Client Alert | Commercial Litigation

National Bank Trust v Ilya Yurov: "a Ponzi scheme with a fancy name"– Proving Fraud in the English Courts

February 2020

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National Bank Trust v Ilya Yurov & Ors [2020] EWHC 100 (Comm) provides a useful insight to the English Court's approach to pleading and evidencing fraud, emphasising the importance of properly particularised claims and documentary evidence.

The English Court rightly adopts a rigorous approach to allegations of fraud and dishonesty in civil proceedings. Fraud allegations are inherently serious in nature; lawyers are duty bound to satisfy themselves that their client has material of the requisite character to justify the pleading. That professional obligation is made more difficult by the myriad of potential fraud allegations, covering both common law and equitable causes of action, including claims for deceit, conspiracy, bribery, breach of trust and certain breaches of fiduciary duty. Parties should ensure that they maintain a focussed approach to pleadings of fraud, and in particular, by concentrating on the particular elements of a "fraudulent" cause of action (and the necessary evidence to prove it).

Within the mammoth 580 page *National Bank Trust v Ilya Yurov & Ors* [2020] EWHC 100 (Comm) judgment, Mr Justice Bryan provided a useful summary of the English law principles that apply to pleading and proving fraud as well making the associated factual findings.

Background

The Claimant, a Russian bank (the "**Bank**"), brought a claim against its former majority shareholders and members of its supervisory board: Mr Yurov, Mr Belyaev and Mr Fetisov (the "**Shareholders**"), and their respective wives. The Bank brought its claim under Russian law in the English Commercial Court.

The Bank alleged that the Shareholders had orchestrated a massive fraud over a 10-year period, during which they procured loans from the Bank totalling around US$1 billion for the benefit of their own companies. This money was then allegedly funnelled through a complex web of offshore companies before ultimately being used to service interest of other loans from the Bank and for the personal benefit and enrichment of the Shareholders.

The Bank claimed the loans were arranged to deliberately falsify accounts, conceal bad debts and deceive, among others, the Russian Regulator (the "**CBR**"), the Bank's auditors and its ordinary Russian customers, resulting in the Bank's collapse in December 2014 requiring a US$1 billion bailout funded by the Russian taxpayer.

Mr Yurov and Mr Fetisov maintained they did nothing wrong and that the process of recycling funds through offshore shell companies ought properly to be characterised as "*balance sheet management*" in the wake of the 2008 financial crisis. It was not, on their case, and as the Court ultimately decided "*a Ponzi scheme with a*

fancy name".[1] For his part, Mr Belyaev denied all knowledge of the Bank's allegations, and of having participated in the "*balance sheet management*" exercise.

Legal Principles

In his judgment, Bryan J summarised[2] certain key principles that arise when pleading and proving fraud[3] before applying them to the facts of the case.

Pleading and proving fraud

Fraud or dishonesty must be distinctly alleged and distinctly proved.[4] In other words, fraud must be pleaded with sufficient clarity so that a defendant has proper and fair notice of the allegations it faces. In this respect, it is important that any claimant uses unequivocal language – "dishonesty" or "fraudulently" as opposed to "wilfully" or "recklessly" – to make it clear that the alleged conduct goes beyond negligence.[5]

Second, an allegation of fraud or dishonesty must also be sufficiently particularised, detailing the facts, matters and circumstances relied on to show that a defendant was dishonest and not just negligent. As dishonesty goes to a defendant's state of mind, and defendants are unlikely to make any concessions in this respect, dishonesty often has to be inferred from the primary facts of the case.[6] Fraud is not sufficiently particularised if the facts pleaded are consistent with innocence.

The burden and standard of proof

In ascertaining a defendant's state of mind, as well as establishing allegations of fraud more generally, both the burden and standard of proof remain as in ordinary civil proceedings; that is, the burden lies with the claimant and the relevant standard is the balance of probabilities.[7]

Inherent probabilities

Although the standard of proof remains the same, clearer evidence is required to prove fraud than to prove negligence or innocence; absent other information, the more serious the wrongdoing, the less likely it is to have occurred, because most people are not serious wrongdoers.[8]

Documentary evidence

Witness evidence is imperfect, as is the Court's ability to assess its honesty and reliability; human memories are fallible and people can convince themselves that their false recollections are correct. Accordingly, the Court should rely on documentary evidence and objectively provable facts, where possible.[9]

Circumstantial evidence

Circumstantial evidence is cumulative in nature and is established by eliminating other possibilities. The overall strength of circumstantial evidence is therefore greater than its constituent parts.[10]

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1 As described by Mr Justice Males in an earlier interlocutory hearing (*National Bank Trust v Ilya Yurov & Ors* [2016] EWHC 1913 (Comm): National Bank Trust v Ilya Yurov & Ors [2020] EWHC 100 (Comm) at 19.

2 At paragraph 50.

3 As he had previously set out in *JSC BM Bank v Kekhman* [2018] EWHC 791 (Comm) at 41-92.

4 *Three Rivers District Council v Bank of England* [2001] UKHL 16; [2003] 2 AC 1, per Lord Millett at 184. This is reinforced by paragraph 8.2 of CPR PD 16 which stipulates that where a claimant seeks to rely on allegations of fraud in support of their claim, the allegations must be specifically set out in the particulars of claim.

5 *Three Rivers*, 185.

6 *Ibid.,* 186; *National Bank v Yurov*, 251.

7 *In Re H (Minors)* [1996] AC 563. *Kekhman,* 41-45.

8 *Kekhman*, 51-66.

9 *Ibid.*, 67-77.

10 *JSC BTA Bank v Ablyazov* [2013] EWHC 510 (Comm) at 197-198; *Kekhman*, 78-81.

Hearsay evidence

As one would expect, the hearsay evidence of a witness who has not been cross-examined should generally be given less weight than the evidence of a witness that has been tested in Court through cross-examination.[11]

Challenging a witness' evidence

If a party wishes to submit that any part of a witness' evidence should be rejected by the Court, that party should challenge that evidence in cross-examination to afford the witness the opportunity to address any contradiction or difficulties with that evidence.[12]

The High Court Decision

Applying these principles, Mr Justice Bryan found that the Shareholders were "*self-evidently*" acting dishonestly and in bad faith in relation to Bank's loans, which had been funnelled through an opaque web of offshore companies before ending up in their own family trusts.[13] In reaching this decision, the Court found that the Shareholders were dishonest witnesses, and that their evidence was unreliable.[14] Mr Belyaev, in particular, was criticised for deploying witness training techniques "*to avoid, so far as possible, answering questions where he considered that a straightforward answer would be adverse to his* interests."[15] In contrast, the documentary evidence showed the Shareholders receiving structure charts, signing numerous documents and facilitating the transfer of assets from the Bank into their family trusts.[16] Accordingly, the Bank was entitled to be compensated for the outstanding amounts due under the loans.

Notably, the judge held that the Bank could not rely on its allegation that certain fiduciary lending arrangements were inherently dishonest because this claim had not been positively pleaded or particularised.[17] This did not, however, significantly impact the Bank's claim as its primary allegations (that the Shareholders knew that the CBR had been misled and the Bank's accounts were deceptive) were deemed to have been particularised sufficiently to give the Shareholders proper and fair notice.[18]

Comment

This case emphasises the importance of properly pleading fraud claims in the English Courts, particularly when dealing with complicated factual matrices that accompany fraud claims. The decision also offers useful guidance on how to do so. For example, allegations should be made early on in the proceedings, where possible, to give any defendant proper and fair notice. It further illustrates the primacy of documentary evidence in order to demonstrate a defendant's dishonest conduct. Finally, it contains some stark warnings against witness training and the impact it can have on a witness' credibility, particularly with respect to evasion techniques where the documentary evidence flies in the face of the witness' testimony.[19]

If you have any queries about this client alert or fraud claims more generally, please contact a member of White & Case London's commercial disputes team.

11 *Kekhman*, 82-88.

12 *Ibid.*, 89-91.

13 *National Bank v Yurov* at 741-745, 926-927.

14 *Ibid.*, 67-69, 129-133, 173-174, 701-706.

15 *Ibid.,* 131.

16 *Ibid.,* 697-700, 706, 743.

17 *Ibid.*, 264.

18 *Ibid.,* 266-269.

19 *Ibid.,* 129-131.

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