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International Fraud & Asset Tracing 2022

England and Wales: Law & Practice
and
England and Wales: Trends & Developments

Simon Bushell, Gareth Keillor,
Kevin Kilgour and Owen Hammond
Seladore Legal Limited

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ENGLAND AND WALES

Law and Practice

Contributed by:
Simon Bushell, Gareth Keillor, Kevin Kilgour and Owen Hammond
Seladore Legal Limited see p.17

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Contributed by: *Simon Bushell, Gareth Keillor, Kevin Kilgour and Owen Hammond,*
Seladore Legal Limited

1. FRAUD CLAIMS

1.1 General Characteristics of Fraud Claims

The law of England and Wales does not provide a specific, single cause of action of civil or commercial fraud, it has developed a flexible and creative approach to assisting victims of fraudulent behaviour. The typical claims utilised by a victim of fraud are fraudulent misrepresentation (under the tort of deceit) and breach of trust or fiduciary duty (which are claims in equity).

Fraudulent Misrepresentation (Deceit)

Fraudulent misrepresentation (or deceit) is a cause of action available where Party A makes a false representation to Party B either by words or conduct, knowing it to be untrue (or being reckless as to whether or not it is true) and intending Party B to rely on that representation. If Party B does so, and suffers a loss as a consequence, then Party A will be liable to Party B in tort.

Importantly, there is also a statutory action for misrepresentation under the Misrepresentation Act 1967. A claim under the Act is often preferable to bringing an action in fraud because:

- it reverses the burden of proof by requiring Party A to show they had an honest belief in the truth of the representation at the time it was made;
- it does not require Party B to prove fraudulent conduct (which is a high hurdle in English law); and
- it still allows for a measure of damages commensurate with a claim in fraud (ie, Party B is allowed to recover all losses flowing from the affected transaction, as opposed to, eg, a claim in negligent misstatement, where Party B is only allowed to recover losses that are the direct consequence of the misstatement).

Breach of Trust/Breach of Fiduciary Duty

A "trustee" or "fiduciary" relationship often plays an important part in fraud claims. It exists where one person (the "fiduciary") has undertaken to act for or on behalf of another person (the "principal") in circumstances that give rise to a special relationship of trust and confidence. Common examples may be the relationship between a trustee and beneficiary in an express trust, a solicitor and their client, a company director (including shadow director) and the company, a financial adviser and the investors they are advising, an agent and their principal, or a business partner and their co-partner(s).

Where such a relationship exists, the fiduciary must act with outright loyalty towards their principal. In broad terms, this means that they must act in good faith, must not make a profit out of the relationship of trust, and must not put themselves in a position where their duty may conflict with their own interests.

Unsurprisingly, fraudulent behaviour (such as misappropriation of assets) in the context of one of these relationships will amount to a breach of trust/breach of fiduciary duty.

There are a number of remedies available for a claim of breach of trust or breach of fiduciary duty. Most commonly, the fiduciary will be required to compensate the principal for losses suffered, or to "account" for any losses and (potentially) profits made as a result of the breach. The principal may also be able to "follow" or "trace" specific trust property or proceeds and assert an equitable interest over them (see **1.5 Proprietary Claims against Property**).

Other Causes of Action

Third-party involvement

English law also provides separate causes of action against third parties who assist or facilitate fraudulent acts (eg, unlawful means con-

spiracy and dishonest assistance). These are discussed in detail in **1.3 Claims against Parties Who Assist or Facilitate Fraudulent Acts**.

Specific insolvency claims – "wrongful trading" and "transaction at undervalue"

Additionally, there are specific claims that arise in an insolvency setting. In particular, English insolvency law provides a specific claim available to liquidators of "wrongful trading", which will occur where a company's director(s) continues to trade in circumstances where they know (or ought to have known) that there is no reasonable prospect of the company avoiding insolvency proceedings. A director who knowingly fails to exercise due care may become personally liable to the company/its creditors for the losses they cause.

Steps may also be taken where a company enters into a "transaction at undervalue" whereby assets are gifted or sold to third parties at a price that is significantly below their actual value. If the company subsequently becomes insolvent, a court may order the reversal of any such transactions that took place in the two years prior to the insolvency.

1.2 Causes of Action after Receipt of a Bribe

Civil Claim

A civil law claim may be brought by a person who discovers that their agent or employee has been bribed or has received a secret commission. In bringing such a claim, the claimant must show:

- a payment was made to the agent/employee of the briber's counterparty;
- the briber knew that the recipient was the agent/employee of the counterparty; and
- the payment was not properly disclosed to the counterparty.

Where that occurs, English law makes an irrebuttable presumption that the party making the payment did so to cause the agent/employee to prioritise their interests over those of the counterparty, and that the agent/employee was actually influenced by the bribe. It should be noted that the agent/employee cannot avoid liability by arguing that the payment is governed by (and has no adverse consequences under) foreign law. This is because the English courts will not apply a foreign law where doing so conflicts with the principles of domestic public policy.

In bribery cases, the English court has historically been readily willing to find that a fiduciary relationship existed by giving the usual rules a wide and loose interpretation – or indeed by disregarding the usual rules that would otherwise suggest that no such relationship existed.

Damages and/or Equitable Remedies

If a claim of bribery is successful, the claimant can seek damages and/or equitable remedies (such as requiring the defendant(s) to account for, or return, any profits made). The amount recovered will generally be at least the value of the bribe (even if there is no other identifiable loss), which can be, for example, on the basis that English law deems that the agent/employee holds the bribe on a "constructive trust" for the benefit of their principal/employer. This is significant as it provides the principal/employer with a proprietary interest (see **1.5 Proprietary Claims against Property**) over those funds (and therefore the asset is not available to creditors of the agent) and carries no requirement to prove that the actions of the agent/employee caused damage to the principal/employer.

Dishonest Assistance

The wronged party may also claim for dishonest assistance (see **1.3 Claims against Parties Who Assist or Facilitate Fraudulent Acts**) against the person who paid the bribe (assum-

ing the party receiving the bribe is a fiduciary) or for procuring a breach of contract (on the basis that an agent/employee will typically breach the terms of any contract if they receive a bribe). In doing so, the wronged party may be able to rescind all transactions between them and the party paying the bribe (or the company they are associated with).

Injury by Unlawful Means

In some circumstances, it may be possible for a wronged party to bring a claim for conspiracy to injure by unlawful means (see **1.3 Claims against Parties Who Assist or Facilitate Fraudulent Acts**) against a third-party competitor that it suspects of bribery (ie, in circumstances where Party A suspects that its competitor, Party B, has paid bribes to a potential customer, Party C, such that Party C agrees to do business with Party B and not with Party A). Such claims are difficult to substantiate, as it is insufficient to show that the bribe was merely likely to injure Party A – rather it must be shown that Party B had an intention to injure Party A.

Separate Criminal Offences

Note there are also separate criminal offences for bribery, which arise under the Bribery Act 2010.

1.3 Claims against Parties Who Assist or Facilitate Fraudulent Acts

In some circumstances, English law allows a wronged party to claim against third parties who do not owe any pre-existing duties. These claims will be particularly important where the primary wrongdoer (ie, the one who owes specific, pre-existing duties to the victim) is out of the jurisdiction or does not have assets with which to satisfy a claim. Three causes of action are most relevant in such circumstances.

The Three Most Relevant Causes of Action

Dishonest assistance

A claim in dishonest assistance will exist where:

- a breach of trust and/or fiduciary duty has occurred, causing loss (see **1.1 General Characteristics of Fraud Claims**);
- the third-party defendant assisted in that breach of trust or breach of fiduciary duty; and
- the third-party defendant acted dishonestly in doing so.

In these circumstances, the third party will be deemed to have acted dishonestly where they have not acted in the way an honest person would have done in the circumstances. This is largely an objective question, which asks whether the third party's actions fell below the standard expected of ordinary honest people, regardless of whether or not they knew it fell below that standard. Importantly, it is not necessary for the wronged party to show that the trustee/fiduciary was also dishonest in breaching their duty.

Where a claim of dishonest assistance is successful, the third party is liable to the wronged party as though they were a trustee or a fiduciary. This means they can be ordered to account for any profits, as well as be required to pay damages.

Knowing receipt

Unlike dishonest assistance, a claim for knowing receipt focuses on a third party who actually receives misappropriated property or proceeds, knowing that they were provided in breach of trust or breach of a fiduciary duty. The third party's state of mind must make it unconscionable for them to retain the benefit of the property or proceeds (even if they have not acted dishonestly).

As with dishonest assistance, the third party is liable to the wronged party as though they were a trustee or a fiduciary, which in a case of knowing receipt may also include accounting for the value of misappropriated property.

Conspiracy

A wronged party may also have a claim in the tort of conspiracy where a number of parties conspired to injure them. This is a helpful tool to a potential claimant as it allows potential defendants to be grouped together (where it can be proved that they took concerted action), even where they may not have a direct cause of action against all of them.

There are two forms of conspiracy. First, "lawful means conspiracy", whereby the claimant must show that notwithstanding the fact that lawful means were used, the defendants' predominant intention was to injure them. This form of conspiracy is rarely seen in practice. The second, more common, form is "unlawful means conspiracy". The fact that the defendants may have utilised unlawful means lowers the evidential burden for the claimant. In particular, they need only show that the defendants intended to injure them, even if that was not the predominant intention. For this second form of conspiracy, "unlawful means" exist where the wronged party has an actionable claim against one or more of the defendants, or where criminal conduct is involved. To claim damages, the claimant is required to show that it has suffered loss as a result of the unlawful act.

Misappropriation

In addition, as noted below, in certain circumstances it may be possible to argue that an asset in the hands of a third party is held on constructive trust for the victim of fraud (eg, where an asset has been misappropriated in breach of fiduciary duty).

Breach of Duty of Care by a Bank

Where fraudulent transactions have been administered by a bank, it may be possible to recover resultant losses from the bank for a breach of the "Quincecare" duty (so called because of the case from which it derives). It is an implied term of the contract between bank and customer that the bank will exercise reasonable care and skill when executing the customer's instructions. The bank may breach its duty where it executes the customer's instructions knowing (or shutting its eyes to the fact) that they were made dishonestly, acts recklessly in failing to make reasonable enquiries, or where there were reasonable grounds to believe the instructions were an attempt to misappropriate funds. It is possible for banks to expressly exclude the duty in their contractual terms, but recent cases suggest victims of fraud may increasingly rely on the cause of action where there are low hopes of recovery from the principal actors (for example, because they are insolvent, or have disappeared).

1.4 Limitation Periods

The limitation period for the wronged party in a fraud claim is typically six years, starting from when they either discovered the fraud or when they could have done so using reasonable diligence.

Importantly, in the context of fraud (whether in relation to trust property or otherwise), where the defendant has deliberately concealed any fact that is relevant to the victim's ability to bring a claim, the limitation period will not begin to run until that concealment has been discovered, or could reasonably have been discovered.

An exception to the general six-year rule also exists in relation to trust property. Specifically, there is no set limitation period in respect of (i) any fraudulent breach of trust, or (ii) any action to recover trust property that the trustee has taken for themselves. This allowance relates only to

trustees who have assumed responsibility for trust property (and therefore does not apply to trusts that arise solely at the discretion of the courts). Furthermore, dependent on the remedy that is being sought, the court may still have discretion to say that there has been unreasonable delay and that it would be unfair to the trustee to allow the claim to proceed.

1.5 Proprietary Claims against Property

Where property has been fraudulently obtained and transferred to a third party, the victim may have a proprietary claim in respect of that property (or its proceeds), unless it has been obtained by a third party in good faith, for value, and without notice of the relevant fraudulent activity.

A proprietary claim will be particularly significant where the third party or the wrongdoer is insolvent as it enables the wronged party to rank ahead of general creditors.

A proprietary interest also becomes particularly relevant (and particularly helpful to a victim of fraud) where a fiduciary or trustee has made a financial gain through a wrongful act, as this will enable the victim to obtain that gain for themselves. By way of example, where a financial adviser invests in an opportunity alongside their client, but fails (in breach of their fiduciary duty) to disclose a conflict of interest, the client may be able to claim the financial adviser's share of the profits from the investment (in addition to retaining their own profit). In this regard, a proprietary interest can dramatically increase the value of any claim.

"Following" and "Tracing" Transferred Property

The proprietary remedies available are assisted by the evidential rules of "following" and "tracing" transferred property. These are processes by which a claimant can identify the relevant property or proceeds that will form the focus of the claim. In broad terms, the claimant generally has a choice to either "follow" the relevant property and recover it from the third party (assuming they are not a good faith purchaser, for value, without prior notice), or they can instead "trace" and recover any proceeds or new assets the fraudster obtained from the third party.

In the event that the proceeds of fraudulent activity become mixed with other funds, there are rules for identifying what the wronged party is entitled to (either in terms of a share of the fund or any asset purchased with it).

1.6 Rules of Pre-action Conduct

Claims in England and Wales are governed by certain "pre-action protocols" that set out the steps that the courts will expect parties to take prior to commencing proceedings. These steps include setting out the claim in full, providing the other side with an opportunity to respond, considering whether the dispute is suitable for alternative forms of dispute resolution such as mediation, and so on. While there is no specific protocol for instances of fraud, an allegation of fraud is serious and has far-reaching consequences even if it is not proved. Given this, any allegation of fraud must be clearly and accurately pleaded (as discussed in **2.7 Rules for Pleading Fraud**).

Note that the pre-action protocols do not apply in respect of "without notice" applications, although there are other steps that must be taken in such circumstances (see **2.4 Procedural Orders**).

1.7 Prevention of Defendants Dissipating or Secreting Assets

A wronged party may seek an interim "freezing injunction" that prevents a defendant from disposing of, or otherwise dealing with, their assets. This is intended to prevent the defendant from hiding, moving or dissipating their assets in a

way that makes them "judgment-proof". Such orders typically also require the defendant to promptly disclose a list of their assets (which they are subsequently required to verify by way of affidavit). Failure to comply with the order may result in the defendant being in contempt of court, which can result in the defendant being fined or (in serious cases) imprisoned. Failure to comply is also likely to affect the defendant's credibility and may have other consequences for their substantive defence of the claim.

Freezing orders are "in personam" orders, meaning they operate over individuals, rather than over specific assets. This is significant as it means they do not only limit dealings with assets that are located within England and Wales (a "domestic freezing order"), but also dealings with assets that are located overseas (a "worldwide freezing order" – discussed in greater detail below). Furthermore, a freezing order can extend over various types of assets (normally bank accounts, shares, physical property, but also things like goodwill) provided that the defendant has a legal or beneficial interest in them. Exceptions to the freezing order (eg, reasonable living costs, legal fees, ordinary business transactions, etc) are typically defined.

In certain cases, it may be possible to obtain a proprietary injunction where a party claims a proprietary interest in a specific asset. There will generally be very limited exceptions to such an order.

An application for a freezing order is made as a standard application to the court but is a complex application, usually done without notice to the respondent, which requires an applicant to discharge its duty of full and frank disclosure (see **2.4 Procedural Orders**). The court fees associated with this are reasonably modest (at the time of writing (May 2022), the fee for a without-notice application was GBP108). However, in making such an application the claimant will typically need to provide (i) an undertaking to commence a claim shortly after the injunction hearing is determined, and (ii) a "cross-undertaking in damages", meaning they must compensate the defendant for any loss suffered if it is later shown that the injunction should not have been granted. It is sometimes necessary to secure that undertaking through a bank guarantee or payment into court.

Remedies Assisting with International Claims

In relation to preventing the dissipation of overseas assets, the English courts have developed two remedies that assist with international claims.

Worldwide freezing injunctions

The English courts have shown a willingness to be dynamic in respect of freezing injunctions with an international aspect. Examples of this include orders being granted in circumstances where the defendant has no significant presence in England and Wales, and orders preventing a defendant from dealing with their overseas assets unless they transferred a specified value of assets to England and left them there for the duration of the order.

The requirements associated with a worldwide freezing order are similar to those associated with a general, domestic freezing order. The notable exceptions, however, are that the claimant must show that (i) any assets the defendant has in England and Wales are insufficient to satisfy the claim, and (ii) there are suitable assets in other jurisdictions. The relevant court will also give consideration to issues such as the interests of other parties or creditors, either in England or overseas.

When making an order, the defendant is entitled to additional protections, given the risk that they may face proceedings in each jurisdiction where

their assets are located. Accordingly, orders typically contain a provision that they will not be enforced outside England and Wales without the permission of the English court. Even if permission is granted by the English court, the process of actually enforcing a worldwide order abroad can be problematic depending on the location of the parties, the relevant international agreements and so on.

Interim relief in support of foreign proceedings

The English court may grant interim relief (including freezing injunctions) to support proceedings that have been brought in a different jurisdiction.

In the case of a freezing injunction, the claimant must show that it is expedient for the order to be granted. This will depend on matters such as the domicile of the defendant, whether granting the order will interfere with the case-management powers of the foreign court, and/or whether the order will create the possibility of conflicting/overlapping restrictions in different jurisdictions.

2. PROCEDURES AND TRIALS

2.1 Disclosure of Defendants' Assets

A freezing injunction (discussed in detail in **1.7 Prevention of Defendants Dissipating or Secreting Assets**) will typically require the defendant to swear an affidavit giving details of assets they have a legal or beneficial interest in. This includes details as to the value and location of any such assets (including overseas locations in the case of a worldwide order). Such disclosure may also be ordered by the court prior to any application for a freezing order (although this is uncommon given that one of the main purposes for seeking disclosure is to guard against the dissipation of assets, and that purpose would be undermined if a freezing order has not been put in place).

The defendant may be required to submit to cross-examination if there are any concerns regarding the disclosure they have given. Failure to comply with the requirement to give disclosure, or providing inadequate/false information, may lead to a finding of contempt of court (and therefore a fine or, in serious cases, imprisonment).

In an effort to ensure compliance with the disclosure requirements (as well as a freezing and/or search and seizure order), in appropriate cases it is possible to obtain an order requiring the defendant to hand over their passport to the claimant's solicitor. Such an order ensures that the defendant cannot leave the jurisdiction until the court orders otherwise.

2.2 Preserving Evidence

Search and Seizure Order

A claimant may obtain a search and seizure order giving the claimant (or their solicitors/agents) access to relevant premises and allowing them to take possession of specified evidence such as documents, computers, electronic data, etc. The purpose of such an order is to preserve (rather than obtain) evidence in circumstances where there is a real risk that it might otherwise be destroyed. These orders are only available in very limited circumstances. Where they are granted, an independent supervising solicitor will oversee the process to ensure it is conducted in a manner that is consistent with the terms of the order.

Terms and conditions

In applying for a search and seizure order, it is necessary to specify which premises will be searched. Those premises must normally be in the United Kingdom and under the defendant's control. No material may be removed from the

premises unless it is specifically identified in the order (and accordingly, orders cannot include any "catch-all" wording), nor can legally privileged material be obtained. The claimant will typically need to provide a "cross-undertaking in damages", which means they must compensate the defendant for any loss unduly suffered as a consequence of the search and seizure order. They must also undertake to commence a claim shortly after any such order is made.

Note that a search and seizure order does not allow a claimant to force their way into the defendant's premises. Rather, if the defendant refuses entry, the claimant's remedy is through contempt of court proceedings.

2.3 Obtaining Disclosure of Documents and Evidence from Third Parties

There are three main ways in which a wronged party may seek to obtain information from third parties.

Third-Party Disclosure Pursuant to the Civil Procedure Rules (the "CPRs")

Rule 31.17 of the CPRs allows for disclosure from a non-party when the disclosure sought is (i) likely to support the claimant's case, or adversely affect the case of the other party(ies), and (ii) necessary to deal with the claim fairly and/or save costs. In considering whether to grant such an order, the court will consider the burden imposed on the third party by having to provide disclosure.

Importantly, Rule 31.17 only applies where proceedings have been commenced. It is possible to obtain disclosure before proceedings have begun under Rule 31.16, but such an order can only be sought against someone who is likely to become a party to any subsequent proceedings (which will be difficult where the third party has not committed any wrong).

Norwich Pharmacal Orders

Where the CPR disclosure route does not assist, a Norwich Pharmacal order (so-called because of the case from which it derives) enables a wronged party to obtain disclosure from a third party who is involved in wrongdoing (innocently or not), but who is unlikely to be a party to any subsequent proceedings.

Norwich Pharmacal orders are flexible and have been developed to respond to a range of circumstances. In fraud cases, they are commonly sought against banks, and are used to identify the proper defendant to a claim, to trace assets, to assist in pleading a case, and/or to enforce a judgment. They are often sought "without notice" and are accompanied by a "gagging order" preventing the third party from informing anyone, including its customer(s), that the order has been obtained.

Bankers Trust Orders

Bankers Trust orders (again, so-called because of the case from which they derive) are typically made against banks or other institutions that hold misappropriated funds or through which misappropriated funds have passed. They require the bank or institution to disclose information relating to customer accounts and can accordingly be very useful in tracing funds. They operate in a similar manner to Norwich Pharmacal orders, but are generally easier to obtain.

Restricted Use

Where an order allows for material to be obtained from a third party, that material can normally only be used in respect of the specific proceedings in which the order was made – it cannot be used for other collateral purposes without the permission of the court.

2.4 Procedural Orders

Procedural orders in fraud cases are often sought "without notice" to the defendant in

order to avoid "tipping them off". If the order is granted, the defendant is then subsequently given an opportunity (through the "return date") to vary or discharge the order.

In an effort to ensure the defendant is not unduly disadvantaged by not being present when the order is first sought, the claimant must give "full and frank" disclosure of all relevant facts, including any points that are disputed or which might have otherwise been advanced by the defendant. The English courts are becoming increasingly vigilant in ensuring that the duty of full and frank disclosure is properly complied with by claimants. This issue is taken seriously and is often a point on which the defendant may subsequently challenge what has taken place. Such challenges may have serious repercussions in that they may not only damage the claimant's credibility, but may also result in the order being discharged at the return date (or earlier) and an adverse costs order being made against the claimant. Furthermore, in seeking an order without notice, the claimant will typically need to provide a "cross-undertaking in damages" which means they must compensate the defendant for any loss suffered if it is later shown that the injunction should not have been granted.

2.5 Criminal Redress

Criminal proceedings for complex and high-value instances of fraud in the United Kingdom are typically investigated and prosecuted by the Government's Serious Fraud Office. While uncommon, it is possible for a private party or individual to bring their own criminal prosecution against the wrongdoer.

In some instances a criminal conviction for fraud will result in an order requiring the wrongdoer to repay the victim, although this is not always the case.

Fraud victims seeking redress will usually pursue a civil claim against the wrongdoer on the basis that:

- civil proceedings are controlled by the victim (rather than a prosecutor);
- civil proceedings have a lower standard of proof (in that the claim must be proven on the balance of probabilities rather than beyond a reasonable doubt); and
- civil proceedings (generally) take less time than a criminal investigation and any subsequent trial.

There is nothing to prevent a civil claim following criminal proceedings, or vice versa. Similarly, civil and criminal proceedings may take place simultaneously, provided there is no risk of serious prejudice to the defendant(s). Having noted this, it is uncommon for proceedings to take place simultaneously.

2.6 Judgment without Trial

As with other civil proceedings, it may be possible for a claimant in a fraud claim to obtain "default judgment" where the defendant does not take steps in the proceedings. Similarly (although only in extreme cases), a defendant who fails to comply with orders and instructions issued by the court may be "de-barred" from taking steps to defend the claim.

It should be noted that the enforcement of any judgment is a separate process (see **5.1 Methods of Enforcement**) and will be particularly difficult where a dispute has an international element and/or where the defendant is refusing to engage. It is difficult (although not impossible) to obtain "summary judgment" (whereby a judgment is obtained without a full trial) in fraud claims because it will generally be necessary for the defendant to be cross-examined and to have the opportunity to respond to the allegations that are being made.

2.7 Rules for Pleading Fraud

There are special rules (set out in Rule 16 of the CPRs and the associated Practice Directions) that apply to pleadings of fraud and/or dishonesty. In particular, allegations must be clear and should set out the specific facts that the claimant intends to rely on in showing that the other party acted fraudulently or dishonestly.

Furthermore, barristers and solicitors in England are subject to specific professional rules in relation to fraud allegations. In general terms, these rules provide that a barrister or solicitor must not make an allegation of fraud unless they have clear instructions and reasonably credible supporting material. In this respect, care should be taken not to overstate the position against a defendant. Pleadings may be amended following disclosure should fraudulent or dishonest activity come to light through that process.

2.8 Claims against "Unknown" Fraudsters

The English courts have the ability to make judgments and orders against "persons unknown" where a claimant cannot identify a specific individual who has caused them harm. Where a freezing order (see **1.7 Prevention of Defendants Dissipating or Secreting Assets**) is made against persons unknown, it is likely to apply to any person who assisted or participated in the fraud, as well as any person who received misappropriated funds. A freezing order will often be paired with orders against third parties like banks (see **2.3 Obtaining Disclosure of Documents and Evidence from Third Parties**) in an effort to identify people involved in the fraud.

The ability to take steps against persons unknown has become particularly significant in recent years given the rise of cyberfraud. Such orders show the English courts' willingness to take a flexible and innovative approach when assisting victims of fraud.

2.9 Compelling Witnesses to Give Evidence

The CPRs allow a court to issue a summons requiring a witness located within the jurisdiction to attend court to give evidence or to produce documents. This power is in addition to the orders requiring third parties to provide specific information and material (see **2.3 Obtaining Disclosure of Documents and Evidence from Third Parties**), which are more likely to be utilised in a fraud claim.

3. CORPORATE ENTITIES, ULTIMATE BENEFICIAL OWNERS AND SHAREHOLDERS

3.1 Imposing Liability for Fraud on to a Corporate Entity

As a general rule, English law holds that a company acts through its board of directors and senior officers, and that the actions and states of mind of those individuals will be attributed to the company. Similarly, companies will normally be vicariously liable for the actions (including fraudulent actions) of employees and agents where they are acting within the scope of their employment or authority.

3.2 Claims against Ultimate Beneficial Owners

Under English law it is difficult to "pierce the corporate veil" so that a beneficial owner of a company will become liable for the actions of the company. Such claims will normally only exist where the beneficial owner is effectively a "shadow director" of the company in that they exercise control and influence over its business decisions, and the actual directors act in accordance with their instructions. Where this occurs, the beneficial owner will have the same duties as an actual director (see **3.3 Shareholders' Claims against Fraudulent Directors**).

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Seladore Legal Limited

The more common approach to bringing a claim against the beneficial owner of a fraudulent company is to bring a claim of conspiracy (as discussed in **1.3 Claims against Parties Who Assist or Facilitate Fraudulent Acts**).

3.3 Shareholders' Claims against Fraudulent Directors

Individual directors must act, with good faith, within the powers set out in the company's constitution. They must also exercise reasonable care, skill, diligence and independence, and seek to promote the success of the company. Undertaking fraudulent or dishonest activity in a way that harms the company will clearly breach these duties.

The Company as Plaintiff

Importantly, these duties are owed to the company itself, rather than to individual shareholders. This means that, under English law, where a wrong is committed against a company, the proper plaintiff in any subsequent claim is the company itself (rather than the shareholders of the company). Accordingly, under normal circumstances, any enforcement action against an individual director will generally be taken by the board or (in an insolvency situation) a liquidator. Importantly, the principle of "no reflective loss" means that a shareholder cannot bring a claim in respect of a loss suffered by the company where the company itself has a cause of action in respect of the same wrongdoing.

Derivative Actions

In some circumstances, it is possible for an individual shareholder (or a group of shareholders) to bring a "derivative action" on behalf of the company. The central question for any court considering whether or not to allow a derivative action is whether a wrong committed against the company would not be adequately redressed if the action were not allowed to proceed.

4. OVERSEAS PARTIES IN FRAUD CLAIMS

4.1 Joining Overseas Parties to Fraud Claims

For many years, England has been a prominent and leading venue for international disputes, and English law has developed to reflect this. It continues to be a popular environment in which to resolve international fraud claims. As a corollary to this, the English courts have developed a number of rules to join overseas parties to English proceedings, and/or to initiate proceedings in England against such parties.

Where a party is located outside the jurisdiction, it will be necessary for the claimant to obtain the court's permission to serve out of the jurisdiction. To do so, they will need to show (broadly) that:

- there is a serious issue to be tried;
- one or more of the "jurisdictional gateways" is satisfied; and
- England is the proper and appropriate forum for the claim.

These gateways provide the English courts with jurisdiction over foreign defendants where the subject matter of the dispute is sufficiently connected to England or Wales. The most common gateways for fraud claims are that the claim relates partly or wholly to property within the jurisdiction, the claim involves a contract governed by English law or a jurisdiction clause in favour of England, the harmful act or the harm suffered occurred in England or Wales, and/or that an international co-defendant is a "necessary and proper party" to proceedings in England against other defendants over whom there is jurisdiction (eg, due to a jurisdiction clause or due to their domicile).

It is open to a foreign party who has been joined to challenge jurisdiction, including on the grounds of forum non conveniens (ie, that England is not the appropriate venue for a particular claim, and a more convenient forum exists elsewhere).

5. ENFORCEMENT

5.1 Methods of Enforcement

In England and Wales, the court will not automatically enforce any judgment or order that is obtained against a defendant. In circumstances where the defendant fails to make payment by the timeframe set by the court, the claimant will be required to take steps to enforce the judgment (including by seeking a further order from the court).

Common Forms of Enforcement in Fraud Proceedings

A freezing order

It is possible to obtain a post-judgment freezing order. This is more straightforward than obtaining a freezing order before a claim is commenced and it can be a useful tool in securing assets pending other enforcement mechanisms being used.

A charging order

A charging order imposes a charge over the defendant's interests (including beneficial interests) in specific land, securities or other assets. In doing so, it prevents the defendant from selling the land or assets without paying what is owed to the claimant (assuming there are no other prior creditors). A charging order is sometimes combined with an "order for sale", which requires the defendant to sell the property or asset in order to satisfy the judgment.

A third-party debt order

A third-party debt order freezes assets that are owned by the defendant, but which are in the hands of a third party, such as a bank. In doing so, it restricts the defendant's ability to access those assets and may lead to the third party being required to make payment to the claimant.

Insolvency proceedings

If the result of the judgment is that the defendant no longer has sufficient assets to pay their debts, it may be possible to apply for them to be wound-up (in the case of a company) or made bankrupt (in the case of an individual). In such circumstances, the defendant's assets will vest in a trustee in bankruptcy or a liquidator, who will then seek to realise the value of those assets and pay the defendant's creditors accordingly.

Care should be taken before initiating insolvency proceedings, as the amount received by the claimant will depend on (i) the value of any assets owned by the defendant, and (ii) the interests of any other creditors (particularly preferred creditors such as employees, or those who hold a security interest in particular assets).

Examination of the debtor

Where the judgment debtor is within the jurisdiction of the English courts it is possible to obtain an order for their examination. This requires the judgment debtor to attend court and be cross-examined about their assets and affairs. If the judgment debtor does not attend, or does not answer truthfully, then they may be subject to proceedings for contempt of court.

6. PRIVILEGES

6.1 Invoking the Privilege against Self-incrimination

English law provides that a party may refuse to produce material or information that would oth-

erwise be disclosable, if doing so will incriminate them in criminal proceedings or expose them to a penalty in England and Wales. This right will also be relevant in cases involving a search and seizure order (as discussed in **2.2 Preserving Evidence**) in that the defendant must be informed of their privilege against self-incrimination before the premises are entered.

In the context of fraud, there are noteworthy limits on the right to privilege against self-incrimination. First, Section 13 of the Fraud Act 2006 disapplies the privilege in relation to criminal fraud and the related offences (including bribery) under that Act. Secondly, the English courts have taken a limited reading of the privilege in respect of pre-existing evidence obtained through a search order that does not require the defendant to testify to its existence. In such cases, it has been held that the evidence obtained may be regarded as being able to "speak for itself" and so does not create the risk that the defendant will be coaxed into making a false statement.

6.2 Undermining the Privilege over Communications Exempt from Discovery or Disclosure

A party to English legal proceedings can withhold "privileged" documents. In broad terms (and specific advice should be sought in respect of each of these), the two main forms of privilege arise in relation to communications between a lawyer and their client for the purpose of giving or receiving legal advice ("legal advice privilege"), and communications between a lawyer, their client and/or a third party for the dominant purpose of conducting legal proceedings, including criminal proceedings ("litigation privilege").

Importantly, privilege will not exist where communications are made for the purpose of allowing or assisting a party to commit a crime or fraud. This has been described as the "crime-fraud" or "iniquity" exception and requires a strong prima facie case of fraud (rather than actual proof of fraud). The exception applies to both legal advice privilege and litigation privilege. It exists whether or not the lawyer involved in the communications knows of the wrongful purpose.

7. SPECIAL RULES AND LAWS

7.1 Rules for Claiming Punitive or Exemplary Damages

Remedies in English law are typically focused on either compensating the wronged party or disgorging any gains that have been obtained by another party in unjust circumstances. As a consequence, the courts are slow to award damages that are purely punitive/exemplary.

However, it is now well established in English law that punitive damages are available where a wrong has been committed wilfully and/or dishonestly (such as in instances of fraud). This allows a victim of such wrongdoing to claim more than they have lost.

It is important to note that the approach to punitive damages continues to be "proportionate and principled". Accordingly, they will only be awarded in cases where the wrongdoing is particularly egregious, and even then, they are likely to be reasonably modest in value.

7.2 Laws to Protect "Banking Secrecy"

There is no specific banking secrecy regime in the United Kingdom. While English law provides that banks owe a general duty of confidentiality to their customers, there are a growing number of exceptions to this duty based on efforts to prevent money laundering, the funding of terrorism, tax evasion and so on.

In any event, in instances of fraud, English law provides avenues by which a wronged party may seek to obtain information from third-party banks (see the discussion of third-party disclosure and Norwich Pharmacal orders set out in **2.3 Obtaining Disclosure of Documents and Evidence from Third Parties**). Where sufficient evidence of fraudulent activity exists, these avenues are unlikely to be impeded by general considerations such as a bank's duty of confidence to its customers.

7.3 Crypto-assets

To date, the courts of England and Wales have consistently held that crypto-assets can be treated as property. The location of the asset (relevant to determining whether a court has jurisdiction over the dispute) is where the person or company who owned the coin or token is domiciled.

Case law on the status of crypto-assets has so far been confined to preliminary findings for the purposes of determining applications for interim relief. In such applications, a judge need only determine whether there is a realistically arguable claim that the crypto-assets in question are a form of property for the purposes of English law. While the approach courts have adopted is likely to be endorsed, the issue is widely expected to be revisited in detail in the near future.

Aside from court intervention in instances of fraud, dealings in crypto-assets remain largely unregulated in the UK. As of January 2020, UK crypto-asset businesses were required to register with the UK Financial Conduct Authority (FCA) and comply with the Money Laundering Regulations but investors are otherwise not protected by financial services regulation.

Accordingly, English courts have demonstrated willingness to be responsive in cases of crypto-asset fraud, which is steadily on the rise (albeit not in line with the massive increase in crypto-asset usage), recognising that "time is of the essence" when facing potentially rapid dissipation of the proceeds of fraud. The particular issue in cases of crypto-asset fraud is that it is difficult to establish the identity and location of the wrongdoers. In such cases, the English courts are able to grant:

- a Bankers Trust order against a cryptocurrency exchange (including one located outside of England and Wales) to obtain information about the relevant transactions with a view to identifying the hackers (see **2.3 Obtaining Disclosure of Documents and Evidence from Third Parties**); or
- a proprietary injunction against "persons unknown", provided the relief was limited to assets which the individuals knew or ought reasonably to have known did not belong to them (see **2.8 Claims against "Unknown" Fraudsters**).

If the individuals can be identified, it is also possible to obtain freezing relief as against those individuals' dealings with the proceeds (see **1.7 Prevention of Defendants Dissipating or Secreting Assets**).

Contributed by: *Simon Bushell, Gareth Keillor, Kevin Kilgour and Owen Hammond,*
Seladore Legal Limited

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AUTHORS

Simon Bushell is the senior partner at Seladore Legal Limited, specialising in international commercial litigation and arbitration, including civil fraud and asset tracing. Simon has over 32 years' experience in high-stakes commercial litigation. He acts for a broad range of clients, including large corporates, private equity houses, financial institutions, banks and ultra-high net worth individuals, in addition to foreign government agencies and state-owned companies. He has undertaken investigations into complex, worldwide frauds, conspiracies and insolvencies, and has wide experience in co-ordinating parallel cross-border disputes and proceedings.

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Contributed by: *Simon Bushell, Gareth Keillor, Kevin Kilgour and Owen Hammond,* ***Seladore Legal Limited***

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Seladore Legal Limited

24 Greville Street
London
EC1N 8SS
UK

Tel: +44 (0)20 3008 4432
Email: info@seladorelegal.com
Web: www.seladorelegal.com

SELADORE LEGAL

Trends and Developments

Contributed by:
Simon Bushell, Gareth Keillor, Kevin Kilgour and Owen Hammond
Seladore Legal Limited see p.23

Introduction

As this article is being written, the world, which seemed to be emerging from the COVID-19 pandemic, is once again in turmoil as a result of the Russian invasion of Ukraine. It goes without saying that that is a human tragedy. It is, however, also likely that that these events will cause very significant disruption to the landscape across which fraud and asset tracing practitioners operate. It has already led to new legislation, and it will also, undoubtedly, lead to a repositioning of assets and changes in the structures used to hold them.

In the England & Wales Trends & Developments chapter of the 2021 edition of this publication, it was suggested that the unusual trend of a drop in fraud cases during a time of economic downturn in 2020 was most likely a result of the impact of COVID-19 on businesses generally, and that a sharp up-tick in the volume of fraud cases heard in UK courts would soon be seen as businesses returned to normal activity. While "normality" was not in fact restored and another major lockdown was imposed at the beginning of 2021, businesses and – according to KPMG's Fraud Barometer report – the UK courts have shown the ability to adapt to remote operations, and 2021 saw a 66% increase in fraud cases valued at GBP100,000 and above compared with 2020.

Interestingly, however, the opposite trend was noted in terms of the value of fraud claims, the total falling 39% to GBP444.7 million in 2021, with no new high value (over GBP50 million) cases. Despite the absence of very large claims, all the signs point to a steady rise in fraud activity that is likely to continue into 2022 as the motivation and opportunity presented by unstable economic conditions persists. In London's courts, for example, there was a 71% increase in allegations of fraud committed by employees and individuals in management roles compared with 2020, with commercial businesses, government institutions and financial institutions increasingly falling victim.

Economic Crime

The Economic Crime (Transparency and Enforcement) Act was introduced to Parliament as a bill on 1 March and received Royal Assent on 15 March 2022. It marked an expedited effort – as a result of Russia's invasion of Ukraine – to pass a law that has seen slow development since the UK government announced its intention to create a register of overseas entities and beneficial owners owning property in the UK in 2016. The Act, the aim of which the government says is "to crack down on dirty money in the UK and corrupt elites" covers three broad areas:

- the creation of a public register of beneficial owners of non-UK entities that buy or own land in the UK;
- widening the potential use of the Unexplained Wealth Orders (UWO) regime (for example to officers of legal entities holding assets, and to UK property held in trusts) and making them easier to use for law enforcement authorities; and
- the broadening of sanctions enforcement, allowing for the imposition of fines on a strict liability basis by the Treasury's Office of Financial Sanctions Implementation (OFSI)

and for public "naming and shaming" of firms or individuals in breach.

The most significant element relevant to fraud and asset tracing practitioners will be the public register which will hold records of any individual who:

- directly or indirectly holds more than 25% of the shares or voting rights of a relevant non-UK entity (similar to the "persons with significant control" (PSCs) register that UK companies have been required to submit since 2016);
- directly or indirectly holds less than 25% but who exercises (or has the right to exercise) significant control over the entity; and
- directly or indirectly have the right to appoint or remove a majority of the board of directors of the overseas entity.

For England and Wales, the registration requirements will apply retrospectively to all qualifying land bought by overseas entities and registered at HM Land Registry on or after 1 January 1999. Non-compliance will be a criminal offence for the entity, all of its officers and (if served with the requisite information notice by the entity) the beneficial owner.

However, the Act leaves loopholes for certain beneficial owners to remain anonymous. Where a person purchases UK property via a company registered, for example, in the BVI and there is no single shareholder with "significant control", then no shareholder will need to be disclosed on the register; only the managing officer. Furthermore, if the overseas entity is owned via a professional corporate trust provider as nominee, it can be named in the beneficial owner's place on the register. Other concerns in respect of land owned by individuals subject to sanctions is that beneficial owners may sell their property within the six-month grace period provided for registration, or could simply decide to provide false information given there are no measures in play to verify registration details.

Nevertheless, the new the transparency requirements under the Act are ultimately likely to assist those pursuing claims against fraudsters, and those seeking to trace assets.

The UK government is planning a second Economic Crime Bill, announced in a White Paper published at the same time as the first Bill was introduced, proposing further reforms to address illicit finance and improve corporate transparency. The proposals include a requirement for directors and PSCs to have to verify their identity with Companies House, thus addressing one practical issue with the Act, and ensuring that there is at least one verified natural person linked to every company. The White Paper also suggests allowing companies to have only one class of corporate director, which must be UK-based. Overseas agents will be prevented from forming UK companies, unless they are subject to a UK-equivalent supervisory regime. Companies House will also be given powers to reject filings, query information that may be false or inaccurate, and share information with law enforcement authorities. Other measures likely to be included in the second Bill include new powers to seize crypto-assets, enhanced anti-money laundering powers to encourage businesses to share information on suspected economic crime, and measures to restrict the misuse of limited partnerships.

Crypto-assets

A report by Chainanalysis shows that cryptocurrency-based crime remains on an upward trend, increasing in value from USD7.8 billion globally in 2020 to USD14 billion in 2021. It should perhaps not be surprising when legitimate cryptocurrency usage has increased 567% in the same period, meaning that the increase in reported

crime has in fact been relatively modest. In the UK, it is thought that around 2.3 million people own a crypto-asset. Action Fraud reported that, by October 2021, the amount of money lost to fraud in the UK (GBP146 million) was already 30% higher than the figure for the whole of 2020.

There have been a number of crypto-asset fraud cases in England and Wales in the past few years and the courts have so far consistently held that crypto-assets can be treated as property, with the location of the asset (relevant to determining whether the court has jurisdiction over the dispute) being where the person or company who owned the coin or token is domiciled. It is worth bearing in mind that the courts of first instance have reached this consensus only in the context of preliminary findings for the purposes of determining applications for interim relief. In such applications, a judge need only determine whether there is a realistically arguable claim that the crypto-assets in question are a form of property for the purposes of English law. While it is an approach likely to be endorsed, the issue will surely be revisited in detail at some stage in the near future.

Dealings in crypto-assets remain largely unregulated in the UK. As of January 2020, UK crypto-asset businesses were required to register with the UK Financial Conduct Authority (FCA) and comply with the Money Laundering Regulations but investors are otherwise not protected by financial services regulation. The UK government regulatory focus over the next year is likely to be on misleading advertising of crypto-assets, and little has been said in relation to fraud. The civil courts therefore have a significant role to play in counter-fraud enforcement.

The endorsement of the approach taken by a High Court judge in the 2019–20 decision, Fetch.ai Ltd and another v Persons Unknown Category A and others [2021] EWHC 2254 (Comm), also demonstrated the courts' continued willingness to grant:

- a "Bankers Trust order" against a crypto-currency exchange (including one located outside of England and Wales) in the context of fraud committed by unknown hackers to obtain critical information about the relevant transactions; and
- a proprietary injunction against "persons unknown" (provided the relief was limited to assets which the individuals knew or ought reasonably to have known did not belong to them).

A similar range of interim relief was granted in early 2022 in Sally Jayne Danisz v (1) Persons Unknown (2) Huobi Global Limited (trading as Huobi) [2022] EWHC 280 (QB), against a likely fraudulent cryptocurrency investment platform based in London and Switzerland after an investor's funds were misappropriated, as well as disclosure orders against another platform that likely administered transactions in relation to the dissipated assets. The judge recognised that crypto transactions allow assets to be dissipated "at the click of a mouse" and that in such cases time is "manifestly of the essence", highlighting the courts' willingness act quickly to grant powerful pre-emptive remedies to secure the proceeds of fraud.

As indicated in a recent speech by Sir Geoffrey Vos, the Master of the Rolls (the head of the English civil division), the UK is keen to be at the vanguard of digital currencies, blockchain and smart contracts, and the way to achieve this is by making English law the choice of law for blockchain technology. One feature of this effort he highlighted was the establishment of a sub-committee of the Civil Procedure Rules Committee, which is looking at amending or expanding the grounds on which proceedings (in particular third-party disclosure applications)

can be served out of the jurisdiction, in order to address the current difficulty of tracing assets in cases of crypto fraud. Also of potential benefit in the context of the urgency and volume of crypto fraud cases is the UK government's proposal to create an Online Procedure Rule Committee that will provide a new set of rules for the online justice system, with a view to supplying swifter and simpler access to justice for parties and their lawyers.

Contributed by: *Simon Bushell, Gareth Keillor, Kevin Kilgour and Owen Hammond,* ***Seladore Legal Limited***

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Seladore Legal Limited

24 Greville Street
London
EC1N 8SS
UK

Tel: +44 (0)20 3008 4432
Email: info@seladorelegal.com
Web: www.seladorelegal.com

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