

A v H

Jurisdiction:	Jersey
Judge:	Master Thompson, Matthew John Thompson
Judgment Date:	07 July 2016
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Text

Between
A
First Plaintiff
K
Second Plaintiff
L
Third Plaintiff
and
H
First Defendant
John Bisson and Others (practising under the name and style of Appleby)
Second Defendant

[2016] JRC 116

Before:

Advocate Matthew John Thompson, Master of the Royal Court

ROYAL COURT**(Samedi)**

Strike out — decision regarding applications by the first and second defendants to strike out parts of first plaintiffs claim.

Authorities

In the Matter of II [\[2016\] JRC 106](#).

Cummins v Howlands (Furniture) Limited [\[2014\] JRC 165](#).

Booth v Zenith [2014] JRC 231.

Three Rivers D.C. v Bank of England (No.3) [\[2003\] 2 AC 1](#).

Nolan et al v Minerva et al [2014] (2) JLR 117.

Fogarty v St Martin's Cottage Limited [\[2016\] JRC 073](#).

The First Plaintiff appeared in person.

The Second Plaintiff appeared in person.

The Third Plaintiff did not appear.

Advocate S. A. Franckel for the First Defendant.

Advocate D. R. Wilson for the Second Defendant

Advocate D. S. Steenson appointed as amicus curiae for the Plaintiffs.

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THE MASTER:**Introduction**

- 1 This judgment represents my decision in respect of the applications by the first and second defendants to strike out parts of the first plaintiff's claim. While I address later the detailed applications made, what was at the heart of both applications was a request to strike out allegations of fraud and dishonesty made by the first plaintiff against the first and second defendants.
- 2 The defendants' applications were heard on Monday, 6TH June, 2016. At the commencement of the hearing, the first plaintiff applied for an adjournment of the defendants' application. The application for an adjournment was refused. This judgment therefore also sets out my reasons for refusal of the adjournment.
- 3 This judgment follows on from the judgment *In the Matter of II* [\[2016\] JRC 106](#) handed down by me on 15TH June, 2016, in respect of a strike out application brought by the first and second defendants against the second and third plaintiffs. I therefore adopt paragraphs 3 to 21 of that judgment ("the Strike-Out Judgment").
- 4 At paragraph 21 of the Strike-Out Judgment I referred to an application to adjourn the applications made by the first plaintiff which application to adjourn was heard on 11th May, 2016. That application was granted with the result that the defendants' summonses against the first plaintiff were adjourned to 6th June, 2016. The purpose of the adjournment was to allow the first plaintiff to obtain a second opinion from Advocate Baker. In re-fixing the defendants' summonses for 6th June, 2016, I made it clear that I wanted Advocate Baker to provide his opinion by 27th May, 2016, so that determination of the defendants' strike out summonses could take place on 6th June, 2016. The decision to adjourn matters on 11th May, 2016, including the terms contained in the Act of Court of that date were not appealed by any party. I also did not receive any indication from Advocate Baker that he could not provide his advice by 27th May, 2016.
- 5 As it became clear during the hearing on 6th June, 2016, Advocate Baker's advice was provided in draft on 27th May, 2016. The advice was provided in draft because the first plaintiff asked for time to comment on it. She then provided her comments back to Advocate Baker who provided his final advice on Tuesday, 30th May, 2016. It was not disputed that his retainer had then ceased.

The application for an adjournment

6 At the outset of the hearing on 6th June, 2016, the first plaintiff applied for an adjournment. Her reasons for doing so were as follows:-

- (i) She had not had enough time to go through the advice received;
- (ii) She found the whole process and procedures confusing;
- (iii) She had not received advice from Advocate Baker on interlocutory matters;
- (iv) She had not had enough time to find the authorities she wished to rely on in opposition to the defendants' applications;
- (v) The previous week had been taken up applying for a *remise* to prevent a *dégrèvement* against her property from taking place. I was informed that the application for a *remise* was made on Friday, 3rd June, 2016, and was referred to two Jurats to report back to the Royal Court, with the *dégrèvement* in the interim being stayed. The need to obtain a stay of the *dégrèvement* process and to apply for *remise* affected her ability to consider the advice received from Advocate Baker.
- (vi) The first plaintiff produced a letter from her general practitioner dated 1st June, 2016, stating she was suffering from acute migraines caused, in part, by the stress the first plaintiff was currently undergoing due to the present litigation. I was informed that treatment had commenced but that might take several days to be effective. The letter further indicated that the first plaintiff should be able to make necessary submissions by the 13th June, 2016. The letter also stated in the second paragraph "I understand that the stress is particularly acute because she has found herself with insufficient time to process legal advice given later than the court allowed for, so she tells me".

7 Advocate Franckel in response opposed the adjournment relying on a number of grounds as follows:-

- (i) The approach I should take in deciding whether or not to grant an adjournment was that set out in *Cummins v Howlands (Furniture) Limited* [\[2014\] JRC 165](#) at paragraphs 12 and 13;
- (ii) No skeleton and no affidavit had been provided in support of the application, notwithstanding the fact that the first plaintiff was well aware of the need to issue a summons and support the application by an affidavit as set out in an email from me dated 18th November, 2015, and as set out at paragraph 16 of the Strike-Out judgment.
- (iii) The basis of the strike out application had been in any event known about by the first plaintiff since 10th August, 2015, which was when the arguments for a strike out had been set out in detail in a letter to the *amicus* copied to the plaintiffs. The first plaintiff had also had the benefit of the defendants' skeleton arguments since early

October 2015.

(iv) There was a pattern of applying for an adjournment either very close to or on the day of the hearing. Since issuing the application there had been six previous adjournments of the defendants' applications granted to the plaintiffs.

(v) The first plaintiff had had the benefit of legal advice from Advocate Baker in accordance with a time table set down by the court. The only reason a final opinion had not been provided until 30th May, 2016, (which was the next working day) was because the first plaintiff asked for the opinion in draft and then provided further comments on it. In any event by that stage she had already had the opinion from Advocate Milner since 22nd April, 2016.

(vi) As Advocate Franckel had foreshadowed when matters were adjourned on 31st March, 2016, whatever legal advice was given to the first plaintiff she would not accept it. Delaying matters to obtain further advice or review existing advice given would only lead to further delay. What was needed was a determination of the defendants' applications.

(vii) In any event the first plaintiff either knew her case or she did not – in other words she can either satisfy the court that there is an arguable claim in fraud or she cannot.

(viii) Further discovery or looking through existing discovery or for witnesses are all irrelevant to the application. The first plaintiff at this stage should be able to articulate her case.

(ix) As with the second and third plaintiffs there was ongoing prejudice to the defendants where the application kept being adjourned which could not be addressed by a costs order because the costs order would never be met.

- 8 Advocate Franckel was also critical of the letter received from the general practitioner. He indicated that it should not have been provided on the morning of the hearing given it was dated 1st June, 2016. The second paragraph which I have set out above was also no more than the first plaintiff's own words. It was not an independent opinion. The letter was also contradictory in terms of on one hand saying several days were needed to treat the migraine but that the first plaintiff would be ready to make submissions after a delay of one week.
- 9 Advocate Wilson supported Advocate Franckel's opposition to the application to adjourn.
- 10 Advocate Steenson drew to my attention the fact that I had not received any indication from Advocate Baker that he was unable to provide the advice within the timeframe that I had required on 11th May, 2016, and had not indicated that the hearing on 6th June, 2016, should be adjourned as a consequence.

Adjournment decision

- 11 In refusing the adjournment I indicated I would give my detailed written reasons when giving my reasons in respect of the substantive applications by the first and second defendants.
- 12 In terms of the approach I should adopt I agree with Advocate Franckel that the relevant factors to consider are those set out in the *Cummins* decision at paragraph 12. In particular, I should evaluate the importance and probable adverse consequences for the party seeking the adjournment, the risk of that party being prejudiced in its conduct of the application if the adjournment was refused, the risk to the other party if the application was granted, the convenience of the court and the interests of justice generally in the efficient dispatch of court business. I have noted in particular in *Les Pas Holdings* cited at paragraph 13 of *Cummins* Commissioner Page's remarks where he stated:-

“The power to adjourn should be exercised with great care and only when there is a real risk of serious prejudice which may lead to injustice”.

- 13 Applying these principles to the application brought by the first plaintiff, firstly it is right to record that the defendants' applications only related to part of the first plaintiff's case. Even if the defendants' applications were wholly successful, there would still remain a number of triable issues before the Royal Court to determine. Furthermore, any loss, if established, flowing from those triable issues was the same loss that was being claimed in respect of the allegations of fraud and dishonesty. What this means is that even if the allegations of fraud and dishonesty are struck out, in this case, the first plaintiff will still be able to seek to recover through the mechanism of a Royal Court trial, the same losses that the first plaintiff seeks to recover based on an allegation of fraud and dishonesty. While it is clear that the allegations of fraud and dishonesty are important to the first plaintiff, the prejudicial effect on the first plaintiff if those allegations are struck out in terms of what the first plaintiff can recover is not affected. This is a relevant factor I have taken into account.
- 14 I also accept that both the first and second defendants have been asking for the allegations of fraud which they say are not justified to be struck out for nine months. The applications further followed on from an act of court of 11th June, 2014, requiring each of the plaintiffs by paragraph 2(c) to set out whether they alleged fraud or dishonesty against the defendants and if so the grounds upon which such fraud and dishonesty was alleged. The issue of whether or not the plaintiffs were alleging fraud or dishonesty and therefore whether or not such allegations were fit for trial has been of concern to the first and second defendants since at least June 2014. While only a short adjournment was asked for by the first plaintiff, in the context of how long concerns about allegations of fraud have been in issue, and how long the first and second defendants' present applications have been awaiting determination, the first and second defendants would suffer a continuation of the prejudice which has been running for a number of months if not years in respect of allegations of fraud which the defendants dispute.

- 15 The first plaintiff has also known of the basis of the allegations since August last year and received the defendants' skeleton arguments in October last year. The first plaintiff has further had access to two lots of legal advice, the first of which was described as lengthy and the second advice from an experienced advocate who is well known for dealing with cases involving fraud. While I am not privy to that advice, the first plaintiff has had since the end of March the opportunity to take legal advice on the issues before me. Indeed, the first plaintiff also had that opportunity between October and mid-December 2015 but for reasons unknown to me chose not to take that advice.
- 16 In relation to the difficulties the first plaintiff may find herself because of the need to apply for the stay of *dégrèvement* proceedings issued against the first plaintiff and to apply for a *remise*, which application was made on 3rd June, 2016, these difficulties are of the first plaintiff's own making. The first plaintiff left the application for a *remise* to the last possible moment, notwithstanding the observations contained in an email dated 28th April, 2016, addressed to the first plaintiff by me as follows:-

"I write in response to your email dated 27 April 2016.

*In relation to the *dégrèvement* proceedings, this was ordered on 22 April 2016. The order granted on that day can be only be applied for 2 months after the court has issued an order Viscomte Chargé d' Écrire. Accordingly the Act Viscomte Chargé d' Écrire must be the latest that had been issued by Friday, 19 February 2016 if not before.*

*I refer to this chronology because by the time the matter last came before me on 31 March 2016, you must have been well aware of the possibility of an order for *dégrèvement* being made. Indeed, on a number of occasions you have stressed to me the difficulties you have had in addressing the defendant summons because of the importance of selling La Vallete.*

*I also note that the *dégrèvement* has sought by Acorn Finance Limited; this can hardly have come as a surprise to you, given they obtained judgment last September and given that they resisted your application for leave to appeal.*

*It is also right to add that in law you have no basis to oppose the order that was made on 22 April 2016. This was decided in a case known as *Eves v Hambros Bank (Jersey) Limited* [1995] 082, a principle which was recently confirmed by the Court of Appeal in *Investec Bank (Channel islands) Limited Appellant v Booth* [2016] JCA 025 (at paragraph 45).*

*I have set out the above in detail because at the time of the last hearing before me you knew that a *dégrèvement* was a possibility. Secondly, in law you do not have a right to challenge the order for renunciation being made. For the sake of completeness I add that if grounds exist to do so you still have the right to apply for what is known as *remise de biens* at least prior to the *dégrèvement* hearing fixed for 6 June 2016. A *remise de biens* allows you a period of time up to a year to sell a property, if you can establish that it can be sold leaving a surplus for*

unsecured creditors.

However, you still have time to make such an application after the hearing scheduled in the present matter. If you do not have such grounds then, much as I am sure that the dégrèvement order is extremely distressing for you, James and Rupert, there are no steps you could otherwise take to prevent the dégrèvement process running its course.

As far as the application by Viberts for leave to pursue a claim for costs, you have legal representation in relation to this issue. The only step you have to take between now and 12 May 2016 is for your legal representative to attend a date fix hearing before the Bailiff's Judicial Secretary.

I am aware from the Court diary that a hearing date for Viberts application will not take place before 12 May 2016.

If you are seeking a second opinion on legal aid, given the assistance the Court has awarded you previously and through an Amicus and given that you have a right to appeal any decision I make, I do not consider it appropriate to defer the hearing while you obtain a further opinion. In terms of James and Rupert's examinations we explored this issue on the last occasion and fixed the hearing date accordingly, I am not aware that anything has since changed.

In the circumstances, by reference to what is set out in your email, based on the matters contained in it, my present view is the hearing should proceed. The arguments the defendant wishes to advance are known to you. You therefore still have time to discuss with Advocate Steenson as Amicus what further points you would wish to be drawn to the Court's attention in response to the defendants' applications."

17 I also concluded that the central issue upon which I wished to hear from the first plaintiff is why she states that the first and second defendants acted dishonestly and/or fraudulently. I have had sufficient hearings involving the first plaintiff to be satisfied that she is able to explain her position and set out her arguments. This dispute is ultimately between two siblings where one sibling makes serious allegations of misconduct against the other. The first plaintiff, having set out her allegations and having seen the criticisms of those allegations in my judgment possesses the ability to explain her case.

18 I also considered that the first plaintiff was not going to be unfairly prejudiced by not having legal representation to explain her case in fraud. The application was ultimately about whether or not the facts alleged were capable of amounting to fraud or dishonesty. The relevant legal principles on what amounts to fraud are clear and had been provided to the first plaintiff. What was required therefore was for the first plaintiff to set out the facts she relied upon to say why a fraud had taken place. This was not requiring the first plaintiff to conduct the entire case which would be challenging based on the expert psychiatric opinion previously received but just to set out why she contended that there was an arguable case in fraud.

- 19 The first and second defendants would on the other hand suffer prejudice if there was further delay due to wasted costs which were not capable of being addressed by a wasted costs order because in this case any such order was not capable of being met.
- 20 This is also not a new action. It was first started in 2012. If the first plaintiff did not know her case by now she never would. This is also not a case involving a party having to look for evidence to uncover a fraud. The first plaintiff has always been clear on what the first defendant said he would do and what he failed to do. The issue is whether there is an arguable case in respect of statements made by the first defendant and his conduct which is capable of falling within the legal definition of fraud.
- 21 The conclusion I therefore reached, as with the second and third plaintiffs, is that the time had come for the first and second defendants' applications to be determined. While there is some risk of prejudice being suffered by the first plaintiff in having to present the case herself, in my judgment this risk of prejudice was outweighed by the prejudice the first and second defendants will suffer by further adjournments being granted. In weighing the interests of justice as a whole I concluded the defendants' applications had to be resolved. Based on what I have seen of the first plaintiff over a number of hearings I concluded she would be able to present her case and would not be unduly prejudiced by the lack of representation.
- 22 I was also not persuaded by reference to the letter from the first plaintiff's general practitioner, that this letter was sufficient to grant an adjournment. It did not say that the first plaintiff could not make the application and the effects of stress are no more than a repetition of what the first plaintiff told her doctor.
- 23 In reaching this decision, I initially also ordered the application for a split trial to also proceed. However, in hearing the substantive argument on the defendants' summonses, it became clear that the summons for a split trial issued by the first plaintiff was best dealt with once I had made a decision on the defendants' strike out summonses. This position was accepted by all the parties and accordingly the first plaintiff's application for a split trial was ultimately adjourned.

The defendants' contentions – the strike out application

- 24 The background to the first defendant's criticisms of the order of justice is set out in paragraph 30 of his skeleton argument as follows:-

"The Order of Justice is predominantly focused on allegations and claims made by the First Plaintiff. Those allegations are numerous and serious. The First Plaintiff has a clear tendency towards the dramatic and exaggeration. There are a number of terms of art referred to in the Order of Justice without apparent

understanding of their meaning or consequences (unjust enrichment, malicious falsehood).”

- 25 At paragraph 2(c) of the schedule of the act of court dated 11th June, 2014, I ordered the plaintiffs by 4th July, 2014, to file and serve a further and better statement of the nature of the case on which the plaintiffs relied setting “whether the plaintiffs allege fraud or dishonesty against either of the defendants, and if so, the grounds upon which such fraud or dishonesty are alleged with sufficient details so that the defendants understand the case against them.”
- 26 On 17th September, 2014, due to the health reasons of the first plaintiff the proceedings were stayed until 4th February, 2015.
- 27 On 4th February, 2015, the stay granted was extended to 11th May, 2015, but the plaintiffs by Friday 24th April, 2015, were required to specify:-

Paragraph 2 of the Act of Court 11th June, 2014, was varied accordingly.

(i) All grounds relied upon in respect of allegations of fraudulent misrepresentation against the first defendant;

(ii) Whether the plaintiffs allege fraud or dishonesty by the second defendant;

(iii) If fraud or dishonesty is alleged against the second defendant, the grounds relied upon with sufficient details so the second defendant understands the case against it;

- 28 The plaintiffs on 27th April, 2015, provided a further document pursuant to paragraph 3 of the order 4th February, 2015, containing “details of the alleged fraudulent conduct of the first and second defendants” (“the particulars of fraud”).
- 29 The first defendant was critical of the particulars of fraud filed and stated at paragraph 31 of his skeleton argument as follows:-
- “The attempt of the Plaintiffs to file a further pleading in order to clarify the claims has been completely unsuccessful. That further pleading appears more of a narrative, akin to an affidavit, and does little more than repeat the vast majority of the claims in a different way and label more of them as fraud.”*
- 30 The approach adopted by the first defendant in respect of the strike out application was to contend that all claims of the plaintiffs should be struck out other than the following causes of action:-

- (i) Lack of capacity of the first plaintiff and first defendant's mother at the time she executed the wills of moveable and immovable property dated 2nd April, 2008;
- (ii) Duress under the influence of the first defendant over his mother in preventing her from executing further wills;
- (iii) A breach of *légitime* rights of the first plaintiff;
- (iv) Mismanagement of the estate of the mother by the first defendant as executor.

31 All other claims of fraudulent misrepresentation, malicious falsehood, causing emotional stress, unjust enrichment and breaches of human rights should be struck out on the basis they disclose no cause of action or are scandalous or vexatious and should not be allowed to proceed to trial.

32 By the time oral argument had concluded, the focus of the first defendant's application was in respect of the allegations of fraud and fraudulent misrepresentation because:-

- (i) The plaintiffs had withdrawn allegations of breaches of their human rights;
- (ii) The first defendant had accepted that it was possible to claim for emotional distress as a result of the consequence of the behaviour of the first defendant (see paragraph 32(6) of the judgment dated 15th June, 2016);
- (iii) The claim in unjust enrichment was also arguable because if allegations of lack of capacity or undue influence or mismanagement of the estate were established such findings could lead to the Royal Court allowing an equitable remedy if it felt that the first defendant had been unjustly enriched at the expense of the first plaintiff;

33 Advocate Franckel also accepted that, if it could be established that the first defendant had made the promise set out at paragraph 15 of the order of justice "that the first defendant, repeatedly assured the Deceased both before and after the execution of the 2008 Wills, that he would divide *the Estate equally with the First Plaintiff on the death of the Deceased regardless of the Deceased's testamentary dispositions provided that the First Plaintiff was then divorced, with the proviso that if the First Plaintiff was not divorced at the time of the Deceased's death, he would hold the First Plaintiff's half share of the Estate on trust for the First Plaintiff*", a failure to honour such a promise was capable of giving rise to legal relations and therefore was capable of being enforced if that was what the parties intended. This might also form the basis of an award based on unjust enrichment, the unjust element being the failure to adhere to the promise set out at paragraph 15 of the order of justice if established in evidence.

34 As the focus of argument became the allegations of fraud, I set out the relevant paragraphs of the order of justice where allegations of fraud, fraud misrepresentation or malicious and fraudulent falsehoods are made. These are found in paragraphs 16, 20, 23, and 26 which

provide as follows:-

“16. That as the Deceased was most anxious that both her offspring should be happy with her final dispositions, however having been made sole heir the First Defendant went to great lengths to delay and prevent the Deceased from formally revoking the 2008 Wills, deliberately making misrepresentations to her about his intentions and the laws of the Island regarding trusts of immoveable estate as well as malicious and fraudulent falsehoods about the First Defendant's management of the money and assets.

20. That since the death of the Deceased, the First Defendant has repeatedly reaffirmed to the Plaintiffs and others, some of whom have as a result extended credit to the First Plaintiff, that he would honour the Deceased's wishes to provide for him and the First Plaintiff equally but has seemingly deliberately caused the First Plaintiff financial distress by making false representations to her and others thereby thereby causing First Plaintiff to act to her considerable financial detriment and greatly increasing the already great emotional stress on the Plaintiffs.

23. That the First Plaintiff was kept out of capital while the First Defendant profited through unjust enrichment and fraudulently induced the First Plaintiff to assume more debt with false representations upon which the First Plaintiff relied seemingly in order to weaken the First Plaintiff, both financially and emotionally, so that she would not be able to cope with litigation.

26. That due to the First Defendant's fraud and/or undue influence with regard to the Deceased as set out in paragraph hereof and with regard to the First Defendant's fraudulent misrepresentations to the First Plaintiff and others interest has accrued on the First Plaintiff's increased debt, her assets are at risk of a forced sale and she has been kept out of the income she could have received had she had control of her assets and the inheritance the Deceased intended her to have” (underlining added).

35 In respect of the second defendant the only clear allegation of fraud in the order of justice is at paragraph 33 which provides as follows:-

“That at all material times the Second Defendant failed to recognise the Deceased's obvious and increased vulnerability to undue influence and/or fraud on the part of the First Defendant.”

36 However paragraph 34 pleads “that the second defendant has joined with the first defendant in misrepresenting the first defendant's intentions with regard to the disposition of the estate and allowing or encouraging the first plaintiff to act to the detriment on the basis of such misrepresentations”. Advocate Wilson was concerned that this paragraph was also hinting at fraud and/or dishonesty.

- 37 The first plaintiff seeks as relief for her claim the sum of £500,000 or half a share of her mother's estates together with "such financial compensation for the first defendant's fraudulent or otherwise improper misappropriation of sole title to the same as the court deems fit".
- 38 In the particulars of fraud filed, the first plaintiffs further appear to allege that her mother was induced to change her wills by the first defendant.
- 39 In relation to allegations of undue influence the particulars of fraud at paragraph 9 state as follows:-

"The First Plaintiff's suspicions that the First Defendant was up to no good continued to be aroused when, having insisted on involving himself and his wife in the First Defendant's divorce he constantly let the First Defendant down apparently the first Plaintiff now believes in an attempt to spin out the divorce proceedings and add to the Plaintiff's distress. The First Plaintiff spent a considerable amount of time looking after the Deceased in spite of the First Plaintiff's own ill health as a cancer patient and became increasingly worried about the level of control which the First Defendant exerted over the Deceased and her affairs. All the Deceased's financial records were locked in the Deceased's study and the First Defendant said the key was lost. The First Defendant took control of the Deceased's credit cards and would not give the First Plaintiff money to buy the Deceased decent food. The Deceased cried regularly that she was not getting proper food and the First Plaintiff brought food for the Deceased when she initially in the course of these events at times had money of her own from a succession of loans from third parties to do so. Unfortunately the First Plaintiff was left in acute financial difficulties by divorce proceedings as she had no income at all which impacted severely on all the Plaintiffs. Often the Deceased and the First Plaintiff made do with a daily diet of porridge and cheap hamburgers. The First Plaintiff arranged Meals on Wheels for the Deceased and registered her concern about the level of control the Defendant was exerting on the Deceased with a GP and Age Concern. The Plaintiff was not even allowed petrol money from the Deceased's own funds, which the First Defendant completely controlled, to take her dying mother out for drives as the first defendant tightened his level of control over both the First Plaintiff and the Deceased. The First defendant refused to countenance putting in place an adequate level of care for the Deceased because of the expense leaving the First Plaintiff to be on call and to regularly spend all day with her mother which was more than the First Plaintiff could adequately manage given her own ill health and the great demands upon her of an extremely acrimonious divorce, acute financial difficulties and two young sons whose lives were being severely disrupted by a lack of security and deprivation. The First Defendant did not wish to pay social security contributions or any carers for the Deceased and did not. The First Plaintiff contacted homecare organisations such as Christies in an attempt to get proper care for her mother but the First Defendant resisted on the grounds of cost."

- 40 In respect of what is meant by fraud, the first defendant relied on *Booth v Zenith* [2014] JRC 231 at paragraph 17 where fraud was defined “in summary as a defendant deliberately making a false representation with the intention of causing thereby and with the result in fact of causing thereby actual prejudice to someone, and an actual benefit to himself or somebody else.”
- 41 In terms of what was required to plead fraud I was referred by Advocate Wilson to the requirements laid down in *Three Rivers D.C. v Bank of England (No.3)* [2003] 2 AC 1 at paragraphs 184 and 186) recently approved in *Nolan et al v Minerva et al* [2014] (2) JLR 117 at paragraph 144.
- 42 Paragraphs 184 to 186 of the *Three Rivers* decision state as follows:-

“184. It is well established that fraud or dishonesty (and the same must go for the present tort) must be distinctly alleged and as distinctly proved; that it must be sufficiently particularised; and that it is not sufficiently particularised if the facts pleaded are consistent with innocence: see Kerr on Fraud and Mistake 7th ed (1952), p 644; Davy v Garrett (1878) 7 Ch D 473, 489; Bullivant v Attorney General for Victoria [1901] AC 196; Armitage v Nurse [1998] Ch 241, 256. This means that a plaintiff who alleges dishonesty must plead the facts, matters and circumstances relied on to show that the defendant was dishonest and not merely negligent, and that facts, matters and circumstances which are consistent with negligence do not do so.

185. It is important to appreciate that there are two principles in play. The first is a matter of pleading. The function of pleadings is to give the party opposite sufficient notice of the case which is being made against him. If the pleader means “dishonestly” or “fraudulently”, it may not be enough to say “wilfully” or “recklessly”. Such language is equivocal. A similar requirement applies, in my opinion, in a case like the present, but the requirement is satisfied by the present pleadings. It is perfectly clear that the depositors are alleging an intentional tort .

186. The second principle, which is quite distinct, is that an allegation of fraud or dishonesty must be sufficiently particularised, and that particulars of facts which are consistent with honesty are not sufficient. This is only partly a matter of pleading. It is also a matter of substance. As I have said, the defendant is entitled to know the case he has to meet. But since dishonesty is usually a matter of inference from primary facts, this involves knowing not only that he is alleged to have acted dishonestly, but also the primary facts which will be relied upon at trial to justify the inference. At trial the court will not normally allow proof of primary facts which have not been pleaded, and will not do so in a case of fraud. It is not open to the court to infer dishonesty from facts which have not been pleaded, or from facts which have been pleaded but are consistent with

honesty. There must be some fact which tilts the balance and justifies an inference of dishonesty, and this fact must be both pleaded and proved.”

- 43 In the context of the present pleadings where allegations not amounting to negligence are matters to be resolved at trial, it is also helpful to set out paragraphs 187 to 190 of the *Three Rivers* case as follows:-

“187. In *Davy v Garrett* [7 Ch D 473](#), 489 *Thesiger LJ* in a well known and frequently passage stated:

“In the present case facts are alleged from which fraud might be inferred, but they are consistent with innocence. They were innocent acts in themselves, and it not to be presumed that they were done with fraudulent intent.”

This is a clear statement of the second of the two principles to which I have referred .

188. In *Armitage v Nurse* [\[1998\] Ch 241](#) the plaintiff needed to prove that trustees had been guilty of fraudulent breach of trust. She pleaded that they had acted “in reckless and wilful breach of trust.” This was equivocal. It did not make it clear that what was alleged was a dishonest breach of trust. But this was not fatal. If the particulars had not been consistent with honesty, it would not have mattered. Indeed, leave to amend would almost certainly have been given as a matter of course, for such an amendment would have been a technical one; it would merely have clarified the pleading without allowing new material to be introduced. But the Court of Appeal struck out the allegation because the facts pleaded in support were consistent with honest incompetence: If proved, they would have supported a finding of negligence, even of gross negligence, but not of fraud. Amending the pleadings by substituting an unequivocal allegation of dishonesty without giving further particulars would not have cured the defect. The defendants would still not have known why they charged with dishonesty rather than with honest incompetence .

189. It is not, therefore, correct to say that if there is no specific allegation of dishonesty it is not open to the court to make a finding of dishonesty if the facts pleaded are consistent with honesty. If the particulars of dishonesty are insufficient, the defect cannot be cured by an unequivocal allegation of dishonesty. Such an allegation is effectively an unparticularised allegation of fraud. If the observations of Buxton LJ in *Taylor v Midland Bank Trust Co Ltd* (unreported) 21 July 1999 are to the contrary, I am unable accept them .

190. In the present case the depositors (save in one respect with which I shall deal later) make the allegations necessary to establish the tort, but the particulars pleaded in support consistent with mere negligence. In my

opinion, even if the depositors succeeded at the trial in establishing all the facts pleaded, it would not be open to court to draw the inferences necessary to find that the essential elements of the tort had been proved.”

- 44 The first defendant therefore argued that the first plaintiff had firstly failed to sufficiently particularise the allegations of fraud. Secondly, the allegations made were at best consistent with negligence or breach of a promise which had not been honoured. There was nothing to distinguish the allegations of fraud from the allegations relied upon which were matters for trial. In other words the first defendant did not know the primary facts he had to meet which were relied on to establish fraud/dishonesty. Thirdly, in this case the allegations of fraud made no difference to the relief claimed. Yet they were significant for the first defendant given he had worked for many years in the financial services industry.
- 45 The first plaintiff had also had an opportunity to particularise fraud; despite this the particulars of fraud did not identify any material facts to sustain a claim in fraud and therefore should be struck out.
- 46 The first plaintiff should not be allowed another opportunity given the length of the time that had elapsed, to file a further pleading; any such pleading would simply be a repetition or regurgitation of the particulars of fraud and would not therefore advance the case, which case needed to advance to a trial.
- 47 Any permission to refine pleadings did not advance the case in any event because the same loss would still be claimed as for those matters that were to go to trial.
- 48 Advocate Wilson for the second defendant supported the first defendant's submissions.
- 49 As far as the second defendant was concerned the allegation in the order of justice of the fraud against the second defendant was wholly un-particularised. This was also a serious allegation to make against a professional services firm who were entitled to have such an allegation properly particularised.
- 50 In relation to the particulars of fraud he contended as follows:-
- (i) Paragraph 2 pleads that certain advice or inadequate advice was received by the deceased from the second defendant. It does not plead any facts of matters to show that the second defendant was dishonest.
 - (ii) The same analysis applies to paragraph 3 and 10.
 - (iii) Paragraphs 4 and 8 plead certain matters involving the second defendant but do not allege dishonesty.

(iv) Paragraph 11 pleads that the first plaintiff was seriously misled in a meeting attended by the first defendant and an employee of the second defendant. Paragraph 11 however does not again plead any matters to show that the second defendant was dishonest.

(v) Paragraph 14 also refers to the same employee attending a meeting with Mr Philip Syvret of Messrs. Benest & Syvret, the first plaintiff and the first defendant. Again no allegation of dishonesty is made.

(vi) Paragraph 16 pleads certain events which the second defendant contends did not appear to be relevant to the plaintiffs' claim.

(vii) The fraudulent practices of the second defendant are said to be found in paragraph 17 where it is pleaded that:-

(a) The second defendant's employee is the spouse of a former close work colleague of the first defendant;

(b) There have been some discussions about the deceased's mistrust of the second defendant's employee;

(c) The second defendant continued to act for the first defendant despite its employee knowing there was a conflict of interest and that she would be a material witness having witnessed the 2008 Wills, which was a clear breach of professional rules of conduct;

(d) The second defendant's employee had misled the first plaintiff as to the law on capacity;

(e) The second defendant continued to act for the first defendant for some time following the commencement of the formal proceedings despite being conflicted as co-defendants.

(viii) In respect of paragraph 17, the second defendant disputed that these allegations can amount to a fraud. In addition the allegations contained in paragraph 17 merely give rise to a claim, at its highest, that the second defendant was negligent but there was nothing to show dishonesty.

(ix) Paragraph 18 pleads that the second defendant is culpable with the first defendant because of the manner in which the first defendant handled their mother's accounts and estate (seemingly on the advice of the second defendant). It also pleads that the second defendant "*acquiesced*" in the first defendant dealing with certain of the deceased's assets as if they were his own. It also pleads that the second defendant "*allowed or encouraged*" the first defendant to keep the first defendant's legitime from her or alternatively to "*fritter*" it away. Advocate Wilson complained that none of these allegations were particularised and the first plaintiff did not plead any facts, matters and circumstances to show that the second defendant was dishonest as distinct from merely negligent (which negligence was disputed in any event).

(x) Paragraph 19 was an invitation by the first plaintiff to invite the Royal Court to infer dishonesty without pleading material facts.

The first plaintiff's submissions

- 51 The first plaintiff started by explaining that the idea of her mother leaving everything to the first defendant on the basis of an assurance from him that he would provide half to her as set out in paragraph 15 of the order of justice, was based on a similar scheme adopted by the father of the first plaintiff's former husband. The first plaintiff was aware of this scheme because she had been told about it by her ex-husband and had discussed it with the first defendant and their mother leading to their mother executing the 2008 Wills. When the first plaintiff became aware of the 2008 Wills she was not surprised by their content as it was what she was expecting.
- 52 However, according to the first plaintiff, after the 2008 Wills had been executed, her mother was not happy with the Wills and wanted to change her mind. The first defendant effectively prevented this from happening by the control which he exercised over their mother and her affairs as set out at paragraph 9 of the particulars of fraud referred to above.
- 53 The first plaintiff specifically referred me to a meeting which took place in July 2011 shortly after the first plaintiff's and first defendant's mother had passed away. What was discussed in the meeting was recorded an email from the first plaintiff to the second defendant's employee dated 18th July, 2011, which states as follows:-

"When my brother and I came to see you soon after my mother's death, you confirmed clearly to us both that my mother had only changed her will in order to protect me and that she intended to change it back after my divorce. This was exactly as I had expected. We discussed the fact that I was uneasy that all my mother's assets were now effectively in my brother's matrimonial pot and you confirmed that, as my mother died after my divorce was finalized, any inheritance I had would not be part of my matrimonial pot. My brother said he thought we should keep my mother's home because he thought property was a good investment while I said I wasn't so sure. You said there was nothing to stop him selling the house, dividing the proceeds in half and then we could each buy a smaller property. I said that while I trusted my brother I did not trust his wife (nor did my mother) and was not happy the way things were. (underlining added)

I left a telephone message a few weeks before we spoke most recently to say I was beginning to worry that my brother had no intention of honouring my mother's wishes. I have been locked out of her house since her death and my brother came up with different excuses. The jewellery my mother said was mine, such as it was, was taken to my brother's flat and I was unable to fulfil my mother's wishes as to her belongings etc. Apart from my mother's wishes, being locked out of her house (my childhood home) after spending so much time with her has been heart-breaking.

My brother is now taking the line that my mother had no intention of redoing her will and in fact favoured him. This is clearly not true.

As I explained on the telephone my mother was desperate to put her affairs in order as she knew she had a terminal illness. My brother kept telling her she could form a trust for the house. I kept telling him she could not. Hence the phone call my mother asked me to make to you when she was still alive to clarify this. I also showed my brother the relevant law. He continued to prevent her changing her will back by stalling on this issue much to her distress. I did become worried about her distress and spoke to Age Concern and a doctor about it. I tried not to believe my brother was stalling her deliberately.

Because my brother accepted and did not dispute your narrative of my mother's wishes and reasons for her instructions to you at our meeting in your offices I was lulled into the belief that he would observe her wishes as indeed he gave every indication he would when we discussed possibility of selling her house and splitting the proceeds. I did not therefore feel I needed any more protection. I am afraid that as my brother has increasingly refused to discuss my mother's estate and is now seemingly intent on ignoring her wishes my relationship with him has broken down.

There is going to have to be legal action because my mother had become concerned about what he was doing with her shares and money in the last months of her life and I am now very concerned about his role as executor. My brother tells me he is now seeing a lawyer and is getting legal advice to minimize any sort of claim I may have. Under the circumstances I doubt that he is consulting you because my mother was your client. She said repeatedly that her lawyer knew why she was doing what she was doing and would confirm it if she should die before she could put matters right, which you did.

Could you please confirm that you have a clear note of your meeting with myself and my brother as this may be needed later."

54 The second defendant's employee's reply on 22nd July, 2015, was as follows:-

Whilst I largely concur with your recollection of our meeting I must take issue with your assertion that I advised you that because your divorce was finalised your ex-husband would have no claim on any assets you received from your late mother's estate. I am certain I would not have given you this advice because I do not know whether this is in fact the case: I am not privy to the terms of your divorce settlement. With regard to anything your brother may have said to you regarding his intentions with regard to your mother's estate I obviously cannot comment as I have not been involved in those discussions. We cannot assist you further in relation to your late mother's estate and recommend that you take independent legal advice before embarking on a legal action which as you are aware can be costly and time consuming."

- 55 The first plaintiff contended in light of this exchange that the second defendant's employee had therefore confirmed that their mother had only changed her Wills in order to protect the first plaintiff and that she intended to change it back after the first plaintiff's divorce. This exchange of emails was also evidence of the statements made by the first defendant that he would provide half of the estate to the first plaintiff.
- 56 I was also referred to a letter dated 7th December, 2011, from Mr Philip Syvret to the second defendant's employee which at paragraph 3 stated "It was acknowledged at our last meeting that Mrs Chambers had wished (the first plaintiff) to enjoy an equal share in the real estate and the position recorded under the Will had only changed because of the divorce situation. Clearly an equal account needs to be taken of both parties wishes in relation to the real estate."
- 57 Despite this clear evidence of the promises made by the first defendant, he could not give a straight answer as to whether the first defendant was going to honour his promise.
- 58 The first defendant also made similar assurances to Acorn Finance Limited which led to the latter advancing funds to the first plaintiff.
- 59 In respect of the second defendant, the first plaintiff stood by her criticisms of their failure to disclose that the first defendant knew the second defendant's employee's husband who was a former work colleague of his and the allegations of conflict of interest.
- 60 In response to these assertions Advocate Franckel was critical of the first plaintiff not providing any affidavit evidence in respect of her allegations which he considered were becoming more exaggerated and embellished. He referred me to an affidavit sworn by the first defendant on 3rd September, 2012, in opposition to the first unsuccessful application by the first plaintiff for an interim payment where at paragraph 21 the first defendant had stated as follows:-

"As described above, I simply do not accept the assertion contained at paragraph 5 of my sister's affidavit to the effect that all parties agree that it was 'clearly declared intention' of my mother to share her estate equally. This is a simplification to such an extent as to be misleading."

- 61 I was also referred to paragraph 23 of the same affidavit where the first defendant deposed in response to the letter of 7th December, 2011, from Mr Syvret (which was set out in paragraph 7 of the first plaintiff's affidavit dated 8th August, 2012, in support of her application for an interim payment) as follows:-

"the matters referred to in paragraph 7 of the first plaintiff's affidavit are matters upon which I will need to give evidence should this matter come to trial. Suffice I

was to say that I have explored many possible solutions in order to address the first plaintiffs financial position, notwithstanding she caused it herself. I will continue to make those efforts. I have never knowingly misled anyone.”

62 Accordingly it was submitted that the first defendant had denied making any promise as alleged.

Decision

63 In terms of what is meant by fraud there was no disagreement between the parties on the definition of fraud contained in *Booth v Zenith* [2014] JRC 231.

64 There was also no disagreement between the parties that allegations of fraud must be sufficiently particularised (see *Three Rivers* above) and also *Fogarty v St Martin's Cottage Limited* [2016] JRC 073 which made it clear that allegations of fraud must be set out “**fully and precisely**” and requires “**full particulars**” and “**reasonably creditable material from which a prima facie case of fraud can be established**” (see paragraphs 20 and 21).

65 It is also clear from the *Three Rivers* decision that, if the allegations relied upon are also consistent with innocent or negligent conduct, that is not enough to sustain a pleading of fraud. Putting it another way something more is required to take a case into the arena of fraud. As Advocate Steenson as *amicus* observed, the court can grant relief in respect of conduct amounting to undue influence. However the fact that undue influence is capable of being established at trial does not mean that such conduct always amounts to fraud. Likewise if a party by a contract agrees to take a particular step and then does not do so, while that party is in breach of contract, a failure to abide by the terms of the contract does not amount to fraud without something more. Additional facts are required to take a case out of some other category and into the arena of fraud.

66 In the present case, what underpins the allegation of fraud (paragraphs 16, 20, 23 and 26 of the order of justice) is what is set out in paragraph 15 of the order of justice as set out above. However paragraph 15 is ambiguous. It could be capable of being a pleading in fraud if the first plaintiff was alleging that the first defendant at the time he is alleged to have made statements that he would divide the estate equally, never intended to abide by such statements. At present however neither the order of justice, nor the particulars of fraud contain any factual assertions to support an assertion that the first defendant from the outset never intended to honour such a statement if it was made.

67 Rather the evidence produced by the first plaintiff only points towards the first defendant having made a promise which he later chose to deny. The idea of their mother leaving everything to the first defendant appeared to come from the first plaintiff based on her approach taken by her ex-husband's family. Secondly, as recorded in the first plaintiff's own email of 18th July, 2011, the alteration of the 1975 wills were what she “*had expected*”.

Both these matters do not sit with an allegation of fraud from the outset. Her complaints of undue influence set out in paragraph 9 of the particulars of fraud also only arise after the 2008 Wills were executed; yet the allegations in paragraph 15 of the order of justice aver that promises were made both before and after the 2008 Wills were executed.

- 68 The material the first plaintiff has referred to set out above is evidence that can be tested at trial as to whether or not the first defendant made a promise and whether or not he later reneged on it. This evidence however is not sufficient to establish a case in fraud by the first defendant. It does not differentiate between making a statement and later refusing to adhere to it and making a statement with the intention of never adhering to it.
- 69 In reaching this view I accept that the answer of the first defendant is not helpful because it does not plead expressly to paragraph 15 of the order of justice and whether or not the first defendant accepts that he made such statements. This is more than a question of evidence as referred to in the first defendant's affidavit sworn on 3rd September, 2012, at paragraph 23. The assertion that he did not mislead anyone relates to an allegation that at the meeting with Mr Syvret the first defendant was then misleading those present about his intentions regarding the estate. The specific denial of what he said at that meeting however is not a general response to what is pleaded at paragraph 15 of the order of justice. When this judgment is handed down, the first defendant will have to make his position clear in respect of the matters alleged at paragraph 15.
- 70 This lack of clarity still does not mean that I am satisfied that the plaintiff has shown that a case in fraud can be pleaded. The first defendant's conduct, assuming that statements were made by him, is equally explainable as a breach of a promise. That is the thrust of the email exchanges in July 2011 and Mr Syvret's letter in December 2011 to which the first plaintiff referred me.
- 71 In considering the first plaintiff's submissions, I considered based on the material provided to me, whether the first plaintiff could allege fraud based on a combination of the first defendant making statements after the 2008 Wills were executed as set out in paragraph 15 together with the allegations of undue influence in paragraph 9 of the particulars of fraud to argue that the first defendant was deliberately making statements that he would divide the mother's estate and that he had no intention of doing so, which can be seen by the first defendant preventing his mother from amending the 2008 Wills. However, the materials provided by the first plaintiff do not make such an assertion. They do not identify why it could be said that the first defendant never intended to keep any promise made. Nothing said by the first plaintiff in oral argument altered this position.
- 72 The case as presently pleaded does not therefore contain material sufficient for there to be a case in fraud for the Royal Court to consider. The case is also clearly explainable as one based on unjust enrichment, the unjust enrichment arising out of either a lack of capacity, undue influence, or a failure to abide by promises previously made. Nothing has been pleaded or demonstrated to differentiate a claim in fraud from these alternative bases of

liability (if established). While I have not been privy to the opinions given by Advocates Milner and Advocate Baker (and I note the latter's experience in fraud cases), if they had identified material facts to justify a plea of fraud, then I have no doubt this would have been drawn to my attention by the first plaintiff.

- 73 The question then arises whether I should permit the first plaintiff a further opportunity to amend her case to try to justify the allegations of fraud. In my view at this stage I should not allow the first plaintiff such an opportunity for the following reasons.
- 74 Firstly, this is a case that started in 2012. As the first plaintiff cannot to date explain clearly or simply her case in fraud, she will not in my judgment be able to do so at some point in the future. She has already had plenty of time to do so both generally since the litigation began, since she was ordered to provide particulars of fraud in 2014, and since this application was first raised last August. Yet she did not identify anything that amounted to a possible case in fraud.
- 75 Secondly, she has had the benefit of two legal opinions. Although the first plaintiff contended she had not sufficient time to consider these opinions, she has had the lengthy opinion (using her own words) of Advocate Milner since 22nd April, 2016, and has had the opinion of Advocate Baker for at least a week. The first plaintiff based on her appearances before me is clearly able to articulate particulars of fraud and draw on any analysis of material facts in the advices provided to contend that there is "*reasonable credible material*" to justify a claim in fraud. Given how long the present application has been pending and that both Advocates had the material relied on by the defendants in support of their application, I consider that if either advocate considered that a case in fraud was capable of being pleaded, the first plaintiff would have been informed of this and would have explained the case to me. This did not happen.
- 76 Thirdly, allowing a pleading of fraud does not advance the first plaintiff's claim in the sense that the first plaintiff is entitled to claim exactly the same losses whether or not the Royal Court determines fraud.
- 77 Fourthly, allowing a further attempt to plead fraud is likely to lead to a re-visitation of the arguments before me and further cost and delay.
- 78 As far as the second defendant is concerned nothing that has been produced to me indicates that there is any basis to allege fraud against the second defendant. The allegations against the second defendant in summary amount to a failure to act, by failing to identify a conflict of interest, or failing to advise. These are matters of negligence or breach of duty but do not amount to fraud. Likewise the fact that the second defendant's employee's husband may have known the first defendant (and I note it is disputed as to the extent of any such knowledge), this is of itself not a basis to allege fraud.

- 79 The statement that was made by the second defendant after the proceedings were commenced in respect of the burden of proof in relation to proving capacity is also not a basis to allege fraud. This question is also no longer an issue as set out at paragraphs 25 and 26 of the *amicus* judgment.
- 80 As far as the second defendant is concerned nothing I have heard would justify permitting the first plaintiff a further attempt to re-plead fraud as against the second defendant.
- 81 I now turn to consider the effect of my decision on the relevant paragraphs of the order of justice where fraud is contained. I do not consider that I should require the first plaintiff to re-plead her case from the outset to only address the claims it is accepted should go to trial. This will not be an easy task for her and will produce more delay and expense when the issues for trial are clear. Rather I consider I should simply strike out those parts of the pleading where allegations of fraud or dishonesty are made.
- 82 In relation to paragraph 16 all the words after 2008 Wills in the fourth line should be deleted. The first plaintiff may if she wishes add the words “including making untrue statements about the first plaintiff’s management of money and assets”.
- 83 In relation to paragraph 20 the words “by making false representations to her and others as to his intention” are deleted and should be replaced by the words “*by failing to honour the deceased’s wishes*”.
- 84 In relation to paragraph 23 I permit the following:-

“That the first plaintiff was kept out of capital while the first defendant profited through unjust enrichment by failing to honour the deceased’s wishes which led the first plaintiff to assume more debt as was known to the first defendant, which had the effect of weakening the first plaintiff both financially and emotionally, so that she would not be able to cope with litigation.”

- 85 In relation to paragraph 26 I permit the following “that due to the first defendant’s undue influence and failure to adhere to the deceased’s wishes as set out above, interest has accrued on the first *plaintiff’s increased debt, her assets are at risk of a forced sale, she has been kept out of the income she could have received had she had control of her own assets and the inheritance the deceased intended her to have.*”
- 86 In relation to paragraph 33 the words “*and/or fraud*” are struck out.
- 87 In relation to paragraph 34 I permit the following:-

“The second defendant has negligently misrepresented the first defendant’s intentions with regard to the disposition of the estate and allowing or

encouraging the first plaintiff to act to her detriment on the basis of such misrepresentations.”

- 88 In respect of paragraph 34 I have therefore disallowed any suggestions of conspiracy or deliberate misrepresentation.
- 89 In the Prayer at paragraph (a) the words “*fraudulent or otherwise*” are struck out.
- 90 As a consequence the particulars of fraud are also struck out. They cannot remain where the allegations of fraud cannot be justified and where I have refused permission to re-plead the case.
- 91 When this judgment is handed down I will hear from the parties by when the first defendant should file a pleading in response to paragraph 15 of the order of justice, what outstanding discovery issues remain and whether or not a split trial should be ordered.

A, K
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and
H
Appleby

[2016] JRC 116

(Master Thompson):

ROYAL COURT

Civil Procedure—pleading—fraud

Fraud Is Defined, In Summary, As A Defendant Deliberately Making A False Representation With The Intention Of Causing Thereby And With The Result In Fact Of Causing Thereby Actual Prejudice To Someone, And An Actual Benefit To Himself Or Someone Else (*Booth V. Zenith*, [2014] JRC 231, Applied). Fraud Must Be Distinctly Alleged And Sufficiently Particularized. It Is Not Sufficiently Particularized If The Facts Pleaded Are Also Consistent With Innocence Or A Different Allegation (e.g., Negligence). Something More Is Required To Take A Case Into The Arena Of Fraud (*three Rivers D.c. V. Bank Of England (no. 3)*, [2003] 2 A.c. 1, Applied; *Nolan V. Minerva Trust Co. Ltd.*, 2014 (2) JLR 117, Referred To). Allegations Of Fraud Must Be Set Out Fully And Precisely With Reasonably Credible Material From Which A Prima Facie Case Of Fraud Can Be Established (*Fogarty V. St. Martin's Cottage Ltd.*, [2016] JRC 073, Considered).

