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Court dismisses fraudulent misrepresentation and conspiracy claims in Loreley Financing (Jersey) No 30 Ltd

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In this article, Hannah Sharp of Rosling King considers the High Court's decision in *Loreley Financing (Jersey) No 30 Ltd v Credit Suisse Securities (Europe) Ltd and others [2023] EWHC 2759 (Comm)*.

Background

In 2007, the claimant (L30) paid $100 million to Credit Suisse (CS) for AAA-rated notes (Notes), which formed the basis of a synthetic collateralised debt obligations (CDO) transaction. The Notes were linked via a credit default swap to a reference portfolio, which comprised 100 residential mortgage-backed securities (RMBS). Each RMBS contained the rights to cash-flows from pools of underlying mortgage loans. Of the 100 RMBS, seven had either been packaged, securitised or underwritten by CS or its affiliates (CS RMBS).

L30 lost its investment during the financial crisis and sought to claim that loss back from CS.

The claim

L30 alleged that, in selling the Notes, CS had made representations about what had been packaged within the CDO by implication and its conduct and that those representations were false, and were made either deliberately or negligently, and that L30 would not have bought the Notes had the representations not been made.

Limitation

The court found that the fraudulent misrepresentation (and negligence) claims were time-barred.

It was common ground that L30's claims in deceit and negligence were prima facie time-barred but L30 argued that sections 14A and 32 of the Limitation Act 1980 applied as L30 could not have, prior to November 2012, pleaded all the elements of the cause of action that it ultimately pleaded in 2018 and that it is the fraud found by the court, not the fraud that was originally asserted, which must be reasonably discoverable.

L30 relied on the decision in *Seedo v Gamal and Salfiti and others [2023] EWCA Civ 330* where at paragraph 53, Nugee LJ said that:

> "It seems wrong in principle, and a distraction, to ask when the claimant discovered allegations which in the end went nowhere; the question is when he discovered the essential facts of the fraud found proved by the Court."

However, Cockerill J held that paragraph 53 of *Seedo* was not ratio and therefore the court was not bound it. She also found that *Seedo* was concerned with a very specific set of facts where there were two distinct lies; in such cases, a party will not be time-barred if one claim is time-barred but an entirely different claim is only discoverable later. The same reasoning did not apply in cases where a party was relying on two versions of the same argument or arguments which have some relation to each other, as was the position in L30's case.

To start time running, it was necessary that a case of the same nature (fraudulent representation) based on essentially the same representations could have been run. On the facts, Cockerill J decided that there was ample material available to L30 at some point in 2012 to advance the case in fact pursued in 2018, and accordingly L30's claim (in both fraudulent misrepresentation and negligence) was time-barred.

Representations

Cockerill J went on to consider the substance of L30's claim, notwithstanding that she had found against L30 on limitation.

L30 argued that the test for express representations (as set out in *IFE Fund v Goldman Sachs [2007] 1 Lloyd's Rep 264* at paragraph 50 and *Cassa di Risparmio della Repubblica di San Marino SpA v Barclays Bank [2011] EWHC 484 (Comm)*) also applied to implied representations, with the relevant question being "what a reasonable person would have inferred was being implicitly represented by the representor's words and conduct in their context".

L30 further argued that the "helpful test", as set out by Colman J in *Geest plc v Fyffes [1999] 1 All ER (Comm) 672* at paragraph 683B, was highly significant as justifying the conclusion that some of the implied representations had been made. L30 argued that the "helpful test" was relevant to finding fraud as, together with the knowledge that CS's CDO group was selling CDOs that were linked to the credit risk of CS RMBS, it was enough to lead to a conclusion that certain implied representations had been made.

However, Cockerill J rejected this argument, finding that the correct test was that stated in *IFE*, that is, "what a reasonable person would have inferred was being implicitly represented by the representor's words and conduct **in the context in which they were used**" (emphasis in original). The "helpful test" was not "the test" for determining the existence of an implied representation, and the boundary between pure omission and misrepresentation must be carefully distinguished.

Reliance

On the question of reliance, Cockerill J revisited her conclusions in the earlier case of *Leeds City Council v Barclays Bank [2021] QB 1027.* In that case, the court rejected an argument that the test for reliance could be satisfied by an assumption as to a state of affairs and held that there is a clear distinction between 'awareness' and 'assumption'.

L30 submitted that awareness was not a prerequisite, arguing that the relevant question is whether the representation materially influenced the claimant's conduct and the correct counterfactual scenario is where the representation was not made.

Cockerill J rejected this argument and re-affirmed her previous decision in *Leeds*, concluding that the representee must be aware of or have the representation actively present within their mind when they act on it. Since L30 had effectively conceded that, if the test was "active presence", its claim would not succeed, it failed on reliance.

Falsity

L30 sought to prove that there had been misconduct by CS as it knew that the credit risk which L30 believed it was buying was not the credit risk it was actually buying. Specifically, it knew that the CS RMBS embedded within the CDO transaction were either affected by, or were exposed to a material risk of being affected by, certain misconduct in the selling of the RMBS between 2005 and 2007. L30 relied for this purpose on a Statement of Facts from the US Department of Justice, which had settled with CS in relation to its investigation into CS's conduct in connection with RMBS.

Whilst not determinative given that the claims were time-barred, Cockerill J found that the Statement of Facts had no legal consequences in these proceedings. Even in relation to the so-called "Approval Representations" (representations that all loan decisions had been made by CS senior underwriters and not third-party contractors), which it was common ground had been made and were literally false, L30 could not demonstrate that relevant individuals within CS had any knowledge of their falsity. There was therefore no evidence of deceit.

Conspiracy

L30 brought an alternative claim in unlawful means conspiracy based on a breach of certain Irish regulations. Two questions arose:

- Whether unlawful means can consist of a breach of foreign law.
- Whether, because a breach of the Irish regulations is not actionable, it can supply the unlawful means for unlawful means conspiracy.

In respect of the first question, Cockerill J considered that a breach of foreign law may give rise to a claim in conspiracy, although she noted that it may be necessary to have some kind of public policy or comity filter for these purposes.

In respect of the second question, L30 relied on *BTA Bank v Khrapunov [2018] UKSC 19*. However, Cockerill J found that *Khrapunov* did not really deal with this point as the Supreme Court did not expressly state that a non-actionable civil statute could give rise to a conspiracy claim. She also considered that a remedy in conspiracy was unnecessary given that the Irish regime provided a separate mechanism for compensation. Accordingly, the conspiracy claim failed.

Trial witness statements

Finally, Cockerill J's findings in respect of witness evidence serve as a useful reminder that parties must comply with PD 57AC so that the court is able to properly establish whether something is a genuine memory.

Cockerill J noted that two of L30's witnesses' evidence was problematic because they had been supplied in advance with documents which they would not have seen at the time. This left the court in real difficulties in being able to establish whether their recollections were genuine memories, or if they had been reconstructed.