

CIVIL FRAUD AND ASSET RECOVERY

AN INTRODUCTION TO UK LEGISLATION | OCTOBER 2020 | SECOND EDITION

Civil proceedings can sometimes be used to recover some or all of the losses incurred as a result of fraud. This guide explains how fraud is usually dealt with under the civil law in England and Wales.



WHAT IS CIVIL FRAUD?

Civil fraud is a civil action that can be brought by a defrauded person (the 'claimant') to recover losses caused by the fraudulent conduct of others. The emphasis is on the claimant obtaining compensation – a payment of money or transfer of assets (called 'damages') – from the fraudster (the 'defendant') or someone else who participated in the fraud.

Commonly, this will be for breach of contract or fraudulent misrepresentation.¹

Civil fraud claims only need to be proven 'on the balance of probabilities', which is a lower threshold than that required in criminal cases. However, if the correct procedures are followed, evidence obtained during a civil investigation can sometimes be used in subsequent or parallel criminal investigations.

WHO CAN BRING CIVIL PROCEEDINGS?

Civil proceedings can be brought by individuals, companies and other organisations.

Sometimes claimants will band together when their allegations of fraud are against the same defendant(s) and have similar facts, to collectively bring what is known as a group or multi-party action.

COSTS

Anyone bringing civil proceedings will usually need to pay their own legal fees, investigation costs and out-of-pocket expenses (called 'disbursements'). Other funding options are sometimes available, such as litigation funding and insurance.

MAKING A CLAIM

One of the first steps to making a claim is to collect evidence that can be used in any court proceedings to show that the claimant has been defrauded. Part of this process will often include investigatory steps to assess whether

the defendant is 'good for the money'. This will also help to decide whether it is financially worthwhile pursuing the claim and, if it is, against whom it should be pursued.

Evidence about the claim may include:

- communications between the defendant and the claimant before loss of money (for example emails or text messages);
- contracts, presentations or other 'official' documents such as share certificates provided to a claimant by the defendant; and
- contemporaneous notes of conversations or meetings.

Evidence about assets may include:

- where the potential defendant is located;
- whether they have (or had) substantial assets or have transferred them to another party;
- where those assets are located; and
- in the case of a company or other incorporated entity, the identity of its beneficial owners or those who are really managing and running the day-to-day affairs of the company (which may not necessarily be the directors listed at Companies House).

Low-value frauds, as well as crimes committed by 'men of straw' (that is, a person of no financial means who is unlikely to be able to meet a claim made against them), are seldom thought to be worth the cost and effort of pursuit through the civil courts. The insolvency registers for **England and Wales, Scotland** and **Northern Ireland** can be a good starting point to check on the financial status of a proposed defendant.

Once evidence has been collected a claim form can be delivered to the appropriate court, usually with a document called the Particulars of Claim which sets out the allegations, why money should be repaid, and how much.

Claims of less than £100,000 are dealt with by the local County Court. Higher-value claims may be dealt with by the High Court or one of the various regional district High Court registries.

Claims will be allocated to one of three tracks: small claims (£10,000 or less), fast-track (£10,000 to £25,000), or multi-track (above £25,000 or complex).

Sometimes a claimant can represent themselves in court by acting as a 'litigant in person'. The **Legal Choices** website has more information on this. More complex cases may require a team of professionals including solicitors, forensic accountants and fraud investigators. Professional advice should be sought to maximise the prospects of successful recovery actions.

TYPES OF CLAIM

Several different types of claim can be brought, which usually involve an element of breach of trust, such as a false statement, a misrepresentation, or withholding the truth where there is a duty to disclose the truth, and which results in reliance and loss to the victim.

Some common claims are set out below.

Claim against the defendant

A claim may be as simple as a request for the repayment or return of monies paid on the basis of misrepresentation and/or obtained by unjust enrichment. In a claim of deceit (misrepresentation) the following elements need to be proven:

- the defendant made a representation which was false, knowing it to be false;
- the defendant intended that the representation would induce the claimant to act; and
- the claimant suffered a loss.

Claim against a party in possession, use or control of misappropriated assets

The suspected perpetrator may have attempted to cover up their wrongdoing by placing legal ownership of the assets into the name of a close and trusted individual or into a company or trust. This may make it necessary to commence proceedings against a party other than the suspected perpetrator.

Claim against a party with a duty of care

Sometimes it is possible for a party other than the suspected perpetrator of a fraud to be held responsible for it. For example:

- a director's personal estate in an insolvency of a company where there is actual or suspected director misfeasance which has resulted in a breach of duty to that company;
- a professional adviser (such as a solicitor, licensed conveyancer or banker) who has breached their professional or other duties by handling the proceeds of fraudulent activity;
- an adviser or fellow company director who may have owed a fiduciary duty to the claimant; or
- a director whose company has been engaged in fraudulent or wrongful trading.

The example in the final bullet above, is typified by the 'phoenix company' in which a director places one company into liquidation to avoid making payments to creditors and then continues to operate substantially the same business using a newly incorporated company to which the assets of the former company have been transferred at an undervalue. This deprives genuine creditors of the first company, leaving them out of pocket for the goods or services they have supplied or paid for but not received.

INSOLVENCY PROCEEDINGS

In certain circumstances, it may be possible to commence bankruptcy (against an individual) or insolvency (against a company) proceedings to recover losses, but only if the suspected perpetrator still has sufficient money or assets to pay any claim.

Recoveries are divided between creditors in order of priority. Secured creditors (such as banks) usually have first claim on any assets before unsecured creditors.

Advice from an insolvency solicitor or licensed insolvency practitioner (usually an accountant) should be sought regarding the appropriate procedure.

OTHER TOOLS THAT CAN BE USED

Disclosure orders

Sometimes a claimant needs more information to help identify who the defendant should be or to confirm that a fraud has occurred when the claimant has grounds for suspicion. Disclosure orders, such as a Norwich Pharmacal or Bankers Book Evidence Act Order, can assist in this regard.

Freezing orders

A freezing order freezes a defendant's assets so that nothing can be done with them until the court process has finished. Freezing orders are usually only appropriate in claims involving fairly large sums of money and are often served on the asset holder, such as a bank. There are strict legal requirements governing their use.

Search orders

A search order may be obtained to allow the claimant's representative to search the defendant's home or business to secure evidence relating to the fraud or which may lead to the location of assets.

Other injunctions

Injunctions can be obtained to help stop any transactions planned by the defendant from happening.

ENFORCING A CLAIM

If a case succeeds at trial the court will enter into a judgment against the wrongdoer, declaring that the defendant owes a sum of money to the claimant.

Where the court has granted a freezing order, the victim may look to the frozen assets to satisfy the debt and seek a post-judgment freezing order until they are secured. If not – and in cases where the wrongdoer fails to make prompt payment – the victim may have the following options available to recover the debt.

Attachment of earnings

If the defendant is employed it may be possible to apply for an order that directs their employer to deduct a certain amount from their wages which is then paid to the claimant to satisfy the debt. These payments are usually spread out so it can take time before the debt is fully paid.

Charging order

This order stops the defendant from selling an asset (usually property such as a house or flat) without paying the debt. Care should be taken to ensure that there is sufficient equity or value in the property before incurring costs.

Third-party debt order

This order is given to a bank to prevent the defendant taking money out of their account. The money owed to the claimant is then paid out from that account.

Warrant of control

This allows bailiffs (County Court) or enforcement officers (High Court) to seize assets belonging to the defendant and sell them at auction to satisfy the debt. Certain assets may not be seized, such as tools of the trade.

FURTHER INFORMATION

The Insolvency Service to [find a licensed insolvency practitioner](#).

The Law Society to [find a solicitor](#).

Money Claim for information on the [small claims process](#).

Also see the [resources](#) section of our website.

Notes

¹ Also known as the tort of deceit.

This helpsheet was kindly reviewed and updated by Arun Chauhan at Tenet Compliance & Litigation and Frances Coulson at Moon Beaver LLP.

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