Pleading dishonesty: how much is enough? *Sofer v Swissindependent Trustees SA* [2020] EWCA Civ 699

Modern trust instruments very frequently contain widely drawn trustee exoneration clauses which exclude liability for everything except the trustee's dishonesty or bad faith – said in England to be the irreducible core of the trustee's duties to the beneficiaries. In many offshore jurisdictions, statutory intervention has added the sliver of gross negligence to that core, but it remains the case that outright dishonesty will often have to be pleaded and proved against trustees to establish personal liability for breach of trust.

This may create difficulties for potential claimants at the point at which a decision is made as to whether sufficient evidence has been gathered to be able to issue a properly pleadable claim. Paragraph 8.2 of Practice Direction 16 stipulates that a claimant must "*specifically set out*" any allegation of fraud relied upon in her particulars of claim. Such an allegation will not be sufficiently particularised if the facts alleged are – on the balance of probabilities – consistent with innocence (*Three Rivers District Council v Governor and Company of the Bank of England (No.3)* [2003] 2 AC 1). However, a fraudulent trustee is unlikely to have left a detailed and readily accessible evidential trail to aid the claimant, and a claimant will therefore often find herself reliant on incomplete information and inferences of dishonesty rather than – especially prior to the disclosure stage of proceedings – any single smoking gun.

The Court of Appeal's judgment in *Sofer v Swissindependent Trustees SA* [2020] EWCA Civ 699 (handed down on 5 June 2020) is a useful addition to the arsenal of such claimants.

The claimant ("C") was a beneficiary of a discretionary trust settled in 2006 by a wealthy South African bookmaker and investor, Hyman Sofer. The trustee was given the power to lend trust assets to beneficiaries, but was prohibited from paying or transferring trust property to the beneficiaries prior to the death of Mr Sofer. Between 2006 and 2016, the trustee paid substantial sums out of the trust to Mr Sofer, recording the payments as loans, but without making any provision for security, interest, or repayment. When Mr Sofer died on 8 July 2016, the total net amount paid out of the trust to him was nearly $19.2 million, which his estate was unable to repay.

C issued a claim alleging that the payments were gifts rather than loans, and sought orders that the trustee reconstitute the trust fund and be removed as trustee. The trust deed, however, contained an exoneration clause which applied to exclude any liability on the part of the trustee

"A claimant will often find herself reliant on incomplete information and inferences of dishonesty, rather than any single smoking gun."

Author /
JAMES FENNEMORE

except where the loss was caused "*by acts done or omissions made in personal conscious and fraudulent bad faith*". The trustee applied to strike out C's claim on the basis that the particulars of claim did not contain adequate particulars of dishonesty, and so it was entitled to rely on its exoneration clause.

This application succeeded at first instance before HHJ Paul Matthews, sitting as a High Court Judge ([2019] EWHC 2071 (Ch)). He considered that C's pleading was flawed in two fatal respects: first, that C had failed to give proper particulars of the trustee's alleged knowledge of, or reckless indifference to, the interests of the beneficiaries; and second, that C had failed to identify the natural persons whose knowledge was to be attributed to the defendant, a corporate trustee.

The Court of Appeal, in a judgment given by Arnold LJ, reversed that first instance decision, disagreeing with both of these criticisms of C's pleading (albeit at the same time acknowledging that it was "*not well drafted*"). In so doing, the judgment confirms two important principles which should be born in mind by claimants considering whether the particulars which they are able to give are sufficient to justify pleading a case of fraud.

First, particulars of dishonesty, especially where they are based on inferences to be drawn from primary facts, should be considered by the court in the round. C had set out various factual allegations – including the that the trustees had failure to enquire as to the reasons why the payments were required or the ability of Mr Sofer to repay the sums, that Mr Sofer was suffering from dementia and that the trustee was aware of that fact, that the payments made were in fact gifts, and that the trustees had not enquired as to the financial position of any of the beneficiaries – which, considered in their totality, C relied upon to establish that the trustee had the requisite knowledge about the breaches of trust to establish liability. Arnold LJ accepted that this form of pleading was sufficient to support a case that, at the very least, the trustee was recklessly indifferent to the interests of the beneficiaries.

Second, it does not matter if, at the time of pleading, the claimant cannot identify the individuals whose knowledge is to be attributed to a corporate defendant in order to establish dishonesty, so long as those particulars are provided as soon as feasible – likely following disclosure. C could therefore wait before identifying which directors, officers, or employees of the trustee had that knowledge.

Both of these findings will be of some substantial comfort to claimants seeking to issue proceedings in circumstances where they are reliant upon limited information and have had to assemble a patchwork of factual allegations which place them on, or near, the borderline of a pleadable case of dishonesty – and where the evidence of dishonesty is, taken in the round, pleadable, but where individual instances of suspicious behaviour taken alone may not be thought to be enough. The Court of Appeal's judgment signals a reluctance to allow such marginal cases to be halted prior to disclosure, and provides claimants with a helpful tool for discouraging any overly hawkish policing of the boundaries of proper allegations of fraud. ■

READ THE JUDGMENT

"Particulars of dishonesty, especially where they are based on inferences to be drawn from primary facts, should be considered by the court in the round."