R v NATWEST (2021): ANOTHER TURNING POINT IN THE REGULATION OF BIG BANKS?

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ABSTRACT

This article examines *R v NatWest*, which made headline news for the record fine given to NatWest following allegations of money laundering. This is a first for banking history. The facts themselves are equally remarkable. The analysis conducted in this article proffers some insights into how such activity persisted. Such a discussion shows how unusual the events were in the context of banking history. A contextualized overview of the growth of NatWest has much to offer those interested in the culture and the internal processes within the bank, which lead to a breach of the Money Laundering Regulations 2007. The present case offers numerous points for reflection. Such a comprehensive analysis is worth undertaking not only because of the historical shifts that can be observed in the banking industry though *R v NatWest*. It shows how some of the tensions in this case are age-old, but, equally, that the decision here has important implications for the future of banking and financial law.

Keywords: big business; banks; banking; bank regulation; money laundering; financial history; corporate governance

I. INTRODUCTION

Regina (the Financial Conduct Authority) v National Westminster Bank PLC (2021), hereafter, *R v NatWest*, made headline news for the record fine given to NatWest,[1] following allegations that it had not done enough to prevent money laundering. The trial of those who were alleged to have taken part in money laundering received media attention, too.[2] It remains ongoing.[3] This is a record fine in financial history. Justice Cockerill, presiding over the Southwark Crown Court, explained the rationale for the record fine and gave clear reasons for it in her sentencing guidelines. Among other points, she noted that '[i]t seems to me that in this case despite the Bank's commitment to improvement and regret it is incumbent on the Court to pass a sentence which is of sufficient size that it will be felt by management and shareholders of the Bank'.[4]

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[1] Rupert Jones, 'Natwest Fined £264m after Taking Deposits of Laundered Cash in Bin Bags' *The Guardian* (13 December 2021) <https://www.theguardian.com/business/2021/dec/13/natwest-fined-264m-after-admitting-breaching-anti-money-laundering-rules> accessed 12 December 2022; 'NatWest Fined £265m after Bin Bags of Cash Laundered' *BBC News* (13 December 2021) <https://www.bbc.com/news/business-59629711> accessed 12 December 2022; 'NatWest Fined £265m for Money Laundering Failures' *Financial Times* (13 December 2021).

[2] Especially as some are media personalities with celebrity status. 'James Stunt among Eight Accused of £266m Bradford Money-Laundering Scam' *BBC News* (3 May 2022) <https://www.bbc.com/news/uk-england-leeds-61309362> accessed 12 December 2022; Jessica Murray, 'Former Son-in-Law of Bernie Ecclestone on Trial for Alleged Money Laundering' *The Guardian* (4 May 2022) <https://www.theguardian.com/uk-news/2022/may/04/former-son-in-law-of-bernie-ecclestone-on-trial-for-money-laundering> accessed 12 December 2022.

[3] The Daily Mail has offered fairly regular coverage of the trial. See, for example, 'James Stunt's Barrister Says Prosecutors Did Not Prove Guilt in Money Laundering Trial | Daily Mail Online' <https://www.dailymail.co.uk/news/article-11488287/James-Stunts-barrister-says-prosecutors-did-not-prove-guilt-money-laundering-trial.html> accessed 12 December 2022.

[4] *Regina (the Financial Conduct Authority) v National Westminster Bank PLC (2021)*, Southwark Crown Court, Sentencing Remarks of Mrs Justice Cockerill, 13 December 2021, Para 121.

Indeed, the bank's size was important. It formed one of the root causes for the award of a record fine.

This article discusses the pertinent issues raised here in Justice Cockerill's judgment about NatWest's size, its scale and its history of internal financial reporting. The analysis considers the business history of NatWest, its organizational structure and the context surrounding it, before moving on to recapping the case itself. The analysis conducted in this article proffers some insights into how such activity persisted and went on in the bank. It considers the historical governance structures of the two constituent parts of NatWest (National Provincial Bank of England and Westminster Bank). Such a discussion shows not only how unusual the events were but also how they were able to continue. A contextualized overview of the growth of NatWest, its size and structures has much to offer those interested in the process, which lead to a breach of regulations 8(1), 14(1) and 45(1) of the Money Laundering Regulations 2007, hereafter MLRs 2007.

The present case offers numerous points for reflection. Such a comprehensive analysis is worth undertaking not only because of the shifts that can be observed in the banking industry though *R v NatWest.* The case poses important implications for the future of banking and financial law. As the UK Financial Conduct Authority's, hereafter FCA, first criminal prosecution, the case serves as a signal for financial institutions that their duties and legal obligations within the fight against financial crime should not be taken lightly. Regulators are now evidently ready to exploit all the tools, including criminal sanctions, offered to them. Financial institutions, therefore, need to take note of *R v NatWest*. Caution will be needed as the ability and willingness to use initiatives, especially criminal investigations, to regulate banking behaviour may have a serious impact on their reputation and also business operations. The impact of the NatWest case as a tool for deterrence remains to be seen. Yet, the record fine is an indicator that those on the bench, as well as those in the FCA, are keen that the internal processes, which allowed such criminal activity to take place, should cease.

II. HISTORICAL CONTEXT

This section examines the business growth over the course of NatWest. It does show in order to show the size and scale of the enterprise; that the bank from its embryonic stage was a medium or large-scale enterprise. There are many ways, or dates, that can be used to measure the lifespan of NatWest, now a 'Brand' of the Royal Bank of Scotland.[5] NatWest was officially and formally created on the 1st January 1970 through a merger of two of the five biggest banks in the United Kingdom: National Provincial and Westminster.[6] Given the size of these two banks and their market share, the task set out was a formidable one.[7] When these negotiations (with each other and then the government) were successful, their namesakes were used together to create a new bank. One that encapsulated a shared heritage. National Westminster Bank, now known, more informally, as NatWest, was the product of this union.

As two independent banks, National Provincial and Westminster each had their own separate history. They grew to a national size by expanding, often as they did in 1968, through amalgamations. A merger movement took place in the late nineteenth century and early

[5] It is a subsidiary but the group refers to it as a 'brand'. See *Regina (the Financial Conduct Authority) v National Westminster Bank PLC (2021)*, Southwark Crown Court, Sentencing Remarks of Mrs Justice Cockerill, 13 December 2021, para 7.

[6] Richard Reed, *National Westminster Bank: A Short History* (National Westminster Bank 1983) 4.

[7] See the proposal for the failed merger between Barclays and Lloyds in 1968. Forrest Capie and Mark Billings, 'Evidence on Competition in English Commercial Banking, 1920–1970' (2004) 11 Financial History Review 69.

twentieth century. It swept up the last remaining single unit banks into large conglomerates.[8] Of all the banks, which were joined together to make what is now known in the marketplace as NatWest, the oldest was Smith's Bank in Nottinghamshire. This bank was formed in 1658.[9] It is sometimes referred to as the origins or beginnings of NatWest.[10] It was acquired by National Provincial through its merger with the Union Bank of London in 1918.[11] Smith's Bank, as the circumstances of this particular acquisition is outlined above implies, was not a major consistent part of National Provincial. Not in terms of its identity, core business or structure, but it, at least, added to, and lengthened, its linage.

Of the two core banks that made up NatWest, National Provincial and Westminster, their formation can be traced to the years of 1833 and 1834, respectively. After the 1825/6 financial crisis and the failure of 93 partnership banks in England and Wales,[12] the Scottish model of joint stock banking was held up as an example of stable banking.[13] The Banking Co-partnership Act 1826 removed the six partnership restriction and allowed banks to form with as many partners in England with the exception of a 65 miles radius of London.[14] The Bank Charter Act 1833 removed the geographical restrictions and permitted joint stock banks to form in the capital, but preventing them from issuing their own bank notes.[15] Both National Provincial Bank of England and London and Westminster Bank were formed shortly after the passage of this Act in 1833, although they had different business operations.

Their divergence in business models is in part owing to the circumstances of their formation and the personalities involved in it.[16] The business of National Provincial was spread geographically around the provinces, although the bank's headquarters, its administrative centre, was located in London. The name, National Provincial Bank of England, reflected an ambition rather than the reality. It had a strong presence in the south west, for example, but lacked business activity in north west.[17] London and Westminster had, by contrast, a rather different profile.[18] As its name implies, London and Westminster serviced the London metropolitan area. It dropped the 'London and' in 1923, after several mergers.[19] The two banks did not compete with each other because they served different aims. One wished to join and circulate credit around the provinces; the other to offer financial services in the capital. National Provincial did not undertake the business of banking in London until 1866.[20]

Despite the different geographical profiles, London and Westminster, like National Provincial, had hundreds of branches, each carrying out multiple transactions each day. Overall, their scale and scope were sizeable. They always added to their network by

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[8] Joseph Sykes, *The Amalgamation Movement in English Banking, 1825-1924* (PS King & son, Limited 1926).
[9] Reed (n 6) 20–21.
[10] Reed (n 6) 20–21.
[11] Reed (n 6) 20–21.
[12] Michael Collins, *Money and Banking in the UK: A History* (Croom Helm Ltd 1988) 9.
[13] Charles W Munn, 'The Emergence of Joint-Stock Banking in the British Isles a Comparative Approach' (1988) 30 Business History 69.
[14] 7 Geo IV c 46.
[15] 3 & 4 Wm IV c 98.
[16] The founder of National Provincial was Thomas Joplin, a notoriously energetic but fairly divisive personality. See DP O'Brien, *Thomas Joplin And Classical Macroeconomics* (Edward Elgar Publishing 1993).
[17] Victoria Barnes and Lucy Newton, 'How Far Does the Apple Fall from the Tree? The Size of English Bank Branch Networks in the Nineteenth Century' (2018) 60 Business History 447.
[18] Iain S Black, 'Symbolic Capital: The London and Westminster Bank Headquarters, 1836–38' (1996) 21 Landscape Research 55.
[19] See, for instance, appendix 8a in TE Gregory, *The Westminster Bank Through a Century* (Curwen Press 1936) vol 2.
[20] Hartley Withers, *National Provincial Bank, 1833 to 1933* (Waterlow & Sons 1933) 66–67.See also Victoria Barnes and Lucy Newton, 'Symbolism in Bank Marketing and Architecture: The Headquarters of National Provincial Bank of England' (2019) 14 Management & Organizational History 213.

amalgamating and adding smaller banks into it. This process of mergers and acquisitions left just five big banks on the high street: National Provincial, Westminster, Lloyds, Barclays and Midland. For these organisations, to reach such a size and complexity was an indicator of strong financial performance. To manage a large number of outlets, and then to add more to it, this suggests that they had developed the internal structures that existed to prevent fraud, maleficence etc. All banks had internal governance structures, although they were of varying quality and differed in relation to the business operations. National Provincial, and also Westminster, relied upon strong interpersonal networks to ensure that their customers were creditworthy, trustworthy and respectable.[21] Although National Provincial had the largest spread of branches across England and Wales, the mechanisms for assessing customers were not unique nor very different to the other banks in the English banking system.

The bank manager in each bank knew his customers well and personally through his local networks.[22] The structure of the organisation varied significantly though.[23] The apparatus for ensuring that each branch manager performed his role honestly – and there were little in the way of internal frauds – was in National Provincial, at least, clear from the outset. Each manager had strict rules and a rule book to follow; his authority was supreme,[24] but limited by the centre. He needed to report to the headquarters with greater evidence to exceed that authority.[25] The branch accounts and procedures would also be inspected by an individual outside of that bank manager's personal network.[26] This helped to ensure that the manager was not too close to friends or one industry.[27] Oversight, and other internal accounting mechanisms, were in place in National Provincial. Owing to the systemic reliance on outsiders inspecting and checking information, they were robust, too. The branches were, therefore, designed to be monitored effectively. It was decided that the most effective way to do this was by those at a distance from the centre of the organisation.

This process of regulating the bank manager, and thus the bank's interaction with its customers, was thought, by some at least, to be relatively successful. One argument that is made here, most pertinently by Capie and Collins, is that banks were cautious – but this was no such failure.[28] While banks may have been reluctant to deal with those outside of their information hinterground and the bank manager's interpersonal networks,[29] this was - for Capie

[21] Lucy Newton, 'Trust and Virtue in English Banking: The Assessment of Borrowers by Bank Managements at the Turn of the Nineteenth Century' (2000) 7 Financial History Review 177.

[22] Lucy A Newton, *Assessment of Information, Uncertainty and Risk: The Strategies of English and Welsh Joint-Stock Bank Managements, 1826-1860* (University of Reading, Department of Economics 2001). See also Victoria Barnes and Lucy Newton, 'Constructing Corporate Identity before the Corporation: Fashioning the Face of the First English Joint Stock Banking Companies through Portraiture' (2017) 18 Enterprise & Society 678.

[23] And so did the incidence of fraud. See James Taylor, 'Directors in the Dock: Joint-Stock Banks and the Criminal Law in Nineteenth-Century Britain' in Matthew Hollow, Folarin Akinbami and Ranald Michie (eds) (Edward Elgar 2016) <https://eprints.lancs.ac.uk/id/eprint/74560/> accessed 4 December 2022.

[24] Alexander Forrester Fergus, *Practical Branch Banking* (2nd edn, Pitmans and sons 1949) 240.

[25] Victoria Barnes and Lucy Newton, 'British Banks and Their Aesop's Fables: Organizational Memories of the Governance and Management of Financial Crisis' in Youssef Cassis and Catherine R Schenk (eds), *Remembering and Learning from Financial Crises* (Oxford University Press 2021) <https://doi.org/10.1093/oso/9780198870906.003.0009> accessed 5 December 2022.

[26] For more on professionalism, training and competency, see Edwin Green, *Debtors to Their Profession: A History of the Institute of Bankers, 1879-1979* (Methuen 1979).

[27] Lucy Newton, 'Regional Bank–Industry Relations during the Mid-Nineteenth Century: Links between Bankers and Manufacturing in Sheffield, c. 1850 to c. 1885' (1996) 38 Business History 64.

[28] Forrest Capie and Michael Collins, *Have the Banks Failed British Industry?* (Institute of Economic Affairs 1992). See also Mark Billings and Forrest Capie, 'Financial Crisis, Contagion, and the British Banking System between the World Wars' (2011) 53 Business History 193.

[29] Fabio Braggion, Narly Dwarkasing and Lyndon Moore, 'Nothing Special about Banks: Competition and Bank Lending in Britain, 1885–1925' (2017) 30 The Review of Financial Studies 3502.

and Collins at least - fair and reasonable banking behaviour.[30] It ensured that there was minimal instability in the British banking sector.[31] Others have, of course, naturally disagreed; they either dispute the empirical evidence or see Capie and Collins as apologists.[32] In this line of thought, such behaviour is risk adverse; it had a negative impact on the potential for economic growth. Banking behaviour, and its conservative culture,[33] is seen by some as a factor that fostered British economic decline in the early twentieth century.[34]

With movements in the early twentieth century,[35] banks interacted with each other more. Yet, this often took the form of collusion rather than competition over custom. It did not constitute a change in business practices.[36] It followed that these internal structures and systems of governance, which were consistent among the big British banks, coped with new problems associated with growth reasonably well and did not change dramatically.[37] Banks were slow to recognise the benefits of mechanisation.[38] Existing practices remained in place until around the 1970s.[39] The reliance on personal contact shifted in the 1970s with computerisation. Innovation in technology offered shifts in management capabilities.[40] Checks and balances were made often electronically thereafter. It was then that the bank manager's role – and, indeed, his status as a figure of authority within the community - was in many senses undercut.[41] Information about bank customers was no longer gathered through interpersonal contacts and by networking. And so, his discretion was lost.

Equally, within the banks themselves, the checks and balances – the coordination and verification of information – was no longer run interpersonally by an inspector, who examined the books and also the staff, who collated the information in them.[42] This was now performed electronically with quantitative accounting mechanisms often taking over. It was also at this point in time that the high street banks expanded to have volume of transactions as well as the customer base that they have today. Hitherto, they were the bastion of the middling sort and elites. Yet, British banks, hereafter, began looking to draw in masses as their customers. Those in more traditionally working class occupations were often paid cash in hand and thus did not

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[30] Forrest Capie and Michael Collins, 'Industrial Lending by English Commercial Banks, 1860s–1914: Why Did Banks Refuse Loans?' (1996) 38 Business History 26. See also Lucy Newton, 'English Banking Concentration and Internationalisation: Contemporary Debate, 1880-1920', *International banking in an age of transition* (Routledge 2016).

[31] Michael Collins, 'English Bank Lending and the Financial Crisis of the 1870s' (1990) 32 Business History 198.

[32] Judith Wale, 'What Help Have the Banks given British Industry? Some Evidence on Bank Lending in the Midlands in the Late Nineteenth Century' (1994) 4 Accounting, Business & Financial History 321.

[33] Forrest H Capie and Terence C Mills, 'British Bank Conservatism in the Late 19th Century' (1995) 32 Explorations in Economic History 409.

[34] Richard S Grossman, 'Rearranging Deck Chairs on the Titanic: English Banking Concentration and Efficiency, 1870–1914' (1999) 3 European Review of Economic History 323.

[35] Sykes (n 8).

[36] Fabio Braggion, Narly Dwarkasing and Lyndon Moore, 'Value Creating Mergers: British Bank Consolidation, 1885–1925' (2022) 83 Explorations in Economic History 101422.

[37] Luther Armstrong Harr, *Branch Banking in England* (University of Pennsylvania Press 1929) 84–85.

[38] Alan Booth, 'Technical Change in Branch Banking at the Midland Bank, 1945–75' (2004) 14 Accounting, Business & Financial History 277.

[39] Matthew Hollow, 'Investigating Attitudes to Risk in British Banking: A Case Study of Barclays' Branch Banking System, c. 1900–80' in Korinna Schönhärl (ed), *Decision Taking, Confidence and Risk Management in Banks from Early Modernity to the 20th Century* (Springer International Publishing 2017) <https://doi.org/10.1007/978-3-319-42076-9_8> accessed 3 December 2022.

[40] Bernardo Bátiz-Lazo and Douglas Wood, 'Management of Core Capabilities in Mexican and European Banks' (1999) 10 International Journal of Service Industry Management 430.

[41] Pål Vik, '"The Computer Says No": The Demise of the Traditional Bank Manager and the Depersonalisation of British Banking, 1960–2010' (2017) 59 Business History 231.

[42] Bernardo Bátiz-Lazo and Peter Wardley, 'Banking on Change: Information Systems and Technologies in UK High Street Banking, 1919–1969' (2007) 14 Financial History Review 177.

require a bank account. With the loss of various lending restrictions,[43] British banks looked to offer more in terms of credit and so they aimed to take on more depositors to balance their books. Aggressive, contentious and loud marketing tactics ensued.[44]

The 2007-9 financial crisis was not generally believed to be caused by those banks, such as NatWest, Lloyds and HSBC, which sit traditionally along the British high street. The nature of contagion in the financial markets means that the poor performance of one organisation can have a systemic impact on the others, as the belief in instability spreads through the financial system.[45] The origins of the 2007-9 financial crisis are often attributed to subprime lending and credit swaps in the United States, although the culture of banking – together with its aims, objectives and values – was also in question.[46] Risky, reckless and profit seeking has no doubt motivated some actors within the financial sector. However, legislative reforms followed to clarify the standard and character that bank managers should aspire to embody. Section 36 of the Financial Services (Banking Reform) Act 2013 now makes it a criminal offence to undertake risky management decisions that cause a bank to fail. We now move to discuss *R v NatWest* and the circumstances in which money laundering took place within the bank.

III. CASE SUMMARY

Fowler Oldfield began banking with NatWest in 2011, when it became a commercial customer.[47] It was originally a small company, owned by a married couple as a family firm.[48] The bank rejected its application for an account initially, because its business buying and selling gold was too risky.[49] One of the factors involved in the shifting of the bank's position, and its decision to offer Fowler Oldfield an account, was the influence of the Relationship Manager, who advocated on Fowler Oldfield's behalf.[50] The bank took on Fowler Oldfield, although identified it as high risk because of the high cash turnover associated with the cash for gold business model.[51] As such the Relationship Manager was due to pay close attention to the account.[52] The risk rating was downgraded to low in 2013, when the information on the Relationship Management Database was amended. Rather than dealing in 'precious metals', such as gold, Fowler Oldfield was listed as trading in 'wholesale metals and metal ores', such as iron and steel. These changes appear not to be implemented manually but occurred through a change in programmes.[53] The information was incorrect - and the risk rating increased manually by the Relationship Manger in 2014 to medium.[54]

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[43] The abolition of government credit control regulations and bank rate took place in 1971 together with the ending of cartel agreements on lending. See Charles Goodhart, "Problems of Monetary Management: The UK Experience," in Charles Goodhart, *Monetary Theory and Practice: The UK Experience* (Macmillan Education, n.d.), 91–121;.

[44] Victoria Barnes and Lucy Newton, 'Women, Uniforms and Brand Identity in Barclays Bank' (2022) 64 Business History 801.

[45] Charles P Kindleberger, *Manias, Panics, and Crashes: A History of Financial Crises* (Wiley 2000).

[46] Carmen M Reinhart and Kenneth S Rogoff, *This Time Is Different: Eight Centuries of Financial Folly* (Princeton University Press 2011).

[47] *Regina (the Financial Conduct Authority) v National Westminster Bank PLC (2021)*, Southwark Crown Court, Sentencing Remarks of Mrs Justice Cockerill, 13 December 2021, para 28.

[48] *Ibid*, para 29.

[49] *Ibid,* para 28 and 29.

[50] *Ibid*, para 32.

[51] *Ibid*, para 31.

[52] *Ibid*, para 33.

[53] *Ibid*, para 34.

[54] *Ibid*, para 35.

There was a significant change in Fowler Oldfield's management and business operations over time but, most importantly, its use of the NatWest account in the beginning of 2014. In November 2013, it deposited around £150,000. Within the space of 6 months or so, it began depositing between £900,000 and £2,500,000 each month.[55] At the high point of the operation, cash was delivered to NatWest at a rate of £1,800,000 per day.[56] These activities triggered alerts from staff and the automated transaction monitoring system.[57] While the volume is remarkable, some of the qualitative information is equally startling. Some of the sums of money were deposited in black bin bags, which were inadequate and tore because of the weight of the cash, and in some branches, the safes were not large enough to store the deposits.[58] While neither of these instances was reported by bank staff as being suspicious, other branches raised concerns repeatedly and set up a team to monitor the deposits from Fowler Oldfield.[59] One centre reported an unusually high number of Scottish bank notes for the location and cash that had a musty smell, suggesting that it was stored rather than used in a high frequency transaction industry, such as the one that Fowler Oldfield was alleged to operate in.[60]

There were 19 subsequent investigations,[61] but none resulted in challenging the incorrect information given on the computer systems.[62] The office dedicated to carrying out most of these investigations was new; it lacked the experience and rigour in its investigations.[63] Given the number of investigations, some reports resulted in little attention because of the scrutiny which appeared on file.[64] When the National Crime Agency and West Yorkshire Police notified NatWest of their investigation into Fowler Oldfield in 2016, this prompted the bank to act. It subsequently submitted 13 Suspicious Activity Reports retrospectively dating back to 2013.[65]

In March 2021, the FCA brought criminal charges against NatWest for alleged violations of the UK's money laundering regulation. The agency contended that the bank did not exercise appropriate control over the sums of money that its customer, Fowler Oldfield, had deposited. The allegations related mostly to events that had taken place between 2012 and 2016. The facts themselves were agreed by either side and took the form of a 114 page document.[66] The FCA weaved these facts together and they took the form of three offences:

- failing to comply with the obligation to conduct ongoing monitoring of a business relationship under Regulations 8(1) and 45(1) of the MLRs 2007;
- failing to comply with the obligation to conduct ongoing monitoring as it applies to customer due diligence measures under Regulations 8(3) of the MLR 2007; and
- failing to apply, on a risk sensitive basis, enhanced customer due diligence measures and enhanced ongoing monitoring under Regulation 14(1) of the MLRs 2007.

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[55] *Ibid*, para 41.
[56] *Ibid*, para 37.
[57] *Ibid*, para 35.
[58] *Ibid*, para 51.
[59] *Ibid*, para 51 and 52.
[60] *Ibid*, para 52 and 53.
[61] *Ibid*, para 37.
[62] *Ibid*, para 38.
[63] *Ibid*, para 39.
[64] *Ibid*, para 54 and 56.
[65] *Ibid*, para 60.
[66] *Regina (the Financial Conduct Authority) v National Westminster Bank PLC (2021)*, Westminster Magistrates' Court, Agreed statement of facts.

NatWest accepted that it had discharged their monitoring obligations and so pleaded guilty in November 2021.[67] There was an agreement and were joint submissions on sentencing,[68] but Justice Cockerill disembarked from this. She decided to 'sentence on the basis' of her 'own consideration of the materials and the submissions'.[69] She had relative freedom as regulation 45(1) of the MLRs provided that the maximum penalty was an unlimited fine. Accordingly, in December 2021, Justice Cockerill in the Southwark Crown Court imposed a fine of £397,156,944.14, which was then reduced to £264,772,619.95 because of NatWest's guilty plea.[70] This exceeded the mathematical calculation of the fine based on a variety of factors.[71] Why a fine of such magnitude?

The answer lies in Justice Cockerill's understanding of the corporate banking system and NatWest's behaviour, which meant these activities had persisted, and, finally, in the way she saw of preventing it from occurring again. Justice Cockerill accepted that the bank took its obligations seriously and spoke positively of NatWest's reaction to the breaches; it had made a 'serious financial commitment' to remedying these issues,[72] 'senior management was serious about improving its AML systems and controls, that there was a clear "tone from the top" and that the Group's key values of "doing the right thing" and "taking risks seriously" had filtered down to the front line',[73] and that it had a positive relationship with the FCA through the investigation.[74] She acknowledged the bank's culture and the scale of its investment in preventing financial crime,[75] although she saw the flaws in their internal governance as being significant.

NatWest used a 'three lines of defence' model in regard to its anti-money laundering policies, which was consistent with industry standards.[76] In many respects, its policies and procedures in terms of monitoring were observed to be following industry guidance.[77] It was the first line of defence – the manual and automated monitoring – that was thought to have failed here.[78] There were too few quality checks of the information on file, despite branches and centres flagging concerns and the regular opportunities to check. Together with the shallow investigations, there was a trust in internal processes that was misplaced.[79] Justice Cockerill also commented on the lack of 'challenging' or 'challenges' to internal processes.[80] Such an approach can be expanded. Few organisations would tolerate such strident activity and potentially persistently disruptive action from individual colleagues, especially those without a mandate for such a role. These comments speak more to the imbalance in power between the periphery and centre, where the management capabilities and competencies at the centre are

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[67] *Regina (the Financial Conduct Authority) v National Westminster Bank PLC (2021)*, Southwark Crown Court, Sentencing Remarks of Mrs Justice Cockerill, 13 December 2021, para 10.
[68] *Ibid*, para 76.
[69] *Ibid*, para 77.
[70] Cockerill was dismissive of the guilty plea in the sense that she believed that because of the length of the indictment period and number of counts, 'NatWest has had no realistic alternative but to plead guilty'. *Ibid*, para 123.
[71] *Ibid*, para 125.
[72] *Ibid*, para 65
[73] *Ibid*, para 64
[74] *Ibid*, para 22
[75] *Ibid*, para 124: 'Even its compliance costs are …[enormous] – the increase which has recently been made from £700 million to £1 billion for the next 5 years gives some hint of what is needed to properly comply with these Regulations which though demanding are of such great importance'
[76] *Ibid*, para 11, 13 and 14.
[77] *Ibid*, para 15.
[78] *Ibid*, para 14.
[79] *Ibid*, para 116.
[80] *Ibid*, para 48 and 63.

inadequate.[81] As such, it is not competent in scrutinising or verifying information given. If it is then charged with checking the periphery only, it dismisses information from the periphery and so takes no notice of where the periphery also regulates the periphery. There is no doubt that the organisational capabilities and internal processes could have been strengthened. Yet, it was the centralisation, computerisation and formalisation of information gathering that prevented such extra knowledge or additional facts to be considered. Indeed, it is the corporate structures themselves rather than the organisational culture of the bank or its behaviour that requires adjustment.

It was clear that Justice Cockerill considered the size of NatWest and the company law dimensions as important. She mentioned the bank's existence as a corporate entity frequently in the judgment, stating most clearly that '[t]he Bank is an entity which operates in the many millions of pounds'.[82] Here, she added and expanded on her comments on its size, by stating that:

> The Bank is a major retail Bank. It forms an important part of the network of banks which are used by individuals across the country daily and which is therefore in a position of some trust… It is also an important financial institution within our financial system… It is incumbent upon corporate entities in such positions to justify their position by a scrupulous regard both for establishing and carefully operating systems which will prevent the infiltration of the financial sector by money which is the proceeds of crime and will also ensure that those who seek to do so are not allowed to flourish.[83]

Permitting risky corporate behaviour means potentially greater profit for shareholders and managers. Such behaviour can be seen as entrepreneurial and growth-inducing, but in banking, on the other hand, it is far more disruptive. Recklessness in banking is equally linked to instability. Banks have a greater role within society, unlike the typical manufacturing firm. The failure of a bank has ramifications that extend far beyond that single entity because it impacts market confidence, other banks in the financial system and thus the economy as a whole. Justice Cockerill noted that link between attitudes towards risk and profit explicitly, by saying that she 'appreciate[d] that in one sense there is an artificiality in fining heavily an entity which has seen no net financial benefit from its involvement with Fowler Oldfield's money laundering'.[84] The message was, therefore, clear: limiting checks in order to reduce costs and improve profit in banking, would not be accepted.

IV. IMPLICATIONS FOR FUTURE LAW

The NatWest case confirms the criticality of conduct risk and the financial institutions' difficulties in mitigating such risk. Bank behaviour and conduct risk has been long debated because of the resonance that some bank wrongdoings, committed even after the 2007-9 financial crisis, had worldwide.[85] Misconduct cases in the financial sector are regarded as a source of systemic risk given their potential to erode trust in businesses and markets.[86] Until

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[81] For the theoretical framework, see Alfred D Chandler Jr, *Scale and Scope: The Dynamics of Industrial Capitalism* (Harvard University Press 1994).

[82] *Regina (the Financial Conduct Authority) v National Westminster Bank PLC (2021)*, Southwark Crown Court, Sentencing Remarks of Mrs Justice Cockerill, 13 December 2021, para 124.

[83] *Ibid*, para 122.

[84] *Ibid*, para 126.

[85] Francesco De Pascalis, 'Conduct Risk: Meaning, Interpretation and Dissension' (2019) 30 European Business Law Review; James Ross, 'A Practical Approach to Culture and Conduct Risk Management' (2020) 3 Journal of Financial Compliance 118.

[86] Kern Alexander, Rahul Dhumale and John Eatwell, *Global Governance of Financial Systems: The International Regulation of Systemic Risk* (Oxford University Press 2005); Chris Brummer, *Soft Law and the Global Financial System: Rule Making in the 21st Century* (Cambridge University Press 2015).

now, financial supervisors have strengthened their controls over the suitability and effectiveness of firms' risk management policies.[87] Though it was recognised that NatWest was not involved in the money laundering operations, the bank's failures were 'vital' in facilitating the scheme over a period of six years.[88] NatWest had in place a proper anti-money laundering system, which did not work as expected in practice. The judgment highlighted how, amongst others, deficiencies in the first line of defence were instrumental to the scheme. In these cases, the reputational damages transcend the fine once the firm violations and the subsequent agency's enforcement actions become public. Further costs are then suffered for implementing new processes and system to clean the reputation. [89]

NatWest made it clear that they would invest, between 2021 and 2025, more than £1,000,000,000 in financial crime arrangements to prevent the failures that led to the current criminal conviction. Within the global fight against money laundering, it can be seen as an increased intervention by supervisory authorities to hold accountable all those financial institutions which have deficiencies in their anti-money laundering programs. It is recognised that firms review notorious money laundering cases involving banks and the actions taken by enforcement agencies to build and implement adequate control systems. Against this backdrop, the NatWest case shows the importance for firms to perform stricter ongoing assessment of the areas of their business that can be more vulnerable to financial crime. This implies continuous evaluation of the robustness of internal safeguards against the inherent financial crime exposure some areas may have.

Another striking aspect of the NatWest case is that technology did not help the bank either. New cutting-edge technologies have been promoted and developed to improve anti-money laundering detection through tools allowing sound customer identification, beneficial ownership transparency, adequate management of large volume of data and more effective monitoring of transactions. The NatWest judgement pointed out the weaknesses of the bank's automated transaction monitoring (ATM) system, particularly the fact that the system categorised as 'cheque deposits' the cash placed in various cash centres. Significantly, such technology deficiencies are not a new issue among financial institutions' anti-money laundering programs. In 2021, the FCA fined HSBC Bank plc (HSBC) £63,946,800 for faulty anti-money laundering processes.[90] The agency identified serious deficiencies in the HSBC's automated transaction monitoring system, which was supposed to scan a large volume of transaction a month for financial crime purposes.

These cases call into question the extent to which anti-money laundering controls can be made more efficient through technological innovation in financial institutions. The recent call for evidence on amending the 2019 Money Laundering Regulations appears to answer this query negatively. Indeed, respondents stressed that there is lack of certainty on whether technologies are enough for firms to meet their anti-money laundering obligations because current guidance and regulations do not reflect the constant technological evolution. In any case, the NatWest and HSBC cases simply show laxness. In other words, technology is not to be blamed for the mentioned failures, but also the lack of sound business judgment and managerial control that is used alongside it. Indeed, as recently argued 'technology is neither

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[87] Stephanie Chaly and others, 'Misconduct Risk, Culture and Supervision' (2017) Federal Reserve Bank of New York <https://www.newyorkfed.org/medialibrary/media/governance-and-culture-reform/2017-whitepaper.pdf> accessed 8 December 2022.

[88] *Regina (the Financial Conduct Authority) v National Westminster Bank PLC (2021)*, Southwark Crown Court, Sentencing Remarks of Mrs Justice Cockerill, 13 December 2021, para 123.

[89] *Regina (the Financial Conduct Authority) v National Westminster Bank PLC (2021)*, Southwark Crown Court, Sentencing Remarks of Mrs Justice Cockerill, 13 December 2021, para 133.

[90] FCA, 'Decision Notice' (2021) Reference Number 114216 <https://www.fca.org.uk/publication/decision-notices/hsbc-bank-plc.pdf> accessed 8 December 2022.

good nor bad, but humans make it so'.[91] These cases teach the importance for regulated firms to apply higher levels of scrutiny and ongoing re-evaluation of their processes and technological resources.

The NatWest case marks also a first in the pursuit of criminal prosecution powers by the FCA. The MLRs 2007 is the legal basis for the agency's civil or criminal sanctions. The regulations identify credit institutions, financial institutions, auditors, insolvency practitioners, external accountants and tax advisers, independent legal professionals, trust or company service providers, estate agents, high value dealers, and casino as the 'relevant persons' subject to the regulations while carrying out their business activities in the UK. Regulations 45 of the MLRs 2007 is then the rule establishing the liability of any relevant person for not complying with the obligations set by the regulations. Such obligations range from due diligence duties, ongoing monitoring of a business relationship, customer verification, customer due diligence, enhanced due diligence, keeping record, robustness of risk-sensitive policies and procedures to employee training and awareness. Relevant persons charged with violations of these requirements need to demonstrate they took all the necessary steps to follow relevant guidance issued by supervisory authorities or approved by the Treasury. The FCA has powers to institute proceedings whenever there is a suspicion of an offence under Regulations 45.

Until now, the FCA has exercised more its civil powers to impose fines and censors under Regulations 76 rather than the prosecution mechanisms under Regulations 45. Some noteworthy cases confirm this trend. In June 2020, the FCA fined Commerzbank AG' s London branch £37,805,400 for failing to conduct effective know-your-client checks, fix deficiencies in its automated systems for detecting money laundering risk on client transactions, and for having inadequate policies and procedures for customer due diligence.[92] Violations were committed despite early investigations and warnings the FCA made in 2021, 2015 and 2017. In the same year, jointly with the Prudential Regulatory Authority (PRA), the FCA sanctioned Goldman Sachs International (GSI) £96.6 million in connection with the underwriting, purchasing and arrangement of three bond transactions for 1MDB, a Malaysian state-owned development company already under watch for serious embezzlement allegations. The joint investigation ascertained that GSI violated several FCA and PRA principles, particularly in relation to the assessment of the risk factors associated to each of the bond transactions and failure to exercise appropriate verifications in connection with the bribery and misconduct allegations 1MDB had been facing.[93] Finally yet importantly, in December 2022 Santander UK Plc was fined £107.7 million after the FCA ascertained major (and prolonged) failures in the bank's anti-money laundering control systems, which finally passed on the surveillance of more than 560,000 business customers' accounts.[94]

Being the first criminal prosecution initiative by the FCA, the NatWest case should be regarded as the agency's intention to take more stringent regulatory actions towards financial

[91] European Central Bank, 'Technology is neither good nor bad, but humans make it so' (2022) Speech by Elizabeth McCaul, Member of the Supervisory Board of the ECB, at the conference on "The use of artificial intelligence to fight financial crime", organized by Intesa Sanpaolo <https://www.bankingsupervision.europa.eu/press/speeches/date/2022/html/ssm.sp220713~73f22a486e.en.html#:~:text=If%20you%20allow%20me%20to,but%20humans%20make%20it%20so.> accessed 8 December 2022.

[92] FCA, 'Final Notice' (2020) Reference Number 124920 <https://www.fca.org.uk/publication/final-notices/commerzbank-ag-2020.pdf> accessed 8 December 2022.

[93] FCA, 'Final Notice' (2020) Reference Number 142888 <https://www.fca.org.uk/publication/final-notices/gsi-2020.pdf accessed 8 December 2022>; PRA, 'Final Notice' Reference Number 142888 <https://www.bankofengland.co.uk/-/media/boe/files/prudential-regulation/regulatory-action/final-notice-to-goldman-sachs-international.pdf?la=en&hash=0905E04952BFE7C4B05B7AFBB11467F21A069E3F> accessed 8 December 2022.

[94] FCA, 'Final Notice' (2022) Reference Number 106054 <https://www.fca.org.uk/publication/final-notices/santander-uk-plc-2022.pdf> accessed 11 December 2022.

institutions involved in money laundering schemes. In fact, in the aftermath of the NatWest's prosecution, the FCA warned firms that stronger efforts would be taken, either civilly or criminally, for ensuring effective detection, investigation and prosecution of money laundering. This declaration of intent was then followed by the 'Dear CEO letter' sent to retail banks in May 2021, in which the FCA instructed retails banks' CEOs to conduct a gap analysis given the persistent deficiencies affecting retail banks in areas such as governance and oversight, risk assessments, due diligence, transaction monitoring, suspicious activity reporting, which make the sector seriously exposed to money laundering schemes. It should be therefore questioned the agency's willingness to explore further the use of prosecutor powers on the spur of the NatWest case. According to recent data, the FCA has been conducting forty criminal investigations over firms for anti-money laundering failures.[95] Among them, twenty-nine probes were regulatory investigations, two were criminal investigations and three were civil probes, while six cases were still under evaluation as to whether regulatory or criminal investigation should be taken.[96]

Unquestionably, criminal prosecution means for the FCA huge resources, higher costs and higher burden of proof to justify the criminal route vis-à-vis civil action. Consequently, though the agency states that decisions are taken based on the merit and importance of the case, it is likely that criminal prosecutions will be 'exceptional' routes rather than frequent cases.[97] However, beyond the aspect of the higher cost and involved resources, due care also needs to be exercised as to the implications that criminal investigations have on the reputation of the firm and how convictions may be perceived by the public. As mentioned, the conduct risk literature highlights systemic implications from loss of trust following misconduct cases. Significantly, a financial institution's criminal conviction may be more impactful than civil sanctions in terms of public resonance, no matter how collaborative the firm is with the regulator to finally discount on the amount of the fines. Consequently, the interplay between loss of reputation and systemic risk can be more severe in the context of criminal proceedings affecting financial institutions. Cost, resources, reputational issues and public implications will be the elements to be factored in by the FCA, along with the merit of the case, before instituting criminal proceedings under the money laundering regulations.

V. CONCLUSION

The article has considered *R v NatWest* and analysed it through a variety of angles. It has, first and foremost, sought to explain why the record fine came to be issued. This was, after all, what caught the press's attention. Justice Cockerill did not err on the side of caution here. With this fine, she put forward a rather unambiguous statement on the severity of the issues. She made the case newsworthy, quite intentionally. The crux – and reason for the record fine – was NatWest's size and role as a financial organisation. In other words, what mattered here was the bank's status as a big business; it was the central role it played within the financial market and British banking system, more generally. In such a position, Cockerill believed that the bank had to be both trustworthy and careful in its ability to shape economic activity. Second, the article has offered a contextualised account of NatWest's growth. This has explained the case at hand as well as the bank's behaviour and its culture. NatWest can trace its roots back to the early nineteenth century. The historical longevity of this firm was not owing to its recklessness. Growth resulted from ambitious, yet prudent business behaviour. Stability was achieved by

[95] Jane Croft & Laura Noonan, 'FCA aims to use criminal powers in anti-money laundering probes' (2022) *Financial Times* <https://www.ft.com/content/5f6ea35c-c3e9-4d08-a69c-6e6677168378> accessed 8 December 2022.
[96] *Ibid*.
[97] *Ibid*.

strong internal corporate governance mechanisms. Inspectors and administrative units routinely carried out a series of independent checks and balances on branches. This shifted with computerisation in the 1970s, when the information gathered and supplied by people became less authoritative. A greater reliance on systems and information centrally held ensued. As its monitoring systems appeared sufficient, NatWest failed to identify money laundering when transacting with Fowler Oldfield in the 2010s. The bank did not notice that it lacked a method to interrogate its own information and detect suspicious business behaviour. It was only with the help of National Crime Agency and West Yorkshire Police that the bank discovered that its internal processes had flaws. Finally, this analysis only shows also how the litigation came into being. It offers a view to the future by discussing how the case may mark the pathway going forward. The record fine in *R v NatWest* sends a clear message that those on the bench will not continue to tolerate such behaviour. The litigation also shows the expanding remit of the FCA. Its aim to regulate bank misconduct now means to prosecute at a criminal level. The scope – and intention to do so – is evident, although the extent to which either the FCA or the judiciary can encourage firms to exercise more cautiousness is unclear. Compliance with industry standards is no longer the benchmark that financial organisations are expected to meet. Monitoring systems need to be developed further. It appears that NatWest is prepared to invest and seriously so. It is hoped that this judgment may contribute to a regulatory system in which agencies, those on the bench and in financial organisations are more allied in this fight, rather than create a launchpad for greater use of the FCA's prosecution powers. As such, this case leaves the potential for bifurcation in way forward.