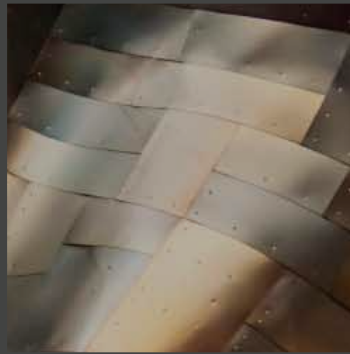


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A Briefing Guide to

Civil Fraud: Bringing A Claim Or Defending A Claim

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Civil Fraud: Bringing A Claim Or Defending A Claim

Civil fraud is a complex area of the law that can be perplexing to those who find themselves involved in it. That is why it is important that such matters are handled by solicitors who are well versed in all aspects of commercial civil fraud and proven experts in assembling a case and responding to all the challenges that can be posed by it.

If a civil fraud case goes to court, it will do so after a huge amount of preparatory work has been carried out. Such work may involve investigating aspects of a case that involve a number of countries and jurisdictions.

Rahman Ravelli's specialist civil fraud team members have the legal expertise and the network of international contacts to ensure that they can manage such cases in the most effective and proactive way possible. We are experts in both obtaining and challenging orders and have the proven ability to give a client a rapid, informed response; no matter how complicated the scenario, how sophisticated the alleged fraud or how high the value of the assets at stake.

Any civil fraud case involves taking the most appropriate steps at the right time. Our

thorough, innovative approach ensures the right strategy and tactics are employed so that the decisions that are acted on are the right ones.

On this page, we cover the major issues that relate to civil fraud cases and outline how best to respond to certain situations.

Civil Proceedings or Criminal Proceedings

If somebody believes they have had fraud perpetrated against them they can report the matter to the police and have it treated as a criminal matter or they can use civil law to seek to recover their losses.

There is no obligation to report fraud to the police. And if you do, it may not be the most appropriate course of action.

This is because if you do:

- You lose control. The police have their own methods of securing evidence which include arrests, raids and interviews under caution. You can have no influence over those. Additionally, the pace at which assets are secured (if at all) is very slow in these situations.
- There can be situations where a civil case against the defendant will not be able to proceed until the criminal proceedings are over.
- The police do not always have the resources to bring a fraud investigation to a swift conclusion, so a criminal investigation could take much longer than civil proceedings.
- A criminal prosecution – even a successful one – will not guarantee that the person who reported the fraud will regain their assets.

The standard of proof in civil law cases is the “balance of probabilities”.

This is a lower threshold than in criminal proceedings, where an accusation must be proved “beyond reasonable doubt”

Tort of Deceit

Tort of deceit can be described as fraudulent misrepresentation. It is the closest that the civil law has to the criminal law concept of fraud.

For a tort of deceit claim to succeed, you must be able to establish:

- The defendant made a representation which was false

- The defendant knew that the representation was false
- The defendant intended that the representation would induce the claimant to act
- The claimant suffered a loss

Bringing A Civil Fraud Claim

In order to pursue fraud-related claims, it is important to obtain strategic advice. Such advice can enable the tracing and, where possible, freezing of stolen assets.

There are a number of tools available to recover any potential losses. These are known as interim reliefs. While interim reliefs can be of great use in helping to locate and regain assets that have been taken fraudulently, it is important that they are employed swiftly. Otherwise there is the risk that the assets could be dissipated – spent, squandered or otherwise placed out of reach of the legitimate owner – if action is not taken quickly enough. The risk of dissipation, therefore, has to be assessed immediately.

Interim reliefs include:

Freezing Orders

Freezing orders are put in place so that defendants cannot diminish the value of the assets or dissipate them before any judgement is made.

A freezing order is an order granted by the High Court to freeze the assets so that the person in possession of them can do nothing with them until the matter is resolved. Assets that can be frozen include bank accounts,

private and public shares, tangible property (such as vehicles and land) and intangible property (such as goodwill in a business or intellectual property rights).

A freezing order is a powerful form of relief, as it restrains a defendant from dealing with the asset. Failure to comply with the freezing order will result in separate contempt of court proceedings where the court has the power to impose a sentence of imprisonment.

In order to make a successful application for a freezing order you will have to show that there was an underlying cause of action (the alleged fraud) and that there is a real risk of dissipation. If this course of action is taken, it must be done quickly. Failure to do so could lead to criticism from the court for delaying and may lead the court to believe that there is no risk of dissipation. Any application must show that you have a “good and arguable claim” against the defendant – which is why you need the most skilled lawyers in this area of law.

World Wide Freezing Orders

As it is not unusual for high net worth individuals to move their wealth between countries, courts can impose worldwide freezing orders. A court will be prepared to impose a freezing order on a defendant whether they are located here or overseas. But while the test is no different to applying for a domestic freezing order, anyone seeking a worldwide freezing order – which can be referred to as a Mareva Injunction, after a 1975 case - must be able to persuade the court that

factors exist which make it necessary to impose an order that covers assets outside of the UK.

The court will look into the location and nature of the assets in question, the level of disruption caused by freezing them and at the effect on any third parties and any litigation; including any related litigation in other countries.

Disclosure Orders

In large-scale fraud claims, disclosure applications are quite often very important.

This is because they can help establish:

- The current location of the property or proceeds from it
- The identity of potential defendants and the basis for claims against them
- The value, location and nature of the assets against which any judgement against the defendant must be enforced
- Critical facts necessary to make out the claimant’s case, which fraudulent defendants might otherwise seek to deny
- The facts from a disclosure order at an early stage in proceedings can be invaluable in limiting the defendants’ ability to mislead the court by fabricating their defence. As such, they can be a very useful tool for evidence gathering.

Search Orders

A search order can be viewed as one of the most draconian forms of injunction known to English law. It requires the respondent to allow the applicant’s solicitor and/or others to enter the premises owned or controlled by the person accused of fraud, in order to search

and remove any documents and material described by the order.

The primary purpose of a search order is the preserving of evidence that is relevant to a claimant's case. A search order is generally used to prevent a defendant from destroying or hiding documentary or other evidence they possess which might support the claimant's case.

A search order only tends to be made when there is no alternative way of ensuring that justice is done for the applicant. For this reason, it is important that expert legal advice is sought before applying for a search order, as the likelihood of obtaining one and the possible value of other options need to be assessed.

Without Notice Applications

When an application is made for a freezing order, disclosure order or search order, it is made ex-parte. This means that the claimant – who is claiming to have been the victim of the fraud – is in attendance at court but the respondent – the person accused of the fraud – is not. Such an approach, known as a without notice application, involves secrecy in order to prevent prejudicing the claim to recover any assets. The respondent will not be aware of an application being made and so the risk of any assets being dissipated is reduced. But with such applications, the respondent has to be able to show good reasons for not giving the respondent any notice.

Other Orders Available to Those Seeking to Recover Assets

Chabra Orders

Anyone involved in fraud will usually make use of third parties – such as a marital partner or associate – to hold assets for them, as this helps disguise their true ownership. A Chabra Order is an interim relief that can be used in circumstances where third parties hold the defendant's assets that are the subject of the fraud accusations.

The third party is not alleged to be liable for the fraud or directly accountable to the claimant. The beneficial owner is still considered to be the defendant but a Chabra Order enables the claimant to freeze assets that are in the possession of the third party.

Norwich Pharmacal Orders 29-052

The purpose behind a Norwich Pharmacal Order is to enable the victim of alleged wrongdoing to obtain information that will enable them to sue the alleged wrongdoer.

Such an order can be used to:

- Identify wrongdoers.
- Identify the full nature of the wrongdoing.
- Trace assets and proprietary claims
- Obtain the source of information contained in a publication
- Enable you to plead your case

In fraud proceedings, these orders are often obtained against banks for disclosure of account details relating to the person who is

facing the accusations. They are usually coupled with a “gagging order” to prevent the bank informing their customer that the account information has been disclosed. The gagging order will be for a set period of time to allow analysis of the information received, although it can be extended on application.

Receivership Orders

A receiver may be appointed at the pre-judgement stage in an effort to preserve assets until a judgement has been made in proceedings. This is a tool that assists post-judgement for the realisation of assets to meet any judgement and it is increasingly used by claimants in civil fraud proceedings.

It involves a receiver taking control or exercising powers of ownership over the relevant assets, depending on the terms of the order. A receivership can be made in respect of foreign assets and over foreign debts.

Receivership operates as an injunction, restraining the respondent from receiving any part of the property which the order covers or the profits of that property, for example the rent paid on a house. The owner of the property that is subject to receivership will not be entitled to any benefit from it while the receivership is ongoing.

Any receiver will be constrained by the terms of a court order so there needs to be careful consideration when proposing the terms of such an order to a High Court

judge. Receivership orders are generally applied for after a freezing order is in place. This is because a receivership order is applied for on the grounds that a freezing order - which freezes assets but still leaves them in the hands of the respondent - provides inadequate protection; hence the need for a receiver to be appointed to take control over the asset.

Receivers can be appointed for assets such as rental properties, dividends from shares (where they may have full power to exercise the rights of the shareholder) and assets that belong to or are controlled by the respondent

Defending a receivership order can involve arguing that appointing a receiver is unnecessary, a step too far, a substantial intrusion into the respondent's affairs and / or likely to have a significant impact on the business or assets that are the subject of the intended receivership. The chances of convincing a court that a receiver is not necessary may depend on the ability to offer an alternative legal approach. This may include offering certain undertakings to the court or involving third party independent experts to manage certain aspects of the business or assets.

Different Types Of Fraud Claims

While tort of deceit is the main and most common type of fraud claim, there are others. And they all require a careful, considered legal approach. Here we list some of the more commonplace examples.

Cross-border Fraud

This can lead to investigations being conducted in a number of countries and/or proceedings being brought in more than one jurisdiction. Knowledge and experience of the law in a variety of countries will be essential in such cases.

Unjust Enrichment

The essence of unjust enrichment relates to wrongdoing; when the defendant is enriched at the expense of the claimant. An example would be if a person gives money to another person to invest in an agreed venture but the second person keeps the money for himself instead of investing it. If the circumstances are such that it is unjust for the defendant to retain that enrichment, then the law of unjust enrichment will provide a way for the claimant to seek its return.

Unlawful Means Conspiracy

A claim for fraud against more than one defendant will most likely include a claim for conspiracy. A conspiracy claim allows a claimant to recover damages for harm caused by the acts of a number of people.

To be liable for unlawful means conspiracy, a defendant must have intended to cause damage to the claimant. For a claimant to prove unlawful means conspiracy they must be able to show an agreement between the defendant and others, that the defendant's intention was to injure, that unlawful acts were carried out as a result

of that agreement as a means of injuring the claimant and that the claimant suffered a loss.

Examples of unlawful means conspiracy include:

- A director conspiring with a company of which he is a director.
- A shareholder conspiring with a company in which he owns shares.
- A parent company conspiring with its subsidiary
- Inducing a breach of contract.

The advantage to bringing a claim for conspiracy is that it enables the claimant to potentially target a wider range of defendants; including many who may not be central characters in the fraud but still played a part in it being carried out. But any such claim will need to be thought out and planned carefully before being pursued.

Breach of Fiduciary Duty

There are a number of fraud claims that can be brought regarding the concept of a breach of fiduciary duty.

A fiduciary duty is owed where one person has undertaken to act for, or on behalf of, another in circumstances which give rise to a relationship of trust and confidence. Duties are owed where the circumstances give rise to a legitimate expectation that one person will not use his position in a way that is adverse to the interest of another.

Examples would include:

- When a director takes an office in which he is responsible for managing the business and controlling the assets of a company

- When a person acts as a trustee to hold property which belongs to the beneficiary
- When an agent agrees to act on behalf of a principal and assumes power to alter his legal position
- Brokers who introduce agents to their clients

A breach of fiduciary duty can be characterised as dishonest if one person deliberately acts knowing that the course of action is contrary to the other party's interests or is recklessly indifferent to that possibility.

If someone owes a fiduciary duty to another and engages in fraud, it amounts to a breach of the core obligation of loyalty. Fiduciary duties provide the basis for a course of action that is flexible in its application to a wide range of factual circumstances. As a result, establishing a breach of fiduciary duty makes it possible to impose a range of remedies against the person who has breached that duty – remedies that do not just involve compensation and that are not normally available in a case that does not involve fiduciary duty being breached.

Offshore Trusts and Cross-Border Trust Disputes

Trust litigation can be complex, multinational, long-running and involve large sums of money and substantial amounts of property. The administration of trusts, disputes between beneficiaries, alleged failure to follow trust rules, secondary liability claims and removal of trustees can all lead to legal disputes.

These may not necessarily have their origins in a fraud claim but fraud allegations may form part of any legal action.

Sham Trusts

A trust will be deemed a sham when the requirements for the creating of a valid trust have not been satisfied. A sham trust must also involve some form of deception. If this is the case, the so-called trust is a nullity, meaning it is legally void. If this is the case and the assets have been transferred to a trustee, they will be held in a resulting trust for the settlor – the original possessor of the assets – until the matter has been legally resolved.

Defending Civil Fraud Claims

Receiving an Order

When an order is made against you, it is important that you take legal advice immediately. The order will set out a number of directions that you will have to comply with. If you do not, you will be in breach of the order, which could lead to contempt proceedings.

In conjunction with a freezing order, the court may also order that you:

- Sign a document authorising your bank(s) or other third parties to disclose to the claimant information regarding your assets
- Hand over your passport to the claimant's solicitors, preventing you from leaving the country
- Are cross-examined about your assets. This is only granted in exceptional cases where you are suspected of having disclosed incorrect or incomplete details regarding your assets.

- Deliver up assets to the claimant's solicitors or make a payment into court

The court may also order that a receiver be appointed over your assets. This is likely to happen if the court feels it is unable to trust you to deal with the assets without breaching a freezing order.

Such potential obligations can seem excessive and unnecessary. This is precisely why you need to appoint a legal team with the appropriate expertise to represent you. It can take the most strategic, experienced legal representatives to persuade a court to drop such conditions.

It is likely that you will have to serve an affidavit within two days, disclosing all of your assets valued over £1,000. Once again, the right legal expertise can be vital in compiling this or in seeking a later deadline for completing it. Strict compliance with a freezing order is required and you should take all possible steps to ensure that you do comply with it.

The freezing order served on you will usually contain a "penal notice" warning you that failure to comply with the terms of the order can lead to contempt of court proceedings. Contempt of court is punishable by a fine, up to two years' imprisonment or seizure of assets. It is another reminder of the importance of ensuring that your response to an order is the correct one.

Challenging Orders

Just as anyone is entitled to bring a civil fraud claim, an individual who is named as the alleged perpetrator of a fraud has every right to contest the allegations and the civil law means by which the claim is pursued. One important way in which this can be done is to challenge the order that the person who is bringing the claim has obtained or is seeking to obtain.

Freezing Orders

The applicant has a duty to make full and frank disclosure to the court when seeking a freezing order. This is in order to ensure fairness in circumstances where the respondent is not before the court to put his case. When such an injunction is made "without notice" to another party (where the subject of the order being applied for is not present) those applying for the order must provide a return date at which the other parties can be present. This is so the case can be reviewed by the court with the benefit of submissions from the defendant.

The return date is usually a couple of weeks after the order is granted. In complex cases, the court should allow sufficient time for the defendant to consider their position, seek legal advice and piece together the arguments they wish to rely on to challenge the order.

It is vital that the subject of such an order acts quickly if they intend to challenge it or seek a variation of its terms; such as the amount it allows to be allocated for living expenses. It is also important for the defendant to ensure that his stance is not viewed as either consenting to the continuation of the

injunction or giving any undertakings that could prejudice his ability to challenge the continuation of the injunction.

Application to discharge the order

There are grounds for resisting or discharging the injunction.

These include:

- The allegation made against you is not an arguable case; either regarding evidence or as a matter of law
- The risk of dissipation has not been established properly
- There is no risk of dissipation
- It is not just to continue this injunction
- The applicant has not disclosed all relevant facts to the court or has misrepresented the situation
- The court has no jurisdiction

Putting it simply, the grounds for discharging a freezing injunction are that the claimant does not meet the criteria for having obtained it or that they have not complied with their duty of full and frank disclosure, as they failed to tell the court some material fact at the without notice hearing – a fact which would have led the judge to decline to make the order.

Disclosure Orders

Defendants are required to provide information that goes above and beyond when they have a disclosure order served on them. They must take all reasonable steps to ensure all their answers are correct and they must go into all the detail that is relevant to the circumstances that have prompted the order. A failure to do this can lead to contempt of court proceedings. In such situations, the response to such an order must be managed by legal representatives who are familiar with all the available options and experts in knowing how the subject of a disclosure order should conduct themselves.

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