CIVIL FRAUD

The Caledonian Club, Halkin Street, London SW1

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"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?"

Fraud Cases and Social Change

1. Fraud cases have a mystique because they involve the puzzle of whether someone can be shown to be a villain. Is a party a bold liar or might he be telling the truth? There are fraud cases because of human nature. There have always been cheats. Social change affects how frauds are committed. Since Roman times people have defrauded creditors by transferring their assets. Courts have been used as a cover for fraudulent conveyances. With the advent of limited companies people have been sold shares in companies with worthless assets. Insurance has brought fraudulent claims including scuttling of ships. Electronic transfers, and off shore company and trust structures have been used for Ponzi schemes, diversion of assets and corrupt payments.

2. We are witnessing the replacement of paper by electronic data. Bills of lading, bills of exchange and most commercial contracts are on paper. There are initiatives to change the law to fit in with advances in technology including distributed ledger technology, cryptoassets, and smart contracts. The LawTech Delivery Panel is promoting the use of technology in the legal sector. Are cryptoassets property? Are they transferable or negotiable? Technology and globalisation are transforming how business can be done, and ways are being looked at so that the law can facilitate this.

3. They are also changing how frauds can be perpetrated. Electronic transfers, offshore company and trust structures and new technology can be used to implement fraud, to impede proof of it, and to obstruct enforcement of judgments.

4. Blockchain will reduce the areas for disputes in bona fide commercial transactions. Blockchain cloud ledger has also been used in fraudulent Initial Coin Offerings, and cryptocurrency frauds. In the UK the FCA reported that in 2018-2019 cryptocurrency and forex frauds led to the average domestic victim losing £14,600. The New York investigation into OneCoin, founded by a brother and sister from Bulgaria, reportedly found that between the fourth quarter of 2014 and the third quarter of 2016 OneCoin generated 3.353 billion euros ($3.769 billion) in sales revenue and earned "profits" of 2.232 billion euros ($2.509 billion). Cryptocurrency or forex frauds often involve Ponzi systems or pyramid selling fuelled by talk of huge returns and minimal risk, or market manipulation. Fraud cases against accessories often are not subject to an arbitration clause. They present new challenges in gathering evidence and to the courts. In Simetra Global Assets v Ikon Finance [2019] 4 WLR 112, which concerned a claim for over US$40 million for accessory liability for an alleged forex scheme carried out from 2013, the CA ordered a retrial because of the inadequacies of the judgment.

5. Evidence has changed. Data is available in huge quantities. An important area is "connections", or whether it is possible to find them; "connectivity". This may be connections between people, or with places or assets. Examination of social media has become a tool for insurers combatting fraudulent claims. It is possible to use court proceedings to obtain data protected by confidentiality or the GDPR, and not just disclosure by the other parties, but also data from non-parties, and in other jurisdictions for example under 28 U.S. Code §1782.

6. Before starting a fraud claim, one has to be clear on exactly what fraud is being alleged against whom, what ingredients are to be proved, and based on what evidence. A key question is what is shown by the contemporaneous documents or data. Another is witness evidence; its impact can be unpredictable. Another is what defence is made and whether it is possible to destroy it. Another is what further evidence can be gathered and how? Some inferences depend on what happens in the run up to and at the trial. Lies told earlier may provide powerful support to a fraud allegation.

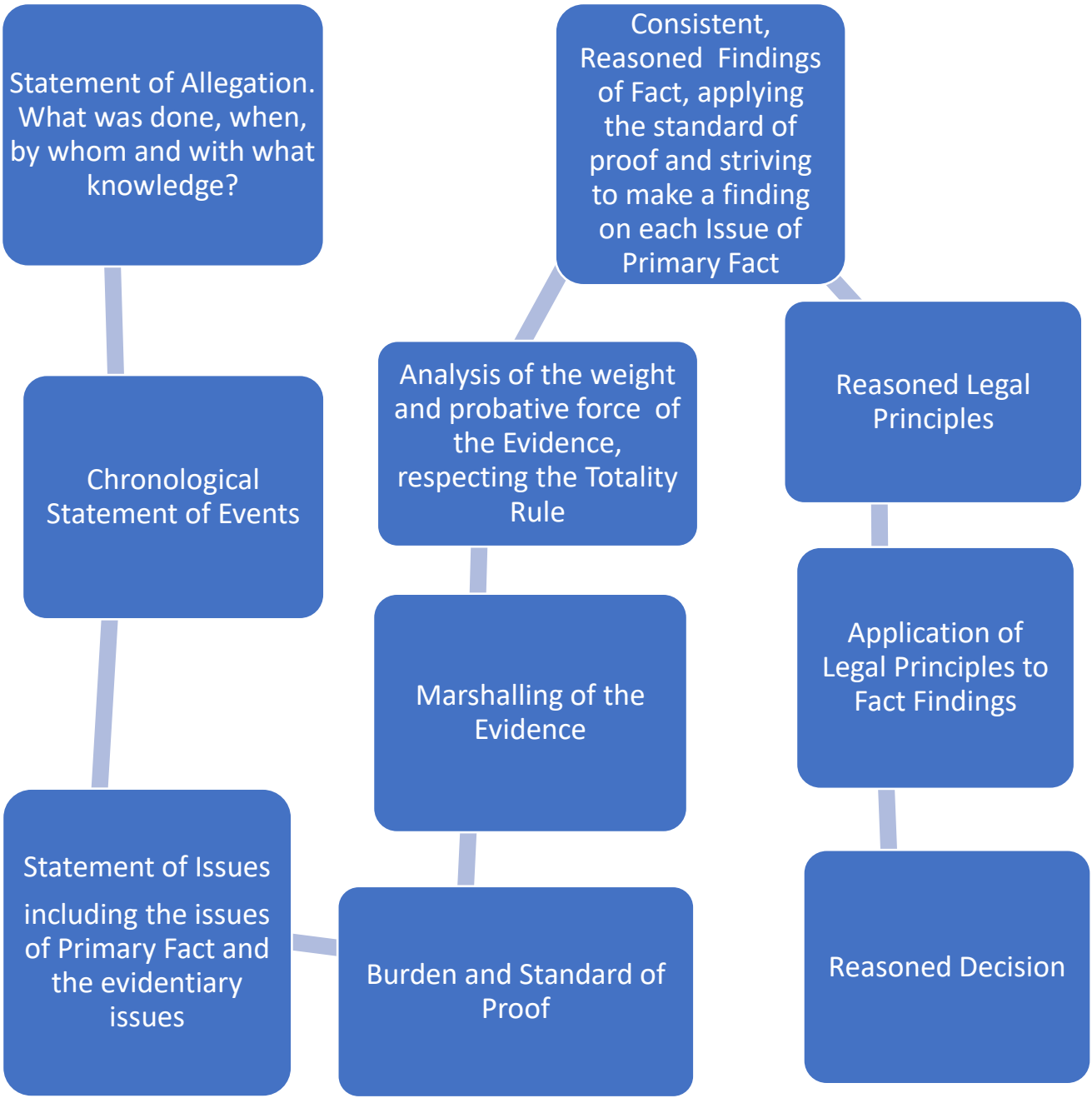
The Building Blocks

7. At a trial the judge uses "building blocks"[1] to arrive at his judgment. These include (i) a chronology of what has happened, (ii) a statement of the issues, (iii) marshalling of the

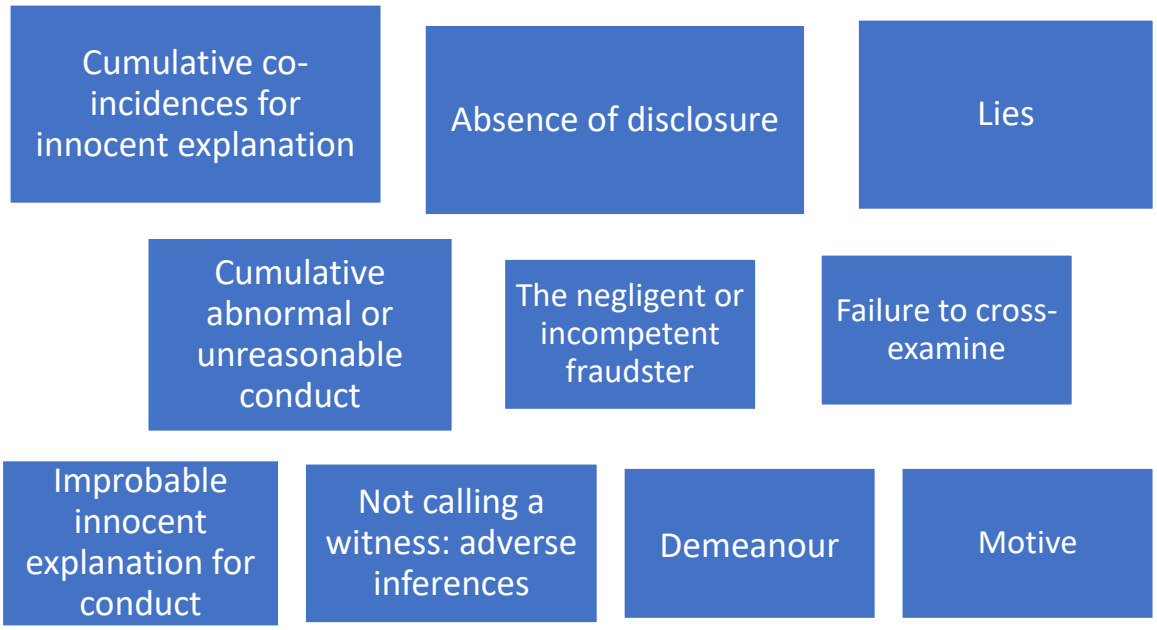
[1] Simetra Global Assets v Ikon Finance [2019] 4 WLR 112 at [42].

evidence, (iv) careful analysis of it, (v) reasoned factual findings and application of law, to arrive at a decision. Assessment of whether to start looks to the building blocks.

The Building Blocks



Analysis of the weight and probative force of the Evidence, respecting the Totality Rule



Pre-Commencement Assessment

8. There is a difference between suspicions of fraud and evidence to prove fraud. Suspicions can fuel the wish to bring a fraud case. When much will depend on oral evidence this may usefully be subjected to scrutiny pre-commencement. Does the witness contradict themselves? Is their story credible? Is it consistent with contemporaneous documents? Expert evidence may be needed and it would often be sensible to obtain a draft before commencing proceedings.

9. The decision whether to allege fraud will take into account (i) suspicions, (ii) the internal assessment of the strength of the case and (iii) whether the allegation can survive the thresholds to avoid strike out and summary judgment. The analysis looks to prospects as at the date of trial. The necessary "building blocks" provide a plan for analysis. Can the claimant prove knowledge, and if so knowledge of what? When looking at beginning a case there is the possibility that a new piece of unhelpful evidence may emerge, a witness may appear or disappear, a lie may become explained; a strong point may disappear.

Strike Out and Summary Judgment

10. Whether a fraud allegation is allowed by the court to proceed to trial depends on meeting both a test on the pleadings and an evidential threshold. (i) whether the pleading itself is sufficient or whether it would be struck out under CPR 3.4 (2)(a) as disclosing "..no reasonable grounds for bringing or defending the claim"; and (ii) whether it will survive a challenge for summary judgment[2] because it has a "realistic" prospect of success (and is more than merely "arguable"). On this the court evaluates the evidence including contemporaneous correspondence. It takes into account future evidence that can reasonably[3] or realistically[4] be expected to be available at trial. A "Micawberish" hope is not enough[5].

11. Pleadings: Fraud must be expressly and specifically[6] pleaded. A defendant is entitled to know the case he has to meet. It is not normally sufficient to assert knowledge of particular facts without giving particulars of the case to be made that the defendant at the relevant time had the pleaded knowledge. A defendant may have been involved in transferring funds but did he know at the time they had been embezzled? There must be relevant particulars where the court is to be asked to draw an inference, setting out the

[2] The principles are set out in Easyair Ltd v Opal telecom Ltd [2009] EWHC 339 (Ch) at [15]
[3] Royal Brompton Hospital NHS Trust v Hammond (No 5) [2001] EWCA Civ 550*;*
[4] Three Rivers DC v Bank of England (No3) [2003] 2 AC 1 at [160]; Baxendale-Walker v Middleton [2011] EWHC 998 at [69-70]
[5] The Claimants Listed in Schedule A v Maersk Line A/S [2019] EWHC 1099 (Comm) at [8-12].
[6] CPR 16 PD 8.2 (i).

"bald"[7] facts (not evidence) alleged from which the inference is to be drawn e.g. the size of the amounts transferred where they had come from to where they were being transferred and the absence of an innocent explanation of their source. Those particulars do not have to be conclusive that the conduct is fraudulent as alleged but at that stage an inference of dishonesty must be more likely than one of innocence or negligence. There must be some fact 'which tilts the balance and justifies an inference of dishonesty'[8].

12. In cases where a defendant will if the allegation is true have "tried to shroud his conduct in secrecy" the court may "..allow a measure of generosity in favour of a claimant"[9].

13. Professional Responsibility: A barrister must 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 ".. 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 includes consideration of what evidence may emerge

The Burden and Standard of Proof, and Issues

14. The legal burden rests upon the person who asserts it. It does not change. The standard of proof is balance of probabilities[10]. There is no heightened standard of proof. But what is required to satisfy it depends on the context and the inherent probabilities. Where because of the context there is an inherent improbability that a person has acted dishonestly[11], "[C]ogent evidence is required to justify a finding of fraud or other

[7] Queen's Bench Guide 6.7.4 (1)
[8] JSC Bank of Moscow v. Kekhman [2015] EWHC 3073 (Comm) at [20]; followed in Saleem Mukhtar v Mohammed Saleem [2018] EWHC 1729 (QB).
[9] Portland Stone Firms Limited v Barclays Bank [2018] EWHC 2341 at [27] citing competition case law on cartels; Arkin v Borchard Lines (No 2) 2001 WL 606419 (Colman J) refusing summary judgment.
[10] In re S-B (Children) (Care Proceedings: Standard of Proof) [2010] A.C. 678; Re H (minors) [1996] A.C. 563.
[11] It does not apply when it is clear that one person out of two has committed a very serious crime and the question is which of the two so acted: In re B (Children) (Care Proceedings: Standard of Proof) [2009] AC 11 at [15].

discreditable conduct"[12]. Circumstances may exist such that absent contrary evidence the fact will be proved, because there is a sensible factual inference to be drawn from the facts absent contrary evidence[13].

15. A key question is what are the issues? This depends on the pleadings. The usual rule is that he who asserts a fact must prove it. 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.

16. Sometimes there is in substance only one issue with the other contested issues depending on it; if a collision was staged for an insurance claim, the falsity of the claim and the intent to make a false statement are proved.

17. Issue by Issue: The probability test has to be applied separately issue by issue. What matters is the probability of the primary fact.

18. Accurate formulation of the issue depends on accurate analysis of the legal principles. One example is on causation and accessory liability for dishonestly assisting in a breach of trust: the dishonest assistance must have more than minimally assisted the breach of trust, and the breach of trust caused the relevant loss. It is not necessary to prove that the dishonest assistance was itself causative of the loss: Group Seven Ltd v Notable Services LLP [2019] PNLR 22 at [112]. Another is a claim against a bank for breach of a Quincecare duty of care: it is no defence to the liquidator's claim that the company's chairman and 100% shareholder was fraudulently abstracting funds: Singularis Holdings v Daiwa Capital [2019] UKSC 50.

19. The trial judge gives judgment by reference to the state of the case at the moment the judgment is delivered. There are constraints on what new material can be produced during

[12] Fiona Trust & Holding Corp v Privalov [2010] EWHC 3199 (Comm) at [1438]-[1439]; The Atlantik Confidence [2016] 2 Lloyd's Reports 525 at [6-7 and 9].
[13] Gany Holdings (PTC) SA v Khan [2018] UKPC 21 at [18-22].

a trial. Disclosure should be complete long beforehand, and witness statements and expert reports exchanged. As the lawyer approaches the trial a clearer and more reliable picture emerges.

The Totality Rule

20. Totality of the evidence and looking 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.

21. In National Justice Compania Naviera SA v Prudential Assurance Co Ltd (The Ikarian Reefer) (No.2) [2000] 1 WLR 603 the judge decided whether an initial grounding of a vessel was done deliberately based on evidence of what had happened up to the grounding, disregarding evidence of whether the subsequent fire was deliberate. The rule required that the questions should have been considered together because there may have been a fraudulent course of conduct.

22. 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]. Therefore, where there are two or more diversions of money which may be related, facilitated by an alleged accessory, the issue of his dishonesty should be decided based on the story as a whole.

Inability to decide an issue.

23. 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."

Demeanour

24. A major cause of demonstrable error in fraud cases is cases which have been decided on the basis of demeanour of a witness. 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")[14]

> "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

[14] [1985] 1 Lloyd's Rep 1 at 56–57 (which contains a fuller report than that in [1986] A.C. 717.), cited with approval in

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."

25. Contemporary documents are generally regarded as far more reliable than the oral evidence of witnesses, still less their demeanour while giving evidence[15]. Lord Devlin and Lord Bingham have cautioned against the assessment of evidence by demeanour. An example is given by concerns and findings about the expert evidence of Professor Sir Roy Meadow in the Sally Clark case which had misunderstood the statistics and was seriously flawed because of his flawed assumption, not appreciated at the original murder trial, that sequential SIDS events were unrelated: Meadow v General Medical Council [2007] Q.B. 462. Evidence may not tell the full story because the relevant material is simply not available and the flaw may not be a known.

26. 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 and was viewed in its entirety by the Appeal Court. The issue is of reasonable doubt in a case where there is no affirmative case put forward of lying or fantasy and when despite the years there is no possibility of mistake or misrecollection. There was no possibility of mistaken identity or mistake on whether the events took place. The question is whether the totality of the evidence raised a reasonable doubt which any reasonable jury should have found?

27. Memories are fallible. Demeanour may mask the possibility of misunderstanding, mistake, unreliable recollection, unconscious bias[16], emotional interference, or imagination distorting the truth. The process of preparing for trial a witness who is not independent, can itself subject memories to biases and interference[17]. That a witness is

[15] Simetra Global Assets v Ikon Finance [2019] 4 WLR 112 at [48-49]; National Justice Compania Naviera SA v Prudential Assurance Co Ltd (The Ikarian Reefer) (No.2) [2000] 1 WLR 603; Gestmin SGPS S.A. v Credit Suisse (UK) Ltd [2013] EWHC 3560 at [22].
[16] Onassis v Vergottis [1968] 2 Lloyd's Rep. 403 at p. 431 per Lord Pearce (who with Lord Wilberforce dissented), a case where the House of Lords split 3-2 on what had been agreed in an oral contract, the majority holding that "it could not be said that there had been a "substantial wrong or miscarriage at first instance".
[17] Gestmin SGPS S.A. v Credit Suisse (UK) Ltd [2013] EWHC 3560 at [16]-[20]

confident of their recollection does not have the consequence that the court should share this.

Dishonesty

28. 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.

29. They may also require proof of dishonesty. The Crockfords test which applies both for civil claims and criminal charges, requires (i) a finding of subjective knowledge, including "blind or shut eye" knowledge, of the facts, and then (ii) 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: Ivey v Genting Casinos UK Ltd (t/a Crockfords Club [2018] A.C. 391 approving Barlow Clowes v Eurotrust International Limited [2006] 1 WLR 1476 at [12-18] . On this it matters not whether he knew or not what would have been the opinion of a reasonable man.

Proof of Fraud

30. Co-incidences: the cumulative effect of multiple unrelated co-incidences needed for an innocent explanation, may strongly point to fraud: National Justice Compania Naviera SA v Prudential Assurance Co Ltd (The Ikarian Reefer) (No.2) [2000] 1 WLR 603.

31. Not calling a witness: is an adverse inference to be drawn?[18]:

(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[19].

(ii) If a witness could be called by either party no adverse inference should be drawn. [This principle has limits. If the person accused of fraud is a party and does not give evidence it may not be a fair solution for the party alleging fraud to have to call him as a witness, because it may not be possible to cross-examine him].

(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. [This principle is of limited application because almost invariably there will be some other probative evidence on the issue].

32. 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[20].

33. 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].

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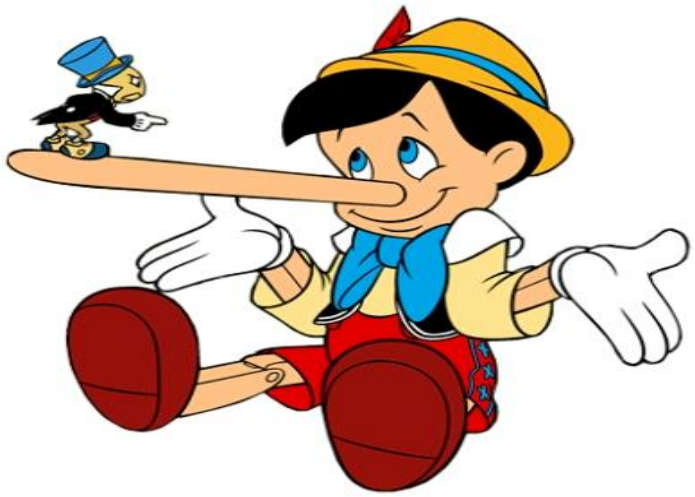
[18] The leading case is Wisnewski v Central Manchester Health Authority [1998] PIQR P324 at p.14

[19] Manzi v King's College Hospital NHS Foundation Trust [2018] EWCA Civ 1882 at [30]

[20] Browne v Dunn (1894) 6 R 67; Markem Corp v Zipher Ltd [2005] RPC 31 at [57-70] (which include Browne v Dunn), Phipson on Evidence 20th ed, at 12-12.

34. Lies or dishonesty on matters unconnected with the claim are relevant to witness credibility, but may not go to propensity to commit the fraud in question. “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.



35. 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).

36. 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]

37. 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).

38. 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.

39. 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).

The Court of Appeal

40. Properly Reasoned Judgment is required on the facts. Not every point has to be dealt with. 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 was about an allegedly dishonest Ponzi scheme by an experienced foreign currency trader, and to which it was alleged that Ikon were knowing parties through giving confirmations of false trading account balances in some 949 accounts, which corresponded to the cent with the trading statements provided by the alleged villain to investors showing alleged results of his forex trading. Ikon said the confirmations were concerned with demonstration accounts, used to demonstrate forex trading using only notional money.

41. The judge based on his evaluation of the demeanour of the witnesses had acquitted Ikon of dishonesty and found that a major investor in the claimants had known all along that Ikon had not held those balances. A retrial was ordered by CA when the first instance judgment was only 13 pages, given 7 months 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, expert, and documentary evidence on a number of critical issues. There was no "building blocks of the reasoned judicial process" : a chronological account of the

facts, marshalling of the evidence, findings on disputed issues and reasoning for those findings. Most of the relevant evidence was not referred to in the judgment.

Appeals against Fact Findings

42. In the Court of Appeal, the trial has already taken place. There are powerful barriers to 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 decide not to interfere because the question and material are such that the CA should not second guess the judge. "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. But this does not have the consequence that findings based on demeanour are impregnable on appeal[21].

43. 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, making a critical finding of fact which has no basis in the evidence, or that he disregarded a relevant part of the evidence, or 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 or was plainly wrong because it "cannot reasonably be explained or justified": Henderson v Foxworth Investments Ltd [2014] 1 WLR 2600 at [66]; Group Seven Ltd v Notable Services LLP [2019] PNLR 22 at [41]. Inconsistent findings of fact by the trial judge on different claims can found an appeal: Group Seven Limited v Notable Services LLP at [95].

Appeals: Fresh Evidence raising a contention that a judgment has been obtained by Fraud

[21] Simetra Global Assets v Ikon Finance [2019] 4 WLR 112; National Justice Compania Naviera SA v Prudential Assurance Co Ltd (The Ikarian Reefer) (No.2) [2000] 1 WLR 603; The Michael [1979] 2 Ll. Rep. 1.

44. A new trial can be ordered where there has been a result at trial unfairly[22] obtained. The general principle is fraud unravels all. An allegation that a judgment has been obtained by fraud[23] involves questions of fact which were not before the first instance judge, and did not form part of the judgment. To be resolved there will need to be a trial. This could be done (i) by the first instance court, or (2) on appeal or (3) by separate action. Normally this will be done in a separate action: Salekipour v Parmar [2018] Q.B. 833 at [69] (a case of alleged subornation of a witness). Where a judgment has been obtained by a party interfering with witnesses or other fraud this "..potentially undermines the credibility of that party on all issues".

Conclusion

45. At the stage of considering whether to bring a fraud case one has to have clear what fraud is being alleged, its ingredients, what has to be proved, against whom, at what dates and based on what evidence. Lies unconnected with the alleged fraud, suspicious behaviour, and unusual connections, can be taken into account in a decision to proceed as raising justifiable suspicions grounding a reasonable expectation that probative evidence will emerge. Suspicion amounting to no more than "mere speculation" (described as like Mr Micawber) is not enough to resist an application to strike out and for summary judgement. To carry out an assessment of the strength of the case as it stands one is doing so as at the date of trial, and using the building blocks just as would a trial judge.

[22] In Meek v Fleming [1961] 2 QB 366 a new trial was ordered: a police inspector had been reduced in rank by a disciplinary board to station sergeant for being party to an arrangement to practise a deception on a court of law in the course of his duty as a senior police officer. That was known to the defendant's legal advisers, but a decision, for which leading counsel for the defence assumed full responsibility, was taken not to make it known to the court, and deliberate steps to that end were taken in the conduct of the defence.

[23] A judgment can be set aside for fraud (e.g. using forged documents) even though the applicant could with reasonable diligence have uncovered it before the original trial: Takhar v Gracefield Developments Ltd [2019] 2 WLR 984.