

**SUMMARY: E D & F MAN CAPITAL MARKETS LIMITED V COME HARVEST HOLDINGS  
LIMITED & ORS**

**1. INTRODUCTION**

- 1.1 The Claimant (*MCM*) is a global financial brokerage business which claims to be the victim of a high value metals fraud. It alleges that D1 (Come Harvest) and D2 (Mega Wealth) used 92 fraudulent documents (the *Purported Receipts*) to fraudulently obtain finance from it through sale and repurchase transactions (or “repo transactions”) between May and October 2016.
- 1.2 The Purported Receipts professed to give D1 and D2 the right to title to nickel. However, they were worthless counterfeits which, the Claimant submits, were produced by someone who had had sight of colour-scanned copies (*CSCs*) of the original warehouse receipts (*OWRs*) issued to D10 (*Straits*), the true owner of the nickel. In reality, the OWRs remained with Straits and were never transferred to D1 or D2.
- 1.3 Deceived by the Purported Receipts, MCM provided finance to D1 and D2 (obtained via its own sub-sale of the Purported Receipts to ANZ Commodity Trading Pty Ltd (*ANZ*)), by entering into repo transactions with them. MCM claims to have been left out of pocket for the monies it advanced when it transpired that the Purported Receipts were forgeries.
- 1.4 As a result of the fraud, the Claimant claimed losses of US\$ 284,536,139.23. To recoup these losses, it brought claims by multiple causes of action.

**2. THE PARTIES**

- 2.1 There were 10 defendants to the claim. MCM submits that each of them was implicated to a lesser or greater extent in this fraudulent scheme, either by facilitating or arranging it.
- 2.2 The claims against D5-D8 (Genesis Properties Holding LLC, Genesis Kinghwa LLC, Transcendent Global Finance Inc. and Transcendent (SG) Pte Ltd) were settled before trial so did not require the attention of the Court.
- 2.3 Of the remaining defendants, D1 and D2 were the counterparties to the repo transactions with MCM. D4 (Genesis Resources) served as D1 and D2’s agent and advisor and D3 (Mr Kao) was the sole director and shareholder of D4. D9 (Sampo International) is a BVI company of which D3 was a director and shareholder. Straits is a Singaporean company which provided commodities brokerage and financing services to D1 and D2. The Straits employees who primarily liaised with D1 and D2 were Mr Jeremy Ang (the CEO of Straits Financial, the parent company of Straits), Ms He (Vice President of Straits) and Ms Tan (an executive and then senior executive in the Trade Services Team at Straits).
- 2.4 Mr Wai Kwok Wong (“Mr. Wong”) was a third party to these proceedings and played a crucial role in the fraud. He was at all material times the sole director and shareholder of D1 and was alleged by MCM to be a shadow director or otherwise in effective control of D2.
- 2.5 Straits was the only Defendant to attend trial which had not entered into a settlement with MCM. Submissions at trial therefore focussed on Straits’ liability.

### 3. FINDINGS OF FACT

3.1 In light of the evidence put before the Court and the parties' submissions, Calver J made the following key findings of fact:

- (a) D3 and Mr Wong knew that Straits was supplying CSCs and not OWRs to D1 and D2 [415];
- (b) D3 and Mr Wong used these CSCs to forge the Purported Receipts which D1 and D2 supplied to MCM [416];
- (c) Straits (through Mr Ang, Ms He and Ms Tan) had actual knowledge that [410-412]:
  - (i) D3/Mr. Wong were using the CSCs which it had supplied to D1 and D2 for the fraudulent purpose of obtaining finance from MCM (and other western financiers); and
  - (ii) MCM was claiming to hold OWRs corresponding to the CSCs supplied to D1 and D2, and that MCM believed it had acquired title to the metal.
- (d) Although Straits may not have had actual knowledge of the *precise method* used to deceive MCM, Straits did know that D3 and Mr. Wong were dishonestly using CSCs to deceive MCM into believing that it had a bona fide claim to title to metal;
- (e) D3 and D4's knowledge was to be attributed to D1 and D2 because D3 and D4 exercised practical control over their actions (it was already common ground between the parties that D3's knowledge was to be attributed to D4) [67]; and
- (f) Mr Wong's knowledge should be attributed to D2 given Mr Wong exercised practical control over D2 (it was already common ground that Mr Wong's knowledge was to be attributed to D1) [419-422].

### 4. THE CLAIMS

4.1 The claimant brought a range of claims to recover its losses. This summary sets out the Court's findings on each claim but focusses on those which raised interesting points of law.

#### (a) Tort of deceit

4.2 Claims in the tort of deceit were brought against (i) D1 and D2 on the basis of express representations and (ii) D1-D4 on the basis of implied representations. Calver J found as follows:

- (a) **Express representations:** The contracts (the *Purchase Contracts*) entered into by MCM with D1/D2 incorporated express representations to the effect that, *inter alia*, D1/D2 had unencumbered title to the metal. D1/D2 knew these representations to be false and intended MCM to rely on them which it did so suffering loss. [427-439]
- (b) **Implied representations:** By sending or causing to be sent the Purported Receipts to MCM and entering into the Purchase Contracts with MCM, D1-D4

impliedly represented, *inter alia*, that they believed the receipts were genuine and that D1 and D2 had unencumbered title to the metal. Those implied representations were false and MCM relied on them so suffering loss. [440-447]

- 4.3 The claims in deceit based on both express and implied representations were therefore made out against D1-D4.

**(b) Tort of conspiracy to injure by unlawful means**

- 4.4 Claims in the tort of unlawful means conspiracy were brought against D1-D4 and Straits. Calver J addressed the claim against Straits and then disposed summarily of the claims against D1-4.

- 4.5 Calver J adopted Cockerill J’s account of the elements of the tort in *FM Capital Partners Ltd v Marino*, [2018] EWHC 1768 (Comm) at [94], observing that it requires: (i) a combination or agreement between the Defendant and another; (ii) an intention to injure the claimant; (iii) unlawful acts carried out pursuant to the combination or understanding; (iv) which caused loss to the claimant [466]:

- (a) **Combination/ understating:** In light of his factual findings, Calver J found that there was a combination/ agreement between Mr Ang, Ms He, D3, Mr Wong and Straits that Straits should (i) supply CSCs of OWRs; (ii) supply “PMA letters” (akin to comfort letters in which the warehouse holding the nickel stated it would release the nickel to any party holding the OWR) addressed to MCM’s sub-buyer ANZ with respect to each fraudulent transaction; (iii) enter into contracts and issue invoices which purported to be, but were not, for “repo transactions”; (iv) refer to the CSCs as ‘WHRs” (warehouse receipts) and not as CSCs in correspondence; and (v) hold the corresponding OWRs for as long as dictated by D1-D4. [469-478]
- (b) **Intention to injure:** The parties disagreed as to the exact nature of the “intention” required. Straits contended that it is not sufficient for a defendant to have intended to harm a class of persons, rather the defendant must have directed their actions towards the *specific* claimant. [479]

By contrast, MCM contended that this submission was “*unsupported by authority cited and contradicted by at least two recent judgment*” (being *CMOC Sales & Marketing Ltd v Person Unknown* [2018] EWHC 2230 (Comm) per HHJ Waksman QC at [124]-[126], and *Taylor v Van Dutch Marine Holding Ltd* [2019] EWHC 1951 (Ch) at [309] per Julia Dias QC). [481]

Calver J concluded that the correct analysis of the law of intention does not require the defendant to have *specifically* targeted the claimant but rather, drawing on *OBG v Allan* [2008] 1 AC 1 and *Secretary of State v Health v Servier Laboratories Ltd* [2021] UKSC 24, the defendant will be considered to have the necessary intention where the harm done to the claimant was (i) the *ends* sought by the defendant; (ii) the *means* by which the defendant achieved its ends; or (iii) the *obverse side of the coin* (i.e. the inevitable consequence) of the defendant’s action. It will not suffice if harm to the claimant was merely a foreseeable consequence of the defendant’s action. [483-529]

In light of this, Calver J held that Straits did have the necessary intention to injure MCM given it knew that D3 and Mr Wong were using the CSCs it supplied for the fraudulent purpose of obtaining finance from Western financiers (of which MCM was one) and nonetheless continued to provide the CSCs so advancing its own economic interests over those of MCM. [530-531]

- (c) **Unlawful means:** The parties disagreed as to the contents of the requirement that the unlawful act must be the *means* by which injury is inflicted on the claimant pursuant to the conspiracy. This is referred to as the “instrumentality requirement”.

Straits submitted that the instrumentality requirement has two aspects: (i) causation; and (ii) intention. It submitted that this requirement of “intention” is *in addition to* the requirement that the defendant had intent to injure the claimant, such that there are two aspects of intent relevant to the tort of unlawful means conspiracy: (a) intent to injure the claimant; and (b) intent to injure the claimant by the unlawful means which caused the claimant damage/loss. Straits submits that this means that “*MCM must establish that Straits knew about the forgeries*”. [535]

In contrast, MCM submitted that Straits’ contention that “*the unlawful means used must be the means by which the defendant intended to harm the claimant is wrong, as is the submission that ‘MCM must establish that Straits knew about the forgeries’*”. [539]

Calver J considered MCM’s analysis to be correct and that Straits was wrong to suggest that there was also an “intention” component to this element of the tort. Calver J agreed with the statement of Lord Hamblen in *Servier* that “*the instrumentality requirement is a causation requirement: the damage to the claimant must be caused in fact through the instrumentality of the third party*” and also the recent dicta of Arnold LJ in *Racing Partnership v Done Bros (Cash Betting)* [2021] Ch 233 [154]. [545]

- (d) **Loss:** Calver J held that there was no doubt MCM suffered loss as a result of the commission of the tort. [551]

- 4.6 In light of these findings, Calver J held that Straits had conspired to injure MCM by unlawful means and also found that D1-D4 were liable on the basis of the above analysis, albeit the application of the law to the facts of their case was simpler: D1-D4 entered into a combination with intent to injure MCM by deceit and caused it loss. There was no doubt that they entered into an arrangement, had the requisite intent to injure by means of deceit, and that they knew that it was MCM who would suffer loss. [552-553]

**(c) Procuring breach of contract**

- 4.7 MCM brought an alternative claim against D3 and D4 for procuring breaches of the Purchase Contracts by D1 and D2.
- 4.8 In light of Calver J’s finding of fact that D3 and D4 exercised effective control over D1 and D2 this claim did not require extensive consideration. Calver J determined that the

Purchase Contracts were breached by D1/D2 and D3 and D4, knowing of the existence of the Purchase Contracts, had procured their breach.

4.9 D3 and D4 were therefore also liable for the tort of procuring breach of contract. [453-456]

**(d) Damages: Res inter alios acta**

4.10 As noted above, MCM did not directly finance the repo transactions with D1 and D2 but entered into sub-sales of the Purported Receipts with ANZ. As a result, when the fraud came to light, ANZ was principally left out of pocket. ANZ had claims against MCM but settled them for *less* than the full value of its loss (c. US\$ 291m).

4.11 This settlement agreement gave rise to an additional issue pertinent to the quantum of damages payable under the claims for deceit, unlawful means conspiracy and procuring breach of contract:

(a) MCM claimed that its total loss (c. US\$ 291m) was recoverable in damages. It contended that (i) the value of its sub-sales to ANZ and (ii) the terms on which it subsequently settled its liability to ANZ for these sub-sales under the settlement agreement were irrelevant because they were *res inter alios acta*. [557]

(b) By contrast, Straits contended that the sub-sales and settlement with ANZ were not *res inter alios acta*. As such, Straits submitted that MCM did not suffer any direct loss from the fraud but rather made a profit of c. USD 7m by selling the WHRs on to ANZ. Straits asserted that MCM should rely on its outstanding liabilities to ANZ under the Settlement Agreement as the starting point for its loss. [558]

4.12 Calver J determined that Straits' analysis was mistaken because, correctly analysed, the sub-sales were separate transactions to the repo transactions and not acts of mitigation. In making this determination Calver J followed the Court of Appeal's decision in *OMV Petrom SA v Glencore International AG* [2016] 2 Lloyd's Rep 432 which also held that sub-sales were irrelevant to calculating the loss which could be claimed by a party bringing an action in deceit. [578-579]

4.13 Calver J noted that even if he was wrong in this analysis and the sub-sales were not *res inter alios acta*, the *settlement agreement* would still be *res inter alios acta* because it was the product of an *independent* commercial act without a sufficient causal connection to the breach of the defendants (citing *Swynson Ltd v Lowick Rose LLP (in liquidation)* [2017] UKSC 32; *Globalia Business Travel S.A.U. of Spain v Fulton Shipping Inc of Panama* [2017] UKSC 43; *Sainsbury's Supermarkets Ltd v Visa Europe Services LLC and others*; *Sainsbury's Supermarkets Ltd v Mastercard Incorporated and others* [2020] UKSC 24. [596-598]

4.14 As such, Calver J held that MCM was entitled to claim its full loss (USD 284,536,139.22) against Straits, less the credit it has received under the settlement agreements with D5-D8 (US\$ 1,800,000). D1-D4 were also liable for this full sum. [609]

### (e) Knowing receipt

- 4.15 MCM sought equitable compensation and/or orders to account against each of D3, D4, D9 and Straits on the basis of knowing/unconscionable receipt of funds.
- 4.16 MCM submitted that (i) D1 and D2 held the monies paid to them in the repo transactions on constructive trust and (ii) that D1 and D2 transferred these monies to D3, D4, D9 and Straits in breach of trust. Given D3, D4, D9 and Straits took receipt of these monies with knowledge of the fraud they were liable to MCM for knowing receipt. [620-622]
- 4.17 Straits contended that this analysis was flawed. It observed that the monies were transferred to D3, D4, D9 and D10 *prior to* MCM's rescission of the Purchase Contracts on 21 June 2017: The transfer of funds induced by misrepresentation does not immediately make the recipient a constructive trustee given fraudulent transactions are voidable not void. A trust only arises over the transferred property when the transferor *rescinds* the relevant contract.
- 4.18 As such, at the time of transfer, no constructive existed over the funds and full title was transferred to D1 and D2 and then onwards to D3, D4, D9 and Straits. No claim in knowing receipt could be made out against D3, D4, D9 or Straits because they had not received monies *in breach of trust*. [633]
- 4.19 Calver J considered that Straits' analysis was correct. He observed that while equity tolerates the legal fiction that the beneficial interest in property transferred prior to rescission retrospectively reverts in the transferee for the purposes of equitable proprietary claims (*Shalson v Russo* [2003] EWHC 1637 (Ch) 281), he was "*not willing to extend the law in the manner advanced by MCM (by doubling the legal fiction)*" for the purposes of liability in knowing receipt [642]. The knowing receipt claims therefore failed against all of the defendants. [635-641]

### (f) Equitable proprietary claims

- 4.20 MCM sought a declaration: (i) that it had rescinded its contracts with D1 and D2; and (ii) that D1, D2, D3, D4, D9 and Straits held the funds transferred them by MCM, D1, D2 or D4 (as the case may be) on constructive trust and were liable to pay these funds back to MCM given they received them other than as bona fide purchasers for value without notice.
- 4.21 Straits contested the quantum of funds MCM submitted it was liable to repay by its expert evidence. There were two issues going to the quantum of the proprietary claims for the Court's resolution:
- (a) **Evidential presumption:** MCM made submissions on the evidential presumption to be applied when following monies out of D1 and D2's mixed account. It submitted that the situation in this case was analogous to *Re Oatway* [1903] 2 Ch 356. In that case, payments were made out of a mixed fund into an investment and the trust fund was subsequently dissipated. The court ruled that the claimant had the right to retrospectively elect to follow the payments made out of the fund into an investment. [647-650] and [664-667]

Calver J considered this analogy inapposite. *Re Oatway* dealt with the right of a beneficiary to trace out of a mixed fund into the investment of the wrongdoing

trustee. By contrast, in this case, the payments out of the fund were made to a third party (i.e. not into an investment) and MCM only sought to follow payments made to *Straits* and not to other non-bona fide recipients. This unfairly penalised *Straits* vis-à-vis other recipients of payments out of the mixed fund and gave MCM an “*arbitrary*” power to “*elect between bringing claims between different third-party recipients*” [684]. Calver J therefore determined that MCM’s proposed presumption was inequitable and instructed the parties to discard the tracing evidence relying upon it. [679-684]

- (b) **Bona fide purchaser:** *Straits* asserted that it should be regarded as the bona fide purchaser for value of certain of the funds received from D1, D2 and D4. In light of his finding of fact that *Straits* had actual knowledge of the fraud, Calver J considered that *Straits* was neither a bona fide nor without notice recipient of the funds. *Straits*’ submissions that it was bona fide purchaser for value without notice therefore failed. [689-690] and [705-723]

- 4.22 In light of these finding, Calver J found that MCM’s net payments under the Purchase Contracts and/or the traceable proceeds of the same were held by D1, D2, D3, D4, D9 and *Straits* on constructive trust and that the exact quantum of the proprietary claims was to be determined by a further tracing phase of proceedings. [724]

**(g) Additional claims**

- 4.23 Claims in unjust enrichment and for breach of contract were also pleaded but did not require determination in light of the findings of the Court on the other causes of action.