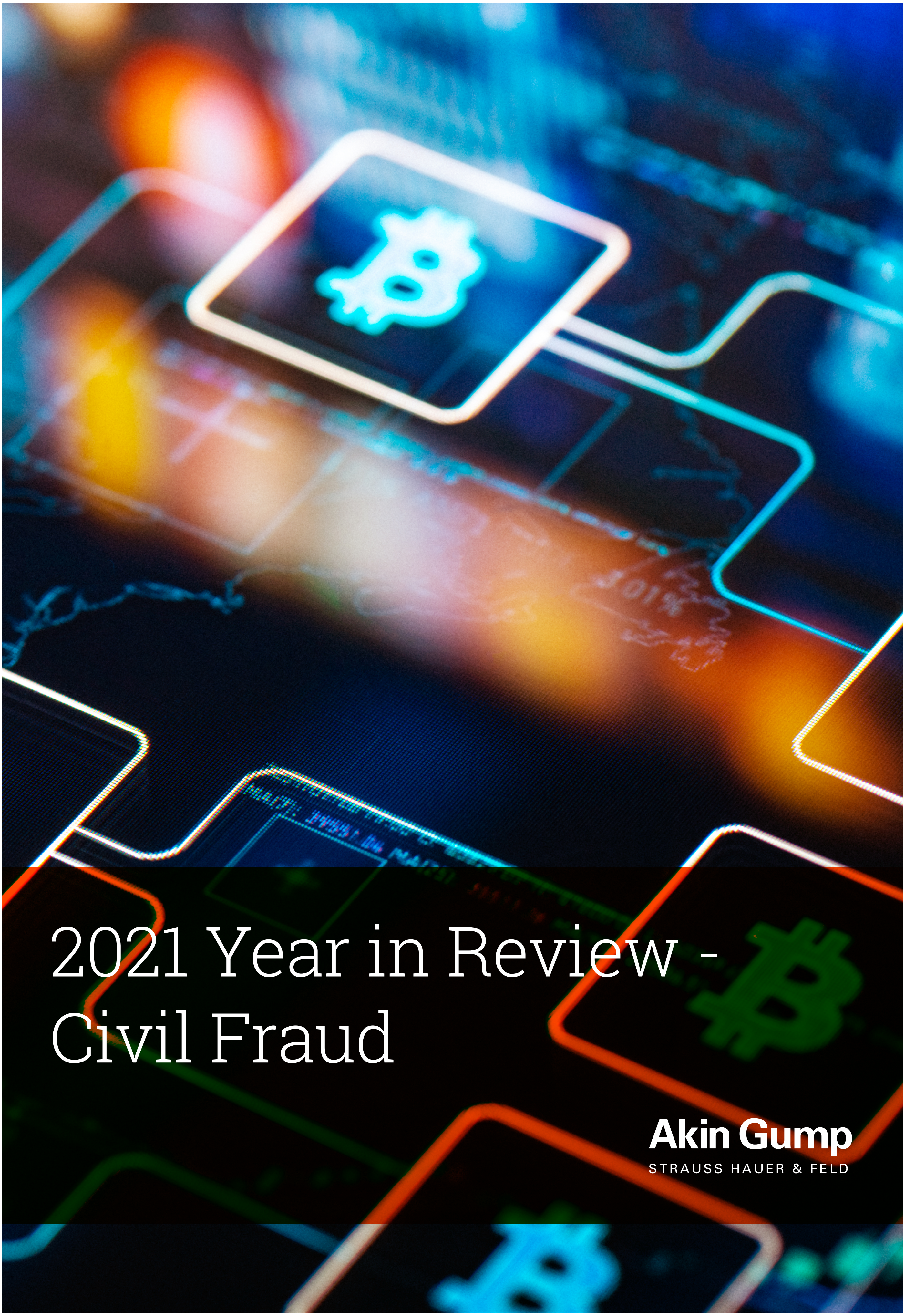

2021 Year in Review - Civil Fraud

Akin Gump
STRAUSS HAUER & FELD

February 2022

Welcome to our 2021 round-up for civil fraud litigation, complex cross-border disputes and asset recovery. In this publication, we consider some of the key cases and developments in English law and practice from the past year that are of particular relevance to this field.

In this publication, our civil fraud team provides an overview of a series of decisions grappling with a range of evolving and sometimes complex areas, including fraudulent misrepresentation, causing loss by unlawful means, obtaining worldwide freezing orders and applying for service out of the jurisdiction.

A copy of our 2020 round-up can be located here.

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The dealing requirement: an essential element of the tort of causing loss by unlawful means

Secretary of State for Health and another v Servier Laboratories Ltd and others **[2021] UKSC 24**

In *Secretary of State for Health and another v Servier Laboratories Ltd and others*,[1] the Supreme Court confirmed that an essential element of the tort of causing loss by unlawful means (the "unlawful means tort") is that the unlawful means in question should have affected a third party's freedom to deal with the claimant (the "dealing requirement"). It was held that the dealing requirement was a part of the *ratio* of the seminal *House of Lords decision in OBG Ltd v Allan*[2] and there was no good or sufficient reason raised to justify a departure from that decision.

The Supreme Court's judgment identifies the policy decision made in *OBG* with respect to the dealing requirement—highlighting its role as a control mechanism to prevent the unlawful means tort from becoming too expansive and creating potentially indeterminate liability. In turn, *Servier* raised questions as to whether an alternative control mechanism should be introduced, and whether the approach set down in *OBG* is here to stay.

Background

Servier concerned a patent relating to "perindopril", a medicinal product used for the treatment of cardiovascular diseases. In 2004, Les Laboratoires Servier SAS ("LLS") was granted a patent for the alpha crystalline form of the perindopril salt (the "947 Patent") by the European Patent Office ("EPO"). Servier Laboratories Limited ("SLL"), the first respondent, was the exclusive licensee under the UK designation of the 947 Patent. In the years that followed, LLS and SLL defended and enforced the UK designation of the 947 Patent in proceedings before the English courts, including by obtaining injunctions against other pharmaceutical companies. However, in 2007 the English court held that the UK designation of the 947 Patent was invalid due to its lack of novelty (or alternatively, it being obvious over another existing patent). In 2008, the Court of Appeal upheld this decision, and in 2009, the EPO revoked the 947 Patent.

The Secretary of State for Health and the NHS Business Services Authority, who fund the cost of medicine dispensed by the NHS, and who were successors in title to the rights of action of various NHS bodies that have since been abolished, were the appellants and claimants in the proceedings. The basis of the appellants' unlawful means tort claim was that in obtaining, defending and enforcing the patent, LLS used unlawful means by practising deceit on the EPO and the courts (the relevant third parties) regarding the novelty and lack of obviousness of the 947 Patent, with the intention of profiting at the claimants' expense. The appellants alleged that manufacturers of a more generic form of perindopril were delayed in entering the market as a result of the respondents' deceit, and as such, the appellants had to pay higher prices for the product.

The unlawful means tort claim was struck-out at first instance. The deceit, although denied by the defendants, was assumed to be true for the sake of the strike-out application, with the Court rejecting the claim on the basis that the dealing requirement is an essential element of the tort, and there had been no dealings between the claimants and the EPO or the English courts with which the defendants could have interfered. The subsequent appeal was also dismissed.

The appellants' case before the Supreme Court was that (i) the dealing requirement should not be treated as a part of the *ratio* of *OBG*, and (ii) alternatively, the Court should depart from *OBG* on the basis that the dealing requirement is an undesirable and unnecessary addition to the essential elements of the tort.

OBG

The Supreme Court's finding in *Servier* that the dealing requirement was a part of the ratio of *OBG* seems fairly uncontroversial.

It is true that Lord Hoffmann's initial summary of the tort in *OBG* did not include a reference to the dealing requirement:

"The essence of the tort therefore appears to be (a) a wrongful interference with the actions of a third party in which the claimant has an economic interest and (b) an intention thereby to cause loss to the claimant."

However, within a few paragraphs, Lord Hoffmann clarified his view that the unlawful means does not include "*acts which may be unlawful against a third party but which do not affect his freedom to deal with the claimant*".

Lord Hamblen's leading speech in *Servier*, which had unanimous support, noted that while the authorities prior to *OBG* did not explicitly hold that the dealing requirement was an essential element of the tort, the purpose of OBG was to clarify and define its requisite elements. Lord Hamblen identified a number of other reasons for finding that the dealing requirement was a part of *OBG*'s *ratio*, including that:

- Lord Hoffmann had explained and justified the dealing requirement through his analysis of previous unlawful means tort cases.
- The dealing requirement was consistent with existing authorities in which liability for the unlawful means tort had been established.
- The other members of the majority in *OBG* had understood that Lord Hoffmann's definition of the tort included the dealing requirement.
- The dealing requirement is consistent with and reflects Lord Hoffmann's concern that the tort should be kept within reasonable bounds.

The final point noted above also proved to be one of the key considerations in the Supreme Court's decision that there was no good or sufficient reason shown in *Servier* to justify a departure from *OBG*'s decision regarding the dealing requirement.

Alternative approaches

The appellants argued that the dealing requirement was an undesirable addition to the tort as it failed to cater for cases where a defendant may strike at a claimant in a situation where the claimant's interest in the third party's actions derives from something other than commercial or labour relations. The appellants also considered the dealing requirement to be an unnecessary element in the unlawful means tort, putting forward the following alternative approaches that the Court could take (although these were not accepted):

1. Reject the dealing requirement in favour of the requirement that the defendant's conduct must interfere with actions of the relevant third party in which the claimant has an interest.

2. Re-define the tort as requiring a defendant to deliberately employ means that the law prohibits (whether or not civilly actionable) with the intention of harming the claimant.

3. Re-define the tort as requiring a defendant to employ means that are unlawful, in the sense that they are actionable by the third party, or would be if the third party suffered loss, with the intention of harming the claimant.

The first option presented by the appellants is particularly notable as it suggests that the other elements of the tort, as currently defined, would be sufficient in performing a limiting role without recourse to the dealing requirement. The appellants emphasised the "*instrumentality requirement*" in this respect, describing this as the need for the third party's conduct to form a necessary link in the causal chain between the defendant's conduct and the harm suffered by the claimant, with the result that the defendant uses the third party as an instrument to strike at the claimant.

This argument was rejected on the basis that factual causation would not operate as an appropriate control mechanism—there could be uncertainty as to what would constitute a sufficient causal relationship, potentially leading to claimants establishing remote connections between the unlawful means used and the damage sustained. By contrast, the dealing requirement sets a very clear line.

Servier nonetheless raised a significant question: while the dealing requirement plays an important role, does this come at the expense of causing arbitrary or unjust outcomes? The appellants questioned why "*as a matter of justice, if a defendant obtains patent protection by deceit practised on the EPO so as to profit at the expense of the NHS, redress should be denied because the EPO does not trade with the NHS*".

This question however comes back to the concerns raised around the potential for the unlawful means tort to create indeterminate liability without the dealing requirement, which is highlighted particularly well in the context of medicinal patents. It is possible that claims against patentees could extend to a vast range of affected parties that also have no dealings with the English courts or the EPO: competitors of the patentee, individual users of the product, their insurers or health authorities who paid a higher price for the product, and so on. Whether the potential liability of deceitful patent-owners should be expanded in such a way is perhaps more appropriately a legislative rather than judicial consideration.

In *Servier*, the appellants did not, according to the Court, provide any real life examples of the dealing requirement causing difficulties, creating uncertainty or impeding the proper development of the law. These are the circumstances in which it may be appropriate for the Supreme Court to depart from the House of Lords decision in *OBG*, in accordance with the 1966 Practice Statement: *Practice Statement (Judicial Precedent)*.[3] This is a high bar to meet—particularly when considering a tort that, as Lord Hamblen acknowledged, "*permits recovery for pure economic loss […] by persons other than the immediate victim of the wrongful act*".

Servier certainly does not, however, prevent any potential departures from the *OBG* decision. The second alternative approach submitted by the appellants raised the prospect of adopting a reformulation of the tort as advocated by Lord Sales and Professor Davies in their 2018 article: *Intentional harm, accessories and conspiracy* (the "Sales/Davies proposal").[4] This approach would:

- Extend unlawful means to cover any civil, criminal or statutory wrong, rather than limiting it to wrongs actionable by the third party.
- Remove the dealing requirement and extend the tort to cover more than just economic interests.
- Adopt a narrow test of intention, requiring a specific intention to use unlawful means to harm a particular person, rather than having a "*hazy idea*" of others who may be harmed by the defendant's actions.

In *OBG*, Lord Hoffmann considered the requisite intention for the unlawful means tort to be present if the harm to the claimant was the means by which the defendant sought some other end, even if the defendant would rather have secured such end without causing harm to the claimant. The Supreme Court was not addressed on the point of revisiting the treatment of intention in OBG, and as noted in the judgment, this was likely because the relevant formulation of intention was not present on the facts. The elevated prices sought by the respondents were achieved at the expense of the appellants as a means to an end, rather than targeting the appellants specifically, and so the reformulation under the Sales/Davies proposal would operate to the detriment of the appellants. The appellants' suggestion did not therefore wholly follow the Sales/Davies proposal and was rejected for being selective and incoherent. The court noted however that if a reformulation like the Sales/Davies proposal "*ever falls to be considered, it would be necessary to consider it in its entirety*".

Lord Sales, who was one of the seven Justices considering *Servier*, added a further comment in his brief judgment on the apparent inconsistency between the treatment of unlawful means in the unlawful means tort and the tort of unlawful means conspiracy. The latter, as a result of the House of Lords decision in *Total Network SL v HMRC*,[5] diverges from the unlawful means tort in treating any conduct which is criminally or civilly unlawful as constituting unlawful means, even if not independently actionable. Lord Sales, while wholly agreeing with the approach taken by Lord Hamblen in *Servier*, expressed his view that this divergence "*will have to be resolved at some stage*".

Conclusion

Servier is a useful reminder of the high bar that needs to be met in order to depart from a previous House of Lords or Supreme Court precedent—particularly where the decision concerns the need to maintain some form of coherent control mechanism to limit the potentially expansive reach of liability under the unlawful means tort. However, *Servier* also acts as a reminder that *OBG* is not entirely without challenge, and, in the right circumstances, we may see aspects of the decision revisited once again.

[1] [2021] UKSC 24
[2] [2007] UKHL 21
[3] [1966] 1 WLR 1234
[4] (2018) 134 LQR 69
[5] [2008] UKHL 19

LIBOR rigging and fraudulent misrepresentation: awareness required to prove inducement

Leeds City Council and Newham LBC v Barclays Bank Plc [2021] EWHC 363 (Comm)

In *Leeds City Council and Newham LBC v Barclays Bank Plc*,[1] the Commercial Court found that awareness (or in some cases, understanding) of the representation is required to establish the element of inducement in a claim for misrepresentation. On that basis, Mrs Justice Cockerill struck-out certain claims for fraudulent misrepresentation in relation to LIBOR manipulation.

Background

In the aftermath of the London Inter-Bank Offered Rate ("LIBOR") rigging scandal, a number of local authorities (the "Claimants") brought claims for fraudulent misrepresentation against Barclays Bank Plc ("Barclays") in relation to the setting of LIBOR. It was public knowledge that Barclays had engaged in LIBOR manipulation, although the precise nature and extent of Barclays' involvement was in issue.

The claims concerned various long-term Lender Option – Borrower Option loans obtained for terms between 60 and 70 years, for large sums of between £3 million and £30 million (the "LOBO Loans"). Under the LOBO Loans, from time to time Barclays could at its option change the interest rate payable. If Barclays did so, the Claimants had the option to break the loans early rather than pay the higher interest, but would be required to pay significant breakage costs. Each of the LOBO Loans employed LIBOR as a reference rate for the purposes of setting the interest rate and / or as part of the methodology for calculating the breakage costs.

Barclays contended that the claims had no real prospect of success and applied to strike these out on two grounds: first, the Claimants could not show that they relied on the alleged representations (the "Reliance Issue"); and second, even if Barclays was unsuccessful on the Reliance Issue, the Claimants had affirmed the relevant contracts and were therefore barred from claiming rescission.[2]

The Reliance Issue

The Reliance Issue, at its core, turned on two opposing interpretations of the applicable legal test for reliance in cases of misrepresentation. In overview, Barclays submitted that, including in cases of implied misrepresentation or misrepresentation by conduct, "*the claimant … must establish that it actively/ consciously appreciated at the time that the alleged representation was being made to it*".

It argued that the awareness requirement cannot be satisfied by an assumption, counterfactual causation, awareness of the facts from which a representation is implied, subconscious influence, or indeed (in cases of fraudulent misrepresentation) by the presumption of inducement in fraud cases. Therefore, as none of the Claimants had pleaded that they had the required awareness, Barclays considered their claims were liable to be struck off.

The case of *Marme*,[3] which involved a claim for fraudulent misrepresentation in the context of Euro Interbank Offered Rate ("EURIBOR") manipulation, was central to Barclays' arguments. In that case, Mr Justice Picken concluded that a claimant must establish that the representee gave some "*contemporaneous conscious thought to the fact that some representations were being impliedly made, even if the precise formulation of those representations may not correspond with what the Court subsequently* *decides that those representations comprised*". Picken J found that to conclude otherwise would impermissibly collapse the "long established and clear distinction" between a representation (including implied representations) and an actionable non-disclosure.

The Claimants contended that Barclays misstated the correct legal test for reliance. In overview they argued that:

- On Barclays' interpretation, a representee would be required to have consciously asked themselves: "*Is the representor making an implied representation to me and, if so, what are the terms of that representation?*" This was unrealistic.
- What actually matters is the causal link between the conduct of the defendant and that of the claimant. That was the wholesale and uniform test for inducement.
- How the question of inducement is assessed will turn on the facts. Sometimes the question will be what the claimant consciously thought. In other cases, it will be the causal connection established by the defendant's conduct giving rise to a particular state of mind of the claimant. Ultimately, the touchstone is whether the claimant was influenced by the representation.
- Awareness of the representation is part of the Court's consideration. However, it is not an independent precondition that has to be satisfied before considering inducement. Nor is it forensically distinct from the question of inducement.

Decision on the Reliance Issue

Reviewing the test for reliance / inducement, including specifically in the context of interest rigging cases, Cockerill J found that the absence of awareness or understanding of a representation is fatal to a claim in misrepresentation. In circumstances where the Claimants had not pleaded any conscious (or subconscious) operation on the representees' minds, or that any natural person actively or consciously (or in any way) understood at the time that representations were being made, Barclays' applications for strike out were granted.

In particular, Cockerill J first considered the authorities on misrepresentation, noting that:

- Misrepresentation is capable of occurring in a vast range of factual circumstances. The complexity of a representation may impact how it is expressed, as well as how it is received and understood. Therefore, one should be slow to "*leap to the conclusion*" that different expressions used by the judges in the authorities imply a different legal test, or indeed that the judges' formulations are intended to set out tests of entirely literal application.
- Inducement is all about the causal link between the conduct of the defendant and that of the claimant and that it is a question of fact in each case. Based on the facts of different cases it may (or may not) be necessary to break inducement down into smaller parts (assumption, counterfactual of truth, and so on). However, that does not mean that each part becomes an essential component of inducement in each case.
- There is a body of case law that supports the view that proof of understanding of the representation is a constituent part of a case in misrepresentation. This marks a critical distinction with claims for non-disclosure. However, whether awareness is to be regarded as a separate element of a claim in mispresentation, or whether it forms part of the element of inducement is unclear from the authorities.
- Reliance / inducement will not be assumed where there is an issue as to whether the representation was ever "*actively present to the representee's mind*". Without the representation having been made and understood there can be no basis for an assumption as to its effects.
- The awareness requirement is particularly significant when dealing with implied representations, such that if the representation was not understood to have been made, or was not understood in the sense relevant for the claim, then reliance / inducement cannot be established.
- Whether awareness or understanding will be required to be proved in a case of misrepresentation will depend on the facts. For example, where a representation is capable of more than one meaning, reliance must be proved by reference both to the making of the representation and its meaning (i.e. understanding). However, where the representation is not susceptible to multiple meanings, merely

the awareness of the representation is required. Further, in some instances, the conduct will "*speak for itself*", amounting to a quasi-automatic understanding which may look like assumption.[4]

- If awareness or understanding is made out, a judge will then turn to consider the other evidence to determine whether inducement is established. The relevant test for that will be "*the counter-factual of non-existence*", i.e. what would have happened if the statement had not been made at all. The question of "*the counter-factual of truth*", i.e. what would have been happened if the representee had been told the truth may, in some instances, be relevant evidence but is not an alternative to proving awareness or understanding.

Cockerill J considered two interest rigging cases to be particularly relevant. In *Property Alliance Group Ltd v The Royal Bank of Scotland Plc*,[5] the Court found that where the evidence goes no further than to say that the key people assumed that LIBOR would be set in a straightforward and proper manner, that will not be enough for a claimant to establish inducement / reliance. The high point of the evidence had been an assumption of honesty, but the absence of any thought being given to the representations had been fatal to the claim. In *Marme*, the Court found that, for the purposes of satisfying the awareness requirement, it was insufficient that the representee assumed that EURIBOR was an honest and true rate, and had no reason to think it otherwise.

Accepting that she should be cautious to depart too far from the authorities on interest rate rigging cases and noting that these were not cases where the conduct 'spoke for itself', Cockerill J found that (by reference both to the interest rate rigging cases and the authorities on misrepresentation more generally) awareness of the representation is required for a misrepresentation to be actionable. In other words, the representee must understand the representation in the sense in which he later complains of it and it must be "*actively present to his mind*".

Conclusion

In what is a highly fact-sensitive area of law, Cockerill J's judgment is significant in clarifying (and seeking to reconcile) the authorities on the test for reliance and inducement, including in how to assess and approach the evidence.

Beyond the mere scope of interest rate rigging cases, the decision is important reading for parties to claims in misrepresentation where a claimant's awareness of the representation is in issue. In such cases, parties are well advised to pay close attention to whether a natural person actively or consciously (or in any way) understood at the time that representations were being made and the nature and extent of that awareness or understanding.

However, the long-term significance of the decision remains to be seen. Some academic commentary has already noted that it may be difficult to reconcile with certain lines of authorities. At the time of publication of this piece, the decision was under appeal (permission to appeal having been granted by Cockerill J). The hearing is set for February 2022.

[1] [2021] EWHC 363 (Comm)

[2] It was not necessary for the Court to consider the question of affirmation, as Barclays was successful on the Reliance Issue. Cockerill J nevertheless briefly considered the application and found that the case on affirmation would not have been appropriate for summary determination.

[3] *Marme Inversiones 2007 v Natwest Markets plc* [2019] EWHC 366 (Comm)

[4] Cockerill J gave the example of raising a paddle at an auction to represent willingness and ability to pay a certain sum.

[5] [2016] EWHC 3342 (Ch)

***Manek and others v IIFL Wealth (UK) Ltd* [2021] EWCA Civ 624 and [2021] EWCA Civ 625**

In 2021, two separate jurisdictional challenges were rejected by the Court of Appeal in the deceit case of *Manek and others v IIFL Wealth (UK) Ltd*. In its first decision, the Court of Appeal held that the English court's jurisdiction under the tort gateway could be triggered by ongoing misrepresentations in a continuing fraud.[1] In its second decision, the Court of Appeal once again rejected a challenge to its jurisdiction in which it had been argued that the substantive claims in deceit did not in fact fall within the arbitration clause and could properly be heard by the English Commercial Court.[2]

Background to the claims

The substantive claims arose out of the sale of shares in an Indian company called Hermes i-Tickets Private Limited ("Hermes") by the Claimants, a group of minority shareholders (the "Minority Shareholders"). The majority shareholder of Hermes was another Indian company called Great Indian Retail Private Limited ("GIR"), which was controlled by two brothers, referred to in the judgments as Ramu and Palani (together, the "Majority Shareholders"). The Minority Shareholders alleged that they were persuaded by the Majority Shareholders to sell their shares in Hermes to GIR, on the basis that a "*good offer*" had been made by a company called EMIF to buy Hermes from GIR for around $40 million. The Minority Shareholders alleged that unbeknownst to them, the Majority Shareholders had in actual fact arranged for Hermes to be immediately sold on by EMIF for $250 million plus earn-out to Wirecard AG.

Service out of the jurisdiction: the tort gateway issue ([2021] EWCA Civ 624)

The Minority Shareholders brought a claim in deceit in the Commercial Court. On 2 February 2018, permission to serve the claim form on the Majority Shareholders' last known address in Chennai, India. was granted. Thereafter, on 14 March 2018 the Majority Shareholders became subject to worldwide freezing orders. The Majority Shareholders made an application to set aside both orders, claiming that the tort gateway at Civil Procedure Rule 6B PD paragraph 3.1(9)(a) (the "Tort Gateway") could not be relied upon to bring a claim within the jurisdiction of England and Wales.

The Tort Gateway allows a claim in tort to be served out of the jurisdiction, with the permission of the Court, where "*damage which has been or will be sustained results from an act committed, or likely to be committed, within the jurisdiction*". Where jurisdiction under the Tort Gateway is disputed, the relevant question is whether the damage resulted from "*substantial and efficacious acts committed within the jurisdiction*" regardless of whether substantial and efficacious acts have also been committed elsewhere (*Metall und Rohstoff v Donaldson*[3]).

At first instance, the judge focussed primarily on a meeting that took place in London between 8 – 9 August 2015 (the "8/9 August Meeting"), in which Ramu presented representatives of the Minority Shareholders with a draft SPA between GIR, Hermes and EMIF, and stated that as Hermes' sales figures were "*not that great*" EMIF's $40 million offer presented a particularly attractive proposal. Ramu stressed that the Majority Shareholders should sell their shares urgently, because otherwise there was a real risk that EMIF might walk away from the deal. At no point during this meeting did Ramu mention that he was having discussions in parallel with WireCard, and that figures in the range of $250 to $ 300 million were being considered by WireCard.

However, the first instance judge held that the events which took place at this meeting in London did not constitute substantial or efficacious acts, in part because the representations made in this meeting were either derived from prior statements which took place outside the jurisdiction, or because nothing material resulted from this particular meeting as it took a second meeting as well as several further telephone calls before the Minority Shareholders were persuaded to sell their shares. Therefore, the judge concluded that no claims could be brought in the jurisdiction against the Majority Shareholders using the Tort Gateway.

The Minority Shareholders appealed this decision. Once again, the Court of Appeal focussed on the 8/9 August Meeting, and held that the trial judge had made a number of errors of principle when considering whether "*substantial and efficacious*" acts had taken place at that meeting.

First, Coulson LJ held that it was wrong to suggest that because the Minority Shareholders were not persuaded that they should immediately sell their shares following the meeting, that made the representations insubstantial or inefficacious. The alleged fraud was continuing, and it was sufficient that the misrepresentation substantially contributed to the ultimate deception. In other words, the absence of immediate reliance on one particular misrepresentation in an evolving fraud cannot be said to render that particular misrepresentation insubstantial.

Second, the fact that some of the misrepresentations that were made at 8/9 August Meeting may have been made previously should not have precluded the trial judge from finding that "*substantial and efficacious*" acts had taken place within the jurisdiction. This was in fact the only face-to-face meeting that took place between the Minority Shareholders' representative and Ramu before an agreement to sell was reached; therefore, what was said at the meeting was critical.

Third, the trial judge had erred in stating that the 8/9 August Meeting was insignificant, when viewed in the context of other misrepresentations that took place outside of the jurisdiction, in India or Singapore. The correct question to ask is whether damage has resulted from substantial and efficacious acts committed within the jurisdiction; and the Court should not concern itself with whether other substantial and efficacious acts have been committed elsewhere.

The Court of Appeal held that the test in *Metall und Rohstoff v Donaldson*[4] had been met, allowing the appeal. In doing so, it emphasised that when considering a challenge to the use of the Tort Gateway, the Court should "*consider the substance of the issues*" in the round and avoid the "*over-elaborate salami-slicing*" of issues, whereby each misrepresentation is considered in isolation.

Service out of the jurisdiction: the arbitration agreement issue ([2021] EWCA Civ 625)

Coulson LJ's decision in favour of the Minority Shareholders on the Tort Gateway issue, meant that the Court of Appeal had to give its judgment on several further arguments advanced by the Majority Shareholders, also contesting the Court's power to grant its permission to serve the claim form outside of the jurisdiction.

Was there an arbitration agreement between the parties?

The first argument advanced by the Majority Shareholders was that it would be inappropriate for the English courts to grant permission to serve out of the jurisdiction as the Minority Shareholders' claim in fraud fell under an arbitration agreement. The arbitration agreement that the Majority Shareholders sought to rely upon was contained within two close to identical Share Purchase Agreements dated 9 September 2015, entered into between GIR and the Minority Shareholders (the "SPAs").

The Majority Shareholders submitted that they were each party to the SPAs, on the basis that each SPA defined GIR as the "*Purchaser*" meaning and including "*its directors, officials, successors, heirs, executors and permitted assigns*". However this argument was swiftly rejected by Coulson LJ, who noted that such a definition of GIR was only included because GIR is a company which can necessarily only operate through natural persons. The Court also gave weight to the fact that neither Majority Shareholder was a signatory to the SPA.

Was there an ad hoc arbitration agreement?

As a matter of both English and Indian law, it is possible for parties to agree to arbitrate their dispute whether or not an arbitration agreement exists prior to their dispute arising. Accordingly, the Majority Shareholders' second submission was that a claim letter sent on 4 April 2017 on behalf of the Majority Shareholders created an ad hoc arbitration agreement, as the letter stated that the Majority Shareholders were parties to the SPAs and therefore covered by the arbitration agreements therein. The Court rejected this argument. As the parties were not party to the SPA as a matter of law, an incorrect statement to that effect in the claim letter could not be of legal effect.

Conclusion

In complex civil fraud claims where defendants often reside in different jurisdictions worldwide, challenges to the English court's jurisdiction are commonplace. However, it is clear from both Court of Appeal decisions in *Manek* that the English courts will take a pragmatic approach in deciding whether to grant permission to serve out. To determine whether the "tort gateway" test has been met, the courts will consider the entire chronology of events to determine whether "*substantial and efficacious*" acts have taken place within England and Wales. Equally, the second of the *Manek* decisions shows that the English courts will not rush to conclude that an arbitration agreement exists between the parties, in order to defeat an application for permission to serve outside the jurisdiction, without careful analysis of the facts.

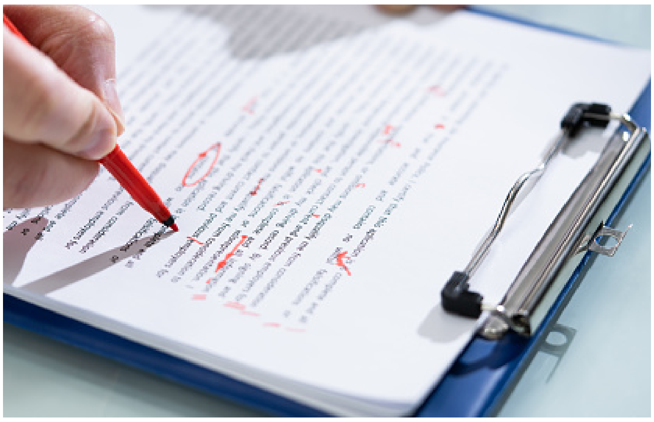
[1] [2021] EWCA Civ 624.

[2] [2021] EWCA Civ 625.

[3] [1990] 1 QB 391.

[4] [1990] 1 QB 391.

A stern reminder of the nuances of fraud pleadings



King and ors v Stiefel and ors [2021] EWHC 1045 (Comm)

In its judgment in *King v Stiefel*,[1] the Commercial Court struck out a £58 million claim in unlawful means conspiracy, which was brought against the defendants to previous (discontinued) litigation between the same parties, as well as against the previous defendants' solicitors and QC. The judgment of Cockerill J is an essential read for parties seeking to bring claims for conspiracy, or fraud more generally, as it contains some valuable lessons on how such claims should be pleaded.

Background

The application in *King v Stiefel* arose out of a previous claim in fraudulent misrepresentation made by the Claimants (the "Kings") against three of the Stiefel defendants. The Kings discontinued that misrepresentation claim during trial, apologised to the defendants, and were ordered to pay £1.7 million in costs. The Kings said that they only discontinued the misrepresentation claim because they were forced to do so by the deliberate improper conduct of the defendants. Had they not discontinued the claim, they say that they would have won the case, and therefore they suffered damage as a result of the defendants' misconduct.

King v Stiefel concerned a claim in unlawful means conspiracy against the defendants to the misrepresentation case, as well as their legal advisors (the "Defendants"). The alleged unlawful means conspiracy was in relation to various accusations against the Defendants, including attempts to mislead the Court on costs, threats made to the Kings' solicitor and a plan to acquire shares in the Kings' company at an undervalue. The Kings also accused the Defendants of conspiracies to cover up their misconduct in getting the Kings to discontinue the misrepresentation claim, and to prevent a fraud case from being brought.

Following the Defendants' applications to strike out the unlawful means conspiracy claim, or grant summary judgment, the judgment of Cockerill J (which extended to 64 pages and found that "*the entirety of the Kings' claim fails*") is a rare example of the circumstances in which the Court will consider detailed facts and evidence at an early stage in complex fraud claims (which often require a full trial) when the claimants fail to present a coherent case.

Inference

An inference of fraud cannot be justified by "*lumping together a number of disparate allegations which bear no relation to the conspiracy, fraud or deceit which is said to sound in damages.*"

The Kings pleaded that certain threats were made by the Defendants in the misrepresentation claim that lead to their decision to discontinue that claim. These "pleaded threats" were included in the particulars, and argued verbally at trial. It emerged, however, that it was not the pleaded threats which the Kings were alleging as being causative of the discontinuance, but rather that they were asking the Court to infer other threats from the existence of the pleaded threats. It was these "inferred threats" that caused the discontinuance, they said.

After lengthy consideration, Cockerill J found in the pleaded threats "*nothing which indicates that the substance of the allegations is very strong*", and in the inferred threats, "*no basis for an inference of threats which would have more than fanciful prospects of* *success*". Moreover, she branded the Kings as having taken a "*hair-trigger approach to accusing their correspondents of impropriety*" and thought that "*in the Kings' eyes there are no mistakes, only conspiracies*".

The lesson for fraud claimants here is that, whilst facts that support an allegation of fraud will be viewed cumulatively, that does not mean, as Cockerill J found, that "*an inference of fraud can be justified by lumping together a number of disparate allegations which bear no relation to the conspiracy, fraud or deceit which is said to sound in damages.*" Further, parties should not be too quick to see fraud and deceit at every turn, and should seek to ensure that all accusations fit within both the pleaded argument, and the required elements of the relevant cause of action.

Pleading fraud claims

Concision

The decision by Cockerill J to strike out the Kings' claim was, in part, due to the way in which it was pleaded, most significantly due to the defects in the particulars of claim, which, according to Cockerill J, "*positively obscured the Kings' case*".

Cockerill J found that the particulars of claim filed by the Kings were "*profoundly unsatisfactory in a number of respects*". She went on to reiterate, at some length, the purpose of particulars and best practice for constructing them, emphasising concision and clarity, before finding that "*the pleading is unclear in the extreme, and combines tendentiousness with a combination of oversupply of evidence and undersupply of proper particulars*" which, in turn, persuaded her that "*the defects in the pleading have complicated the applications before me*".

Cockerill J's judgment is an important reminder to parties commencing proceedings, particularly complex fraud proceedings, that the particulars of claim should be a carefully considered document which "*sets out the essential facts which go to make up each essential element of the cause of action*", and that a badly drafted and presented pleading can significantly harm a claim from the outset. Cockerill J also found that some of the fraud accusations made in the particulars lacked basis—this serves as a further reminder that legal advisors must not attempt to plead fraud unless they are satisfied that there is material to support such a claim.

Disclosure

"*Where particulars are required it is not permissible to avoid the need for giving particulars by saying that particulars will be given at a later stage.*"

At several points throughout the particulars, the Kings' pleaded arguments were said to be "*pending disclosure*". Cockerill J emphasised that, whilst there can be "*a little latitude*" at the summary judgment or strike out stage "*where a party has recently discovered facts which it would wish to plead*", this was not the case here. Cockerill J found that the facts which underpinned the case had been known to the Kings for some time, and as a result the Kings should have had material support for their arguments before including them in the particulars.

Amendments

It is common ground in complex fraud claims that the particulars of claim may need to be updated as the case evolves, particularly as certain lines of enquiry are pursued by the claimants. Failure to update the particulars of claim may result in claimants being precluded from advancing certain arguments they wish to make at trial.

In the present case, although the Kings' case had changed significantly by the time of the hearing, their particulars had not been updated to reflect this. Cockerill J did consider the unpleaded arguments in order to "*ensure the [Claimants] understand that the case they advance has been considered*" but acknowledged that this was not 'technically' the correct procedure and it would "*probably be right to proceed only on the basis of the pleaded case*"

Cross-contamination

As is common in complex fraud claims, several sets of parallel proceedings were underway between the parties. In these circumstances, parties should take care that arguments raised in one set of proceedings do not negatively affect their case in other proceedings. In the present case, Cockerill J found that parts of the Kings' claim were inconsistent with positions taken in other simultaneous actions. Furthermore, amongst other things, Cockerill J found abuse of process in the way the Kings were attempting to re-litigate certain points that were or should have been litigated in other proceedings.

Absence of a defence

The Defendants did not file defences before filing their summary judgment and strike out applications. The Kings argued that the Civil Procedure Rules (the "Rules") require a defendant to file a defence even where they apply for summary judgment, and that the Defendants' failure to file a defence, in direct breach of the Rules, should lead to an inference that "*the alternative* [i.e. filing a defence] *is worse*" for them. Whilst Cockerill J did not consider this point to be of any central relevance, she dealt with the point at considerable length, as it was clear that the Kings considered the absence of a defence as "*significant to the point of pointing a powerful positive inference as to the merits*". Cockerill J found that the Rules "*provide a powerful indication […] that there is no breach by failing to file a defence even when the application for summary judgment is launched by the defendant and not the Claimant*". She went on to say that the clarification of this point might lend itself to the attention of the Rules Committee.

Conclusion

The judgment in *King v Stiefel* serves as a useful guide on the concision and thoroughness required in order to construct a fraud pleading and to draft particulars of claim more generally. It is essential that claimants take care to identify and plead all aspects of their case and, particularly in the context of fraud proceedings, to ensure that there is sufficient material to justify their allegations.

[1] [2021] EWHC 1045 (Comm)

Revival of the so-called Black Swan jurisdiction

Convoy Collateral Ltd Broad Idea International Ltd & Anor (BVI) [2021] UKPC 24

In October, the Privy Council handed down its much anticipated decision in *Convoy Collateral Ltd v Broad Idea International Ltd*.

The Board had cause to consider several issues, namely: the jurisdiction of the British Virgin Islands ("BVI") Court to permit service out of the jurisdiction of an application for a freezing injunction where there was no other substantive cause of action in the BVI; to grant freezing orders in support of foreign proceedings; and to enjoin potentially implicated third parties against whom no claims are brought in the underlying foreign proceedings (non-cause of action or *Chabra* defendants).

The appeal followed a decision of the Court of Appeal of the Eastern Caribbean Supreme Court, which in turn had overturned the decision in the *Black Swan* case,[1] arriving at the conclusion that the BVI Court had no jurisdiction to grant a freezing order where there were no underlying domestic proceedings claiming substantive relief before the BVI Court.

Although the appeal turned on its facts, the Board was invited to, and took the opportunity to, revisit and consider several significant prior decisions of its own and of the House of Lords in this area. The Board dismissed both appeals unanimously but, in so doing, took the opportunity to restate the position on the prior authorities in respect of the Court's jurisdiction to grant injunctive relief. As a result of the unsurprising likely wider implications of its decision, the Privy Council deployed an expanded heavyweight seven-member Board, which included both the President and Deputy President of the Supreme Court, and the Master of the Rolls, to adjudicate on it.

As Lord Leggatt summarised in his speech, in its appeal to the Privy Council, Convoy Collateral Ltd ("CCL") invited the Board "*to return the law to what it submits is the proper path*" by holding that:

1. Under the Eastern Caribbean Supreme Court Civil Procedure Rules 2000 (the "EC CPR") the Court has power to authorise service on a defendant outside the jurisdiction of a claim form in which a freezing injunction is the only relief sought.

2. Where the High Court of the British Virgin Islands has personal jurisdiction over a party, the Court has power to grant a freezing injunction against that party to assist enforcement through the Court's process of a prospective (or existing) foreign judgment.

The factual background

Although the analysis is of broader significance for the cross-border and fraud practitioner, it is best understood in the context of its own factual background. The facts in summary are as follows.

The Claimant ("CCL"), had brought substantive proceedings in Hong Kong against a number of defendants, including the second respondent, Dr Cho, a Hong Kong resident. CCL then sought freezing orders in the BVI against both Dr Cho and Broad Idea (the first respondent), a BVI company that was not itself party to the Hong Kong proceedings, but in which Dr Cho held a majority interest. Those orders resulted in two separate appeals to the EC Court of Appeal, and then the Board.

The injunction sought against Dr Cho

As regards Dr Cho, who was otherwise outside of the Court's jurisdiction, CCL required the Court's permission to serve him with proceedings. CCL was initially successful in this venture and was granted a freezing order and permission to serve him out of the jurisdiction. However, this was subsequently set aside by Adderley J in the BVI Court. The EC Court of Appeal dismissed CCL's appeal against Adderley J's decision.

This engaged the first of the two questions identified in Lord Leggatt's speech: whether the BVI Court had jurisdiction under its procedural rules to grant permission to serve a foreign defendant outside of the jurisdiction with a claim form in which there was no substantive claim and the only relief sought was a freezing order. To conclude that it did have such a jurisdiction would have required the Board to depart from the interpretation adopted in relation to injunctions in the long-standing House of Lords decision in *The Siskina*[2] as well as its own decision in *Mercedes Benz v Leiduck*.[3]

The Board concluded that there was no identifiable basis in the present appeal to depart from the settled meaning of prior decisions of the House or the Privy Council, and that the justice of retaining the settled meaning was all the greater in circumstances where any departure would have repercussions for and cause uncertainty in cases in jurisdictions beyond the BVI. Moreover, it was observed that the EC CPR itself had been introduced in 2000 against the background of those two prior decisions and EC CPR 7.3(1)(b), which had replaced the prior rules whose interpretation had been considered in the *The Siskina* and in *Mercedes Benz*, was materially the same as before. As such, it was to be concluded that the new rules were to be given the same meaning and effect as the old. In order to arrive at the conclusion contended for by CCL would require a legislative amendment of the rules, and not just a purposive reinterpretation of them.

Accordingly, the Board followed the reasoning in *Mercedes Benz* and dismissed CCL's appeal, concluding there was no jurisdiction over Dr Cho.

The injunction sought against Broad Idea

As regards Broad Idea, there was no such jurisdictional hurdle to overcome: as a BVI company, no permission was required for service. Instead the question was whether the Court had the power to grant a freezing order in support of foreign proceedings, in the absence of any substantive claims in the domestic BVI court against the defendant (in this case, Broad Idea).

The Board concluded that the EC Court of Appeal was wrong to have overruled the Court in *Black Swan* and to have departed from its own decision in *Yukos*: contrary to the EC Court's line of reasoning pursuant to *The Siskina*, the Court had long held jurisdiction to grant freezing and other injunctions against non-cause of action defendants where there were no substantive proceedings on foot in the BVI.

In the event, however, on the specific facts of the appeal itself, the Board dismissed it. While the Court had the *Black Swan* jurisdiction to grant an injunction in appropriate circumstances, in the present case, the Board agreed with the EC Court of Appeal's separate conclusion that the freezing order should be set aside, irrespective of any power it might have, on the basis that there had been insufficient evidence to support the first instance judge's finding of a good arguable case against Broad Idea.

This would have been sufficient to dispose of the appeal and to confirm the position established in the Black Swan. If the Board had left it there, it would have been a welcome clarification for parties and their lawyers in the BVI.

However, given that the statements in *The Siskina* had been squarely in issue in the appeal and in light of the more widespread significance of the questions that they had raised, the majority of the Board, determined, in the speech of Lord Leggatt, that "*at this stage of the law's development*" it would be appropriate "*to go further and recognise that a freezing injunction is not…ancillary to a cause of action, in the sense of a claim for substantive relief, at all*". In so doing, the Board took the opportunity to revisit *The Siskina* and a number of prior authorities and restate clearly the Court's power to grant freezing injunctions pursuant to the "enforcement principle", setting out a new three stage test:

"*i. The applicant has already been granted or has a good arguable case for being granted a judgment or order for the payment of a sum of money that is or will be enforceable through the process of the court;*

ii. The respondent holds assets (or… is liable to take steps other than in the ordinary course of business *which will reduce the value of assets) against which such a judgment could be enforced; and*

iii. There is a real risk that, unless the injunction is granted, the respondent will deal with such assets (or take steps which make them less valuable) other than in the ordinary course of business, with the result that the availability or value of the assets is impaired and the judgment is left unsatisfied."

Equally importantly, the Board made clear that, while other factors were relevant to the exercise of the Court's discretion, there was no distinction between domestic and foreign judgments; nor was there any requirement that the judgment should be against the respondent; and finally that there was no requirement for proceedings to have been commenced – it was sufficient that the Court could be satisfied that a right to bring proceedings would arise and such proceedings would be brought.

Conclusion

The Board's decision clearly demonstrates a more modern, purposive and more muscular approach towards its powers to grant injunctions to do justice to a case, and a willingness to break with and sweep away any perceived historic limitations on that power. As Lord Leggatt forcefully put it, it was "*necessary to dispel the residual uncertainty emanating from The Siskina and to make it clear that the constraints on the power, and the exercise of the power, to grant freezing and other interim injunctions which were articulated in that case are not merely undesirable in modern day international commerce but legally unsound. The shades of The Siskina have haunted this area of the law for far too long and they should now finally be laid to rest*".

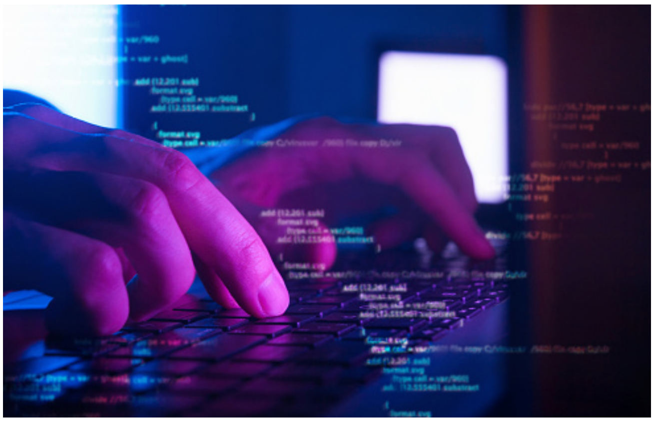
While the Board unanimously dismissed both appeals on fairly conventional grounds, the impact of its analysis plainly will be felt wider than the BVI. It remains to be seen precisely how it will be employed in practice, particularly in respect of third-party *Chabra* defendants. However, on any view it will be welcomed by claimants in fast moving fraud litigation as a pragmatic boost and a sign of the Court's preparedness to support them in their efforts to preserve assets across borders and in off-shore centres.

[1] *Black Swan Invesment ISA v Harvest View Ltd* (BVIHCV 2009/399) (unreported)

[2] *Siskina (Cargo Owners) v Distos Compania Naviera S* [1979] AC 210

[3] [1996] AC 284

Evidence obtained by hacking: to admit or not?



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

Parties seeking justice in the English court often face a dilemma if they are in possession of evidence relevant to their claim where such evidence has been obtained unlawfully. On the one hand, if admitted, whilst there may be a risk of criticism from the judge (amongst other things), that evidence may assist the underlying claim. On the other hand, however, if the evidence is not admitted, the claim may be deprived of vital evidence and the claimant may as a result fail to prove the allegations. The case of *Ras Al Khaimah Investment Authority v Azima*[1] considers this dilemma, amongst other issues, and provides a recent Court of Appeal authority which may help parties in such situations.

Background facts

The Defendant, Mr Azima, a businessman, had a number of commercial dealings with Ras Al Khaimah Investment Authority ("RAKIA"), the state investment entity of the Emirate of Ras Al Khaimah, one of the emirates making up the United Arab Emirates.

Through his company, HeavyLift International Airlines FZC ("HeavyLift"), Mr Azima had set up a pilot training academy as a joint venture with the RAKIA (the "Joint Venture"). The academy was not successful and ceased operations, giving rise to a claim for compensation by HeavyLift. Mr Azima, HeavyLift and RAKIA entered into a settlement agreement, pursuant to which RAKIA paid $2.6 million in full and final settlement of all claims, with Mr Azima and HeavyLift providing a warranty that they had acted and would continue to act "*at all times [...] in good faith and with the utmost professional integrity*" towards RAKIA.

Mr Azima had also entered into a referral agreement with RAKIA, under which he was to assist RAKIA in selling a hotel which it indirectly owned in Georgia by introducing potential buyers in return for a commission. Mr Azima received two commissions under that agreement, $400,000 and $1,162,500 respectively, On the date Mr Azima received the second payment, he transferred $500,000 to Dr Massaad, the former chief executive officer of RAKIA. Subsequently, RAKIA began an investigation into the activities of Dr Massaad and concluded the payment by Mr Azima was a bribe.

The issues at first instance

In the English High Court, RAKIA alleged that Mr Azima had induced it to enter into the settlement agreement with HeavyLift by fraudulently misrepresenting that he was acting in good faith and that HeavyLift had invested $2.6 million in the Joint Venture. In relation to the referral agreement, RAKIA claimed damages for an unlawful means conspiracy arising in connection with the intended sale of the hotel in Georgia.

Mr Azima denied all claims, and brought a counterclaim in relation to hacking. It was common ground that hacking of Mr Azima's email accounts had taken place and that RAKIA's case at trial was in large part based on confidential emails and other materials obtained through such hacking. Who was responsible for the hacking was, however, contested: Mr Azima argued that RAKIA was responsible, whereas RAKIA maintained that it had come across the material innocently on the internet where it had been placed by anonymous hackers. Mr Azima brought a counterclaim in relation to the hacking, seeking to dismiss or strike out RAKIA's claims on the basis that it had relied upon unlawfully obtained evidence to bring such claims.

Mr Azima also argued there had been an actionable breach of the Data Protection Act 1998, a breach of statutory duty under the Computer Misuse Act 1990, a breach of US Federal Law, breach of confidence, misuse of private information, invasion of privacy and conspiracy to injure by unlawful means. He claimed losses including the cost of purchase of new devices, loss of business consequent upon the publication of the material online and damage to his reputation.

After a four-week trial, Lenon J found in favour of RAKIA, determining (among other things) that Mr Azima had induced RAKIA to enter into the settlement agreement by means of a fraudulent misrepresentation, had manufactured a sham referral agreement intended to conceal his dishonest misappropriation of funds and had been guilty of bribery by making payments to Dr Massaad.

After a lengthy assessment of the hacking claims, occupying some 47 pages of his judgment, Lenon J found that Mr Azima had not proved, on the balance of probabilities, the allegations that RAKIA hacked his emails and therefore dismissed his counterclaim.

The issues on appeal

On appeal, Mr Azima attacked (among other things) the judge's findings in relation to the responsibility for the hacking, arguing that the counterclaim was wrongly dismissed and that if the judge had found that RAKIA was responsible for the hacking, he ought to have struck out the claim as an abuse of process. Mr Azima applied for permission to adduce fresh evidence that would purportedly prove that RAKIA obtained Mr Azima's personal data by hacking his email accounts and that the information, which had allegedly been obtained by unlawful means, was used as the basis for RAKIA's claims against him.

Mr Azima requested that, even after the trial had completed, RAKIA's claim should be struck out. In the alternative, Mr Azima argued that the issue of whether RAKIA was responsible for the hacking, as well as RAKIA's substantive claims (since the judge's decision on the hacking responsibility was fundamental to at least some of his conclusions on the substantive claims), should both be remitted for a retrial.

The Court of Appeal decided to consider the issues on appeal in the following order. First, it considered whether, if RAKIA was indeed responsible for the hacking, the evidence obtained through hacking ought to have been excluded and whether RAKIA's claims should have been, or should at this stage on appeal be, struck out. Second, the Court considered the grounds of appeal against the judge's conclusions on the claims in fraudulent misrepresentation and conspiracy, including the application to admit fresh evidence on the conspiracy claim. Last, the Court turned to the attacks on the judge's findings on the hacking claim taken together with the applications to admit fresh evidence on the hacking claim.

The Court's finding on whether the evidence should have been excluded and/or RAKIA's claims struck out

In deliberating on the first issue, the Court adopted a few assumptions, including that RAKIA was responsible for the unlawful hacking and that RAKIA's case would have failed but for the existence of the documents obtained that way.

The Court confirmed two general rules: that evidence relevant to the matters in issue was in principle admissible (bar evidence procured by torture), and that the Court had a discretionary power to exclude admissible evidence. The Court then set out its views as to how that discretionary power should be exercised in cases where one party has obtained evidence unlawfully. The Court took into account, amongst other things, the fact that the materials obtained through hacking were documents within Mr Azima's control and he would have been required to produce them during standard disclosure in the usual way. Had Mr Azima applied before trial for an order granting him the return of the hacked materials, he would not have succeeded. The Court saw no reason to apply a different approach after the trial.

As to striking RAKIA's claims out, the Court confirmed that it had such power even after trial, though the cases in which that power has been exercised are few and far between. The Court drew a distinction between a claim which was itself fraudulent or fraudulently exaggerated on the one hand, and a claim which, although well-founded, was supported by collateral lies. The Court assumed that at least some of RAKIA's witnesses gave dishonest evidence about how RAKIA came into possession of the hacked material, but any unlawful conduct by RAKIA did not go to the merits of its underlying claims against Mr Azima.

One of the issues the Court reiterated was the fact that RAKIA would have been unable to prove its claims without the illicitly obtained evidence and that as a result Mr Azima would have been left with the benefit of his "*seriously fraudulent conduct*". The Court found that the relevant element of public policy in such civil cases was at least as strong, if not stronger, than disapproval of the means by which relevant evidence was gathered. In light of that, the Court fully agreed with Lenon J's assessment that the judge would not have necessarily excluded the evidence and also confirmed that it would have been wholly disproportionate to have struck out RAKIA's claim. The Court also pointed out that there were other ways in which the Court may express its disapproval of the conduct of a party found to have procured relevant evidence by unlawful means, such as by penalties in costs or the refusal of interest on damages awarded.

The decision on the claims and counterclaims

In relation to the second issue which the Court considered, i.e. Mr Azima's appeal of the judge's conclusions on the claims in fraudulent misrepresentation and conspiracy against him, the Court determined that the judge's findings were not unfair and refused to admit fresh evidence in the form of a witness statement by a new witness allegedly supporting Mr Azima's case. The Court also dismissed Mr Azima's argument that his hacking allegation operated by way of equitable set-off so as to provide him with a defence to RAKIA's claims. The Court reaffirmed the principle that equity will not protect a dishonest person from the consequences of their dishonesty. The Court concluded that irrespective of the outcome of Mr Azima's counterclaim, the judgment in RAKIA's favour on its claims must stand.

Mr Azima's counterclaim was, however, remitted for a re-trial, on the following grounds:

- Mr Azima applied to adduce fresh evidence as a result of a tip-off he received from Thomson Reuters after the trial, allegedly confirming that RAKIA was responsible for the hacking of his emails. Mr Azima argued that Lenon J's judgment was therefore procured by fraud, through the reliance on unlawfully obtained evidence. The Court stated that there were two alternative ways to deal with such an allegation: the litigant alleging fraud may bring a separate action to set aside the judgment; or the Court may direct a trial of the fraud issue within the existing action. Whilst RAKIA argued that there should be a fresh action, Mr Azima argued that the Court should not order a retrial, but rather find itself that RAKIA was responsible for the hacking. The Court dismissed that argument, stating that there are at least two mutually inconsistent accounts of how the hacking took place, which necessitated a re-evaluation of the evidence, with the new case to be pleaded and proved in the usual way. The Court stated that it was narrowly persuaded that remission of the hacking claim would be more expeditious and less costly than leaving Mr Azima to begin a fresh action, although the remission would have to be to a different judge. This would also have the benefit that RAKIA's judgment against Mr Azima on its own claims will stay in place, irrespective of the outcome of the counterclaim.

Conclusion

The admission of unlawfully obtained evidence will be closely scrutinised by the English court. As this case shows, only in exceptional circumstances will such evidence be admitted, where for example any unlawfulness perpetrated by a claimant does not go to the merits of the underlying claim, and where the defendant will be allowed to benefit from their own fraud without the evidence being admitted. Even if admitted, the Court can penalise a party that has obtained evidence illicitly in various ways, including by denying other discretionary remedies such as interest on damages awarded. On balance, the Court will strive for justice to be served all around.

[1] [2021] EWCA Civ 349

The importance of disclosure can outweigh the risk of criminal prosecution

Alexander Tugushev v Vitaly Orlov, Magnus Roth, Andrey Petrik **[2021] EWHC 1514 (Comm)**

Where disclosure of certain documents in English proceedings is prohibited by a foreign law, the English court has the power to order disclosure nonetheless, at its discretion. In exercising such discretion, the court will carefully consider the facts against a number of factors, most importantly against the risk of prosecution under the relevant foreign law. If the importance of disclosure in the English proceedings is found to outweigh the risk of prosecution, disclosure is likely to be ordered.

Background facts

The main proceedings are in two parts. First, Mr Tugushev claims against Mr Orlov and Mr Roth in contract, to realise his share in a joint venture that he says existed between the three of them under a tripartite joint venture agreement. Second, Mr Tugushev claims in the tort of conspiracy against Mr Orlov and Mr Petrik for alleged conspiracies to deny his interests in such joint venture.

During the course of the main proceedings, the first Defendant, Mr Orlov, made a criminal complaint against Mr Tugushev in Murmansk, Russia, and a criminal case was opened on 31 October 2019. On 10 April 2020, Mr Orlov signed an acknowledgment of nondisclosure in the criminal case, by which he agreed, amongst other things, that "*I do not have the right to disclose preliminary investigation data that have become known to me in connection with my participation in this criminal case*". On 29 January 2021, the Russian investigator on the criminal case seized material belonging to Mr Orlov, including servers and data storage devices (the so-called "red list" documents). The "red list" documents were due to be disclosed in the English proceedings, and were already in the possession of Mr Orlov's lawyers in London.

After agreeing several delays to disclosure with Mr Tugushev, Mr Orlov applied to the English court in March 2021, making several requests which amounted, in sum, to his not being required to disclose the "red list" documents "*at least for the time being*", thus causing knock-on amendments to the timetable for disclosure and a significant shortening to the dates for trial, which had already been set by the court.

The basis for Mr Orlov's application was that he might incur criminal liability in Russia by disclosing the "red list" documents. The question for the English court was, therefore, whether to order disclosure of the "red list" documents despite the risk of Mr Orlov's possible prosecution in Russia.

The law

The question for Butcher J boiled down to whether the English courts can, and should, order disclosure by a party where such disclosure is illegal under a foreign law and carried with it a risk of prosecution for the disclosing party. Butcher J set out a concise yet thorough summary of the law, and quickly determined that the English courts can make such an order. The question of whether or not they should make such an order is down to the court's discretion, which manifests as a balancing act between the importance of the disclosure in the English case, and the real risk of prosecution under the foreign law. The risk of prosecution is the key question for the Court, and the risk must be of actual prosecution, not merely of a breach of foreign criminal law.

Butcher J identified other relevant points, including whether the foreign law contains any exemptions where disclosure is required by other legal proceedings; whether the foreign law is frequently enforced; the fact that the English court can fashion an order to reduce the risk of prosecution; and the assumption that foreign states will take into account the order of the English courts when considering prosecution.

The risk of prosecution

Butcher J considered the threat of prosecution to Mr Orlov, finding that the threat had not been shown to be "*significant or substantial*". He began by considering the wording of the acknowledgment of non-disclosure itself, and which documents it actually prohibited from disclosure. He found that the "red list" documents did not actually appear to meet the relevant description – they were not documents that had become known to Mr Orlov "*in connection with [his] participation in [the] criminal case*", but rather that they were pre-existing documents which were already in Mr Orlov's possession before the criminal proceedings began.

Butcher J went on to consider that in order for there to be a real risk of prosecution, the breach of the foreign law (i.e. the disclosure of the "red list" documents) would have to cause harm or the threat of harm. It was quickly established that it was not apparent what harm would be caused, and to whom, by the disclosure of the "red list" documents in the English case.

Thirdly, Butcher J found that it was Mr Orlov who bore the burden of "*showing the reality of the risk of prosecution*". Neither expert in the application was able to produce any evidence of a similar previous prosecution, and the fact that Mr Orlov was unable to produce such evidence went against him.

The balance

Butcher J found, relatively straightforwardly yet after acknowledging that such a matter must be given serious consideration, that "*the balance comes down in this case firmly in favour of ordering disclosure to be made and to be made now*".

His primary reason was that "*there is no real threat of prosecution, and in any event, even if it can be said that there is a "real" threat, I do not consider it a substantial or significant threat*". His second key reason was that the information contained in the "red list" documents was essential for the fair trial of the proceedings: the email data was from custodians of central relevance to the issues, and the "red list" documents formed almost half of Mr Orlov's disclosure (approximately 10,000 documents). He also noted that had this been an application to redact certain documents, the threshold for granting the application might have been lower.

Additionally, Butcher J took into account the facts that the criminal proceedings were initiated by Mr Orlov himself and that he was allegedly the victim, and that Mr Orlov had signed the acknowledgment of non-disclosure in the knowledge that he would have to give disclosure in the English proceedings.

Finally, Butcher J considered that granting the application would cause significant and unfair disruption to the case timetable, including a six and a half week shortening of the 16-week trial. The circumstances of the application were not ones that should endanger the trial date so significantly.

Conclusion

The threat of criminal prosecution under a foreign law was, in this case, not enough to deter the Court from exercising its discretion to order disclosure. Whilst this does not mean that the Court will always make such an order in these circumstances, the judgment in *Tugushev v Orlov* is an illustration of the robust approach that the Court will take to disclosure, and the weight they place on the role of disclosure in achieving a fair trial.

Court of Appeal clarifies the test for cross-examination on a Norwich Pharmacal affidavit

Stokoe Partnership Solicitors v (1) Patrick Grayson and (2) Grayson + Co Ltd

In April 2021, the Court of Appeal handed down its judgment in the case of *Stokoe Partnership Solicitors v (1) Patrick Grayson and (2) Grayson + Co Ltd*,[1] clarifying the circumstances in which the maker of an affidavit sworn under a *Norwich Pharmacal* order may be ordered to attend court to be cross-examined on the content of the affidavit.

Background

The Claimant law firm acted for a man imprisoned in the United Arab Emirates ("UAE"), Mr Karam Al Sadeq, following his conviction of a substantial fraud. Mr Sadeq disputed and continues to dispute this, alleging that he came to be in the UAE only because of an act of unlawful rendition, and that his conviction was based on material obtained as a result of torture and duress. Mr Sadeq brought proceedings against an international law firm and some of that firm's current and former partners in January 2020, the essence of which is that the defendants were complicit or involved in Mr Sadeq's rendition and subsequent interrogation and torture.

In March 2020, the Claimant law firm was contacted via an intermediary by a man named Oliver Moon. Mr Moon said that he had been instructed to obtain confidential information about the firm, and that his instructions had come from a man named Gunning but that his understanding was that Gunning in turn was acting at the behest of Paul Robinson. In order to establish Mr Robinson's involvement, the Claimant created two documents, which purported to contain confidential information, and which enabled the firm (with the assistance of an investigation agency) to electronically trace Mr Robinson as the individual accessing the documents.

The High Court proceedings

The Claimant issued a Part 7 claim against Mr Robinson and the company by which he operated in June 2020 for injunctive relief to restrain Mr Robinson for actual or threatened breaches of confidence. The essence of the claim was that the obtaining of or attempting to obtain confidential information was linked to the Al Sadeq litigation, which the Claimant firm was conducting.

In addition, the Claimant sought a *Norwich Pharmacal Order*, requiring Mr Robinson to swear an affidavit providing information on three issues (i) the identity of the person providing him with instructions, (ii) the extent of the confidential information already obtained from the Claimant, and (iii) the identity of those to whom he had passed on the confidential information.

The affidavit ultimately sworn by Mr Robinson confirmed, amongst other things, that:

- His instructions came from the first Defendant, Mr Patrick Grayson, who was a private investigator and by whom Mr Robinson had been instructed in the past.
- The confidential information obtained consisted of the two documents created by the Claimant following the contact from Mr Moon. Mr Robinson did not request or obtain any other confidential information.
- Mr Gunning passed information to Mr Robinson via email. Mr Robinson would pass on the information to Mr Grayson.

Relying on the contents of Mr Robinson's affidavit, the firm issued a claim against Mr Grayson and others. In July 2020, the firm made an application for relief from Mr Grayson in similar terms to the application made in respect of Mr Robinson. On 24 July 2020, Tipples J made an order by consent upon the application, which largely consisted of recitals of undertakings given by Mr Grayson, and which provided a definition of "Confidential Information".[2] Mr Grayson's affidavit, dated 29 July 2020, set out the definition of Confidential Information as recited in the consent order, and stated, amongst other matters, that:

- No-one had requested him to obtain Confidential Information (as defined) from or pertaining to the Claimant.
- He had not obtained any such information.
- Consequently, he had not provided such information to anyone.

Upon receipt of Mr Grayson's affidavit, the Claimant took the view that its contents were inconsistent with Mr Robinson's affidavit. As such, in August 2020, the Claimant wrote to Mr Grayson's solicitors, making a request for further information pursuant to Part 18 of the CPR, asking the following:

"Please state whether Mr Grayson accepts any part of the account given in the text from Mr Robinson's affidavit reproduced above, and if so which.

Please state whether Mr Grayson denies any part of the account given in the text from Mr Robinson's affidavit reproduced above, and if so which."

Mr Grayson's solicitors declined to provide the information, arguing that the request was wholly premature. Particulars of Claim and Mr Grayson's Defence were served subsequently.

In October 2020, the Claimant issued an application, both in the proceedings involving Mr Grayson and in the proceedings involving Mr Robinson. The nature of the application in each case was effectively identical, seeking that Mr Grayson and Mr Robinson be cross-examined on the contents of their affidavits, pursuant to section 37 of the Senior Courts Act 1981 and/or the Court's inherent jurisdiction. The application stated that the affidavits were inconsistent with each other and that cross-examination was needed to "*resolve the inconsistency in order to uncover the identity of the ultimate perpetrator of very grave wrongdoing*" (i.e. the apparent attempt to interfere with the Al Sadeq litigation before the High Court). That application was rejected by Davis J, who held that allowing the cross-examination would, amongst other things, "*not be just and convenient*" and would "*pre-empt the cross examination at trial*".

The appeal

On appeal, the Claimant sought an order for cross-examination against Mr Grayson only. Although the Court of Appeal was critical of Mr Grayson's conduct in the litigation—holding that he had "*engaged in months of stonewalling and bare denials*" and had "*brought this litigation on himself*"—it refused the order.

The Court of Appeal noted that CPR 32.7(1) provides that "*where, at a hearing other than the trial, evidence is given in writing, any party may apply to the court for permission to cross-examine the person giving the evidence*", and that the notes to the White Book make clear that such evidence may be in a statement of case, affidavit (as here), a witness statement, a witness summary or an application notice. However, the Court did not accept the argument that a party automatically opens itself up to cross-examination by consenting to provide disclosure by affidavit, or the protection offered by that Claimant (namely that it would undertake not to use at trial any of the material obtained in cross-examination) would in practice afford.

The Court of Appeal also acknowledged that it appears to have been common ground at first instance and was on appeal that the Court may order cross-examination whenever it is "*just and convenient*". However, the Court expressed some doubt as to whether this was the right test, given it is derived from s.37 of the Senior Courts Act 1981, which concerns the power of the High Court to grant an injunction, as opposed to *Norwich Pharmacal Order*.

In arriving at its judgment, the Court of Appeal considered those cases where cross-examination has been ordered on an affidavit sworn pursuant to a disclosure order in the *Norwich Pharmacal* jurisdiction. However, the Court distinguished them on the basis that cross-examination was not in those cases ordered solely to enforce a disclosure affidavit, but rather on a basis equivalent to the two recognised exceptions to the rule against permitting the examination of an opposing party except at trial, namely (i) examination of a judgment debtor, and (ii) cross-examination on an affidavit sworn in answer to an application for a freezing injunction containing an order for disclosure of assets. Both of these exceptions ultimately going to the issue of enforcement of judgments.

Conclusion

The Court of Appeal's judgment confirms that an order for the cross-examination of a deponent of an affidavit sworn pursuant to a *Norwich Pharmacal Order* will be made only in exceptional circumstances. It is particularly unlikely in circumstances where:

- The deponent is a defendant in the action and the action is proceeding to trial.
- The subject matter of the affidavit (and thus of the proposed cross-examination) overlaps substantially with the substance of the claim against the defendant.

In those circumstances, the effect of such an order would be to compel the defendant (under pain of proceedings for contempt of court) to submit to cross-examination on the substantive merits of the claim against him in advance of a trial in which he would be free to choose whether to give evidence.

[1] [2021] EWCA Civ 626

[2] *""Confidential Information" shall mean any information sourced or derived, in whole or in part, from any document, whether paper or electronic, that has been obtained from the Claimant without its authority and is either designated as confidential, or is evidently confidential by reason of its subject-matter or the manner in which it has been obtained. "Confidential Information" shall include, but shall not be limited to: (i) the Claimant's banking records, accounts and statements; (ii) the Claimant's telephone records, accounts and statements; and (iii) documents which have not been published and which, on their face, relate to the conduct of legal proceedings on behalf of Mr Karam Al Sadeq."*

CPR 81 in 2021: ironing out the kinks

From 1 October 2020, a restated Civil Procedure Rule (CPR) 81 came into effect, replacing the former provisions governing contempt proceedings in their entirety. As we acknowledged in our 2020 Year in Review, this was a welcome change for practitioners. CPR 81 had historically faced much criticism for its complexity, and the newly simplified provisions were intended to produce a "*one stop procedural code*".[1] In this update we explore some of the cases decided under the new provisions and the clarifications this has brought.

The Court's own initiative: a novel change?

Under CPR 81.6, the Court may consider whether to bring contempt proceedings on its own initiative if it considers that a contempt may have been committed. In the case of *Isbilen v Turk*[2] the court provided guidance on this "*novel requirement*" and when it may be exercised. In the absence of relevant authorities decided under the new CPR 81, it was important to examine the provision in the context of pre-existing authorities. The Court made clear that CPR 81.6 made no change to the its substantive powers, and that some of the additional requirements introduced under this provision (such as the procedure concerning the issue and service of the summons on the relevant defendant) were likely introduced to avoid criticisms of the summary disposal of contempt proceedings.

The established position was found to be as follows:

- In the hierarchy of applicants in civil contempt proceedings, the Court is least well placed to commence contempt proceedings and should only consider doing so of its own volition where (i) the relevant party to the litigation decides not to, and (ii) the Attorney General has not intervened in the public interest. This should inform the Court's approach to CPR 81.6.
- The Court is only likely to do so in exceptional circumstances, where: the contempt is clear, there is urgency and it is imperative to act immediately. CPR 81.6 made no changes to these requirements.
- The Court will place an emphasis on the overriding objective and on the need for proportionality, suggesting that the exercise of the Court's initiative under CPR 81.6 is likely to occur in relation to serious rather than technical breaches, where proceedings are directed at obtaining compliance with the order in question, where there is a real prospect of success and where the circumstances involve something of sufficient gravity to justify the imposition of a serious penalty.

Given that CPR 81.6 requires the Court to act on its own initiative, does this mean that parties and practitioners should simply forget about the provision unless and until it is exercised? *Isbilen v Turk* suggests that the Court should not expect submissions on CPR 81.6 in the majority of cases, and if that were to happen in all cases involving an arguable or even obvious breach of a court order, this would result in a waste of time and resources. However, the parties "*may wish to remind the Court of the provision where appropriate*".

It is therefore unlikely that CPR 81.6 will be relied upon frequently, although it should be noted that, in circumstances where the Court does act pursuant to this provision, under CPR 81.6(2): "*any other party in the proceedings may be required by the court to give such assistance to the court as is proportionate and reasonable, having regard to the resources available to that party*".

The Court's inherent strike-out power

In addition to the clarifications provided by the Court concerning CPR 81.6, we have also seen an examination of elements that are distinctly absent from the new CPR 81.

In March 2021, *Taylor v Robinson*[3] confirmed the Court's inherent power to strike out committal applications, despite the fact that there is no express reference to this power in the new CPR 81.

The Court's power to strike out committal applications on the grounds of an abuse of process was included in the practice direction that accompanied the former CPR 81. The new CPR 81 includes no practice direction, nor any express confirmation of the Court's power. This absence might appear notable in light of the discussion above concerning CPR 81.6, in which the provisions appear to affirm an existing court power. However, the Court confirmed on the basis of previous authority that notwithstanding its absence, the court had this inherent discretionary power deriving from the right to control its own proceedings so as to prevent abuse of its process. In addition, it was noted that practice directions were an explanation and enunciation of the Court's powers and how these will be exercised, and that they do not themselves create new powers: "*If a practice direction were to be issued supplementing the new Pt 81 it would not give the court any new power but would simply be a statement of the existing power*".

The Court went on to confirm that as part of this inherent power, it could strike out a committal application by reference to the "*Henderson v Henderson*" principle (the rule that prevents parties from raising claims and defences in subsequent proceedings which could and should have been raised in earlier proceedings, but were not).

Taylor v Robinson also raised an interesting point regarding the effective date of implementation of the new CPR 81, which "*unusually*"[4] contained no transitional provisions. It was argued that the committal application in question, which had been submitted on 7 September 2020, was not adequately particularised and did not meet the requirements of a contempt application as set out in the new CPR 81.4. The Court took the view that, just because the application would not have been compliant with the CPR if issued after 1 October, that does not necessarily mean that it was not compliant with the relevant requirements in place at the time it was issued, and it did not therefore follow that striking out was appropriate.

Court permission for contempt applications

Under CPR 81.3(5), there are two circumstances in which permission is now required to make a contempt application:

- Where there are allegations of interference with due administration of justice, except in relation to existing High Court or county court proceedings (CPR 81.3(5)(a)).
- Where it is alleged that a false statement has knowingly been made in any affidavit, affirmation or other document verified by a statement of truth or in a disclosure statement (CPR 81.3(5)(b)).

In *Mohamed v Khalil*,[5] the Court granted permission for the Claimant to bring contempt proceedings under CPR 81.3(5)(b), and considered the extent to which the Claimant was the "*appropriate person*" to bring the proceedings. The Claimant had also sought an order that the defendant be committed to prison on the grounds that he had knowingly or recklessly interfered with the administration of justice, although as it related to existing High Court proceedings, permission was not required under CPR 81.3(5)(a).

Trower J considered the "*well-established*" existing authorities on the principles applicable to the granting of permission to make a contempt application in the circumstances as they are now set out under CPR 81.3(5)(b). In particular, the public interest considerations that arise when contempt proceedings are brought by a private litigant based on allegations of false statements made in witness statements, as well as the need to guard against vindictive litigants using such proceedings to harass defendants. While *Mohamed v Khalil* does not particularly expand or comment upon the new wording of CPR 81, it demonstrates the continuing relevance of the existing authorities, principles and policy concerns despite the restatement of the procedural rules.

Conclusion

When viewed together, the recent cases applying the new CPR 81 suggest that, although the changes and simplifications it brought were welcome, questions will inevitably continue to be raised about the application and scope of the new provisions. It is evident however that the Court will most likely find and justify its answers to these questions by reference to the existing authorities and principles that pre-date the new rules.

[1] Mr Justice Kerr, Chair of the Civil Procedure Rule Committee subcommittee, responsible for drafting the new rules. Law Society Seminar, 'Civil Procedure Rules relating to Contempt of Court' (8 October 2020)

[2] [2021] EWHC 854 (Ch)

[3] [2021] EWHC 664 (Ch)

[4] *White Book* commentary on CPR 81 at paragraph 81.0.2

[5] [2021] EWHC 1346 (Ch)

Cryptoassets and fraud: injunctions and other successes for the claimants

Cryptoassets and fraud: injunctions and other successes for the claimants

A collection of recent cases involving cryptoassets and injunctive relief confirm what seems to be starting to become the established view of the English courts in relation to a few central issues relating to cryptoassets. First, the Court has arrived at the conclusion that cryptoassets are to be considered property within the common law definition of the term, in particular following the Statement of the UK Jurisdiction Taskforce on Cryptoassets and Smart Contracts (see our articles on the Statement here). Second, the Court has firmly embraced the jurisdiction to issue claims and make injunctions against "persons unknown". Third, it may well be possible to serve a *Bankers Trust* order on parties outside the jurisdiction. The three cases below include certain common features and in the usual way, each turns on its own facts.

Ion Science Limited and Duncan Johns v Persons Unknown, Binance Holdings Limited and Payment Ventures Inc. (unreported, 21 December 2020)

The claimants, Ion Science Limited and its sole director and sole indirect shareholder, Mr Johns, brought an urgent *ex parte* application seeking a proprietary injunction, a worldwide freezing order and an ancillary disclosure order in what is believed to be the first case relating to an initial coin offering ("ICO") fraud in the Commercial Court. The first defendant was persons unknown, defined as individuals or companies describing themselves as connected to a Swiss company allegedly called Neo Capital and giving various aliases such as Marilyn Black, Claire Jones and Carey Jones. The second and third defendants were two cryptocurrency exchange operators: Binance Holdings Limited, a Cayman entity, the parent of the group of companies operating the Binance Cryptocurrency Exchange ("Binance"), and Payment Ventures Inc., a US entity, the parent of the group of companies operating the Kraken Cryptocurrency Exchange ("Kraken").

Background facts

The Claimants alleged that they were approached by someone using the alias of Ms Black, describing herself as an adviser working for Neo Capital, purportedly a Swiss company specialising in investments for high net worth individuals. Ms Black persuaded the second Claimant, Mr Johns, to make a personal investment in two genuine cryptocurrencies, which was successful and produced a return of £15,000. The transfers had been made by Ms Black herself, who had convinced Mr Johns to give her remote access to his computer. Encouraged by this initial success, Mr Johns and the first Claimant were then induced to transfer, again via Ms Black remotely accessing his computer, a further £557,002, in the form of approximately 64.35 bitcoin. Part of this sum was purportedly transferred to wallet addresses held by Uvexo and Oileum, two companies that were allegedly launching their own ICOs; the Claimants being drawn in by an offer to invest early and achieve a high return. The other part of the sum was transferred as a purported commission payment in order to receive an alleged profit of $15 million from Oileum.

As with so many such visionary investments, the irresistible offer was too good to be true: the Claimants never received any of these funds back, nor did they receive any of the profits purportedly made on their investments; instead, Ms Black insisted that even more commission was due to be paid.

It subsequently transpired that Neo Capital was not a real company, and the Claimants produced expert evidence stating that their bitcoin ended up at accounts held by the Binance and Kraken exchanges.

Claims and ancillary relief sought

The Claimants advanced claims against "persons unknown" in deceit, unlawful means conspiracy and by way of an equitable proprietary claim. As an urgent ancillary relief in support of tracing and recovering their cryptoassets, they also sought:

- A proprietary injunction, a worldwide freezing order and an ancillary disclosure order against the persons unknown.
- Disclosure orders pursuant to the *Bankers Trust* jurisdiction and/or CPR 25.1(g) against Binance and Kraken.
- Orders for alternative service pursuant to CPR 6.15 and 6.27.

Judgment

In examining whether the Court had a "persons unknown" jurisdiction over defendants who may not be domiciled in England and Wales, Butcher J found that there were serious issues to be tried; one such issue was that English law should apply to the claim on the basis that the place in which the damage occurred was England. Butcher J was drawn to that conclusion in part on the basis that in his judgement the *lex situs* of a cryptoasset is the place where the person or company who owns it is domiciled. As apparently there had been no decided cases in relation to the *lex situs* of a cryptoasset before, Butcher J relied on academic commentary, being satisfied that there is at least a serious issue to be tried that that is the correct analysis.

Butcher J also found that the other elements for establishing jurisdiction and granting the injunctive relief sought were satisfied, bar one. The claimants were not in a position to show that there were assets which could be caught by the order, but the Court stated that this was a common issue for a case involving persons unknown and it should not be a bar to the grant of this type of freezing order in such a case.

Further, the Court ruled that it could make disclosure orders pursuant to the *Bankers Trust* jurisdiction against the second and third Defendants, the cryptocurrency exchange operators based outside the jurisdiction. The Claimants and the Court acknowledged that there was authority stating that there was no gateway which permitted service out of the jurisdiction against a third party for the purposes of a Norwich Pharmacal order. However, the Court found that there was a good arguable case that the two Defendants would be necessary or proper parties to the anchor claim, that *Bankers Trust* orders were distinguishable from Norwich Pharmacal orders, and hence that there was a basis on which the Court could permit service out of a claim for a *Bankers Trust* order even where no positive remedy is sought against those Defendants other than the provision of information. The Court further concluded that there was a real prospect that the information sought from Binance and Kraken would lead to the location and preservation of the Claimants' property.

The Claimants' application for orders for alternative service was also granted, with Butcher J referring to *AA v Persons unknown and others*[i] , and to the exceptional circumstances, including that the application before him concerned urgent injunctions, the nature of bitcoin meaning they can be moved "*at the click of a button*" and dissipated at any moment, and the nature of the claim involving a proprietary claim where it was important that the relief was obtained as soon as possible.

Fetch.ai Ltd and Ors v Persons Unknown, Binance Holdings Ltd and Ors [2021] EWHC 2254 (Comm)

The claimants, Fetch.ai Limited, an English company, and Fetch.ai Foundation PTE Limited, a Singaporean entity, sought similar relief as the Claimants in the *Ion Science* case, against persons unknown, as well as Binance Holdings Limited (the Cayman defendant in the *Ion Science* case) and Binance Markets Limited, an English entity. The Claimants were similarly successful, obtaining the urgent relief sought at the without notice hearing.

Background facts

The Claimants alleged that unknown fraudsters had been able to obtain unauthorised access to accounts maintained by the first Claimant with the Binance cryptocurrency exchange. The accounts held various cryptocurrencies, including bitcoin, USDT, BNB and FET. Over a very short period of time, the fraudsters were able to trade the cryptoassets at "*massive undervalue*", moving the assets out of the accounts and causing an estimated $2.6 million loss.

Claims

The Claimants brought claims for breach of confidence, unjust enrichment and an equitable proprietary claim based upon constructive trust in respect of assets which had been removed from them dishonestly and without their licence or consent. They also sought a proprietary injunction, a worldwide freezing order and ancillary disclosure orders against the first Defendant, the "person unknown"; an order using the *Bankers Trust* jurisdiction and/or CPR rule 25.1(g) as against the second Defendant; and a disclosure order, either in *Bankers Trust* and/or pursuant to CPR 25.1(g) and/or using the Norwich Pharmacal jurisdiction, against the third, UK-based Defendant.

Judgment

Pelling J's concern at the outset was in relation to the wide scope of the injunctive relief sought, in particular in light of the broad definition of persons unknown initially proposed by the claimants which was wide enough in principle to cover innocent persons who did not know and had no reason to believe that assets belonging to the Claimant had been credited to their accounts. In the circumstances, the Court determined that it would be appropriate to split the persons unknown into three categories: first, those who were involved in the fraud; second, a class designed to capture those who had received assets without having paid a full price for them; and, third, those who fell within the category of innocent recipients.

In deciding that he had jurisdiction, Pelling J adopted the approach taken by Butcher J in the *Ion Science* case that there is a good arguable case that the *lex situ* of the cryptoassets was where the person or company who owned them were domiciled. The Court granted the injunctive relief sought, limiting the proprietary relief against the third category of the persons unknown, i.e. the innocent recipients, to those assets which that category either knew, or ought reasonably to have known, belong to the Claimants or did not belong to them.

In relation to the *Bankers Trust* orders and the issue whether those could be served out of the jurisdiction, Pelling J stated that judges of concurrent jurisdiction were required to follow each other unless satisfied that the earlier judgment was wrong. As Pelling J was not of the view that Butcher J was plainly wrong, he granted the orders sought adopting the *Ion Science* reasoning. The Norwich Pharmacal relief against the UK-based defendant was also granted.

In allowing the application for orders for alternative service, the Court acknowledged that there was an increasing body of case law in which various judges of the Commercial Court have held that orders which involve either prohibitory injunctions or mandatory orders (including, in particular, freezing orders) should be served by alternative means if that is the only means by which the orders can be drawn speedily to the attention of the respondent concerned.

Zi Wang v Graham Darby [2021] EWHC 3054 (Comm)

The third case also involved an application for injunctive relief, though in contrast to the previous two cases the Defendant was not persons unknown and judgment was handed down following a two-day hearing which both parties attended.

Background facts

The Claimant Mr Wang, resident in Australia, entered into two contracts with the defendant, Mr Darby, an experienced cryptocurrency trader resident in the UK, over Telegram, a popular encrypted instant messaging platform. Although the parties fundamentally disagreed about the correct legal characterisation of the transactions, broadly the contracts involved the parties exchanging specified quantities of certain cryptocurrencies (Tezos and Bitcoin), on terms as to the reciprocal restoration of the same amount of each currency after an agreed period of two years. Under those contracts, Mr Wang transferred two separate parcels of 200,000 Tezos to Mr Darby, in return for 13 Bitcoin and 17 Bitcoin, respectively, transferred by Mr Darby to Mr Wang by way of simultaneous digital exchange. Mr Wang wished to remain invested in Tezos and expected the 400,000 Tezos to be used by Mr Darby during the applicable period for so-called "baking" ("baking" in the terminology of Tezos being akin to "mining" in the terminology of other cryptocurrencies; essentially requiring the relevant holder to run a blockchain node and keep it online and current) and/or "stake bonding" (the transferring of Tezos into the account of another to undertake baking). At the expiry of the period, Mr Wang expected the Tezos to be returned to him, and he was to return the Bitcoin or an agreed sum in fiat currency.

Around three months after the conclusion of the contracts (a period over which the price of Tezos had trebled), Mr Darby informed Mr Wang that he was ceasing baking Tezos. Mr Wang requested the return of "his" Tezos but Mr Darby blocked him from all communications, deleted his own social media presence and moved the Tezos to another account, purportedly trading them for his own gain.

Claims

Mr Wang brought personal and proprietary claims, together with applications for a worldwide freezing injunction and a proprietary injunction, on the basis of an alleged existence of a trust over the Tezos. Mr Darby brought an application seeking to strike out or enter reverse summary judgment in respect of the proprietary claims.

Judgment

Houseman J acknowledged that it was common ground between the parties that the question of whether digital assets such as Tezos constitute property that was capable of being bought and sold as well as held on trust was one to be determined as a matter of English law; further that as a matter of English law, in principle, a unit of Tezos constituted property that could be the subject of a trust, notwithstanding the fungible and non-specific nature of it. The Court found that this was indeed the position taken at first instance in the Commercial Court, in light of the *AA v Persons Unknown* and the *Ion Science* cases mentioned earlier. The Court also expressly observed that "*the transfer of digital assets from one account-holder to another for the purpose of baking or stake bonding could involve or constitute a trust*".

Accordingly, Houseman J stated that his task was "*to apply well-known principles of English private law to an ultra-bespoke set of facts in which all relevant evidence is contained within the four corners of verbatim transcripts*" of the Telegram chats between the parties. He concluded that the contracts, contained within the four corners of those transcripts (together with a recovered previously deleted voice message), did not support, and indeed were positively contrary to, the notion of establishing a trust, whether express, resulting or constructive. One of the main reasons for that finding was the economic reciprocity envisaged in the contracts, as they involved reciprocal exchange and re-exchange of assets or economic value. Further, each sale and purchase under those contracts transferred ownership of the cryptocurrencies from transferor/seller to transferee/purchaser, which was antithetical to the notion of a trust.

Houseman J found no good, let alone compelling, reasons for the proprietary claims to proceed to trial and granted Mr Darby's application for summary judgment. The proprietary injunction relief was also dismissed.

Nevertheless, the Court upheld the continuation of the worldwide freezing injunction against Mr Darby; Mr Darby's counsel had conceded that there was a good arguable case in respect of the other personal claims made against him. From that foundation, Houseman J concluded "*without serious hesitation*" that there was a real risk of dissipation: not only was Mr Darby a sophisticated cryptocurrency trader, he had been less than candid with the Court. The Judge went so far as to conclude that "*the inconsistencies, omissions and conspicuous obscurities in some of his explanations raise justifiable doubts about whether the correct or complete position has been disclosed or explained. No application has yet been made for contempt of court, but Mr Darby must know by now that this is in prospect*".

Conclusion

It remains to be seen how the cryptoassets fraud cases proceed through the Court, and whether claimants are able to obtain lasting relief after having become victims of digital fraud. In line with its long-lasting tradition, the English Court is approaching these novel issues with flexibility and desire to assist, in an objective manner, a party that has been defrauded. As the use of cryptocurrency grows, further ground-breaking issues in this area will certainly be aired in court.

[1] [2019] EWHC 3556 (Comm)

If you have any questions regarding this update, please contact:

Kambiz Larizadeh
Partner, London
kambiz.larizadeh@akingump.com
+44 20.7012.9717

Jenny Arlington
Counsel, London
jarlington@akingump.com
+44 20.7012.9631

Conor Mc Stravick
Counsel, London
conor.mcstravick@akingump.com
+44 20.7012.9822

Mouna Moussaoui
Associate, London
mouna.moussaoui@akingump.com
+44 20.7012.9823

Jay Jamooji
Associate, London
jay.jamooji@akingump.com
+44 20.7012.9845

Adam Parkins
Associate, London
adam.parkins@akingump.com
+44 20.7012.9689

Alexander Armytage
Associate, London
alexander.armytage@akingump.com
+44 20.7012.9651

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