KEY POINTS

- There is only one civil standard of proof and that is the balance of probabilities.
- Whilst the criminal standard of proof may apply in certain civil cases of a quasi-criminal nature, this is not the case with claims in fraud.
- There is considerable uncertainty whether the nostrum that "the more serious the allegation, the more cogent the evidence needed to prove it" continues to apply in banking fraud disputes.

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Banking fraud: the standard of proof and the cogency nostrum

This article considers the standard of proof applicable to banking fraud disputes under English law.

The standard of proof is often important in banking fraud disputes as it can be difficult to prove the requisite state of mind and the claims are invariably hotly contested by defendants.

The usual standard of proof in civil proceedings is the balance of probabilities, ie that it is more probable than not that the fact in issue occurred, whereas the criminal standard is proof beyond all reasonable doubt. Whilst the criminal standard will apply in civil proceedings which are of a quasi-criminal nature such as applications for sex offender orders, it is clear that fraud does not fall into this quasi-criminal category.

However, there is a widely held view amongst commercial litigators that the standard of proof and the cogency of evidence required are higher where the claimant alleges fraud. Despite recent decisions of the Commercial Court, there remains some uncertainty in this area.

EARLY CASES

There had been considerable uncertainty as to whether there was a higher standard of proof where a serious allegation had been made, but in *Bater v Bater* [1950] 2 All ER 458 Lord Justice Denning as he then was attempted to clarify the law:

> "A civil court, when considering a charge of fraud, will naturally require for itself a higher degree of probability than that which it would require if considering whether negligence were established. It does not adopt so high a degree as a criminal court, even when it is considering a charge of a criminal nature, but still it does require a degree of probability which is commensurate with the occasion."

In *Hornal v Neuberger Products* [1957] 1 QB 247, a case involving allegations of fraudulent misrepresentation, the Court of Appeal proceeded on the basis that whilst the civil standard of proof remained constant, the standard is flexible in its application according to the gravity of the allegations in question. Lord Nicholls explained:

> "… in truth no real mischief results from an acceptance of the fact that there is some difference of approach in civil actions. Particularly is this so if the words which are used to define that approach are the servants but not the masters of meaning. Though no court and no jury would give less careful attention to issues lacking gravity than to those marked by it, the very elements of gravity become a part of the whole range of circumstances which have to be weighed in the scale when deciding as to the balance of probabilities."

This passage was cited with approval by Mr Justice Ungoed-Thomas in *Re Dellow's Will Trusts* [1964] 1 WLR 451 who succinctly stated:

> "The more serious the allegation the more cogent is the evidence required to overcome the unlikelihood of what is alleged and thus to prove it."

THE CHILDREN ACT CASES

Subsequently there were a series of decisions of the House of Lords in the context of proceedings under s 31(2) of the Children Act 1989 in which a decision is made as to whether or not the circumstances are such that a child should be removed from its parents and placed into care.

In the decision of *In re H (Minors)* [1996] AC 563, Lord Nicholls said:

> "The balance of probability standard means that a court is satisfied an event occurred if the court considers that, on the evidence, the occurrence of the event was more likely than not. When assessing the probabilities the court will have in mind as a factor, to whatever extent is appropriate in the particular case, that the more serious the allegation the less likely it is that the event occurred and hence the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability. Fraud is usually less likely than negligence…. The more improbable the event, the stronger must be the evidence that it did occur before, on the balance of probability, its occurrence will be established."

The last sentence of this quote became known as the "*Re H* cogency test" or the "cogency nostrum".

A number of subsequent cases gave rise to a line of authority to the effect that there was a "heightened standard of proof" in cases involving serious allegations. The position was clarified by Lord Hoffmann in *In re B (Children)* [2008] UKHL 35:

> "I think that the time has come to say, once and for all, that there is only one civil standard of proof and that is proof that the fact in issue more probably occurred than not."

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Baroness Hale observed in *Re B* that the cogency nostrum had been repeated time and time again in fact-finding hearings in care proceedings, but that it was time to "loosen its grip and give it its quietus". She went on to emphasise a distinguishing characteristic of care proceedings:

> "[Care proceedings] are not there to punish or to deter anyone. The consequences of breaking a care order are not penal. Care proceedings are there to protect a child from harm. The consequences for the child of getting it wrong are equally serious either way."

It is also notable that the Children Act cases tend to involve non-accidental injuries which must have been caused by those in charge of the children and in such circumstances it is not likely to be necessary to have more cogent evidence in order for the court to conclude that the serious allegations are true.

In *Re S-B* [2009] UKSC 17, Lady Hale referred to *Re B* as having rejected the cogency nostrum which had become commonplace but was a misinterpretation of what Lord Nicholls had in fact said. This point was reinforced in *In the matter of J* [2013] UKSC 9.

The House of Lords has therefore comprehensively rejected the cogency nostrum, but only in cases concerning the care of children and, as they have made it clear, significantly different considerations apply in such cases.

RECENT FRAUD CASES IN THE COMMERCIAL COURT

The decision of Mr Justice Teare in *JSC BTA Bank v Ablyazov* [2013] EWHC 510 concerned a substantial fraud allegedly perpetrated by Mr Ablyazov against BTA Bank. Teare J's explanation of how he applied the standard of proof was as follows:

> "I have also kept well in mind that although the standard of proof is the civil standard, the balance of probabilities, the cogency of the evidence relied upon must be commensurate with the seriousness of the conduct alleged."

This decision was relied upon by some of the defendants in the case of *Otkritie v Urumov* [2014] EWHC 191 which concerned an alleged US$160m fraud against the Russian bank Otkritie. Some of the defendants submitted that the Children Act cases were not directly applicable to cases involving an allegation of fraud. Nevertheless, Mr Justice Eder held that:

(i) There is only one civil standard of proof and that is proof that the fact in issue more probably occurred than not, following *Re B*; and

(ii) The proposition that "the more serious the allegation, the more cogent the evidence needed to prove it" is wrong in law and must be rejected, following *Re S-B* and *In the matter of J*.

When rejecting the cogency nostrum, Eder J did not elucidate as to why he preferred the Children Act cases to the *Ablyazov* decision.

Eder J did accept that one way in which the seriousness of the allegation may have an impact upon the judge's assessment of whether the allegations had been proved was in relation to inherent improbabilities. He explained that:

> "I am prepared to accept that in a very broad sense, it may well be true to say that it is inherently improbable that a particular defendant will commit a fraud. But it all depends on a wide range of factors. For example, if the court is satisfied… that a defendant has acted fraudulently or reprehensibly on one occasion, it cannot necessarily be considered inherently improbable that such defendant would have done so on another; or if, for example, the court is satisfied… that a defendant has created or deployed sham or false documents, the court cannot assume that it is inherently unlikely that such defendant did so on other occasions... I accept, of course, that the court should take into account the inherent probability of an event taking place (or not taking place) as is made abundantly plain by Baroness Hale in [*Re S-B*]. However, as it seems to me, the court must in each case consider carefully what is – and is not – inherently probable having regard to the particular circumstances…"

Evidence of the continuing uncertainty in relation to the standard of proof is illustrated by *Alpstream v PK Airfinance* [2013] EWHC 2370 in which Mr Justice Burton relied upon *Hornal v Neuberger* in applying a "higher standard of proof" in claims for conspiracy to injure by unlawful means and wilful misconduct.

CONCLUSION

Despite the uncertainty created by the *Alpstream* decision, it appears likely that the correct view is that there is no specific heightened standard of proof in cases involving fraud. The position in relation to the cogency nostrum is less certain given the conflict between the *Otkritie* and *Ablyazov* decisions and the question as to whether the Children Act cases are applicable given the differing considerations which apply in such cases, namely that the consequences for the child of getting it wrong are equally serious either way whereas in cases of fraud the consequences for an individual of a finding of fraud are potentially very severe.

Hopefully the position will be clarified by the Court of Appeal or the Supreme Court in due course. In any event, it would appear likely that in practice the courts will exercise caution when assessing allegations of fraud and that this will inevitably have an impact upon the strength of evidence required to prove such allegations. ■

Further reading

- Financial Crime Update [2012] 1 JIBFL 55
- Financial Crime Update [2011] 4 JIBFL 231
- Lexis PSL: Corporate Crime: Burden and standard of proof practice note