Baker McKenzie.

Bilta (UK) Limited (in liquidation) et ors v (1) Natwest Markets PLC and (2) Mercuria Energy Europe Trading Limited [2020] EWHC 546 (Ch)

Earlier in March and prior to Covid-19 taking over both the world and the legal world, Mr Justice Snowden handed down his judgment in **Bilta (UK) Limited (in liquidation) et ors v (1) Natwest Markets PLC and (2) Mercuria Energy Europe Trading Limited** [2020] EWHC 546 (Ch) in which he found both RBS (as defined below) and RBS SEEL (also as defined below) liable for dishonest assistance and knowingly being a party to fraudulent trading. As demonstrated below, the judgment contains a number of cautionary lessons for both banks and traders alike.

Factual background

The claimant companies (the "Claimants") are all currently in insolvent liquidation. The Claimants brought claims against the defendants of dishonest assistance and knowing participation in fraudulent trading. At the relevant time, the defendants were known as the Royal Bank of Scotland PLC ("**RBS**") and RBS Sempra Energy Europe Limited ("**RBS SEEL**") respectively. RBS SEEL was the entity through which traders were employed to trade EU carbon credits called EU Allowances ("**EUAs**") on behalf of RBS pursuant to a joint venture.

The Claimants alleged that the defendants participated in the commission of missing trader intra-community VAT fraud during the summer of 2009 through their trading with an intermediary called CarbonDesk Limited ("**CarbonDesk**"). In a somewhat twisted turn of events, it was found that the VAT fraud was in fact perpetrated by the directors of the Claimants who caused their companies to purchase EUAs from EU member states where VAT was not applicable and then sell those EUAs to UK counterparties which did attract a charge of VAT. The Claimants then misappropriated or misapplied the VAT payable on the EUAs that had been sold, rather than accounting for it to HMRC resulting in their respective directors breaching their fiduciary duties. The Claimants were then left without assets and defaulted on their obligations to HMRC which collectively amounted to £83 million over 445 EUA transaction chains. In very broad terms, the defendants argued that the traders involved in EUA trading did not act dishonestly in their trading activities and therefore neither RBS or RBS SEEL should be held liable.

The law

In this case, Mr Justice Snowden dealt with issues of dishonest assistance, fraudulent trading pursuant to s.213 of the Insolvency Act 1986 ("s.213"), vicarious liability and attribution.

1. Dishonest assistance

In considering whether the claims of dishonest assistance were made out, Mr Justice Snowden made clear that in the instance where a "**chain of transactions can be established linking the actions of the Traders and RBS with the misappropriation or misapplication of the VAT monies by the directors of the Claimant companies**" then the necessary assistance would have been given. Mr Justice Snowden rejected the defendants' argument that this would widen the scope of dishonest assistance to the point of illegitimacy as the defendants' conduct was too far removed from the breaches of fiduciary duty that eventually occurred and therefore anyone operating in the secondary trading market for EUAs could find themselves facing claims of dishonest assistance. Following this judgment, banks and traders alike should not fear that they could face endless claims of dishonest assistance; Mr Justice Snowden highlighted that "**the factual connection between the trading and the fraud still needs to be established**", therefore those who participate in good faith in the market will have nothing to fear by way of repercussion.

2. s.213 - Fraudulent trading

Having established that the threshold for the assistance element of dishonest assistance was met, Mr Justice Snowden considered whether the traders and RBS could be found liable for fraudulent trading under s.213. The relevant question to establish was whether the traders, as outsiders of the Claimants and with no direct involvement in the management of the Claimants, could be held liable under s.213. Citing the Court of Appeal in **Bank of India v Morris** [2005] BCC 739, Mr Justice Snowden stated that liability under s.213 "**is not limited to those who have been involved in the management of the company whose business has been carried on with intent to defraud, but potentially extends to outsiders who simply deal with the company**". Therefore, if the facts demonstrated that the traders turned a blind eye to the fraudulent scheme causing RBS to enter trades that facilitated fraudulent trading by the Claimants, then s.213 liability would be established.

3. Behaviour that was deemed dishonest

As their names would suggest, claims of both dishonest assistance and fraudulent trading require an element of dishonesty to be established. In his judgment, Mr Justice Snowden stated that "**the requirement is thus for the court to determine what a defendant actually knew or believed, and then to appraise his conduct in light of that knowledge or belief against the objective standards of ordinary decent people**". However, and crucially for those operating in trading circles, a finding of dishonesty can be made where an assister does not actually know all the relevant facts of the dishonest action afoot. In this instance, Mr Justice Snowden accepted that where the traders had a clear suspicion that CarbonDesk was part of or connected with VAT fraud but deliberately chose not to inquire into that possibility, then the traders would have acted dishonestly.

At the relevant time, there were strong rumours circulating within the emissions market that EUAs were subject to VAT fraud schemes, and that CarbonDesk was acting as a "buffer company" for those benefitting from such schemes. The RBS SEEL traders were made aware of these rumours in early June 2009 through numerous emails, blog links and documents which described VAT carousel frauds and their emergence onto the UK market. These market emails became increasingly more factual as opposed to mere speculation as the month progressed. The traders emailed each other with their suspicions and queries about the situation but did not raise the potential issue with their compliance team, or indeed directly with CarbonDesk themselves. In this regard, the traders took representatives from CarbonDesk out for dinner on the evening of 25 June 2009 but did not discuss the rumours or seek clarification as to CarbonDesk's business model and client base during that dinner. Instead, the traders continued to trade with CarbonDesk in increasingly larger volumes. It was only on 30 June 2009 when RBS received a letter from BlueNext (the leading EUAs trading exchange) asking for RBS to explain the source of the huge volume of EUAs that RBS was trading at the time, that the compliance departments at RBS and RBS SEEL became fully aware of the potential issue. The traders continued trading with CarbonDesk while the relevant compliance and legal departments investigated the position and until RBS made the final decision to cease trading with CarbonDesk on 3 July 2009. Despite this decision, some final trades were conducted with CarbonDesk on 6 July 2009.

The Court found that by failing to interrogate their suspicions about CarbonDesk more fully and especially by failing to ask questions at the 25 June 2009 dinner with CarbonDesk, the traders had acted dishonestly. In relation to the failure to ask questions at the 25 June 2009 dinner, Mr Justice Snowden's finding was that despite their suspicions, they "**decided together that it would be best not to ask and thereby risk learning the truth behind the extraordinary levels of very profitable trading that they were doing**". Furthermore, the traders had failed to be full and frank when disclosing their trading with CarbonDesk to RBS SEEL's internal compliance team, in order to keep their suspicions of any fraud low. Mr Justice Snowden considered that the traders had 'turned a blind eye' to the situation and therefore determined that they had acted dishonestly from the morning of the 26 June 2009 until trading with CarbonDesk ceased on 6 July 2009.

4. Who is liable?

Finally, Mr Justice Snowden had to consider whose state of mind can be imputed on a corporate defendant facing claims of fraudulent trading and dishonest assistance: should either of RBS and / or RBS SEEL be held vicariously liable for their traders' actions. The document governing the terms under which RBS SEEL made traders available to RBS was the "Commodities Trading Activities Master Agreement" (the "CTAMA") dated 1 April 2008. Each defendant argued that its terms meant that the other should be held responsible for the traders' actions, in the event that the Claimants claims were successful.

An analysis of the CTAMA made it clear that the traders were employees of RBS SEEL and it was RBS SEEL who remained liable for the traders' salaries, bonuses and other benefits.

However, the CTAMA also gave the traders the authority to perform their trading activities as agents of RBS. RBS SEEL had also agreed that the traders would perform their trading activities in line with various RBS policies relating to market and credit risk, trading guidelines and any restrictions that RBS may choose to impose. Finally, the CTAMA provided for RBS to reimburse RBS SEEL for salaries, bonuses and other benefit costs of the traders. The combination of these factors led Mr Justice Snowden, with reference to the Court of Appeal in **Viasystems (Tyneside) v Thermal Transfer (Northern)** [2006] QB 510, to conclude that "**the Traders were so much a part of the work, business or organisation of both RBS SEEL and RBS that it would be just to make both companies liable for any wrongs that the Traders committed to third parties**". As such, both RBS and RBS SEEL were found vicariously liable for the traders' misconduct.

Conclusion

What is clear from this judgment is that traders and banks alike should always investigate any suspicions that they have regarding entities with whom they trade fully either to confirm or allay such concerns. Individual traders cannot rely on the fact that they are physically removed from the actual fraud being carried out, or that they do not have total knowledge of the fraudulent scheme; where traders have effectively been 'put on notice' of the potential existence of these frauds, they should investigate. Banks should also be aware that where a sub-entity has been created to trade in a particular market, the documents governing that relationship may result in the bank also being held liable for conduct of traders who are seemingly employed by the sub-entity and with whom there is no direct contractual relationship.

Contact Us

Charles Thomson
Partner | Baker McKenzie, London
Charles.Thomson@bakermckenzie.com

Anna Storer
Associate | Baker McKenzie, London
Anna.Storer@bakermckenzie.com