FRAUDULENT TRADING AND LIMITATION IN DISSOLVED COMPANIES:

THE SUPREME COURT'S JUDGMENT IN BILTA V TRADITION

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Who are the persons that may be held liable for fraudulent trading, and how do limitation rules operate in relation to dissolved companies? In this article, Victor Lui (Associate) examines the significant decision of Bilta (UK) Ltd (in liq) v Tradition Financial Services Ltd[1] and its implications for insolvency practitioners.

Civil Liability For Fraudulent Trading

s.213 of the Insolvency Act 1986 ("IA") provides that:

> "(1) If in the course of the winding up of a company it appears that any business of the company has been carried on with intent to defraud creditors of the company or creditors of any other person, or for any fraudulent purpose, the following has effect.
>
> (2) The court, on the application of the liquidator may declare that any persons who were knowingly parties to the carrying on of the business in the manner above-mentioned are to be liable to make such contributions (if any) to the company's assets as the court thinks proper."

The provision allows liquidators (not a creditor or contributory[2]) to apply for contributions by persons who had transacted with the company in the knowledge that it was carrying on its business for a fraudulent purpose.

Do those "persons who were knowingly parties" need to have been the company's directors or "insiders" who carried out a managerial or controlling role within the company, or is the statute broad enough to catch "outsiders" who had dealt with that company? That was the question which the Supreme Court had to grapple with in Bilta v Tradition.

The facts concerned a VAT fraud involving spot trading in carbon credits within the EU. In essence, rogue traders would fail to account for VAT due on imported credits, pay the VAT receipts to third parties and then enter into insolvent liquidation. The various claimant companies were among the vehicles used to perpetrate the fraud; they are now in liquidation with HMRC as the principal creditor. The defendant company, Tradition, brokered deals on behalf of the rogue traders and was paid brokerage by volume traded.

The liquidators' primary claim was that Tradition had knowingly participated in the fraudulent trading.

The appeal proceeded on such assumed facts as: (1) Tradition knew the traders were unlikely legitimate trading concerns; (2) Tradition did not perform genuine KYC inquiries of the suppliers; (3) Tradition was aware that the nature of the trading was suspicious and it knew (or did not care whether) such trading was linked to VAT fraud.[3]

That claim was successful. In the joint judgment by Lord Hodge DPSC and Lord Briggs JSC, the Court held that on its correct statutory interpretation, s.213 IA applies to third parties or outsiders who participate in, facilitate or assist fraudulent transactions by a company when they know its business is (or are wilfully blind to it) being carried on for any fraudulent purpose.[4] The Court arrived at this conclusion after having considered the provision's natural

1 [2025] 2 WLR 1015, [2025] UKSC 18

2 Albeit there is an equivalent provision for administrators: s.246ZA IA

3 Bilta v Tradition, [9]-[15]

4 Bilta v Tradition, [26], [36], [58]

meaning, its statutory context, its legislative history, analogous criminal provisions[5] and both civil and criminal case law.

The purpose of s.213 IA is to discourage dishonest participation in fraud. The Court of Appeal gave the example where a manufacturer regularly supplies counterfeit products to a retailing company, knowing that the retailer will pass them off as genuine; that manufacturer would be a relevant party even though he exercises no managerial or controlling role in the retailing company.[6]

s.213 IA is subject to these limitations: (1) the person to incur liability must be party to the carrying on by the company of a fraudulent business, not merely involved in a one-off transaction; (2) a mere failure to advise does not amount to being a relevant party; (3) the person liable must have had an active involvement in the carrying on of that business.[7]

The Court's decision widens the scope of recovery under s.213 IA, which is already capable of applying to persons outside the UK.[8] Whether a third party is liable will however depend on their degree of involvement and their state of mind at the relevant time. Recent High Court authorities[9] have adopted the two-stage test of dishonesty from Ivey v Genting Casinos[10] (which applies to dishonest assistance): (1) ascertain (subjectively) the actual state of the individual's knowledge / belief as to the facts; (2) determine whether their conduct was honest or dishonest by applying (objective) standards of ordinary decent people.

Bilta left open the question whether a creditor, who accepts money from a debtor company (which becomes insolvent) whilst being aware that the funds were procured fraudulently, would count as a relevant party.[11] The requisite knowledge threshold may be ripe for argument in a different appeal.

Limitation And Dissolved Companies

The liquidators had a second claim in Bilta, being that Tradition had dishonestly assisted the claimants' directors in their breach of fiduciary duties (by perpetrating the VAT fraud) owed to the claimant companies. The two relevant claimant companies had been abandoned by their directors before they were struck off and dissolved; it took years before they were restored and wound up, the liquidators were appointed, and the claims were issued.

To come within the 6-year limitation period for dishonest assistance, the liquidators relied on s.32(1)(a) of the Limitation Act 1980 for postponement in case of fraud.[12] They argued (the burden being on them) that, after the claimant companies were deserted by their directors, they could not with reasonable diligence have discovered the fraud until the liquidators were appointed.[13]

At issue was the effect of the deeming provision in s.1032(1) of the Companies Act 2006 ("CA 2006"), which provides that "The general effect of an order by the court for restoration to the register is that the company is deemed to have continued in existence as if it had not been dissolved or struck off the register." Does that mean that the companies should be deemed to have had no directors or liquidators for as long as they remained struck off?

The Court held in the negative. The question of what would have happened if the company had not been dissolved is not answered by s.1032(1) CA 2006 itself, but by adducing factual evidence of the counterfactual (not historical) scenario, to be decided on the balance of probabilities.[14] The rationale was that otherwise, every restored company wishing to pursue a claim in fraud would be able to postpone the running of time.[15] On the facts, the second claim was time-barred as the claimant companies had failed to discharge that evidential burden.[16]

s.1032(3) CA 2006 gives the court discretion to give such directions as seems just for placing the company and other persons in as near a position as possible if the company had not been dissolved. The Court noted, however, that such discretion may only be exercised in exceptional circumstances to override the statutory limitation regime.[17] Although the claimant companies had not sought a "limitation direction",[18] in the light of the Court's conclusion on this issue, it should be expected that difficulties in adducing factual evidence of the counterfactual world would not generally qualify as exceptional circumstances.

Proving the counterfactual will likely be practically challenging and may well require expert evidence. The hypothetical world in Bilta may be along these lines: the claimant companies remained without directors for years, whereas liquidators might have been appointed at an earlier date. Since time does not begin to run until the claimant's (reasonable) discovery of the fraud, the factual inquiry should centre on the information readily available to the liquidators and the steps that they would have taken to investigate potential recovery after their appointment. Any delay by creditors in claiming against the company or putting it into liquidation should not be relevant. It should also be borne in mind that time starts running upon the essential facts of the fraud (as found proved by the court) being discovered; should subsequent details of the fraud be uncovered without giving rise to a separate cause of action, that does not reset the clock.[19]

To seek advice on commercial litigation, please contact Lucas Moore or Victor Lui, or alternatively, telephone on 020 7465 4300.

5 s.993 CA 2006 created the offence of fraudulent trading, which applies whether or not the company has been wound up and a person convicted on indictment may be imprisoned for up to 10 years or a fine (or both)
6 Bilta v Tradition, [36]
7 Bilta v Tradition, [25]
8 Bilta (UK) Ltd v Nazir (No 2) [2016] AC 1, [2015] UKSC 23, [213] (Lord Toulson and Lord Hodge JJSC)
9 E.g. Bilta (UK) Ltd v Natwest Markets Plc [2020] EWHC 546 (Ch), [225]-[228] (this point not disturbed on appeal: [2021] EWCA Civ 680, [61], [128]-[134]); Re JD Group Ltd [2022] EWHC 202 (Ch), [33]-[36] (Deputy Judge Agnello QC); London Capital & Finance Plc v Thomson [2024] EWHC 2894 (Ch), [1558] (Miles J)
10 [2018] AC 391, [2017] UKSC 67, [74] (Lord Hughes JSC)
11 Bilta v Tradition, [44]
12 s.21(3) of the Limitation Act 1980 as applied in Williams v Central Bank of Nigeria [2014] 2 WLR 355, [2014] UKSC 10, [116]-[119] (Lord Neuberger PSC)
13 The directors' knowledge of the fraud not to be attributed to those companies in such circumstances: Bilta v Nazir, [207]
14 Bilta v Tradition, [78]-[81]
15 Bilta v Tradition, [82]
16 Bilta v Tradition, [83], [85]
17 Bilta v Tradition, [75]
18 Bilta v Tradition, [75]-[76]
19 Seedo v El Gamal [2023] Ch 473, [2023] EWCA Civ 330, [53], [70]-[74] (Nugee LJ)