

## CIVIL FRAUD

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1. Fraud cases have a mystique because they involve someone doing something which is deliberately wrong and trying to get away with it. Often there is a witness where the question is whether he is a bold liar or might be telling the truth. These cases can also be from events long ago. The rules on limitation periods are generous when it comes to proving a fraud. Fraud cases can involve key questions of fact. I have been asked to address how do you tell whether to go ahead with a fraud case. The question I have been asked can be compared to that asked to a gynaecologist at the beginning of a pregnancy. What matters then is whether it is to be expected that there will be a healthy baby at birth.
2. Fraud must be expressly and specifically<sup>1</sup> pleaded. There must be relevant particulars where the court is to be asked to draw an inference, setting out the facts alleged from which the inference is to be drawn. Those particulars do not have to be conclusive that the conduct is fraudulent as alleged but must at that stage an inference of dishonesty is more likely than one of innocence or negligence, there must be some fact 'which tilts the balance and justifies an inference of dishonesty'<sup>2</sup>. A defendant is entitled to know the case he has to meet.
3. There is a professional responsibility not to plead fraud unless there is a proper case. This is of particularly heavy responsibility where the contemplated defendant is a professional or someone of good reputation. The Bar Professional Conduct Rules "... requirement is not that counsel should necessarily have before him evidence in admissible form but that he should have material of such a character as to lead responsible counsel to conclude that serious allegations should properly be based upon it.": *Medcalf v Mardell* [2003] 1 A.C. 120 at [22]. This can include consideration of what evidence may emerge.

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<sup>1</sup> CPR 16 PD 8.2 (i).

<sup>2</sup> *JSC Bank of Moscow v. Kekhman & Ors*, [2015] EWHC 3073 (Comm) at [20]; followed in *Saleem Mukhtar v Mohammed Saleem* [2018] EWHC 1729 (QB).

4. Whether fraud is proved is decided by the judge at the end of the trial.
  
5. There is then the possibility of an appeal- has the judge produced a judgment which will withstand scrutiny? The legal rules governing assessment of findings of fact on appeal are relevant to two questions on an appeal: (1) has the the trial judge made a mistake? Has he given sufficient reasons? Has he failed to have regard to part of the evidence? (2) Should the CA interfere? These questions are not necessarily sequential.
  
6. At Court of Appeal level, the trial has already taken place. There are constraints on adducing new evidence. There are constraints on interfering with findings of fact. This is because (i) a judge will have had the advantage of hearing the witnesses which is not reproduced on transcripts and (ii) an appeal involves looking at great detail on particular points and the CA is less able to stand back having heard all of the whole and decide a case on all that has happened at the trial. It is both microscopic and telescopic. The CA may be able to decide not to interfere because the question and material are such that the CA will not second guess the judge.
  
7. The rules on factual issues on appeals are geared to both how cases are decided at first instance and limited communication through a transcript.
  
8. Question (1) is relevant to a lawyer because he is trying to look forward to what the position is at the moment the judge gives judgment. At that stage there is only an embryo of a case- and it may be affected by what happens between then and birth, by what evidence is adduced and what is not, and what may become a key question in the future. A new piece of evidence may emerge, a witness may appear or disappear, a lie may become apparent. Part of the lawyer's job is to advise on evidence.
  
9. The trial judge gives judgment by reference to the state of the case at the moment the judgment is delivered. In practice this will almost invariable the same as its state at the conclusion of submissions. There are also constraints on what new material can be produced during a trial. Disclosure should be complete long beforehand, and witness statements and

expert reports exchanged. As the lawyer approaches the trial a clearer picture begins to form. But fraud has to be clearly and distinctly pleaded. It can be pleaded without having at that stage the evidence to prove it. But no-one likes to start a fraud claim without a proper foundation or at least the real prospect of having evidence to support it. On this the lawyer looks with a telescope and possibly as a prophet.

10. Fraud embraces criminal law and civil law and has no single universal definition. The burden of proof is upon the person alleging fraud.

#### The Burden of Proof the Standard of Proof and Issues

11. The standard of proof is balance of probabilities. The legal burden rests upon the person who asserts it. It does not change. But circumstances may exist such that absent contrary evidence the fact will be proved. An example is where a ship sets sail on a calm sea and within a short time sinks for no apparent reason. This can raise an inference that it was not seaworthy. Sometimes this is called a presumption and that the evidentiary burden of proof has shifted.
12. A key question is what are the issues? This depends on the pleadings. Sometimes there is more than one key issue. For example in a claim brought in deceit, the claimant has to prove the statement was made, was false and was made with the requisite intent, deliberate untruth or reckless as to the truth. Each of these is an issue. These are the “principal” facts. Facts relevant to their determination can be called “evidentiary” facts because they are relevant evidence to the principal fact which is in issue. An example is provided by a case on scuttling. There the issue is whether the vessel has been deliberately sunk, and there may be a further issue of whether this was done with the participation of the owner or was only the act of one or more crew members.
13. Sometimes there is in substance only one issue with the other contested issues depending on it; if a collision was staged the falsity of the claim and the intent are proved.
14. Issue by Issue: The probability test has to be applied separately issue by issue. One does not get proof of one evidentiary fact on balance of probabilities, and proof of another

and another on balance of probabilities and then conclude because of the findings that on the fact in issue that is necessarily proved on the balance of probabilities.

### The Totality Rule

15. Totality of the evidence/the story as a whole: In doing so the judge must look to the totality of the evidence relevant to the particular issue: *The Olympia* (1924) 19 Ll L Rep 255 at p. 257 per the Earl of Birkenhead. The rule requires that at the trial all issues or principal facts are determined simultaneously.
16. A consequence of the totality rule is that the cumulative effect of events of odd behaviour raising some suspicion may support a finding of fraud when each individual event taken on its own would not prove fraud: *The Atlantik Confidence* [2016] 1 Lloyd's Reports 525 at [299].

### Inability to decide an issue.

17. Refuge in the burden of proof based on inability to decide an issue one way or the other: this is possible but is only permissible as a refuge of last resort, in exceptional cases, when the court must give reasons for its inability to decide the issue. The court must strive to make a finding one way or the other and show in its reasoning that it has done so: *Stephens v Cannon* [2005] EWCA Civ 222 (where at first instance the master had not found a market value and given judgment for the lower of two figures given by the respective valuation experts, rejecting a higher figure based on burden of proof, and a new trial was ordered); *Aquarius Financial Enterprises Inc v Lloyd's Underwriters (The Delphine)* [2001] 2 Ll. Rep. 542 at [16-19] commenting that court will "obviously be reluctant to arrive at such a conclusion and in practice it very rarely happens. Indeed, it is noteworthy that even in such an unusual case as [*Rhesa Shipping Co SA v Edmunds*] (*The Popi M*) [1985] 1 WLR 948 distinguished judges were divided as to the correct result, and the decision of the House of Lords has itself been criticised."

### The Court of Appeal

18. Properly Reasoned Judgment is required on the facts: In the judgment proper reasons must be given to show the CA that the totality of the evidence has been taken into account, and care has been taken by the judge to do so. Where there is apparently compelling

evidence inconsistent with the judge's findings Fairness requires that it is addressed in the judge's reasons: *Simetra Global Assets v Ikon Finance* [2019] 4 WLR 112. Contemporary documents are important to the facts, including motive and state of mind. A retrial was ordered by CA when the first instance judgment was only 13 pages, after a 13 day Commercial Court trial on issues of dishonesty, and that judgment failed to address many of the issues which arose at trial, its conclusions were cursory, its reasoning limited, and it failed properly to analyse the witness and documentary evidence on a number of critical issues.

19. Factual appeals: On appeal it must be shown the judge has made an error, for example he misunderstood the issue in a material respect, or misunderstood the evidence, or that he failed to take the totality of the evidence into account, or that he arrived at a conclusion which the totality of the evidence could not support. "There is a world of difference between the impression which evidence makes on a judge who has followed it as it was deployed and the impression that an appellate court derives from cold transcript.": *Volcafe Ltd v Cia Sud Americana de Vapores SA (trading as CSAV)* [2019] A.C. 358; *Thomas v Thomas* [1947] A.C. 484.
20. Demeanour: Judges should be cautious in placing excessive weight on the demeanour of a witness alone. That may be about to change. In Cardinal Pell's case his conviction rested entirely on the evidence of a single choir boy aged 13 at the time of the alleged sexual offences who was giving evidence many years later. That evidence was played to the jury by video. The issue of reasonable doubt in a case where there is no case put forward of lying or fantasy and when despite the years there is no possibility of mistake or mis-recollection is the central issue. Lord Devlin has cautioned against the assessment of evidence by demeanour. An example is given by the legacy of Sir Bernard Spilsbury . Always immaculately attired, clearly spoken and adamant on the scientific conclusions. But is that caution to be applied when there is no possibility of mistaken identity or whether the events took place?
21. Demeanour alone: The judge's view based on demeanour must be tested by him by reference to the other evidence in the case and will be assessed on appeal on that basis: The

Michael [1983] 2 Ll. Rep 1 at p.12. Robert Goff LJ in *Armagas Ltd v Mundogas SA (The "Ocean Frost")*<sup>3</sup>

“Speaking from my own experience I have found it essential in cases of fraud, when considering the credibility of witnesses, always to test their veracity by reference to the objective facts proved independently of their testimony, in particular by reference to the documents in the case, and also to pay particular regard to their motives and to the overall probabilities. It is frequently very difficult to tell whether a witness is telling the truth or not; and where there is a conflict of evidence such as there was in the present case, reference to the objective facts and documents, to the witnesses’ motives and to the overall probabilities can be of very great assistance to a judge in ascertaining the truth.”

### Dishonesty

22. Fraud is a generic expression having different specific meaning according to its context. A man cheating at Baccharat under s. 42 of the Gambling Act 2005 may be said to act fraudulently but there is no requirement under that Act that the conduct must be dishonest: *Ivey v Genting Casinos UK Ltd (t/a Crockfords Club* [2018] A.C. 391. Fraud cases all involve proof of intent. Normally intent is an inference.
23. They may also require proof of dishonesty. The Crockfords test involves a finding of subjective knowledge and intent, and then application of an objective dishonesty test to that state of mind. A man cannot say that his personal view was that conduct was dishonest if the reasonable man would have regarded it as dishonest. On this it matters not whether he knew or not what would have been the opinion of a reasonable man.

### Proof of Fraud

24. Co-incidences: the cumulative effect of multiple co-incidences needed for an innocent explanation, point to fraud: *National Justice Compania Naviera SA v Prudential Assurance Co Ltd (The Ikarian Reefer) (No.2)* [2000] 1 WLR 603.
25. Proof of dishonesty of a person on another matter unconnected with the claim: “It is a long step from deceiving a bank to scuttling a ship”: *The Michael* [1979] 2 Ll. Rep. 1 at p. 21 RHC 9 rejecting the probative value in a case of an alleged scuttling of proving that an individual had deceived Danish tax authorities.

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<sup>3</sup> [1985] 1 Lloyd’s Rep 1 at 56–57 (which contains a fuller report than that in [1986] A.C. 717.)

26. Not calling a witness: is an adverse inference to be drawn?: Wisniewski v Central Manchester Health Authority [1998] PIQR P324 at p.14:
- (i) Unless it can be shown that the witness was in a position to give material evidence additional to that before the court, then no adverse inference should be drawn<sup>4</sup>.
  - (ii) If a witness could be called by either party no adverse inference should be drawn.
  - (iii) If the reason for the witness's absence or silence satisfies the court, then no such adverse inference may be drawn. If, on the other hand, there is some credible explanation given, even if it is not wholly satisfactory, the potentially detrimental effect of his/her absence or silence may be reduced or nullified.
  - (iv) An inference alone from not calling a witness can only go to supporting other evidence and cannot prove the case on its own.
27. Failure to Cross-examine: This is a rule about fairness. A person is not at liberty not to ask a witness for an explanation so that his evidence is not available on a point, and then rely on that point in argument without the relevant evidence.
28. Lies by a witness or a party: Relevant lies may be told pre-action in the investigation phase or later. Were the lies told to "mask guilt or fortify innocence"; see *R v Lucas* [1981] QB 720 at p.724, *The Grecia Express* [2002] 2 Lloyd's Reports 88 at p.119 col.2 ; *The Atlantik Confidence* [2016] 1 Lloyd's Reports 525 at [30, 301]
29. Improbable innocent explanation for conduct or events can point towards fraud: *Aquarius Financial Enterprises Inc v Lloyd's Underwriters (The Delphine)* [2001] 2 Ll. Rep. 542 at [160] (very remote possibility of a nut securing a high pressure fuel line becoming loose spontaneously by vibration resulting in total disconnection of the nut).
30. Cumulative abnormal or unreasonable conduct can point towards fraud: this includes breaking from a normal pattern of behaviour, or doing something not to be expected unless there was an underlying fraud. An example is taking a ship off route into deep water before it sinks and hiding that this had been done: *The Atlantik Confidence* [2016] 1 Lloyd's Reports 525 at [298]

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<sup>4</sup> *Manzi v King's College Hospital NHS Foundation Trust* [2018] EWCA Civ 1882 at [30]

31. Absence of disclosure which ought to have been made: Can be very relevant to proof of mis-conduct: *Aktieselskabet De Dansk v Bajamar Compania Naviera S.A. (The Torenia)* [1983] 2 Ll. Rep. 210 at pp. 227-228 (where if the missing correspondence had been produced there was “a strong probability” that it would have revealed material highly damaging to the defendant’s case).
32. The negligent or incompetent fraudster: a person may in carrying out a fraud expose himself to physical harm or take an unnecessary risk of discovery. “In these matters I suppose you must take some risks”. “There is no primer or guide to scuttling”: *The Atlantik Confidence* [2016] 1 Lloyd's Reports 525 at [306]. There is no text book for how to carry out a fraud.
33. Motive where proved can support a conclusion of fraud: *The Atlantik Confidence* [2016] 1 Lloyd's Reports 525 at [314] (The owner had lied about the destination of the insurance proceeds and his companies were in real financial difficulties); *Aquarius Financial Enterprises Inc v Lloyd’s Underwriters (The Delphine)* [2001] 2 Ll. Rep. 542 (vessel significantly over insured).