



CIVIL FRAUD – BACK TO BASICS

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What is “Commercial Fraud”?

1. The main title of the Guildhall Chambers Commercial Team Seminar 2012 is “Commercial Fraud”. If that title suggests a field of legal endeavour which is a thing apart, a distinct area of practice and analysis, then it may prove too much. Fraud, wrote Sir Rupert Cross, is “one of those irritating words that seems more technical than it really is”.¹ According to Lord MacNaghten in *Reddaway v Banham*:²

“[F]raud is infinite in variety. Sometimes it is audacious and unblushing; sometimes it pays a sort of homage to virtue, and then it is modest and retiring; it would be honesty itself if it could only afford it.”

2. His Lordship was echoing the sentiments of Lord Hardwicke in a letter to Lord Kames of 30th June 1759,³ that:

“Fraud is infinite, and were a court once to ... define strictly the species of evidences of it, the jurisdiction would be cramped, and perpetually eluded by new schemes which the fertility of man’s invention would contrive.”

3. Take, for instance, the recently-reported *Weavering Capital (UK) Ltd v Peterson*⁴, which might be thought an illustration *avant la lettre* of the wisdom of Lord Hardwicke’s remarks in the 1750s. The managing director of the Claimant company (now in liquidation) had incorporated two hedge fund entities managed by the company, one of which (A) he caused, or appeared to cause, to enter into over-the-counter options and swaps with the other. When an unusual volume of redemption requests were made to A, it was discovered that the fund did not have the money to satisfy them and that its asset-value was massively inflated. It turned out that, among many other things, the swaps had been consistently and deliberately mis-valued, swaps documentation was consciously backdated to suggest that transactions which never eventuated had in fact taken place and that the risks as represented in A’s offering memorandum and due diligence questionnaires painted a wholly different picture of the viability of the trades that investors were invited to back. Fundamentally, the purpose of the swaps was to massage A’s accounts in order to create the impression of a successful fund. The book was well and truly thrown at the primary fraudster, the managing director, who was found liable (i) in the tort of deceit, and (ii) for breach of his fiduciary duties to the company, and (iii) for a series of transactions defrauding creditors under s.423 of the Insolvency Act 1986.
4. As *Weavering Capital* illustrates, English law does not recognise a single cause of action known as civil, or commercial, fraud. Instead what might be described as “fraud actions” covers a multitude of claims operating at common law and in equity, requiring distinct elements to be pleaded and proved and attracting a variety of defences. Claims involving what lawyers loosely call “fraud” include claims in fraudulent misrepresentation or deceit, the economic torts of conspiracy and inducing breach of contract, bribery, certain breaches of fiduciary duty and claims founded on secondary liability for breach of trust in dishonest assistance and knowing receipt, as well as claims for wrongful or fraudulent trading and for transactions defrauding creditors made in the context of the Insolvency Act 1986. Critically, what a criminal lawyer might call the *mens rea* involved in each claim differs, sometimes substantially.
5. Thus to a lawyer the answer to the question posed in the sub-heading introducing this paper, “What is ‘Commercial Fraud’?”, can only be: it depends on what you need to prove.

¹ “The Theft Bill I: Theft and Deception” [1966] Crim LR 415 at 416

² [1896] AC 199 at 221

³ Cited in Holdsworth, “A History of English Law (1972), vol 12, at 262

⁴ [2012] EWHC 1480 (Ch)



6. For reasons of space and time, and with a view to considering the legal, practical and ethical issues arising out of claims involving allegations of fraud, this paper will initially analyse two of the most commonly-encountered pleas of commercial fraud: claims for fraudulent misrepresentation or in the tort of deceit and for secondary liability for breach of trust.

Deceit / Fraudulent Misrepresentation

7. It goes without saying that a claim in deceit carries special forensic, professional and practical difficulties. Forensically, even allowing for the special meaning of “fraud” in the context of deceit to encompass recklessness (see below), proof of a subjective mental state is necessary. Solicitors and Counsel have a particular professional responsibility when considering whether to allege fraud (again, see below). Practically, and certainly in less than clear-cut cases, an allegation of fraud as distinct from mere carelessness will almost always up the ante in a case, leading to a greater degree of hostility and antagonism.⁵
8. Given those special difficulties, it might well be asked whether a Claimant who has an otherwise good case in misrepresentation needs to go so far as to plead a case in fraud. Where a duty of care can be made out, negligent misstatement might provide a more suitable cause of action; where a contract has been entered into between representor and representee, the Claimant might in most cases just as well rely on the Misrepresentation Act 1967 – the measure of loss under that Act is the same as the measure in fraud,⁶ and once the Claimant proves that a misrepresentation was made s.2(1) of that Act provides for a shift in the burden of proof to the Defendant to show that he had reasonable grounds to believe that his statement was true.
9. A properly pleaded and supportable claim in deceit does, however, have a number of particular benefits when compared to the alternative causes of action which might present themselves to a Claimant:
 - (a) A claim under the Misrepresentation Act 1967 requires that the representee and representor entered into a contract. It is by no means always the case that the innocent victim of a misrepresentation enters into a contract with the representor directly;⁷
 - (b) Where an action is brought in deceit, the Claimant benefits from the more generous limitation period provided by s.32 of the Limitation Act 1980: where the action is based on the fraud of the Defendant, the relevant limitation period does not start running until the Claimant has discovered the fraud or could with reasonable diligence have discovered it. By way of contrast, the High Court has recently held definitively (and at last) that the limitation period for claims under the Misrepresentation Act 1967 must be brought within 6 years of the date on which the misrepresentation was made, or on which the Claimant first suffered loss;⁸
 - (c) Contributory negligence is no defence to a claim in deceit.⁹ It is, however, a defence to a claim founded on negligence brought under s.2(1) of the Misrepresentation Act 1967;¹⁰
 - (d) Limitation and exclusion clauses will generally not be effective in a fraud claim;¹¹ and
 - (e) As compared to a claim at common law for negligent misstatement, the measure of damages is more expansive. In *Doyle v Olby (Ironmongers) Ltd*,¹² the Court of Appeal held

⁵ Not, of course, that this is necessarily a bad thing, but it is a factor which ought tactically to be borne in mind.

⁶ *Royscott Trust v Rogerson* [1991] 2 QB 297

⁷ For instance, in *Osteopathic Education and Research Ltd v Purfleet Office Systems Ltd* [2010] EWHC 1801 (QB), the Defendant had fraudulently persuaded the Claimant to enter into a series of leasing contracts with third party finance houses. It was those leases which caused the Claimant's loss (and indeed the Defendant's profits). The Misrepresentation Act 1967 would not have helped the Claimant.

⁸ *Green v Eadie* [2012] Ch 363

⁹ *Alliance and Leicester BS v Edgestop Ltd* [1993] 1 WLR 1462

¹⁰ *Gran Gelato Ltd v Richcliff (Group) Ltd* [1992] Ch 560

¹¹ *Pearson v Dublin Corp* [1907] AC 351



that the Claimant is entitled to damages for any such loss which flows from the Defendant's deceit, even if it was not reasonably foreseeable. However, it is worth remembering that even in a fraud case, the Claimant must mitigate its loss – though the court is more favourable to the Claimant once fraud is established, the normal rules as to the quantum are not discarded entirely.

10. Assuming there is a benefit, or a need, to bring the claim in the tort of deceit, to sustain such a cause, a Claimant must establish that:
 - (a) The Defendant made a statement of fact. This apparently simple condition has proved one of the more complex in its analysis. A statement of “fact” may in certain circumstances include (i) a statement of present intention,¹³ and (ii) a statement of opinion where the relevant “fact” represented is that the Defendant holds the opinion.¹⁴ As in all species of misrepresentation, a “statement” of fact in a claim in deceit may be implied from words or conduct, although the court will be astute to ensure that the relevant representation is clearly identified,¹⁵ and generally a claim in misrepresentation will not lie for a failure to disclose facts unless there is a duty to disclose them¹⁶ or where it is possible to construe an express or implied statement by the Defendant as implying certain other facts which would be misleading unless the statement is amplified or corrected.¹⁷ In *Peek v Gurney*,¹⁸ Lord Cairns said that “there must be some active misstatement of fact, or, in all events, such a partial and fragmentary statement of fact, as that withholding of that which is not stated makes that which is stated absolutely false”;
 - (b) The statement was false. For obvious reasons, this tends to prevent few analytical difficulties once the relevant statement is clearly identified;
 - (c) The Defendant's state of mind was dishonest. This is analysed below;
 - (d) The Defendant intended the Claimant (whether specifically¹⁹ or as a member of a class²⁰) to rely upon the statement.²¹ In fraud claims, this is imperative. It is suggested that where fraud is alleged the Claimant must prove an actual intention that the Claimant (or a class of persons to which the Claimant belongs) should rely, not merely that it was reasonably foreseeable that he will or may rely, on the statement;²²

¹² [1969] 2 QB 158, approved by the House of Lords in *Smith New Court Securities Ltd v Scrimgeour Vickers (Asset Management) Ltd* [1997] AC 254

¹³ *Edgington v Fitzmaurice* (1885) 29 ChD 459, where it was said that one's state of mind is as much a “fact” as the state of one's digestion.

¹⁴ *AIC Ltd v ITS Testing Services (UK) Ltd (The Kriti Palm)* [2007] 1 All ER (Comm) 667. A statement of law is not a representation of fact per se, although a “mixed” statement of fact and law will suffice to found liability – not forensically an easy distinction to draw. Although where a misstatement of law is made it is “in nineteen cases out of twenty, made by a person who does not know the law any better than the person to whom it is made”, a deliberate or wilful misstatement of law will, or will probably, amount to a misrepresentation: *West London Commercial Bank v Kitson* (1884) 13 QBD 360 at 362-363. *Derry v Peek* (1889) 14 App Cas 337 may provide an early instance of a mixed statement of fact and law. The directors of the Plymouth, Devonport and Stonehouse Tramway Company sought subscriptions for shares by way of a prospectus which suggested that the relevant Act had granted them the right to use steam power instead of horses to power the company's trams; the Act in fact provided that the Board of Trade may grant a power licence; the Claimant subscribed for shares; the Board of Trade refused the licence; and the company was wound up. The statement in the prospectus was considered by most of the judges to be a statement of fact: it was a statement of absolute right and not (which would have been true) of conditional right. Interestingly, Lord Fitzgerald in the House of Lords disagreed (although his judgment is not a formal dissent): the Act did, he felt, provide a right to use steam, but those rights were not exercisable until the Board of Trade had consented to their use.

¹⁵ *Contex Drouzhba Ltd v Wiseman* [2008] BCC 301; *Lindsay v O'Loughnane* [2012] BCC 153

¹⁶ See e.g. *Smith v Hughes* (1871) LR 6 QB 597

¹⁷ In *Goldsmith v Rodger* [1962] 2 Lloyd's Rep 249, the Defendant purchaser informed the seller that a yacht's keel had rot in it. This implied that the Defendant had inspected it, and that that inspection had revealed rot. That representation, inferred from the positive statement, was untrue.

¹⁸ (1873) LR 6 HL 377 at 403

¹⁹ In the sense that the statement was directed to the Claimant or was intended to be transmitted to the Claimant.

²⁰ *Abu Dhabi Investment Co v H Clarkson Ltd* [2008] EWCA Civ 699. “The precise identity of the Claimant need not be known when the false representation is made, provided that he belongs to a class of persons within the contemplation of the Defendant as likely and intended to be deceived by the misrepresentation”: [33]

²¹ *Mead v Babington* [2007] EWCA Civ 518. It has been suggested that this is one of the factors which sets a claim in deceit apart from, for instance, a claim in tort of negligent misstatement where the test is one of reasonable foreseeability: see *Chitty on Contracts* (30th edition) at 6-030.

²² As is noted in *Chitty* (above), the authorities are not entirely clear. *Halsbury's Laws of England* (2003 edition) Vol.31 suggests at para.770 that the intention may be “presumed” on proof of the making of a statement that the representor must (i.e. objectively) have foreseen would probably produce the effect on the representee that it did. To the extent that this proposes a



- (e) The Claimant did in fact rely upon the statement (or was induced to act in a particular way by the statement). Rather unsurprisingly, the Claimant must actually have known of the statement and have been influenced to act by it. However, the point demands slightly more analysis. Once it is established that the misrepresentation was made fraudulently (see below), it is *rebuttably* presumed that the Claimant was induced to act by it.²³ It is enough that the statement was *one* of the factors which induced the Claimant to act, generally by entering into a contract; it need not be the *only* factor.²⁴ Analytically, the Claimant does not need to establish that his reliance on the statement was “reasonable” (although forensically it will be more difficult to establish reliance in fact where his reliance was unreasonable); and
- (f) The Claimant was thereby caused financial loss.
11. In the context of the tort of deceit, what is the relevant “dishonest state of mind”? The *locus classicus* is still the speech of Lord Herschell in *Derry v Peek*.²⁵
- “First, in order to sustain an action in deceit, there must be proof of fraud and nothing short of that will suffice. Secondly, fraud is proved when it is shown that a false representation has been made (i) knowingly, (ii) without belief in its truth, or (iii) recklessly, careless whether it be true or false. Although I have treated the second as distinct cases, I think the third is but an instance of the second, for one who makes a statement under such circumstances can have no real belief in the truth of what he states. To prevent a false statement being fraudulent, there must, I think, always be an honest belief in its truth. And this probably covers the whole ground, for one who knowingly alleges that which is false, has obviously no such honest belief. Thirdly, if fraud be proved, the motive of the person guilty of it is immaterial. It matters not that there was no intention to cheat or injure the person to whom the statement was made.”*
12. The Defendant’s *motive* in making the representation is irrelevant; “If fraud be established it is immaterial that there was no intention to cheat or injure the person to whom the false statement was made”.²⁶ By the same token, a laudable motive is no defence if the constituent mental element is proved.²⁷
13. What constitutes *actual* knowledge was analysed by Devlin J in *Armstrong v Strain*.²⁸
- “A man may be said to know a fact when once he has been told it and pigeon-holed it somewhere in his brain where it is more or less accessible in case of need. In another sense of the word a man knows a fact only when he is fully conscious of it. For an action of deceit there must be knowledge in the narrower sense; and conscious knowledge of falsity must always amount to wickedness and dishonesty. When Judges say, therefore, that wickedness and dishonesty must be present, they are not requiring a new ingredient for the tort of deceit so much as describing the sort of knowledge which is necessary.”*
14. But it is not necessary that to prove deceit, the Claimant must establish that the Defendant *actually* knew the statement to be untrue. A lack of belief in its truth, or recklessness as to whether the statement is true or false, will suffice. What links each element of Lord Herschell’s formula is not making a statement known to be false, but making a statement not believed to be true.
15. This is obviously not, however, to say that a *negligent* state of mind will suffice. Reckless disregard for the truth is a state of mind and so requires subjective analysis; whether a person

common sense approach to the evidence, rather than comprises a statement of a legal presumption, it is submitted that it is correct.

²³ *Goose v Wilson Sandford* [2001] Lloyds Rep PN 189

²⁴ *Edgington v Fitzmaurice* (above)

²⁵ [1886-90] All ER Rep 1at 376

²⁶ *Bradford Third Benefit BS v Borders* [1941] 2 All ER 205, followed in *Ludsin Overseas Ltd v Eco3 Capital Ltd* [2012] EWHC 1980 (Ch)

²⁷ In *Polhill v Walter* (1832) 3 B&Ad 114, the Defendant endorsed a bill of exchange in an attempt to be helpful; held: that was no defence.

²⁸ [1951] 1 TLR 856 at 871



is negligent – even grossly negligent²⁹ - is measured objectively against the standards of the reasonable man. This much was emphasised by Bowen LJ in *Angus v Clifford*:³⁰

*“Not caring, in that context, did not mean not taking care, it meant indifference to the truth, the moral obliquity of which consists in a wilful disregard of the importance of truth, and unless you keep it clear that this is the true meaning of the term, you are constantly in danger of confusing the evidence from which the inference of dishonesty in the mind may be drawn – evidence which consists in a great many cases of gross want of caution – with the inference of fraud, or of dishonesty itself, which has to be drawn after you have weighed all the evidence.”*³¹

16. For all the highfalutin morality espoused in the authorities, running a deceit case based on “reckless disregard for the truth” presents special problems of evidence. Interestingly in this regard, immediately after the famous passage from Lord Herschell’s speech in *Derry v Peek* cited above, he went on to say that there are many cases “where the fact that an alleged belief was destitute of all reasonable foundations would suffice of itself to convince a court that it was not really entertained, and that the representation was a fraudulent one.” Lack of reason may be evidence of lack of reality.

Breach of trust / fiduciary duty

17. In a commercial context, fraud may arise due to the commission of a breach of trust and/or a breach of fiduciary duty.
18. Equity imposes special duties upon persons who are held to owe a fiduciary relationship to another. A fundamental principle of equity is that a person who owes duties of a fiduciary nature to another may not place himself in a situation where he has, or can have, a personal interest conflicting, or which may possibly conflict, with the interests of the person to whom he owes a fiduciary duty³².
19. The principle extends not only to the relationship between trustee and beneficiary, but to all kinds of fiduciary relationships where a real conflict of duty and interest occurs; it is not dependent on fraud or absence of good faith³³.
20. Of course, as a precursor to any allegation that a breach of fiduciary duty has occurred, it is necessary to identify whether or not the nature of the relationship between the relevant parties is one which gives rise to a fiduciary duty in the first place. Mentioned above is the example relationship between trustee and beneficiary: by way of further examples, an agent owes a fiduciary duty to his principal; a company director owes a fiduciary duty to the company of which she, or he, is a director³⁴; and a solicitor owes a fiduciary duty to his client³⁵.
21. However, misconceptions abound as to the types of relationship which may give rise to a fiduciary relationship. It is commonly pleaded (still³⁶) in payment protection insurance (“PPI”) mis-selling cases that a bank or financial institution which sold PPI to a customer owed the customer a fiduciary duty. Similarly, there is a widespread misapprehension that the relationship between banker and customer is one which, in the normal course, gives rise to a fiduciary duty.
22. The classic description of fiduciary duty was set down by the Court of Appeal in *Bristol & West Building Society v Mothew*³⁷:

²⁹ See *The Kriti Palm* (above) at 256.

³⁰ [1891] 2 Ch 449 at 471.

³¹ In *The Kriti Palm* (above) at 257 Rix LJ described recklessness as “a species of dishonest knowledge”.

³² See for example, *Boulting v Association of Cinematograph, Television and Allied Technicians* [1963] 1 All ER 716, CA.

³³ *Boulting v Association of Cinematograph, Television and Allied Technicians* [1963] 1 All ER 716, CA, at 729, per Upjohn LJ.

³⁴ *Horcal Ltd v Gatland* [1983] BCLC 60; affirmed by the Court of Appeal – [1984] BCLC 549 CA.

³⁵ See *Halsburys Laws of England*, Legal Professions, Volume 66, (2009) Paragraph 814 et seq.

³⁶ Despite the judgments handed down in *Harrison & Anor v Black Horse Limited* [2011] EWCA Civ 1128; and in *Barnes v Black Horse Limited* [2011] EWHC 1416 Q.B.

³⁷ [1996] 4 All ER 698, per Millett, LJ at 711j – 712b.



“A fiduciary is someone who has undertaken to act for or on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence. The distinguishing obligation of a fiduciary is the obligation of loyalty. The principal is entitled to the single-minded loyalty of his fiduciary. This core liability has several facets. A fiduciary must act in good faith; he must not make a profit out of his trust; he must not place himself in a position where his duty and his interest may conflict; he may not act for his own benefit or the benefit of a third person without the informed consent of his principal. This is not intended to be an exhaustive list, but it is sufficient to indicate the nature of fiduciary obligations. They are the defining characteristics of the fiduciary.”

23. A fiduciary is required to exercise caution, because as a fiduciary, he cannot even place himself in a position where his personal interest might possibly conflict with his fiduciary duty, in circumstances where a reasonable person would think that there was a real and sensible possibility of conflict.
24. A more nuanced situation may arise where, in relation to a particular transaction, a fiduciary owes non-fiduciary duties in respect of the relevant transaction. Obviously, it follows that if there is no non-fiduciary duty (and no fiduciary duty) in the circumstances, a conflict between duty and interest cannot arise. Nevertheless, if a fiduciary has a personal interest in a transaction which conflicts with his non-fiduciary duty, the fiduciary “puts himself in such a position that he has a temptation not faithfully to perform his duty to his employer”³⁸.
25. Further, a fiduciary can be in breach of the fiduciary conflict rule even though his or her conduct actually benefits the fiduciary's principal. Similarly, the fairness or otherwise of the transaction is generally not a relevant consideration, and it is not relevant whether any gain by the fiduciary was one that the principal could or could not have obtained for him or herself. The honesty or otherwise of the fiduciary is also irrelevant: a breach of fiduciary duty 'may be attended with perfect good faith'.
26. If the first signifier of a fiduciary duty is loyalty, the second major signifier of a fiduciary duty is the 'profit rule'. A fiduciary will be in breach of his or her fiduciary duty if the fiduciary makes a profit by reason or by virtue of the fiduciary office or otherwise within the scope of that fiduciary office. A fiduciary is required “to account for any benefit or gain obtained or received by reason of or by use of his fiduciary position or of opportunity or knowledge resulting from it”³⁹. The fiduciary's honesty is no defence; the rule is not dependent on fraud or bad faith or whether the actions of the fiduciary were clandestine.
27. It is irrelevant whether the principal could have obtained the profit for him or herself; it is irrelevant whether the fiduciary's conduct has caused any loss to the principal. Indeed, the fiduciary can still be required to account even though he acted in good faith and avowedly in the interests of his principal⁴⁰. The 'no profit' rule is dependent on the mere fact of the profit being made.

Consent to a conflict of duty and interest

28. In certain circumstances, a possible conflict between fiduciary duty and personal interest may be waived or consented to by a relevant party. In commercial transactions for example, directors are routinely required to declare their personal interests in any transactions in which the company of which they are a director is interested or otherwise contemplating participation⁴¹.
29. The rules applicable to the circumstances in which a conflict between duty and interest can be authorised may be summarised as follows⁴²:

³⁸ *Snell's Equity*, 32nd Edition, at paragraph 7 - 018.

³⁹ *Snell's Equity*, 32nd Edition, at paragraph 7 - 041.

⁴⁰ *Snell's Equity*, paragraph 7 - 041.

⁴¹ Such declaration of interests is a statutory requirement pursuant to s.177 Companies Act 2006 (and consider further the provisions of s.41 Companies Act 2006).

⁴² *Snell's Equity*, paragraph 7-019



“The fiduciary conflict rule has few exceptions. However, 'a person occupying a fiduciary position will be absolved from liability for what would otherwise be a breach of duty by obtaining a fully informed consent'. Such consent may have been obtained at the outset from the person who created the fiduciary relationship, or it can be obtained from the fiduciary's principal, or from the court. Company directors can seek authorisation to act with a conflict between duty and interest from the other directors.

Fiduciaries are not generally obliged to make full disclosure and seek consent. Rather, the fundamental obligation is to desist from acting in a way that involves a conflict between duty and interest; disclosure and consent provide a mechanism by which the fiduciary can avoid liability if he wishes to act in such a situation.

However, it is a breach of statutory duty for a company director to fail to disclose any interest he has in a contract or proposed contract with the company, although this is not necessary where the other directors are already aware of the conflicting interest.

It has been said that a fiduciary is liable under the fiduciary conflict rule even if he was not aware of the conflicting interest, but this seems unnecessarily harsh and there is contrary authority. However, a fiduciary cannot avoid the effect of the rule where he has deliberately refrained from acquiring information about a conflicting interest, or where he ought, consistently with his professional duty, to have recognised the conflicting interest”.

Dishonest assistance in breach of fiduciary duty

30. Turning then to the issue of dishonest assistance, it is worth returning to the fundamental question posed above of 'what needs to be proved'? In order to bring a claim of dishonest assistance, the law requires four basic criteria to be fulfilled:

- (a) the existence of a fiduciary relationship;
- (b) breach of the fiduciary duty which was causative of loss;
- (c) assistance of the breach; and
- (d) a dishonest state of mind.

31. The test of dishonesty was clearly established by the Privy Council in *Barlow Clowes v Eurotrust*⁴³. The Court of Appeal (Morritt C, Hughes and Leveson LJ) reviewed the applicable principles and authorities more recently in *Starglade Properties Ltd v Roland Nash*⁴⁴ and it is instructive to set out the analysis in full as follows:

“26 In *Twinsectra Ltd v Yardley*, [2002] 2 AC 164 . . . [t]he majority concluded that the test of dishonesty was a combination of an objective and subjective test. The combined test was described by Lord Hutton (p 172D) as one,

' . . . which requires that before there can be a finding of dishonesty it must be established that the Defendant's conduct was dishonest by the ordinary standards of reasonable and honest people and that he himself realised that by those standards his conduct was dishonest.'

27 This was explained by Lord Hutton, with whom the majority agreed, in paragraph 36 in these terms:

'It would be open to your Lordships to depart from the principle stated by Lord Nicholls that dishonesty is a necessary ingredient of accessory liability and to hold that knowledge is a sufficient ingredient. But the statement of that principle by Lord Nicholls has been widely regarded as clarifying this area of the law and, as he observed, the tide of authority in England has flowed strongly in favour of the test of dishonesty. Therefore I consider that the courts

⁴³ [2006] 1 WLR 1476.

⁴⁴ [2010] EWCA Civ 1314.



should continue to apply that test and that your Lordships should state that dishonesty requires knowledge by the Defendant that what he was doing would be regarded as dishonest by honest people, although he should not escape a finding of dishonesty because he sets his own standards of honesty and does not regard as dishonest what he knows would offend the normally accepted standards of honest conduct.'

28 There is no suggestion in any of the speeches in *Twinsectra Ltd v Yardley* that the standard of dishonesty is flexible or determined by anyone other than by the court on an objective basis having regard to the ingredients of the combined test explained by Lord Hutton.

29. In the third of the relevant authorities I have listed in paragraph 23 above, *Barlow Clowes Ltd v Eurotrust Ltd* [2006] 1 WLR 1476, the Privy Council accepted that (para 10):

'Although a dishonest state of mind is a subjective mental state, the standard by which the law determines whether it is dishonest is objective. If by ordinary standards a Defendant's mental state would be characterised as dishonest, it is irrelevant that the Defendant judges by different standards.'

It added:

'15 Their Lordships accept that there is an element of ambiguity in these remarks which may have encouraged a belief, expressed in some academic writing, that *Twinsectra* had departed from the law as previously understood and invited inquiry not merely into the Defendant's mental state about the nature of the transaction in which he was participating but also into his views about generally acceptable standards of honesty. But they do not consider that this is what Lord Hutton meant. The reference to 'what he knows would offend normally accepted standards of honest conduct' meant only that his knowledge of the transaction had to be such as to render his participation contrary to normally acceptable standards of honest conduct. It did not require that he should have had reflections about what those normally acceptable standards were.

16 Similarly in the speech of Lord Hoffmann, the statement (in para 20) that a dishonest state of mind meant 'consciousness that one is transgressing ordinary standards of honest behaviour' was in their Lordships' view intended to require consciousness of those elements of the transaction which make participation transgress ordinary standards of honest behaviour. It did not also to require him to have thought about what those standards were.

17 On the facts of *Twinsectra*, neither the judge who acquitted Mr Leach of dishonesty nor the House undertook any inquiry into the views of the Defendant solicitor Mr Leach about ordinary standards of honest behaviour. He had received on behalf of his client a payment from another solicitor whom he knew had given an undertaking to pay it to Mr Leach's client only for a particular use. But the other solicitor had paid the money to Mr Leach without requiring any undertaking. The judge found that he was not dishonest because he honestly believed that the undertaking did not, so to speak, run with the money and that, as between him and his client, he held it for his client unconditionally. He was therefore bound to pay it upon his client's instructions without restriction on its use. The majority in the House of Lords considered that a solicitor who held this view of the law, even though he knew all the facts, was not by normal standards dishonest.'

There is no suggestion in this case either that the standard of dishonesty is flexible or determined by anyone other than by the court on an objective basis having regard to the ingredients of the combined test as explained by Lord Hutton in *Twinsectra* and Lord Hoffmann in *Barlow Clowes*."

32. It is important to note that whilst the assistance in any breach of fiduciary duty must be more than of minimal importance in procuring or assisting the breach of fiduciary duty, it is not necessary to show that the assistance itself was causative of the relevant loss⁴⁵.

⁴⁵ *Baden v Societe Generale* [1993] 1 WLR 509 at 574 – 575.



Causation in relation to breaches of fiduciary duty and dishonest assistance

33. In any claim for equitable compensation in respect of breach of fiduciary duty the usual rules as to causation will apply⁴⁶. Equitable compensation will only be available in respect of loss which is shown to have been caused by the breach of fiduciary duty.
34. In *Gwembe Valley Development Co Ltd v Koshy*⁴⁷, the Defendant – a company director - was held to have acted dishonestly in not disclosing his interest in a transaction with which the company was involved. Nevertheless, it was held that the director was not liable to pay equitable compensation on the basis that his breach of duty had not been proven to have caused loss to his company.
35. It follows that the Court will be required to determine what would have happened but for the relevant breach of fiduciary duty. This can involve consideration of how the principal would have acted if the fiduciary had not acted in breach of fiduciary duty. It is clear that compensation will not be recovered in circumstances where causation cannot be established and it can be shown that the principal would have acted in the same way even if the fiduciary had disclosed all the material facts.
36. The burden of proof rests with the principal or beneficiary to show that the breach of fiduciary duty caused the loss for which equitable compensation is claimed. It is incumbent on the principal to show that but for the breach, the principal (or beneficiary) would not have acted in the way which has caused the loss. If that burden of proof is discharged, the court may draw inferences (but cannot merely speculate) as to what would have happened if the fiduciary had performed his duty properly. In the absence of evidence to justify such inferences the beneficiary is entitled to be placed in the position he was in before the breach occurred, unless the fiduciary (on whom the onus will lie) is able to show what the principal (or beneficiary) would have done if there had been no breach of fiduciary duty.
37. In English cases, where the onus of proof has fallen on the Claimant, claims have generally failed not because the Claimant failed to show that he would have acted differently, but because it was clear from the evidence that he would not have acted differently⁴⁸.

Bribery

38. For the purposes of civil claims, English law casts a wide net in terms of what constitutes a bribe. 'Surreptitious payments' and 'secret commissions' are forms of bribery for the purposes of English law⁴⁹.
39. For example, a bribe will have been paid where:
 - (e) the person making the payment makes it to the agent of another person with whom he is dealing;
 - (f) he makes it to that person knowing that that person is acting as the agent of the other person with whom he is dealing; and
 - (g) he fails to disclose to the other person with whom he is dealing that he has made that payment to the person whom he knows to be the other person's agent.⁵⁰
40. Thus, a bribe is "a commission or other inducement which is given by a third party to an agent as such, and which is secret from his principal"⁵¹. When an agent receives or arranges to

⁴⁶ Although in *Swindle v Harrison* [1997] 4 ALL ER 705, Evans LJ suggested that a fiduciary may be unable to avail himself or herself of a defence based on causation where the relevant breach of fiduciary duty involved dishonesty or fraud. However, Tuckey LJ has since pointed out that neither Hobhouse LJ nor Mummery LJ appeared to accept Evans LJ's distinction between fraudulent and non-fraudulent breaches of fiduciary duty.

⁴⁷ [2001] EWCA Civ 1306.

⁴⁸ Snells Equity, 32nd Edition, 7 -059.

⁴⁹ *Fiona Trust & Holding Corporation v Yuri Privalov* [2010] EWHC 3199 (Comm), per Andrew Smith J, at paragraphs 70 – 73.

⁵⁰ *Industries & General Mortgage Co Ltd v Lewis* [1949] 2 All ER 573 at 575G.

⁵¹ *Anangel Atlas Compania Naviera SA v Ishikawajima-Harima Heavy Industries Co Ltd* [1990] 1 Lloyd's LR 166 at 169.



receive by way of a bribe or secret commission in the course of his agency from a person who deals or seeks to deal with his principal, the agent is liable to his principal jointly and severally with that person in restitution for the amount of the bribe or secret commission; or in tort for any loss suffered by the principal from entering into the transaction in respect of which the bribe or secret commission was given or promised. The bribe, if it was paid, is held on trust for the principal, and the person who pays or promises the bribe is also liable in restitution and damages to the principal⁵². The principal may also require either the agent or the briber to give an account of profits.

41. A Claimant does not need to show that a bribe was either paid or received dishonestly. For such purposes, if a bribe is paid, it is irrelevant whether either the payer or the recipient realised that they were doing wrong. In English law, corruption and fraud are presumed, and so a claim can be brought on the basis of the payment of a bribe, even where the payer and the recipient insist that the payment was 'innocent'⁵³.
42. A further presumption is that the briber, by paying the bribe, does so with the intention that the recipient agent would be influenced by it and that the result of payment was that the recipient was in fact induced to act in favour of the briber in relation to transactions between the briber and the recipient's principal⁵⁴. In common with the principles outlined above, if a bribe is paid to an agent, it is no defence to show that in fact the agent acted in his principal's best interests.
43. The principles outlined above bring us neatly back to the first principle of a fiduciary relationship: loyalty. A principal is entitled to be confident that the agent will act wholly in his interests and so, this is why the law offers such comprehensive protections where a bribe has been paid.
44. Accordingly, it is not necessary that a bribe is paid for some exclusive purpose or in connection with a specified transaction or series of transactions. It is possible for a conflict of interest to arise (the conflict between duty and interest) because a bribe or payment has been made to a recipient agent in an attempt to influence him or her generally. Payment of the bribe need not be referable to a specific transaction. If a secret payment is made to an agent, it taints future dealings between the principal and the person making it in which the agent acts for the principal or in which he is in a position to influence the principal's decisions, so long as the potential conflict of interest remains a real possibility⁵⁵.
45. Of course, some gifts or benefits are too small or insignificant to create even a possibility of a conflict of interest. The law recognises this and so, payments and gifts which are small are not treated as a bribe. In such a situation, whether or not a payment or commission is, or is not, a bribe will be a question of fact depending on the circumstances of each case. The test is whether the relevant payment is sufficient to create a 'real possibility' of a conflict between interest and duty⁵⁶. The test is not whether such a conflict is actually created.
46. If a payment is made to an agent that creates a real possibility of this kind, it does not make any difference whether the surreptitious profit was gained as a pure gift or for services rendered or for any other reason⁵⁷.

Practicalities

47. It goes without saying that, when fraud is in the air, a solicitor should immediately consider whether the circumstances justify seeking a freezing injunction or search order: a previous Guildhall Commercial Team seminar dealt exhaustively with the principles governing the grant of such relief, and accordingly no attempt will be made in this paper to repeat the guidance offered.⁵⁸ The following and final part of this paper concerns a number of other practical and

⁵² *Bowstead & Reynolds on Agency* (2010) 19th Edition at 6-084.

⁵³ *Re a debtor* [1927] 2 Ch 367 at 376 per Scrutton LJ.

⁵⁴ *Hovenden & Sons v Millhoff* (1900) 83 LT 41.

⁵⁵ *Daraydan Holdings v Solland* [2005] Ch 115 at para 132.

⁵⁶ *Imageview Management v Jack* [2009] 1 Lloyd's Rep 436 para 6 per Jacob LJ.

⁵⁷ *Keogh v Dalgety & Co Ltd* (1916) 22 CLR 402, 418.

⁵⁸ All of which is available on the Guildhall Chambers website www.guildhallchambers.co.uk.



professional issues arising in a claim in which fraud, bribery, dishonesty and/or conscious or deliberate misconduct are alleged:

- (a) Ethical issues affecting solicitors and barristers when making such allegations;
- (b) The likelihood of summary disposal of such claims from the perspective of Claimant and Defendant; and
- (c) Some further evidential issues.

The Ethical Issues

48. Version 5 of the SRA Code of Conduct contains the following guidance as to “indicative behaviour” at IB(5.7)(b):

“Acting in the following way(s) may tend to show that you have not achieved [the above] outcomes and therefore not complied with the Principles:

... drafting any documents relating to any proceedings containing ... (b) any allegation of fraud, unless you are instructed to do so and you have material which you reasonably believe shows, on the face of it, a case of fraud”.⁵⁹

49. Counsel, of course, is subject to a similar prohibition at para.704(c) of the Bar Code of Conduct:

“A barrister ... must not draft any statement of case, witness statement, affidavit, notice of appeal or other document⁶⁰ containing:

... (c) any allegation of fraud unless he has clear instructions to make such allegation and has before him reasonably credible material which as it stands establishes a prima facie case of fraud”.

50. For present purposes, there is unlikely to be any significant difference between the two formulations. To make, or to persist in, an allegation of fraud without having the material to justify it is an act of professional misconduct, and may result in disciplinary action by the regulator and, separately, a wasted costs order.

51. The rules of conduct might sometimes be thought to leave a legal representative in an difficult position, faced with a client which is insistent that it is the victim of a fraud and with a rule of conduct which requires an enhanced degree of satisfaction with the cogency of the material available to establish the allegation. There is a balance to be struck between (i) the need to protect Defendants from unfounded, improperly founded or insufficiently founded allegations, and (ii) the need to ensure that unnecessary obstacles are not put in the way of Claimants and their representatives raising proceedings promptly, accurately and with all properly arguable cases put as early as possible.⁶¹

52. The rules seek to achieve the balance by the imposition of an objective test when analysing the material available and considering whether it justifies an allegation of fraud or dishonesty: the solicitor must “reasonably” believe the material shows a case “on the face of it”; Counsel must have before him “reasonably credible material” which “as it stands” shows a prima facie case. The analysis of the material and the degree of confidence that it provides in support of a plea of dishonesty will differ depending upon the stage of the proceedings reached. In *Medcalf v Mardell*,⁶² the House of Lords heard an appeal by leading and junior Counsel against a wasted costs order made by the Court of Appeal in circumstances in which Counsel had made serious allegations of fraud against the Claimant both orally and in writing. Counsel argued that the

⁵⁹ The immediately following “indicative behaviour” goes on to provide that a solicitor ought not to draft any document suggesting that a person “is guilty of a crime, fraud or misconduct unless such allegations (a) go to a matter in issue which is material [to the client’s case]; and (b) appear to [the solicitor] to be supported by reasonable grounds.”

⁶⁰ Which encompasses anything from a letter settled for a “direct access” client to a skeleton argument.

⁶¹ See Lord Rodger in *Medcalf v Mardell* [2003] 1 AC 120 at 79.

⁶² *Supra*.



material on which their written allegations had been made was, although not admissible in evidence, sufficient objectively to support the position as drafted.

53. Lord Bingham said:

*“At the hearing stage, counsel cannot properly make or persist in an allegation which is unsupported by admissible evidence, since if there is not admissible evidence to support the allegation the court cannot be invited to find that it has been proved, and if the court cannot find that it has been proved the allegation should not be made or withdrawn. I would however agree with Wilson J [at first instance] that at the preparatory stage the requirement is not that counsel should 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 could properly be based upon it. I could not think, for example, that it would be professionally improper for counsel to plead allegations, however serious, based on the documented conclusions of a DTI inspector or a public inquiry, even though counsel had no access to the documents referred to and the findings in question were inadmissible hearsay.”*⁶³

54. Lord Rodger agreed, noting that “usually, the material before counsel will comprise evidence in admissible form, [but] something less can satisfy the requirements of the current rule, provided that it establishes a prima facie case of fraud.”⁶⁴

55. It is the earlier, pre-hearing stage that is likely to be more important for a solicitor considering whether he or she has material which objectively justifies an allegation of fraud or misconduct. It is noteworthy that there is nothing in the rules which requires the material to be in writing, although it goes without saying that contemporaneous written material will be likely to give rise to a significantly greater degree of confidence than the mere words and recollections of a potential Claimant.

56. When the material is sufficient to justify an allegation of fraud, and assuming that a plea of fraud serves some useful purpose in the litigation, the allegation must be clearly and expressly made. If for instance, as is overwhelmingly likely, the particular cause of action demands proof that the Defendant had knowledge of a particular fact or matter, a mere allegation that it “knew or ought to have known” it is not good enough: *Armitage v Nurse*.⁶⁵ That formulation (with the “or”) is consistent with innocence and not, or not only, with dishonesty.

57. Para.8.2 of the Practice Direction to Part 16 of the Civil Procedure Rules requires that, where a Claimant wishes to rely upon an allegation of fraud in its particulars of claim, it must specifically set it out. In *Seaton v Seddon*⁶⁶ it was argued that the phrasing of para.8.2 reflected a change in approach from the old Rules of the Supreme Court, such that it is no longer necessary to include particulars of the facts relied on in support of an allegation of dishonesty. The court roundly rejected this interpretation of the CPR, referring to Lord Hope’s dictum in *Three Rivers District Council v Bank of England (No 3)*⁶⁷ that:

“[13] ...as a general rule, the more serious the allegation of misconduct, the greater is the need for particulars to be given which explain the basis for the allegation. This is especially so where the allegation that is being made is of bad faith or dishonesty...

[15] Of course, the allegation of fraud, dishonesty or bad faith must be supported by particulars. The other party is entitled to notice of the particulars on which the allegation is based. If they are not capable of supporting the allegation, the allegation itself may be struck out.”

58. This is not only a question of fairness to the Defendant, but a question of what a court may properly find. Pleadings remain the basis upon which a party puts its case and answers the other’s. A Defendant’s honesty must be put in issue in order that a judge may properly make an

⁶³ At [22].

⁶⁴ At [79].

⁶⁵ [1998] Ch 241, per Millet LJ at 256-257.

⁶⁶ [2012] EWHC 735 (Ch).

⁶⁷ [2003] 2 AC 1.



evidential finding that he or she was indeed dishonest: *Co-operative (CWS) Ltd v International Computers Ltd*,⁶⁸ *Brewer v Mann*.⁶⁹

Summary Disposal of Fraud Cases

59. In practice, and unsurprisingly, it is unusual for a court to accede to an application for summary judgment under CPR Part 24 by a Claimant whose case depends upon making good an allegation of fraud or serious misconduct. In the recent case of *Stratford Coin & Bullion Inc v Henien*,⁷⁰ the Claimant sought summary judgment in its claim based in part upon conspiracy to defraud by the wrongful misappropriation of profit realised on the London metal market. Although Beatson J noted⁷¹ that the Defendants' case faced "very significant hurdles" and that he had concluded that it was "unlikely to succeed", he felt unable to grant summary judgment. Even though the Claimant had sought to "disengage its application from the serious dishonesty" pleaded, and to proceed on a less taxing course, "the very nature of the breaches of contract and breaches of fiduciary duty alleged involve[d] serious misconduct", the determination of which against the Defendants would "constitute a conclusion ... that the Defendants ... acted in a seriously improper way".⁷²
60. The Court of Appeal in *Wrexham AFC Ltd v Crucialmove Ltd*⁷³ explained the rationale for the additional caution that is demonstrated in summary judgment applications where an allegation of fraud, dishonesty or serious misconduct must be proven thus:
- "Experience teaches us that on occasion apparently overwhelming cases of fraud and dishonesty somehow inexplicably disintegrate. In short, oral testimony may show that some such cases are only tissue paper strong."
61. It may be thought that the reluctance to grant summary judgment is because of the difficulty in establishing, as required by CPR r.24.2(a)(ii), "that the Defendant has no real prospect of successfully defending the claim or issue". The tenor of Sir Igor Judge's judgment in *Esprit Telecoms UK Ltd v Fashion Gossip Ltd*,⁷⁴ however, suggests that as a matter of procedural jurisprudence CPR r.24.2(b) may be significant: i.e. that the allegation of fraud or dishonesty may provide a rare instance of a "compelling reason" why the case should be disposed of after consideration of the evidence at trial, notwithstanding (it must follow logically) that the court considers that the Defendant does not have a real prospect of success.⁷⁵
62. It is by no means the case that summary judgment will never be granted in a fraud case, merely that it will be more sparingly granted. *Wrexham AFC* was in fact a case in which the Court of Appeal upheld the order for summary judgment made by the first instance judge, because the basis on which the serious allegations were found established to the requisite standard derived from matters which were not in dispute or which were given in evidence by the alleged wrongdoer itself.
63. *Cheshire Building Society v Dunlop Haywards (DHL) Ltd*⁷⁶ provides another example. The case involved a lender's claim against a corporate valuer in deceit (the allegation involving fraudulent inflation of property valuations against the background of an unquestionably fraudulent series of bogus lease transactions by the borrowers), and the valuer's claim on the same basis against its director (who had carried out the valuation). In the applications for summary judgment in each claim by the respective Claimants, the only real issue was whether the director had had no real belief in the truth of what he had stated and was conscious of their falsity. David Steel J was content to grant summary judgment, since there were features of the valuation which were consistent only with dishonesty.⁷⁷ He fortified his conclusion by the absence of any record for

⁶⁸ [2003] EWCA Civ 1955.

⁶⁹ [2012] EWCA Civ 246.

⁷⁰ [2011] EWHC 2552 (Comm).

⁷¹ At [43].

⁷² At [44].

⁷³ [2007] BCC 139 at 57.

⁷⁴ LTL 27/7/2000. And see notes to the White Book (2012) Vol I 24.2.4 680.

⁷⁵ The interplay between CPR r.24.2(a) and r.24.2(b) remains a procedural peculiarity.

⁷⁶ [2008] PNL 19.

⁷⁷ Somewhat unusually, expert evidence was adduced and formed a critical part of the Judge's reasoning.



payment by the fraudulent borrower for the valuations to the valuer (suggesting that the director had been paid directly) and that the valuer had made no substantive defence at all, merely “not admitting” the allegations of fraud despite apparently extensive investigations.

64. It is perhaps noteworthy that the director did not attend the hearing of the application, and it is thought that this case represents a high watermark of successful applications for summary judgment in deceit claims. Away from those unusual examples in which primary facts are admitted or (as in *Cheshire BS*) “not admitted”, fraud cases in which summary judgment is granted to the Claimant tend to involve (i) admissible criminal convictions for the very acts which make out the pleaded case of dishonesty, and (ii) extremely straightforward allegations where there is overwhelming evidence in the form of unambiguous contemporaneous documentation firmly against the Defendant.
65. A Defendant to a fraud or dishonesty allegation, by contrast, may find summary judgment more readily granted in his favour. This bold statement is supportable in principle because of the heightened scrutiny to which a statement of case pleading fraud will be subjected.
66. A recent revealing example of a case in which a Defendant successfully obtained summary judgment in a fraud claim was *Seaton v Seddon*.⁷⁸ The Claimants were members of the former reggae boyband Musical Youth.⁷⁹ They had brought a claim against a former legal representative who had acted for them in a royalties dispute, alleging that the first Defendant had also fraudulently breached fiduciary obligations owed to the Claimants by acting for another party to the dispute as well as failing to advise the Claimants of their entitlement to copyright in the disputed tune.
67. The specific facts pleaded in support of their allegations of fraud amounted to no more than that the Defendant had acted for more than one party, had done so without telling the Claimants, and had failed to advise them about their rights to publishing royalties in the tune. Although as a pure matter of pleading, the court refused to strike out the statement of case since it was (just about) good enough to plead a proper case in dishonesty, on the Defendant’s application for summary determination the court closely analysed the evidence supporting the allegations that the pleaded acts were in some way carried out fraudulently. The only pleaded basis upon which the Claimants had sought to make good their adverbial description of the Defendant as having acted “fraudulently” was that the Defendant was a solicitor specialised in the music industry and therefore could not honestly have believed that there was no distinct copyright in the tune or that there was no conflict of interest. These allegations, if made good, would rather obviously have the effect that almost any solicitor accused of serious negligence would on that basis alone also be susceptible to an arguable claim of fraud. Having tested the evidence and finding no other support for the plea of dishonesty, the judge was content summarily to dispose of the allegations.
68. Needless to say, there is no general invitation to a Defendant facing an allegation of dishonesty to apply for summary judgment (or to strike it out).⁸⁰ The salutary lesson is one which returns to the pleading issues identified above. Given that a Defendant is entitled to have the facts on which the allegation of fraud or dishonesty is based fairly and squarely laid out in the statement of case, it follows that those facts or particulars may be subjected to a close degree of scrutiny at a very early stage in order to determine whether (i) if proven they would make out the plea on their face, and (ii) there is any sufficient evidential support for the conclusion that the court is invited to find they establish.

Evidential Issues

69. A few final points on evidence may be made.

⁷⁸ *Supra*.

⁷⁹ Best known for their early-1980s hit “Pass the Dutchie”.

⁸⁰ *Bleasdale v Forster* [2011] EWHC 416 (Ch saw Henderson J give very short shrift to the Defendant’s late application for summary disposal of those parts of the claim against her which alleged that she had fraudulently misrepresented the securing of a £750,000 funding stream to investors in a company. To make good the Defendant’s position would have required Henderson J to consider the Claimants’ evidence at best unreliable and at worst deliberately untruthful.



70. Firstly, an allegation of fraud does not affect the standard to which a Claimant must prove his case. It remains the usual civil standard of proof, that is proof on the balance of probabilities (or “50%+1”).⁸¹
71. However, where serious misconduct is alleged, and in particular where serious misconduct is alleged which requires proof of a dishonest state of mind, the courts understand that “the balance of probabilities” is a flexible concept, and that proof of a serious allegation to the “50%+1” standard is likely to require substantially more cogent evidence than would be required to prove a less serious case. This makes sense because dishonesty and fraud are, in the general run of things, less likely explanations for events than negligence or foolishness. In the family law case of *Re B (children) (sexual abuse: standard of proof)*,⁸² Lord Hoffmann explained (in words relevant to all cases involving the civil standard of proof):
- “There is only one rule of law, namely that the occurrence of the fact in issue must be proved to have been more probable than not. Common sense, not law, requires that in deciding this question, regard should be had, to whatever extent appropriate, to inherent probabilities. If a child alleges sexual abuse by a parent, it is common sense to start with the assumption that most parents do not abuse their children. But this assumption may be swiftly dispelled by other compelling evidence of the relationship between parent and child or parent and other children. It would be absurd to suggest that the tribunal must in all cases assume that serious conduct is unlikely to have occurred. In many cases, the other evidence will show that it was all too likely. If, for example, it is clear that a child was assaulted by one or other of two people, it would make no sense to start one’s reasoning by saying that assaulting children is a serious matter and therefore neither of them is likely to have done so. The fact is that one of them did and the question for the tribunal is simply whether it is more probable that one rather than the other was the perpetrator.”*
72. As has already been noted, one of the principal difficulties in most fraud cases is proof of the requisite subjective state of mind. Defendants do not generally own up to fraud, and whistleblowers remain thin on the ground. Inevitably, the Claimant asks the court to draw inferences from circumstances.
73. It is worth noting, however, that in the extract cited above, Lord Hoffmann used similar fact evidence as his example in support of the logic of his analysis.
74. *Abbey National plc v JSF Finance & Currency Exchange Co Ltd*⁸³ provides a good example. In that case, the bank sought an injunction restraining the Defendant bureau de change from presenting a winding-up petition against the bank on the basis of an unpaid debt. The bureau’s managing director had exchanged a number of Euros for a counter-cheque issued by the bank and payable to him for £30,000. The cheque was not paid on presentation. The bank said that the individual who procured the cheque was an impostor, and that the director of the bureau had at the very least shut his eyes to the possibility of fraud. In support, the bank sought to rely on evidence of a number of similar transactions in which actual or attempted fraudulent transactions had taken place, in which an impostor had procured a cheque or transfer of funds and had exchanged them for foreign currency with the bureau’s director. On appeal against the first-instance refusal of an injunction, the Court of Appeal held that in order to prove “blind-eye” knowledge or “recklessness as to truth” (as justification for refusal to pay) to the standard required to obtain an injunction, the bank was entitled to rely upon the similar fact evidence of other transactions in which the director was involved.
75. All of which ultimately means that proper control of the disclosure process, and proper analysis of a Defendant’s disclosure list(s), is all the more important in a fraud case.⁸⁴ A pre-action

⁸¹ Which to a statistician is emphatically not the same as 51%.

⁸² [2008] 4 All ER 1.

⁸³ [2006] EWCA Civ 328.

⁸⁴ A separate paper prepared for this seminar concerns e-disclosure. In respect of email, it has to be said that fraudsters turn out to be just as prone to inadvertent or unwise commentary in electronic communication as anyone else. In *Digicel v Cable and Wireless plc* [2008] EWHC 2522 (Ch), it was noted that it may only take one revealing statement in an email to show clearly what a person actually thought or was intending to achieve, which might not otherwise have been revealed in tens of thousands of redundant pages in a trial bundle.



disclosure application can be a powerful weapon in a fraud case, but requires very special care if it is to be used effectively. In *Cheshire BS v Dunlop Haywards (DHL) Ltd*,⁸⁵ the High Court refused an application for pre-action disclosure in what was ultimately a successful claim in deceit (see above) on the basis that the application lacked the necessary degree of particularity and clarity so to enable the Defendants to know precisely what documentation they should disclose, let alone whether that documentation would be discloseable under standard disclosure rules. The Claimant / applicant's difficulty in many cases with the whiff of fraud about them is knowing how to balance (i) a sufficiently extensive request for disclosure to allow him to obtain the documents which may provide the evidential basis for his case, against (ii) the courts' proper insistence that the request be "appropriately focused".⁸⁶

76. Neither legal advice privilege nor litigation privilege attaches to communications between a legal advisor and client produced for the purpose of committing or furthering a fraudulent act or crime.⁸⁷ There is no professional confidence as to disclosure of communications of this sort because it is not part of a legal advisor's duty to further (knowingly or otherwise) a client's purpose of wrongfully evading the law. Neither does privilege attach where the client seeks guidance in the commission of the fraud (again whether or not the advisor is aware of the purpose for which he is asked to advise).⁸⁸ In cases in which the issue of fraud is one of the issues in the action, to persuade a court to order specific disclosure of documents in respect of which a claim to privilege has been made will require a strong, or perhaps very strong,⁸⁹ prima facie case of fraud.⁹⁰

Conclusions

77. In conclusion then, as a matter of law and as in life, fraud is wide ranging and always subject to new ingenuity.
78. Great care must be taken to identify the type of fraud which is alleged; what it is necessary to prove; and to consider the ethical and practical issues arising from the same.

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November 2012**

⁸⁵ [2007] EWHC 403 (QB).

⁸⁶ See *Black v Sumitomo Corp* [2003] 3 All ER 643.

⁸⁷ *Kuwait Airways Corp v Iraqi Airways Co (No.6)* [2005] 1 WLR 2734.

⁸⁸ *Williams v Quebrada Rly Land and Copper Co* [1895] 2 Ch 751.

⁸⁹ See *Kuwait Airways* (above).

⁹⁰ A lower standard may be applicable where fraud is not an issue in the action.