FRAUD ACTIONS POST - BREXIT - HOW MIGHT THEY BE MANAGED

(INCLUDING BY THE USE OF MEDIATION)

BY

ANTHONY TRACE QC

4 PUMP COURT

TEMPLE

LONDON 3C4Y 7AN

PRESENTATION TO CFLA

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1 It is a great privilege to be asked to speak to this Association, of which I have been a Member since its earliest days. In that time, I have seen the Association grow and grow in terms of membership and prestige, and I am delighted to follow in the footsteps of previous distinguished speakers.

Timing of Presentation

2 With the able assistance of your tireless Committee, it has been agreed that (a) this talk should be given immediately before the day originally set for Brexit, and (b) this talk should look at the central matters for which this Association stands for, namely *Fraud* actions (including *Mediation)*, *post-Brexit* in these uncertain times. I hope to lend some certainty in relation to, and cast light on the darkest corners of, these complex areas *post-Brexit*.

The need to examine the key areas of Fraud actions *pre - Brexit* and then examine those areas *post – Brexit*

3 "Let's start at the very beginning; a very good place to start", as Julie Andrews sang in The Sound of Music (!). It is necessary, before one looks at the management of *Fraud* actions (including *Mediations*) *post-Brexit*, to examine the key areas in relation to how to manage *Fraud* actions *pre-Brexit*. Thereafter, I will examine how managing *Fraud* actions (including Mediations) in those key areas might change *post – Brexit*.

Anthony Trace QC (with other contributors) book: *Civil Fraud: Law, Practice and Procedure*

4 There is obviously not time in this Presentation to go through all the various complexities of the law as to managing *Fraud* actions, whether acting for the Claimant or for the Defendant. What I do have time to do in that regard is to refer to the Book that I have written with various others entitled *Civil Fraud: Law, Practice and Procedure*, which has recently been published by Sweet & Maxwell and has been named *Wildy's "Book of the Month".* I have brought along my copy of the book for you all to look at, and I urge every one of you to buy a copy for yourself and to ensure that there is a copy in your respective Law Libraries. Although I say it myself, it is a very clear, comprehensive, readable and exceptional book, as one would expect from the calibre of the contributors.

Detailed analysis of alleged Fraud pre-issue of proceedings

5 The first key area in relation to how to manage *Fraud* actions is, if one is acting for the proposed Claimant, to spend proper time analysing what

the alleged *Fraud* actually is. Not only is this essential in order to work out the causes of action but also it is essential in order to get the pleadings into proper shape. In my experience, clients complained about the costs involved but were happy when a strike-out was warded off. I always recommended preparing a draft pleading, which clarifies thought and helps to anticipate defences.

Striking out strategy by Defendant in a *Fraud* action

6 One of my strategies (and this is the second key area) when I was a *Litigator* (everyone will know that I am now a *Mediator*), and was acting for a Defendant in a *Fraud* action, was to seek to attack the pleading in terms of saying that the alleged *Fraud* was unclear from the pleading. The aim was to make the Claimant amend, and ideally to amend again, and ideally then again, such that the alleged claim looked thoroughly without legs.

7 In one memorable case, I was acting for a Defendant Bank, and the case against my client was very badly pleaded. I attacked the pleading and managed to get it struck out at three levels (the case went as far as the Court of Appeal) and at every stage it was found that, despite various amendments, which made the Claimant look increasingly desperate, no cause of action in *Fraud* was properly disclosed. In the end, the Claimant packed its tents and the action went no further.

Conspiracy actions

8 The need to spend time in a detailed analysis of a *Fraud* action is particularly important if one is acting for a Claimant in a *Conspiracy* action (and this is the third key area). In all the many *Conspiracy* actions that I did as a *Litigator*, I always counselled clients to spend the money on a full investigation before issuing *Conspiracy* proceedings. My

grandfather always used to say that "*Time spent in reconnaissance is never wasted*" and this axiom is particularly true of *Conspiracy* actions - and indeed of all *Fraud* actions - as I mentioned above.

Overt Acts of Conspiracy

9 So far, I have focussed on managing *Fraud* claims in the general sense. I now turn to an important sub-set, namely that of managing the pleading of *Conspiracy* claims in particular (and this is the fourth key area). I was involved, as you all know, in a very large number of these claims, both for the Claimant and for the Defendant. As you will also know, there are two types of *Conspiracy*: *Lawful Means Conspiracy* and *Unlawful Means Conspiracy*, the key difference between the two being that in *Lawful Means Conspiracy* it is necessary to prove that the predominant purpose of the *Conspiracy* is to injure the Defendant (*Civil Fraud: Law, Practice and Procedure, paragraphs 2-007 to 2-009*). In both types of *Conspiracy* it is vital to plead out the overt acts of the *Conspiracy*. What I always did when acting for a Claimant was to include a Section in the pleading headed "*Overt Acts of the Conspiracy*". This helped to head off a striking-out claim and made the *Conspiracy* look as if it had more depth and strength.

Managing *Fraud* actions at *Mediations:* Part 1

10 As a *Mediator*, I deal with a wide range of *Fraud* claims and I draw to your attention a number of matters (and this is the fifth key area) that, in my experience, parties to the *Mediation* do not know how to deal with:

(1) The need to do a proper analysis of the Claimant's claim prior to issue of proceedings. As you know, a *Mediator* like myself is not meant to

cross-examine, but I am allowed to "*probe*" and "*reality-test*" the claim, and you would all be very surprised at how a little probing from me leads to a Claimant getting very worried about the strength of the claim. I have dealt with this analysis, and the need for it, above;

(2) The need to plead the case (and this is the sixth key area) such that, whether as a Defendant or as a Claimant, the claim is not strikeable. Again, you would be amazed at how many people, after a "*reality-check*" by me, see for the first time the weaknesses of the pleading – and of the case. Again, I have dealt with this, and the need for it, above;

(3) The need to consider what happens if witnesses are not called (and this is the seventh key area). Once again, you would be astonished at how this has not been considered at all. I have not dealt with this above, so I deal with it now.

The drawing of inferences from non-attendance of witnesses

11 As you all probably know, I have been one of the key advocates for the development of the law in this area.

12 Shortly after I took Silk in 1998 the Court of Appeal decided the case of *Wiszniewski –v- Central Manchester Health Authority [1998] P.I.Q.R 324*. In that case, which was a medical negligence case, a key person did not attend the trial and the Court of Appeal held that the absence of a witness could turn a *prima facie* case into one established on the balance of probabilities. This is, on one view, something that is not evidence *stricto sensu.* I thought, and still do, that the principle was (and is) too good to be true and used it many times over the next 17 years or so to great effect. I would regularly ask witnesses "Is X alive?" to which, not really understanding, the witnesses would say "Yes" –

assuming, of course, that such was true. This would go on throughout the trial in relation to all material witnesses who had not presented themselves to give evidence. Once the relevant case was closed (That, by the way, is another trap many people used to fall into – I would ask whether Counsel, Miss X, had "closed her case" to which Counsel would normally say "Yes" not realising that that it would need the Judge's permission to reopen her case and call another witness). Returning to the question of a witness who had not been called: once the case was closed, I used to spring the trap, and refer to *Wiszniewski*, asking the Judge to draw inferences, which invariably were drawn. There were many cases in which I placed successful reliance on the "*Wiszniewski principle"*.

13 With this principle in mind, it is vital in a *Fraud* action, if one is acting for a Claimant, to take into account that the Defendant might not call any evidence and there would therefore be no chance to cross-examine the Defendant's witnesses in order to help prove the Claimant's case. Thus, unless the Claimant can rely on the drawing of inferences, the case may fail. A classic example of this was a *Conspiracy* case that I did in the Cayman Islands. I was acting for the Defendants, and the Claimant had completed its evidence. I was due to open the Defendants' case in the morning. We gave careful consideration as to whether to call any evidence and decided not to, such that the Claimant only had its own evidence and any allowable drawing of inferences. We therefore went straight into closing speeches for which my opponent was not prepared at all. I am happy to say that the strategy paid off and the claim was dismissed with costs. My clients were delighted.

Managing *Fraud* Actions at *Mediations*: Part 2

14 Returning to managing *Fraud* actions at *Mediation*, I have had various *Mediations* where the *Wiszniewski principle* has been entirely overlooked. Regularly, I have had Counsel for a Claimant tell me how

strong her client's case is, only for me to ask what would happen if the Defendant called no evidence, at which the relevant Counsel has looked very surprised and crestfallen. The moral is: "*There is no excuse for lack of preparation*".

Managing *Fraud* Actions (including by *Mediation*) *post-Brexit*

15 I now deal with all the matters that, in my view, probably will or will not change below:

(1) First, as to the need to analyse what the *Fraud* or *Conspiracy* is, I do not consider that this will change so far as English proceedings (including *Mediations*) are concerned;

(2) It is not clear how countries like France that have a codified legal system of law will allow *Fraud/Conspiracy* actions by English Claimants (or *Mediations* in such actions) to be brought in their jurisdictions;

(3) There are also noises about changing the rules about the ability to bring people before the English courts as can presently be done. This would not be at all helpful for *Fraud/Conspiracy* claims (and *Mediations* in such claims);

(4) It is highly questionable whether the present "*court first seized*" principle will continue to apply. Again, this would not be at all helpful for *Fraud/Conspiracy* claims (and *Mediations* in such claims);

(5) If new trade agreements are entered into with other countries, then everything is probably "up for grabs", to use the vernacular: it depends on what is agreed. To my mind, this is one of the areas where the negotiators of the *Brexit* arrangements have "dropped the ball", to use a colloquialism: I have heard of no attention being given as to what legal systems will be in place. This could have particular, and direct, consequences in terms of the need for exclusive Court jurisdiction clauses. Moreover, as a *Mediator* I have been exploring with many people the possibilities of including in new contracts between English and non-English companies not only standard exclusive *Litigation* jurisdiction clauses but also exclusive *Mediation* clauses such that, if the parties wish to *Mediate*, it is agreed that such *Mediation* shall take place in England.

(6) The *Wiszniewski principle* has seen considerable growth in its application in the last 20 years and I see no reason why, *post – Brexit*, this growth should not continue throughout the non-English world in both *Litigation* and in *Mediation*;

(7) One area that may well also grow, and grow significantly, is *Mediation*. This is because *Mediation* is much further advanced in England than it is in much of the rest of Europe (and in many parts of the world) such that there is room for England to lead the way in the expansion of *Mediation* both in the rest of Europe (and globally).

14 Thank you again for allowing me to speak to you.

ANTHONY TRACE QC

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