Breaking Privilege: The fraud exception – answer sheet

PART 1

Fork Construction Limited ("FCL") is a long-standing manufacturer of fine cutlery. In recent years it has struggled to compete with overseas competitors and now finds itself having to reschedule repayments of bank loans and implementing pay freezes. The Bank has taken security over its UK assets.

Among its supply contracts is one to supply Hilton Hotels with cutlery on demand. It receives a handsome monthly payment in return for keeping a production line solely devoted to Hilton, always ready to produce branded Hilton cutlery.

FCL owns its factory in the UK, plant and machinery, but also some overseas shops and a large collection of rare silver forks, dating from its days as the market leader. They include the diamond-studded "Coronation Fork", made for Queen Victoria's coronation and kept in the UK.

Two of FCL's directors, A and B, with ostensible authority to act for FCL, seek advice from solicitors on the following proposed actions:

a) **Using the dedicated "Hilton" production line to produce cutlery for other customers, without telling Hilton, in order to increase revenue from other customers while continuing to claim the monthly payments;**
b) **Transferring the machinery needed for the "Hilton" production line to a new company ("GCL"), at cost, in order to ensure that the Bank cannot interfere with fulfilment of the Hilton contract;**
c) **Transferring FCL's silver fork collection to Mrs A and Mrs B, in return for nothing but their agreement to donate them to a museum in due course;**
d) **Granting a prospective new lender security over the Coronation Fork and FCL's offshore assets in return for an injection of new money, on terms that make Wonga look reasonable.**

The solicitor advises, and each of actions a) to d) are carried out.

Q1. In subsequent litigation in which each of those actions was relevant to the litigation, will legal professional privilege cover the advice given by the solicitor to A and B?

Answer 1:

1. Misleading to talk about the "fraud exception" to legal professional privilege; the iniquity of the scheme to which the advice relates *prevents* privilege from arising in the first place. Either professional privilege exists (in which case it is inviolate) or it does not. There is no balancing exercise: *Three Rivers DC v Bank of England (No. 6)* [2005] 1 AC 610 at [25]; *JP Morgan Multi Strategy Fund v Macro Fund Limited* [2003 CILR 250].

2. The gravity of conduct which is required for the "exception" to apply is such that the applicability of the exception is *potentially* quite wide. Per Kekewich J in *Williams v Quebrada Railway, Land & Copper Co* [1895] 2 Ch 751:

> *"where there is anything of an underhand nature or approaching to fraud, especially in commercial matters, where there should be the veriest good faith, the whole transaction should be ripped up and disclosed in all its nakedness to the light of the court."*

3. Subsequent cases have, however, sought to identify how close to "fraud" the conduct needs to be before the exception can be engaged.

    a. It does not apply to any act or scheme which is unlawful in the sense of giving rise to a civil claim: parties must be at liberty to take advice as to the ambit of their contractual obligations and liabilities in tort without risking losing privilege. The exception will bite not only on the tort of deceit, all forms of civil fraud and dishonesty, such as fraudulent breach of trust, fraudulent conspiracy, treachery and 'sham contrivances', but not all forms of unlawful means conspiracy or inducing breach of contract: *Crescent Farm (Sidcup) Sports Ltd v Sterling Offices Ltd* [1972] 1 Ch 553.

    b. The Australian authorities also agree that *"mere breach"* of contract or the commission of tort is not sufficient: *Watson v McLernon* [2000] NSWSC 306 (though, in that case, the secret use of employers' confidential information by employees crossed the line). Deliberate abuse of statutory powers, preventing others from exercising their rights under the law, may suffice: *Attorney General (NT) v Kearney* (1985) 158 C.L.R. 500 (Aboriginal land claims).

    c. A Canadian authority suggests a lower threshold than in the English cases: email communications between client and solicitor which tended to show that the defendants intended to inflict emotional harm on another fell within the exception (though the judge recognised it to be a controversial decision): *Dublin v Montessori Jewish Day School of Toronto,* 2007 CanLII 8923 (ON SC).

    d. The conduct must be such as *"really is dishonest, and not merely disreputable or a failure to* maintain *good ethical standards"*: *Gamlen Chemical Co (UK) Ltd v Rochem Ltd* (unrep.) 7 December 1979, *Court of Appeal (Civil Division) Transcript No. 777 of 1979*.

4. Recent cases have – on balance - probably expanded the category of conduct that can engage the iniquity exception. Per *Norris* J. in *BBGP v Babcock* [2011] Ch 296:

> *"Although the case law refers to crime or fraud or dishonesty (such as fraudulent breach of trust, fraudulent conspiracy, trickery or sham contrivances) it is plain that the term "fraud" is used in a relatively wide sense:* Eustice's case [1995] 1 WLR 1238 *, 1249D. So a scheme to effect transactions at an undervalue was sufficient (Eustice's case); as was deliberate misrepresentation for the purpose of securing a mortgage advance (*Nationwide Building Society v Various Solicitors [1999] PNLR 52 *, 72); or making a disposition with the intention of defeating a spouse's claim for financial relief (*C v C (Privilege) [2008] 1 FLR 115*); or the establishment by employees, in breach of a duty of fidelity to their employer, of a rival business:* Gamlen Chemical Co (UK) Ltd v Rochem Ltd (No 2) (1979) 124 SJ 276 *and Walsh Automation (Europe) Ltd v Bridgeman [2002] EWHC 1344 (QB). The enumeration of examples is useful only in so far as it enables some underlying theme or connectedness to be identified. In each of these cases the wrongdoer has gone beyond conduct which merely amounts to a civil wrong; he has indulged in sharp practice, something of an underhand nature where the circumstances required good faith, something which commercial men would say was a fraud or which the law treats as entirely contrary to public policy. (I borrow language from Gamlen's case and from* Williams v Quebrada Railway Land and Copper Co [1895] 2 Ch 751.*)"*

5. Looking at the particular examples here:

    a. Using the dedicated Hilton line for other orders:

        i. A deliberate breach of contract for monetary gain

        ii. Looks like sharp practice; and conduct of an underhand nature

        iii. But, would treating this as dishonest be to stretch dishonesty too far?

    b. Transferring Hilton machinery at cost:

        i. Almost certainly a breach of the bank's debenture (not a trade in the ordinary course of business); and therefore a civil wrong for that reason alone

        ii. Query if transfer at cost is a transfer at an undervalue? Was it intended to undermine creditors' security?

        iii. Close to the line of being dishonest

    c. Transferring fork collection: Fraud on the company; exception probably engaged

    d. New "Wonga" loan: assuming that this does not seek to defeat existing bank's security, hard to see any dishonesty at all (as opposed to, perhaps, a foolish business decision).

Q2. Would it make a difference if the solicitor were the owner of GCL and motivated by a desire to benefit GCL?

Answer 2:

6. No. The solicitor may be wholly innocent, or deeply involved in the iniquity, and in either case the exception can apply.

7. The reasoning for this is found in the old case of *R v Cox & Railton* [1884] 14 QBD 153 at 168: Legal professional privilege only applies if there is professional confidence and professional employment. If a client uses a solicitor in furtherance of fraudulent purpose, and the solicitor does not know this, then there is no confidence. If the solicitor does know, then there is no professional employment (as the communication is not in the ordinary scope of professional employment).

8. The circumstance where this might be relevant is if the fraud was that of the solicitor alone, and the client was innocent. There the privilege of the client would be unaffected (*Fields v Watts* (CA, 22.1.1986).

Q3. Would it make a difference if A and B had kept the rest of FCL's Board in the dark as to the actions they proposed?

Answer 3:

9. This raises the question of whether an innocent client can lose his right to privilege due to a third party holding the relevant iniquitous purpose. The answer appears to be yes, per Lord Goff of Chieveley in *R v Central Criminal Court, ex p. Francis & Francis* [1989] AC 346 at 396:

   "when I have regard both to the purpose which has long been understood to underline the principle of legal professional privilege, and to the reason why communications passing between a client with a criminal purpose and a solicitor who is innocent of any such purpose are held not to be protected by such privilege, it appears to me to be immaterial to that exception whether it is the client himself, or a third party who is using the client as his innocent tool, who has the criminal intention"

Q4. Will privilege cover the legal advice given by a separate solicitor, to Mrs A and Mrs B, in relation to whether they should accept the fork collection?

Answer 4:

10. The answer here will turn on whether the conduct that this solicitor is advising on is conduct that falls within the relevant category in 1. above.

PART 2

FCL's business collapses and the company enters winding up. FCL's liquidator concludes that A and B have carried out a massive fraud on FCL, by channelling its overseas assets into their own pockets. The liquidator brings proceedings, obtaining a worldwide freezing injunction against A and B plus an order that they disclose their assets. A and B deny the allegations.

Prior to the proceedings, A attempted to conceal the fraud and hide his ill-gotten gains through a restructuring of his assets, by moving the money into an opaque offshore trust structure.

When the freezing injunction is later served on A, he deliberately fails to disclose the offshore assets. Soon afterwards (and long before the trial of the claim), the liquidator obtains evidence indicating that A has concealed the assets. At the interlocutory stage, can the liquidator defeat A's claim to privilege when seeking:

Q1. disclosure of the legal advice given to A by the transactional lawyers who were advising on the asset restructuring;

Answer 1:

11. Q1 raises two issues:

    a. whether it is possible to rely on the iniquity exception to break legal advice privilege at the interlocutory stage of proceedings;

    b. whether the fraud exception applies not only to communications made before in the context of the fraud (or other conduct) which gives rise to the substantive cause of action in the proceedings, but also subsequent communications designed to hide the fraud or its proceeds.

12. The answer to the first issue, is 'yes'. In principle, it is possible to rely on the iniquity exception to break legal advice privilege at the interlocutory stage, although in practice the Court might need a lot of persuading to do so.

13. As to the second issue: in several reported cases, the Court has applied the iniquity exception to a defendant's attempts to conceal a fraud and/or to frustrate enforcement by secreting

assets. See, for example: *Chandler v Church* (1987) 137 NLJ 451, Ch D; *Derby & Co v Weldon (No 7)* [1990] 1 WLR 1156, Ch D; *Dubai Bank v Galadari (No 6)*, The Times, 22.4.91, Ch D; and *JSC BTA Bank v Ablyazov* [2014] 2 CLC 263.

14. Thus in *Dubai Bank v Galadari (No 6)*, Morritt J held that the iniquity exception applied not only to communications made before the alleged fraud which is the subject of the proceedings, but also to subsequent communications with the aim of concealing the fraud and stifling its discovery. The iniquity exception was therefore capable of applying to transactions post-dating the alleged fraud, if they were carried out to conceal that fraud. It did not matter that the subsequent transactions were not in contemplation at the time of the original fraud (as to which see *Derby v Weldon (No 7)*). Hence in *Dubai Bank v Galadari (No 6)*, the Court ordered disclosure of legal advice given to the defendants in relation to several transactions prior to the issue of proceedings, where there was a prima facie case that the purpose of the transactions was to conceal the fraud.

15. Likewise, in *Chandler v Church*, Hoffmann J accepted that the iniquity principle could apply to similar transactions entered into after the commencement of proceedings, if carried out to achieve the fraudulent purpose of preventing the claimant from recovering assets to which he was entitled (although in that case Hoffmann J declined to order disclosure in the exercise of his discretion). *Derby v Weldon (No 7)* was another case where the Court accepted that legal advice on transactions undertaken by the defendant for the purpose of rendering assets irrecoverable by the claimant were subject to the iniquity exception.

16. However, where the advice on the transactions overlaps with communications protected by a legitimate claim to litigation privilege, the Court will exclude those documents from the disclosure: see *Derby v Weldon (No 7)* (but see the next question for the possibility that the iniquity exception might apply to documents that would otherwise be subject to litigation privilege).

Q2. disclosure of the communications between A and his litigation solicitors in relation to his asset disclosure pursuant to the freezing injunction, plus drafts of A's asset disclosure affidavit.

Answer 2:

17. The question here is whether the iniquity exception applies not only to legal advice privilege but also to litigation privilege. The answer is that the exception is capable of applying to litigation privilege: see *Kuwait Airways Corp v Iraqi Airways (No 6)* [2005] 1 WLR 2734, CA. In

truly exceptional circumstances, this could apply to a party's litigation privilege in relation to the proceedings as whole – see further Part 3 below where this possibility is discussed.

18. In practice, it is more likely that the exception might apply to a distinct episode in the proceedings, the most obvious example being non-compliance with an interlocutory order such as asset disclosure under a freezing injunction.

19. In *Chandler v Church*, cited above, Hoffmann J accepted that in principle the iniquity exception could be applied at the interlocutory stage to documents generated in the course of the proceedings. In *Dubai Bank v Galadari (No 6)*, cited above, Morritt J went a step further and ordered disclosure of apparently privileged communications relating to the preparation of an affidavit made in response to a freezing injunction, where there was prima facie evidence that the affidavit was designed to mislead the Court so as to conceal the fraud.

20. In *JSC BTA Bank v Ablyazov* [2014] 2 CLC 263, Popplewell J concluded that there was a very strong *prima facie* case that the defendant had conducted proceedings pursuant to a strategy of concealment and deceit in relation to his assets, including by deliberate non-disclosure of assets in response to a freezing injunction. The Court ordered disclosure of all his communications with his solicitors during the proceedings in furtherance of this iniquitous strategy, insofar as the communications concerned information about his current or former assets.

21. It should be borne in mind that where disclosure is sought in respect of failure to comply with a freezing injunction, there might be scope for the privilege against self-incrimination to apply. That privilege entitles a person to refuse to disclose documents if to do so would tend to expose him to proceedings for an offence or for recovery of a penalty (such as contempt proceedings for non-compliance with an injunction). However, the privilege only applies to statements or documents which are brought into existence by the compulsion of the Court (e.g. an asset disclosure statement made pursuant to a freezing injunction), and does not attach to compulsory production of documents which have an existence independently of the order compelling production. Where the Court invokes the iniquity exception and orders disclosure of communications between a defendant and his solicitor in relation to a freezing injunction, the privilege against self-incrimination is unlikely to apply because the creation of those documents was not compelled by the Court; it is not enough that the injunction merely provided the occasion for the creation of the documents: see *JSC BTA Bank v Ablyazov*, cited above, at [117].

Q3. In order to succeed on an interlocutory application to defeat A's privilege claim:

Q3a. Is it enough for the liquidator to file written evidence showing A's fraudulent purpose, or would there need to be cross-examination of A?

Answer 3a:

22. The general rule is that an application at the interlocutory stage to invoke the iniquity exception will be determined on written evidence in the form of affidavits (or witness statements in the UK): see CPR 32.6; GCR O.28, r.2(3); ECSC CPR 29.2(1)(b).

23. Although the Court has power to order cross-examination at the interlocutory stage (CPR 32.7; GCR O.28, r.2(3); ECSC CPR 29. 2(2)), the approach taken in the reported decisions on the iniquity exception is to resolve the matter on paper without cross-examination, applying the following principles.

24. There is a tension at the heart of the exercise of deciding whether disclosure of potentially privileged documents should be ordered: if the party seeking disclosure has to prove guilt on the part of the party claiming privilege, the relevant documentation would never be produced at all – or at least until it was too late; on the other hand, if disclosure is too readily ordered on the basis of a *suspicion* of illegality – it may be that a proper claim for privilege is wrongly displaced. On an interlocutory application, the party seeking disclosure does not have conclusively to prove the fraud/iniquity in order to engage the exception.

25. The Court has a discretion to order disclosure on the basis of a prima facie case that the legal adviser's assistance or advice was obtained for an iniquitous purpose: see *Chandler v Church* (1987) 137 NLJ 451, Ch D, per Hoffmann J.

26. It is not enough merely to allege fraud. Suspicion, assumption, surmise and conjecture are insufficient: *C v C* [2008] 1 FLR 115.

27. *O'Rourke v Darbishire* [1920] AC 581, 604:

> "*There must be something to give colour to the charge. The statement must be made in clear and definite terms and there must be some prima facie evidence that it has some foundation in fact. … The Court will exercise its discretion not merely as to the terms in which the allegation is made but also as to the surrounding circumstances for the purpose of seeing whether the charge is made honestly and with sufficient probability of its truth to make it right to disallow the privilege of professional communications*"

28. The requirement for a prima facie case has been tightened up in subsequent case-law so that, at least where the existence of the fraud/iniquity is one of the underlying issues in the action, it must now be shown that there is a "*strong prima facie case*" that the iniquity exception applies: *Kuwait Airways (No 6)*, cited above, at [42] per Longmore LJ (he went on to suggest that a "*very strong*" prima facie case would be needed).

29. In *Derby v Weldon (No 7)*, cited above, the Court emphasised that an order for disclosure at the interlocutory stage would only be made in "*very exceptional circumstances*", though it was *"too restrictive to say that the plaintiff's case must always be founded on an admission or supported by affidavit evidence or that the court must carry out the preliminary exercise of deciding on the material before it whether the plaintiff's case will probably succeed."*

30. However, where the existence of the fraud/iniquity is not one of the underlying issues in the action, it has been said that the requirement is still merely that of showing there is a "*prima facie case*" of fraud/iniquity, albeit that the Judge will need to be "*clear in his view*" that such prima facie case is made out: see *R v Gibbins* [2004] EWCA Crim 311 at [50] per Potter LJ, and *Kuwait Airways* at [37].

31. It has also been said that "*If all one has is disputed versions of events, it will be difficult to say that there is even a prima facie case of fraud. This will be particularly so if the disputed version of events is the very same issue that is to be tried in the proceedings*": *Kuwait Airways* at [37].

32. If a prima facie case of sufficient cogency is made out, the Court still has a discretion as to whether to order disclosure. The Court will weigh up, on the one hand, the risk of injustice to the applicant by depriving it of information which it needs to prove its case or recover its assets, and, on the other hand, the risk of injustice to the respondent by hampering its defence and by infringing the confidentiality of its communications with its lawyers: *Chandler v Church*, cited above.

33. Clearly these risks will be all the greater at the interlocutory stage and it can be expected

Q3b. Would the judge need to look at the disputed documents *in camera*?

Answer 3b:

34. The Court has power to inspect the allegedly privileged documents to see whether the iniquity exception applies: see *R v Governor of Pentonville Prison, ex p Osman* [1989] 3 All ER 701, 716 and *R v Gibbins*, cited above; and see CPR 31.19(6)(a); GCR O.24, r.13; ECSC CPR 26.14(7).

35. However, it has been said that the Court's power to inspect the documents should be exercised "*very sparingly*" so as to avoid undermining the public policy on which privilege is based (*C v C* [2008] 1 FLR 115 at [67]). Similarly, in *BBGP v Babcock* [2011] Ch 296, Norris J said that as a rule the Court should not look at the disputed documents; there needs to be an exceptional factor of real weight before the Court will examine them. Norris J added that the mere fact that the iniquity exception cannot be established without looking at the documents is not an exceptional factor.

36. If the Judge is to be invited to examine the disputed documents, then, depending on the circumstances, it might be appropriate for the disclosure application to be made to a Judge other than the Trial Judge.

Q3c. Would it be necessary to join the solicitors as respondents to the application?

Answer 3c:

37. There is no settled rule as to whether it is necessary to join the solicitors with whom the communications were made. In some circumstances it might be appropriate to join the solicitors as respondents, and this occurred in *Dubai Bank v Galadari (No 6)*, cited above, and in *JSC BTA Bank v Ablyazov*, cited above.

38. However, in general it would seem unnecessary to join the solicitors. Any privilege is the client's privilege, not the solicitors', so it ought to be enough to determine whether privilege applies against the client alone without joining the solicitors. It is also unnecessary to show that the solicitors were party to the fraud/iniquity, so in general it will be unnecessary for the Court to make any findings against the solicitors: see for example *Dubai Bank v Galadari (No 6)*, where the Court ruled that an attack on the bona fides of the solicitors in question was irrelevant.

39. However, there might be cases where it is appropriate to join the solicitors, for example if it is desired to obtain disclosure of documents on the solicitors' file which belong to the solicitors and which are not under the client's "control". It is also possible that the solicitors might wish to be parties, so that there is a binding determination as between the solicitors and their client as to whether privilege exists, for example where the client has fled and has taken no part in the application (as occurred in *JSC BTA Bank v Ablyazov*, cited above).

40. It would appear that the costs of the disclosure exercise should not be borne by the solicitors personally but by their client, and if the client has absconded or is unable to pay, then the applicant for disclosure will need to fund the exercise: see *JSC BTA Bank v Ablyazov*, cited above.

Q4. Assuming that the liquidator succeeds in defeating A's claim to privilege, would that also entitle him to see A's communications with his co-defendant B, who is separately represented? B claims common interest privilege in the communications.

Answer 4:

41. If B has shared his privileged documents with A on a legitimate common interest privileged basis, then it would appear that the application of the iniquity exception to A would not cause B to lose his own privilege, so B's privileged documents in A's hands would not be disclosable. Hence it was accepted in *JSC BTA Bank v Ablyazov*, cited above, that any documents subject to common interest privilege should be excluded from the disclosure ordered pursuant to the iniquity exception: see [134].

42. Of course, if B was engaged in the same iniquitous conduct as A, so that the iniquity exception applied to B as well, it would seem that common interest privilege could not be claimed, since neither A nor B could avail himself of privilege at all.

43. A more difficult question is what would be the position if A provided his purportedly privileged documents to B on a common interest privileged basis, in circumstances where the iniquity exception applies to A's documents but B is innocent of the iniquity. It is not clear what the answer is in this situation. It may be that A's documents would be disclosable, but any documents prepared by B using A's documents would remain privileged whether in A's or B's hands.

PART 3

Following the trial of the claim, the liquidator of FCL successfully obtains judgment against A and B. With a view to enforcing the judgment and further investigating the fraud, the liquidator seeks disclosure and inspection of all documents provided to or produced for or by A and B's solicitors relating to the proceedings. Will these documents be covered by privilege in circumstances where the trial judge made the following (alternative) findings:

a) A and B's evidence was unreliable, and on balance the liquidator's case that they acted fraudulently was preferred; alternatively

b) On the key points, A and B had deliberately lied in evidence; alternatively

c) A and B were wholly unreliable and dishonest witnesses who forged documents, had repeatedly lied on oath, and intentionally failed properly to disclose their assets pursuant to a fraudulent design. Their entire defence was a fabrication and they had attempted to pervert the course of justice by bribing witnesses and deceiving their own solicitors.

Answer:

44. In this Part, the liquidator has the benefit of the findings of the trial judge, so the evidential hurdle of showing a "*strong prima facie case*" (as discussed in the context of the interlocutory application in Part 2) no longer applies.

45. The iniquity exception can apply to litigation privilege (see *Kuwait Airways Corpn v Iraqi Airways Co (No 6)* [2005] 1 WLR 2734, CA). However, case law has established that in the context of litigation privilege, the exception does not apply to the 'ordinary run' of cases. In *R v Snaresbrook Crown Court, Ex parte Director of Public Prosecutions* [1988] QB 532, Glidewell LJ stated at pp. 537-538:

> "*Obviously, not infrequently persons allege that accidents have happened in ways other than the ways in which they in fact happened, or that they were on the correct side of the road when driving while actually they were on the wrong side of the road, and matters of that sort. Again, litigants in civil litigation may not be believed when their cases come to trial, but that is not to say that the statements they had made to their solicitors pending the trial, much less the applications which they made if they applied for legal aid, are not subject to legal privilege. The principle to be derived from R v Cox and Railton applies in my view to circumstances which do not cover the ordinary run of cases such as this is.*"

46. There was detailed consideration of the issue in *JSC BTA Bank v Ablyazov* [2014] 2 CLC 263. Popplewell J concluded at paragraph [93] that:

> "*the touchstone is whether the communication is made for the purposes of giving or receiving legal advice, or for the purposes of the conduct of actual or contemplated litigation, which is advice or conduct in which the solicitor is acting in the ordinary*

course of the professional engagement of a solicitor. If the iniquity puts the advice or conduct outside the normal scope of such professional engagement, or renders it an abuse of the relationship which properly falls within the ordinary course of such an engagement, a communication for such purpose cannot attract legal professional privilege. In cases where a lawyer is engaged to put forward a false case supported by false evidence, it will be a question of fact and degree whether it involves an abuse of the ordinary professional engagement of a solicitor in the circumstances in question. In the 'ordinary run' of criminal cases the solicitor will be acting in the ordinary course of professional engagement, and the client doing no more than using him to provide the services inherent in the proper fulfilment of such engagement, even where in denying the crime the defendant puts forward what the jury finds to be a bogus defence. But where in civil proceedings there is deception of the solicitors in order to use them as an instrument to perpetrate a substantial fraud on the other party and the court, that may well be indicative of a lack of confidentiality which is the essential prerequisite for the attachment of legal professional privilege. The deception of the solicitors, and therefore the abuse of the normal solicitor/client relationship, will often be the hallmark of iniquity which negates the privilege" (emphasis added).

47. Applying this test to the questions in this Part:

    a. The iniquity exception is unlikely to apply. The finding that A and B's evidence was unreliable is in the 'ordinary run' of cases.

    b. The answer will depend upon all the circumstances of the case. Nevertheless, in light of the guidance in *Ablyazov*, it could well be said that the iniquity exception applies.

    c. The iniquity exception will apply.