

What To Watch For In UK Financial Litigation In 2018

By **Richard Crump**

Law360, London (January 3, 2018, 6:41 PM GMT) -- The U.K. financial services industry faces another active year in court, preparing to wrestle with more rate rigging cases, claims against credit card companies over fees and follow-up misconduct allegations dating from the financial crisis.



Lloyds Banking Group will remain in the spotlight in 2018 as legal action brought against it by former shareholders seeking more than £550 million continues. (AP)

British banks are bracing for the outcome in a key Euribor manipulation criminal trial that could open the way to civil claims, while Lloyds Banking Group PLC is preparing for a potential wave of civil suits following revelations of serious internal failings at HBOS PLC during the trial of six financiers who were jailed last year for running a £245 million (\$331.2 million) loan fraud scam.

"Financial misselling cases are going to continue. You have got Libor cases and the Euribor trial in April. It is a big trend," said Claire Stockford, a partner specializing in international disputes at Shepherd & Wedderburn.

On other fronts, the Court of Appeal is also set to rule on two near-identical interchange fee cases involving British supermarket Sainsbury's that earned two different results for credit card firms Visa and Mastercard, in a case that will be closely watched by U.K. retailers that continue to push through swipe fee claims against the firms.

Here, Law360 looks at the biggest financial services cases to watch in the coming year.

Rate-Rigging Prosecutions Draw to a Close

The London trial for six former Deutsche Bank AG and Barclays PLC bankers accused of rigging a key European interest rate benchmark could mark the end of the Serious Fraud Office's crusade against benchmark manipulation.

In April, the agency will prosecute the so-called Euribor six — six former traders accused of rigging the Euro Interbank Offered Rate, or Euribor, between January and December 2009. The SFO has been investigating interest rate manipulation since 2012.

Euribor and the much more widely used London Interbank Offered Rate, a benchmark for trillions of dollars in securities and loans, are the rates that banks charge each other to lend cash.

Joanna Torode, an attorney in the enforcement practice group at Ropes & Gray LLP, says the case is the next stage in the development of financial mis-selling litigation.

"It follows on from Libor and foreign exchange manipulation. Despite initial setbacks, the SFO remains keen to push ahead with such cases and keep them within their remit," she told Law360.

David Green, the SFO's director since 2012, asked shortly after his appointment that the agency be judged on its results from investigations into benchmark-rigging, which makes the Euribor case an important one because of the SFO's mixed success in securing convictions.

The SFO's five-year investigation into financial benchmark rigging abuses by U.K.-based bankers suffered a major blow last year when former Barclays PLC derivatives trader Stylianos Contogoulas was found not guilty by a London jury in April of dishonestly rigging Libor to boost his profits. Another former Barclays derivatives trader, Ryan Reich, was found not guilty of the same offense at Southwark Crown Court the same month.

Last summer, however, four of Reich's and Contogoulas' former colleagues, Jay Merchant, Jonathan Mathew, Alex Pabon and Peter Johnson, were handed sentences from just under three years to six-and-a-half years for their roles in manipulating Libor.

"In any SFO case that is brought, it is critical for the SFO to secure a conviction. David Green has said he will be judged on this," said Richard Burger, a London-based partner specializing in financial services and corporate crime at Reynolds Porter Chamberlain LLP.

The SFO is now facing both an appeal and petitions for new appeals from several defendants taking issue with one of the expert witnesses the agency used across its Libor cases.

The case is the SFO v. Kraemer and others, case numbers T20167021, T20167022, T20167023, T20167025, T20167026 and T20167024, in Southwark Crown Court.

Swipe Fee Litigation Promises to Get Messy

In one of the key decisions of 2017, a U.K. competition tribunal put the brakes on a huge £14 billion consumer antitrust suit against Mastercard Inc. over swipe fees, ruling in July that the suit failed several tests necessary for it to be granted a collective proceedings order.

The case, which was dismissed because there were insufficient common issues to make a class action from individual claims, was just the second to be brought under the class action rules, which went into effect in October 2015.

Nevertheless, financial lawyers expect credit card giants such as Mastercard and Visa Inc. to continue facing a flurry of antitrust litigation in the U.K. off the back of European Commission decisions taking issue with the companies' interchange fees, bank-to-bank charges that underpin the swipe fees merchants must pay to process card transactions.

“Interchange fee litigation is the gift that keeps on giving in the sense that cases just keep coming in. Cases continue to be brought and don’t show any sign of drying up just yet,” Stockford said.

But she warns that swipe fees litigation is “starting to get quite messy” because of inconsistent decisions being made by U.K. High Court judges and which are set to be challenged in the Court of Appeal later this year.

In November, the High Court handed down a decision in a claim by Sainsbury’s Supermarkets against Visa. The court found that Visa’s interchange fees were not anti-competitive in principle, which Stockford said seems to stand in contrast with other recent decisions across the swipe fees litigation saga.

Sainsbury’s lawyers had urged the judge at trial to consider the points made by the Competition Appeals Tribunal in July 2016 when it found that Mastercard had violated EU and U.K. competition laws in a similar case brought by Sainsbury’s over swipe fees. The CAT awarded the supermarket company £68 million in damages.

But the judge said that the reasoning in the Mastercard decision did not alter his own findings that the Visa fees did not restrict competition, as he took a different view on the counterfactual scenario that needed to be applied.

“It is a real dog’s breakfast. It will be up to the Court of Appeal to unpick the conflicting judgments and arguments in April 2018,” Stockford said.

Given the complex and often inconsistent judgments across different jurisdictions on this issue, it is far from likely that this would be the “nail in the coffin” for these actions, she added.

The case is Sainsbury's Supermarkets Ltd. v Mastercard Inc. and Ors, case number C3/2016/4250 in the Court of Appeal.

Lloyds Continues to Nurse a Post-Crisis HBOS Hangover

Lloyds Banking Group PLC in 2017 continued to suffer the effects of its ill-fated acquisition of stricken U.K. mortgage lender HBOS PLC, which it acquired in a state-engineered takeover at the height of the financial crisis in 2008.

The British bank and five of its former directors are being sued by around 6,000 investors for more than £550 million over claims they were misled into approving the deal as key information over the true health of HBOS was withheld, including details of the loan facility.

Lloyds and its directors deny allegations that they withheld information about the financial position of HBOS before the deal and breached their duties by recommending the takeover, which they claim was a “unique opportunity” to acquire a rival that would otherwise have been blocked by competition rules. A High Court ruling is expected in early 2018.

"The trial was closely watched during 2017 as it considered events during the extraordinary period from 2008 when the acquisition took place. The outcome will be closely scrutinized by the market, both its result and because of the events the judgment will consider," said Chris Warren-Smith, white collar crime partner at Morgan Lewis.

Of more concern to the bank and its current management will be the revelations of serious internal failings at HBOS PLC that emerged during the trial of six financiers who were jailed in February for running a £245 million loan fraud scam through the bank, which has left Lloyds vulnerable to potentially hundreds of civil claims. The fraud took place before Lloyds acquired HBOS.

"The civil proceedings, some brought by high-profile individuals, continue to drive public interest and regulatory scrutiny of HBOS and cause issues for Lloyds," Warren-Smith said.

"Other potential claimants and third-party litigation funders are scrutinizing developments closely and other civil actions arising from lending and recovery operations may be seen soon against other financial institutions," he added.

Lloyds already faces the prospect of a £300 million lawsuit, launched by British television celebrity Noel Edmonds for losses he claims he suffered because of the fraud scam.

The former DJ had originally sought between £50 million and £70 million in compensation. But he said in July that he would pursue the bank for three times that amount for the “catastrophic impact” it had had on his life, which he claims almost led him to commit suicide following the fraud.

Lloyds has set aside a £100 million compensation fund for victims of the fraud. By the end of November, Lloyds had paid around £29 million in compensation to 35 out of 63 businesses included in a review of customers affected by the scandal.

The case is John Michael Sharp and others v. Sir Maurice Victor Blank, John Eric Daniels, Timothy Tookey, Helen Weir, George Truett Tate and Lloyds Banking Group PLC, claim number HC-2015-000105, in the Chancery Division of the High Court of Justice of England and Wales.

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