

# Different shades of fraud in different jurisdictions



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# Standard of Proof



- ❧ In a civil claim, where the allegation of fraud is serious or criminal in nature, would a higher quality of evidence be required?
- ❧ **Sinnaiyah & Sons Sdn Bhd v Damai Setia Sdn Bhd** [2015] 5 MLJ 1 Federal Court at paras 49 & 50 held that *“As such even if fraud is the subject in a civil claim the standard of proof is on the balance of probabilities. There is no third standard. And ‘(N)either the seriousness of the allegation nor the seriousness of the consequences should make any difference to the standard of proof to be applied in determining the facts’.”*



# Dishonesty in underlying transaction

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- ☞ Where both parties are dishonest:
- ☞ Equitable Set Off only in Malaysia
- ☞ No Legal Set Off in Malaysia\*







❧ **Permodalan Plantations Sdn Bhd v Rachuta Sdn Bhd [1985] 1 MLJ 157 FC at p 161:**

*“... there being no Malaysian Statutes comparable to the United Kingdom Statutes on the subject, we therefore hold that only equitable and not legal set-off is part of our law, and consequently the court can only deal with an equitable set-off.”*

❧ \* However, take note that under Third Schedule para 6 (1) of the Subordinate Courts Act 1948, the Subordinate Courts have the power to allow a defence of set-off where the defence would be allowed in the High Court in England.



# Dishonesty in litigation (i)



Court may punish the dishonest litigant with costs on an indemnity basis:

The guideline for an award of costs on an indemnity basis in **Macmillan Inc v Bishopsgate Investment Trust plc and others (No 3)** [1995] 3 All ER 747 was approved by the Federal Court in **Takako Sakao (f) v Ng Pek Yuen (f) & Anor (No 2)** [2010] 2 MLJ 181 para 8 to be applied in Malaysia:

*“Litigants who conduct their cases in bad faith, or as a personal vendetta, or in an improper or oppressive manner, or who cause costs to be incurred irrationally or out of all proportion as to what is at stake, and have part of their costs disallowed if they win may also expect to be ordered to pay costs on an indemnity basis if they lose.”*



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# Dishonesty in litigation (ii)



## ❧ Contempt of court

❧ A party may be found to be in contempt of court where they have:

❧ suppressed material evidence; and

❧ lied in court.

❧ Whoever intentionally gives false evidence in any stage of a judicial proceeding, or fabricates false evidence for the purpose of being used in any stage of a judicial proceeding, shall be punished with imprisonment for a term which may extend to seven years, and shall also be liable to fine; and whoever intentionally gives or fabricates false evidence in any other case, shall be punished with imprisonment for a term which may extend to three years, and shall also be liable to fine. – section 193 of **Penal Code**



# Contempt of Court



**Jaginder Singh & Ors v Attorney-General** [1983] 1 MLJ 71  
FC at p 73, Raja Azlan Shah AG LP (as he then was):

*“Contempt of court would lie not only in the false testimony but in the obstruction or frustration of the administration of justice. What is required is “an evinced intention” to interfere with the course of justice.*

...

*False testimony, together with a refusal to answer questions amounts to an obstruction of the administration of justice which is punishable as a contempt; false testimony, without more, does not.”*



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# General bad behavior



☞ Where a party has been dishonest in the underlying transaction which is the subject matter of the suit:-

☞ Remedies for fraudulent Misrepresentation:

1. Rescission and possibly restitution
2. Section 19(2) of Contracts Act 1950



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# Rescission



✧ **Abdul Razak bin Datuk Abu Samah v Shah Alam Properties Sdn Bhd [1999] 2 MLJ 500 CA at p 509 :**

*“Where there has been fraudulent misrepresentation, the Plaintiff is entitled to recover all expenditure reasonably and properly incurred in consequence of the representation of the Defendant.”*



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# Restitution



✧ Courts have inherent jurisdiction to grant restitution

**Malacca Malay Guru-Guru Co-operative Thrift & Loan Society Ltd v Tan Mei Hua & Ors** [1971] 1 MLJ 107 (OCJ Malacca) at p 109:

*“The main judgment or order is varied or reversed, all orders consequential or depending upon it are affected and wrongs done under them have to be righted by granting restitution.”*



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# S.19(2) Contracts Act



✧ It is open for the court to order that the contract be performed as if the representations were true.

## **S19(2) Contracts Act 1950:**

*“A party to a contract, whose consent was caused by fraud or misrepresentation, may, if he thinks fit, insist that the contract shall be performed, and that he shall be put in the position which he would have been if the representations made had been true.”*



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# Dishonesty in different jurisdictions (i)

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- ❧ What if Defendant has done something which is legal in jurisdiction A but is considered dishonest or illegal in your jurisdiction B (Malaysia)?
- ❧ Obtain judgment in jurisdiction A.
- ❧ Then register the judgment under the **Reciprocal Enforcement of Judgments Act 1958** (only for judgments from certain jurisdictions) in jurisdiction B.
- ❧ Courts in jurisdiction B will not look behind the judgment.



# Dishonesty in different jurisdictions (ii)

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- ❧ If the cause of action has resulted in a judgment, it would be capable of registration under the Reciprocal Enforcement of Judgments Act 1958 but if it has to be sued upon then it will not be allowed to succeed
- ❧ e.g an action to recover gambling debts

See: **Jupiters Ltd (trading as Conrad International Treasury Casino) v Gan Kok Bing** [2007] 7MLJ 228 and **Marina Bay Sands Pte Ltd v Wong Kah Hin** [2017] MLJU 491, **Marina Bay Sands Pte Ltd v Ng Kong Seong** [2017] 7 MLJ 188 HC Hanipah Farikullah J



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# Dishonesty in different jurisdictions (iii)

☞ **S23 Courts of Judicature Act 1964** provides as follows:

23. (1) Subject to the limitations contained in Article 128 of the Constitution the High Court shall have jurisdiction to try all civil proceedings where –

- (a) the cause of action arose;
- (b) the defendant or one of several defendants resides or has his place of business;
- (c) the facts on which the proceedings are based exist or are alleged to have occurred; or
- (d) any land the ownership of which is disputed is situated, within the local jurisdiction of the Court and notwithstanding anything contained in this section in any case where all parties consent in writing within the local jurisdiction of the other High Court.





# Forum non conveniens



The common law on *forum non conveniens* applies in Malaysia.

**Malacca Securities Sdn Bhd v Loke Yu [1999] 6 MLJ 112 HC p 119C– 120B:**

“The critical issue for determination is whether the court is the forum conveniens to hear the dispute between the parties notwithstanding the fact that it has jurisdiction to do so... a court which has jurisdiction to hear a case can lawfully decline to exercise its jurisdiction on the ground that the case must be heard by a more accessible court. In declining to exercise jurisdiction a court does so not on grounds of convenience but of the suitability or appropriateness of another tribunal in the interests of all the parties and for the ends of justice (see *Sim v Robinow* (1892) 19 R 665, *Spiliada Maritime Corp v Consulex Ltd* [1987] AC 460).”



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# Fraud discovered after judgment?



**Hock Hua Bank Bhd v Sahari bin Murid**  
[1981] 1 MLJ 143 FC at p 144:

*“if a judgment or order has been obtained by fraud or where further evidence which could not possibly have been adduced at the original hearing is forthcoming, a fresh action will lie to impeach the original judgment.”*



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# Fraud unravels all



**Govinaraju a/l Nagarajan v Pacific & Orient Insurance Co Bhd [2014] 8 MLJ 839 HC at para 40:**

*“Of course, it is trite that fraud unravels everything. See Denning LJ in a famous dictum in *Lazarus Estates Ltd v Beasley* [1956] 1 QB 702 at p 712 where he said, 'No court in this land will allow a person to keep an advantage which he has obtained by fraud. No judgment of a court, no order of a Minister, can be allowed to stand if it has been obtained by fraud. Fraud unravels everything. The court is careful not to find fraud unless it is distinctly pleaded and proved; but once it is proved, it vitiates judgments, contracts and all transactions whatsoever...’”*



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