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CAUSE OR OCCASION? CLIENT MONEY ACCOUNT FRAUD AND TRADING LOSSES

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INTRODUCTION

Directors dipping into a client account to meet trade creditors is plainly a breach of duty, but it does not follow that they must answer for everything that afterwards befalls the company. In *Next Generation Holdings Limited and Ambon Brokers Limited v Finch and Finch* [2026] EWCA Civ 1015 (Bean, Peter Jackson and Snowden LJJ), directors (father and son) took £3,510,000 from the client money accounts of an FCA-authorised insurance broker over six years and falsified its books to conceal the fact. The Court of Appeal nonetheless held that they were not liable for the company's trading losses. Those losses were occasioned by the fraud; they were not caused by it. The distinction reduced the award by £598,994 — and would have cost the company a good deal more had the same reasoning not also relieved it of the obligation to give credit for the £2,847,038 realised on the sale of its business.

The judgment repays attention for three reasons:

1. It confirms, at Court of Appeal level and after *BTI 2014 LLC v Sequana SA* [2022] UKSC 25, that directors owe no duty to prevent their company trading at a loss or while insolvent.

2. It applies the *Galoo* distinction between cause and occasion to the tort of unlawful means conspiracy and to equitable compensation for breach of fiduciary duty.

3. It is a pointed reminder that the loss must follow the breach of duty pleaded.

THE FACTS

AFL Insurance Brokers Limited (subsequently changed its name to Ambon Brokers) ("AFL") was an FCA-authorised wholesale insurance broker. It placed risks in the Lloyd's market for retail brokers, received premium, deducted its commission and remitted the net premium to insurers. It was bound by Chapter 5 of the FCA's Client Assets Sourcebook ("CASS 5"): client money was to be held on trust in accounts segregated from the company's own money (with onerous regular reconciliation and audit requirements).

Between August 2011 and September 2017 the directors caused money to be drawn from the client money accounts to meet AFL's expenses and trading losses. Together with AFL's then chief financial officer, they entered false income accruals in the accounting records so as to generate fictitious surpluses on the client money calculations and conceal the drawings. The Judge below found that AFL was insolvent on both a balance-sheet and a cash-flow basis from at least 30 June 2014, when the false accruals stood at £700,000, and that by September 2017 the deficit on the client money accounts had reached £3,510,000.

On 14 September 2017 one of the directors sold their 58% shareholding in AFL to Next Generation Holdings Limited ("NGHL") for £2,119,900. The Judge found the sale to have been induced by fraudulent misrepresentation — principally a spreadsheet built upon the false accruals — and that warranties as to AFL's accounts and its regulatory compliance had been given in the knowledge that they were untrue. New management arrived and the false accruals ceased. In ignorance of the fraud, AFL raised substantial new equity between 2018 and 2020 to expand. The fraud was discovered in April 2020. AFL then raised a further £3.64m and borrowed £1m to restore the client money accounts, before entering a solvent wind-down and selling the principal parts of its business.

THE DECISION BELOW

HHJ Johns KC (sitting as a deputy High Court Judge) found the directors liable to NGHL in deceit and for breach of warranty, and liable to AFL for breaches of their duty under section 172(1) of the Companies Act 2006 and in unlawful means conspiracy. NGHL got judgment for £3,216,836.31, representing its post-acquisition recapitalisation of AFL. AFL obtained judgment for £6,124,430.02, of which £7,114,167 comprised trading losses in three tranches: £2,810,000 for the period to the share sale (the client money deficit being used as a "proxy", less the £700,000 of accruals subsisting at 30 June 2014); £2,663,513 to 29 December 2018; and £1,640,654 net over 2019 to 2021. To that were added preference share interest, the costs of the £1 million loan and the costs of run-off, and against it a credit of £2,847,038 realised on the sale of the business.

Causation, the Judge observed, had received "only modest attention" at the three-week trial. He approached it by analogy with the wrongful trading authorities — *Re Continental Assurance Co of London plc* [2007] 2 BCLC 287 at [378] and *Re Brian D Pierson (Contractors) Ltd* [2001] 1 BCLC 275 — and concluded that the connection was sufficient: the wrongdoing was a cause of the loss and not merely the occasion for it.

Newey LJ granted permission on a single ground: that the Judge had erred in holding AFL's trading losses to have been caused by the directors' fraud. The appeal therefore engaged £7,114,167 of the award to AFL and left the award to NGHL untouched.

IDENTIFYING THE BREACH

Snowden LJ began where any causation analysis must: with a precise identification of the pleaded duty broken. First, it was never alleged that the directors had breached their duties in the commercial management of the broking business; it was loss-making for reasons of its own. Secondly, they had not misapplied any asset of AFL: what was taken belonged to AFL's clients. The breach of fiduciary duty was the wrongful taking of client money in breach of trust to discharge AFL's expenses and liabilities, and the unlawful means underlying the conspiracy were that misappropriation together with the false accounting employed to conceal it.

That mattered because the Judge's language — that the directors had caused AFL to build up huge trading losses and had combined in causing AFL to trade at a loss — suggested that he may have treated loss-making or insolvent trading as itself a breach of duty or as unlawful means. If so, Snowden LJ held, that was wrong. Directors owe no duty, without more, to prevent their company trading at a loss or while insolvent: *Secretary of State for Trade and Industry v Gash* [1997] 1 WLR 407 at 414D–F. Nor did *Sequana* create one. The section 172 duty is modified once directors know or ought to know that the company is insolvent or that insolvency is imminent, so that the interests of the general body of creditors must be weighed and, where an insolvent liquidation or administration is inevitable, treated as paramount; but nothing in the reasoning of the majority imposes an obligation to stop trading (see Lord Briggs at [120] and [174], and Lord Hodge at [238]). Nor is it unlawful for directors to trade in the circumstances described in section 214 of the Insolvency Act 1986. That section imposes no duty at all: it confers a discretionary power on the court to order a contribution to the assets of a company which has gone into insolvent liquidation or insolvent administration — which AFL never did. Critically (and surprisingly) there was neither a pleading nor a finding of a *Sequana*-type failure to have regard to creditors' interests. The irony, not lost on the Court, was that the precise object of the fraud was to ensure that AFL's trade creditors and expenses were paid, albeit with other trust monies.

CAUSATION: CAUSE AND OCCASION

Turning to causation, Snowden LJ took as his starting point Lord Hoffmann's speech in *South Australia Asset Management Corp v York Montague Ltd* [1997] AC 191 (*SAAMCO*) at 212G–213D: rules making a wrongdoer liable for all the consequences of his conduct are exceptional and require special justification; normally the law limits liability to those consequences attributable to that which made the act wrongful. To the same effect is Lord Sumption in *Hughes-Holland v BPE Solicitors* [2018] AC 599 at [20]: that the loss would not have been suffered but for the breach is generally a necessary condition of recovery, but it has never been a sufficient one, and the law distinguishes between a mere precondition or occasion for a loss and an act which gives rise to a liability to make it good (relying on *Galoo*

Ltd v Bright Grahame Murray [1994] 1 WLR 1360). *Galoo* was the closest analogue: negligently prepared accounts concealed the company's true position and so allowed it to continue trading, but, as Glidewell LJ held, the auditors' negligence gave the opportunity for the trading losses; in law it did not cause them. Snowden LJ held there was no reason why that approach should not apply equally to the tort of unlawful means conspiracy.

A structurally similar, though not identical, approach governs claims for equitable compensation for breaches of fiduciary duty which do not involve a misapplication of trust property: *AIB Group (UK) plc v Mark Redler & Co* [2015] AC 1503 at [135]–[136] — the loss must flow directly from the breach and be attributable to it. The inquiry is therefore into the nature of the breach and its connection with the postulated consequence.

APPLICATION TO THE FACTS

On the pre-sale losses, the Court of Appeal held that the causal relationship ran in the opposite direction to that supposed below. AFL's trading losses arose in the ordinary course of transactions with clients and counterparties. It was the directors' response to those losses that was wrongful. What the misappropriation directly caused was AFL's own liability, as trustee, to restore the fund at its own expense. That liability of £3,510,000 was the loss; the Judge should have awarded it as such, rather than deploying the hole in the client account as an indirect proxy for something else.

On the post-sale losses, there was no further misappropriation; the company was under new management. The continued concealment of the earlier fraud was a further breach of duty, but it merely provided the opportunity for the underlying business to generate losses (and profits) by continuing to trade rather than being shut down. That was *Galoo* territory. The same test then operated in AFL's favour. Whether or not the 2021 sale of parts of the business would have occurred but for the fraud, it did not flow directly from it and was not attributable to it; no credit for the £2,847,038 therefore fell to be given. Nor was it relevant that the shareholders had chosen to invest and raise money to enable AFL to meet its liability to restore the client money accounts rather than to let the company fall into an insolvency process.

The result was that £3,668,135 was substituted for the £7,114,167 awarded in respect of trading losses, the credit of £2,847,038 was removed, and the award to AFL was reduced by a net £598,994 to £5,525,436.02. NGHL's £3,216,836.31 stood. Peter Jackson and Bean LJJ agreed.

TAKE-HOME MESSAGES

- **"Trading while insolvent" is not a cause of action:** it is neither a breach of section 172(1) nor unlawful means. Section 214 of the Insolvency Act 1986 imposes no duty, and is unavailable altogether unless the company enters insolvent liquidation or insolvent administration.

- **Plead the duty, then the loss:** the scope of recoverable loss is disciplined by the content of the obligation broken.

- ***Galoo*** travels: the distinction between cause and occasion applies expressly to unlawful means conspiracy and to claims for compensation for breach of fiduciary duty. Concealment that merely permits a business to continue trading does not cause the results of that trading.

- **Causation deserves more than modest attention:** over a three-week trial such was the view of the trial judge; the appeal demonstrates why that was ill-advised.

- **Causation cuts both ways:** the defendants' success on causation deprived them of a credit worth £2.85 million; before advancing a causation defence, model the consequences for the credits and set-offs on which the wider defence relies.

- **If a *Sequana* claim is intended, plead it:** it was not pleaded here, and it ought to have been.

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