

1. EDF Man Capital Markets v Come Harvest Holdings Ltd [2022] EWHC 229

Facts

The case arose out of a high value international warehouse receipt fraud. The claimant, EDF MCM, bought metal from the first two Defendants (D1 and D2) in over twenty repo transactions for sums totalling over US\$280million. It later discovered the warehouse receipts provided were forged and it had not been given title to the metal. Title remained with D10 (Straits, a commodities broker and financier to D1 and D2), which had entered into purported prior repos with D1 and D2. D10 agreed not to cancel its original warehouse receipts and received substantial fees for providing blank endorsed ones, which other defendants then used to produce the forgeries. D4 was a corporate agent to D1 and D2; D3 was the individual who owned and directed D4. Other Ds had settled pre-trial.

Rescission

The claimant's primary case was that it had validly rescinded the repos after discovering the fraud, which was upheld. It meant, however, that the claimant did not have a claim for breach of contract, as there were no live repos to hang this on (though the contract claims would have succeeded if the contracts had still existed).

Tort claims

The claimant's claims for damages were instead brought in deceit, procuring a breach of contract and unlawful means conspiracy. These claims succeeded:

- **Deceit:** the Court found D1 and D2 (the sellers) liable for false express and implied representations in the repos that they had good title to the metal and that the warehouse receipts were genuine. D1 and D2 knew these were false, intended EDF MCM to rely on them, which EDF MCM did (by entering the repos and making payment), and this caused EDF MCM loss.
- **Procuring breaches:** the Court found D3 and D4 (the sellers' agents) procured breaches of the repos between D1 and D2 / EDFMCM, with D3 the "architect" of the fraud.
- **Unlawful means conspiracy:** the Court found all of D1 to D4 and D10 liable in unlawful means conspiracy. This was clear for D1 to D4, the more direct parties to the fraud. The Court rejected the arguments of D10 (which was the broker/owner of the metal) that it was not sufficiently party

to and/or aware of the fraud. It found that all the parties conspired together, but by playing different roles, and that they sought different benefits.

The Court confirmed the legal test for intention, which D10 had challenged, as existing if harm to the claimant is the end sought, the means to the end or the defendant knows it is an inevitable consequence of its action. Intention existed for D10, which knew D1 to D4 were forging receipts to obtain finance, but participated to gain substantial fees. The Court also confirmed that the unlawful means only need to cause the loss to the claimant, which they had on the facts. There was no further requirement, as D10 contended, that the particular defendant must have intended the loss by the precise unlawful means used.

Tort claims: damages

For every repo with D1/D2, EDF MCM had also entered into a back to back repo with a bank. The immediate losses from the forged receipts fell on this bank, which the claimant had settled pre-trial at less than full value.

D10 argued that these arrangements meant that EDF MCM suffered no recoverable loss (as it was never itself out of pocket) or had mitigated its loss to the amount paid under the settlement agreement. The Court rejected D10's arguments. It held that EDF MCM entered into separate sets of principal to principal transactions, rather than acting as a 'pass through' agent never exposed to liability. EDF MCM's repos with the bank were independent sub-sales and were therefore not relevant to the assessment of damages in the repos with D1/D2. As the settlement agreement related to repos with the bank, this was also legally separate and not relevant to the repos with D1/D2.

EDF MCM could recover over US\$280million for its tort claims (broadly the purchase price paid less "credit" for amounts received from the defendants that had settled).

Equitable claims: constructive trusts and knowing receipt

The Court granted a declaration that various defendants held EDF MCM's purchase funds, or their traceable proceeds, on constructive trust for EDFMCM (quantum calculations were left for another hearing).

The Court did not allow a claim in "knowing receipt" for "equitable compensation" and/or an "order to account", against various defendants which had received purchase funds from D1 and D2. The Court noted the principle that fraud makes a contract voidable, not void. Only when a party rescinds a contract for fraud does a constructive trust arise over the property. This meant that the defendants which had received the purchase funds did so before EDFMCM rescinded the repos and any constructive trust could arise over them. The Court declined to apply a fiction that a constructive trust had always been in place.