was happy with her existing banking arrangements.

Conclusion on red flags

Whilst the 2023 Supreme Court decision in *Philipp* narrows the boundaries of Quincecare duty claims to a situation where an agent is instructing the payment on behalf of a customer, we are likely to see a continuation of these claims. The following principles can be derived from the above cases regarding "red flags" that might be sufficient to place a bank on notice of a potential fraud by the agent:

- What does or does not constitute a red flag sufficient to put a bank on inquiry will be highly fact-specific.
- The nature of the bank's operations and the detail of its relationship with the customer will be highly relevant.
- Expert evidence will be required as to the standards expected of a reasonable banker at the relevant time.
- It will be relevant to consider any internal communications within the bank as to how a customer account should be treated from time to time and any risks identified or internal procedures in place for approving payments.
- Instructions to transfer high amounts on an urgent basis; the identity of the payee; and payments to foreign bank accounts will all be potential features of a transaction to carefully consider, but no single feature is likely to be determinative in and of itself.
- Courts are likely to expect banks to question strange supporting documents or explanations for payments that are objectively implausible.
- Concerns as to fraud need to relate to the specific transaction in question that the bank is being asked to process (rather than more general/historic concerns).

Retrieval duty?

In addition to claims being advanced based on an alleged breach of the Quincecare Duty (in an agency scenario), we are also likely to see claims being advanced on the basis of a breach of the so-called "retrieval duty". The Supreme Court decision in *Philipp* permitted Mrs Philipp to advance a claim based on a potential duty of care on the bank to take reasonable steps to recover the sums paid out as a result of a fraud. The same head of claim survived a strike out application in the 2024 decision in *CCP Graduate School Ltd v National Westminster Bank plc & Anor* [2024] EWHC 581. It seems likely that these types of claim will face significant challenges but, to date at least, they have survived strike out applications. Judicial treatment of the "retrieval duty" is therefore a topic to watch in 2024 and beyond.

Redress schemes

Redress schemes have historically been used across a number of sectors, including the financial services sector, as a way of remediating customers when things go wrong without the need for recourse to formal legal proceedings.

However, there have been a number of complaints regarding the effectiveness of certain historic redress schemes. Most recently, redress schemes are in the public and political spotlight as a result of the Post Office/Horizon scandal where the compensation scheme for postmasters has received heavy criticism.

In 2023, the All-Party Parliamentary Group for Fair Business Banking (APPG) published a report titled "Building a Framework for Compensation and Redress" ("the Report"). The Report raised concerns as to how redress schemes have been structured and implemented to date in the UK.

We summarise below the APPG's concerns and their recommendations which provides some insight on where historic schemes are considered to have fallen short and what future best practice might look like from a customer's perspective.

Context to the Report

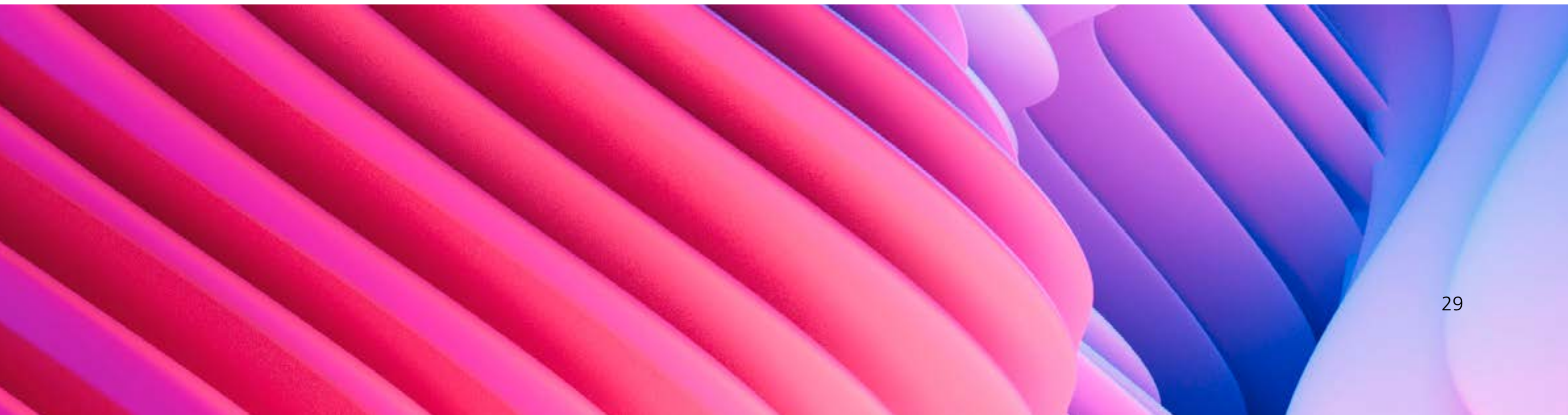
The APPG is a cross-party group with members from the House of Commons and the House of Lords which puts forward policy recommendations to Government. The APPG has a particular focus on improving the banking dispute resolution landscape for SMEs in the UK.

The Report identifies the APPG's concerns regarding limitations in the current UK framework for redress and lists key lessons learnt from a comparative study of ten schemes (across different sectors), from which the APPG derives certain key building blocks for future redress schemes.

Concerns with the current landscape

The Report identifies the following concerns that the APPG has with the current approach to redress schemes in the UK. In the APPG's view:

1. There is a lack of public trust in redress schemes given the problems experienced with many high profile schemes to date.
2. Most mass redress schemes are ad hoc and voluntary: they are established to tackle a specific scandal, usually after the failure of a given firm's internal complaints procedures. The process is often designed in such a way that limits the liability of the firm involved.
3. While many redress schemes have a stated aim of providing fair compensation, most scheme processes have historically led to unfair offers of redress and a lack of trust in the outcomes.



Common problems

Having reviewed ten significant redress schemes across different sectors, the Report identifies the following common problems:

- A refusal to learn from past mistakes: The design of many of the schemes are said to display the same features that led to the wrongdoing in the first place.
- The redress framework is often highly complex, sometimes involving multiple schemes and placing a significant burden of proof on victims.
- Many of the schemes considered in the APPG study were said to suffer from inherent or perceived conflicts of interest.
- Most schemes considered had failed to put victims back in the position they would have been in had the adversity not occurred.
- Lack of timeliness was said to be a consistent failing of the redress schemes considered by the APPG. Interim payments were identified as being crucial to ensuring that victims were returned as closely as possible to the situation they were in before the wrongdoing occurred, sooner rather than later.
- Schemes often excluded groups of victims with no prospect of independent assessment. Insolvent victims are said to have been unfairly excluded from most schemes and are not eligible for compensation.
- Several schemes suffered from a lack of transparency of processes, information, and outcomes and a corresponding lack of accountability.

The central conclusion of the Report is that ad hoc compensation schemes that "reinvent the wheel" each time a scandal emerges do not lead to optimal outcomes.

The building blocks of a compensation framework

The APPG identified the following essential building blocks to a good redress scheme:

1. A collaborative approach and process: There must be agreement between the firm and claimants on the detailed Terms of Reference (ToRs) before the scheme is launched. The design and administration of the scheme should be a collaborative process, in which claimants are consulted and sign off on the final ToRs.
2. Timeliness, both in set-up and adjudication: It is essential that the redress scheme be set up in a timely manner, as soon as the adversity is revealed, to limit the continued effects of the adversity, and restore harm caused as soon as possible.
3. Independence: Having an entirely independent adjudicator, with no links to the firm involved, is essential to guaranteeing that the outcomes are fair, and that claimants trust the process and engage with it. The choice of professional firms and adjudicators must involve the participation and agreement of claimants' representatives and groups.
4. A recognition of adversity: Putting individuals back where they would have been had it not happened should be the driving force behind the scheme.
5. Transparency of processes and outcomes: All pertinent information must be available to claimants. All evidence that is used to calculate awards must be made available to claimants, as well as detailed methodologies and descriptions of the process.
6. Broad eligibility: The scheme should actively seek to identify who is eligible for redress rather than who is not, and eligibility must be broad enough to compensate all of those affected by the adversity. Where there is a question, there must be an independent process for evaluating eligibility that is open to anyone that considers that they may have been affected.
7. Accessibility and legal costs: Schemes should be designed to be accessible without legal assistance, and not place an unreasonable burden of proof on victims. If this is not possible, it should cover the legal costs that are therefore necessary for claimants to access redress and ensure that full disclosure of information is available.
8. Appeals mechanism: Where claimants are dissatisfied with their assessment, they should have access to an internal review and after that an independent appeal panel.
9. Fairness and efficiency must be at the heart of the objectives of any redress scheme and must provide a sense of closure to claimants.

Key recommendations

The APPG made three recommendations:

Recommendation 1

Clear and compulsory guidelines for setting up a redress scheme. The Government should urgently publish a handbook establishing compulsory guidelines by which any public agency (such as the FCA), or any private firm or organisation (such as a bank), must abide by when setting up a redress scheme, based on the nine core building blocks above.

Recommendation 2

Creating an arms-length body (ALB) responsible for setting up and overseeing redress schemes. The ALB can then be activated when a scandal emerges, and be co-funded by private sector firms responsible for wrongdoing. This body would be composed of expert panels, to ensure guaranteed independence of judgement and be accountable directly to Parliament and regulators for the expenditure of public funds and the fulfilment of its terms of reference.

Recommendation 3

Creating a Financial Services Tribunal (FST) to adjudicate disputes in the financial sector, where both businesses of all sizes and individuals would be eligible to participate. The Financial Services Tribunal would be funded by the Treasury in the same way as other tribunals. However, it would introduce a small levy on financial services companies to meet the cost which would require legislation. This accessible and expert dispute resolution service would likely head off most scandals but if the FST noticed trends and clusters of cases on particular issues, this would trigger reference to the ALB above to consider redress schemes.

Summary

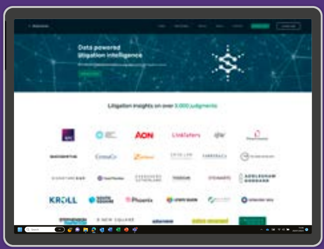
None of the recommendations from the APPG are likely to be implemented any time soon and it is unlikely that the three recommendations will ever be implemented in full.

The Report focuses on findings from a review of ten cross-sector schemes where problems have arisen. It is important to note that the financial services sector is highly regulated and there is already access to the FOS for claimants who feel they have been unfairly treated. Many redress schemes have been successfully designed and implemented in the financial services sector without the problems identified in the Report.

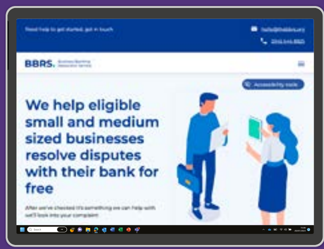
However, with redress schemes currently under the public and political spotlight, it is likely that future schemes will come under closer scrutiny. The "common problems" and "building blocks" sections of the Report may therefore provide a useful point of reference and cross-check when structuring future redress schemes in the financial services sector – both when considering the expectations of consumers and predicting the types of complaints that might be raised by those representing claimants if redress schemes are designed without addressing these issues.

Methodology

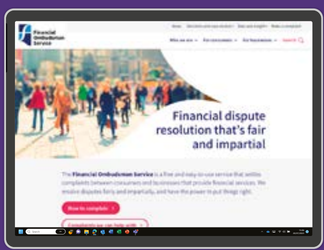
The High Court data is from Solomonic.

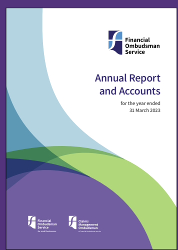


The BBRS data is taken from the BBRS website: [Business Banking Resolution Service (thebbrs.org)](thebbrs.org)



The FOS data is taken from the FOS Annual Report and Accounts for the year ended 31 March 2023 and other data from the FOS website: Financial Ombudsman Service: (financial-ombudsman.org.uk)





The arbitration data is taken from the LCIA Annual Casework Report 2022.

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