Devonshires

Litigation Know How:

Staying Ahead of the Game

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In this issue

Devonshires

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Welcome to the latest edition of the Litigation Know How brief, prepared by Devonshires' Commercial Litigation team. The last six months has seen our team continue to be involved in some landmark cases, including:

- Obtaining what is understood to be the first freezing injunction over Bitcoin in the UK Courts;
- Challenging the decision of the DPP in Northern Ireland to refuse Dennis Hutchings a jury trial; and
- Advising a housing association on a Company Voluntary Arrangement which is the first in the regulated social housing sector.

These cases are just three examples reflecting the breadth of work undertaken by our team. To find out more, read on for further insights into our work and an overview of some of our recent successes. We are also working with a growing number of clients, including public sector organisations, small to medium enterprises and large multinationals, may of whom are suffering from increasingly sophisticated forms of fraud, particularly bank fraud. This is an issue discussed in more detail in this brief, but often involves changes made to payment details which, at first glance, are difficult to detect. Many banks are now requiring you to certify that a payment has been received in a secure form. Emails are increasingly unsecure and so encryption programmes, faxes, post or simply speaking over the telephone with someone that you know, are sensible alternatives when confirming payment details of receipts.

If this happens to you, our advice is to:

1. Act quickly;
2. Notify your insurer and Action Fraud (although note that the majority of fraud cases are not solved); and
3. Obtain specialist legal advice with a view to recovering any fraudulently obtained monies.

As well as payment fraud, we also advise on a wide spectrum of other fraud matters including fraud prevention advisory work, freezing injunctions over fraudulently obtained monies, and general advice regarding internal policies and procedures. Successfully preventing and combatting fraud can save organisations a lot of money, and a key factor in achieving this is through the use of artificial intelligence as we explain on pages 4 to 5.

I hope you enjoy the contents of our Litigation Know How brief.

Philip Barden

Does Artificial Intelligence Hold the Key to Tackling Fraud?

Physical and digital threats are converging; fraudsters are evolving more elaborate and dishonest schemes to defraud companies. Rapid changes in technology are creating new vulnerabilities for fraudsters to exploit but it is often the simplest frauds that can cost companies thousands of pounds or more.

Companies are susceptible to corporate fraud at every level from the post room to the board room. Fraud is pervasive, some of the more common corporate examples include:

1. False accounting
2. Procurement/fake invoicing
3. Transaction attacks
4. Personnel management fraud
5. Identity/data theft
6. Misuse of company assets
7. Insurance fraud
8. Expenses fraud

Tackling Fraud: Where to Start?

A company will have different vulnerabilities by the very nature of its day-to-day business. Fraud is motivated by human greed. A company's customers, employees, contractors, professional advisors, shareholders and/or non-connected third parties all pose varying threat levels. Avaricious individuals will target a company's assets, including; cash in the bank and in hand, equipment and physical property, staff, intellectual property and customer data. A determined fraudster will find a way to exploit a company to their personal gain.

Following a risk assessment, the correct practices and procedures can be implemented to reduce the risk of fraud. It is not possible to prevent fraud entirely. Any process should include an ongoing strategy to identify new frauds and how to respond to such a threat. Staff should be trained regularly to identify and respond quickly and efficiently to any risk of fraud.

Investigating Fraud: Best Practice

All fraud leaves a trail to follow. Over the past 20 years, we've seen a seismic shift from a paper-based environment to the creation and storage of terabytes of increasingly more unstructured electronic data within organisations. The key to detecting, identifying, preventing further losses

and recovery is the ability to analyse the data connected with the fraud quickly and efficiently.

It cannot be understated how important it is to instruct companies who are trained and experienced at completing fraud investigations at the earliest opportunity, any delay will drastically reduce the effectiveness to respond to the threat.

A traditional investigation would involve reviewing material on a document-by-document basis to identify the relevant information. With millions of electronic documents this is a long and cumbersome process.

The Role of Artificial Intelligence

Artificial intelligence (AI), in the form of digital forensic services is overcoming this issue and driving significant change in the fight against fraud. AI can do in minutes what a human would take days if not weeks to complete, at a fraction of the cost.

Relating to company data, there are three key phases in any fraud investigation: (1) recovery, (2) extraction and (3) interpretation. The likely source of the data is identified; servers, desktop computers, laptops, mobile phones and physical files. A forensic image is taken from the identified source(s). If the threat is internal this can be achieved discreetly. Suspected individuals are not 'tipped off' and the integrity of the data is maintained. For physical documents, these documents will be scanned, uploaded and converted into digital documents.

The data collected will be uploaded onto the digital forensic platform. A number of tools are then used to ensure that data is in a searchable form and that duplicates and irrelevant data are removed. The data is analysed to identify patterns within the data to see if there is any deletion or corruption of the data. Even attempts to delete data are indicative that somebody is trying to hide their behaviour. In certain situations this data can be recovered or a report produced detailing exactly what data has been lost, when and why.

A core set of data is then made available to search by highly trained individuals. The latest platforms enable vast amounts of data to be efficiently interrogated to investigate and evidence the fraud, including by identifying key people and applying key date and word searches. This vastly reduces the amount of data to be reviewed, producing it in a very structured and easy to review form. During the review, the AI built into the platform will learn and continue to reduce the data to remove irrelevant material, augmenting the human element in the process.

By maintaining the integrity of the data it can be used as evidence in future court proceedings against the individuals involved. The data can be analysed to prevent the same frauds repeating themselves and so the company can implement more effective fraud prevention strategies.

Artificial intelligence is a vital component to complement the fight against fraud. Effective use of technology results in a far quicker and more cost-effective solution than more traditional investigative approaches.

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A Beginner's Guide to Inquiries and Investigations

In public and commercial situations there is an almost infinite variety of inquiries or investigations that might be carried out when something has, or is perceived to have, gone wrong. It is important that the facts giving rise to this situation be determined as accurately as possible, and for lessons to be learned that might prevent any repetition.

Public and Judicial Inquiries

At one end of the scale there are public or judicial inquires such as those which have been completed relatively recently into Bloody Sunday (Lord Saville) and the Iraq War (Sir John Chilcot) and those currently underway into child sexual abuse and Grenfell. This type of inquiry will only be initiated by a Government Minister in circumstances where the event(s) have caused or are capable of causing public concern. Such an inquiry generally receives huge publicity but can often take many years to complete and can cost many millions of pounds.

Private Inquiries

At the other end of the scale, there are private inquiries that are deliberately kept far away from the limelight and the public will never be aware of them. This type of inquiry might be initiated where there is an allegation or suspicion of misconduct by a director or senior executive of a company and it's expected that it would be completed in days rather than weeks and at modest cost or, in the case of an employee grievance, by the complainant's line manager. Employee manuals may well include a time limit of just a few days for a grievance to be investigated.

Variations

In between these extremes there are a very large number of variations. There are, for example, numerous planning inquiries running at any one time, some lasting less than a day and others involving major infrastructure projects such as an airport extension lasting years.

Powers and Processes

The Inquiries Act 2005 gives the Tribunal in a major public inquiry a set of wide-ranging powers to compel the production of documents and the attendance of witnesses. A solicitor undertaking a private inquiry or investigation into an employee grievance, for example, would have no such powers but it is very surprising what can be achieved on a voluntary basis. The investigator/inquisitor would need to be provided with terms of reference setting out what he or she is required to investigate which might incorporate a time limit for completing the investigation and whether recommendations are expected.

There is no set procedure for such an investigation. Generally, the investigator/inquisitor would be provided with details of the complaint and whatever documentation might be available. He/she would then ordinarily interview the person who is the subject of the complaint and get his/her side of the story. After that, it would be a question of gathering and considering whatever evidence is available before reaching any conclusions and writing a report incorporating the findings.

Devonshires is involved in all types of inquiries, with expertise representing interested parties in a major public inquiry such as the soldiers involved in Bloody Sunday through to conducting an inquiry or investigation into internal issues where speed confidentiality and discretion may well be paramount considerations.

For further information or advice on inquiries and investigations, and how Devonshires may be able to assist you, please contact:

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Case Law Round Up - Litigants in Person

In March 2018, Sir Terence Etherton identified that permission to appeal applications made by litigants in person ("LiPs") in the civil division of the Court of Appeal stood at 42% of all applications for the 12 months ending 31 January 2018. Given that nearly half of all Court of Appeal matters now involve LiPs, it is important for both represented parties and potential LiPs to be aware of the latest developments concerning their treatment by the courts.

Generally, represented parties should take into account their opponent's unrepresented status, for example by preparing trial bundles when the burden would normally fall on the LiP. This is not likely to change. However recent decisions show that LiPs are not able to blame non-compliance with important legal provisions merely on their unrepresented status.

The most important decision of the year so far is that in Barton v Wright Hassall LLP [2018] UKSC 12. In this case, an LiP issued a claim form and elected to serve this on the defendant himself. On the last day prior to the deadline for service of the claim form, the claimant emailed the defendant's solicitors, attaching the claim form by way of service.

However he had not obtained permission from them to serve the claim form electronically, and he was subsequently informed that as they had not indicated that they would accept service by email, the claim form had expired and the action was now statute-barred. The claimant made an application for an order validating service retrospectively, and this proceeded to the highest appellate court.

The Supreme Court found that, although in the current climate of cuts to legal aid acting as a LiP was not always by choice, "it will not usually justify applying to litigants in person a lower standard of compliance with rules or orders of the court". The Civil Procedure Rules provide a framework within which to balance the interests of both sides, and if a LiP was entitled to greater indulgence in complying with

these rules then this would affect that balance. Unless the rules in question were "particularly inaccessible or obscure", a LiP should familiarise himself with any relevant rules which apply. The rules in this instance were not inaccessible or obscure, and so the claimant's appeal was dismissed.

Interestingly, the Supreme Court also stated that although the defendant's solicitors could have warned the claimant that they did not accept service by email, they were under no duty to do so.

Similarly, in Reynard v Fox [2018] EWHC 443 (Ch), the claimant argued that because he was an LiP, it would be unjust for his claim to be struck out because it had not been brought under the correct provision, as he did not have a detailed knowledge of insolvency regulations. However the judge determined that none of the rules in question were "hard to find, difficult to understand or … ambiguous", and the claimant was an intelligent litigant who had learned a great deal about insolvency law and procedure. Accordingly, no injustice arose merely due to the claimant's status as a LiP.

The position was further considered in EDF Energy Customers Ltd v Re-Energized Ltd [2018] EWHC 652 (Ch), in which the defendant company's director appeared on its behalf.

In considering whether the LiP should have been allowed to adduce arguments at a hearing of a winding-up petition which he had already made during an application for an injunction which had been dismissed, the judge emphasised that the LiP was not the only party to consider, and that delays and lack of finality impacted on the represented party and the courts as well. It would not be right to allow a party to act in person at first instance, and if the result went against them, to allow them to appeal with legal representation and present the same arguments again, or arguments which could have been made but which were not.

The judge derived the following principles from existing case law:

1. There is a general duty on tribunals to assist litigants, depending on the circumstances, but it is for the tribunal to decide what this duty requires in any particular case and how best to fulfil it, whilst remaining impartial.

2. The fact that a litigant is acting in person is not in itself a reason to disapply procedural rules or orders or directions, or excuse non-compliance with them.

3. The granting of a special indulgence to a litigant in person may be justified where a rule is hard to find or it is difficult to understand, or it is ambiguous.

4. There may be some leeway given to a litigant in person at the margins when the court is considering relief from sanctions or promptness in applying to set aside an order.

Accordingly, it appears that LiPs will only be able to rely on the 'excuse' of being a LiP in limited circumstances. They should take care to ensure they are familiar with all relevant steps in the litigation, or face the consequences. Represented parties should be mindful of the level of assistance that they are expected to provide to assist the Court and their opponent when they are dealing with an LiP.

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Cryptocurrency Fraud is Rising and so is Litigation

Cryptocurrency fraud is rising and becoming increasingly more sophisticated, risking the loss of potentially huge gains and triggering litigation claims.As highlighted by a case we are working on, even FCA regulated FX traders can scam investors looking to profit from selling their Bitcoins.

About the Case

Devonshires has been instructed by a private investor who has been scammed by an FCA regulated FX trader during the sale of £1 million of Bitcoins. We have since obtained, what we believe to be, the first Bitcoin freezing injunction in the UK courts.

Our client wanted to capitalise on their recent Bitcoin gains and use the proceeds to purchase a London property. Given the daily volatility of a Bitcoin's value, the client wanted to instruct a specialist broker who could maximise the price obtained.

Following a recommendation, an FCA regulated broker was selected and due diligence carried out. The company had been trading for a number of years, there was no obvious bad press, and a number of successful test transactions were completed.

On the day of the transaction, the broker provided a forecasted sale price less its commissions. The client was

satisfied with the price, so transferred the Bitcoins into the broker's e-wallet and the broker then purported to sell the Bitcoins. However, the sale proceeds were never transferred to the client despite numerous reassurances by the broker.

We immediately obtained a freezing injunction in the UK courts over the assets of the company and the assets of its director and ultimate beneficial owner; this included any Bitcoins. Devonshires instructed Quintel Intelligence Limited, a specialist forensic intelligence company, to assist with tracing the Bitcoins, the proceeds of sale and the assets of the director and ultimate beneficial owner.

Freezing Injunctions: The Legal Bit

The legal test to obtain a freezing injunction is well established and the court will exercise its discretion to grant a freezing order only where it considers it just and convenient to do so. The following conditions must be established by the applicant:

- A cause of action, that is, an underlying legal or equitable right.
- A good arguable case.
- Assets within the jurisdiction.
- A real risk of the respondent's assets being dissipated.

In doing so, the applicant has an onerous duty to give full and frank disclosure of all facts even if these are detrimental to the applicant's claim. A cross undertaking in damages must be given and if an applicant does not have sufficient assets in the UK, the court will order fortification in the form of a bank guarantee, a payment into court or an undertaking by the applicant's solicitors for such sums as the court orders.

Any delays in this process could increase the risk of the funds being dissipated and the court may be less likely to grant the application.

A freezing order prevents the sale or dealing of any assets, but does not provide any security over the assets. Legal proceedings are therefore necessary to obtain an order from the court which can then be used in enforcement proceedings to recover any sums owing.

What to do if you've been scammed

Individuals or owners of companies who are concerned that the sale and/or purchase of Bitcoins or other cryptocurrencies has been compromised should seek immediate legal advice.

As soon as there is any suspicion of foul play, assets can be frozen the same day (or night) which will increase the likelihood of recovery.

For further information or advice on cryptocurrency fraud and litigation, please contact David Pack:

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Work Highlights

Complex IT Disputes Settled

We have recently settled two complex IT disputes for a social housing provider. In both cases, as is common to lots of IT disputes, the IT suppliers had failed to provide the promised service on time and in accordance with the specification. The settlements allowed our client to walk away from suppliers who were not meeting their needs and contracts that were absorbing a lot of management time so that they could move forward with new suppliers. Philip Barden and Nikki Bowker acted on these matters.

Banking Error Resolved

In July 2018, we were approached by a very concerned client who had in error sent a payment of several hundreds of thousands of pounds to the wrong bank account details. The payment had not automatically bounced back and the client had no knowledge of where the funds were, or whether possible fraudsters had obtained the money. Within a few hours of being instructed we were able to locate where the funds were being held, obtain confirmation from the bank holding the funds that they were held securely by the bank and that the monies were being sent back to our client. Nikki Bowker acted on this matter.

The First CVA For the Social Housing Sector

Also in July 2018, we acted for First Priority Housing Association (FPHA) in successfully entering into a Company Voluntary Arrangement (CVA). This is the first to have been done in the regulated social housing sector.

In February 2018, FPHA was deemed by the Regulator of Social Housing to be failing to meet the required finance and governance standards for social housing providers. As landlords began to transfer their properties away from FPHA to other housing associations, FPHA was under increasing pressure from its remaining creditors to get its finances onto a sustainable footing and demonstrate its ability to continue trading, or face liquidation.

The agreement of the CVA by FPHA's creditors meant that FPHA could continue operating and providing supported accommodation to its tenants, many of whom are vulnerable adults with complex needs. As this was the first such agreement to be secured in the social housing sphere, there was a high level of interest from the housing trade press. Jim Varley acted on this matter, in conjunction with our Corporate team.

Client Acquittal

In May 2018, we defended an elderly individual charged with a series of historic criminal offences before the Crown Court. At the conclusion of the complex five week trial, our client was acquitted and awarded a Defence Costs Order.

The case threw up a number of issues including inadequate disclosure by the Crown Prosecution Service and a dearth of witness testimony available to the Defendant. It also highlights the team's expertise in criminal, as well as civil and commercial, matters. Philip Barden, Matthew Garbutt, Sam Moodey and Courtney William-Jones acted on this matter.

Commercial Litigation Seminar Programme 2018/19

Devonshires Commercial Litigation Team is pleased to present the 2018/19 Commercial Litigation seminar programme.

Fraud & Corruption Update

07 November 2018

Half day session with drinks and networking

Alternate Dispute Resolution

15 January 2019

Breakfast Briefing

Devonshires IT Seminar: The Complete Guide to Procurement, Outsourcing, Data Security and Disputes

21 February 2019

Half day session with drinks and networking

Devonshires 2019/20 Seminar Programme will be available shortly.

Devonshires produce a wide range of briefings and legal updates for clients as well as running comprehensive seminar programmes.

If you would like to receive legal updates and seminar invitations please visit our website on the link below.

https://www.devonshires.com/join-mailing-list/

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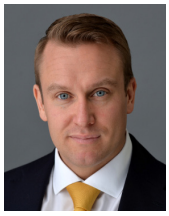

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