Cases of Interest for Fraud Practitioners

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Welcome to the fourth edition of the Littleton Civil Fraud Group's quarterly newsletter, which captures recent cases of interest for civil fraud practitioners.

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.

Anirudh Mathur and **Alex Francis**, Civil Fraud Group Members

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Case 1

Convoy Collateral Ltd v Broad Idea International Ltd and Cho Kwai Chee **[2021] UKPC 24**

Lord Leggatt, Lord Briggs, Lord Sales, Lord Hamblen (in the majority) and Sir Geoffrey Vos MR Lord Reed, Lord Hodge (in the minority), 4 October 2021

Delivering the majority judgment of the Privy Council Lord Leggat sought in this case to "*provide a juridical foundation for the entire law of freezing and interlocutory injunctions*" (in the words of the Master of the Rolls, in the minority). Although the analysis in this case is technically *obiter dicta*, it will no doubt be highly influential on any English or other common law court exercising a general power to grant injunctions.

Lord Leggatt's summary of the law in paras. 101-102 is likely to be the future starting point for any freezing injunction application. For more detailed commentary on this case see Alexander Halban's article here.

Case 2

CPS v Aquila Advisory Limited **[2021] UKSC 49**

Lord Stephens (for the Court), 3 November 2021

Aquila had acquired proprietary rights by assignment from VTL (a company in administration). VTL's directors had exploited their positions to make a secret profit of £4.55m, in breach of fiduciary duty. They were also convicted of a criminal offence from which they had personally obtained the same benefit of £4.55m and were ordered to pay substantial sums to the CPS under the Proceeds of Crime Act 2002 ("**POCA**"). In an action between Aquila and the directors, Aquila argued that it had

a proprietary claim to the directors' secret profit under a constructive trust, the benefit of which had been assigned from VTL. The CPS intervened and disputed Aquila's proprietary claim on the basis that orders under POCA took priority.

At first instance it was determined that Aquila could recover what remained of the secret profit from the directors in priority to the POCA orders. The CPS appealed to the Court of Appeal and then the Supreme Court. The thrust of its case was that the directors' actions should have been attributed to VTL, and thus VTL/Aquila should have been barred from recovering any proceeds of crime under the principle of illegality.

The Supreme Court dismissed the Appeal. It held that in proceedings by a company against its directors for breach of fiduciary duty, the unlawful acts or dishonest state of mind of a director could not be attributed to the company. Accordingly, the company's claim under a constructive trust was not barred under the doctrine of illegality. The Supreme Court also rejected the argument that victory for Aquila would be inimical to the regime of POCA. Sam Neaman was one of the counsel team that successfully represented Aquila.

Case 3

Libyan Investment Authority v Credit Suisse International **[2021] EWHC 2684 (Comm)**

HHJ Pelling QC, sitting as a Judge of the High Court, 3 December 2021

The Commercial Court set aside orders which had granted the LIA permission to serve three defendants out of the jurisdiction, and which extended the validity of the Claim Form. It also granted summary judgement in relation to causes of action against two Defendants.

The LIA's claim concerned an investment of $200m into financial instruments issued by Credit Suisse in 2008 and restructured in 2009. The Judge found, inter alia, that the claims were statute-barred as against all of the Defendants and the LIA had no realistic prospect of postponing limitation under the Limitation Act 1980 s.32. Of broader interest, he held that once knowledge of a fact was attributed to an entity such as the LIA for limitation purposes, it remained within that entity's knowledge even if the relevant individual subsequently forgot it or left the entity. Knowledge acquired during the Gaddafi era was knowledge of the LIA.

Case 4

MAD Atelier International BV v Manes **[2021] EWHC 3335 (Comm)**

Sir Michael Burton GBE, sitting as a Judge of the High Court, 9 December 2021

The Claimant brought proceedings against Axel Manes, a renowned French chef, principally in deceit. In 2016 one of the Claimant's directors had signed share transfer documents at a meeting with Mr Manes by which the Claimant sold shares to a company he owned. This sale had the effect of terminating a joint venture between the Claimant, Mr Manes and others to develop an international franchise of restaurants. The core of the Claimant's claim was that the director had not known that he was executing a share transfer and that his signature had been induced by deceit.

The Court found for the Claimant and concluded that Mr Manes had set up a scheme to persuade the Claimant's director to come to Paris on the pretext of approving accounts in order to deceive him into signing the share transfer documents. A large bundle of documents had been produced, most of which were accounts in French, which he knew the director would have great difficulty in understanding.

Paragraph 30 of the judgment contains a useful summary of the legal principles on the recoverability of damages for deceit, including on the rationality of imposing wider liability on an intentional wrongdoer, and the "*fair wind*" principle by which the Court would "*err if anything on the side of generosity*" for a loss that was proved but difficult or impossible to exactly calculate as a result of the defendant's wrongdoing.

Case 5

Crossley & Ors v Volkswagen ("VW NOx Emissions Group Litigation") **[2021] EWHC 3444 (QB)**

Waksman J, 20 December 2021

The High Court considered and dismissed two applications made in the ongoing group litigation concerning emissions defeat devices on Volkswagen vehicles. The first, which is the focus for current purposes, was an application by the Defendants, the principal part of which sought strike out or summary dismissal of the Claimants' claims in fraudulent misrepresentation. This was sought on the basis that "*conscious awareness*" was an essential element of such claims, following Cockerill J's decision in ***Leeds City Council & Ors v Barclays Bank plc & Anr*** [2021] EWHC 363 (Comm). Such conscious awareness was said to be absent.

In dismissing the application Waksman J noted that he did not consider the issue of conscious awareness was one "*which could seriously be described as a 'short point of law' which I should grapple with now*". Cockerill J's judgment in Leeds is due to be heard by the Court of Appeal in February 2022, setting the stage for further authoritative discussion of these issues.

Case 6

Kazakhstan Kagazy Plc v Zhunus & Ors **[2021] EWHC 3462 (Comm)**

Henshaw J, 21 December 2021

The latest chapter in the long-running case involving Kazakhstan Kagazy Group, this complex judgment concerns ongoing efforts by the Claimants to enforce an order that their former Chairman (Mr Arip) and associates pay damages of $300m.

The Claimants sought to enforce against valuable assets including four sets of London properties and £72m in cash. The Court granted all of the Claimants' claims, holding that the assets belong beneficially to the Claimants; alternatively, to Mr Arip, meaning the Claimants could enforce against them; in the further alternative, that they had been disposed of under s.423 Insolvency Act 1986.

Of the many issues of interest are (i) the discussion of the governing law for the tracing claim (in Section F), and (ii) the Court's decision to make Orders under s.423 Insolvency Act 1986 with extra-territorial effect.

Case 7

Tuke v Hood **[2022] EWCA Civ 23**

Andrews LJ, 14 January 2022

The issue raised in this appeal was whether, in the computation of damages for deceit, and specifically, a head of damages compensating for the loss of an investment opportunity, a victim is obliged to give credit to the fraudster not only for the cash he received as part of the fraudulently induced transactions, but also for the "*time value*" of that money in the period between that transaction and the trial.

The suggestion that, unless the victim gives credit to the fraudster for the time value of the money he will be overcompensated, was a novel one and was rejected by the Court as misconceived and contrary to principle. The upshot of requiring such credit would be to reduce the recoverable damages the longer the fraud went undetected, allowing a dishonest defendant to benefit from the concealment of his fraud. It would also be contrary to the fundamental aim of fully compensating a victim of fraud for all the loss directly flowing from the fraudulent transaction.

Case 8

Pisante v Logothetis **[2022] EWHC 161 (Comm)**

Andrew Baker J, 28 January 2022

Mr Pisante claimed that he was induced to invest in a business with Mr Logothetis (through corporate structures) on the basis of false statements. He claimed that Mr Logothetis knew of their falsity, and so the primary claim made was in deceit. The alleged falsity was that one of Mr Logothetis' entities would be investing ships and cash into a joint venture, whereas such investments were not made to the extent expressed.

Of interest in this case was the Court's "*tentative conclusion*" at para. 35 that where a statement of fact was made, with a view to inducing a contract, indifferent as to what the statement would convey, so it could be said that the representor was recklessly indifferent as to whether he was misleading the representee, that was deceit, if the statement was untrue, just as much as where a statement of fact was made by the representor aware of how it would be understood, but recklessly indifferent as to its truth. The Court concluded that in neither case is the representor able to say he had an honest belief in a meaning he thought his words would convey. In the event this conclusion was not determinative. The Court held that Mr Logothetis knew what he was telling Mr Pisante and that it was false. Claims in deceit were upheld.

Case 9

Autonomy v Lynch **(summary of conclusions)**

Hildyard J, 28 January 2022

The High Court has published a summary of its findings on liability in the long-running action brought by Hewlett Packard in connection with its 2012 acquisition of the software company Autonomy. The case has been billed in the media as Britain's biggest fraud case. The claimants have "*substantially succeeded*" in their claims.

The Court's findings have been outlined in a detailed Summary of Conclusions, in advance of a full judgment which is currently embargoed. The successful claims were brought under Schedule 10A of the Financial Services and Markets Act 2000 (FSMA), common law misrepresentation and deceit, the Misrepresentation Act 1967, and for breach of the defendants' contractual and fiduciary duties.

It is of interest at this stage to note the Judge's general comments in relation to an unusually long and complex trial, which lasted 93 days, and in particular in relation to the witness evidence. He highlighted concerns about the reliability of some of the Claimants' witness and hearsay evidence, which bore signs of having been fashioned, rehearsed and repeated in the course of multiple previous proceedings in the US and the preparatory stages for them.

Case 10

ED & F Man Capital Markets Limited v Come Harvest Limited **[2022] EWHC 229**

Calver J, 16 February 2022

The claim arose in relation to 92 documents which professed to give two of the Defendants a right to title in parcels of nickel. The documents, which were counterfeits, were purchased by the Claimant for a total of $284m. It was alleged that each of the 10 Defendants was implicated to a lesser or greater extent in this fraudulent scheme, by either facilitating or arranging it.

Calver J found that the purported warehouse receipts were forged; that MCM had rescinded its purchase contracts with D1 & D2; that D1-D4 were liable to MCM in deceit; and that D3 and D4 were liable for procuring breach of contract. He further found that D10 was part of an unlawful means conspiracy with D1-D4.

The Judgment is lengthy, given the complexity of the factual and legal issues in play. Nonetheless, practitioners may find helpful the Court's summary of the authorities on the deliberate destruction of documents [125-136] and its detailed discussion of the requirement of "*intention to injure*" in an unlawful means conspiracy [479-528].

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