NORTON ROSE FULBRIGHT

Summaries of the six key cases

1. EDF Man Capital Markets v Come Harvest Holdings Ltd [2022] EWHC 229

Facts

The case arose out of a high value international warehouse receipt fraud. The claimant, EDF MCM, bought metal from the first two Defendants (D1 and D2) in over twenty repo transactions for sums totalling over US$280million. It later discovered the warehouse receipts provided were forged and it had not been given title to the metal. Title remained with D10 (Straits, a commodities broker and financier to D1 and D2), which had entered into purported prior repos with D1 and D2. D10 agreed not to cancel its original warehouse receipts and received substantial fees for providing blank endorsed ones, which other defendants then used to produce the forgeries. D4 was a corporate agent to D1 and D2; D3 was the individual who owned and directed D4. Other Ds had settled pre-trial.

Rescission

The claimant's primary case was that it had validly rescinded the repos after discovering the fraud, which was upheld. It meant, however, that the claimant did not have a claim for breach of contract, as there were no live repos to hang this on (though the contract claims would have succeeded if the contracts had still existed).

Tort claims

The claimant's claims for damages were instead brought in deceit, procuring a breach of contract and unlawful means conspiracy. These claims succeeded:

- Deceit: the Court found D1 and D2 (the sellers) liable for false express and implied representations in the repos that they had good title to the metal and that the warehouse receipts were genuine. D1 and D2 knew these were false, intended EDF MCM to rely on them, which EDF MCM did (by entering the repos and making payment), and this caused EDF MCM loss.

- Procuring breaches: the Court found D3 and D4 (the sellers' agents) procured breaches of the repos between D1 and D2 / EDFMCM, with D3 the "architect" of the fraud.

- Unlawful means conspiracy: the Court found all of D1 to D4 and D10 liable in unlawful means conspiracy. This was clear for D1 to D4, the more direct parties to the fraud. The Court rejected the arguments of D10 (which was the broker/owner of the metal) that it was not sufficiently party

to and/or aware of the fraud. It found that all the parties conspired together, but by playing different roles, and that they sought different benefits.

The Court confirmed the legal test for intention, which D10 had challenged, as existing if harm to the claimant is the end sought, the means to the end or the defendant knows it is an inevitable consequence of its action. Intention existed for D10, which knew D1 to D4 were forging receipts to obtain finance, but participated to gain substantial fees. The Court also confirmed that the unlawful means only need to cause the loss to the claimant, which they had on the facts. There was no further requirement, as D10 contended, that the particular defendant must have intended the loss by the precise unlawful means used.

Tort claims: damages

For every repo with D1/D2, EDF MCM had also entered into a back to back repo with a bank. The immediate losses from the forged receipts fell on this bank, which the claimant had settled pre-trial at less than full value.

D10 argued that these arrangements meant that EDF MCM suffered no recoverable loss (as it was never itself out of pocket) or had mitigated its loss to the amount paid under the settlement agreement. The Court rejected D10's arguments. It held that EDF MCM entered into separate sets of principal to principal transactions, rather than acting as a 'pass through' agent never exposed to liability. EDF MCM's repos with the bank were independent sub-sales and were therefore not relevant to the assessment of damages in the repos with D1/D2. As the settlement agreement related to repos with the bank, this was also legally separate and not relevant to the repos with D1/D2.

EDF MCM could recover over US$280million for its tort claims (broadly the purchase price paid less "credit" for amounts received from the defendants that had settled).

Equitable claims: constructive trusts and knowing receipt

The Court granted a declaration that various defendants held EDF MCM's purchase funds, or their traceable proceeds, on constructive trust for EDFMCM (quantum calculations were left for another hearing).

The Court did not allow a claim in "knowing receipt" for "equitable compensation" and/or an "order to account", against various defendants which had received purchase funds from D1 and D2. The Court noted the principle that fraud makes a contract voidable, not void. Only when a party rescinds a contract for fraud does a constructive trust arise over the property. This meant that the defendants which had received the purchase funds did so before EDFMCM rescinded the repos and any constructive trust could arise over them. The Court declined to apply a fiction that a constructive trust had always been in place.

2. Quadra Commodities SA v XL Insurance Company SE & Ors [2023] EWCA Civ 432

Facts

The case arose out of a large scale commodities fraud discovered in 2019. Quadra purchased various cargos of grain from Agroinvest in a commodities trading deal. When the fraud came to light, Quadra discovered that it had been provided with fraudulent warehouse receipts – it was one of multiple buyers to which receipts for the same grain had been issued. There was insufficient grain to go round. Quadra made an insurance claim under its all risks marine cargo insurance policy for the grain not received. Quadra's insurers refused the claim on the basis that Quadra did not have an "insurable interest" in the lost grain and Quadra's loss was purely financial, whereas the policy covered physical loss of property only.

Good claim under policy?

The High Court had already held that Quadra, under the policy properly interpreted, had insured against physical loss to property (i.e. the grain), not the success of its commodities trading venture, as Quadra contended. However, Quadra's claim had succeeded as it could show that the grain had existed, an *insurable interest* in the grain and that it had suffered a covered loss.

The grain existed: The Court of Appeal accepted that the High Court had made findings of fact that grain (in bulk, unascertained) was, on the balance of probabilities, in the warehouses when Quadra's warehouse receipts were issued, and that these findings were plainly correct. The evidence the High Court relied on included inspection reports, the warehouse receipts themselves (the fraud was re-selling the same grain, so grain was likely to be in the warehouses to prevent detection of the fraud), and that some grain had actually been delivered to Quadra.

Interest: The Court of Appeal upheld the High Court's first instance decision, that found that Quadra had an "*insurable interest*" in that grain. This was on two grounds: (i) under the warehouse receipts, the Court found that Quadra had immediate possessory rights to its quantities of the grain; and (ii) irrespective of the title of Quadra and other parties to the grain, authority establishes that an "insurable interest" can arise in unascertained goods where the purchase price is paid (which Quadra had done).

Covered physical loss: The Court of Appeal upheld the first instance decision that the fraud on the grain was in the scope of the misappropriation clause in the policy, as Quadra had been "*irretrievably deprived*" of it.

Characteristics of an insurable interest: The High Court judgment helpfully sets out a non-exhaustive list of three characteristics that will usually be present in an insurable interest: (1) the assured may benefit by the safety/due arrival of the insured property or be prejudiced by its loss or damage or detention, or may incur liability in respect of same; (2) the assured stands in a legal or equitable relation to the adventure or to any insurable interest in such an adventure; and (3) benefit, prejudice or liability must arise as a consequence of the legal or equitable relation.

Practical changes: Whilst it was a victory for policyholders and increases the risk of insurance pay-outs, insurers are rapidly redrafting policies in the light of the judgement.

3. Natixis -v- Marex and Access World Logistics (Singapore) Pte Ltd. [2019] EWHC 2549

Facts

Natixis bought nickel from Marex in a series of repo transactions. Marex delivered what later transpired to be forged warehouse receipts, which had been mistakenly authenticated by the warehouse, Access World. Natixis claimed against Marex for breach of contract, which Marex defended on the basis that (1) the repos were void for common mistake as to the authenticity of the warehouse receipts or (2) Marex had delivered good title to Natixis as it was required, because the receipts were contractual promises by the warehouse to deliver the nickel. Marex also brought claims against Access World for breach of contract and negligent misstatement for the mis-authentication of the receipts.

Not void for common mistake

Natixis' claim against Marex succeeded. The Court held that the repo contracts between Natixis and Marex allocated the risk of fraud to Marex, so the repos were not void for common mistake (as risk allocation means common mistake cannot apply). Marex had to provide Natixis with genuine warehouse receipts, which it had not done.

Contractual claims

Marex's claims that Access World had made contractual promises to deliver the nickel to Marex or Natixis, so that Marex was not in breach of its own contractual obligations to Natixis, also failed:

3.1 Warehouse receipts: unilateral contracts?

Marex's first argument was that the authenticated warehouse receipts were unilateral contracts containing promises of delivery by the warehouse. The Court followed established principles in confirming that a warehouse receipt is not a document of title under English law. The relationship between a warehouse storing goods and the party that deposited them is a contract of bailment, on the terms of the warehouse receipt. The mere transfer of a warehouse receipt from the seller to the buyer (endorsed or not) does not create a legal relationship between the warehouse and the buyer. This only arises when the warehouse "attorns" to the buyer i.e. acknowledges that it holds the goods on behalf of the buyer. As no attornment to Marex or Natixis had occurred, the Court held that the mis-authenticated warehouse receipts did not create a contractual relationship between either party and the warehouse.

3.2 Collateral contracts to the repos

Marex's second argument was that Access World's statements of authenticity amounted to contracts collateral to the Marex/Natixis repos. This failed for absence of the necessary ingredients for a contract

(including lack of consideration and intention to create legal relations). The estoppel claims Marex made also failed. They were contingent on finding contractual rights and the estoppel argued could not create the necessary the proprietary rights against third parties.

Negligent mis-authentication and limited liability

The Court held that Access World did not owe a duty of care to Natixis in negligence, as it had not "assumed responsibility" to Natixis for the authentication (statements communicated directly to Natixis contained disclaimers and Natixis could not reasonably rely on certain other documents it had obtained indirectly). Access World did owe such a duty to Marex for certain receipts, which had been breached by the negligent authentication. However, a clause in Access World's standard terms and conditions, limited Access World's liability, which the Court upheld as reasonably notified to Marex and the limitation reasonable in the circumstances.

4. Euro-Asian Oil SA v Credit Suisse AG, Abilo (UK) Ltd, Mr Dan Igniska [2019] 1 All E.R. (Comm) 706

Facts

The case arose out of a series of four contracts, stated to be on CIF terms, for the sale of oil from Abilo (the seller) to Euro-Asian (the buyer). Each contract was financed by a letter of credit, with payment to Abilo due against Abilo's presentation of documents. These included title documents (bills of lading) or a letter of indemnity (**LOI**) counter signed by Abilo's bank (the **Bank**) if title documents were unavailable. Euro-Asian paid for the cargos of oil against Abilo's presentation of countersigned LOIs but Abilo failed to deliver any oil under the fourth contract.

Claims for breach of warranties

Euro-Asian claimed against both Abilo and the Bank for breach of the warranties in the fourth LOI that Abilo had title to, and could deliver, the oil specified in the fourth contract. These were untrue because Abilo was performing by a "carousel" (delivering oil out of step with the documents) and had already used that oil named in the third contract in the series. The Bank was unaware of the "carousel" and that these warranties were untrue.

High Court decision

At first instance, the Court held that the Bank, having co-signed the LOI, was jointly and severally liable with Abilo for the breach of the warranties, but liable to contribute to only a portion of Euro-Asian's losses.

Court of Appeal: no variation to contractual terms

On appeal, the Bank argued that the fourth contract was not intended to operate on normal CIF terms (with title to the oil passing on presentation of the prescribed documents) as Euro-Asian had agreed to

another round of alternative "carousel" performance. The Bank argued that Euro-Asian could not therefore rely on the warranties as to title and performance in the LOI.

The Court of Appeal rejected this argument. It held that this would be inconsistent with the first instance findings of fact that Euro-Asian was never a willing participant to "carousel" performance and did not agree to vary the terms of the fourth transaction. The Court of Appeal echoed the first instance observation that it also would not have made commercial sense for Euro-Asian to give up its rights to insist on strict performance of the terms contracted.

Court of Appeal: effect of the indemnity

The Court of Appeal overturned the finding that the Bank should bear part of Euro Asian's losses. The Court of Appeal held that it was clearly implicit in the LOI that Abilo was the primary obligor and that the Bank could recover from Abilo if called to pay. The Bank could recover in full from Abilo, as it had assumed liability under the LOI for the benefit of Abilo, at its request, and unaware of how Abilo intended to perform.

5. Engelhart CTP (US) LLC v Lloyd's Syndicate 1221 for the 2014 Year of Account [2019] 1 All E.R. (Comm) 583

The claimant had entered into back to back transactions to buy and sell copper ingots, and paid for them on the basis of what transpired to be fraudulent bills of lading. During shipping to the claimant's buyer, the fraud was discovered, with the shipping containers found to hold waste material of nominal value rather than the copper ingots. The claimant claimed for loss of cargo on an "all risks marine cargo and storage" insurance policy, which it contended covered this loss.

The Court held that, properly construed, the policy did not. It held that marine cargo and storage insurance policies only normally cover physical loss or damage to goods, so clear language is required to extend them to "paper" losses. On the facts, there was no physical loss of or damage to the ingots as they had never existed and been shipped. The Court held that the claimant's losses were instead paper based, arising from accepting fraudulent title documents. Although the Court acknowledged that the policy was significantly broader than an entry level all risks policy, it held that the policy, taken as a whole and giving its terms their ordinary meanings, had not been extended to cover non-physical losses. The Court also derived support for its interpretation from specific clauses in the policy, such as a fraudulent documents clause which provided only for cover for physical loss of goods.

6. K v A [2019] EWHC 1118 (Comm)

Facts

The seller (A) claimed against the buyer (K) for a payment shortfall under a contract for the sale of sunflower meal. A had emailed an invoice (including its bank details for payment) to K via an agent but this was intercepted by a hacker, which changed the bank details to those for another account at the

same bank. K sent payment to the fraudulently notified bank account. The funds were retrieved but a shortfall arose because payment into and out of the incorrect account involved currency conversions.

Claims in High Court appeal

On appeal from the arbitral decision of the GAFTA Board of Appeal, K argued that its contractual obligation to "pay the price in net cash to A's bank" was only to pay A's bank, which it had done. It also challenged the decision on grounds of "serious irregularity". The Board had decided that A had given K good notice of the correct bank details by its email to the agent, based on a standard form GAFTA term incorporated in the contract. This point had, however, not been raised by A in the proceedings so K had not had the opportunity to respond to it.

High Court decision

The High Court upheld the decision of the Board that K's obligation was to pay A's bank for the account of A. It held that the clause clearly contemplated that A would notify its bank details to K and that K would instruct its transfer to be made using them. It would otherwise be commercially impossible to give A the electronic equivalent of "net cash" (i.e. credit to A's bank account) given how modern banking transactions operate. The High Court accepted K's challenge for irregularity, finding that hearing K's arguments on whether notice to an agent was good notice could have affected the Board's decision. This point was sent back for consideration by a first instance tribunal.