Fraudulent trading claims expanded beyond directors

A UK Supreme Court judgment has opened the door to recoveries against a wider group of potential defendants in insolvency scenarios. ***Tim Carter*** *and* ***Lucy Trott*** *of Stevens & Bolton explain the decision and its utility for counter-fraud purposes.*

Fraudulent trading is one of the lesser-utilised tools in the armoury of insolvency practitioners under the Insolvency Act 1986. The high burden of proof and requirement of dishonesty make fraudulent trading claims difficult to pursue, with officeholders often instead opting to pursue ‘easier’ wrongful trading claims. However, wrongful trading claims can only be brought against company directors. In contrast, the Supreme Court has recently confirmed that fraudulent trading claims can be brought against any knowing participant to a fraud, thereby opening the door to recoveries beyond company directors and against a wider group of potential defendants. This decision has attracted much interest. However, the obstacles to pursuing fraudulent trading claims mean that the decision will probably have limited practical effect and it seems unlikely that we will see any material increase in the number of these claims successfully pursued.

The decision in *Bilta (UK) Ltd (in liquidation)*

The Supreme Court has recently handed down judgment in the case of *Bilta (UK) Ltd (in liquidation) v Tradition Financial Services Ltd* [2025] UKSC 18. [1]

The case focused on the complex issues of fraudulent trading and dishonest assistance, specifically in relation to missing trader intra-community fraud (MTIC fraud) involving carbon credits under the European Union emissions trading scheme. MTIC fraud is a type of VAT scam that exploits the VAT-free status of imports between EU countries whereby companies import goods VAT-free and sell them domestically while charging VAT, thus accruing significant VAT liabilities which are left unpaid.

The claim was commenced by liquidators of five companies against a third party, Tradition Financial Services Ltd (TFS) who had brokered the trades of carbon credits that constituted the MTIC fraud. The liquidators argued that TFS either knew or should have suspected that the trades were not legitimate and therefore constituted fraudulent trading.

The key issue considered by the Supreme Court was the potential scope of liability for fraudulent trading under section 213 of the Insolvency Act 1986 (the ‘Act’).

Section 213 of the Act provides: *“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 … any persons who were knowingly parties to the carrying on of the business in the manner above-mentioned are to be liable”.*

The Supreme Court confirmed that liability for fraudulent trading could extend to third parties who knowingly participate in or facilitate fraudulent trading, even if they did not exercise management or control over a company. This follows the natural interpretation of section 213 which refers to “*any persons who were knowingly parties to*” the fraud.

The court noted that section 213(2) of the Act is specifically designed to discourage dishonest participation in fraudulent activity. By imputing liability on those who are “knowingly parties” to the fraud, the court has affirmed that anybody who wilfully participates in a fraudulent scheme can be liable, rather than limiting liability to company insiders. However, liability can only attach where there has been a course of conduct, or carrying on of fraudulent business, as opposed to a one-off transaction. Liability also requires active involvement in the fraudulent scheme and will not attach to those who failed to advise against it, so would exclude professional advisers.

What does this mean for fraudulent trading claims?

The recent ruling confirms that liquidators can pursue any knowing participant who was actively involved in fraudulent trading, even where that company or individual was not involved in the management of the business. This broadens the scope of defendants to fraudulent trading claims and could, theoretically, lead to more claims being brought and greater realisations for the creditors of insolvent companies, as the pool for contributions to the insolvent estate is widened.

Will this decision lead to more fraudulent trading claims?

Probably not. The recent Supreme Court judgment reaffirmed the earlier decision of the Court of Appeal which already confirmed that third-party participants can be liable for fraudulent trading. While this is theoretically good news for liquidators and creditors of insolvent companies, fraudulent trading claims are rarely pursued. In contrast, where claims are against directors, they are usually brought for wrongful trading under section 214 of the Act.

At the heart of the matter is the different burdens of proof: what must the insolvency officeholder demonstrate to the court? Fraudulent trading requires proof of an intention to defraud creditors, or fraudulent conduct. It is a criminal offence, with the accompanying higher criminal burden of proof. In contrast, wrongful trading is a civil offence and merely requires the liquidator to demonstrate, on the balance of probabilities, that the directors knew or ought to have known that there was no reasonable prospect of avoiding insolvent liquidation and that they failed to take every step to minimise losses to creditors.

In the case of claims against a director, there is often little to be gained from obtaining a finding of fraudulent trading rather than one for wrongful trading. The consequences for the insolvent company of a finding of fraudulent trading are similar to a finding of wrongful trading, with both usually resulting in the director being required to make a contribution to the company's assets. In both cases disqualification proceedings may follow for the defaulting director.

The key difference between wrongful trading and fraudulent trading, as demonstrated by the *Bilta* case, remains that wrongful trading can only be pursued against directors and shadow directors of a company. *Bilta* hence provides an avenue for insolvency officeholders to pursue claims against third parties where there is clear evidence of knowing participation in fraudulent activity.

For directors of insolvent companies, therefore, this recent decision is unlikely to have any impact on insolvency officeholders switching to pursue claims for fraudulent rather than wrongful trading. However, for third-party participants in fraudulent business, this case confirms that they are within the scope of section 213 of the Act and could be found liable to contribute to the insolvent company's assets, if found guilty of fraudulent trading. While insolvency officeholders will no doubt be keen to survey the landscape to see if there are any non-directors against whom a claim for fraudulent trading can be made out, our view is that in practice the high evidential threshold for bringing a claim, together with the costs of doing so, are likely to prevent all but the strongest claims being litigated.

Note

1. https://supremecourt.uk/uploads/uksc_2023_0033_0034_judgment_d7c4a2d210.pdf

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