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Pleading fraud: getting your facts straight

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There are strict rules in the English Courts when it comes to pleading fraud. It is not acceptable to make baseless and unfounded allegations in the hope or expectation that supporting evidence might materialise or that the accused might be cowed into submission. Legal representatives must satisfy themselves that on the material presented, on the face of it, there is a prima facie case of fraud.

Statements of case should plead the facts with particularity so that the defendant knows the case it has to meet and include all the essential ingredients of the cause of action (fraud) which would give a right to a particular remedy. Because parties to a fraud tend to act covertly and conceal their wrongdoing, it can be difficult for the pleader to be able to detail sufficiently a claim for fraud and meet the strict criteria of the English courts.

Within the arsenal of commercial and civil fraud practitioners, there is the ability to invite the court to draw an inference of fraud from the primary facts. The English Commercial Court has recently had to consider this very issue in the context of a strike-out application.[1] In an interesting case in 2013, the sole director of Grove Park brought separate proceedings against RBS relating to various guarantees entered into between the parties. In the course of these proceedings, RBS accused the professional director of forging the term of a loan agreement in order to fraudulently mislead potential investors in the company. RBS maintained these allegations against the director when it sought to amend its defence. RBS subsequently served late witness evidence that contradicted its allegations of fraud. This led to a withdrawal of the allegations against the director and the case settled on confidential terms.

In the subsequent proceedings (based on the same events and financial documents as the earlier proceedings), Grove Park set out in its particulars of claim its allegations against RBS in respect of the circumstances surrounding the forging of the loan agreement and RBS's conduct in the earlier proceedings. Grove Park alleged that RBS knowingly put forward a false and misleading case in respect of the amendments to the loan agreement. RBS refused to plead a positive response regarding its conduct in the earlier proceedings, save that it would at trial rely on documents served in the earlier proceedings (ie, witness statements/documents) for their true meaning and effect. Just prior to the case management conference, RBS made an application to strike out these parts of Grove Park's pleadings, principally on the basis that they were irrelevant to the issues in the current action (ie, they did not deal with the forging of the loan) and because they did not disclose any reasonable grounds for a claim or defence. In his judgment, Males J (as was) commented that Grove Park's pleading in this regard 'appears to be no more than a prejudicial factual narrative…..If the allegation is to remain, its relevance must be explained so that the case can be understood.'[2]

An inference of fraud

Males J determined that if Grove Park was to cross-examine RBS's witnesses as to their conduct in the earlier proceedings then Grove Park must plead to the relevant facts. The pleadings should be concise and plead to the material facts – it should not include background facts or evidence.[3]

The pleadings should not be used as a weapon to try to obtain additional disclosure to which a party would not otherwise be entitled; in such circumstances the pleader will run the real risk of strike out early on in the proceedings.[4]

In cases where fraud is alleged, the pleader must set out the facts that are relied on to show that the defendant was dishonest and not merely negligent. If dishonesty can be inferred from the primary facts, these must be set out so that a party can rely on them. The courts do not, in matters of fraud, allow proof of facts unless they are pleaded. Further, the court cannot infer dishonesty from facts that have not been pleaded.

Males J pointed out that there is a difference between pleading 'fact' and pleading 'evidence' albeit the distinction can be elusive. Evidence is the material that proves the fact, for example, a document or a witness statement. A fact is a fact, which once supported by evidence will be relied upon to show that the defendant has perpetrated a fraud.[5]

At the interlocutory stage, the court is not concerned with whether the evidence at trial will or will not establish fraud, but only whether the facts as pleaded would justify a plea of fraud.[6]

Males J found that '[I]n the absence of any explanation of why a false allegation against [the director] had been made, it is a reasonable (although not necessarily an inevitable) inference that this was done knowingly…. in order to conceal reprehensible conduct'.[7]

Grove Park was therefore permitted to plead that RBS knowingly put forward a false and misleading case, as this is a fact, which if proved by evidence, is a fact from which an inference of fraud can be drawn.

In summary

Grove Park is a useful reminder to fraud practitioners as to the potential scope of pleading fraud. The pleader should not stray into an overly long, prejudicial narrative nor should they try to broaden the pleading with the objective of obtaining additional disclosure (albeit the latter might prove more difficult with the advent of the Disclosure Pilot). In doing so, the pleader runs a real risk of having to resist a strike-out application, which could lead to a substantial adverse costs order and additional costs consequential on further amendments to the statements of case. In order to avoid/defeat such an application, pleadings should be drafted concisely, setting out the material facts from which an inference of dishonesty can be drawn. If the facts leave open an explanation of negligence or mistake, a party is unlikely to get over the hurdle of being able to justify an inference of fraud.

Notes

1 See *Grove Park Properties Ltd v The Royal Bank of Scotland* [2018] EWHC 3521 (Comm).
2 *Ibid.* at para 21.
3 *Tchenguiz v Grant Thornton LLP* [2015] EWHC 405 (Comm), [2015] 1 All ER (Comm) 961.
4 *Charter UK Ltd v Nationwide Building Society* [2009] EWHC 1002 (TCC) at (the second) [15].
5 *Grove Park Properties* at para 26.
6 See Flaux J in *JSC Bank of Moscow v Kekhman* [2015] EWHC 3037 (Comm) at [20].
7 *Grove Park Properties* at [34].

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The importance of full and frank disclosure in letters of request applications

In the recent case of *Picard v Ceretti & Grosso*,[1] the High Court of England and Wales considered applications by Ceretti and Grosso (the 'respondents') to set aside orders seeking oral and documentary evidence (the 'Orders') made pursuant to letters of request ('LoRs') issued by the US Bankruptcy Court for the Southern District of New York (the 'New York Court').

The respondents contended that in obtaining the Orders, the applicant had failed to make full and frank disclosure of all matters material to its ex parte application.[2] In response, the applicant submitted that the court's obligation was to assist foreign courts as far as possible under principles of comity, and that the English Court was therefore bound to uphold the Orders, regardless of the conduct of an applicant.

The Court found that there had been material non-disclosure by the applicant, and that there were no restrictions on its ability to impose sanctions on the non-disclosing party: it was not limited by principles of comity or otherwise.