Bilta (UK) Ltd (in liquidation) and ors v Tradition Financial Services Ltd - fraudulent trading and dishonest assistance

Bulletin No 1129

Case: Bilta (UK) Ltd (in liquidation) and ors v Tradition Financial Services Ltd; Nathanael Eurl Ltd (in liquidation) and anr v Tradition Financial Services Ltd, 7 May 2025, [2025] UKSC 18, Lords Hodge, Briggs, Hamblen, Burrows and Richards

Synopsis: The Supreme Court has confirmed that third parties/outsiders who participate in, facilitate or assist fraudulent transactions by a company when they know that the company's business is being carried on for any fraudulent purpose may be liable for fraudulent trading under s213 IA 1986. Separately, in the context of claims for dishonest assistance, the court recognised that a dissolved company subsequently restored to the register is deemed to have continued in existence during the period of its dissolution but held that the question of whether it should be deemed during that period to have had competent directors or liquidators is a question of fact.

Topics Covered: Fraudulent trading – section 213 IA 1986 – statutory interpretation – limitation – section 32 LA 1980 – dissolved and restored companies

Comment:

The judgment brings long-awaited clarity to a question that has troubled practitioners since *In re Bank of Credit and Commerce International SA* [2002] BCC 407 and the series of missing trader intra-community ("MTIC") fraud cases that followed: whether or not a person with no directorial or managerial role in a business can be caught by s213 IA 1986 where that business is carried on for a fraudulent purpose. In other words, the key question for the court was whether persons who may be required to make contributions to a company's assets because they were "knowingly party" to the company's fraudulent trading, contrary to s213 IA 1986, is confined to those involved in the management or control of the fraudulent business or not. In concluding that there is nothing in the language of s213 restricting its scope to directors and other "insiders" who were directing or managing the relevant fraudulent business, such that s213 is wide enough to cover these 'insiders' as well as persons who were dealing with the relevant company if they knowingly were parties to the fraudulent business activities in which the company was engaged, the court reflects a wider policy of deterring those who "*warm themselves with the fire of fraud*". The judgment also identifies some factors to aid in determining whether a person is "knowingly party" to the carrying on of a fraudulent business.

The court's approach to limitation in the context of claims for dishonest assistance, specifically regarding the relationship between s1032 CA 2006 and s32 LA 1980, is also significant. The court recognised that, under s1032 CA 2006, the restoration of a company means that the company is deemed to have always continued in existence but held s1032 does not necessarily deem that, during its period of dissolution, such company had or did not have competent directors or liquidators (which question was to be answered on the balance of probabilities as a question of fact).

For office-holders, the practical lessons from this judgment are clear. Where it appears that any business of a company has been carried on with intent to defraud creditors of the company or creditors of any other person, or for any fraudulent purpose, office-holders should consider all knowing participants in the fraudulent business as being potentially liable for fraudulent trading under s213 IA 1986, not merely directors or other insiders in respect of the company. Furthermore, office-holders must be cognisant of the uncertain effect that a company's restoration has as regards its officers during the period of the company's dissolution.

Facts:

Five companies – Bilta (UK) Ltd, Weston Trading UK Ltd, Nathanael Eurl Ltd, Vehement Solutions Ltd and Inline Trading Ltd – were vehicles in a 2009 MITC fraud involving spot trading in carbon credits under the EU Emissions Trading Scheme which resulted in those companies being left with significant VAT liabilities owing to HMRC. All five companies are now in liquidation and HMRC is their principal creditor.

Tradition Financial Services Ltd (Tradition) brokered deals on behalf of companies which were its clients that dealt with SVS Securities plc (SVS), on a back-to-back basis; SVS itself purchased carbon credits on a back-to-back basis for the five companies which were vehicles in the fraud. On the assumed facts, Tradition knew that the companies which were vehicles in the fraud were not legitimate trading concerns, failed to carry out any genuine

KYC, and was aware that the pattern of trading was suspicious, yet pretended it had credible explanations for its clients' trading.

The liquidators of the five companies which were vehicles in the fraud claimed that Tradition both: (i) dishonestly assisted the directors of those companies in the breach of their fiduciary duties to those companies, as applicable; and (ii) was "knowingly party" to the carrying on of the business of those companies for a fraudulent purpose contrary to s213 IA 1986.

A partial settlement left two issues for determination on assumed facts: (i) whether s213 extends beyond persons exercising management or control over the company in question such that Tradition was within the scope of s213; and (ii) whether certain dishonest assistance claims were time-barred under LA 1980 as a result of, among other things, certain of the companies which were vehicles in the fraud having been dissolved and later restored to the register of companies.

Decision

The claim under s213 IA 1986
The court considered the scope of s213 IA 1986 and held that the statutory language, specifically the phrase "*any persons who were knowingly parties to the carrying on of the business,*" is naturally wide and contains no words limiting liability to those who direct, control or manage the business. In the statutory context, the court noted that neighbouring provisions such as ss212, 214, and 216 target closely defined classes such as directors, shadow directors, and managers, such that the deliberate use of broader wording in s213 indicates a wider reach. The court had regard to the legislative history of the precursors to s213. Specifically, the court noted that the 1945 Cohen Report of the Committee on Company Law Amendment recommended extending liability (under a precursor provision to s213) to "*other persons who were knowingly parties to the frauds*," and considered that, in response, s332 Companies Act 1948 was enacted in materially identical terms to s213.

To be caught by s213, a person must: (i) participate in, facilitate or assist fraudulent transactions by a company knowing that the company's business was being carried on for a fraudulent purpose (which includes persons who transacted with the company in the knowledge that by those transactions the company was carrying on its business for a fraudulent purpose); (ii) be a party to the carrying on by the company of a fraudulent business and not merely involved in a one-off fraudulent transaction (unless it is sufficient evidence on its own of the carrying on of a fraudulent business); (iii) have done something which goes beyond a mere failure to advise; and (iv) have had an active involvement in the carrying on of the fraudulent business.

The court also had regard to case law, which trended towards treating knowing third party 'outsiders' to fraudulent businesses as potential defendants to claims under s213 and which the court endorsed as "*strong persuasive authority which points in only one direction*." The court neatly summarises its judgment on the breadth of s213 in that "*the correct interpretation of section 213(2) of IA 1986 is that third parties/outsiders who participate in, facilitate or assist fraudulent transactions by a company when they know that the company's business is being carried on for any fraudulent purpose are within the ambit of that section*".

Tradition's appeal on this issue was therefore dismissed. Consequently, brokers, suppliers, lenders, and advisers who knowingly aid fraud face exposure to liability for fraudulent trading even where they are not involved in the control or management of the fraudulent business; the key consideration is knowing participation in the fraudulent carrying-on of the business.

Whether the claims in dishonest assistance are time barred
Turning to limitation and the dishonest-assistance claims against Tradition, the court was asked to determine whether there was an entitlement to a postponement of the limitation period of the claims under s32 LA 1980, until a date less than six years before the claims were issued (as otherwise the claims were time barred for having been issued more than six years after the fraud). This revolved around the question whether, during its period of dissolution prior to restoration, a company could with reasonable diligence discover a fraud (since on restoration it is deemed to have continued in existence as if it had never been dissolved or struck off).

In this case, where for critical periods the relevant company had been dissolved and later restored, it was argued that the relevant companies had a 'bare existence' during their period of dissolution (i.e. they had no directors or liquidators who could have discovered the fraud) such that the limitation period for the dishonest assistance claims could not begin to run until the companies were restored.

The question for the court was whether a company, on restoration, should be deemed to have had no directors or liquidators for as long as it remained dissolved. The court held that the answer to that question was "no" and that the only thing which is to be deemed to be true about a restored company under s1032 CA 2006 is that it continued in existence during the period of its dissolution. As such, whether a company should be deemed during a period of dissolution to have had competent directors or liquidators is to be answered on the balance of probabilities as a question of fact as to what would have happened had the company not been dissolved. Otherwise, being deemed in every case to have competent officers during its period of dissolution would allow any restored company to rely on a postponement under s32 LA 1980.

The court turned back to the question of whether the companies making the dishonest assistance claims against Tradition had established a factual basis for the postponement of the statutory limitation period under LA 1980. The court held that they had not because they adduced no evidence to prove that they could not with reasonable diligence have discovered the relevant fraud.

Office-holders must therefore be cognisant of the uncertain effect that a company's dissolution and subsequent restoration has as regards its office-holders.

The views expressed in this Technical Bulletin do not necessarily reflect those of individual members of the Technical Committee, or the members of the Insolvency Lawyers' Association as a whole.
