

Inferring fraud

How willing is the Court to accept inferences when pleading fraud,
because the victim may not know any or many of the facts?
How strong should the case be before starting out?

Steven Thompson QC
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The problem with fraud

- What is fraud? Why is it hard to prove?
- Bribery, forgery, cheating, lying, theft, conversion, deceit, misappropriation, accessory liability, knowing receipt, dishonest assistance, fraudulent trading, conspiracy
- Hard to conceive of a fraud without dishonesty but deception, not dishonesty, is usually the touchstone
 - *Kensington International v Congo* [2008] 1 WLR
 - Abuse of position, wrongful withholding of information, secret actions
- A hidden act – or at least a hidden intention or plan

All in the mind

- Deceit and dishonesty – a state of mind
 - Lying impossible to prove?
 - *Angus v Clifford* [1891] 2 Ch 449
- Lying and recklessness
- Lying a turning a blind eye
 - Lord Blackburn in *Jones v Gordon* (1877) 2 App Cas 616
 - *Manifest Shipping v Uni-Polaris Insurance Co* [2003] 1 AC 469

When?

- Fraud is usually a process not an event
 - mortgage frauds, exceeding limits, covering up mistakes (Nick Leeson), Ponzi schemes (Bernie Madoff), house of cards
- Fraud drags you in
- One-off frauds: fraudulent conveyancers, insurance claims

Victims

- Common targets:
 - Banks (mortgage fraud, loan applications)
 - Employers (admin and account department staff)
 - Clients and investors
 - Companies and creditors (fraudulent trading, insolvency)
 - Banks you happen to own – the Russian and Kazakh cases (BTA, Alliance Bank, National Bank Trust)
 - Insurance companies – policies and claims
 - Public authorities – corrupt politicians and oil companies
 - Partners and friends – revenge fraud
 - Members of the public and little old ladies

The knowledge and ignorance of the victim

- Nature of fraud that the victim is deceived – ignorant at the time
- State of knowledge depends on the fraud and the victim
- Third parties, management oversight, audits, whistleblowers
- How ignorant?
 - What could you have spotted? Barings and Mr Baker
 - Negligence, embarrassment – banks and big companies: HSBC and Mr Brown
 - ‘Internal’ fraud – company directors and owners
 - Victims who rarely check – insurance companies
- Investigations and discoveries
 - Timing issues – for freezing order applications
 - When do you know enough? Continuum from ignorance to certainty
 - Paranoia and overkill

Inherent likely and unlikely things

- *Re H (Minors)* [1996] AC 563, *Re B (Children)* [2009] 1 AC 11
 - Seriousness of the allegation: fraud is usually less likely than negligence
 - Cogency of evidence
 - One standard of proof in civil cases: balance of probabilities
 - No connection between seriousness and probability
 - Depends on the context – fact specific
- *Bank St Petersburg v Arkhangelsky* [2020] 4 WLR 55
 - Test is NOT facts “consistent only with a fraud”, “incapable of innocent explanation”, or having “no plausible innocent explanation”, “benign explanations which are not implausible”

How the Court finds fraud

- Finding fraud in a case against a fraudster or against a third party?
- Documents, witnesses, expert evidence
- Judges' thought processes...
 - Capacity – could they do that?
 - Common sense – what would one expect?
 - Statistical analysis – what are the chances?
 - Inferences – what does this imply?
 - Motive – why would they do that?
 - What is missing?
 - Are the inferences reasonable?
 - Was there an opportunity to answer the allegation, not taken up
- Genuine belief in a falsehood: *Ivey v Genting Casinos* [2018] AC 391

How the Court finds fraud

- Commercial fraud and documentation in the modern world
 - *“We would expect the Court to require strong corroborative evidence...usually in the form of contemporaneous documents” (United Trading Corpn v Allied Arab Bank [1985] 2 Lloyd’s Rep 554)*
- *The Ocean Frost* [1985] 3 WLR 640, Robert Goff LJ – testing credibility of witnesses against document
- *Bank St Petersburg v Arkhangelsky* [2020] 4 WLR 55
 - Not necessary to exclude every possibility of innocent explanation
 - Standing back and considering effects and implications of facts in the round
- *“only realistic inference to draw is that of fraud” – United Trading*
- Bad defences...are easy to undermine
 - stupidity, lack of attention to detail, “aw shucks”, “just following orders”

Inferences from the lack of evidence

- Silence and a duty to speak – different standards for different people
- Expectation and opportunity to speak
- Missing documents
 - What is missing? Are the gaps and absences explicable?
 - Documents which should have been retained and disclosed
 - Before and after any dispute arises: CPR PD 31B, para 7 and PD 51U paras 3, 4 (duty to retain suspending document deletion processes; telling staff, agents, third parties)
- Destruction with intent: *The Ophelia* [1916] 2 AC 206
- Modern and ephemeral communications – emails, WhatsApp, texts, Shapchat: easy to delete, hard to erase

Missing witnesses

- Dragging a crook to court to confess
- The crook's own word – his cronies, family and friends
- Third parties with no interest in the dispute
- *Prest v Prest* [2013] 2 AC 415, *R v Inland Revenue Comrs ex parte TC Coombs & Co* [1991] 2 AC 283, *Wisniewski v Central Manchester HA* [1998] PIQR 324
 - Converting silence into proof
 - Adverse inferences from the absence or silence of a witness
 - Must be an expectation that the witness would give evidence
 - Difficulty with multi-jurisdictional cases
- *Property Alliance Group v Royal Bank of Scotland* [2018] 1 WLR 3529, CA
 - “No litigant is obliged to call witnesses to satisfy the curiosity or enthusiasm of his opponent”
 - “The fact that a party who might be expected to produce witnesses does not do so may sometimes speak volumes but it is a matter for the judge to decide whether it does so in a particular case.”

Expert evidence

- Handwriting experts
- Document experts
- Metadata and electronic experts
- Expert evidence is just evidence

Different tests at different stages

- Different defendants (the fraudster himself, negligent overseers, assisters and recipients)
- Satisfying the lawyers: is it arguable? Can it be pleaded and alleged?
- Ex parte hearings
 - Full and frank disclosure AND fair presentation
- Interim hearings
 - Is it seriously arguable that the defendant was deceitful?
- Freezing orders
 - Good arguable case on the merits
- Trial
 - More likely than not – *Re B (Children)* [2009] 1 AC 11
- Appeals
 - No new evidence
 - Appealing against judge's inferences – the totality of the evidence: *Bank St Petersburg v Arkhangelsky* [2020] 4 WLR 55
 - Delay in judgments – reviews and transcripts

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