

SUMMARILY JUDGING FRAUD:

BRINGING CLAIMS TO AN EARLY CLOSE



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The conventional wisdom when faced with a fraud claim is that the claim will not be subject to early termination whether by way of strike out or of summary judgment in the Claimant's favour. The nature of fraud claims, involving serious factual findings against the Defendant make them generally inappropriate for summary determination.

However, a number of decisions over the past year should serve to remind parties that even when faced with a fraud case, summary judgment and strike out are available to both Claimants and Defendants and in the appropriate case where claims or defences are inadequately pleaded or where the evidence is overwhelming, the court will be willing to bring the litigation to an early close.



Foglia v Family Officer Ltd

In *Foglia v Family Officer Ltd* [2021] EWHC 650 (Comm), the Claimant claimed to have been a victim of a fraud whereby €15 million had been misappropriated from a bank account in the Cayman Islands in the account of a

company that was owned and controlled by the Defendant. The transfers were obtained through fraudulent telephone calls and a fraudulent fax purporting to instruct the transfer. The Claimant had managed, through freezing and non-party disclosure orders to recover around €11 million from third parties and brought a claim against the Defendant and his company for the balance.

Through a number of non-party disclosure orders, the Claimant was able to show that the instructions for the fraudulent transfer came from a phone purchased by an employee of the defendant and made from within 100 metres of his office. The Claimant also adduced evidence that the monies had been used to settle debts by the Defendant and his company. While the Defendant produced emails which he claimed evidenced his belief that the monies came from a new client, these emails were shown to have been falsified.

Cockerill J referred to the oft-cited authorities of *Easyair Ltd v Opal Telecom Ltd* [2009] EWHC 339 (Ch) at [15] which has been approved by the Court of Appeal (inter alia in *AC Ward & Sons v Catlin (Five) Ltd* [2009] EWCA Civ 1098 at [24]) and noted the guidance from Sir Igor Judge PQBD in *Wrexham Association Football Club v Crucialmove Ltd* [2006] EWCA Civ 237 at [57]-[58] (later approved by Sir Terence Etherton CHC in *Allied Fort Insurance Services Ltd v Ahmed* [2015] EWCA Civ 841 at [81]) that a finding

adverse to the integrity of one of the parties may in and of itself provide a compelling reason to allow a case to proceed to trial.

She therefore held that “bearing in mind the stage of the proceedings the approach of looking to see if any honest explanation is possible, as at the pleading stage, is almost certainly a sound cautionary check.”

Having done so, she considered that the combination of the email fabrication, the mobile phone evidence and the use of the proceeds rendered any innocent explanation fanciful. The email fabrication was itself sufficient for summary judgment but the further two points were also very close to being sufficient in themselves. The Defendant had provided no satisfactory explanation of these points. While the Defendant raised a number of points which he stated required further investigation, he had not carried out any investigation for seven months and they did not affect the three “red flag” issues identified such that Cockerill J found that they amounted to little more than “surmise and Micawberism”. She was therefore prepared, despite the considerable caution required in this area, to grant summary judgment. She further held that, even if she had not granted summary judgment, this was a case where she would have made

a conditional order which required the outstanding sum to be paid into the court funds office.

This case demonstrates that the courts will not shy away from granting summary judgment provided clear and uncontestable evidence is obtained against the Defendant which they are unable satisfactorily to explain.



Rahbarpoor v Suliman

In *Rahbarpoor v Suliman* [2021] EWHC 2686 (Ch), the Claimants brought claims that the Defendants had unlawfully trespassed on their property and misappropriated rental income from tenants. The Defendants relied upon a declaration of trust which appeared to bear a forged signature. The Claimants therefore sought summary judgment.

Clare Ambrose, sitting as a deputy judge of the High Court, referred to *Foglia* and noted that while a court must show very considerable caution in granting summary judgment where dishonesty is critical to the claim in question, especially where each side will effectively be saying that the other is lying, *Foglia* and *Easyair* do suggest that the court may properly be willing to grasp the nettle where there is firm, unanswerable contemporaneous evidence suggesting that the defence to the allegation of dishonesty has no real prospect of success. In this case while the judge held that the Defendants faced an “uphill battle” in defending their case, they should nevertheless be able to test the Claimants’ evidence at trial.

However, in light of the “very strong evidence that the defendants have acted dishonestly regarding this property and that it is highly improbable that they will successfully defend the claim” together with the inconsistent evidence put forward by the Defendants, the judge was prepared to order that the Defendants give security for the Claimants’ costs.



King v Stiefel

At the other end of the spectrum, in *King v Stiefel* [2021] EWHC 1045 (Comm) the Court emphasised the importance of clear pleading in fraud cases. The Claimants had previously sought to bring fraudulent misrepresentation claims against the Second to Fourth Defendants which they had then discontinued on day 10 of a 20-day trial.

This led to what Cockerill J described as “a multiplicity of litigation” which “must inevitably put any observer with a taste for nineteenth century fiction in mind of the infamous Jarndyce case.”

The Claimants here alleged that there was a conspiracy between a number of different parties which caused them to lose their misrepresentation claim.

The Defendants’ application for strike out/summary judgment was successful. Cockerill J noted that fraud claims would be struck out where the particulars of claim were inadequate to support the claims being made: *AAI Consulting Ltd v FCA* [2016] EWHC 2812 (Comm) and *Cunningham v Ellis* [2018] EWHC 3188 (Comm). She noted that clear pleadings had three purposes (a) to enable the defendants to know the case they were required to meet; (b) to enable the parties to prepare for trial and (c) importantly, to perform an audit of the completeness of the party’s cause of action or defence. None of these

objectives were met in the present case and, following a detailed exposition of the pleaded case, Cockerill J held that the particulars were structurally fatally flawed, abusive and lacking in pleadable substance.

Particular attention should also be paid to the postscript at paragraph 456 onwards in which Cockerill J noted that the proceedings had been characterised by unpleaded and unsubstantiated allegations of wrongdoing against both the Defendants and their legal team. She noted that such conduct was becoming too common and reiterated the Commercial Court Guide’s expectation of a high level of co-operation and realism from parties’ legal representatives.



Conclusion

Taken together these cases demonstrate the importance of parties clearly setting out their case at an early stage in fraud cases. If a fraud claim is to be maintained it must be clearly pleaded and, where strong evidence of dishonesty is identified, a party should carry out the investigations necessary in order to articulate their explanation at an early stage. Parties cannot simply wait for trial in the hope that something will turn up – in doing so, even as Defendants, they run the risk that the court will use its powers to bring the proceedings to a close or will use their case management powers to make leave to defend the claim conditional upon a significant payment into court.

