Cases of Interest for Fraud Practitioners

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Welcome to the second edition of the Littleton Civil Fraud Group's quarterly newsletter. Since our last edition, accessible here, we have been on the lookout for further cases that may be of interest to civil fraud practitioners. These are listed below in chronological order.

We all know how busy practice can be, therefore as previously, the purpose of this newsletter is not to analyse decisions, but to provide brief details of what each case is about and why it may be of interest.

We hope that these newsletters continue to be of benefit.

Alexander Halban, Civil Fraud Group Member

Alex Francis, Civil Fraud Group Member

12 April 2021

Case 1

***Philipp v Barclays Bank UK plc* [2021] EWHC 10 (Comm), [2021] Bus LR 451**

Queen's Bench Division, Circuit Commercial Court, HHJ Russen QC, 18 January 2021

The Quincecare duty on banks does not extend to detecting authorised push payment fraud

Our first case concerns the duty of care owed by a bank to protect its customers from fraud. Under the so-called *Quincecare* duty (*Barclays Bank plc v Quincecare Ltd* [1992] 4 All ER 363), the bank is required to refrain from executing a customer's order if it has reasonable grounds to believe that the order is an attempt to steal the customer's money. In this case, the customer was the victim of an authorised push payment fraud in which she had been deceived by fraudsters into making two international transfers. She alleged that the bank had failed to comply with its duty to protect her from the consequences of the fraud. The bank successfully applied to strike out her claim. The court rejected the customer's attempt to extend the *Quincecare* duty to cases where, as here, the payment instructions were validly given by the customer and were not themselves fraudulent. Banks did not owe a duty to intervene in what appeared to be validly authorised payments.

Case 2

R (on the application of KBR, Inc) v Director of the Serious Fraud Office **[2021] UKSC 2**

Supreme Court, Lord Lloyd-Jones, Lord Briggs, Lady Arden, Lord Hamblen, Lord Stephens, 5 February 2021

SFO investigation notices do not have extraterritorial effect

Though strictly outside the bounds of civil fraud, our next case is a Supreme Court decision from early this year which may be of interest to those acting for multinational organisations faced with investigation by the SFO. Under section 2(3) of the Criminal Justice Act 1987 the Director of the SFO has the power to issue a notice requiring persons to produce documents and other information for the purposes of an SFO investigation into serious or complex fraud. Failure to comply is a criminal offence. The key issue in this case was whether the SFO could use that power to compel a foreign company to produce documents it holds outside the UK. The Supreme Court unanimously found that it could not.

Case 3

Leeds City Council v Barclays Bank Plc **[2021] EWHC 363 (Comm)**

Queen's Bench Division, Commercial Court, Financial List, Cockerill J, 22 February 2021

Strike out of LIBOR fraudulent misrepresentation claim

Barclays successfully applied for strike out of claims brought by two local authorities alleging fraudulent implied misrepresentations in relation to the setting of LIBOR. Barclays disputed various aspects of the claims but the application proceeded on the hypothetical basis that it had made the fraudulent misrepresentations alleged. The claim was struck out on the basis that the Claimants had not pleaded that the alleged representations were actively present in their mind when entering into relevant transaction and therefore the claim stood no realistic prospect of success for lack of reliance. For Cockerill J's discussion of what constitutes reliance in a misrepresentation claim see [49]-[74]. For her discussion of the cases relating to LIBOR specifically – namely *Property Alliance Group Ltd v The Royal Bank of Scotland plc* [2016] EWHC 3342 (Ch) and *Marme Inversiones 2007 v Natwest Markets* [2019] EWHC 366 (Comm) – see [75]-[101].

Case 4

Dale v Banga **[2021] EWCA Civ 240**

Court of Appeal (Civil Division), Moylan LJ, Asplin LJ and Hayden J, 24 February 2021

Fresh evidence in setting aside judgments for fraud

The first instance judgment in this case was given in 2016. The appellant later maintained that fresh evidence had come to light which indicated that the respondents had misled the judge. The Court of Appeal outlined the correct approach in a case where such allegations were made: see, in particular, [39-41]. The party complaining of fraud can either start a new action to set aside the earlier judgment (the route preferred by the Court of Appeal in previous cases) or can seek to appeal the judgment out of time and the Court of Appeal will likely remit the issue of fraud to the lower court to decide. In the instant case the Court had to decide whether the fresh evidence was sufficient to warrant a trial of the fraud issue, or in other words whether it was capable of showing that the judge was deliberately misled by the Respondents and that the judgment may have been obtained by fraud [42]. The Court held that this threshold test was not satisfied on the facts and the appeal was dismissed.

Case 5

PCP Capital Partners LLP v Barclays Bank Plc **[2021] EWHC 307 (Comm)**

Queen's Bench Division, Commercial Court, Waksman J, 26 February 2021

Barclays Bank executive made fraudulent misrepresentations, but did not cause loss

Following a trial adjourned twice as a result of related criminal proceedings, a senior executive at Barclays was held to have made fraudulent misrepresentations to PCP (owned by the famous businesswoman, Amanda Staveley) during a recapitalisation exercise during the 2008 financial crisis. The factual background in this case was complex and is reflected in a lengthy judgment. In summary, Barclays wished to avoid a government bailout and chose instead to raise capital through investments from Qatari interests and from PCP. The Court found that a senior executive at Barclays had made representations to PCP which he knew were false, including that PCP and the Qatari interests were getting the 'same deal'. The Court determined that Barclays made those representations knowing that they were false, with the intention that PCP would rely on them, and that PCP did, in fact, do so. However, PCP's claim on causation and loss failed, and Barclays was not liable in damages. The judgment includes a helpful discussion of the loss of a chance / balance of probabilities approach and the 'fair wind' principle in the assessment of damages – see [533] et seq and [568-569].

Case 6

Manek v IIFL Wealth (UK) Ltd **[2021] EWCA Civ 264**

Court of Appeal (Civil Division), Underhill, Coulson and Phillips LJJ, 1 March 2021

Fraudulent misrepresentations made in England sufficient to found jurisdiction

The claimants alleged that they were victim of fraudulent misrepresentation by the defendants which induced them to sell their minority shareholdings in a company. The claimants appealed against a decision setting aside permission to serve the defendants out of the jurisdiction.

Allowing the appeal, the Court of Appeal held that the claimants had shown that sufficiently 'substantial or efficacious' acts had been committed within England, so that the claimants could rely on the 'tort' jurisdictional gateway (CPR PD 6B para.3.1(9)(a)). Misrepresentations made during a meeting in London amounted to substantial and efficacious acts committed within the jurisdiction for the purposes of the test in Metall und Rohstoff AG v Donaldson Lufkin & Jenrette Inc [1990] 1 Q.B. 391, [1989] 2 WLUK 162. The legal potency of the misrepresentations was not extinguished because they were subsequently repeated and/or embellished, or because other substantial and efficacious acts happened elsewhere, or because it took time for the claimants to decide to sell their shareholdings [54].

Case 7

Canada Square Operations Ltd v Potter **[2021] EWCA Civ 339**

Court of Appeal (Civil Division), Sir Julian Flaux C, Males and Rose LJJ, 11 March 2021

Postponement of the limitation period for deliberate concealment

This was a case on section 32 of the Limitation Act 1980, which governs the postponement of the limitation period in case of fraud, concealment or mistake. Canada Square appealed against a decision that Mrs Potter's claim in respect of mis-sold payment protection insurance had been brought in time in light of the deliberate concealment provisions under section 32. The issues on appeal were, broadly, whether Mrs Potter could rely on either section 32(1)(b) or section 32(2) to postpone the start of the limitation period so that her claim had been brought in time. Dismissing the appeal the Court of Appeal held that: (1) the creation of an unfair relationship under s.140A of the Consumer Credit Act 1974 was a breach of duty which Mrs Potter could rely on for s.32(2) purposes; (2) recklessness was a sufficient mental element for concealment to be deliberate under s. 32; and (3) that for there have been concealment under s.32(1)(b) there did not have to be a free-standing contractual, tortious or fiduciary duty to disclose.

Case 8

Mozambique v Credit Suisse International **[2021] EWCA Civ 329**

Court of Appeal (Civil Division), Henderson, Singh, Carr LJJ, 11 March 2021

Fraud against Mozambique has to be heard within Swiss arbitration

The Republic of Mozambique brought a claim that it was the victim of bribery, conspiracy and fraud in respect of supply contracts with a UAE shipbuilder, which were financed by various banks,

including Credit Suisse, and supported by sovereign guarantees from the Republic. The suppliers had sub-contracted their roles to other companies. The Republic's liability under the loans was around US$2.1 billion, The Republic alleged that bribes had been paid to government officials and Credit Suisse employees.

The supply contracts were subject to Swiss law and arbitration; the loans, guarantees and two sub-contracts were subject to English law and jurisdiction. The defendants sought a stay of the claim under the Arbitration Act 1996, in favour of Swiss arbitration. The judge refused the stay, finding that the Republic's claims did not fall within the scope of the arbitration agreements, as the supply contracts were instruments of fraud or shams. The Court of Appeal disagreed: the claims concerned the validity of the supply contracts and the defendants would likely allege that they were genuine commercial contracts in their defence to the bribery and conspiracy claims. The claims therefore fell within the scope of the arbitration agreement and a stay was granted. Somewhat unusually, a substantial fraud claim will therefore be heard within Swiss arbitration, which will, naturally, be confidential.

Case 9

Ras Al Khaimah Investment Authority v Azima **[2021] EWCA Civ 349**

Court of Appeal (Civil Division), Lewison, Asplin and Males LJJ, 12 March 2021

Unlawfully hacked emails admissible evidence in fraud cases

The Claimant ('RAKIA') was the state investment authority of the Emirate of Ras Al Khaimah, one of the United Arab Emirates. It brought claims against Mr Azima in which findings of fraudulent misrepresentation, bribery and unlawful means conspiracy were made against him at first instance. At trial, RAKIA relied heavily on emails obtained by the unlawful hacking of Mr Azima's email account. Mr Azima appealed *inter alia* on the basis that since RAKIA had procured the hacking, the emails should have been excluded and/or the claim should have been struck out as an abuse of process.

The Court of Appeal noted that, under CPR 32.1, the court had a power, but not a duty, to exclude the hacked evidence, which would otherwise be admissible. Two factors counted against Mr Azima: firstly, the emails were disclosable documents, such that he should have disclosed them at trial in any event; secondly, the emails *'revealed serious fraud on the part of Mr Azima'*, which was a significant bar to the exclusion of evidence which he sought: [47]. As to the question of strike-out the Court held that even if the judge had found that RAKIA was involved in the hacking, it would have been wholly disproportionate to strike out its claim. The Court held that new evidence in relation to the hacking was sufficient for the case to be remitted to a different judge to determine Mr Azima's counterclaim concerning the hacking [145]-[147]. For a fuller discussion of this case and its implications see here.

Contact

Telephone: 020 7797 8600
Facsimile: 020 7797 8699
DX: 1047 Chancery Lane

Email: clerks@littletonchambers.co.uk

Address

Littleton Chambers
3 King's Bench Walk North
Temple
London
EC4Y 7HR

Social

littletonchambers.com

LinkedIn
Twitter
Vimeo