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Fraud: Where to Begin – Part I

by [Corey Groper](#) and [Ryder Gilliland](#)

Introduction

This is the first in a series of bulletins which will discuss relevant considerations for practitioners faced with the prosecution and defence of civil fraud actions.

This introductory bulletin addresses considerations at play when commencing a fraud action, including the various relevant causes of action available.

Future bulletins will address, among other topics, the following:

- advantages and disadvantages surrounding the pleading of fraud;
- practical tips when considering who to name as defendants;
- strategies for piercing the corporate veil;
- interim relief measures including Mareva, Norwich and Anton Pillar orders; and
- jurisdictional considerations which frequently arise in the context of cross-border fraud cases.

We will also aim to provide timely commentary on noteworthy fraud cases.

What to Plead

Fraud embraces a wide range of actionable wrongs and can take a variety of different forms. Depending on the factual circumstances of a particular case, different causes of action may be available to an aggrieved party including, among others, deceit, conversion, fraudulent misrepresentation, breach of fiduciary duty, conspiracy, bribery, breach of trust, inducing breach of contract, unjust enrichment, knowing receipt, and unlawful means. The common thread is deliberate action on the part of the wrongdoer, often premised on reckless and/or dishonest conduct. The more serious the alleged misconduct, the more cogent the evidence required to establish the fraud and meet the civil onus of

proof.¹

Civil Fraud, Fraudulent Misrepresentation and Deceit

Courts have long used the same test for civil fraud as they have for the torts of deceit and fraudulent misrepresentation.² As Justice Perrell noted in *Holley v. Northern Trust Co. Canada*, “at the fundamental core of fraud, deceit, or fraudulent misrepresentation is the moral turpitude of the defendant”.³ In this regard, “while the notion of fraud may elude precise definition, it necessarily involves some aspect of impropriety, deceit, or dishonesty”.⁴

The core requirements of a civil fraud claim were set out by the Supreme Court of Canada in *Bruno Appliance and Furniture Inc. v. Hryniak*. They include: (1) a false representation made by the defendant; (2) some level of knowledge of the falsehood on the part of the defendant (whether through knowledge or recklessness); (3) the false representation caused the plaintiff to act; and (4) the plaintiff’s actions resulted in a loss.⁵ All four of these elements must be satisfied in order to make out a claim for civil fraud.⁶

Civil fraud must be established on a balance of probabilities.⁷ The onus of proof rests upon the party alleging the fraud.⁸ The evidence must be clear and convincing to satisfy the balance of probabilities test.⁹ The totality of the evidence must be considered, not just separate pieces of evidence assessed in isolation.¹⁰ The more serious the allegations, the more cogent the evidence required to establish the fraud and meet the civil onus of proof.¹¹

The defendant’s knowledge and state of mind are critical considerations in cases of fraud.¹² Intent to deceive or reckless disregard for the truth is of vital significance.¹³ Once fraud is established, it is not necessary for the plaintiff to

¹ *Anker v. Sattaur*, [2007] O.J. No. 5257, at [para. 117](#).

² *Paulus v. Fleury*, 2018 ONCA 1072, at [para. 8](#) (also see: *Deposit Insurance Corp. of Ontario v. Malette*, 2014 ONSC 2845, at [para. 19](#); *Amertek Inc. v. Canadian Commercial Corp.*, (2005), 76 O.R. (3d) 241, at [para. 63](#); *Midland Resources Holding Ltd. v. Shtauf*, 2017 ONCA 320, at [para. 162](#))

³ *Holley v. The Northern Trust Company, Canada*, 2014 ONSC 889, at [para. 113](#).

⁴ *Holley*, at [para. 114](#).

⁵ *Bruno Appliance and Furniture, Inc. v. Hryniak*, 2014 SCC 8, at [para. 21](#).

⁶ *Brozmanova v. Tarshis*, 2017 ONSC 6559, at [para. 17](#).

⁷ *McGee v. Samra*, 2021 ONSC 2540, at [para. 54](#).

⁸ *Russell v. Thompson*, 2021 ONCJ 16, 2021 at [para. 17](#).

⁹ *Rosati v. Reggimenti*, [2018] O.J. No. 41, at [para. 33](#).

¹⁰ *Rosati*, at [para. 33](#).

¹¹ *Russell*, at [para. 19](#) (citing: *Anker v. Sattaur*, [2007] O.J. No. 5257, [para. 117](#)).

¹² *Cannon v. Funds for Canada Foundation*, 2012 ONSC 399, at [para. 478](#).

¹³ *Gebre-Hiwet et al v. McPherson*, 2022 ONSC 1421, at [para. 74](#).

show that the defendant intended to cause the plaintiff's loss.¹⁴ A defendant's motive is irrelevant to the analysis.¹⁵

Silence and half-truths may constitute fraud in the correct circumstances.¹⁶ Representations made through negligence, carelessness or wishful thinking are not enough to establish fraud in the absence of moral recklessness or a callous disregard as to whether or not the statement is true.¹⁷ Deceit is made out where a defendant either knows that his or her representations are untrue or is reckless as to the truth of those representations.¹⁸ It is not a defence to assert that the plaintiff could have discovered the fraud if they had investigated the truth of the representations themselves.¹⁹ Failure to exercise due diligence is not a defence to fraud.²⁰

It is not enough to prove that the defendant was aware of the false representations or fraudulent conduct or, even, that he or she benefited from the fraud. In order for liability to be established, it must be shown that the defendant actually perpetrated the fraudulent conduct by inducing the plaintiff to act (thereby incurring a loss).²¹ The plaintiff need not show that the false representation was the sole inducement as long as it had a material influence.²² If a misrepresentation is obviously material, it is a natural inference that the plaintiff relied upon it.²³

Equitable or Constructive Fraud

The doctrine of equitable or constructive fraud captures conduct that falls short of deceit (and, therefore, is not "fraud" in the traditional sense) but that is still found to be unconscientious, unconscionable, or unfair.²⁴ As Justice Perrell noted in *Holley*, "the moral turpitude of constructive fraud is of a different sort than the lying with an intent to deceive which is the insignia of common law fraud".²⁵

In *Performance Industries Ltd. v. Sylvan Lake Golf & Tennis Club*, the Supreme

¹⁴ *Bruno*, at [para. 18](#) (citing *Derry v. Peek* (1889), 14 App. Cas. 337, at p. 374).

¹⁵ *Fiorillo v. Krispy Kreme Doughnuts Inc.*, 2009 CanLII 29902, at [paras 75-77](#).

¹⁶ *Borelli v. Chan*, 2018 ONSC 1429, at [para 912](#).

¹⁷ *McLaughlin v. Colvin*, [1941 CanLII 302](#), [1941] 4 DLR 568, at 583.

¹⁸ *Canadian National Railway Company v. Holmes et al.*, 2022 ONSC 168, at [para. 195](#).

¹⁹ *Vidcom Communications Ltd. v. Rattan*, 2022 BCSC 522, at [para. 54](#).

²⁰ *Vidcom*, at [para. 54](#).

²¹ *Bruno*, at [para. 29](#).

²² *Caroti v. Vuletic*, 2022 ONSC 4695, at [para 545](#).

²³ *Caroti*, at [para 545](#) (citing: *Borelli*, at para 918).

²⁴ *Crowder v. Canada Builds Company*, [2022 ONSC 6018](#).

²⁵ *Holley*, [para. 119](#).

Court of Canada stated that equitable or constructive fraud “is so infinite in its varieties that the courts have not attempted to define it”.²⁶ At its core, it is said to embrace “conduct not guided by principles of what is the right thing to do but falling short of the evil or wickedness of deceitful conduct”.²⁷ The doctrine is “wider than the tort of deceit or strict fraud in the legal sense” and encompasses all types of scenarios “where the court is of the opinion that it is unconscientious for a person to avail himself of the advantage obtained”.²⁸

Notwithstanding the expansiveness of the doctrine, in *Outaouais Synergist Inc. v. Keenan*, the Court of Appeal for Ontario noted that there are certain recognized circumstances where the concept of equitable fraud is engaged:

1. “First, conduct amounting to equitable fraud may prevent a party from relying on a limitation period or other statutory provision that would otherwise exonerate the party from liability...;
2. Second, conduct amounting to equitable fraud is one of the preconditions to the availability of the remedy of rectification of a contract on the grounds of unilateral mistake...;
3. Finally, conduct amounting to equitable fraud has been used to describe conduct that gives rise to a breach of a fiduciary duty or other equitable obligation...”²⁹

A useful example of how the broad and flexible doctrine functions in practice is found in the recent decision of *Campbell v. Toronto Standard Condominium Corp. No. 2600*. The facts are straightforward. The Campbells, who were condo owners, brought an application to set aside an arbitral award ordering them to pay \$30,641.72 to the respondent, the Toronto Standard Condominium Corporation No. 2600 (the “Condo”).³⁰

The matter began as a dispute regarding the Campbell’s alleged non-compliance with the Condo’s Rules, including noise complaints and short-term rental issues.³¹ Although the Campbells were led to believe that the arbitration would be limited to the Condo’s entitlement to legal costs in enforcing those Rules, the Condo “vigorously pursued” the substantive underlying issues between the parties, resulting in an arbitral award which far exceeded the issue

²⁶ *Performance Industries Ltd. v. Sylvan Lake Golf & Tennis Club*, 2002 SCC 19, at [para. 39](#).

²⁷ *Rajakumar v. Marydel Homes (Beaverton) Inc.*, 2022 ONSC 4121 (CanLII), [para. 123](#) (citing *Holley*, [para. 123](#)).

²⁸ *Performance Industries*, [para. 39](#).

²⁹ *Outaouais Synergist Inc. v. Keenan*, 2013 ONCA 526 (CanLII), [para. 93](#).

³⁰ *Campbell v. Toronto Standard Condominium Corp. No. 2600*, 2022 ONSC 2805, at [para. 1](#)

³¹ *Campbell*, at [para 73](#).

of costs.³² According to Justice Perell, “the Campbells were tricked into the arbitration, which was notionally or purportedly about costs but actually was an arbitration of substantive issues”.³³

Despite finding that the Condo was not deceitful and that the facts did not disclose an “actual fraud”³⁴, Justice Perell set aside the arbitral award on the basis of constructive fraud³⁵, determining that the Campbells had been “outfoxed” and “lured into an adjudicative trap”.³⁶

Justice Perrell made it clear that his decision “should not be read as attributing any actual fraud or moral turpitude on the Condo”.³⁷ Instead, the “critical matter” which justified setting aside the arbitral award was “that it was unconscionable and unfair that an arbitration notionally or purportedly about costs became something much different”.³⁸ As Justice Perrell put it:

“In my opinion, the Campbells are the victims of constructive fraud, which focuses on unfairness more than it does on deceit. Although the Condominium Corp. was not deceitful, it misled, outmaneuvered, and outsmarted the Campbells. The court should not countenance the trickery and the injustice, and I, therefore, set aside the arbitral award”.³⁹

The decision serves as a prime example of the elasticity of constructive fraud and the manner in which it operates to fill in the gap left by conventional fraud where some of the constituent elements are missing. Notwithstanding the lack of any evidence of deceit, the Condo had “led the Campbells to believe that the only outstanding issue was the matter of costs” in a “sort of procedural sleight of hand”.⁴⁰ In the circumstances, it was “simply unconscionable and unfair” to allow the arbitral award to stand⁴¹.

³² *Campbell*, at [para. 77](#).

³³ *Campbell*, at [para. 2](#).

³⁴ *Campbell*, at [paras. 2 & 85](#).

³⁵ *Campbell*, at [para. 88](#).

³⁶ *Campbell*, at [para. 78](#).

³⁷ *Campbell*, at [para. 95](#).

³⁸ *Campbell*, at [para. 90](#).

³⁹ *Campbell*, at [para. 2](#).

⁴⁰ *Campbell*, at [para. 96](#).

⁴¹ *Campbell*, at [para. 93](#).