

10 January 2023

Commodities in Focus Weekly – issue 12

ED&F Man Capital Markets Ltd v Come Harvest Holdings Ltd & Ors

Background

Happy New Year and welcome back to Commodities in Focus Weekly. In our first issue for 2023, we highlight the Court of Appeal ("**CA**") judgment handed down on 21 December 2022 of [ED&F Man Capital Markets Ltd v Come Harvest Holdings Ltd & Ors¹](#).

This judgment tells the story of Straits (Singapore) Pte Ltd ("**Straits**") and others who defrauded ED&F Man Capital Markets Ltd ("**MCM**") by issuing forged warehouse receipts to MCM in 2016 who, in turn, unknowingly used the receipts to trade nickel. The CA judgment considered whether a settlement agreement in the context of this case should be ignored (on the *res inter alia acta* or "none of your business" principle) or how, if at all, it and any benefits from it should be taken into account in assessing damages. The decision of the CA has important ramifications.

Facts and first instance decision

MCM paid around US\$284M for the warehouse receipts and sold them to ANZ Commodity Trading Pty Ltd ("**ANZ**") for around US\$291M. Following the discovery of the fraud, MCM settled its liability to ANZ by entering into a settlement agreement and paying a sum less than US\$284M (the "**Settlement Agreement**"). The settlement sum was not disclosed in the case and is referred to as US \$X million in the judgment.

The decision of Mr Justice Calver² on damages was that the settlement should be ignored on the basis of "none of your business" because the purchase from Straits and sale to ANZ were two separate transactions and the settlement with ANZ was also

separate. MCM's loss was therefore what it paid for the forged warehouse receipts i.e., US\$284m.

CA's decision and analysis

Straits' appeal was dismissed but its reasons differed from the Judge. The CA asked itself three questions as part of a two-stage process.

Stage 1:

Was there a single transaction?

The CA considered there to be a single transaction in the form of a package deal where ANZ would pay MCM for the warehouse receipts who would in turn pass that on to the fraudsters, less any profit for itself. A single transaction meant there was a single fraud; that ANZ would be deceived into paying MCM for the false warehouse receipts, knowing that MCM would innocently pass on the proceeds to the fraudsters after deducting its own profit. The Settlement Agreement was therefore part of that single transaction.

Stage 2:

Did MCM receive any benefit as a result of the transaction?

Given the circumstances, the Settlement Agreement was relevant to be considered as something which could amount to a benefit, and which could be one that avoided (or partially avoided) the loss. That then led the CA to examine its terms.

Was the loss avoided by the Settlement Agreement?

The CA looked at the specific terms of the Settlement Agreement. If it involved merely a payment to ANZ of US \$X million the CA would have accepted that the loss was avoided, but it did not.

¹ [2022] EWCA Civ 1704.

² ED & F Man Capital Markets Ltd v Come Harvest Holdings Ltd & Ors [2022] EWHC 229 (Comm) (16 February 2022).

Under it, MCM agreed to pursue the fraudsters for the full amount of the loss suffered by ANZ. Adopting the analysis of LJ Rix in *Mobil North Sea Ltd v PJ Pipe & Valve Co*³, the Settlement Agreement was construed as a reorganisation of the terms upon which the parties were going to conduct litigation against the fraudsters. It was not an attempt at mitigation. The Settlement Agreement therefore had not avoided the loss at all.

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Contact us

We hope that you find this update both useful and interesting. If you have any comments or would like to learn more about this topic, please get in touch with either your usual SH contact or any member of our commodities team by clicking [here](#).

³ [2001] EWCA Civ 741.