Meeting the challenges of complex civil fraud in 2022

Seladore Legal co-founder Simon Bushell, along with partners Gareth Keillor, Kevin Kilgour and Gary Milner-Moore, look ahead to the key civil fraud issues facing general counsel in the coming year.

The new year is a good time to reflect, and as Seladore Legal enters 2022 at frenetic pace – having concluded a trial in early December 2021, and another due to start in early February – it occurs to me: has there ever been a better time to be practising complex commercial litigation, and in particular fraud claims?

Fraud comes in all shapes and sizes, and traverses borders as never before. It is unique in its challenges: obliging the expert lawyer to meet and overcome the deviousness of the fraudster – uncovering hidden tracks, and acting swiftly and decisively in preserving evidence and freezing assets before they disappear beyond the reach of the victim.

It is not enough for the fraud lawyer to be focused on their local law and it is a handicap not to be able to see that even if the facts surrounding the act of fraud may be localised, the consequential acts and concealment of evidence and financial gain will likely cross borders, with each touchpoint giving rise to jurisdiction and proper law considerations.

There is no universal law relating to fraud, and this may be a good thing, thereby enabling judges to adapt and find equitable solutions to meet newly devised frauds created to take advantage of innovation, such as fintech, and specifically cryptocurrency.

It is notable that in *AA v Persons Unknown* [2019] it was recognised that cryptocurrencies can be considered to be 'property' under English law, and could therefore be the subject of a proprietary injunction. This principle was applied in *Ion Science Ltd v Persons Unknown & ors* [2020], where the court granted a proprietary injunction and worldwide freezing order against persons unknown, and an ancillary disclosure order to help with identifying the fraudsters. Bankers Trust orders were also obtained against the cryptocurrency exchanges. The Court also considered the *lex situs* of Bitcoin, and held that on the facts of that case the *lex situs* of a crypto asset is the place where the person who owned the crypto asset is domiciled. This principle was followed in *Fetch.Ai Ltd v Persons Unknown* [2021].

I am doubtless not the only fraud lawyer to have rolled their eyes at hearing the claim that blockchain – the technology that underpins cryptocurrency and non-fungible token (NFT) based commerce – is so secure as to be impenetrable to even the most sophisticated computer hacker.

That particular myth was shattered in early August 2021, when the world came to understand that an alleged hacker had pilfered $600m in a crypto-heist that left the crypto industry red-faced and scratching its head. The target was a company called Poly Network which links together some of the most widely used digital ledgers. Poly Network had developed a computer-based set of rules permitting users to transfer tokens tied to one blockchain to a different network, thus, apparently addressing the problem of how investors in cryptocurrencies move tokens from one blockchain platform to another so as to facilitate trading (and underlying commerce) and thereby broaden the market and the appeal of cryptocurrency in general. Somehow the hacker found a vulnerability in the cyber security, thereby gaining access to ledgers which were understood to be impenetrable.

In a dramatic twist, the anonymous hacker (adopting the *nom de plume* 'Mr White Hat') sent a series of messages via blockchain (but in effect open to public scrutiny) regarding his motives, leading

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ultimately to Poly Network offering the hacker a 'reward' of $500,000 to encourage him to return the balance of the stolen assets, and to give an explanation of how the technology was undermined in the first place. Almost everything which had been misappropriated was returned, although it is unclear how the individual victims were recompensed. Investors and commentators often describe cryptocurrency as a potential alternative to gold as an asset class (ie, a valuable asset which is an alternative to cash and securities). I cannot comment on that, but it is surely a goldmine for fraud lawyers for the foreseeable future.

Most, if not all, fraud lawyers will have encountered a situation where it proves impossible to pursue the perpetrator(s) of a particular fraud – monies have been dissipated in ways which preclude a recovery ie invested in schemes which performed poorly, or where unavoidable delay has left the trail 'cold' and impossible to follow. In such situations, the focus turns to the issue of whether third parties have been caught up in the facilitation of the fraud, and if so, circumstances exist in which it is possible to allege that the third party performed its role carelessly, recklessly or dishonestly, knowing that a fraud was being perpetrated, or where it should have appreciated the risk, and asked questions of the perpetrator, rather than blindly proceeding to follow the instructions given to it. Claims advanced against third parties such as accountants, banks, fiduciaries, and company administrators are known as 'accessory liability' and they generally focus on what is known to practitioners as 'constructive knowledge': were there sufficient 'red flags' known to the accessory as to put them on inquiry? These are notoriously difficult claims to bring successfully because of the element of 'dishonesty' which, in effect, needs to be established.

Another 'lesser' form of accessory liability which has taken more prominence recently is the so-called 'Quincecare' duty. Essentially, the duty applies to banks in its execution dealings on behalf of customers and requires the bank to refrain from giving effect to a customer's payment instruction if and for so long as the bank has reasonable grounds for believing that the instruction is an attempt to misappropriate the customer's funds, for example if a director is seeking to syphon away a company's funds (the company being the bank's customer). Recent case law has confirmed that the duty does not apply to accounts held by individuals and that where a bank is on inquiry it must not only refrain from making a payment, but must do 'something more' to resolve its concerns such as making enquiries of the customer.

Looking ahead to 2022, *Nigeria v JPMorgan Chase* is due to come to trial and is likely to shed considerable light on the Quincecare duty and it is anticipated that the scope of the duty and what banks must do to avoid liability will be further enunciated. The Quincecare duty is often described (by lawyers representing banks, mostly) as 'novel' but that may in part be down to the fact that few such cases actually get to trial. Banks are certainly nervous about the duty and its implications. In another Quincecare case (yet to go to trial) *Stanford v HSBC*, the Supreme Court will consider whether the duty protects creditors of the bank's customer where that customer has gone into liquidation.

The development of the 'Marex Tort' is another example of how the English courts have sought to adapt and respond to particular situations

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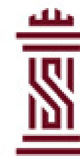
so as to limit the scope for fraudsters to succeed in frustrating their creditors. In *Marex Financial Ltd v Carlos Sevilleja Garcia* [2017], the court established the concept of the Marex Tort, namely the tort of inducing or procuring a violation of rights under a judgment. In a later case, *Lakatamia Shipping Co Ltd v Nobu Su*, the court reaffirmed the parameters of the Marex Tort, and set out the necessary elements: (i) the entry of the judgment in the claimant's favour; (ii) a breach of the rights existing under that judgment; (iii) the procurement or inducement of that breach by the defendant; (iv) knowledge of the judgment on the part of the defendant; and (v) realisation on the part of the defendant that the conduct being induced or procured would breach the rights owed under the judgment. There is, however, no requirement that the defendant should intend to cause damage or harm to the claimant.

Marex Tort principles are most likely to apply in a situation where a director of a company (or other person with a controlling influence) arranges for the dissipation of the companies' assets knowing of the existence of a judgment in favour of the claimant, which as a result of the dissipation, the company is unable to meet. There may be other applications of these principles, and the prospect of the new tort developing in scope is one fraud lawyers will be relishing.

Writing this piece in early January 2022, it would seem remiss not to turn the spotlight briefly on the recent events in Kazakhstan. The incumbent President Tokayev has sacked the government, arrested a former Prime Minister Massimov (on charges of breach) and removed former President Nazarbayev from his role as head of the country's security council. These measures appear to be in response to anti-government protests but also signal that genuine regime change may be on the near horizon. It is believed to be the case that extensive wealth emanating from Kazakhstan has found its way overseas, including the UK. It would not be at all surprising to find that in due course claims are brought in which those now in charge of state assets seek recoveries of allegedly misappropriated assets or benefits wrongly diverted. Anyone with involvement in managing such wealth, or otherwise entangled in it, will be on their guard. ■

Seladore Legal is a disputes only law rm, specialising in complex, cross-border litigations and arbitrations. Its partnership comprises some of London's most experienced and senior litigators, with experience of the biggest civil fraud and white-collar cases of recent years.

e rm does not undertake non-contentious work, minimising potential con icts of interest. Seladore Legal takes a focused, partner-driven approach, developing and pursuing creative causes of action for clients.



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AA v Persons Unknown
[2019] EWHC 3556 (Comm)

Fetch.Ai Ltd v Persons Unknown
[2021] EWHC 2254 (Comm)

Ion Science Ltd v Persons Unknown & ors
(unreported) 21 December 2020 (Commercial Court)

Lakatamia Shipping Co Ltd v Nobu Su
[2021] EWHC 1907 (Comm)

Marex Financial Ltd v Carlos Sevilleja Garcia
[2017] EWHC 918 (Comm)

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Simon is a co-founder of Seladore Legal and acts for a broad range of clients, including large corporates, private equity houses, financial institutions and banks. He previously spent more than twenty years as a disputes partner and senior leader at top-tier City and US law firms, including 15 years as a partner at Herbert Smith Freehills.

He has been inducted into *e Legal 500*'s Hall of Fame for civil fraud and is one of a small handful of commercial lawyers in London to have been named both in *e Legal 500*'s Hall of Fame for civil fraud and listed as a leading individual for premium commercial litigation.

Simon has undertaken investigations into complex, worldwide frauds, conspiracies and insolvencies, and has wide experience in co-ordinating parallel cross border disputes and proceedings before a number of courts and tribunals.

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