

When Can You Plead Fraud?

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JOSEPH CARNEY

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“A hair’s breadth”

“...It is no small responsibility which the State throws upon the lawyer in thus confiding to his discretion the reputation of the citizen. No enthusiasm for his client’s case, no specious assurance from his client that the insertion of some strong allegations will coerce a favourable settlement, no desire to fortify the relevance of his client’s case, entitles the advocate to trespass, in matters involving reputation, a hair’s breadth beyond what the facts as laid before him and duly vouched and tested will justify. It will not do to say lightly that it is for the Court to decide the matter. It is for counsel to see that no man’s good name is wantonly attacked”

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Rule 13.10

“(1) Every pleading shall contain the necessary particulars of any fact or matter pleaded

.....

(3) Without limiting paragraph (1), every pleading shall contain particulars of any—

(a) misrepresentation, fraud, breach of trust, wilful default or undue influence which is alleged

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Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015

21.3 A solicitor must not allege any matter of fact in:

- 21.3.1 any court document settled by the solicitor;
- 21.3.2 any submission during any hearing;
- 21.3.3 the course of an opening address; or
- 21.3.4 the course of a closing address or submission on the evidence, unless the solicitor believes on reasonable grounds that the factual material already available provides a proper basis to do so.

21.4 A solicitor must not allege any matter of fact amounting to criminality, fraud or other serious misconduct against any person unless the solicitor believes on reasonable grounds that:

- 21.4.1 available material by which the allegation could be supported provides a proper basis for it; and
- 21.4.2 the client wishes the allegation to be made, after having been advised of the seriousness of the allegation and of the possible consequences for the client and the case if it is not made out.

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Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015

21.5 A solicitor must not make a suggestion in cross-examination on credit unless the solicitor believes on reasonable grounds that acceptance of the suggestion would diminish the credibility of the evidence of the witness.

21.6 A solicitor may regard the opinion of an instructing solicitor that material which is available to the instructing solicitor is credible, being material which appears to the solicitor from its nature to support an allegation to which Rules 21.1, 21.2, 21.3 and 21.4 apply, as a reasonable ground for holding the belief required by those Rules (except in the case of a closing address or submission on the evidence)

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Why would you want to plead fraud anyway?

- Money had and received

- Conversion

- “Innocent misrepresentation”

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Why would you want to plead fraud anyway?

- Knowing Receipt
- Damages
- Setting aside dispositions of property
- Limitation Periods

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When Can You Legitimately Plead Fraud?

“..... an allegation of fraud or dishonesty must be sufficiently particularised, and that particulars of facts which are consistent with honesty are not sufficient. This is only partly a matter of pleading. It is also a matter of substance. As I have said, the defendant is entitled to know the case he has to meet.”

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But since dishonesty is usually a matter of inference from primary facts, this involves knowing not only that he is alleged to have acted dishonestly, but also the primary facts which will be relied upon at trial to justify the inference. At trial the court will not normally allow proof of primary facts which have not been pleaded, and will not do so in a case of fraud. It is not open to the court to infer dishonesty from facts which have not been pleaded, or from facts which have been pleaded but are consistent with honesty. There must be some fact which tilts the balance and justifies an inference of dishonesty, and this fact must be both pleaded and proved. ”

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What are the consequences of improperly alleging fraud?

- Costs Consequences
- Disciplinary Proceedings

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Allegations against other practitioners

Victorian Legal Services Commissioner v McDonald [2019] VSCA 18

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