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TGC Fraud Update

The Newsletter of the TGC Fraud Team

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Editorial

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Thank you for continuing to support this publication. As will be apparent from the contents of this edition, the TGC motor fraud team has remained extremely busy and has continued its involvement in a number of cases that raise interesting points of law and/or application of the existing law to new and unusual factual situations in this ever-developing field. In a slight change to the usual format, there will be no full-length editorial from me on this occasion so as to avoid inducing reader fatigue given that we lead with my article on Pre-Action Disclosure Applications, a topic that I know has been causing a headache to a number of insurers and defendant solicitors over recent months.

Resisting pre-action disclosure of call recordings

Anthony Johnson

I suspect that most readers of this publication are extremely familiar with the practice of insurers relying upon recordings, or transcripts thereof, of telephone calls that have taken place in the immediate aftermath of an alleged road traffic collision, usually with the insured driver or third party driver, or occasionally with a third-party insurer or solicitor. Such a telephone call is an invaluable, often crucial, piece of evidence in the all too common situation where an individual truthfully relates that they were uninjured immediately after the event, but then later elects to bring a claim for personal injury and consequential losses, often at the instigation of a claims management company following a cold call.

Unsurprisingly, as soon as the Claimant's solicitors are made aware of such a call, or even deduce its existence from an allegation that the Claimant was not injured, they are extremely keen to obtain such evidence as soon as possible in order to test the validity of the information that their own client has been providing to them and (one would assume) cease to represent them if they are not satisfied that prospects of success remain. With this in mind, one response that has been becoming increasingly prevalent amongst Claimant solicitors is to launch an Application for Pre-Action Disclosure pursuant to CPR 31.16 in order to seek to compel Defendants to provide copies of the transcript and/or recording prior to a decision having to be taken to issue proceedings.

If acceded to, such an approach would cause a significant difficulty for Defendants in relation to the future conduct of such cases. Claimants would be able to tailor their evidence (whether deliberately or sub-consciously) in relation to matters such as the time of onset of symptoms, the site of injury, time off work, the number of occupants in the vehicle etc. in order to ensure consistency with the telephone call and thus undermining its utility. Defendants are placed in a position where they are unable to make an assessment whether a Claimant is telling the truth, or whether their evidence has been reconstructed to give the appearance of consistency. Further, it is all too common for Claim Notification Forms to be completed by Claimant firms without any input from their client who then at trial claims (often entirely genuinely) to have never seen the document before, meaning that the Defendant struggles to place reliance upon the discrepancy between the Statement of Truth and the contemporaneous information that had been provided.

In my view, such Applications are fundamentally misguided in relation to both the purpose of CPR 31.16 and the case-law that has developed in relation to it and should be opposed in the strongest terms. Further, when defending any such Application it should be incumbent upon the Defendant (whether by a Witness Statement from the Solicitor, a Skeleton Argument from Counsel or both) to identify the correct legal position in order that the judge does not allow such Disclosure and thereby encourage the Claimant solicitors to persist with the approach in future cases.

Before marshalling the legal arguments below, it is sensible to check that the Application is correctly constituted. It is not uncommon for Applications that I have seen to name the individual insured driver as the Defendant rather than their insurance company. In such situations, the Application fails at the first hurdle because the call recording was never within the individual's possession, custody or control.

Another error that I have seen in Applications is for the Claimant's solicitors to state on the face of their Application Notice that the purpose for seeking the disclosure is to test the credibility of their client or other words to that effect, rather than seeking to 'dress up' the reason as something permissible. In that situation, the Defendant should argue that the Application presented is not actually brought on behalf of the Claimant at all, but rather by his solicitors for the purposes of evaluating their own client's veracity. There is no provision in the CPR or authority for such a 'non-party' Pre-Action Disclosure Application.

In the event that the Application is correctly constituted, it is then necessary to consider the wording of CPR 31.16 itself. CPR 31.16(c) requires the applicant to prove that the document in question would form part of Standard Disclosure pursuant to CPR 31.6. CPR 31.16(d) then requires them to prove that Disclosure before proceedings start is 'desirable' for one of three reasons: *(i)* disposing fairly of the anticipated proceedings; *(ii)* assisting the dispute to be resolved without proceedings; or *(iii)* saving costs.

The most common argument in support of the recording/transcript not being disclosable per se is if it can be argued that it attracts litigation privilege, and thus only becomes disclosable in the event that such privilege is waived by the Defendant (the appropriate analogy to be drawn is with surveillance evidence, which the Defendant will elect to 'deploy' by waiving privilege at the appropriate time). In order for a communication to be subject to litigation privilege, it must have been created for the sole or 'dominant' purpose of being used in actual or anticipated litigation (which must be reasonably in prospect). Whether or not this test is satisfied will depend upon the facts of any given case.

Another argument that may be deployed in some cases depending upon how the claim has been presented, although rarely likely to succeed in its own right, is to suggest that the call recording is not relevant for the purposes of CPR 31.6(b) on the basis that it does not advance or detriment the Defendant's case at the time of the Application, i.e. unless and until the Claimant has committed to a version of events in a document verified with a Statement of Truth then it is impossible to determine whether the telephone call is relevant at all, it is merely potentially relevant until it is required to rebut a specific assertion contrary to its contents by the Claimant.

Moving on to consider the question of whether Disclosure is desirable, the Claimant's position is superficially attractive in this regard given that it appears likely that the proceedings can be avoided and costs saved if the Disclosure causes the Claimant to drop the claim or to provide a satisfactory explanation that leads to a settlement. However, there are a number of points that a Defendant can make in response to this point, including the following:

- The Disclosure is not required to enable the Claimant to properly plead their case or to assess whether there is a legal basis for the claim. They are effectively arguing that they were injured and (unless they are lying) will continue to do so irrespective of the outcome. At best, the information goes to the prospects of success rather than the nature of the claim;
- As is set out above, Disclosure that is required solely to enable the Claimant's solicitors to assess the veracity of their own client is not information reasonably required by the Claimant;
- CPR 31 has to be construed in the context of the Overriding Objective in CPR 1, i.e. ensuring that cases are decided justly and proportionately with fairness to both parties. It is not fair for the Claimant to be granted the advantage of seeing a crucial plank of the Defendant's case before they have 'nailed their colours to the mast' by committing to a version of events;
- In situations where the Claimant was personally a party to the call, the recording will not contain any new information that they have not already been privy to; and
- There is often no good basis advanced why the Disclosure cannot wait until the Standard Disclosure stage. Proceedings cannot be avoided or any costs saved if the Defendant has already expressed an intention not to compromise the claim without proceedings, as is often the case in pre-issue correspondence.

Although not an authority that is binding upon them, it is my experience that some District Judges can find that the decision in McGann v. LV (Mansfield CC, 08.09.15) 'fortifies' them in a decision to reject an Application under this head. DJ Davies stated:

"...I do not find that the jurisdictional hurdle under 31.16(3)(d) has been surmounted by the applicant in this matter for two reasons. Firstly, that is not this evidence that will dispose of the issue of whether or not the Applicant has been truthful. It is within her own knowledge. Secondly, I think this is an important factor, since CPR 31.16 was drafted 16 years or more ago, the litigation rules have changed and it is more or less now accepted across the board that telephone calls to large institutions are taped in a way that they were not in 1999 and, of course, we have recently seen the introduction of QOCS, the concept of fundamental dishonesty and the recent legislation. In my judgment, it would not be a fair disposal for an applicant or a claimant to be able to advance a potentially fraudulent claim and to be spared the consequences of that, avoiding the issue of proceedings by reason of insurers having had the foresight to find out by telephone information ab initio."

Even if is found that the above jurisdictional threshold for Disclosure is met, the Court of Appeal made clear in *Smith v. Secretary of State for Energy and Climate Change* [2013] EWCA Civ 1585 that there is a separate discretional threshold that must also be met before the Order is made because the power conveyed by CPR 31.16 is a discretionary one. The test for the judge can be characterised as: (1) can I make the Order sought? (2) if so, should I make the Order sought? The Court of Appeal in *Black v. Sumitomo* [2001] EWCA Civ 1819 emphasised that Pre-Action Disclosure Applications are very much an exceptional remedy. The judgment of Rix LJ sets out that the discretionary threshold serves to prevent Orders being sought *"...in almost every dispute of any seriousness, irrespective of its context and detail."*

The major difficulty that Defendants face in this regard is that if the Court is even considering the discretionary threshold then it has already ruled against them on jurisdiction, meaning that it is helpful to be able to point to further reason(s) why the Application should be rejected. One tactic that has found favour with judges on several occasions is for the Defendant to offer prior to the hearing to voluntarily provide the Disclosure sought on the condition that the Claimant voluntarily provides an account of the onset and progression of their symptoms in a witness statement or other document personally verified with a Statement of Truth. If such an approach has been rejected (invariably without good reason) then the Court is much less likely to be willing to exercise its discretion to allow Disclosure.

Finally, a word on costs. CPR 46.1 sets out that the general rule in respect of the costs of a Pre-Action Disclosure Application hearing are that the party against whom disclosure is sought will recover their costs from the applicant. The Court of Appeal confirmed in *Sharp v Leeds City Council* [2017] EWCA Civ 33 that ordinarily, the fixed costs regime in Part IIIA of CPR 45 would apply to those costs. However, if the Court can be persuaded that the Application was utterly hopeless and/or that the Claimant's solicitors have acted unreasonably then there is scope for arguing that costs should be awarded on the indemnity basis and/or that there are 'exceptional circumstances' present pursuant to CPR 45.29J. I would suggest that a Court is only likely to entertain such an Application in fairly rare cases, and even then probably only if the point has been foreshadowed clearly in correspondence (i.e. drop your Application or we will pursue you for these additional costs).

What is meant by 'fundamental dishonesty'?

Tim Sharpe

The decision of HHJ Ian Hughes QC in the County Court at Portsmouth on 13.12.16 in the case of Menary v. Darnton provides support for the well-known decision of HHJ Moloney in *Gosling v Screwfix* and makes a number of supplementary comments. It also serves as a reminder to Courts to consider carefully the implications of their findings.

The Claimant claimed that he had stopped his car to let another emerge when he was hit at the rear by the Defendant on his motorbike, causing injury. The Defendant by contrast said it was a 'near miss' whereby he had stopped without collision, but his bike had fallen to the ground. The Defendant expressly alleged fraud. The Deputy District Judge specifically found there had been no impact, but declined to make a finding that the claim was 'fundamentally dishonest'. On appeal, the Defendant argued that such a finding ought to have been made. The Claimant sought to reverse the finding that there had been no impact but (unusually) did not seek to set aside the dismissal of the claim, only the finding of fact.

The Judge noted that in order for CPR 44.16(1) to be made out, the Defendant does not have to establish that the Claimant was fundamentally dishonest, but that that the *claim* was fundamentally dishonest. Often these are inseparable, but it need not be the case *"for example a credulous and other worldly Claimant might be used by dishonest lawyers to advance a fundamentally dishonest claim"* (a highly unusual situation to say the least, but the Court recognised that there must have been a deliberate decision by the draftsperson to use these words).

He stated that 'fundamental dishonesty' includes some characteristic that 'goes to the root of the matter' as opposed to some peripheral matter. In essence, it is advancing a claim without an honest and genuine belief in its truth, as distinct from *"the exaggerations, concealment and the like that accompany personal injury claims from time to time."* While dishonest, such matters are not fundamental.

In the instant case, the DDJ had made a positive finding that there was no impact. The inescapable conclusion was that there was no collision and no accident, and consequently no injuries or damage or even a cause of action. In rejecting the Defendant's request for a finding that the claim was fundamentally dishonest (having failed to address the pleaded case of fraud during the main judgment), the DDJ said that 'just because the Claimant was wrong' on the issue of impact, it did not amount to fundamental dishonesty, albeit this failed by a narrow margin on the basis of some of the documents in the bundle. On appeal, it was noted that the difference between the parties was not one of recollection, with one being right and one wrong – such a conclusion might often resolve the dispute, but not in the context of whether there had been an accident at all. Having made his finding of fact the DDJ *"was obliged either to be consistent with it or else to modify it. He could not, at the same time, find that there had been no accident at all and then merely remark that the Claimant had been wrong about that fact."* The entries in the medical records relied upon by the DDJ were considered on appeal not to exculpate the Claimant but formed part of the narrative. The decision was held to be a 'serious misdirection' and contradictory in failing to follow the inescapable consequences of the earlier finding of fact. HHJ Ian Hughes QC stated that he was satisfied 'beyond any doubt' that the claim was fundamentally dishonest: he asked rhetorically *"if a claim such as this is not fundamentally dishonest, what claim could be?"*

The support for *Gosling* is welcome, and the comments from an experienced Circuit Judge that from time to time personal injury case contain exaggerations and concealments, may assist other Courts in establishing the conduct required before the fundamental dishonesty test is reached. The case further reminds Courts and practitioners of the need for consistency in decisions. The decision was plainly given at the end of a long day without time for reflection. It should have also dealt with the Defendant's positive case of fraud as part of the main decision and not only in relation to costs. Having made a positive finding that there was no collision, fundamental dishonesty was the logical next step. If the judge had sought to reject the claim but not to make an enforceable award of costs, he might have done better to dismiss the claim on the ground that the Claimant had failed to satisfy him that collision had taken place.

A note of caution should be sounded. Usually, the most important step at a trial for a Defendant is for the claim to fail. An enforceable costs order in addition is not usually the primary aim of the Defendant. Care should be taken that insurers' desire for an enforceable costs order does not cause the Court to shy away from dismissing the primary claim in the first place out of a desire not to have to impose such a costs order on a Claimant.

Admitting the truth, the whole truth and nothing but: the dangers for insurers in making admissions within the RTA protocol

Matt Waszak

In the spirit of conducting litigation efficiently, parties are encouraged to make sensible concessions and to reach agreement in respect of issues which are no longer disputed. In many road traffic accident cases, there is often no dispute about the fact that an accident occurred or the fact that an accident was caused by a Defendant, but the insurer seeks to defend the case on the grounds that the Claimant did not sustain injury at all (causation challenge/ low velocity impact/fundamental dishonesty etc).

In the *Claim notification form (RTA1) Insurer response*, the response to a claimant's *Claim notification form (RTA 1)*, the insurer can make an admission in relation to liability.

The insurer response form is a poorly drafted document, which presents a significant potential pitfall for Defendant motor insurers. Section A of the form, titled 'Liability', provides the insurer with the opportunity to make an admission. It is drafted as follows:

Defendant admits:

- Accident occurred
- Caused by the defendant's breach of duty
- Caused some loss to the claimant, the nature and extent of which is not admitted
- The defendant has no accrued defence

The above are admitted.

Drafted in this way, the Form allows an insurer to make a 'wholesale' admission in relation to *(i)* the happening of an accident; *(ii)* breach of duty on the part of the Defendant; *(iii)* the fact that the accident caused some loss, the type or extent of which is not specified or admitted; and (iv) that the Defendant has no limitation defence.

Significantly, a Defendant cannot make a partial admission of liability in its response Form. It either ticks the box, which is an admission in respect of the four different clauses, or it makes no admission at all (with the consequences that follow from that).

Recent case-law has held that pre-action admissions of liability made within the MOJ Portal are binding in subsequent proceedings after those proceedings have commenced *(Chimel v. Chibwana & anor*, 27.10.16, HHJ Simpkiss, featuring Paul McGrath and Lionel Stride of Temple Garden Chambers). The significant potential pitfall in the insurer's response form arises because of the ambiguity in the way that *"Caused some loss to the claimant, the nature and extent of which is not admitted"* is drafted.

There is probably little doubt that this clause was never intended to refer to causation of injury, or to bind a Defendant to having made an admission in relation to causation of injury where the box in the Form is ticked. That is evident from the fact that 'injury' is not referred to, and the drafting of the clause- even if it is admitted that some loss was caused to a Claimant, no admission is made in relation to its nature or extent. Many of those involved in this area of litigation share the view that all the clause within the RTA1 Response Form was designed to do was to provide the insurer with the opportunity to admit that an accident which was caused by fault of its policy holder happened, and that the accident would have caused some damage to the Claimant's vehicle, with no admissions made in relation to any alleged consequential loss, including injury, flowing from that.

The potential danger caused by the ambiguity in the way that the Form is drafted is *most acute* where a Claimant's CNF intimates a claim for personal injury only, with no claim for vehicle damage or hire included. In that situation, the only damages sought by the claimant are for personal injury, meaning that the only loss that they have allegedly sustained is the pain, suffering and loss of amenity arising from their injury.

In that situation, where an insurer makes a 'liability' admission by ticking the box on the Form, they are at an extremely high risk of being bound by an admission in relation to causation of injury. If a Claimant brings an injury claim only, an admission of some loss by an insurer cannot be construed to be anything other than an admission of some injury. Though it would then remain open for the Defendant to challenge the extent of the injury sustained by the Claimant, they would be bound by the admission that some injury was caused. Where proceedings have commenced, unless the Claimant consents to the admission being withdrawn (unlikely) the Defendant will have to successfully make an application to the Court under CPR 14.

The ambiguity in the way that the insurer's response Form is drafted is fraught with potential danger. An insurer who seeks to defend an RTA claim on the basis of causation of injury only must be extremely careful about making any admission of liability. Indeed, where the claimant's CNF intimates a claim for injury only, and the insurer challenges causation of injury, making an admission in this way should be avoided altogether.

Qader v. Esure: an appraisal

Robert Riddell

The question for the Court in *Qader v. Esure Services Ltd* [2016] EWCA Civ 1109 was straightforward: do fixed costs continue to apply to a personal injury claim which starts life in the Portal but concludes in the Multi-Track? But what appeared to be a simple exercise of statutory interpretation turned into something much more controversial. Although a close reading of the relevant provisions of CPR 45 revealed an answer, it was not one which the Court of Appeal favoured. Accordingly, the Court then considered whether the Rules had been incorrectly drafted. In keeping with the spirit of the times, it appeared that some 'fake news' had made its way into the CPR.

The Claimants in *Qader* (and in the conjoined appeal in *Khan & anor. v. McGee*) had initially pursued PI claims through the RTA protocol. Following denials of liability, the claims exited the Portal and proceedings were issued under CPR 7. Fraud was raised in both Defences: *Qader* was alleged to have been a slam on, while in *Khan* it was suspected that the Claimants had colluded with a stooge vehicle to contrive the accident. Accordingly, the claims were allocated to the Multi-Track.

As the Court of Appeal stated, section IIIA of CPR 45 appears to make comprehensive provision for the recovery only of fixed costs in all cases which start but no longer continue under either of the relevant Protocols (with only limited exceptions). On the face of it, both *Qader* and *Khan* fell within the ambit of that section. However, the District Judges who allocated the claims to the Multi-Track appear to have concluded that allocation to the Multi-Track automatically disapplied the fixed costs regime, as directions were given on allocation for the filing of budgets and Costs and Case Management Conferences.

These hearings generated divergent approaches: in *Qader*, it was held that (notwithstanding allocation to the Multi-Track) CPR 45.29A unmistakeably provided for the fixed costs regime to apply; whereas in Khan the judge on allocation considered there were exceptional circumstances which permitted a claim for costs greater than fixed costs. Both cases were appealed to Circuit Judges, before the matter came before the Court of Appeal.

The Court of Appeal (Briggs LJ giving the leading judgment) found that the language of CPR 45.29A and B appeared unambiguously to apply the fixed costs regime to all cases started under the Protocol, wherever the claim ends up. The Court considered that this was not an outcome which could be said to be irrational, even though it would potentially lead to rough justice for some Claimants. But (without expressing itself in these terms) the Court plainly viewed that as unjust. As Briggs LJ noted, where fraud is pleaded, the stakes are high for both Claimants and Defendants; proceedings are pursued and defended on the basis that no stone is left unturned and, critically, at very substantial cost. In that context, it was 'unattractive' that the rules as drafted left Claimants defending serious allegations of dishonesty on the basis of a fixed cost regime which was plainly designed to be suitable only for Fast-Track cases.

The Court reached that last conclusion on what it termed a careful analysis of the historic origins of the scheme. Having probed the depths of Jackson Report annexes, Government consultations, and Ministerial correspondence, the Court found that the Rule Committee had apparently failed to implement the continuing intention of the Government to exclude Multi-Track cases from the fixed costs regime which had been enacted for cases leaving the Portal. Further, as identified by Lord Nicholls in *Inco Europe Limited v First Choice Distribution* [2000] 1 WLR 586, the Court had an exceptional jurisdiction to correct legislation where it suffered from an obvious drafting mistake to make it compatible with the intention of the legislator. Accordingly, the Court re-drafted CPR 45.29B to limit the application of the fixed costs scheme to claims not allocated to the Multi-Track.

The decision raised eyebrows for the unusual way the Court gleaned statutory intent and its liberal approach to correcting what it viewed as defective drafting. As Briggs LJ noted, the Rule Committee regularly reconsiders rules when invited to do so by the court. However, such amendments have no retrospective effect, and in this instance the Court wished to provide more fundamental relief to Claimants currently pursuing claims.

While widely interpreted as a setback for Defendants, *Qader* may not in fact have a long-lasting impact. The conclusions of Jackson LJ's ongoing review of Multi-Track costs across the civil sector is due to be published in July 2017, and it seems likely that a fixed costs regime will be extended to higher value PI claims. At that point, the focus will shift from whether costs should be fixed to what they should be fixed at.

As yet unknown is whether the decision will generate, as the Respondent in *Qader* argued, satellite litigation at the allocation stage by Claimants seeking to disapply the fixed costs regime. With the prospect of another set of allocation disputes across the new boundary of the Small Claims Track and Fast-Track (once the Small Claims Track is extended for RTA PI claims), it could be mean a return to the days of disputed Case Management Conferences. It would be somewhat ironic if the growth of such hearings deterred Defendants from fighting exaggerated or fraudulent claims, particularly given the Government's stated objective in the recent whiplash consultation was to disincentivise such claims.

Update: disposal hearings are trials for the purposes of fixed costs

Piers Taylor

In *Bird v Acorn* [2016] EWCA Civ 1096, the Court of Appeal answered one of many outstanding questions arising from Section IIIA of CPR 45: is a Disposal hearing listed pursuant to CPR 26 PD 12.4 a 'trial' for the purposes of fixed costs? The appeal concerned a claim that started in the EL/PL Portal, but would apply equally to RTA Portal claims.

CPR 45.29C(4)(c) defines 'trial' as 'the final contested hearing'. The Court of Appeal ruled that Disposal hearings are 'final contested hearings' for the purposes of fixed costs and thus the full amount of fixed costs can be recovered along with a trial advocacy fee as though the matter had been allocated to the Fast-Track and directions for a (true) trial had been made. This is notwithstanding the fact that Disposal hearings are sometimes treated as directions hearings (meaning that they are not the final hearing at all).

The ruling is not inconsistent with a number of first instance decisions on the point, but can represent something of a windfall for Claimants, particularly where the Disposal hearing is listed to deal with multiple Claimants who recover a set of fixed costs on a 'per Claimant' basis (see TGC Fraud Update Issue IV, *"The recovery of multiple advocacy fees in the Fast-Track"*).

In light of this clarification, the only incentive for a Defendant to admit causation in a Defence (and thus provoke a Disposal hearing) is: (a) to ensure a faster listing; and (b) because it avoids the usual requirement for a hearing fee (some £545). On the other hand, a Defendant who is 'on the fence' about whether to admit causation will see little cost incentive in conceding the issue at the Defence stage. Further, another Defendant who just needs more time to make an offer might tactically decline to admit causation in the Defence. In that scenario, the Court will require a round of Directions Questionnaires before the trial is listed (and thus the full fixed profit costs are incurred), instead of listing the Disposal hearing on receipt of the Defence.

The 'public interest' in committal

Tim Sharpe

Applications for Committal to prison for Contempt of Court in the personal injury context have become more common in the last few years (at least in the experience of this writer). The principles upon which the High Court's discretion are exercised are well set out in *Barnes (t/a Pool Motors) v. Seabrook* [2010] EWHC 1849. A key part of the test at the permission stage is whether the proposed proceedings are in the public interest. That consideration in turn requires the Court to assess the strength of the case against the alleged contemnor, as permission will only be granted in cases where the *prima facie* evidence is strong.

The recent case of *AXA Corporate Solutions Service Ltd. v. Khan & anor.* (QBD, 27.02.17) provides a practical example of the circumstances in which the High Court may refuse to accept that evidence deployed to defeat a claim in the County Court, and leading to a finding of dishonesty (made, of course, on the balance of probabilities) provides a sufficiently strongly strong evidential basis to allow a Contempt application to proceed. It further serves a reminder to insurers of the need to ensure that any such applications are brought promptly.

A claim was brought for damages for personal injury which the Respondent claimed arose out of a road traffic accident caused by the negligence of the Defendant. The Respondent also claimed that his niece was in the car with him. The Defendant, however, said that another car ahead had turned suddenly, causing the Respondent to brake and the Defendant to hit the back of his car. The judge found that the lead car was a 'stooge' vehicle. The judge also found the evidence of the niece to be unconvincing. The judge found that the claims were fraudulent and warned the Claimants/ Respondents that there would be consequences (although from the case report at least, the judge appears not to have taken any further action, despite it being open to the Court to refer matters to the Attorney General).

On the application by the insurer (some 18 months later) it was argued that the public interest test had been satisfied given the importance of deterrence and raising public awareness with regards to false road traffic claims. The delay was acknowledged but the insurer argued that a fair trial was still possible.

The High Court observed that findings of dishonesty in the County Court were not *"a green light for bringing committal proceedings."* There was no connection between that finding (however robustly expressed by the trial judge) and the permission test – if it were otherwise, there would be Committal proceedings every time a judge found a witness to be dishonest. The Court noted that there are often inconsistencies in these types of claims, but this does not necessarily mean there is strong prima facie evidence of fraud. Here, the evidence as to the fraud was circumstantial (there was no evidence of conspiracy), and the evidence as to whether the niece was in the car or not depended on whose evidence the Court accepted: it was a simple case of conflicting accounts.

Doubtless there were particular reasons why the insurer chose to bring these proceedings, which do not come across from the reported case summary. This article is, therefore, not intended as criticism of the application. However, insurers need to take care that applications for Contempt are only made in cases where the evidence is strong, so as not to increase costs and/or dilute the force of such applications (or indeed lead to judges in the County Court being reluctant to make findings favourable to insurers on the balance of probabilities for fear that further proceedings will be brought off the back of that decision). They need to bear in mind the significant differences in both the standard and burden of proof between a County Court PI claim and an insurer's application for Committal for Contempt. Applications for Committal following a finding of fraud or fundamental dishonesty are likely to be and to remain exceptional rather than routine.

Moreover, the case also provides some practical guidance on delay. Committal proceedings are categorised as criminal proceedings for the purposes of Article 6 of the European Convention on Human Rights, giving the respondent a right to a fair and public hearing within a 'reasonable time'. Delay by the applicant is likely to be a "significant factor" (Barnes) in deciding whether to grant permission, but there are few reported cases dealing with delay. In this particular case, it was the 'decisive and tipping factor'. The Court noted that the threat had loomed over the respondents for a considerable time but no action had been taken for eighteen months. The reasons for the delay are not apparent from the short summary currently available on Lawtel, and it may be that the insurer was seeking further evidence to strengthen the application. However, in the application of the Overriding Objective, and when combined with the weakness of the case presented, this delay led the Court to conclude that it was not appropriate to bring the proceedings. It may be that had the case been stronger on the merits, the Court would have placed less weight on the delay. However, insurers need to be in no doubt that such applications ought to be brought promptly and that despite the obvious public importance of preventing fraud and raising awareness of the Courts of such activities, such applications will not just be 'waived through'.

Recent Noteworthy Cases

Hamid v (1) Khalid (2) Co-Operative Insurance (Court of Appeal, hearing 02.03.17, judgment 31.03,17)

Appeal – Findings of Fact – Expert Evidence

Paul McGrath (instructed by Kellie Lacey of Weightmans) appeared for the Second Defendant. The Claimant brought proceedings against the First Defendant and Second Defendant for personal injury, credit hire and associated losses. The Second Defendant denied the claim and, by way of an Amended Defence, pleaded that the collision did not take place as alleged and averred that the claim was fraudulent. The First Defendant admitted fault for the accident and sought indemnity from the Second Defendant by way of a CPR 20 additional claim for a declaration. The Second Defendant and Claimant both called expert engineers to give evidence. The evidence was taken concurrently (colloquially referred to as 'hot-tubbing').

Following a three-day trial in Manchester CC, Mrs. Recorder Howells allowed the Claimant's claim, dismissed the allegations of fraud, and assessed damages on conventional principles. The Claimant and First Defendant applied for costs on the indemnity basis on the grounds that the Second Defendant had pleaded, but failed to prove, fraud. The Judge ordered costs on the standard basis as the Second Defendant had not acted unreasonably given the expert evidence and other concerns held. The Second Defendant appealed against the Judge's decision allowing the claim and submitted that the Judge left out of her account significant inconsistencies and troubling features, failed to provide adequate reasons for her decision and misevaluated the weight of the expert evidence. The Second Defendant received permission from a single Lord Justice on the papers and the matter was listed for a full appeal hearing.

Lewison LJ and Henderson LJ held that whilst there was force in the Appellant's submissions regarding the unsatisfactory nature of the evidence, it could not be said that the 'judge demonstrably failed to consider, or misunderstood, the evidence on these points' and that the Appellant did not surmount the high threshold of satisfying the appellate Court that it ought to interfere with her findings: applying *McGraddie v. McGraddie* [2013] UKSC 58; [2013] 1 WLR 2477 at [1] to [6], *Henderson v. Foxworth Investments Ltd* [2014] UKSC 41; [2014] 1 WLR 2600 at [58] to [68]. *Fage UK Ltd v. Chobani UK Ltd* [2014] EWCA Civ 5 at [114] to [115] and *Grizzly Business Ltd v. Stena Drilling Ltd & anor.* [2017] EWCA Civ 94 at [39] to [40]. The appeal was therefore dismissed and the decision of Recorder Howells upheld.

The Court also gave guidance in relation to overturning acquittals of fraud at the appeal stage, citing with approval the decision of the Privy Council in *Akerhielm v. De Mare* [1959] AC 789 (PC) at page 806 and drawing a distinction between 'cases where an appellate court substitutes a finding of fraud for an acquittal below, which will only happen in the rarest cases, and cases where a retrial is ordered, without the appellate court expressing any concluded view on the defendant's guilt' citing what was said by Fry LJ in *Glaiser v. Rolls* (1889) 42 Ch D 436 at 459.

Khan v Tufail & Liverpool Victoria Insurance Company (Manchester CC, 11.08.16)

Telematics – Fraud – Staged accident

Emma-Jane Hobbs (instructed by Gareth Berry of Keoghs) represented the Second Defendant in this case in which the Claimant alleged he had been involved in a collision caused by the negligence of the First Defendant, who was the Second Defendant's insured. The Second Defendant alleged fraud on the basis that the Claimant and First Defendant knew each other and had contrived to stage the 'accident'. The Claimant denied knowing the First Defendant.

There was a 'telematics' box in the First Defendant's vehicle, the evidence from which was inconsistent with the accounts given. It showed that the First Defendant's vehicle had been on the road where the Claimant lived, both before and after the 'accident'. Both parties were given permission to rely on expert telematics evidence and the experts were largely agreed upon the interpretation of the data.

The claim was listed for a two-day trial before HHJ Main QC. The Second Defendant was able to obtain evidence showing that the First Defendant had taken out motor insurance quotes using the Claimant's address before the 'accident'. A statement setting out that evidence was served on the morning of the trial. The Claimant discontinued his claim before the trial commenced.

Powar v Evans (Slough CC, 22.03.17)

Fundamental Dishonesty – Counterclaim – Exemplary Damages

Edward Hutchin (instructed by Laura Maher of Keoghs on behalf of LV Insurance) successfully represented the insurers in this case in which they recovered pre-issue payments made to the Claimant, and were awarded exemplary damages, after the judge found that the claim was false.

The Claimant made a claim for compensation for personal injuries following a road traffic collision. Liability was not in issue, and payments were made to the Claimant in respect of special damage claims presented pre-issue. The Claimant then issued a claim for damages for injuries he alleged that he had suffered in the accident, which occurred when his car was hit whilst stationary in a car park.

A defence was filed denying the claim and alleging fraud, on the basis that the Claimant was not in his vehicle when the collision occurred and so could not have been injured. A Counterclaim was also included, claiming the return of payments made to the Claimant, and exemplary damages, on the basis that his claim was fraudulent. This was subsequently supported by the disclosure of CCTV evidence showing that the Claimant was not in the car at the material time. He then discontinued his claim, but an application was made to enforce costs against him on the basis of fundamental dishonesty.

Following a hearing before Judge Taskis sitting at the County Court at Slough, the Claimant was ordered to repay the full amount of the payments received, together with exemplary damages of £1,500, and costs on an indemnity basis, after the Judge made a finding of fundamental dishonesty, having accepted the evidence showing that the Claimant was not in his car as alleged at the time of collision.

The case demonstrates the potential range of enforcement weapons available when combatting fraudulent claims. Whilst in many cases discontinuance of a claim will represent a successful outcome, pursuing applications for fundamental dishonesty and indemnity costs, and considering counterclaims for recovery of payments made, and for exemplary damages, can increase the potential to recover insurers' outlay, and send out a message that dishonest Claimants will be punished.

Iqbal v Octagon Insurance (Manchester CC, 15.11.16 and 16.11.16)

Induced Accident – Negligence – Illegality – Costs

Paul McGrath (instructed by Nasreen Rehman of Hill Dickinson LLP) appeared for the Defendant, Octagon Insurance in this case where the Claimant alleged that he was travelling along a slip road when traffic ahead started to slow by reason of busy traffic on the motorway. The Claimant alleged that the Defendant's insured simply failed to pay appropriate attention and collided with his vehicle as a result of his negligence. He claimed damages for personal injury (knee, neck and back) and damages for credit hire. The Defendant denied negligence and alleged that the Claimant was guilty of inducing the accident with the intention of defrauding the Defendant's insurers.

In relation to credit hire, there was a letter within the agreed trial bundle addressed correctly and apparently sent to the Claimant offering him a 'free' replacement car (but which set out the cost that Octagon would incur in supplying the said car). The Claimant said that he did not recall receiving the letter.

Mr. Recorder Heaton QC made the following findings: (i) that the traffic had been quiet and free-flowing; (ii) that the Claimant had set out that day to find a car to follow him on to the slip road with the intent to induce a collision and thereby to make a fraudulent claim; (iii) that the collision was caused by the Claimant's deliberate actions and any carelessness as might be alleged against the Defendant's insured was not the 'effective cause' of the collision and as such the Defendant did not need to rely on the doctrine of ex turpi causa; (iv) that the Defendant was not, in the particular circumstances of the present case, negligent by failing to stop in time. He had been driving reasonably when increasing his speed in order to safely join the motorway traffic and making the observations that he did (accepting the Defendant's submission that the Highway Code provides general guidance and needs to be read in context); (v) that the Defendant's plea of fraud had been proven in line with the threshold set out in Raja v. Van Hoogstarten and Re. H; (vi) that the Claimant had lied about his injury in any event and in fact he had not been injured at all; (vii) as the Claimant's evidence was disbelieved, the Court would not believe him that he could not recall receiving the Defendant's letter with regard the 'free' car; (viii) the claims would be dismissed; and (ix) the Claimant must pay the Defendant's costs, to be assessed on an indemnity basis and QOCS was disapplied pursuant to CPR 44.16(1) due to his fundamental dishonesty. The Defendant was also given until 05.01.17 to make any application seeking a costs order against the credit hire company pursuant to CPR 44.16(3).

Sarvananthan & Sasikumar v. Jones (Clerkenwell & Shoreditch CC, 03.03.17)

LVI – Bogus Driver – Fundamental Dishonesty

Piers Taylor (instructed by Dawn Drabble of BLM) appeared in this case arising from a genuine but minor collision involving the Defendant's car and a dual-controlled learner vehicle. The Defendant accepted responsibility for the collision and that the driving instructor (the Second Claimant) had occupied the front passenger seat. It was disputed that the First Claimant had been the driver at the time, and it was not admitted that the collision was capable of causing injury.

The Court heard the evidence of the Claimants and the Defendant. The Defendant had given evidence that the learner driver had sported long wavy hair; in contrast, the First Claimant was bald. The Judge found both Claimants' evidence conflicting, both internally and with one another. It was 'riddled with inconsistencies', including in relation to their alleged injuries and alleged time off work. Of particular note, both Claimants' written evidence had alleged that the other had driven from the scene. The Second Claimant had been unable to produce a diary of lessons to prove that he had been teaching the First Claimant at the time, stating that he kept it all in his head, despite having many students at any one time as well as a young family. The Judge found this extraordinary.

In contrast, the Judge was impressed by the Defendant's quiet, unshakable determination as to the appearance of the driver and accepted his evidence that the collision was at no more than 2 mph. Both claims were dismissed. The Judge found that the First Claimant had not been the driver at the time of the accident and thus had made a fundamentally dishonest claim. He dismissed the Second Claimant's claim for injury for want of sufficient proof.

Duda v Leakey (Oxford County Court, 26.10.16)

Strike Out – Solicitor's Misconduct – Forging Signatures – Referral to SRA and the Police

Lionel Stride (instructed by Claire Barnes of Keoghs) appeared for the Defendant in this claim that was Struck Out in unusual circumstances after the Judge found as a preliminary issue at trial that the Claimant's solicitors were likely to have forged the Claimant's signature on crucial Court documents.

During the course of the litigation, the Defendant obtained evidence from a handwriting expert demonstrating that signatures on key documents that had required re-service with appropriate interpretation certificates (including a revised Particulars of Claim with interpretation certificate, a Schedule of Loss and a List of Documents) had been penned by a different hand to that of the Claimant.

At trial, after cross-examination, the Claimant admitted that the signatures were not his own and averred that his solicitors must have forged the signatures (as he would have had no need to do so). After hearing evidence from the handwriting expert, HHJ Clarke found that the signatures were forgeries and that there was a prima facie case that such forgeries were carried out by somebody at the Claimant's firm of solicitors. Accordingly, she Struck Out the claim as an abuse of process; made a Show Cause Order against the Claimant's solicitors for payment of the Defendant's full costs; and ordered that a transcript of the judgment be sent to the Solicitors' Regulation Authority and the police.

Grimes v. Service Insurance Company Limited (Swansea CC, 09.03.17)

Exaggerated Quantum – Fundamental Dishonesty – s.57 – QOCS

James Yapp (instructed by Miles Hepworth of DWF) appeared in this case arising from a genuine road traffic accident for which liability had been admitted. The Defendant was given permission to resile from an admission of causation made in the Portal. The Claimant had been aware that causation was in dispute since the case had been removed from the Portal process and would therefore suffer no prejudice.

The Court was invited to compare the Claimant's oral evidence with the accounts offered to her General Practitioner, in her CNF and to the medical expert. The GP's record mentioned only a mild right s houlder injury. This differed substantially from the medical report which recorded 'severe' symptoms for three months in the neck and both shoulders along with ongoing severe travel anxiety.

The Claimant accepted in cross examination that she had seen her GP when her symptoms were at their worst. Her evidence that she had failed to mention her other symptoms on that occasion was rejected on the basis that it "simply made no sense". In the circumstances, DJ Scannell found that the Claimant had exaggerated her symptoms to the expert. She was also found to have exaggerated her symptoms in oral evidence when she reported an inability to lift her infant nephew; the medical report suggested activities involving lifting were restricted, but never prevented, by her injuries. The Judge was satisfied that the Claimant had suffered only a mild injury to her shoulder lasting for approximately one-month.

The claim was dismissed as fundamentally dishonest under section 57 of the Criminal Justice and Courts Act 2015. This was not a minor or self-contained exaggeration, it went to the heart of the only head of loss and would have significantly increased the damages awarded. QOCS was disapplied and an enforceable costs order was made in favour of the Defendant.

Ahmed v. (1) Uddin & (2)Advantage Insurance Company (Clerkenwell and Shoreditch CC, 15.03.17)

Co-Operation – Burden of Proof

David R. White (instructed by Karen Mann of Horwich Farrelly) successfully defended this matter in which the First Defendant had ceased co-operating, and where the Second Defendant was concerned that no genuine accident had ever occurred at all.

The trial was preceded by a dispute over the extent to which the First Defendant was in fact not co-operating, and indeed the extent to which this was even relevant. The Claimant's solicitors became very excited when they believed that they had discovered that the First Defendant had been in touch with his insurer on more than one occasion, in apparent contradiction of the Defence. Whilst it was right that there had been more than one contact, it was really of little relevance, and the Judge dismissed the Claimant's application to strike out the Defence before the trial commenced, describing the issue as 'a red herring swimming in a stormy tea cup'. Fundamentally, the Second Defendant was still without anything that might properly be called 'assistance' from the First Defendant, and was entitled to pursue whatever case it saw fit. This gives useful guidance, as the question of the level of 'co-operation' and its relevance could arise in many similar cases.

Whilst there was only one live active Claimant, there were a number of passenger claims in the background. The Claimant and his brother both gave evidence, and were calm and sophisticated witnesses, who had clearly rehearsed well. However, once their stories were examined in fine detail, they began to fall apart. There was additionally engineering evidence questioning the happening of the accident as alleged, and background suggestions of links between the parties via the accident management industry.

In the end, the Judge said he could not be persuaded by the Claimant and his witness due to the very large number of concerns and inconsistencies, and he dismissed the claim.

Mimms v Mulsanne Insurance (Dartford CC, 21.03.17)

Late Claim – QOCS – Discontinuance – Obstructing the Just Disposal of Proceedings

Richard Boyle (instructed by Miles Hepworth of DWF) appeared in this case involving an RTA which had led to a late claim. The Claimant discontinued. The Judge (EJ Russell) felt that she did not have the evidence to make a finding of fundamental dishonesty. However, she considered it appropriate to set aside the Notice of Discontinuance and Strike Out the claim for obstructing the just disposal of proceedings, meaning that QOCS was disapplied pursuant to CPR 44.15(1)(c).

The Claimant had been involved in a genuine RTA. Credit hire documentation was sent to the Defendant a few days later and recorded that nobody had been injured in the accident. The Claimant intimated a claim over two years later. The Defendant's claims handler had called the Claimant and asked whether she was responsible for the claim. The Claimant's response was that she had decided to claim at that stage because she had essentially got fed up with the phone calls that were harassing her. There were inconsistencies between the Claimant's Claim Notification Form and her medical report, including whether she had taken time off work. The medical report was prepared without sight of the Claimant's medical records. The Claimant stated that she had not sought any medical attention despite her medico-legal expert diagnosing her with four months of Post-Traumatic Stress Disorder. Directions were set requiring the Claimant to disclose her medical records, occupational health records and employment records. The day after the Directions were sealed, the Claimant discontinued.

The Defendant applied for a finding of fundamental dishonesty or for the Notice of Discontinuance to be set aside and the claim Struck Out. The Claimant disclosed a witness statement dealing with her reasons for discontinuing, which included medical reasons, although no medical evidence was disclosed. She did not address the failure to disclose medical records, occupational health records or employment records. The Claimant disclosed responses to Part 18 Questions which her solicitors had previously refused to disclose. The answers were inconsistent in relation to the nature of the Claimant's injuries. She did not attend the application hearing to give oral evidence.

The Judge gave limited weight to the Claimant's witness statement because it was not supported by documentary evidence and the Claimant had not come to Court to be cross-examined. The Judge acknowledged that she did not have to receive oral evidence to make a finding of fundamental dishonesty, citing Gosling v. Screwfix. She found that adjournment was not just or proportionate because it would cause delay and cost. She was concerned about the inferences that could be drawn from the facts of the case. However, she declined to make a finding of fundamental dishonesty on the basis of the evidence and without oral evidence.

Instead, she felt that the Claimant's conduct had obstructed the just disposal of proceedings. In discontinuing and refusing disclosure, the Claimant had deprived the Defendant of the opportunity to pursue arguments in relation to fundamental dishonesty. She felt that the Claimant's conduct was such that it was appropriate to disapply QOCS. She drew an analogy with the decision in Brahilika v. Allianz Insurance PLC (DJ Dodsworth, Romford CC, 30.07.15). She therefore set aside the Notice of Discontinuance, Struck Out the claim for obstructing the just disposal of proceedings and ordered that QOCS did not apply pursuant to CPR 44.15(1)(c).

Ghiasis & ors. v. Qualcare (Reading CC, 29.09.16)

Admitted Accident – Breach of Duty Conceded – Injury Denied

Paul McGrath (instructed by Ian Barrans of Keoghs LLP) appeared for the Defendant in this case in which the Claimants alleged that they had suffered injury following a side impact (minor road / major road). The Defendant's driver accepted in evidence that injury was possible, but he thought that it was very unlikely as the impact was quite minor. The Defendant's vehicle was a Range Rover and the Claimants' vehicle was much smaller.

District Judge Duncan thought that the Defendant's engineering evidence did not sit well with the evidence from the Defendant's driver, and therefore did not rely upon it. Therefore, whether the Claimants proved their claim really depended solely on their own credibility. Each Claimant was cross-examined.

The Judge said that he did not find any of the Claimants to be satisfactory witnesses. He listed a number of matters that had arisen during cross-examination that concerned him: the immediate presentation to the doctor by telephone, the concealment of injury history, the potential overlap of previous symptoms, the behaviour after the accident itself and the chequered accident history of the First Claimant. Overall, the Judge rejected their evidence and refused to make the finding that any of them had been injured.

The Judge also dismissed the claim for vehicle damage on the basis that the First Claimant had failed to prove ownership (which was in issue between the parties: n.b. the Claimant did not seek to claim as bailee in valid possession). The Judge based this on the fact that the Claimant was insured on two policies in relation to the vehicle but was named driver on both (different policyholders) and the receipt for repairs that was brought to trial was not accepted as authentic (though no positive finding was made that it was a fake document). Accordingly, he dismissed all of the claims and awarded the Defendant its costs.

Ahmed & Egan v. (1)Noshouki & (2) CIS General Insurance (Watford and St. Albans CC, 17.01.17 and 21.02.17)

Burden of Proof – Indemnity Costs

Edward Hutchin (instructed by Nasreen Rehman of Hill Dickinson) successfully represented the insurers in this case in which the claims of two Claimants were dismissed with an order for indemnity costs.

The Claimants both claimed compensation following a road traffic collision. The First Claimant claimed to be a taxi driver, and the Second Claimant his alleged passenger. A Defence was filed denying the claims. Although stopping short of an express allegation of fraud, the Claimants were required to prove that an accident occurred as they alleged, and that they suffered the injuries and losses alleged. In accordance with Ahmed v. Lalik, the Defence set out specific issues undermining the credibility of the claims.

Following a trial over two days, Judge Tansey (sitting at Watford and St. Albans County Courts) dismissed the claims. The Judge commented that the Claimants had not impressed her at all under cross-examination, becoming increasingly vague and hesitant as they were challenged. There were also numerous inconsistencies in the Claimants' evidence, as well as engineering evidence contradicting their version of events, leading the Judge to conclude that they had not proven that the collision occurred as they alleged or at all, nor that they had suffered the injuries or losses alleged. The claims were therefore dismissed, and the Defendant insurers awarded costs on the indemnity basis.

The case illustrates that, even in cases where the evidence is not sufficient to support an allegation of fraud, well-deployed evidence undermining the credibility of the Claimants, coupled with targeted cross-examination at trial, can be sufficient to defeat suspicious claims, and to achieve worthwhile costs orders.

Irfan v ASG Essex Limited (Birmingham CC, 01.11.16 and 02.11.16)

Fraud – Slam On – Quantum – Fundamental Dishonesty

Emma-Jane Hobbs (instructed by Patrick Williams of Keoghs) successfully represented the Defendant in this case which arose from a road traffic incident involving the Claimant and the Defendant's insured. The Claimant's case was that his vehicle (which had four occupants at the material time), had been hit in the rear due to the negligence of the Defendant's insured. He claimed damages for alleged injuries, the pre-accident value of his vehicle, and credit hire and storage charges in excess of £20,000. His pleaded case was that he had needed to hire a replacement vehicle in order to continue his work as a private hire taxi driver, and that he'd needed to store his damaged vehicle as he had nowhere free to keep it. The Defendant alleged fraud; that the accident had been caused deliberately by the Claimant, by swerving in front of its insured and carrying out an emergency braking manoeuvre for no apparent reason.

None of the passengers in the Claimant's vehicle (one of whom was the Claimant's partner, and all of whom had intimated claims for personal injury) attended the trial to give evidence. Spurious reasons were given for their absence. Having heard evidence from the Claimant and the insured's driver and wife, Recorder Khangure QC preferred the Defendant's evidence. The Claimant was found to have lied during cross-examination. Although the Judge was not satisfied that the Claimant had braked deliberately to cause an accident, he found that the Claimant had caused the accident by reason of his reckless braking manoeuvre, which had left the Defendant's insured no opportunity to avoid the collision. He therefore dismissed the claim.

The Judge made a finding of fundamental dishonesty in relation to quantum as the Claimant conceded in cross-examination that, contrary to his pleaded case and the evidence in his witness statement, he had not needed to hire a replacement vehicle, and could have stored his vehicle outside his house free of charge. Accordingly, the Judge ordered the Claimant to pay the Defendant's costs, lifted QOCS protection pursuant to CPR 44.16 and made an interim payment on account of costs for half the amount of the Defendant's approved costs budget.

Ali v. (1) Nowakowska (2) UK Insurance Limited (Oxford CC, 08.12.16)

Confession – Admissibility – Relevance – Fraud – pre-QOCS case

Paul McGrath (instructed by Andrew Burkitt of Keoghs LLP) appeared for the Second Defendant in this case in which the Claimant alleged that he was involved in a road traffic accident with someone purporting to be Ms. Nowakowska. Ms. Nowakowska initially provided a supporting statement, but later said that she had not been involved in any accident and others had taken her car to carry out a 'fake' accident for which she would be paid money. The Second Defendant pleaded fraud. The Claimant alleged that he was not party to any such fraud and had been the victim of a genuine road traffic accident. The damage was suggested to be inconsistent with the reported accident, but the Second Defendant did not rely upon any forensic engineering evidence.

The First Defendant did not attend Court and there was no CEA in support of her evidence (she had not attended despite a Witness Summons). The Claimant submitted that her evidence ought to be ignored. The Second Defendant submitted that as the 'confession' statements had been exhibited to other statements which were admissible, they were also admissible, subject to weight. HHJ Charles Harris QC agreed with this approach and the statements were admitted, subject to weight.

The Claimant's claim was dismissed: the Judge held that he had come very far from proving his case that this was a genuine accident involving the First Defendant and the Judge had concerns about the extent of the damage and the Claimant's evidence about an alleged 'fake' witness. The Judge did not make any express finding of fraud, and instead simply found that the Claimant had failed to prove his case. The Second Defendant was successful in its Counterclaim (for previous payments made to the Claimant and his solicitor). This was a pre-QOCS case and the Second Defendant was successful in obtaining the costs of the action against the Claimant with a substantial payment on account of such costs (£20,000).

Rana v. (1)Burden & (2)Octagon Insurance Company Ltd (20.02.17–21.02.17, judgment 02.03.17)

Slam On – Fundamental Dishonesty – Witnesses not Attending – Adverse Inferences

Lionel Stride (instructed by Ven Dwarampudi at Keoghs on behalf of the Defendant) and Emma Northey (instructed by Ruth Wainwright at DWF on behalf of the Third Party) appeared in this case arising from a three-car collision when the Claimant braked to a complete stop for no obvious reason with three alleged occupants in his vehicle.

The Defendant (supported by the Third Party) alleged that the accident had been deliberately induced by the Claimant, whether or not in concert with a lead vehicle, that the Claimant was not the driver of the vehicle and/or that the Defendant and Third Party were not in any event negligent on the facts of this case. Significantly, two passenger claims had been intimated but were not pursued; and the Claimant failed to call his wife as a witness despite obtaining a statement from her.

After extensive cross-examination of the Claimant and his remaining witness, in a reserved judgment HHJ Lochrane found that they lacked credibility as witnesses of fact and did not accept any of their testimony, drawing adverse inferences from the Claimant's failure to call his wife as a witness. Rather than make a finding of fundamental dishonesty, the Judge dismissed the case on grounds that the Claimant had not proven that he was the driver or that there was any negligence on the part of the Defendant or the Third Party's insured, who had been unable to avoid a collision due to the Claimant's braking, i.e. exonerating them in negligence on the facts of the case.

Gregory v. UK Insurance Limited (County Court, 16.12.16)

Rear End Shunt – Denial of Liability – Put to Proof

Paul McGrath (instructed by Katie Watmough of Keoghs LLP) appeared for the Defendant in this matter in which the Claimant, allegedly accompanied by three other passengers, said that he was stationary at lights when he was hit in the rear by the Defendant's insured, damaging his new Mercedes. The Claimant alleged that his vehicle was damaged and would cost c.£5,500 to repair a pronounced dent in its rear. The Defendant insured's vehicle had sustained only modest damage (c. £375) to the front bumper and bonnet. The Defendant did not have any engineering evidence in relation to the damage to the vehicles. The Defendant admitted striking the back of the Claimant's vehicle but alleged that he had moved away on a green light and then suddenly stopped for no good reason.

Fraud had not been pleaded and the case was argued on conventional grounds, although the Claimant's reliability of account was put into question concerning the vehicle damage and inconsistent reporting from the Claimant and his witnesses in their CNFs. The Defendant submitted their insured was not negligent in the particular circumstances of the case – the Defendant in accelerating away from lights and close to the Claimant was acting reasonably in all the circumstances and the true effective cause for the accident was the Claimant's sudden braking. The Defendant also submitted that the Claimant had not proven his case as to vehicle damage, severity of impact and injury (LVI).

DDJ Rea dismissed the Claimant's claim. The Claimant and his witnesses' evidence was not accepted as reliable. The Claimant had failed to prove that the Defendant drove negligently. She had driven reasonably in the context of this case, albeit colliding with the rear of the Claimant in a minor way. The true effective cause of the accident had been the Claimant stopping as he did. Further, the damage was inconsistent and the damage caused by the Defendant was not in the magnitude alleged. The Claimant's case would be dismissed.

Tokhi v (1)K (2)Aviva Insurance Limited (Clerkenwell & Shoreditch CC, 23.03.17)

Fraud – Staged/Contrived Collision – Forensic Engineer – Fundamental Dishonesty

Piers Taylor (instructed by Jascaran Chahal of DAC Beachcroft Claims) appeared on behalf of the Second Defendant in this case involving an alleged collision between the Claimant's vehicle and the First Defendant's vehicle. The Claim was for personal injury and some £18,000 of credit hire and storage charges.

The Second Defendant had withdrawn indemnity from the First Defendant, but she had actually entered a Defence in which she agreed a collision had taken place but had alleged that it was the Claimant's fault. The Second Defendant had, however, obtained a forensic engineer's report which concluded that the damage to the two vehicles was inconsistent. It had also noticed that the Claimant had named an entirely different person as the driver of the insured vehicle in his CNF. The Second Defendant thus denied that there had been a collision between the two vehicles.

The Court permitted the Claimant's evidence to be heard, despite him requiring an interpreter at trial and not ever having indicated such a requirement in his pleadings or witness statement. The Claimant was found to have been an unreliable witness who lacked credibility, was evasive and at times incoherent (even allowing for the fact that his responses were interpreted). His explanation for providing the wrong name of the driver of the insured vehicle had been incredible and not helped by the Claimant at one point saying there had been an apology from the First Defendant and an exchange of details and at another point alleging that the First Defendant had 'run off' without giving any details.

The Claimant had a pre-arranged GP appointment two-days post-accident to discuss scans relating to his knee (which he alleged had been worsened as a result of the accident), but there was no mention of the accident in the notes. His GP in fact noted that physiotherapy treatment to the knee was helping it to improve. The Claimant's explanation as to why there was no mention in his GP notes of the accident (he said he was never asked if he had just had an accident affecting his knee and thus did not mention it) was also found to be incredible. In light of these (and other) matters, the Judge found the Claimant so unreliable that he could not place any weight on what he said.

As to the Defendant's only evidence from its forensic engineer, there had been no attempt to challenge the opinion by way of Part 35 Questions. The Judge found that the expert made a compelling case that the vehicles had not collided with one another in the manner alleged based upon his careful analysis of photographs of the damage to the respective vehicles. The Judge did not feel that he had to make specific findings as to a conspiracy between the Claimant and First Defendant in order to find that the vehicles had not collided with one another. He made just that finding and dismissed the claim. He also found that the Claimant had not been honest about the collision (by alleging there had been a collision when it had been found, on balance, that there had not been). The Judge therefore found the Claimant to be fundamentally dishonest and made an enforceable order in respect of the Second Defendant's costs.

Alawi v. (1)Bibi (2)Liberty Insurance (3) Khan (Central London CC, 02.03.17)

Preliminary Issue – Identity of Defendant– Strike Out– QOCS

Anthony Johnson (instructed by Eli Wieder of Horwich Farrelly) successfully argued as a preliminary issue on the morning of a Fast-Track trial that the Second Defendant insurer had no potential liability to the Claimant on the basis of the pleaded claim that had been presented. The Claimant declined to proceed with trial against the untraceable Third Defendant only, whom it was suspected may well not exist.

In a situation where the driver had not been identifiable (and a claim against the MIB under the Untraced Driver's Agreement had not been pursued on technical grounds), the Claimant initially brought a claim against the owner of the vehicle, the First Defendant, on the basis that she was 'vicariously liable' for the driver, whomsoever it was. Although it was made clear that there was no substance to the argument, it was never formally conceded.

The major issue before the Court was whether the Claimant could prove that the Third Defendant had been the driver of the vehicle, and that he had been properly served with the proceedings. The Claimant's case was built around a number of enquiries that had been made on his behalf, on the basis of which it was suggested that, on the balance of probabilities, the Third Defendant was an alias for the partner of the First Defendant, who must have been residing with her at the address where proceedings were served at the time.

In rejecting that argument, DJ Rollason held that there was nothing at any point in the papers to link the Third Defendant to the address where he had been served. There was no sound basis for the hypothesis that he represented an alias for some other party. Reliance on anything said by the First Defendant was misplaced, as neither side contended that she was a witness of truth. A mobile telephone number alone is unlikely to ever be sufficient evidence to link an individual to a particular address, especially when the timing is unclear.

The Judge Struck Out the claim against the Second Defendant specifically on the basis that the claim disclosed no cause of action against the insurer. She made clear on the face of the Order that QOCS should be disapplied in respect of that Strike Out.