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FRAUD AND NEGLIGENCE IN CIVIL LITIGATION - *DIFFERENCES BETWEEN COCK-UP AND CONSPIRACY*

By Jim Oulton

There have been numerous reports in recent years of fraud cases involving professional advisers – from property and asset valuers, to fund and asset managers, to IT professionals. More recently the number of negligence claims against those same types of advisers has risen, many focussed on the pre-Crunch period 2004-2007, some alleging both fraud and negligence.

Napoleon is often credited with the adage, one should “*never attribute to malice that which can be adequately explained by incompetence*”. For professionals, allegations of fraud, if proven, often end careers - and allegations alone can do irreparable damage. Most lawyers say you know fraud when you see it, but go on to say that making allegations of fraud stick can be hard work. Judges, instinctively (and quite rightly), require fraud to be clearly made out, perhaps subconsciously applying the maxim above.

When someone takes client money and uses it for their own purposes, of course you know it is fraud. But what of the professional who takes on work that he lacks the ability or time to do? Or the professional who doesn't ask questions about the source of funds he is asked to transfer – who avoids asking questions for fear of the answers incriminating him and his client? Are those people dishonest, negligent, blameless? At the battle of Copenhagen, when told his commander was flying the signal for recall, Nelson put his telescope to his blind eye

and reported he saw no signal. He secured a famous victory and was lauded for doing so. However, was his conduct honest? It was right that he saw no recall signal, but he knew it had been given.

If civil fraud is so hard to prove, why bother to make such claims? One simple answer is that where fraud is proven, claimants can generally recover all losses flowing from the dishonesty. Claims for breach of contract or negligence, duties owed and losses recoverable are limited by public policy and law. So, a valuer who negligently values a property will not usually be responsible for losses caused by a fall in the market. However, public policy will not assist that same valuer where fraud is established: a fraudster will be liable for all losses caused by his dishonest conduct. Claimants establishing fraud have more generous time limits in which to bring claims. And defendants found to have acted dishonestly cannot reduce liability by establishing contributory negligence on the Claimant's part (which, in some large cases, can be worth millions of pounds), nor rely on clauses limiting liability for losses arising from fraud/dishonesty.

So what is dishonesty in the civil context? Lawyers still rely on the 19th century case of *Derry v Peek*, where it was held that where parties rely on statements which the maker intends them to rely on, knowing (or reckless as to whether) they are untrue, deceit is established. Here recklessness means high



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degrees of carelessness as to whether statements are true. Similarly with the charge of *assisting* someone else's dishonest act, individuals are liable if they act dishonestly, which can include acting recklessly: if their knowledge is sufficient to render their conduct contrary to normally acceptable standards of behaviour, this is dishonest. Consciously closing one's eyes or ears to what's happening will not assist defendants if their conduct is, by ordinary people's standards, dishonest. The standards by which defendants' conduct is measured are objective, but the Courts will look at what defendants actually knew (or believed). Negligence is an entirely different beast: to prove negligence a Claimant must show that no member of the Defendant's profession acting with reasonable skill and care would have acted as the Defendant did. Claimants should bear in mind that professionals' work is often an art, not a science, and the burden of proof rests with the claimant.

So where is all this leading? To quote Napoleon again "*the infectiousness of crime is like that of the plague*". Perhaps the wave of mortgage fraud claims which have come to light in recent years is proof of that. Undoubtedly, we have not heard the last of fraud claims - and as new allegations of negligence and fraud come forward, particularly relating to asset valuations in rising and then declining markets, we will doubtless hear much more.

The case of *BSkyB v EDS*, in which EDS were found to have made fraudulent representations as to their ability to deliver an IT solution within a given timescale when they had not undertaken sufficient work to believe they could do so, has reminded professionals that making promises on too little information can lead to a finding of fraud - and damages potentially far in excess of a contractual cap.

As Mr McGarry of Dunlop Haywards (a surveyor implicated in a multi-million-pound mortgage fraud) discovered, surveyors pretending to have visited properties before valuing them are clearly dishonest. However, the Courts will look at greyer areas too - for example professionals hiding mistakes, or under pressure to provide particular results. Whilst it is clear that dishonesty only has to be proved on the balance of probabilities - it must be *clearly* proved. Woe betide the claimant who cannot sustain an allegation of fraud. Defendants and Judges quite rightly take a dim view of that and unproven allegations of fraud will often result in hefty costs awards against claimants. Potential claimants are well-advised to take heed of that maxim "*Never attribute to malice that which can be adequately explained by incompetence*".