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?

CASE REFERENCES FOR TALK BY

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XXIV OLD BUILDINGS

26 January 2021

The problem with fraud

- Lord Hardwicke in 1759:

  "Fraud is infinite, and were a Court of Equity once to lay down rules, how far they would go, and no further, in extending their relief against it, or to define strictly the species or evidence of it, the jurisdiction would be cramped and perpetually eluded by new schemes which the fertility of man's invention would continue."

- ***In re London and Globe Finance Corporation*** [1903] 1 Ch 728, Buckley J:

  "To deceive is, I apprehend, to induce a man to believe that a thing is true which is false, and which the person practising the deceit knows or believes to be false. To defraud is to deprive by deceit: it is by deceit to induce a man to act to his injury. More tersely it may be put, that to deceive is by falsehood to induce a state of mind; to defraud is by deceit to induce a course of action."

- ***Welham v DPP*** [1961] A.C. 103, per Lord Radcliffe:

  "Now, I think that there are one or two things that can be said with confidence about the meaning of this word 'defraud.' It requires a person as its object: that is, defrauding involves doing something to someone. Although in the nature of things it is almost invariably associated with the obtaining of an advantage for the person who commits the fraud, it is the effect upon the person who is the object of the fraud that ultimately determines its meaning… Secondly, popular speech does not give, and I do not think ever has given, any sure guide as to the limits of what is meant by 'to defraud.' It may mean to cheat someone. It may mean to practice a fraud upon someone. It may mean to deprive someone by deceit of something which is regarded as belonging to him or, though not belonging to him, is due to him or his right."

- ***Kensington International v Congo*** [2008] 1 WLR 1144, Moore-Bick LJ:

  "For my own part I think that the essence of fraud is deception of one kind or another coupled with injury or an intention to expose another to a risk of injury by means of that deception."

- ***Rous v Mitchell*** [1991] 1 WLR 469, CA, a case about L&T notices, upholding Aldous J first instance:

  [csl submitted that] *"before fraud could be found the court must also hold that the dishonest and false representation was calculated to deceive and did*

deceive the recipient. That may be necessary in actions in which a party seeks to recover damages based on fraudulent statements, but in a case where the party committing the fraud seeks to rely upon his fraudulent conduct a court will not give effect to that conduct whether or not it deceives the recipient."

- ***Lazarus Estates v Beasley*** [1956] 1 QB 702, Denning LJ:

  "Fraud unravels everything. The court is careful not to find fraud unless it is distinctly pleaded and proved; but once it is proved, it vitiates judgments, contracts and all transactions whatsoever"

Range of fraud

- Codified crimes: false representations, failure to disclose, abuse of position: Fraud Act 2006:

  1 Fraud

  (1) A person is guilty of fraud if he is in breach of any of the sections [2-4]…

  2 Fraud by false representation

  (1) A person is in breach of this section if he—

  (a) dishonestly makes a false representation, and

  (b) intends, by making the representation—

  (i) to make a gain for himself or another, or

  (ii) to cause loss to another or to expose another to a risk of loss.

  (2) A representation is false if—

  (a) it is untrue or misleading, and

  (b) the person making it knows that it is, or might be, untrue or misleading.…

  3 Fraud by failing to disclose information

  A person is in breach of this section if he—

  (a) dishonestly fails to disclose to another person information which he is under a legal duty to disclose, and

  (b) intends, by failing to disclose the information—

  (i) to make a gain for himself or another, or

  (ii) to cause loss to another or to expose another to a risk of loss.

  4 Fraud by abuse of position

  (1) A person is in breach of this section if he—

  (a) occupies a position in which he is expected to safeguard, or not to act against, the financial interests of another person,

  (b) dishonestly abuses that position, and

  (c) intends, by means of the abuse of that position—

  (i) to make a gain for himself or another, or

  (ii) to cause loss to another or to expose another to a risk of loss.

  (2) A person may be regarded as having abused his position even though his conduct consisted of an omission rather than an act.

- ***Derry v Peek*** (1889) 14 App Cas 337

  Classic fraud - deceit: encompasses intention and reckless indifference

- ***Cavell USA v Seaton Insurance*** [2009] 2 CLC 991, Longmore LJ

  "..I [do not] consider that a decision on an English statute entitling someone charged with fraud to a jury trial in a civil action can be a decision of the meaning of 'fraud' in a commercial document which has a decided international flavour."

- ***Armitage v Nurse*** [1998] Ch 241, Millett LJ:

  Equitable fraud *"covers breach of fiduciary duty, undue influence, abuse of confidence, unconscionable bargains and frauds on powers. With the sole exception of the last, which is a technical doctrine in which the word "fraud" merely connotes excess of vires, it involves some dealing by the fiduciary with his principal and the risk that the fiduciary may have exploited his position to his own advantage. In* ***Earl of Aylesford v. Morris*** *(1873) L.R. 8 Ch.App. 484, 490-491 Lord Selborne L.C. said:* "Fraud does not here mean deceit or circumvention; it means an **unconscientious use of the power** arising out of these circumstances and conditions; ..."

- Bribery: ***Panama and South Pacific Telegraph Co v India Rubber*** (1875) LR 10 Ch App 515, 526, per James LJ:

  "I take it to be clear that any surreptitious dealing between one principal and the agent of the other principal is a fraud on such other principal…"

- Pleading: ***Three Rivers v Bank of England (no. 3)*** [2003] 2 AC 1, Lord Millett §186

  "must be some fact which tilts the balance and justifies an inference of dishonesty, and this fact must be both pleaded and proved"

<u>All in the Mind</u>

- ***Angus v Clifford*** [1891] 2 Ch 449, 471

  "A man may tell a lie about the state of his own mind, just as much as he can tell a lie about the state of the weather, or the state of his own digestion. It makes, to be sure, the inquiry a difficult and complicated one, and probably an obscure one, as to what the state of his mind may have been, but once arrive at the inference of fact that the state of his mind was to his own knowledge not that which he describes it as being, then he has told a lie, just as if he made an intentional misstatement of something outside his own mind, and visible to the eyes of all men….

  So far from saying that you cannot look into a man's mind, you must look into it, if you are going to find fraud against him; and unless you think you see what must have been in his mind, you cannot find him guilty of fraud.

- ***Jones v Gordon*** (1877) 2 App Cas 616, 629 : blind eye knowledge :

  Lord Blackburn described a person who *"refrained from asking questions, not because he was an honest blunderer or a stupid man, but because he thought in his own secret mind—I suspect there is something wrong, and if I ask*

questions and make farther inquiry, it will no longer be my suspecting it, but my knowing it, and then I shall not be able to recover…I think that is dishonesty."

- ***Manifest Shipping v Uni-Polaris Insurance*** [2003] 1 AC 469 per Lord Scott, para 116:

  "blind-eye knowledge requires…a suspicion that the relevant facts do exist and a deliberate decision to avoid confirming that they exist. But a warning should be sounded. Suspicion is a word that can be used to describe a state-of-mind that may, at one extreme, be no more than a vague feeling of unease and, at the other extreme, reflect a firm belief in the existence of the relevant facts. In my opinion, in order for there to be blind-eye knowledge, the suspicion must be firmly grounded and targeted on specific facts. The deliberate decision must be a decision to avoid obtaining confirmation of facts in whose existence the individual has good reason to believe."

<u>Inherently likely and unlikely things</u>

- ***In re Dellow's Will Trusts*** [1964] 1 WLR 451, 455 Ungoed-Thomas J:

  'The more serious the allegation the more cogent the evidence required to overcome the unlikelihood of what is alleged and thus to prove it'

- ***Re H (Minors)*** [1996] AC 563, Lord Nicholls:

  "When assessing the probabilities the court will have in mind as a factor, to whatever extent is appropriate in the particular case, that the more serious the allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on a balance of probability. Fraud is usually less likely than negligence."

- In some cases an allegation of fraud may be so implausible and extravagant that it will, in the words of Lord Millett in ***Three Rivers v Bank of England (No. 3)*** [2003] 2 AC 1, §181, *"require evidence of the most compelling kind to establish"*.

- ***Re B (Children)*** [2009] 1 AC 11 Baroness Hale:

  "Neither the seriousness of the allegation nor the seriousness of the consequences should make any difference to the standard of proof to be applied in determining the facts. The inherent probabilities are simply something to be taken into account, where relevant, in deciding where the truth lies."

  Some seriously harmful behaviour, such as murder, is sufficiently rare to be inherently improbable in most circumstances. Even then there are circumstances, such as a body with its throat cut and no weapon to hand, where it is not at all improbable. Other seriously harmful behaviour, such as alcohol or drug abuse, is regrettably all too common and not at all improbable. Nor are serious allegations made in a vacuum. Consider the famous example of the animal seen in Regent's Park. If it is seen outside the zoo on a stretch of greensward regularly used for walking dogs, then of course it is more likely to be a dog than a lion. If it is seen in the zoo next to the lions' enclosure when the door is open, then it may well be more likely to be a lion than a dog."

- ***BM Bank v Kekhman*** [2018] EWHC 791 (Comm), Bryan J cited Flaux J's judgment at an earlier hearing in the same case:

  "The correct test is whether or not, on the basis of the primary facts pleaded, an inference of dishonesty is more likely than one of innocence or negligence. As Lord Millett put it, there must be some fact 'which tilts the balance and justifies an inference of dishonesty'."

- ***Bank St Petersburg v Arkhangelsky*** [2020] 4 WLR 55

  "[the judge] had then to determine…whether…it was …more likely or not that the explanation for the so-called curiosities of the…arrangements was the respondents' explanation or the conspiracy alleged."

- ***Ivey v Genting Casinos*** [2018] AC 391, §74, per Lord Hughes:

  "When dishonesty is in question the fact-finding tribunal must first ascertain (subjectively) the actual state of the individual's knowledge or belief as to the facts. The reasonableness or otherwise of his belief is a matter of evidence (often in practice determinative) going to whether he held the belief, but it is not an additional requirement that his belief must be reasonable; the question is whether it is genuinely held."

- In the **Worldcom** trial (in the US), Bernie Ebbers, former CEO of Worldcom, testified, *"I was shocked. I couldn't believe it, I never thought anything like that would have gone on. I put those people in place. I trusted them. I had no idea they would do anything like this."* The prosecutor referred to this as the *"aw shucks defense."*

<u>How the court finds fraud</u>

- ***United Trading Corporation v Allied Arab Bank*** [1985] 2 Lloyd's Rep 554, Acker LJ:

  "They contend that this is because proof of facts which, in the absence of explanation, would ordinarily establish fraud is not sufficient unless every possibility of an innocent explanation is excluded. They submit that the Courts will accordingly speculate whether an innocent explanation is possible, and will usually not infer fraud from mere silence in the face of the accusation. In our judgment the respondents are overstating the standard of proof. The evidence of fraud must be clear, both as to the fact of fraud and as to the bank's knowledge. The mere assertion or allegation of fraud would not be sufficient. We would expect the Court to require strong corroborative evidence of the allegation, usually in the form of contemporary documents, particularly those emanating from the buyer. In general, for the evidence of fraud to be clear, we would also expect the buyer to have been given an opportunity to answer the allegation and to have failed to provide any, or any adequate answer in circumstances where one could properly be expected. If the Court considers that on the material before it the only realistic inference to draw is that of fraud, then the seller would have made out a sufficient case of fraud."

- ***Armagas v Mundogas (The 'Ocean Frost')*** [1985] 3 WLR 640, [1985] 1 Lloyd's Rep 1, Robert Goff LJ:

  "Speaking from my own experience, I have found it essential in cases of fraud, when considering the credibility of witnesses, always to test their veracity by reference to the objective facts proved independently of their testimony, in particular by reference to the documents in the case, and also to pay particular regard to their motives and to the overall probabilities. It is frequently very difficult to tell whether a witness is telling the truth or not; and where there is a conflict of evidence such as there was in the present case, reference to the objective facts and documents, to the witnesses' motives, and to the overall probabilities, can be of very great assistance to a Judge in ascertaining the truth. I have been driven to the conclusion that the Judge did not pay sufficient regard to these matters in making his findings of fact in the present case."

- ***Bank St Petersburg v Arkhangelsky*** [2020] 4 WLR 55

  "the judge was wrong to describe his task…as being to "decide … whether the justification offered is a plausible one". That was part of his task, but not the whole of it. He had then to determine, standing back from this allegation (and later looking at all the allegations together) whether fairly regarded, it was in all the circumstances of the case, and on the evidence before the court, more likely or not that the explanation for the so-called curiosities of the repo arrangements was the respondents' explanation or the conspiracy alleged."

Inferences from the lack of evidence, if destroyed

- ***The Ophelia*** [1916] 2 AC 206

  "If any one by a deliberate act destroys a document which, according to what its contents may have been, would have told strongly either for him or against him, the strongest possible presumption arises that if it had been produced it would have told against him, and even if the document is destroyed by his own act, but under circumstances in which the intention to destroy evidence may fairly be considered rebutted, still he has to suffer. He is in the position that he is without the corroboration which might have been expected in his case."

Missing witnesses

- ***R v Inland Revenue Comrs, ex p TC Coombs & Co*** [1991] 2 AC 283, 300:

  "In our legal system generally, the silence of one party in face of the other party's evidence may convert that evidence into proof in relation to matters which are, or are likely to be, within the knowledge of the silent party and about which that party could be expected to give evidence. Thus, depending on the circumstances, a prima facie case may become a strong or even an overwhelming case. But, if the silent party's failure to give evidence (or to give the necessary evidence) can be credibly explained, even if not entirely justified, the effect of his silence in favour of the other party, may be either reduced or nullified."

- ***Prest v Prest*** [2013] AC , Lord Sumption:

  "There must be a reasonable basis for some hypothesis in the evidence or the inherent probabilities, before a court can draw useful inferences from a party's failure to rebut it. For my part I would adopt [with a modification in ancillary relief cases only] the more balanced view expressed [cited above]… in R v Inland Revenue Comrs, Ex p TC Coombs & Co"

- ***Wisniewski v Central Manchester Health Authority*** [1998] PIQR 324, Brooke LJ:

  "From this line of authority I derive the following principles in the context of the present case:

  > *(1) In certain circumstances a court may be entitled to draw adverse inferences from the absence or silence of a witness who might be expected to have material evidence to give on an issue in an action.*
  >
  > *(2) If a court is willing to draw such inferences, they may go to strengthen the evidence adduced on that issue by the other party or to weaken the evidence, if any, adduced by the party who might reasonably have been expected to call the witness.*
  >
  > *(3) There must, however, have been some evidence, however weak, adduced by the former on the matter in question before the court is entitled to draw the desired inference: in other words, there must be a case to answer on that issue.*
  >
  > *(4) 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."*

- ***Property Alliance Group v Royal Bank of Scotland*** [2018] 1 WLR 3529, CA:

  "[154] No litigant is obliged to call witnesses to satisfy the curiosity or enthusiasm of his opponent….The fact that a party who might be expected to produce witnesses does not do so may sometimes speak volumes but it is a matter for the judge to decide whether it does so in a particular case.

<u>Different tests at different stages</u>

- ***United Trading v Allied Arab Bank*** [1985] 2 Lloyd's Rep 554, 561:

  "The learned Judge concluded that the test to be applied by the Courts is the standard of the hypothetical reasonable banker in possession of all the relevant facts. Unless he can say "this is plainly fraudulent; there cannot be any other explanation", the Courts cannot intervene. We respectfully disagree. The corroborative evidence of a plaintiff and the unexplained failure of a beneficiary to respond to the attack, although given a fair and proper opportunity, may well make the only realistic inference that of fraud, although the possibility that he may ultimately come forward with an explanation cannot be ruled out. The claim before us is a claim for an interlocutory judgment. The first question is therefore - following the principles laid down in American Cyanamid Co. v. Ethicon Ltd.,

[1975] A.C. 396 - Have the plaintiffs established that it is seriously arguable that, on the material available, the only realistic inference is that Agromark could not honestly have believed in the validity of its demands on the performance bonds?"

- ***Re B (Children)*** [2009] 1 AC 11 Lord Hoffmann:

  "I think that the time has come to say, once and for all, that there is only one civil standard of proof and that is proof that the fact in issue more probably occurred than not."

- ***Bank St Petersburg v Arkhangelsky*** [2020] 4 WLR 55

  "[the judge] had then to determine…whether…it was …more likely or not that the explanation for the so-called curiosities of the…arrangements was the respondents' explanation or the conspiracy alleged."

- ***Goose v Wilson Sandford and Co*** [1998] TLR 85, Peter Gibson LJ

  "In ordinary circumstances where there is a conflict of evidence a judge who has seen and heard the witnesses has an advantage, denied to an appellate court, which is likely to prove decisive on an appeal unless it can be shown that he failed to use, or misused, this advantage. We do not lose sight of the fact that the judge had transcripts of the evidence, as well as very extensive written submissions from counsel. But the very fact of the huge delay in itself weakened the judge's advantage, and this consideration had to be taken into account when we reviewed the material which was before the judge. In a case as complex as this, it is not uncommon for a judge to form an initial impression of the likely result at the end of the evidence, but when he has come to study the evidence (both oral and written) and the submissions he has received with greater care, he will then go back to consider the effect the witnesses made on him when they gave evidence about the matters that are now troubling him. At a distance of 20 months, Harman J denied himself the opportunity of making this further check in any meaningful way"