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Fraud Year
in Review
2024

Contents

Introduction

2024 was yet another active year in fraud disputes.

In this wrap up, we take a look back at some of the key decisions from last year. Freezing injunctions remain a key focus, with further judicial guidance provided as to the merits threshold to be satisfied, and the application of Babanaft provisos.

2024 also saw a key Supreme Court decision handed down in relation to how far directors will be liable as "accessories" for torts committed by their companies, providing much needed clarity for officers.

We also consider some interesting cases which provided procedural guidance as to: (i) how fraud cases are to be pleaded, and how much evidence is needed at an early pleading stage – with courts recognising that placing too heavy an evidential burden on claimants early on has a potential stifling effect, and (ii) when fraud claims may be appropriate for summary judgment / strike out.

The scope of *Norwich Pharmacal* relief was also considered insofar as it applies to firms of solicitors - demonstrating that privilege will not always operate as a bar to the relief.

We hope you enjoy this 2024 wrap up and find it useful. Please stay tuned for part two of this series, where we will be looking forward to key trends in 2025.

Andrew Taplin
Partner
T +44 20 7524 6463
E andrew.taplin@cms-cmno.com

Luke Pardey
Partner
T +44 20 7067 3551
E luke.pardey@cms-cmno.com

Michaela Potter
Senior Associate
T +44 20 7367 3749
E michaela.potter@cms-cmno.com

Anita de Villiers
Senior Associate
T +44 20 7067 3393
E anita.devilliers@cms-cmno.com

Freezing Injunctions

Isabel dos Santos v Unitel S.A. [2024] EWCA Civ 1109

In September 2024, the Court of Appeal handed down a landmark ruling upholding a c. £850m worldwide freezing order, clarifying how the threshold requirement of a "good arguable case" should be applied in the context of freezing injunctions.

The appellant (Isabel Dos Santos) appealed a worldwide freezing order made against her. One of the issues to be considered on appeal, was the meaning of the "good arguable case" element of the test required for the grant of a freezing injunction, and whether (whatever the test), the judge was right to find that the respondent (Unitel) had a good arguable case.

Specifically, the Court of Appeal considered whether the requirement to establish a "good arguable case" remained the traditional test as set out in ***Ninemia Maritime Corp v Trave Schiffahrtsgesellschaft GmbH*** ("The Niedersachsen") [1983] 2 Lloyd's Rep 600, of:

"… one which is more than barely capable of serious argument, but not necessarily one which the judge considers would have a better than 50 per cent chance of success."

Some more recent cases had suggested that the "good arguable case test" was to be applied in an equivalent manner as in the context of jurisdiction, adopting the three-limb approach in ***Brownlie v Four Seasons Holdings Inc*** [2017] UKSC 80 – which required the better of the argument.

The Court of Appeal unanimously confirmed that the merits threshold remained as stated in *The Niedersachsen*, and that the test of a "good arguable case" in the freezing order context was to be applied differently than in the context of jurisdiction.

The Court separately considered whether the test of a "good arguable case" should be assimilated with consideration of whether there is a "serious issue to be tried", which forms part of the *American Cyanimid* test (applied in interlocutory injunctions more generally). After it considered the authorities, the Court of Appeal confirmed that these two tests should be equated.

Lakatamia v Su [2024] EWHC 1749 (Comm)

No third-party breach of a freezing injunction where Babanaft proviso present, and guidance provided as to the application of the *Marex* tort.

This case was the latest instalment in a long running dispute between Lakatamia Shipping Company Limited ("**Lakatamia**"), and Mr Nobu Su.

This particular decision concerned Lakatamia's claim against Mr Su and two other individuals, Mr Chou (the "**Second Defendant**") and Mr Zabaldano (the "**Third Defendant**"), arising out of breaches of a freezing order against Mr Su. The central issue was whether the Second and Third Defendants had any liability arising out of the events in question. In the context of the claims against the Third Defendant, the Court considered interesting points as to the operation of Babanaft provision, and the application of the *Marex* tort.

As to the alleged unlawful means conspiracy to breach of the freezing order:

- The Court considered the effect of the standard Babanaft proviso included in freezing order, which stated that its terms *"do not affect or concern anyone outside the jurisdiction of this Court"*.
- The Court found that the presence of the Babanaft proviso precluded liability of the Third Defendant (a Monaco-based lawyer), for unlawful means conspiracy in this case. In doing so, the Court held that it would be *"a strong thing to hold a person liable for involvement in breach of a freezing order in circumstances where the court has previously, in the freezing order itself, stated the terms of the order "do not affect or concern" such person"*.
- However, the Court observed that the position would be different if the defendant in question had engaged in independently wrongful conduct – such as the production of false documents to mislead the English court.

Considering the application of the so-called *Marex* tort, the Court provided useful guidance as to how the tort should be applied. The *Marex* tort concerns interference with a judgment debt – in this case, previous judgments obtained by Lakatamia.

- The Court confirmed that in order to make out a claim in *Marex* tort, there was no need for any independent unlawfulness. A third party who knowingly assists a judgment debtor to dissipate their assets so as to hinder enforcement of a judgment debt has, in principle, liability in the Marex tort – whether or not there is a freezing order in place. Accordingly, the issues around the Babanaft proviso discussed above did not arise.
- The Court explained that in applying the *Marex* tort *"the same approach to intention should be taken […] as is applied to the tort of inducing breach of contract. The requisite intention will be missing where the defendant honestly believed that he was entitled to induce the breach of a judgment or order.."*
- In this case, the Court found that the Third Defendant did not have the necessary intention to satisfy this element of the *Marex* tort, believing that he was entitled (and in fact obliged) to transfer the relevant assets.

Pleading fraud: How much detail or evidence is required?

The Persons Identified in Schedule 1 to the Re-Amended Particulars of Claim v Standard Chartered plc [2024] EWCA Civ 674

The Court of Appeal provided a useful summary of the requirements for pleading fraud, and how much supporting evidence is required at the pleadings stage.

In consolidated actions brought under s. 90A of the Financial Services and Markets Act 2000, Standard Chartered plc appealed against a judge's decision not to strike out parts of the particulars of claim.

Section 90A imposes a statutory liability scheme for published misleading statements / dishonest omissions made by publicly listed companies. One of the hurdles which must be established, is whether a person discharging managerial responsibilities (a "**PDMR**"), held the required state of knowledge.

Standard Chartered plc appealed the decision at first instance not to strike out parts of the particulars on the basis that: (1) certain allegations were not sufficiently particularised and did not demonstrate the required evidential foundation for allegations of fraud or dishonesty; and (2) the respondents had not pleaded a sustainable case that there were PDMRs with the relevant knowledge.

The Court of Appeal dismissed the appeal. In doing so, it usefully affirmed the correct test for pleading requirements in fraud cases, noting that:

— While particulars of claim had to include a concise statement of the facts which are relied on, there is no rule that a pleading had to disclose, on its face, a solid evidential foundation for any allegation of fraud or dishonesty made therein.

— The requirement is that particulars of claim must include *"a concise statement of the facts on which the claimant relies"*; **not** the evidence relied on to support those facts.

— Where the claim is based on fraud or dishonesty or where it is to be inferred, there is a line of authority that primary facts supporting the allegations or inference must be pleaded to *"tilt the balance"* in their favour, but this does not require claimants to detail all the evidence on which they may seek to rely,

— Although allegations of fraud or dishonesty had to be properly particularised, courts need to be cautious in imposing onerous pleading requirements that would make it impractical to bring meritorious fraud claims, particularly given the limited information that might initially be available to a claimant.

As to the second limb of the appeal, regarding the knowledge of PDMR's, the Court of Appeal found that it was desirable for the claimants to spell out their case on individual PDMRs as soon as possible. However, it was not appropriate to strike out the allegations simply because they advanced allegations of fraud *en bloc* against the group executive. At this stage of the proceedings, it was sufficient that the claimants had pleaded a basis for an allegation that one or more PDMRs had the requisite knowledge.

Summary judgment will be granted in cases of manifest fraud

Giwa v JNFX Limited [2024] EWHC 735 (Ch) and *L & S Accounting Firm Umbrella Ltd v Oronsaye* [2024] EWHC 1919 (Ch)

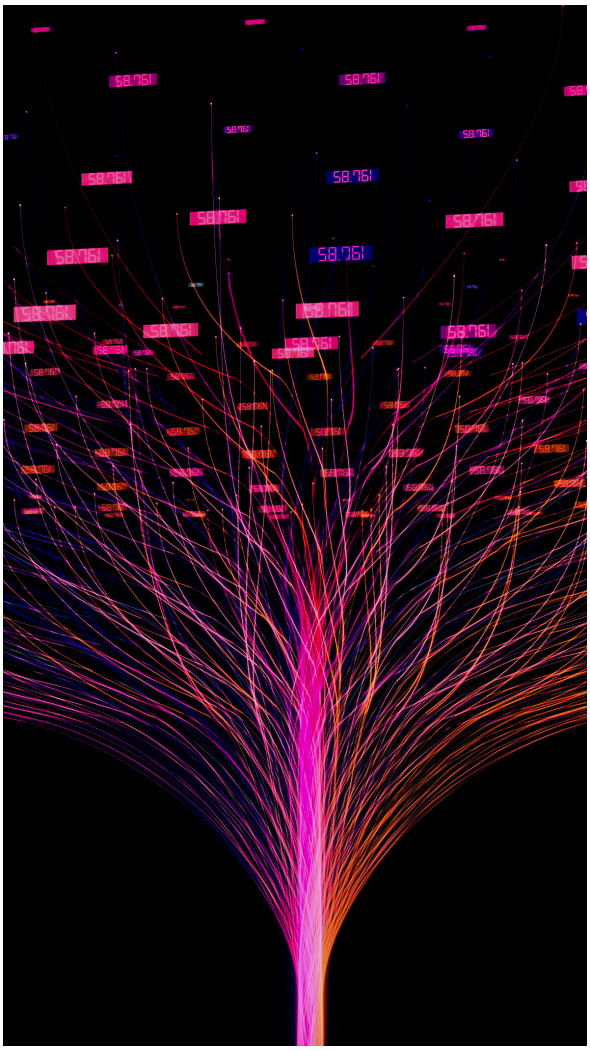
The Court considered two cases last year which both highlight that courts will be prepared to grant summary judgment in cases where fraud is clearly made out.

Giwa concerned an application for summary judgment in a high value and complex deceit claim against a foreign exchange services provider, JNFX Limited. Summary judgment was granted on the basis that there was no realistic prospect of the defendant successfully defending the claim. In particular, the Court did not accept that with the benefit of further disclosure and/cross examination, JNFX Limited would have a realistic prospect of showing the relevant representations relied on by Giwa were not made.

In *L&S Accounting Firm Umbrella Ltd*, the claimant company (which was in liquidation) sought summary judgment against the defendant directors of the company, alleging breach of fiduciary duty and seeking recovery of misappropriated funds. The claimant asserted that over £25 million had been undeclared to HMRC, and instead had been misapplied and extracted by the defendants in a large-scale labour supply fraud.

The High Court granted summary judgment, finding that: (i) there was no reasonable prospect of mounting any defence to the claim that the defendants had caused the company to perpetrate a massive VAT fraud against HMRC; (ii) this was a blatant breach of their duties as directors; and (iii) monies belonging to the company could clearly be traced into the hands of the directors.

Both cases show that in appropriate circumstances, the Court will be prepared to make findings on a summary basis in cases of fraud, without further evidence and cross examination.



Norwich Pharmacal relief

Filatona Trading Ltd v Quinn Emanuel Urquhart & Sullivan UK LLP [2024] EWHC 2573 (Comm)

This judgment served as an illustration of when and in what circumstances a Norwich Pharmacal order may be made against a firm of solicitors, and the interplay with privilege.

These proceedings concerned an application by the claimant (Filatona Trading) for a Norwich Pharmacal order against the respondent law firm, Quinn Emanuel. Quinn Emanuel had obtained a report from an unnamed business intelligence consultancy firm, which had been deployed in proceedings against the claimant with a view to setting aside an arbitral award. That report was found to be a forgery.

The judgment provided guidance as to when a firm of solicitors may be subject to a *Norwich Pharmacal* order, and the extent to which privilege might bar such relief:

— The Court considered the question of whether law firms should always be considered to be mere onlookers or witnesses, noting that it would depend on the facts of the particular case as to whether the lawyer is involved in the wrongdoing.

— Here, the Court was satisfied that Quinn Emanuel had become involved in the wrongdoing and had unwittingly facilitated it, noting that *"Quinn Emanuel's involvement in passing [the report] on for use in litigation gave it the imprimatur of authenticity"*, and accepting the applicant's submissions that Quinn Emanuel *"were critical to every stage of the life and propagation of the report"*.

— The Court did not accept that providing information on the identity of the consultancy that produced the report was protected by confidentiality or privilege. The provision of the identity of the consultancy (and of the persons who procured the relevant report) would not have revealed the content of any privileged communications, nor would it reveal anything about the litigation strategy of Quinn Emanuel's client.

Correct Test for Accessory Liability

Lifestyle Equities CV v Ahmed [2024] UKSC 17

In a landmark decision, the Supreme Court clarified how accessory liability is to be applied as against directors, and the correct approach to assessing account of profits.

Lifestyle Equities CV ("**Lifestyle**") had previously brought proceedings against 16 defendants for trade mark infringement, including the appellant in the appeal proceedings and his sister (the "**Ahmeds**") who were directors of two family owned companies - Continental Shelf 128 Ltd and Hornby Street Ltd (the "**Companies**").

The Ahmeds were joined to the proceedings on the basis they were alleged to be responsible for the torts of the Companies.

At the first trial the court found against the Companies. However no findings were made against the Ahmeds, as the first trial did not materially concern their involvement.

Both Companies subsequently entered insolvency. At a second trial, the Ahmeds were each found liable on the basis of accessory liability.

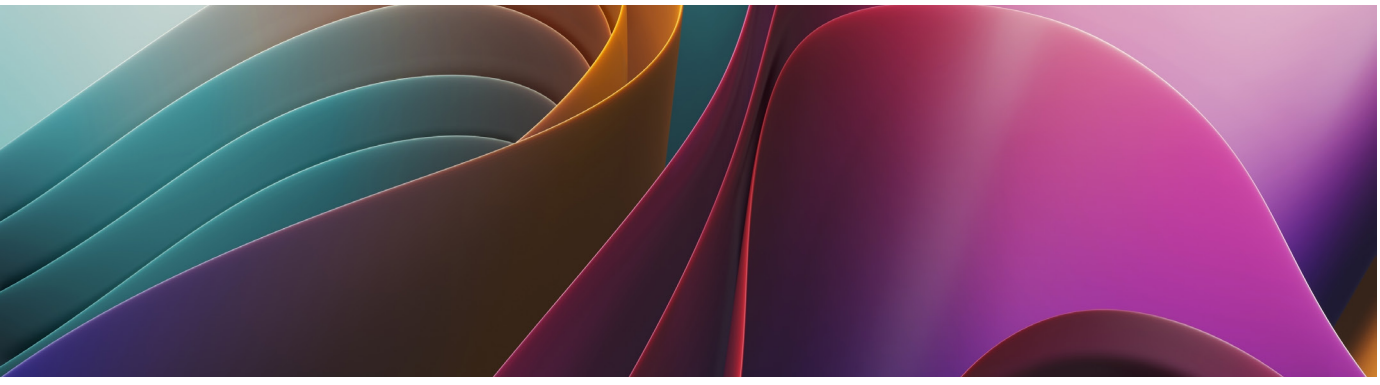
Both the Ahmeds and Lifestyle appealed to the Court of Appeal. The Ahmeds appealed in respect of their liability as accessories and whether they had made any profits from the infringements. Lifestyle appealed on the point of whether the Ahmeds were liable to account for the relevant Company's profits, rather than simply their own personal profits. The Court of Appeal dismissed both appeals (save for on one point of appeal by the Ahmeds - but that did not relate to the finding in respect of their accessory liability).

Both parties appealed to Supreme Court. In its judgment, the Supreme Court upheld the Ahmed's appeal and dismissed the Lifestyle's appeal:

— Importantly, the Supreme Court found that there was no support for the proposition that the mental state required for accessory liability should be the same as that required for primary liability. To be liable as an accessory for procuring a tort, a person must know the essential facts which make the act done wrongful, even if the tort is one of strict liability.

— The Supreme Court held that the Ahmeds were not aware of the essential facts which made the use of the mark wrongful.

— As to account of profits, the Supreme Court clarified that parties cannot be liable to account for profits which they themselves have not made. Even if the Ahmeds had been found personally liable on the basis of accessory liability, they could only have been liable to account for profits which they personally made from the infringements.



Fabrication (Arbitration)

Contax Partners Inc BVI v Kuwait Finance House [2024] EWHC 43 (Comm)

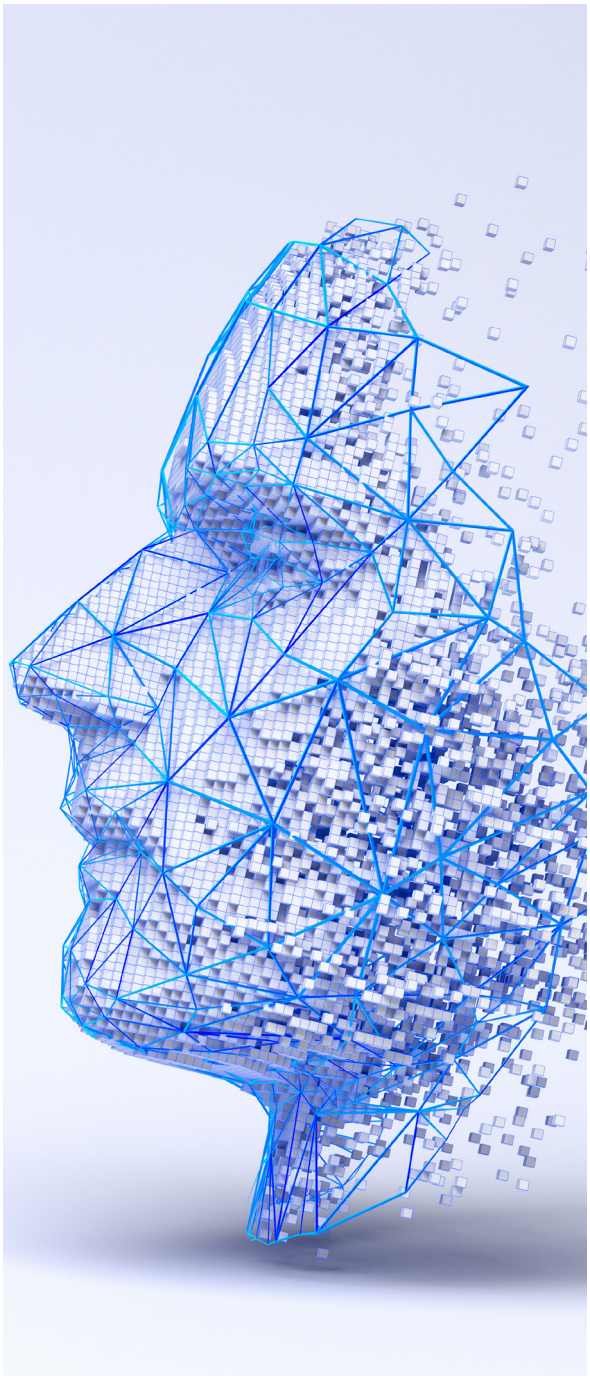
Arbitral Award set aside on the basis it was a fabrication.

This case considered an unusual situation in which a claimant had attempted to enforce a fabricated Arbitral Award based on a non-existent arbitration agreement.

The application to set aside the Award was made on two grounds: first, that the enforcement claim was made without authority; and second, that the arbitration agreement and Award did not exist.

The first ground failed because it was not clear who had been properly exercising authority on behalf of the claimant. The second ground succeeded, with the Court finding that the Award was a fabrication. Amongst other reasons, no original arbitration agreement had been produced nor had any documentary evidence been produced that showed an arbitration agreement existed before the enforcement claim was issued.

Whilst the facts of this case are extreme, given the growing sophistication of artificial intelligence and other technologies, legal practitioners and their clients will need to be on their guard to question the provenance of documents.



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