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# Litigating civil fraud: practice, procedure and tactics

**by Matthew Hoyle, Barrister, One Essex Court**

Status: **Law stated date 2 May 2023** | Jurisdiction: **England, Wales**

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This note is an overview of the practical elements of litigating civil fraud claims, from pre-action to post-judgement.

## Scope of this note

This note is an overview of the various practical elements of litigating civil fraud claims, from pre-action to post-judgment. It covers investigating fraud and preparing a claim, preserving assets and evidence, proving fraud, remedies and enforcement of judgments.

It does not cover in detail the various causes of action which may be relevant to a civil fraud claim, other than where necessary to explain the various practical aspects discussed below.

### What is "civil fraud"?

The term "fraud" has a variety of meanings under English law depending on the context it is used in (and much care must therefore be taken to consider the relevant definition in a particular context). The generic phrase "civil fraud" in contemporary English legal practice is not a term of art, but usually refers to claims alleging dishonest, bad faith or unconscionable behaviour, particularly in a commercial context.

There are a large number of causes of action which may be particularly relevant to a civil fraud claim:

- The torts of deceit and bribery (see Practice notes, Misrepresentation: Fraudulent misrepresentation and Commercial fraud: Bribery (secretly paying an agent)).
- The "economic" torts, particularly conspiracy, causing loss by unlawful means, inducing breach of contract and intimidation (see Practice note, Economic torts).
- Conversion, trespass to goods and slander of goods/ malicious falsehood (see Practice notes, Bailment: introduction: Tort, Bailment: types of bailment and Malicious falsehood).
- Breach of trust and fiduciary duty (see Practice note, Fiduciary duties).
- Dishonest assistance in a breach of fiduciary duty and knowing receipt (see Practice note, Trusts in Commercial transactions, Trusts imposed by operation of law).
- Unjust enrichment (see Practice note, Remedies: restitution, "Unjust" enrichment).
- Rescission for fraud, duress, undue influence and unconscionability (see Practice note, Rescission).
- Statutory claims under the Insolvency Act 1986 and the Financial Services and Markets Act 2000 (see Practice notes, Misfeasance claims in corporate insolvency and Claims for financial misselling under English law).
- The tort of misfeasance in public office (in claims against public officials) (see Practice note, Bringing a claim for misfeasance in public office).

Of course, while the term "civil fraud" is not a term of art and may cover all of the above causes of action, not all of them will amount to an allegation of "fraud" for the purposes of certain legal rules. Some, like conversion, require no mental element on the part of the defendant, even though on the facts there may be bad faith. Thus, even if a claimant's goods are converted knowingly or dishonestly, the claim will not be one "*based upon the fraud of the defendant*" for the purposes of section 32(1)(a) of the Limitation Act 1980 (*Beaman v ARTS [1949] 1 KB 550*).

Nor is it essential to plead one of the above list of claims in a "civil fraud" claim – in many cases it is sufficient to simply allege breach of contract or negligence. For example, in *Eurasian Natural Resources Company Limited v Dechert [2022] EWHC 1138 (Comm)* at paragraphs 10, 149 and 449, the claimant's main claims against its former solicitor were in negligence and breach of contract, despite alleging that his conduct was deliberate and calculated to make profits at the expense of the claimant (at paragraphs 10, 44(3), 149 and 449).

# Pre-Action: Investigating fraud and preparing a claim

## Evidence gathering

Like all claims, the first step in litigating a potential civil fraud claim is gathering evidence. However, this process serves two functions in civil fraud cases – first to enable claimants and their legal advisers to decide whether a claim based on fraud is sufficiently meritorious (discussed further below) and the second to enable a case to be pleaded as fully as possible.

It is important to note that the English courts' powers to compel the production of evidence is limited before proceedings commence, particularly against persons who are not going to be made parties to the intended action. Before an action is commenced a party will usually have to rely on the evidence it has to hand, or that which can be obtained voluntarily from third parties. As discussed further below, in fraud cases it may be unwise to seek evidence from the potential defendant before proceedings have commenced, as would normally occur under the CPR Protocol on Pre-Action Conduct.

While documents may ultimately play an important role in a civil fraud case at trial (given that the honesty and accuracy of witnesses will invariably be challenged), the courts are alive to the fact that fraud is rarely done in the open and that private claimants will rarely have access to (or the ability to obtain) critical documents at the outset. As a result, they will usually permit a claimant to rely on inferences from the documents which are available to it when pleading its case (*Lakatamia v Su (permission to amend) [2021] EWHC 203* at paragraph 37 (Waksman J)). For the same reason, a claimant in a civil fraud case will frequently be permitted to amend its claim following the disclosure process without immediately paying the costs of and caused by such amendments, provided it did not have material on which to plead the claim previously (*Various Claimants v MGN Limited [2021] 4 WLR 55* at paragraph 35).

Witness evidence may also be more important in a fraud case than other commercial matters. However, when litigating in the Business and Property Courts, a solicitor investigating and preparing a fraud claim should be mindful of the rules PD 57AC imposes for trial witness statements (see Practice note, Requirements for trial witness statements in the B&PCs under Practice Direction 57AC), and should be careful not to lead potential witnesses or otherwise influence their evidence. Doing this at an early stage can cause problems later when a statement of compliance needs to be signed by the solicitor responsible.

## Investigators and experts

A number of expert fields are likely to be relevant in a civil fraud claim:

- Evidence from forensic accountants or market experts will be required where the court is required to engage in complex quantum exercises, including in ascertaining the value of assets or in constructing wide-ranging counterfactuals (*Parabola Investments v Browallia Cal [2009] EWHC 1492 (Comm)*).
- Forensic accounting evidence is also very common in asset tracing exercises, and can be of significant assistance to the court: *Lum v Chan [2020] EWHC 2445 (QB)* at paragraphs 30, 35 and 40. However, they can be extremely costly (*Turner Smith Investments v Philex [2005] EWHC 257 (Ch)*) and the court will not simply accept, as a matter of course, that anyone who claims to be a "forensic accountant" has sufficient expertise (*De Sena v Notaro [2020] EWHC 1031 (Ch)* at paragraphs 155 to 157). Parties should be mindful of these points before seeking to instruct them.
- In cases involving allegedly forged or falsified documents, handwriting expertise has long been common (Hindmarch (1865-69) LR 1 P&D 307) and remains so (*Promontoria v Emmanuel [2020] EWHC 104 (Ch)* at paragraph 46(4)). However, while it has had high profile use in the United States, English courts appear reluctant to admit so called "stylometric" evidence (*R v Robb (1991) 93 Cr App R 161, 164*).
- A range of other forensic expertise may be considered, including fingerprint experts (for example, *Moviebox Megastores v Rahi [2023] EWHC 501 (Ch)* at paragraph 73) and audio, video and photography experts (for example, *Moviebox* at paragraphs 76 to 80).
- Given the increasing prevalence of digital communications, computer forensics is assuming an ever more prominent role in litigation. However, litigants should be aware of its limitations; while it can provide insights on when information was created and deleted, it is of limited use in establishing who was using the computer or smartphone (*Vardy v Rooney [2022] EWHC 2017 (QB)* at paragraphs 53 to 54 (Steyn J)).
- Where (as is frequently the case) the claim involves foreign elements, it may be necessary to seek expert advice on foreign law, usually with a view to pleading and proving foreign law at trial.

For more information on expert evidence, see Practice note, Expert evidence: an overview. For more information on evidence of foreign law, see Practice note, Pleading and proving foreign law in the English court.

Of course, while forensic evidence can be a powerful tool, it is not infallible, and a judge is entitled to prefer the evidence of factual witnesses (*Kingley Developments Ltd v Brudenell [2016] EWCA Civ 980*). Parties should always bear in mind the cost of obtaining expert evidence, and the fact (following CPR 35.4) that a judge may not be prepared to allow a wide proliferation of forensic witnesses in any but the highest value multi-track cases.

It is also common for litigants to make use of enquiry agents and other private investigators, particularly for matters which require specialist training or experience (for example, covert surveillance or interviewing potential witnesses) but also for investigative tasks that require no special training (for example, ascertaining whether a defendant is in the jurisdiction or still operates from a particular address). In respect of the latter, this can be useful because it avoids the risk of a member of a legal team becoming a witness in any subsequent action. A barrister becoming a witness on a significant matter will generally require them to return their instructions (BSB Code of Conduct, gC73) and while there is no direct equivalent for solicitors, in *SRCL v NHS England [2018] EWHC 1985 (TCC)*, Fraser J made clear (at paragraph 79) that because there is an obvious potential conflict of interest, and restated (at paragraph 81) that a solicitor should never be called if doing so would give rise to a conflict of interest or apparent conflict of interest, and even if there is no such conflict of interest, an alternative witness should always be preferred. Calling a solicitor should be "rare" and should be raised with the court as soon as the possibility arises.

On the other hand, while hiring independent investigators may have benefits, a litigant should be extremely careful in how it employs private investigators and make sure their methods are lawful. While an English court will generally not exclude unlawfully obtained evidence (although it has the power to do so under CPR 32.1 in exceptional cases), a party employing investigators whose methods cross the line into illegality (such as trespass, harassment, breach of confidence or misuse of private information) can expect to be met with a claim or counterclaim:

- In *Gerrard v Diligence International [2020]* (unreported) the court permitted the claimant to bring forward claims based on the Protection from Harassment Act 1997 in respect of extensive covert surveillance allegedly carried out for the purposes of related High Court litigation. (The claim was ultimately settled: 2022 WL 01085105).
- In *RAKIA v Azima [2021] EWCA Civ 349*, the defendant was permitted to bring a counterclaim in respect of the hacking of his computer by persons employed by the claimant, which was said to have been used against him in court. Similarly, in *FKJ v RVT [2023] EWHC 3 (KB)* at paragraph 11, the Court considered it likely that a claimant would succeed in their claim for misuse of private information (namely WhatsApp messages) which were unlawfully obtained and used against her in her employment tribunal claim. Master Davison considered that the obtaining of such information was "*an impermissible form of self-help which it is the policy of English law to discourage*" (citing *Imerman v Tchenguiz [2011] Fam 116*), and that the correct course would have been to hand over any documents to the claimants' solicitors for them to disclose in the usual manner.

## The critical first question - *can* I plead fraud?

Alleging fraud against a defendant is a serious matter. The mere existence of civil fraud proceedings can cause considerable damage to a defendant's reputation and business and inflict distress and personal strain on individuals. Furthermore, as explained below, it can trigger greater powers on the part of the court and impose wider and costlier obligations on the defendant during the litigation process.

As a result, there are a variety of rules designed to protect defendants from ill-founded or improper fraud claims. It is important to distinguish between these rules, as they are different in nature and effect: one is professional, one relates to pleading, and one is a matter of procedure: *Three Rivers DC v Bank of England (No 3) [2003] 2 AC 1* at paragraphs 185 and 186 (Lord Millett) (See also *Lakatamia v Su [2021] EWHC 1907 (Comm)* at paragraphs 39 to 52). Taking each in turn:

- First, both solicitors and barristers are under a professional duty to ensure that any case they put forward is properly arguable (BSB Handbook rC9.2; SRA Code of Conduct 2.4). Furthermore, BSB Handbook rC9.2.c specifically prohibits a barrister making "*any allegation of fraud, unless* [they] *have clear instructions to allege fraud and* [they] *have reasonably credible material which establishes an arguable case of fraud*". This duty was explained in *Medcalf v Mardell [2003] 1 AC 120* at paragraphs 21 and 22. In particular, counsel can plead a case based upon inadmissible evidence if it establishes a credible case; for example, they may rely upon a report from an expert investigator or an inadmissible judgment. Of course, by the time of a hearing, admissible evidence must be available to support the allegations if necessary, and if it is not, counsel should not persist with the claim.
- Secondly, an allegation of fraud must be clearly pleaded. Where dishonesty or bad faith is alleged,

it is not sufficient for a claimant to hedge its bets by using language such as "*recklessly*" or "*wilfully*": *Armitage v Nurse [1998] Ch 241* at paragraph 257. Any equivocal language will be construed against the pleader and the court will not give judgment on a fraud claim: *Wallingford v Mutual Society (1880) 5 App Cas 685, 697*. This principle is now expressed in CPR PD16.8.2 and the Commercial Court Guide (11th ed.) paragraph C1.3(c).

- Third and finally, the primary facts from which an inference of fraud is made must be expressly set out and the facts must be such that, *if* each were proven they would suggest fraud rather than mere negligence. A court will not usually permit a party to prove further, unpleaded facts at trial to support the inference (*Three Rivers DC* at paragraph 186).

As to this last point, Lord Millett explained further that there must be facts which (if established at trial) "tip the balance" towards fraud rather than negligence. However, unlike a criminal or quasi-criminal context, in a civil case this should not be understood as facts which show no other possible conclusion, only facts which suggest fraud is more likely than not: *Lakatamia v Su [2021] EWHC 1907 (Comm)* at paragraph 64 (Bryan J).

### The other critical question – *should* I plead fraud?

Even if there is material on which a fraud claim may be based, a practitioner should not simply do so without any further thought. As noted above, in many cases there is no need to plead allegations of fraud or bad faith, and a cause of action which may be committed innocently or negligently may suffice.

Of course, pleading a claim in fraud can have significant legal or strategic value, whether because it triggers special rules (such as postponing limitation) or because it forms the basis of a powerful argument on merits.

However, if a claimant pleads a claim in fraud, it sets in motion a process which cannot straightforwardly be stopped. In particular, a claimant who fails to make good a fraud allegation at trial (even if the allegation was reasonably arguable) is likely to face an order for indemnity costs: *Clutterbuck v HSBC Plc [2015] EWHC 3233 (Ch)*.

Similar considerations will apply if a fraud claim is discontinued before trial, particularly in light of the fact that such conduct prevents the defendant from vindicating his position: *PJSC Aeroflot-Russian Airlines v Leeds [2018] EWHC 1735 (Ch)* at paragraphs 53 and 59 (Rose J). There must be some good reason given by the claimant as to why discontinuance was considered necessary, and indemnity costs may well follow if the claim in fraud was obviously weak or hopeless from the start.

More seriously, if a claimant obtains interim injunctions (in particular, freezing or proprietary injunctions), they will not even have a unilateral right to discontinue the part of their claim to which the injunction relates (*CPR 38.2(2)*). A claimant who seeks to discontinue, with the court's permission, at a late stage, because of difficulties with its case may well find that the court refuses such permission and instead summarily dismisses the action: *Vale SA v Steinmetz [2022] EWHC 343 (Comm)*. While a discontinued claim can be revived in some circumstances (*CPR 38.7*), a dismissal will act as an estoppel and bar further proceedings (unless the claimant can prove that the dismissal was obtained by fraud).

## Commencing proceedings: Preserving assets and evidence

### Seeking interim orders before the commencement of proceedings

While claims formally begin with the service of a claim form (*CPR 7.2*), in many fraud cases the claimant may be concerned that defendants will continue to act in bad faith by hiding or disposing of assets, or destroying evidence of their wrongdoing once it is apparent their conduct has been detected by the claimant. For that reason, in practice, many civil fraud claims will effectively commence with the claimant seeking without notice orders against the defendant before (or contemporaneously with) the issue a claim form:

CPR 25.2(1)(a) and CPR 25.2(2) permit a court to grant interim relief before the commencement of proceedings provided the matter is "urgent" or it is "otherwise desirable to do so in the interests of justice". The grant of relief will usually be subject to an undertaking that a claim be filed, if it has not already been filed at that time (unless the relief sought is pre-action disclosure under s.33 Senior Courts Act 1980).

Even where relief is sought before proceedings commence, the rules require the respondent to be given notice of the application, unless there is provision for notice to be dispensed with (*CPR 23.4(2)*). PD 25A.4.3 permits interim injunctions to be sought without any notice at all if "secrecy is essential". As explained by Lord Hoffman in *National Commercial Bank of Jamaica v Olint Corporation [2009] 1 WLR 1405* at paragraph 13, a court will only entertain a without notice application if "*giving notice would enable the defendant to take steps to defeat the purpose of the injunction... or there is literally no time to give notice*". An applicant will be required to undertake to serve notice on the respondent in such circumstances. For further information, see Practice note, Injunctions: an overview.

There are a number of interim orders which may be useful for a claimant in a civil fraud claim, but the most significant are discussed below.

## Interim orders – procedural considerations

Whether or not an order is sought pre-action, the claimant will be required to comply with the general steps in CPR 23 and CPR 25 and PD 23A and 25A, including giving notice and permitting time for service of evidence in response. Where an order is sought without notice, service of documents should be dealt with by the court as part of the order (*CPR 23.9*), as should arrangements for any return date hearing (*PD 25A.5.1*).

Particular issues can arise in respect of service of an order out of the jurisdiction (as is common in civil fraud cases). An application for an interim injunction may only be served out of the jurisdiction where the substantive claim falls within one of the "gateways" under PD 6B (although in light of the increasingly liberal construction of the gateways (*Orexim Trading Ltd v Mahavir Port and Terminal Private Ltd [2018] EWCA Civ 1660*), along with their widening in October 2022, that is now less of an issue).

While a party may seek orders for alternative service or to dispose of the need for service (under CPR 6.15 and CPR 6.16 respectively), neither rule will permit the court to take jurisdiction over a defendant who is not present in the jurisdiction, as this would be to circumvent the requirement that a gateway be established (by analogy, *Integral Petroleum v SCU-Finanz [2014] EWHC 702 (Comm)* at paragraph 36).

The considerations relating to ordering alternative service (including retrospective alternative service) were discussed by the Supreme Court in *Abela v Baadarani [2013] 1 WLR 2043*, but the guiding principle is one of whether there is a "good reason" to permit alternative service. Orders under CPR 6.16 may only be made under "exceptional circumstances" (*Bethell Construction Ltd v Deloitte and Touche [2011] EWCA Civ 1321* at paragraph 28).

As to the enforcement of orders served on parties out of the jurisdiction, under PD 6B gateway 24 (one of the gateways introduced in October 2022), contempt applications may be served outside the jurisdiction (although prior to the introduction of this gateway, contempt applications could be served out of the jurisdiction where they were ancillary to existing orders properly served (*Vik v Deutsche Bank AG [2019] 1 WLR 1737*). For more information on service outside the jurisdiction, see Practice note, Service of the claim form and other documents: outside the jurisdiction.

Of course, a defendant may simply refuse to engage with such proceedings. While it is not generally possible to seek extradition for civil contempt (not being within the scope of extradition treaties), the courts have made clear that the fact that a defendant is outside the jurisdiction will not prevent findings of contempt or the imposition of custodial sentences (*VIS Trading v Nazarov [2016] 4 WLR 1* at paragraph 58 (Whipple J)). Furthermore:

- A claimant outside of the jurisdiction may be subject to a "surrender order" requiring them to present themselves to the Tipstaff for arrest: *BTA Bank v Ablyazov [2012] EWHC 455 (Comm)*.
- Claimants may also seek sequestration of assets present within the jurisdiction as an alternative to a custodial sentence.

For more information, see Practice note, Contempt of court: an overview.

## Preserving assets – freezing and proprietary injunctions and receivers

Where a claimant is simply seeking damages (or some other personal monetary award), they can seek a freeing injunction (or "freezing order") (traditionally known as a *Mareva* injunction) to prevent a defendant dissipating their assets or moving them out of the reach of enforcement measures (*CPR 25.1(f)*). Freezing orders are often divided into two types: "domestic" freezing orders and "worldwide" freezing orders. In order for the court to grant an injunction, the applicant will be expected to provide an unlimited cross-undertaking in damages.

### Domestic freezing orders

A domestic freezing order relates only to assets within the jurisdiction. There are four requirements for the grant of such relief:

- The claimant has a "good arguable case" on a substantive claim for a sum of money (following recent developments discussed below, this claim may be one brought in England or elsewhere). This is intended to be higher threshold than "a serious issue to be tried" which is required for other interim injunctions (*American Cyanamid v Ethicon [1975] AC 396*) and reflects both the onerous nature of the order and the fact that the claimant is not asserting any rights to the defendants' assets. For a discussion of the meaning of "good arguable case" in this context see *Lakatamia Shipping v Morimoto [2019] EWCA Civ 2203* at paragraphs 37 and 38.
- There must be assets within the jurisdiction in relation to which an order can be granted. When there is a dispute about whether assets are within the scope of the injunction, the court must do its best and will not accept the defendant or third party's say-so, but there must be evidence upon which such a finding can be based (*SCF Finance Co Ltd v Masri [1985] 1 WLR 876*).

- The claimant can show there is a "real risk" of assets being disposed of such as to prevent any judgment obtained being unsatisfied. This does not require that disposition is likely; merely that there is a risk which is justified by objective evidence rather than mere speculation. No further gloss can helpfully be applied to that test (*Les Ambassadeurs v Yu [2022] 4 WLR 1* at paragraph 35) but the factors which a court may consider were set out by Picken J in *[2018] EWHC 1019 (Comm)* at paragraphs 17 to 20. A party may rely on inferences to make good their case on real risk, but only if the evidence they can adduce "calls for an explanation" by the defendant (*Grosvenor v Aygun [2019] Bus LR 628* at paragraphs 44 to 47).
- Finally, as with any interim injunction, the court must consider the "balance of convenience" that is, whether the order is "just and convenient" (*The Niedersachsen [1983] 1 WLR 1412, 1426* (Kerr LJ)). At its core, this is a question of whether the risk of irremediable harm to the claimant outweighs that to the defendant (*Olint* (above) at paragraph 17). Given the nature of such an enquire a complete list of considerations is not possible, but a variety of factors are considered in Civil Fraud (2nd ed.) at paragraph 28-059.

For more information, see Practice notes, Freezing orders: an overview and Freezing orders: what must be proved?.

### Worldwide freezing orders

A "worldwide freezing order" or "WFO" relates to assets anywhere in the world and can be granted against persons resident both inside and outside the jurisdiction (provided they can be served in accordance with the usual rules of service). This is possible because the order acts on the defendant personally, not against their assets (*Derby & Co Ltd v Weldon (Nos 3 and 4) [1990] Ch 65*, paragraph 93 (Neill LJ)).

The core test for the grant of such relief is the same as for a domestic freezing order stated above, with the exception of the second requirement: the claimant must show that there is a good reason why worldwide reach is required. Traditionally, the usual reason accepted by the court was that there were no (or no sufficient) assets within the jurisdiction to satisfy any award, but there are such assets outside the jurisdiction (*Derby & Co Ltd v Weldon (Nos 3 & 4) [1990] 1 Ch. 65, 79*) and there is a real risk of their disposition (*Derby & Co Ltd v Weldon [1989] 1 All ER 469, 474* (May and Parker LLJ)). However, it appears that this is just one example of a good reason for giving worldwide rather than domestic relief. For example, it may also be that there are notionally sufficient assets within the jurisdiction, but they are difficult to value or may prove difficult to enforce against (*Grant & Mumford, Civil Fraud (Sweet & Maxwell) (2nd ed., 2022)* at paragraphs 28-065 to 28-068).

Either way, because of the extra-territorial reach of the order the court will not automatically grant such relief (*Ashtiani v Kashi [1987] QB 888*). The balance of convenience will usually weigh particularly heavily in such cases: (*Derby & Co Ltd v Weldon [1989] 1 All ER 469, 478* (Nicholls LJ). While a WFO can in some cases be enforced abroad, it will usually be a requirement of a WFO that the court's permission is needed to seek to enforce abroad to avoid a multiplicity of suits (*Re BCCI [1994] 1 WLR 708*). The guidelines for the grant of such permission were laid down in *Dadourian Group International Inc v Simms (Practice Note) [2006] 1 WLR 2499*. A WFO will often be required to contain a proviso preventing interference with the rights of third parties outside the jurisdiction: *Babanaft International Co v Bassatne [1990] Ch 13*.

It is important to note that not all jurisdictions will recognise freezing orders or be willing or able to give effect to them under their local procedural rules. Moreover, there have been challenges to the validity of judgments obtained following freezing orders (see, for example the decision of the Italian Supreme Court of 16 September 2021, No.25064; although it allowed enforcement of the judgment, it had to overturn the decision of Court of Appeal of Rome, which had refused to enforce a Guernsey judgment on the basis that the freezing order and ancillary disclosure orders made in those proceedings would not have been given under Italian law and had interfered with the defendants right to a fair trial).

For more information, see Practice note, Freezing orders: an overview: Worldwide freezing orders.

### Freezing injunction standard form

A standard form for both types of freezing injunction is found annexed to CPR PD 25A and in the Appendixes to the Commercial Court and Chancery Division Guides (Appendixes 11 and M, respectively) (see Standard document, Freezing order: draft order (with drafting notes)), although this may be amended as appropriate (*PD 25A.6.2*). Any amendment should be identified and drawn to the attention of the court (*paragraph F14.6, Commercial Court Guide*). The standard form injunction requires a cross undertaking in damages which, given the intrusive nature of the order, will be required in almost all circumstances (*Nomihold v Mobile Telesystems [2011] EWHC 337 (Comm)* at paragraph 24). The undertaking must also be unlimited, absent the claimant showing some good reason for a limitation (*Hunt v Ravneet UBHI [2023] EWCA Civ 417* at

paragraphs 37 and 38). The Commercial Court Guide (at paragraph F14.3) also provides for fortification unless a claimant can show it has sufficient assets within the jurisdiction to satisfy any undertaking.

### Variations on freezing orders

Depending on the nature (and, importantly, value) of a claim, there are a number of variations on the subject matter of freezing orders:

- The usual order (reflected in the standard form) is a so called "maximum sum" order, which prevents disposition of assets such as to bring them below a certain amount (usually the greatest amount in relation to which the claimant can show a good arguable case (*Rogachev v Goryainov [2019] EWHC 1529 (QB)* at paragraphs 63 and 64) sometimes combined with likely costs (*Thevarajah v Riordan [2015] EWHC 1949 (Ch)* at paragraph 29). Parties should not necessarily push for the maximum sum possible they think they can get because if judgment is obtained for far less than is frozen the court may require compensation under the cross-undertaking (*Atlas Maritime Company SA v Avalon Maritime Ltd (No 3) [1991] 1 WLR 917, 920* (Lord Donaldson)). For the same reason, a claimant should (and will be expected to) agree to reduce the maximum sum if the value of the claim falls (*O'Farrell v O'Farrell [2013] 1 FLR 77* at paragraphs 85 and 86).
- "Unlimited" orders, with no maximum sum, are now almost unheard of because of their oppressive effect on the defendant (*Willetts v Alvey [2010] EWHC 155 (Ch)* at paragraph 15). Only where it is impossible to quantify the maximum value of the claim can such an order be considered.
- Orders limited to a specific asset or assets, such as a bank account or a property (which may include requirements that the defendant notify the claimant of any intention to deal with the asset (*Lakatamia Shipping Co Ltd v Su [2015] 1 WLR 291*).

### Notification orders

A further variation on a freezing order is a pure "notification" order, which requires the respondent to notify the applicant if they intend to dispose of property and gives them time to decide whether or not to take further steps to prevent such disposition (*Holyoake v Candy [2018] Ch 297* at paragraph 8(6) (Nugee J)). Such orders still require a claimant to show a good arguable case and a real risk of dissipation, but the "balance of convenience" test may reflect that a notification order of this sort may be less onerous than a freezing order (*Holyoake* at paragraphs 39 and 45 (Gloster LJ). A cross-undertaking will generally still be required for such orders (*Holyoake*).

### The enforcement principle

Freezing or notification injunctions act personally on the defendant. They and do not relate to (or require) existing rights – instead they protect the claimant's interest in enforcing any monetary award the claimant ultimately obtains (sometimes called the "enforcement principle" (*BTA Bank v Ablyazov [2015] 1 WLR 4754* at paragraph 13 (Lord Clarke)). Along with enabling the relief to operate in respect of assets globally, this has a number of effects on the subject matter of the order:

- A freezing order can be sought in respect of any "asset" or means by which the defendant may store wealth, even if entirely unconnected to the dispute and wherever it is in the world. This can include tangible property, choses in action (most commonly, bank accounts but also for example, insurance policies (*TDK Tape Distributor (UK) Ltd v Videochoice Ltd [1986] 1 WLR 141*) and even things which are not property, like goodwill (*Templeton v Motorcare [2012] EWHC 795 (Comm)* at paragraph 25 and *[2013] EWCA Civ 35* at paragraph 18). This may be of particular relevance where a dispute involves wealth held in the form of bitcoin or other cryptoasset, should their current status as "property" (as was held in *AA v Persons Unknown [2020] 4 WLR 35*) be reconsidered by higher courts.
- The property can even include assets which the defendant is prohibited from charging or alienating (*Bank Mellat v Kazmi [1989] QB 541*) although if the asset would never be available for enforcement after judgment, it is doubtful that injunction should (or would) be granted.
- The flip side of this personal nature is that a freezing injunction can (and in its standard form, will) capture any new assets acquired by the defendant between when it is made and when it is discharged (*Cretanor Maritime v Irish Marine Management Ltd [1978] 1 WLR 966, 973* (Buckley LJ)).

### Proprietary injunctions

Alternatively, where a claimant is asserting a right in relation to a specific asset (particularly rights to the traceable proceeds of property obtained by fraud) instead of a freezing injunction they may seek what is often termed an "interim proprietary injunction" which restrains a defendant from dealing with the asset (*Mercedes-Benz AG v Leiduck [1996] AC 284* at paragraph 300 (Lord Mustill)). This can take the form of a simple prohibition on sale or movement, or orders that a claimant be notified if the defendant proposes to dispose of the asset (*Holyoake v Candy* at paragraph 8(3)-(4) (Nugee J) and paragraph 35 (Gloster LJ)). Because the proprietary injunction is based on an assertion of specific rights by the claimant, there are considerable differences between such orders and freezing injunction. Practitioners should

always have these in mind when deciding what form of order to seek:

- A defendant seeking a proprietary injunction need not show a real risk of dissipation nor a good arguable case (as described above). A claimant merely needs to meet the *American Cyanamid* test of a "serious issue to be tried" (*Sukhoruchkin v Van Bekestein [2014] EWCA Civ 399* at paragraph 17 and 18).
- There is no general distinction between cases where the assets are held in England and Wales or outside of it (although the availability of local relief may be considered at the balance of convenience stage).
- Delay in seeking a freezing injunction *may* justify refusing such an order because any risk of dissipation would already have come to pass (*Madoff Securities Ltd v Raven [2011] EWHC 3102 (Comm)* at paragraph 156 (although note an order was granted in that case)). Conversely, delay is unlikely to justify refusing a proprietary injunction (*Cherney v Neuman [2009] EWHC 1743 (Ch)* (freezing injunction refused but proprietary injunction granted)).
- A freezing injunction is designed to prevent dissipation of assets to prevent enforcement, not to prevent the claimant spending funds in the ordinary course of business or on their ordinary living expenses (or from expending money on legal fees) (*Iraqi Ministry of Defence v Arcepey Shipping Co SA (No 2) (The Angel Bell) [1981] QB 65*). For that reason, freezing orders will usually include provision for the so called "Angel Bell" exception for such expenditure (even if that expenditure is "*lavish*" and may even exhaust the frozen assets, provided it is in good faith) (*Vneshprombank LLC v Bedzhamov [2019] EWCA Civ 1992* at paragraphs 1, 2 and 59). On the other hand, where assets are said to belong to the claimant, a court is unlikely to allow the claimant to spend those monies on personal expenses unless they can show they have no other assets available (*Fitzgerald v Williams [1999] QB 657* at paragraphs 669 to 670).
- At the more extreme end, a proprietary injunction may require money said to constitute traceable proceeds be placed in a special account (*Polly Peck v Nadir (No 2) [1992] 4 All ER 769* at paragraphs 784 and 785).

However, neither freezing injunctions nor proprietary injunctions create new rights in relation to the assets covered by them or operate as a form of pre-trial attachment (*Cretanor Maritime*). They require the subject(s) of the order to exercise their rights, powers or control in a certain way (or more accurately, not to do so). As such, neither injunction will give the claimant further priority in insolvency or permit a claimant to trace the assets if they are dissipated in breach of the order (*Taylor v Van Dutch Marine [2017] 1 WLR 2571*). If the proprietary rights asserted when seeking a proprietary are established at trial then the clamant will be able to rely on these in insolvency and against third parties. That being said, if a third party who holds assets which may be used to satisfy a judgment against the defendant, a freezing order may be extended to them (and indeed the standard form order now provides for this) (*TSB v Chabra [1992] 1 WLR 231*). There is no requirement that such assets (*Parbulk II v PT Humpuss Intermoda [2011] 2 CLC 988* at paragraphs 45 to 46), but merely that there is a "good reason to suppose" that the third party would be amenable to some process of enforcement if the claimant succeeded in its claim (*Banca Turco Romana SA v Cortuk [2018] EWHC 662 (Comm)*). The "*Chabra*" jurisdiction can therefore provide greater protection by granting the claimant rights against institutional parties.

For more information on proprietary injunctions and the Chabra jurisdiction, see Practice note, Injunctions: an overview.

### Receivers

Finally, if there is "*measurable risk*" that a freezing or proprietary injunction will be insufficient to protect the claimant's position, they may seek the appointment of an interim receiver to take control of the defendant's assets pending trial (*BTA Bank v Abylazov [2010] EWCA Civ 1141* at paragraphs 16 to 17). A measurable risk can be shown not only by evidence that the defendant has breached (or will shortly breach) the freezing order, but also by evidence that the defendant has failed to comply with the asset disclosure provisions usually made in a freezing order, particularly where their assets are structured so as to make policing a freezing order difficult. However, such an order will not be granted where there are less intrusive methods of protection such as giving notice to the bank at which a frozen account is held (*Abylazov [2010] EWCA Civ 1141* at paragraphs 14 and 16).

Unlike freezing orders and proprietary injunctions, receivership will (once put into effect) result in the transfer of direct control of property from the defendant to the receiver (and, by the order of the court, title may be transferred (*Ablyazov [2010] EWHC 1779 (Comm)* at paragraph 168). This will give much greater protection to the claimant but is a costly and lengthy process which may cause considerable losses to a defendant should it transpire the order was wrongly granted (the court will usually require a fortified cross-undertaking in damages from a claimant before making such an order (*Ablyazov [2010] EWCA Civ 1141* at paragraph 14). Moreover, a claimant will be expected to pay a receiver and meet their costs, in the first instance, which means such orders will only be suitable in large scale litigation with well-resourced claimants.

## Locating assets and evidence: information orders and third-party disclosure

A freezing order will usually be accompanied by an ancillary order that the defendant disclose the location their assets, this being an essential part of policing such an order (*Yuzu Hair and Beauty v Selvathiraviam [2020] EWHC 1539 (Ch)* at paragraph 10). This is normally provided by way of a witness statement or affidavit, and where there is evidence that the disclosure is incomplete and there is no reasonable alternative, the court may permit cross examination on the disclosure given (*BTA Bank v Ablyazov [2009] EWHC 2833 (QB)*).

The power to order a respondent to provide information on property or assets under CPR 25.1(1)(g) is not, however, limited only to ancillary disclosure alongside a freezing order:

- It may be invoked to obtain information at a time when a party is deciding whether or not to apply for a freezing order (or to extend an existing order). In granting an order, a court need only be satisfied that there is "some credible material" to show that a freezing order would be sought; an applicant is not required to show that an application for a freezing order would succeed (*JSC Mezhdunarodniy Promyshlenniy Bank v Pugachev [2016] 1 WLR 160* at paragraphs 49 to 52 (Lewison LJ)).
- Furthermore, it may be used to obtain further information to assist with the enforcement of the freezing order (*Tullett Prebon Plc v BGC Brokers LP [2009] EWHC 819 (QB)*).

However, neither type of application is permissible if a party is simply fishing for information on which to base a cause of action; the purpose is for ascertaining whether the defendant has assets which can be or are subject to the freezing injunction (*Parker v CS Structured Credit [2003] 1 WLR 1680* at paragraph 26).

Furthermore, while there is no power at common law to order disclosure against a non-party, a variety of specific orders are available to obtain evidence from third parties:

- Norwich Pharmacal Orders (see Practice note, Norwich Pharmacal orders: an overview).
- So called "Bankers Trust Orders", relating to the assets of the claimant.
- Bankers Books Act Orders (under *section 7* of the Bankers' Books Evidence Act 1879).
- Third-party disclosure orders under CPR 31.17 (see Practice note, Non-party disclosure).
- Witness summons to produce documents (previously known as a subpoena duces tecum).

One issue is that such evidence is frequently located outside of England and Wales.

Historically, the courts had been prepared to permit service of Bankers Trust orders outside the jurisdiction but had been reluctant to grant Norwich Pharmacal orders against non-parties outside the jurisdiction, as it was thought that the court did not have jurisdiction do so (cf. *AB Bank v Abu Dhabi Commercial Bank [2017] 1 WLR 810*; *Fetch.ai v Persons Unknown [2021] EWHC 2254 (Comm)*).

However, on 1 October 2022, the common law jurisdiction gateways (under which the court may grant permission to serve out) were amended and a new gateway was added, clarifying that the court may make two kinds of "information orders" against third parties outside the jurisdiction. Gateway 25 of paragraph 3.1, PD 6B, provides for service out of applications to obtain information on the true identity of a defendant or potential defendant (a traditional Norwich Pharmacal Order) or what has become of the property for the claimant or applicant (Bankers Trust Orders) (see Practice note, Jurisdiction: the gateways: Information orders against non-parties). As a result, it seems likely that obtaining permission to serve out in respect of Norwich Pharmacal Orders will become more common (see *LMN v Bitflyer [2022] EWHC 2954 (Comm)* at paragraphs 26 and 27).

Furthermore, the courts have recently affirmed that applications for third-party disclosure under *section 36* of the Senior Courts Act 1981 can be served on persons outside the jurisdiction, at least where such applications concern documents held within England and Wales (*Gorbachev v Guriev [2022] EWCA Civ 1270*, cf. *Olympic Counsel of Asia v Novans [2023] EWHC 276 (Comm)* at paragraph 91). This is likely to be useful where the disclosure sought is outside the two types of Norwich Pharmacal relief envisioned by the new gateway 25 (for example, evidence not relating to the identify of a defendant or to the location of assets).

## Preserving evidence: search orders

Where the defendant is believed to have evidence under their control which they may seek to destroy or place beyond the courts' jurisdiction, a claimant may seek a "search order" (traditionally known as an *Anton Piller* order) (*section 7, Civil Procedure Act 1997* and *CPR 25.1(1)(h)*). Such orders are at the most intrusive end of the court's powers, given English law's traditional regard for the security of one's premises (*Booker McConnell v Plascow [1985] RPC 425, 441*), and the threshold for obtaining them (as set out in *Indicii Salus v Chandrasekaran [2007] EWHC 406 (Ch)* at paragraph 11) are commensurately high:

- The applicant must have an extremely strong prima facie case (although there is "flexibility" in this requirement).
- The damage to the applicant, threatened or actual, must be very serious.
- There must be clear evidence that the respondents have in their possession incriminating evidence and there is a real possibility that it will be destroyed or disposed of before an application for its preservation can be made on notice.
- The harm caused by execution of the order is not out of proportion to the legitimate objection of the order. This will include delay in applying for such an order and any matters of public interest (*BWM AG v Premier Alloys Wheels [2018] EWHC 1713 (Ch)* at paragraphs 15 to 16).
- A cross-undertaking in damages will also be required as a matter of course.

In respect of the fourth criterion, a prospective applicant should always consider whether an order less intrusive than conducting a physical search is suitable. Previously this took the form of "doorstep" delivery up orders, whereby the defendant was required to hand over items (*Hyperama v Poulis [2018] EWHC 3483 (QB)*).

However, given the increasing dominance of digital communication over paper, the focus of such orders today has shifted towards "imaging", whereby a computer forensics expert is authorised to take a copy or "image" of an electronic storage devices. The considerations for seeking such an order were considered in *TBD (Owen Holland) Ltd v Simons [2021] 1 WLR 992*, at paragraphs 176 to 193. Practitioners should also be mindful that an order to image a device does not automatically extend to viewing (and this applies more widely to any evidence obtained under a search order).

A party applying for a search order should note the requirements in PD 25A.7-8, particularly the need for a "Supervising Solicitor" and making provision for the respondent to take legal advice upon service of the notice. A standard form search order is annexed to PD 25A, along with a new standard form imaging order. An application for any form of Search Order must be accompanied by an affidavit on behalf of the applicant (*PD25A.3.1*). This must set out its case, reasons for making the application and giving full and frank disclosure.

Like a freezing order (and unlike a search *warrant* in the criminal courts), a search order is made against a respondent personally, requiring them to allow access to property for the purposes of a search (*Anton Piller v Manufacturing Processes [1976] Ch 55*, 60 (Lord Denning MR)). As such, it can in theory be made in respect of property outside the jurisdiction, although the court will be very circumspect before granting such an order and will usually expect such an application to be made to a local court, if possible (*Cook Industries v Galliher [1979] Ch. 439*).

A search order can also be made against a third party in whose premises evidence is located. However, unless the third party is implicated in the wrongdoing, a court is very unlikely to make such an order lightly (by analogy, *Galaxia v Mineralimportexport [1982] 1 WLR 539, 543* (Sir George Baker)), and consideration should be given to seeking another form of third party disclosure (as discussed below).

Alternatively, CPR 25.1 contemplates other orders in relation to evidence or other property (in addition to other orders which may be of interest to a claimant in civil fraud proceedings). In particular, it contemplates under CPR 25.1(1)(c) orders for the detention, inspection, sampling of or experimenting on "relevant property" (and for entry onto land for the purposes of carrying this out under CPR 25.1(1)(d)).

For more information, see Practice note, Search orders: an overview.

## Other interim orders

Another interim order of particular note are "passport orders" (although the requirement that the defendant surrender their passport to the court is ancillary to the order that they do not leave the jurisdiction), first made in *Bayer AG v Winter [1986] 1 WLR 497*. In the case of corporate defendants, it may be possible to obtain such orders against directors (*Kuwait Airways Corp v Iraq Airways Co [2010] EWCA Civ 741*).

Such orders are typically made pre-judgment, usually to support freezing injunctions or orders for disclosure (*JSC Mezhdunarodny Promyshlenniy Bank v Pugachev [2015] EWCA Civ 1108*, at paragraphs 10 to 12 (Floyd LJ)). However, they may also be made after judgment, provided that they do not amount to a form of imprisonment within the jurisdiction in order to coerce payment (*Lakatamia v Su [2021] EWCA Civ 1187* at paragraph 5 (Sir Nicholas Patten)). Post-judgment uses of such orders include ensuring the defendant can be cross-examined on their assets (*Lakatami [2021] EWHC 297*) or ensuring a defendant is present for pending contempt proceedings (*Lexi Holdings v Luqman [2008] EWHC 2908 (Ch)*). The criteria for making such orders are summarised in *Moss v Martin [2022] EWHC 2385 (Comm)* at paragraphs 32 to 33.

For more information, see Practice note, Freezing orders: an overview: Other ancillary orders: Passport order.

## Interim remedies against persons unknown

The internet and globalisation have facilitated a large increase in the potential for fraud to be carried out

anonymously or pseudonymously. In response, over the past 20 years the courts have developed their jurisdiction to make orders against "persons unknown" (*Bloomsbury Publishing Group v News Group Newspapers [2003] 1 WLR 1633*). Such persons must usually be identified by reference to some class or other descriptor. Examples of such identifiers were discussed by Marcus Smith J in *Vastint Leeds v Persons unknown [2019] 4 WLR 2* at paragraph 21. Persons unknown should not generally be identified by references to states of mind however (*Osbourne v Persons Unknown [2023] EWHC 39 (KB)* at paragraph 14).

While service of a claim form and application notices for injunctions against persons unknown will not normally be permitted unless a person is "anonymous but identifiable" (that is, they can be communicated with and identified from the order), this is not a concern where the defendant has taken steps to conceal their identity or otherwise evade identification, which are appropriate cases to authorise alternative service under CPR 6.15 or to dispense with service under CPR 6.16 (*Cameron v LV Insurance [2019] 1 WLR 1471* at paragraph 25 (Lord Sumption)).

Such principles were applied in the leading crypto-currency hacking case *AA v Persons Unknown*, where Byran J:

- Authorised alternative service of the claim form under CPR 6.15, by way of email, physical delivery on related addresses and by filing at court.
- Required known defendants to provide any information in their possession as to the identity of the unknown defendants and requiring the unknown defendants to identify themselves.
- Further noted that an order can be made requiring unknown parties to provide an address for service.

Since this decision, alternative service has also been permitted through non-fungible token (*Osbourne v Persons Unknown [2023] EWHC 39 (KB)* at paragraphs 47 to 49 (Lavender J)). It appears that even where it is possible that the persons unknown are within the jurisdiction, before authorising alternative service, the courts will wish to be satisfied that jurisdictional gateways would be satisfied should it prove otherwise (*AA v Persons Unknown* (above) at paragraphs 44 and 49, *Jones v Persons Unknown [2022] EWHC 2543 (Comm)* at paragraphs 30 and 31; *Osbourne v Persons Unknown [2023] EWHC 340 (KB)* at paragraph 29).

It appears to have been accepted that if it is ultimately possible to identify the person unknown, the injunction can be enforced against them, in respect of failure to comply, before the time of identification, provided that the claimant has fully complied with the requirements of service, even if they were not subjectively aware of the order (*Cuciurean v Transport Secretary [2021] EWCA Civ 357* at paragraph 58 (albeit that subjective knowledge may be highly relevant as to whether any sanction is imposed)). This is contrary to some previous understandings of the principle identified in *Masri v CCIC [2011] EWHC 1024 (Comm)* at paragraph 353.

Even if the persons unknown never come forward and are never identified, the court can proceed to give judgment and order permanent injunctions: *XXX v Persons Unknown [2022] EWHC 2776 (KB)*.

### Interim remedies in support of foreign proceedings

Much civil fraud litigation has an international dimension, and indeed may involve litigation in several jurisdictions. While it was previously thought that interim remedies could be sought only in support of claims intended to be pursued in the English courts (The Siskina [1979] AC 210) today it is clear that there is no need for such a claim to be in the English courts.

Under *section 25* of the Civil Judgments and Jurisdiction Act 1982 (as extended by the Civil Jurisdiction and Judgments Act 1981 (Interim Relief) Order 1997), the English court can grant interim relief in support of essentially any foreign proceedings, however tenuous the link to the UK: *Haiti v Duvalier [1990] 1 QB 202*.

Furthermore, in *Broad Idea v Convoy Collateral [2022] 2 WLR 703*, the Privy Council has found that there is a general power under *section 37* of the Senior Courts Act 1981 to grant injunctions against persons within the jurisdiction of the court in support of foreign proceedings. This has now been confirmed to form part of English law by the Court of Appeal (*Re G [2022] 3 WLR 1339* at paragraphs 54 to 60; *Bacci v Green [2022] EWCA Civ 1393* at paragraph 16 (Newey LJ), paragraph 52 (Arnold LJ)).

## Proving fraud

### Disclosure

Civil fraud is one area where very expansive disclosure may still be sought, including in some cases for documents which may prompt a "train of enquiry". This was traditionally known as "*Peruvian Guano*" disclosure before the CPR came into effect and, though it remains an option for a court under CPR Part 31 in a "substantial case", it is rarely, if ever, used even in the most serious and high value disputes (*Berezovsky v Abramovich [2010] EWHC 2010 (Comm)* at paragraph 12 (Gloster J)).

In the Business and Property courts it is now known as "Model E" disclosure under PD 57AD and is said to be exceptional and even rarer than under Part 31

(*Qatar v Banque Havilland [2020] EWHC 1248 (Comm)* at paragraph 22 (Cockerill J). (For more information on Model E disclosure, see Practice note, Disclosure in the B&PCs: comparison of some aspects of the disclosure process under the CPR 31 regime and under PD 57AD ("Disclosure in the Business and Property Courts").)

Following the first *Banque Havilland* decision, the Commercial Court has appeared reticent to grant Model E disclosure at an early stage in the proceedings (for example, *Kelly v Baker [2021] EWHC 964 (Comm)* at paragraphs 16 to 17 (Moulder J)). However, on a renewed application in *Banque Havilliand*, Model E disclosure was ordered on one particular issue, telephone conversations between key participants in the alleged conspiracy (*[2021] EWHC 2172 (Comm)* at paragraphs 226 to 232 (David Edwards QC)). This was in circumstances where it was clear, by that stage of the proceedings that: (i) relevant material had previously been withheld; (ii) the available documents suggested that important conversations had happened over the telephone; (iii) it was unlikely any direct evidence of the conspiracy existed but wider disclosure could help identify circumstantial evidence and (iv) other more conventional sources of information had been lost or were unavailable.

On the other hand, there have been a number of cases where the Chancery Division has shown willingness to grant Model E disclosure on critical issues in major fraud trials (for example, *Privatbank v Kolomisky [2022] EWHC 868 (Ch)* at paragraph 5; *RAKIA v Azima [2022] EWHC 1295 (Ch)* at paragraphs 80 to 82 (Michael Green J)). Notably, Michael Green J referred to the four factors relied on in *Banque Havilland*; litigators may wish to rely on these as useful starting points if they are considering seeking Model E disclosure.

Even where a model of disclosure has been decided, PD 57AD requires consideration of "custodians" and of the keywords which will be used to search documents. The choice of the correct keywords is vital given the volume of electronic documents which are likely to be disclosed under Model D or Model E disclosure. Some guidance on how to select keywords was suggested by the Singaporean High Court in *Global Yellow Pages Limited v Promedia Directories Pte Ltd [2013] SGHC 111* at paragraph 53 to 55. Keywords can be run with sophisticated parameters as explained by in *Agents Mutual v Gascoine [2019] EWHC 3104 (Ch)* at paragraph 4(b)(ii) (Marcus Smith J). However, while names are a frequently chosen as keywords, in a civil fraud claim where the parties have been seeking to hide their identity (for example, *Ocado v McKeeve [2022] EWHC 2079 (Ch)* at paragraphs 47 to 57) it may be appropriate to choose other words, such as unique phrases or codewords that have been identified on the existing evidence.

The courts are aware of the difficulty of selecting the correct keywords and may be willing to consider multiple rounds of searching or refinement of keywords if the results appear unsatisfactory (for example, only a small number of hits or too many hits). Where a party is represented, a court will expect the parties to have cooperated so as to try to resolve difficulties with search terms (*Montpellier v Leeds CC [2012] EWHC 1343 (QB)* at paragraph 36).

Claimants may expect to find that defendants have destroyed electronic data. While this can be sometimes be dealt with by data recovery services, these can be very expensive and not always successful (*Ocado v McKeeve [2021] EWCA Civ 145* at paragraphs 31 and 61). In particular, it is increasingly apparent that unlike with traditional hard drives which are very hard to wipe totally, solid state drives can irreversibly be wiped much more easily. In such circumstances, the claimant will have to resort to adverse inferences (see Circumstantial cases and adverse inferences), although consideration may also be given to committal orders where evidence has been destroyed in the face of a search or delivery up order (see Preserving evidence: search orders).

## Burden of proof

In most fraud claims, the burden of proving each element of the cause of action will lie upon the claimant as the party making the assertion (to the extent they are in issue between the parties). The defendant will then bear the burden of proving any particular defence it raises to an otherwise complete cause of action. In traditional language "they who assert must prove" (*Emmanuel v Avison [2020] EWHC 1696 (Ch)* at paragraph 54 (Birss J)).

There are a variety of exceptions to this rule, most of which are highly specific and which space does not allow to be discussed here. The most significant general exception is in relation to claims for breach of trust and fiduciary duty. Where a defendant is a trustee or otherwise subject to fiduciary duties in respect of property under its control, it will bear the burden of justifying any dealings with that property or any payments made out it (*Ross River v Waveley Commerical [2013] EWCA Civ 910* at paragraphs 64 and 94). Similarly, an agent or other fiduciary who enters a situation of conflict of interest or a self-dealing transaction will bear the burden of proving informed consent of their principal (*Bentick v Fenn (1887) 12 App Cas 652, 666* (Lord Watson); *Hurstanger v Wilson [2007] 1 WLR 2351* at paragraph 35).

## Standard of proof

Outside of proceedings for contempt of court (addressed below), there is only one standard of proof in civil

proceedings, namely the balance of probabilities (*Re B [2009] 1 AC 11* at paragraphs 13 and 15 (Lord Hoffman), paragraph 64 (Lady Hale)). If the person bearing the burden of proof satisfies the judge (or, highly exceptionally, jury) that something is more likely than not to be true, then it is proven, even if that balance is only marginal (*Miller v Minister of Pensions [1947] 2 All ER 372, 374* (Denning J)). Contrary to the suggestion in some older cases, there is no rule that a judge need to be satisfied to some higher standard in order to find a defendant has committed fraud or other acts of bad faith (*Re B* at paragraphs 13 and 64).

It is important to recall that judges do not usually need to rely upon the burden and standard of proof in reaching a conclusion on the facts (*Re B* at paragraph 32). Having seen all the evidence, they will be completely satisfied as to the facts of the case.

Those simple statements of principle belie significant complexity, especially in civil fraud matters. Particular care must be taken with judicial statements around "inherent probabilities" and the standard of proof for fraud. As made clear in *Re B* (at paragraph 62) and *Bank of St Petersburg v Arkhangelsky [2020] 4 WLR 55* at paragraphs 115 to 117, fraud and conspiracy is, in the abstract, less likely than negligence because people rarely engage in commercial fraud (relative, at least, to how often they are careless). However, the concept of inherent probabilities is a forensic tool to assist the judge in evaluating the evidence (*Re B* at paragraph 70). It should not be elevated into a rule that there is always connection between the seriousness of the conduct alleged and the evidence necessary to prove it, which was the very thing rejected in *Re B* (at paragraphs 15 and 72) (see also *Arkhangelsky* at paragraph 47, in which a decision was set aside because the judge had applied the incorrect standard of proof: paragraphs 48 to 56).

In particular, where a defendant has been found to be a dishonest person, a court is entitled to re-assess the inherent probabilities of them committing further frauds in light of this fact (*Kazakhstan Kagazy v Zhunus [2017] EWHC 3374 (Comm)* at paragraph 158 (Picken J)). Where both parties are found to have acted dishonestly, it is unlikely to be helpful to begin with the presumption that dishonesty is unlikely (*Arkhangelsky* at paragraph 47). Moreover, there is no requirement in a civil claim that the claimant show that the facts were "*incapable of innocent explanation*" (*Arkhangelsky* at paragraph 48).

## Documentary evidence and hearsay

Civil fraud trials frequently involve extensive reference to documentary evidence and the inferences to be drawn from it. In a world where nearly all business involves smartphones, emails and computers, almost every defendant will leave a digital trail which will be picked up at trial. The approach a court should take to documentary evidence, particular in comparing it to the evidence of witnesses, was considered at length by Bryan J in *Lakatamia v Su [2021] EWHC 1907 (Comm)* at paragraphs 54 to 57.

In document heavy cases, practitioners should particularly bear in mind questions of hearsay (that is, where a statement by a witness or contained in a document is tendered as proof of what is stated). Since hearsay became admissible (and particularly since it became generally admissible under the Civil Evidence Act 1995) there has been a tendency for practitioners to lose sight of the rule. However, while hearsay is now admissible, the reasons why it was once excluded remain pertinent to its forensic weight (hence the list in *section 4* of the 1995 Act), and the requirements for notice to be given under CPR 33 are ignored at a parties' peril (see, for example, *Yukos Hydrocarbons v Georgiades [2020] EWHC 173 (Comm)* at paragraphs 71 to 80). In the case of exceptionally tenuous or prejudicial hearsay evidence, which cannot properly be tested during the trial, a court may exercise its powers under CPR 32.1 to exclude documents from evidence (*NCA v Azim [2014] EWHC 4742 (QB)* at paragraph 48).

Even where there are no difficulties arising from documentary hearsay, parties should not assume that every admissible document placed in the trial bundle can be relied upon during the trial. The Commercial Court Guide (11th ed.), paragraph J8.6 makes clear that the parties must usually agree which documents are to be regarded as in evidence, or otherwise seek an order from the judge at a Pre-Trial Review.

For more information on hearsay evidence, see Practice note, Hearsay evidence in civil litigation.

## Cultural differences

Many civil fraud claims before the Business and Property Courts have an international element. The extent to which regard should or may be had to cultural differences was considered by Bryan J in *Lakatamia v Su [2021] EWHC 1907 (Comm)* at paragraphs 67 to 72. Local standards of conduct may also be relevant under Article 17 of the Rome II Regulation. However, cultural differences may never be invoked to justify what amounts to wrongdoing under the applicable law, English or otherwise (*Lakatamia* at paragraph 70), nor actions which may or may not be lawful under the appliable law but are inconsistent with English public policy (*Les Laboratoires Servier v Apotex [2015] AC 430* at paragraph 25).

## Circumstantial cases and adverse inferences

As noted above, civil fraud cases will rarely feature "*smoking guns*", as defendants do not usually record

their criminal conduct in writing. Direct evidence of fraudulent or dishonest intent is unlikely (unless it is admitted, the state of defendant's mind necessarily must be inferred). A party must usually therefore rely on circumstantial evidence and the inferences drawn therefrom to make good their case, and the courts are understanding of this (*Lakatamia v Su [2021] EWHC 1907 (Comm)* at paragraphs 59 to 66 and 799 to 802).

Although there is a popular belief that circumstantial evidence is in some way inferior to direct evidence, there is no such legal rule or presumption to this effect in either a criminal or civil context (*R v Donovan (1930) 21 Cr App R 20*). A simple, striking example suffices: CCTV showing a person leaving the site of a murder covered in blood is circumstantial evidence that they committed the murder, but it may well be more powerful evidence than a witness who saw the murder but only got a glimpse of the killer.

That being said, circumstantial evidence is rarely compelling in isolation, and it should not be considered piecemeal. Its effect is in its totality, each inference excluding other possibilities until only one remains likely (or, in the context of contempt, there is no other possible explanation). For that reason, it has been described as working like a net, cutting off each potential avenue of escape (see *BTA Bank v Ablyazov and others [2013] EWHC 510 (Comm)* at paragraphs 197 to 198 (Teare J) and the authorities cited therein).

A claimant (and indeed defendant) may also seek to rely on the drawing of adverse inferences:

- The most frequently sought type of adverse inference is where a witness who could be expected to give relevant evidence is not called. Spurred on by what were sometimes seen as "rules" for obtaining such inferences, there was an increasing (and, eventually, deprecated) tendency to seek such inferences in the last decade: *Magdeev v Tsvetkov [2020] EWHC 887 (Comm)* at paragraphs 150 to 152. However, in *Royal Mail Group v Efobi [2021] 1 WLR 3863* at paragraph 41, Lord Leggatt made clear that such inferences are not governed by special rules but instead are simply a matter of "*common sense*" and forensic judgment for the tribunal, like any other inference from the evidence. That being said, it is probably still correct to say that such "adverse inference" is not merely a general prejudice against the party or witness, it must relate to some specific matters or facts which the missing evidence would likely have spoken to (*Magdeev* at paragraph 154; *Efobi* at paragraph 43).
- Inferences may also be drawn against a defendant who fails to explain their conduct. This extends to the context of an alleged contemnor's failure to give evidence (despite their right to silence), but in either case, only if there is a prima facie case which calls for explanation (*Therium (UK) Holdings Ltd v Brooke [2016] EWHC 2421 (Comm)* at paragraph 29).
- Other examples of adverse inferences which may arise include those from the deliberate destruction or concealment of evidence (*Vardy v Rooney [2022] EWHC 2017 (QB)* at paragraph 71).
- Furthermore, the withholding of consent to forensic testing (without good reason) may also be held against the party refusing testing (*ENRC v Dechert* at paragraphs 1471 to 1479).

## Remedies and enforcement

### Remedies

The wide-ranging causes of action involved in civil fraud claims may result in a variety of remedies. Most common will be compensatory damages for loss caused. However, a number of other remedies may be sought, in particular:

- Account of profits for breach of fiduciary duty or confidence (see Practice note, Personal remedies in equity to recover a sum of money).
- Rescission of contracts obtained by fraud, bribery, duress or breach of fiduciary duty (see Practice note, Rescission).
- Accounts of property or assets held in a fiduciary capacity.
- Declarations that traceable property is held on constructive trust for (and orders that it be conveyed to) the claimant (see Practice note, Tracing, following and constructive trusts).
- Restitution of benefits transferred to the defendant (see Practice note, Remedies: restitution).
- Final injunctions or orders for specific performance (see Practice notes, Injunctions: an overview and Specific performance).

### Enforcement

Unfortunately, in many civil fraud causes, winning is (comparatively) the easy part. For example, the defendant may simply refuse to engage in the litigation, or they may refuse to comply with orders for disclosure because of the damning evidence which the process would reveal. Memorably, in *BTA Bank v Abylazov [2012] EWHC 455 (Comm)*, the main defendant had absconded (ultimately, it transpired, to Italy) after being found to have given false evidence about his assets pursuant to a pre-judgment freezing order. After failing to comply with the courts' subsequent order that he surrender to custody (*BTA Bank v Ablyazov [2012] EWHC 455 (Comm)*), the court debarred Mr Ablyazov from

defending the substantive proceedings and judgment was duly entered against him (*BTA Bank v Ablyazov [2013] 1 WLR 1331*). A debarring order can serve as a powerful tool against an intransigent defendant, although it is worth bearing in mind that foreign courts may refuse to enforce orders obtained following debarring orders, on the basis of their own public policy relating to the right to a fair trial.

But even with a judgment against a fraud defendant (at that point, a judgment debtor), enforcing that judgment can prove difficult, particularly where the judgment debtor has had the opportunity to conceal their assets before their conduct is discovered, or interim relief has proven ineffective. Mindful of this, the court have made clear that a judgment creditor will benefit from a strong policy which favours facilitating the satisfaction of court judgments by those able to do so (*Lakatamia v Su [2020] 1 WLR 2852* at paragraph 25 (Foxton J)).

## Post-judgment freezing injunctions

It has long been within the courts' power to grant a freezing injunction following judgment, even if no order was sought or obtained before trial (*Jet West v Haddican [1992] 1 WLR 487* 490 (Lord Donaldson MR); *Emmott* at paragraph 40). Although they were once considered a rarity, a post-judgement freezing order are now regularly granted to aid enforcement: Broad Idea at paragraph 14 (Lord Leggatt); *Mobile Telesystems v Nomihold Securities [2012] Bus LR 1166* at paragraph 32), although they should not be used simply to pressure a judgment debtor to make payment.

Obtaining a post-judgment freezing injunction will usually be more straightforward:

- By definition, a judgment creditor will have discharged (and indeed exceeded) the "good arguable case" threshold – they have an enforceable judgment debt.
- A court is less likely to need further evidence showing a real risk of dissipation (*Great Station Properties SA v UMS Holding Ltd [2017] EWHC 3330 (Comm)* at paragraph 63; *VB Football v Blackpool Football Club [2018] EWHC 1232 (Ch)* at paragraphs 30 and 31 (Marcus Smith J)).
- There will usually be no need for a cross-undertaking to protect the judgment debtor (*Watson v Applegarth Dene Ltd [2019] EWHC 349 (Ch)* at paragraphs 46 to 47).
- However, a cross undertaking may still be required in order to protect innocent third parties (*Banco Nacional de Comercio v Empresa de Telecommunicaciones [2008] 1 WLR 1936* at paragraphs 40 to 47).

Furthermore, a court can "convert" a pre-judgment freezing order into a post-judgment freezing order by modifying its provisions (*Stewart Chartering v C&O Managements [1980] 1 WLR 460*). The various steps the court may take, and the considerations in doing so, where discussed by Picken J in *Kazakhstan Kagazy v Zhanus [2018] EWHC 369 (Comm)* at paragraphs 141 to 187).

However, like a pre-judgment freezing order, post-judgment orders do not themselves create any additional rights to the debtor's assets (*Leiduck* at paragraph 306 (Lord Nicholls)). A judgment creditor who wishes to obtain further protection from insolvency or disposition to third parties should seek charging orders over the debtors' property under CPR Part 73.

For more information, see Practice note, Freezing orders: an overview: Post-judgment freezing orders.

## Post-judgment search orders

As with freezing injunctions, the court also has a power to make post-judgment search orders for the purpose of obtaining evidence for the purposes of enforcement procedures (*Distributori Automatici Italia SpA v Holford General Trading Co Ltd [1985] 1 WLR 1066*, including against third parties: *Abdela v Baadarani (No 2) [2018] 1 WLR 89*).

## CPR 71 orders for oral examination and other information orders

Of course, enforcement actions, receivership and the policing of freezing injunctions require visibility over the assets of a defendant. Like a pre-judgment freezing order, a post-judgment freezer will usually require disclosure of assets, insofar as such disclosure has not already been given already. However, while cross-examination on a pre-judgment declaration of assets is exceptional, in practice a judgment creditor has a right to seek examination (*Vale v BSG Resources [2020] EWHC 2021 (Comm)*; *Khouj v Acropolis [2021] EWHC 1667 (Comm)* at paragraph 43) provided they have a presently enforceable judgment (*White Son & Pill v Stennings [1911] 2 KB 418*).

Where the judgment debtor is a company, a creditor may instead seek examination of its director (*CPR 71.2(1)(b)*). Somewhat unfortunately (and on contrast to the pre-CPR position) this does not extend to directors at the time the claim arose but who have since resigned their position (*Vitol SA v Capri Marine Ltd) [2009] Bus LR 271*).

Outside of CPR 71, the Courts' have recognised a wide variety of orders for the provision of information. These include orders that the entirety of a debtor's documents be handed over to an independent lawyer for examination of privilege (*Lakatamia v Su [2020] 1 WLR 2852*).

For more information, see Practice note, Orders under CPR 71 requiring judgment debtors to attend court to

provide information about means and other matters relevant to enforcement of judgment debt (by answering questions and producing documents).

## Committal for contempt

If a court order is disobeyed, proceedings may be brought against the disobedient party or, in the case of a corporate defendant, those who control it (*Olympic Council of Asia v Novans [2023] EWHC 276 (Comm)* at paragraph 33) for contempt, both as punishment and to coerce performance of the order (*Crystal Mews v Metterick [2006] EWHC 3087 (Ch)* at paragraph 8).

For more detail on contempt, see Practice note, Contempt of court: overview.

Penalties for contempt include debarring orders, fines and sequestration of assets. However, the ultimate punitive and coercive tool available to the court is committal to prison. Under *section 12* of the Contempt of Court Act 1981, a court may commit a contemnor for up to two years.

Committal proceedings are not available in respect of failures to pay judgment debts (or any other "ordinary" form of debt) due to the effects of the Debtors Acts 1869 and 1878. It is, however available against those who fail to pay money by way of security, or undertakings to the court to pay sums of money in order to prevent the court making another order, such as sale of a property (*Hussain v Vaswani [2020] EWCA Civ 1216* at paragraph 46).

Given this limitation in respect of debts, committal will therefore be most useful in a civil fraud context where a debtor fails to transfer specific property found to be held on trust for the defendant (for example, following rescission of contracts for fraud). This can include payment of specific monies held on trust by the defendant, as *section 4(3)* of the Debtors Act 1869 provides for an exception for such claims.

However, contempt is now frequently invoked in respect of ancillary orders:

- Disposal of assets in breach of a freezing order (*Templeton v Thomas [2013] EWCA Civ 35*).
- Failure to disclose assets following a freezing order (as described above) (*Asia Islamic Trade Finance Fund Ltd v Drum Risk Management Ltd [2015] EWHC 3748 (Comm)*).
- Failure to produce documents and give proper answers in a CPR 71 order for oral examination (*Deutsche Bank v Vik [2020] EWHC 3536 (Comm)* at paragraph 238; *[2022] EWHC 1599 (Comm)*).
- Destruction of evidence subject to a search order (*Holland v Fast Corporate [2014] EWHC 825 (QB)*; *Ocado v McKeeve [2022] EWHC 2079 (Ch)*).

That being said, parties must be careful in their attempts to invoke the contempt jurisdiction. Although there is a public interest, as well as a private one, in orders being followed and upheld (*Navigator v Deripaska [2022] 1 WLR 3656* at paragraphs 82(i) and 137 (Carr LJ)), the Commercial Court has warned on more than one occasion that such procedure is "complicated and onerous" and that parties may wish to consider whether other options are open to them (*Olympic Council of Asia v Novans [2023] EWHC 276 (Comm)* at paragraph 102).

A claimant who brings and loses (or withdraws) committal proceedings risks being ordered to pay costs on the indemnity basis (particularly in relation to serious contempts), although there is no rule to this effect (*Loveridge v Loveridge [2022] BCC 324* at paragraphs 170 to 173). Conversely, a proven contemnor may well expect to pay indemnity costs, particularly if they are found to have been aware their actions constituted contempt, or resistance to the application compounds the underlying contempt (*Atkinson v Varma [2021] EWHC 592 (Ch)* at paragraphs 26 to 27; *Vik [2022] EWHC 2057 (Comm)* at paragraphs 31 and 46 (costs already agreed to be on an indemnity basis, but judge considered them the "*price of losing contempt proceedings*" defended in a dishonest way).

For more information, see Practice note, Contempt of court: overview.

## Further claims for interference with a judgment debt or conspiracy to commit contempt

In some circumstances, it may be impossible to satisfy the judgment debt against the original judgment debtor or debtors, most commonly because they have succeeded in hiding their assets or are outside the practical reach of court orders. However, given the increasing tendency for judgment debtors (or, in the case of corporate defendants, those in control of them) to attempt to evade judgment debts, the courts have recently recognised two further claims which may be brought against third parties who have been involved in frustrating the enforcement of the court's orders (and thereby cause loss to the claimant):

- Conspiracy to commit a contempt of court (*BTA Bank v Khrapunov [2020] AC 727*).
- Inducing or procuring a breach of a judgment debt (*Marex v Sevilleja [2017] EWHC 918 (Comm)*, *Lakatamia v Su [2021] EWHC 1907 (Comm)* at paragraphs 121 to 131).

Insofar as these third parties are strangers to the original judgment, a claimant will be required to prove their factual case afresh, albeit the existence of the judgment debt will not be in dispute (*JSC BTA Bank v*

*Ablyazov (No 15) [2017] 1 WLR 603*). That being said, evidence from a previous hearing may be admissible (*BTA Bank v Shalabayev [2017] EWHC 2906 (Comm)*). Given the expense of prosecuting new proceedings, which themselves will need to be enforced even if successful, this should be seen as a last resort, rather than a first choice.

For more information, see Practice note, Economic torts.